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Getting to grips with EU citizenship:

Understanding the friction between UK immigration law and EU free movement law

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EDINBURGH LAW SCHOOL CITIZENSHIP STUDIES

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Executive Summary and Briefing Note

Introduction

There are still major difficulties with the effective implementation of EU free movement law in all EU Member States. These challenges are not just practical ones about the application of the law by administrators and courts, but they also have a legal cultural dimension. It is hard to say that there is already a fully functioning **common citizenship area**, as part of the broader EU internal market despite the fact that the free movement rules make the EU the largest laboratory for human mobility in the world. Also, EU free movement is not hermetically sealed off from broader debates about immigration, and so is affected by policy changes and popular perceptions about immigration and immigrants. This project has explored these challenges by looking at EU free movement law and UK immigration law, by seeing how they overlap and interact, and by studying the frictions that arise between them. It has also reviewed the context in which EU policies such as free movement rights operate. The research studied both materials explaining the current state of EU and UK law, with a particular focus on primary materials such as recent case law of the EU court and the UK tribunal system, and also incorporated the findings from interviews with members of important stakeholder groups to ask them to explain how they saw the relationship between the two systems evolving. EU law and the relevant UK implementing measures continue to evolve rapidly, and we have attempted in this research project to present a dynamic picture of the law and its application.

Although EU citizenship is a political priority of the current European Commission and free movement of persons, especially for economic reasons such as work and self-employment but also for leisure and study, is a professed goal of all Member States, in practice when EU citizens attempt to exercise their citizenship rights by living and working (or studying) in other Member States, they often face many legal, practical and cultural obstacles. The complaints they make to the EU institutions help us to see the pattern of obstacles. But we can also find out more by looking at how the UK institutions work. For example, a high rate of refusals of applications by EEA applicants by the UK Borders Agency acting on behalf of the Home Office can be seen in recent years, especially those applications made by the family members of EU citizens. But there has also been a high rate of successful appeals against those refusals within the tribunals and courts systems, suggesting that something may be amiss in the decision-making matrix. Also, in the UK, the increasingly negative attitudes within public opinion towards both immigration and the UK's membership of the European Union has raised sensitivities about EU free movement, especially with the impending removal of the transitional measures restricting access to the labour market for EU citizens from Romania and Bulgaria at the end of 2013. But there is very little informed attention directed to the detailed issues by bodies that could hold the UKBA to account, such as Committees of the UK Houses of Parliament, when it comes to the application of EU law. There is plenty of negative press coverage, but not very much of it cites the extensive research that has been done about the fiscal and economic consequences of migration from the new post-2004 and 2007 Member States of the EU or provides robust evidence about the numbers of current and future citizens of those states taking advantage, or likely to take advantage, of the free movement rules.

The research

To unpick the issues raised in more detail, the research addressed **three descriptive and analytical questions and one normative question**:

1. In which areas do we see particular frictions between the systems of EU free movement law and UK immigration law?
2. What are the principal dimensions of these frictions, in the sense of how they play out in both legal structures and popular discourse?
3. Can we identify the possible causes of those frictions? In particular, do they stem from causes within the legal systems in question, or are they the result of external factors impacting upon how free movement law operates in the UK?
4. What types of measures or approaches might alleviate the friction between the systems and thus give rise to more effective implementation of EU free movement law in the UK?

Addressing these questions led to **four key findings** and to **conclusions and recommendations** about the best way forward in the future to ensure better fit between the UK and EU legal systems, and to promote the EU as a 'common citizenship area'.

Key Finding 1

We found that there are **four main areas** where we can see evidence of high levels of misfit or friction between EU law and UK law in the area of free movement:

- **residence rights**, especially in relation to third country national family members of EU citizens/EEA nationals;
- problems of **access to welfare** relating to the application of the 'right to reside' test;
- problems of '**probity**' and the perceived need to distinguish between 'good' and 'bad' migrants;
- issues raised by the **transitional or special regimes** for certain groups of citizens (new Member State citizens and Turkish citizens).

Illustrating our findings with stories drawing on legal materials and coverage of the relevant issues in the press, what we saw in each case was that there were significant differences between the way that the law was applied by the UK authorities, especially the UK Borders Agency and the interpretations put forward by the European Commission and the Court of Justice. In a number of occasions, the UK law had been found not to be in compliance with EU law, but adjustment of practices at the national level was slow in arriving.

The common factor for each of these areas was that they pose challenges to the boundaries between EU free movement law, based on facilitative principles and rights such as 'equal treatment' and national immigration control, based on limited permissions which continue to draw stark distinctions between the citizen and the alien. EU law, in contrast, breaks down those distinctions through the protection it provides for migrant EU citizens. The **'edges'** of EU free movement law and UK immigration law each need careful study to help us understand how they operate in relation to each other, both in terms of legal doctrinal questions, but also in terms of differing legal cultures. EU free movement law is rights-based and UK immigration law is permissions-based. UK judges dealing with (national) immigration matters are accustomed to finding that the national rules provide exhaustive answers to most questions, and/or leave wide discretion to decision-makers. This is not the case with EU law on free movement. These differences matter when the two systems come into close contact, and close attention should be paid to these matters both in terms of differences of legal doctrine and also of perceptions and approaches of stakeholders and 'users' within legal institutions.

Key Finding 2

We found that particular problems arise as regards the extent to which the **'culture'** of EU free movement is effectively embedded into UK law and legal/administrative practice. We found that there continued to be some degree of reluctance on the part of decision-makers fully to accept the rights-based character of EU law. The impact of this is most obvious where claimants are seeking to rely on the very 'edges' of free movement law, e.g. a third country national family member of a migrant EU citizen, or an EU citizen with residence rights seeking to resist a post-imprisonment removal order that would normally be upheld if the person in question was a third country national with no EU connections. Sometimes this means relying on the more controversial or contested parts of the EU's Citizens' Rights Directive, such as the provisions protecting extended family members, or the provisions on removal for reasons of public security or public policy, but sometimes applicants also have to rely directly upon EU citizenship rights or upon the EU Charter of Fundamental Rights. Here lack of familiarity with elements of EU law beyond the confines of the Citizens' Rights Directive and the UK Regulations on the part of decision-makers with responsibilities for applying and interpreting EU law (the UKBA and, in some circumstances, the courts/tribunals) plays a role in undermining the capacity of these parties to make correct decisions, within the timescales laid down by EU law. We found that these problems raised both training issues for decision-makers, but also legal cultural issues relating to the character of EU law as separate from immigration law.

Key Finding 3

Our research showed that internal system-level frictions represent a very significant challenge to the effective implementation of EU free movement law within the UK. These relate to the character of the two systems, and the way in which rules are applied by decision-makers. For example, it was widely felt that some of the cultures of immigration law, which see the credibility of the claimant being placed at the heart of the enquiry, had 'seeped' or 'leaked' into EU free movement law, where a factual enquiry alone based on the principles of EU law is normally the central task of the decision-maker. Beyond that enquiry, the decision-maker has relatively little discretion in EU law, and the burden of showing that there is a substantive reason to doubt, for example, that the applicant is the person she says she is, or has the family relationship she claims she has, lies with the authorities. However, the evidence to be drawn from recent judgments of the Upper Tribunal (Immigration and Asylum Chamber), which has shown itself ready both to admonish the UKBA for obvious errors and to refer difficult and unresolved questions on the interpretation of the Citizens' Rights Directive to the Court of Justice for decision, suggests that over time some of the legal problems of implementation identified by the research may be decreasing in scope and significance. This is important given that the numbers of persons exercising EU free movement rights has grown considerably since the enlargements of the EU in 2004 and 2007, although it would be wrong to assume that all the difficulties that arise with decision-making relate solely to citizens of those states.

Key Finding 4

In addition to internal system-level friction, problems of friction can also stem from exogenous causes such as the politicisation of immigration and of attitudes towards the EU in the UK, media coverage on these matters, and the UK's powerful 'border identity' as an island state which has negotiated itself an opt-out from membership of the Schengen zone and the development of certain policies which flow from the creation of a borderless Europe, including most aspects of external immigration policy. This identity, combined with the hostility shown in sections of the press both to some aspects of EU free movement and also to European integration more generally, has led to a broad public opinion consensus at the present time which is wary of free movement, so far as it concerns flows into the UK. In fact, immigration issues and EU issues were both identified as problematic areas in terms of press coverage in the 2012 Leveson Inquiry on the *Culture, Practices and Ethics of the Press*. These factors, which may be on the increase, could act as a possible counterweight to the evidence noted above of a new approach to EU free movement law which is thus far most evident in the case law of the Upper Tribunal. The prospective easing of the transitional restrictions on the access of citizens of Bulgaria and Romania to the UK labour market at the end of 2013 has been a particular cause of controversy and debate in the press, with the potential to spill over into the application of the law.

Conclusions

Perceptions about EU free movement are changing, in both popular and political discourse, and this is reflected in what appear to be increasingly adversarial relationships around the construction of the boundaries of EU free movement rights and the relationships between EU law and UK law, in spite of the best efforts of the Upper Tribunal to clarify many aspects of the law. In fact, even the courts have commented upon the adversarial positions taken by Home Office employees from time to time. Our research was not limited to observing the internal system-level aspects of friction, as we had expected at the outset, but rather it led on quite organically in our interviews to discussions about how the UKBA works, what resources it has and how it trains decision-makers, all as part and parcel of an administrative justice system. Looked at in these terms, many of our interviewees felt that it does not match up to the highest standards such as those set by the Administrative Justice Tribunals Council Report *Right First Time*.

Recommendations

We concluded that these structural difficulties and the adversarial relationships emerging around the concept of EU free movement needed to be addressed urgently because these are having a corrosive effect upon the effective implementation of EU law. This has costs not only for citizens of other Member States who come to the UK but also potentially for UK citizens who themselves benefit from free movement rights. Challenges in the UK to EU citizens' rights could lead to difficulties for UK citizens in other Member States. In addition, as is widely recognised, free movement goes to the very core of EU law and does not represent some sort of optional competence for which the UK could easily leverage an opt out. While training and awareness raising can help to militate some of the most egregious effects of poor decision-making that is unfortunately evident in the written record of the law at present, we felt that there was an urgent to need to discuss in more detail the institutional arrangements for the application of EU law in the UK. It is well established in the UK that there are very few specific vehicles for the implementation of EU law, and this is true for the administration of free movement rights which are the responsibility of the UK Borders Agency under the broader aegis of the Home Office. There is little about the public face of these institutions which might lead the casually enquiring EU citizen at present to conclude that they evinced an open attitude towards the possibilities of free movement. In practice, the specific responsibilities of these bodies relating to EU law are not fully visible to the outside world, with the material made available on the UKBA/Home Office website often confusing in character. What is more, issues raised by the proper implementation of free movement law are not often picked up and tested out by bodies such as the Committees of the House of Commons and Lords that have responsibility for scrutiny and accountability matters in relation to both EU affairs and immigration more generally. There continues to be a significant lack of awareness about what EU free movement means, who it benefits and how, and what its costs might be, even though there is a substantial body of robust research-based evidence there to be drawn on by those who wish to seek it out.

Towards a citizenship champion

To overcome these obstacles, we propose the creation of a new office of **EU free movement or citizenship 'champion'**. The role of this 'Ombudsman-like' office would be to support the effective development of a **common citizenship area** in a manner that promotes joined up policy-making and enhances the flow of information between government institutions and those who rely upon the law. It would not be to supplant the current decision-making processes, but it would help to ensure that the 'EU flag' was clearly visible when so-called EEA decisions are taken by the UK authorities, or when the information necessary for EU citizens to make effective use of their free movement rights is made available through websites or other outlets. As with the investment in the creation of specific institutions which aim to protect human rights, raise awareness of issues around discrimination on grounds of sex, race or other protected characteristics, or even act as a strategic litigant in key court cases, innovative institutional solutions bringing together expertise with political will can, without great expense, give visibility to certain issues which are often misreported in the media.

Even with limited powers to provide information, act as an advice and reference service offering assured levels of expertise, and operate as the EU conscience of UK decision-makers, this new institution can bring great benefits. It can, in sum, act as the single reference point for EU citizens both arriving in or departing from the UK to ensure that they enjoy the full benefits of the common citizenship area and promote a profound and much needed culture change in this area.

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Section 1: Introduction

1. This research report presents the results of a Nuffield Foundation funded study[1] aimed at building a better understanding of how precisely the European Union's free movement rules take effect in the United Kingdom. **The primary focus is upon the tensions that arise specifically between the EU free movement rules and United Kingdom immigration law. It should be recalled, however, that EU free movement law also operates at times in tension with other areas of national law such as social welfare law, taxation law, criminal law and criminal procedure, and even family law.** Whilst it is apparent that very large numbers of EU citizens resident in the UK exercise their EU citizenship rights in the UK without encountering any particular difficulties, even a brief review of the case law of the UK and EU courts, the work and outputs of advocacy and advisory organisations, the scholarly literature and recent media coverage makes it clear that there have been some difficulties within the system for some groups of EU citizens and their family members resident in the UK (or wanting to be so resident). More than just a pure implementation or compliance report, our research has tried to go below the surface of the interaction between the systems. It has addressed **three key questions of description and analysis** followed by **one additional question** regarding the **consequences and conclusions** which flow from the research:

a. In which areas do we see particular frictions between the systems of EU free movement law and UK immigration law?

b. What are the principal dimensions of these frictions, in the sense of how they play out in both legal structures and popular discourse?

c. Can we identify the possible causes of those frictions? In particular, do they stem from causes within the legal systems in question, or are they the result of external factors impacting upon how free movement law operates in the UK?

d. What types of measures or new approaches might alleviate the friction between the systems and thus give rise to a better and more effective implementation of EU free movement law in the UK?

2. We will address those questions by reviewing the relevant legal and policy background to the implementation of the free movement rules in the UK (Sections 2-4), exploring the different ways in which EU law and national law interact with each other (Section 6), and by presenting the data from a series of semi-structured interviews with stakeholders who engage directly with the application of EU free movement law in practice interwoven with commentary drawn from other primary materials such as case law and legislation (Section 7-8). We present only a limited snapshot of the relevant and very extensive legislation and case law on EU free movement and its application in the UK, because of restrictions of space in this report. Our intention is rather to map the key features of the legal landscape.[2] Reference is made, where necessary, to more detailed commentary on these matters in the footnotes and the bibliography. We have also made use of secondary data on perceptions of EU free movement in the UK, where this is available, including press coverage.

1. *Friction and Overlap between European Union Free Movement Rules and Immigration Law in the United Kingdom.*
2. The methods used both in the 'mapping' exercise and in the empirical section of the research are discussed in more detail in Section 9 below.

3. The wider context of our research is that of EU citizenship. 2013 – the 20th anniversary of the Treaty of Maastricht and thus of the inception of EU citizenship – is the European Year of Citizens[3] and the 2009-2014 Barroso Commission has made citizenship a political priority. As the Commission has made clear in a report in 2010,[4] citizenship of the Union should be a means whereby citizens can confront the obstacles to enjoying the full fruits of the single market in their daily lives. Based on their own extensive research,[5] the examples offered in the Commission's practical programmes for developing citizenship rights (e.g. '25 Actions to Improve the Daily Lives of Citizens' in the EU Citizenship Report 2010 and '20 Main Concerns' developed as part of seeing the single market through the 'lens' of the people[6]) are organised not according to the traditional legal categories of EU law (free movement rights, especially for economically active groups such as migrant workers; rights to non-discrimination; harmonisation of national laws, etc.), but according to 'real life' engagement with the single market in its widest sense. This important shift in approach means engaging with common sense social categories of how cross-border activities occur: e.g. through the everyday lives of international families, of students studying abroad, of consumers purchasing goods or services, and of holidaymakers and other travellers. It also includes such activities as paying taxes, voting, or participation in crime (as victim or perpetrator) where these have a cross border dimension, alongside the other more conventional economic categories such as working, self-employment and provision or receipt of services. Such acts or engagements, even though cross-border in character, may not always involve physical cross-border mobility, since many exchanges are virtual or electronic. All of this means, of course, that the enjoyment of rights under EU law is dependent upon implementation through many fields of national law beyond the obvious areas (e.g. immigration, welfare, employment, taxation, consumer) including family law, criminal law and procedure, civil procedure, not to mention various areas of executive action, such as consular protection and naturalisation processes, most of which lie beyond the scope of this research. It will also necessarily involve many different types of public and private sector organisations and actors, although in this research we limit our focus to public authorities only.

4. According to 2012 Eurostat figures,[7] of the UK's total population of just under 63m persons, around 7.2% or 4.48m were not UK citizens, and of these 3.3% of the population, or 2.06m persons were citizens of other EU Member States. Although the UK's percentage of non-national EU citizens is not especially high (the same as Germany; considerably lower than Spain or Ireland), its absolute numbers are amongst the highest in the EU, as the UK is one of the EU's most populous countries, after Germany and France. Detailed statistics about EEA national arrivals and departures, plus figures relating to the participation of citizens of Bulgaria and Romania in the UK labour market, as well as grants of residence permits to EEA nationals are published quarterly by the Home Office.[8]

3. Proposal for a Decision of the European Parliament and of the Council on the European Year of Citizens (2013), COM(2011) 489. Press Release, "It's about Europe. It's about you. Join the debate" – 2013 is the 'European Year of Citizens', IP/12/1253, http://europa.eu/rapid/press-release_IP-12-1253_en.htm. Details are to be found at http://ec.europa.eu/citizenship/european-year-of-citizens-2013/index_en.htm.
4. EU Citizenship Report 2010: ***Dismantling the obstacles to EU citizens' rights***, COM(2010) 603.
5. E.g. Commission Staff Working Paper, ***The Single Market through the lens of the people: A snapshot of citizens' and businesses' 20 main concerns***, SEC(2011) 1003, August 16 2011.
6. Single Market through the lens of people: a snapshot of citizens' and businesses' views and concerns, http://ec.europa.eu/internal_market/strategy/index_en.htm#20concerns, 2011, last accessed 29 January 2012
7. See ***Nearly two-thirds of the foreigners living in EU Member States are citizens of countries outside the EU-27***, Eurostat statistics in focus, 31/2012, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-12-031/EN/KS-SF-12-031-EN.PDF. These figures had risen from those published in 2011, where they were respectively 4.36m non-UK citizen residents, of which 1.92m were EU citizens. See http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-034/EN/KS-SF-11-034-EN.PDF.
8. See http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/.

Section 2: The UK and EU citizenship

5. During the forty years of the UK's membership of what we now call the European Union, the free movement of persons has generally been understood as a bulwark of the European integration project. In the EU institutions themselves, for sure, but also within the Member States, it has widely been regarded as a relatively uncontroversial foundation stone of the single market, which extends also to goods, services and capital. It was rarely called into question by national institutions or within broader public opinion or media coverage. In fact, for many years, it received little attention at all beyond administrative and legal circles.

6. Despite the many treaty amendments since their inception in 1958, and the supplanting of the EU and EC Treaties with the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) on the entry into force of the Treaty of Lisbon in December 2009,[9] the key free movement principles have been preserved more or less intact since the moment when the EEC Treaty came into force. They can now be found in Articles 45, 49 and 56 TFEU. While the right of free movement as laid down in the EEC Treaty originally covered the categories of workers, self-employed persons and providers of services, subsequent developments through amending treaty provisions, secondary legislation and the case law of the Court of Justice of the European Union (CJEU) have seen the scope of coverage extended to cover aspects of the movement and residence of almost all EU citizens and their family members (whether EU citizens or third country nationals). This means the inclusion of categories such as students, retired persons, work seekers and persons of independent means, all of whom can reside in other Member States, albeit under conditions. The range of rights and the extent of protection against discrimination on grounds of nationality have widened considerably, and the list of rights granted has even extended into the political sphere since the Treaty of Maastricht. None the less, the restrictive **economic** character of the original provisions of the Treaty still prevails to some extent, as free movement rights – or in particular *residence rights* and certain rights which may flow from stable and continued residence such as access to *full* welfare state protection – are not extended unconditionally to those persons who are not capable of maintaining themselves without recourse to state support.

7. However, the concept of EU citizenship, enshrined in the EU treaties since the Treaty of Maastricht of 1993, gives a certain **constitutional** character to the idea of the EU as a space of free movement and also – in certain respects – of solidarity amongst the Member States. Article 20(2) TFEU indeed suggests that the starting point is that all EU citizens must benefit from EU free movement:

> 'Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
>
> (a) the right to move and reside freely within the territory of the Member States...'

The existence of a right of free movement has been the primary focus of the interpretation given by the CJEU to this provision since the *Baumbast* case where the Court held that this provision was directly effective and could be relied upon in national courts against the national authorities.[10] Later on in the same provision, another clause seems to provide some space for Member States to restrict *citizenship rights* in the same ways as they have retained the power to restrict *free movement* rights:

9. This text refers throughout to the post-Treaty of Lisbon organisation of the Treaty provisions and article numbering.
10. Case C-413/99 ***Baumbast***, [2002] ECR I-7091; Case C-60/00 ***Carpenter*** [2002] ECR I-6279; Case C-200/02 ***Zhu and Chen*** [2004] ECR I-9925; Case C-34/09 ***Ruiz Zambrano*** [2011] ECR I-1177; Case C-256/11 ***Dereci, Heiml, Kokollari, Maduike and Stevic***, 15 November 2011.

> 'These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.'

It is the **balance** between the obligations of the Member States to ensure rights of free movement and residence to EU citizens and their families regardless of national citizenship and the residual power of those same states to impose limitations or restrictions on those rights which lies at the heart of many debates about exactly what EU citizenship means today. This raises questions about the extent of the **solidarity** which must exist between the Member States as regards any possible costs which accrue from the exercise of free movement rights if any sort of notion of EU citizenship is to function effectively. And more broadly it challenges us to consider whether the EU is now a **political** and **social** union based, *inter alia*, on citizenship rather than simply an **economic** union based essentially on trading relationships. Such restrictions do still allow the Member States legitimately to deny the right of free movement to persons who become an unreasonable burden on the state or who represent an unreasonable threat to public policy or public security. Removals can occur under the latter headings even – in very limited circumstances – if the EU citizens in question have the permanent right of residence under the Citizens' Rights Directive (CRD).[11] Any such restrictions must, however, be proportionate.[12]

8. This constitutional structure is also supported by the general features which characterise the relationship between EU law and national law. This phenomenon is generally known as the idea of the 'constitutionalised treaty' because of the way in which the CJEU has interpreted the effects of the EU treaties as being different to those of other international treaties. So where there is a conflict between EU law and national law, the former must take precedence, and national courts and administrative authorities are under a duty to apply EU law and to ensure that individuals are able to rely upon their rights derived directly under EU law. These are the well known principles of supremacy and direct effect and they have been of considerable significance in the field of free movement law because they have made it possible for EU citizens to enforce their rights against the Member States in national courts which can then be referred to the CJEU for an interpretation of EU law, rather than relying on the Commission to bring enforcement actions in the CJEU against states which do not comply with their obligations. These features are more or less effectively picked up and taken into UK law through a combination of the European Communities Act 1972 and the generally receptive approach to key concepts such as supremacy, direct effect and the duty to give a concordant interpretation of national law in the light of EU law given by most UK courts, including the House of Lords (and more recently the Supreme Court).

9. While the application of EU law in practice – whether in the UK or in other Member States – was never wholly satisfactory, the general principles of EU free movement law and the widespread acceptance of those principles (if not their honouring in every case) had not really seemed to be under serious threat since the beginning of the 1970s. In recent years, the situation has changed. It is arguable that some of the difficulties with regard to the application of EU free movement law can be dated to 2004 and the accession of eight Member States from central and eastern Europe, followed by a further two states from that region in 2007.[13] The differences in labour market costs and GDP between the

11. Directive 2004/38/EC of the European Parliament and the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L158/77. The abbreviation 'CRD' is one used primarily by academic scholars and other commentators and it is not used by the European Commission, which refers generally to the 'Free Movement Directive', or 'FMD' in its documentation, perhaps responding to Member State sensibilities in this area. On the other hand, the connection between this directive and the filling out of the concept of citizenship of the Union through legislative action and judicial interpretation is clear.
12. N. Nic Shuibhne 'The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights', in C. Barnard and P. Odudu, ***The Outer Limits of European Union Law***, Oxford: Hart Publishing, 167-195.
13. So-called A8 or EU8 = Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia; A2 or EU2 = Bulgaria, Romania.

'new' and the 'old' Member States always seemed likely to place some new demands upon the system of free movement as it had operated since the end of the original transitional period. Certainly the eagerness of many Member States (but not the UK with the 2004 accession) to restrict the access of the citizens of those states to their domestic labour markets during a lengthy transitional period imposed by the accession treaties, when viewed in combination with some media coverage of and popular conceptions about the mobility of that group of EU citizens, would seem to suggest as much. In addition, it would seem that the implementation of the 2004 CRD, with its novelties such as the right of permanent residence, has raised particular problems as the Commission's 2008 report on the implementation of the CRD makes clear.[14] The acceptance of EU free movement has also been significantly challenged by the economic problems and high levels of unemployment in many states – and thus the pressures on wages for existing 'sedentary' workers – since the banking crisis first erupted in 2008 and during the period of significant austerity, especially in those states in the Eurozone which have had to have recourse to bailouts.[15] The prolonged jobs crisis has brought to the fore one of the key controversies of labour migration, namely what impact it has on jobs and wages overall both in the host and the sending country. In that context, the EU continues to be one of the most significant laboratories for understanding the effects of economic migration which the world has ever seen.[16]

10. Yet at the same time, despite these new controversies, EU free movement is such a 'regular' issue for many people and in many contexts, as a result of student mobility, leisure and work travel, the free movement of goods and services, etc. This is true to the extent that any form of obstacle to such regular exchanges, however seemingly trivial,[17] can engender a great deal of comment if it reaches the attention of the media. The character of such attention would seem to add weight to the view sometimes expressed that EU free movement rights, and EU citizenship more generally, largely benefit the mobile middle class citizens of the Member States, at the expense of those who are poor, socially and economically marginalised or members of ethnic minorities, for whom solidarity may be as important as equal treatment. The UK has not been the only state reaching for the toolkit of protectionism, or acting in denial of certain free movement rights in recent years. In addition to a pilot in the UK aimed at the removal of some homeless and destitute new Member State citizens, discussed in Story Three below, recent incidents have included threats on the part of the UK to deny the right to exercise free movement rights to Greek citizens seeking to exercise their mobility rights in the event of the departure of that state from the Eurozone,[18] and more worryingly, in the sense that they have resulted in substantial numbers of EU citizens actually being removed from the host Member State, steps taken by France and Italy to remove larger groups of Roma migrants on the grounds that they were occupying illegal camps or because they were somehow associated in the public perception with crime and illegality. The expulsion of

14. European Commission Report to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States Brussels, 10 December 2008 COM(2008) 840.
15. See A. Lazarowicz, 'A dangerous UK consensus on free movement of workers in the EU', EPC Commentary, 21 March 2013, http://www.epc.eu/documents/uploads/pub_3421_a_dangerous_uk_consensus_on_free_movement_of_workers_in_the_eu.pdf.
16. See M. Benton and M. Petrovic, 'How Free is Free Movement? Drivers and Dynamics of Mobility within the European Union', Migration Policy Institute Europe, March 2013, http://www.migrationpolicy.org/pubs/MPIEurope-FreeMovement-Drivers.pdf.
17. 'Diplomatic spat over Edinburgh pub's refusal to accept EU identity card', http://www.heraldscotland.com/news/home-news/diplomatic-spat-over-edinburgh-pubs-refusal-to-accept-eu-identity-card.17243655.
18. See the report on the views of the Home Secretary: 'Theresa May: we'll stop migrants if euro collapses', http://www.telegraph.co.uk/news/uknews/immigration/9291493/Theresa-May-well-stop-migrants-if-euro-collapses.html, ***Daily Telegraph***, 25 May 2012, subsequently refuted by the Deputy Prime Minister as 'apocalyptic' in character: 'No British 'drawbridge' to stop Greek immigration, says Nick Clegg', http://www.telegraph.co.uk/news/9293763/No-British-drawbridge-to-stop-Greek-immigration-says-Nick-Clegg.html, ***Daily Telegraph***, 27 May 2012. The point was repeated several weeks later by Prime Minister David Cameron, although without making any of the legal modalities clear: 'UK prepared to seal border against Greeks', http://euobserver.com/22/116864, ***EU Observer***, 4 July 2012.

around 1000 Romanian and Bulgarian citizens of Roma origin by France, as perhaps the most salient example, attracted a great deal of attention from the EU institutions, especially in the form of negative comment by the Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding, who used quite strong language to condemn the French actions.[19] Yet despite the existence of a French government circular[20] (since withdrawn) that seemed to make it clear that the actions of the French state were specifically targeting Roma origin EU citizens, there has been no effective legal redress to establish the precise legal position under EU or European human rights law in relation to such apparently collective expulsions or to compensate in any way those who were expelled without individual consideration of their cases. This points to weaknesses in these formal legal processes.

11. Of course, legal action in the national courts, or by the European Commission in the CJEU, is not the only means by which redress for alleged failures in respect of the free movement rules can be sought.[21] Through the SOLVIT system,[22] the European Commission has created an online framework for receiving complaints intended to allow Member States to work together pragmatically to deal with problems that arise as a result of the misapplication of EU law. It has also created the Your Europe Advice service for EU citizens, through which they can receive information from experts on their rights under EU law.[23] Both services are free of charge and receive growing numbers of inputs from aggrieved citizens that in turn inform Commission policy-making and priority-setting. Although many of the complaints do not relate to the types of free movement rights (that is, those which come close to traditional issues of immigration) under scrutiny in our report, and – moreover – neither of these frameworks really provides a remedy where it is private not public action that obstructs free movement in practice (e.g. employers who discriminate against workers from certain Member States), in practice one core free movement issue, namely residence rights, has been a consistently important part of the workload, amounting to 12% of SOLVIT cases across the period 2002-2011.[24]

12. Fears about the growing gap between theory and practice in relation to EU free movement law in the UK and elsewhere have led the European Commission to raise concerns about the implementation of EU law at the national level. In quite a number of cases, this has gone as far as bringing infringement proceedings, although none have so far reached the CJEU for adjudication (see paragraph 32). There is room for criticism of many Member States in respect of their compliance as recent steps taken by the Commission towards the bringing of infringement proceedings have shown, but some of the criticisms directed at the UK have been quite harsh. A recent example from a European Parliament report adopted in March 2012 (drawing on petitions made to the European Parliament Committee on Petitions where complaints about the UK have been particularly prominent) will suffice to give the flavour:[25]

19. For full coverage, see S. Carrera and A. Atger, ***L'affaire des Roms : A Challenge to the EU's Area of Freedom, Security and Justice***, CEPS Paper in Liberty and Security, September 2010 (available from http://www.ceps.eu/books).
20. This text was leaked to the press and made available publicly: http://www.lecanardsocial.com/upload/IllustrationsLibres/Circulaire_du_5ao%C3%BBt_2010.pdf.
21. M. Dawson and E. Muir, 'Individual, Institutional and Collective Vigilance in protecting fundamental rights in the EU: lessons from the Roma', (2011) 48 ***Common Market Law Review*** 751-775.
22. SOLVIT: http://ec/europa.eu/solvit/.
23. Your Europe Advice: http://ec.europa.eu/citizensrights/front_end/index_en.htm.
24. Commission Staff Working Document, 'Reinforcing Effective Problem-Solving in the Single Market – Unlocking SOLVIT's full potential at the occasion of its 10th anniversary', SWD(2012) 33 final, 24 February 2012.
25. European Parliament Report on the EU Citizenship Report 2010, A7-0047/2012, p18.

> 'Several petitions showed that the United Kingdom did not allow non-EU family members to enter without a visa, even though they had residence cards issued by another Member State. The UK authorities asked for an excessive number of documents, processed applications with excessive delays and retained the original documents. Following the intervention of the European Commission, based on many complaints and petitions received, some improvements in the administrative practices have been initiated.'

These impressions can be backed up from the case law. A particularly unfortunate example which reached the courts by way of a damages claim brought against the Home Office is *AB and MVC* v. *Home Office*,[26] where the applicants (an EEA citizen[27] resident and initially working in the UK and a third country national spouse, along with their EEA citizen child) waited altogether for 953 days for the third country national partner to be issued with a residence card as an extended family member.[28] Likewise, the case of *Papajorgji*[29] is instructive. It shows the (over-)readiness of consular officials to assert that a perfectly ordinary marriage of 14 years standing between a Greek man and an Albanian woman resident in Greece, with two children living in a common household, was a marriage of convenience. The ECO refused the family permit initially because the applicant, having answered 115 questions in the entry clearance application form and having submitted numerous documents evidencing that her husband was a Greek citizen and was intending to accompany her on the visit to the UK, had apparently failed to provide evidence that she was not asked for, such as photographs evidencing family life. The Upper Tribunal determination made it clear that there must be some evidence of abuse before the United Kingdom Borders Agency (UKBA[30]) could require the applicant to show that his or her marriage was *not* one of convenience.

13. Further evidence of difficulties relating to the application of the EU free movement rules is offered by information on applications and appeals provided by the UKBA and the Courts Service. Information provided by the UKBA indicated that of the 73,373 EEA applications (e.g. for permanent residence, EEA family permits or specific decisions related to new Member State citizens) made in 2010 and 90,879 made in 2011, 82% were granted in 2010 and only 62% were granted in 2011.[31] 38% is a high refusal rate in circumstances where national authorities have little discretion in deciding whether to admit an application, and where the rules of eligibility are supposed to be reasonably clear. Inevitably a certain percentage of those refusals were appealed to the First Tier Tribunal and it was interesting to see that 39% of appeals succeeded in 2010 and 60% succeeded in 2011. The dates do not align entirely, but information provided by HM Courts Service offered back up data confirming these trends by indicating that there were 7100 appeals in respect of EEA decisions received by the First Tier Tribunal between 1 April 2011 and 31 March 2012.[32] The Courts Service data indicated that during the same period 40% of appeals were allowed,

26. [2012] EWHC 226 (QB).
27. UK implementation of EU free movement rules explicitly extends all the same rights and legal frameworks to citizens of the EEA as well as the EU (i.e. Norway, Iceland and Liechtenstein), as well as Swiss citizens. The 'shorthand' to cover all these categories is the reference "EEA".
28. For detailed comment, see I. Solanke, 'Another type of 'Other' in EU Law? ***AB (2) MVC*** v ***Home Office*** and ***Rahman*** v ***Secretary of State for the Home Office',*** (2013) 76 MLR 370-400.
29. [2012] UKUT 00038 (IAC).
30. At the time when this research was conducted, the decision-making function in relation to EEA rights fell within various parts of the UKBA and throughout this report we therefore refer to the UKBA. The Secretary of State for the Home Department announced in March 2013 a further splitting and reorganization of the UKBA's current functions, amounting in effect to an abolition of the UKBA and a reassertion of certain functions by the 'owner', the Home Office. Press reports referred to the separation of the visa function from the enforcement function. However, no specific attention was paid in the brief documentation announcing this to the implications for the EU free movement rules and those who seek to rely upon them. See 'UK Border Agency to be abolished, Teresa May announces', ***Guardian***, 26 March 2013, http://www.guardian.co.uk/uk/2013/mar/26/uk-border-agency-broken-up. Some have argued that the split will be expensive and unnecessary, since it has already been announced that most officials will still carry on working in the same way, for the same immediate bosses: http://www.instituteforgovernment.org.uk/news/latest/institute-statements-decision-scrap-ukba.
31. Information (dated 4 September 2012) provided to the authors pursuant to an FOI request, and held on file.
32. Information (dated 21 August 2012) provided to the authors pursuant to an FOI request, and held on file.

41% were refused, and the balance withdrawn or abandoned. In the same period (and thus inevitably not referring to the same batch of cases), 670 appeals to the Upper Tribunal from the First Tier Tribunal were received, of which 40% were allowed.[33] This represents a substantial case load for the Tribunals, and reflects also why practitioners, as this research shows, now indicate that EEA cases represent a substantial proportion of and challenging element within their ongoing immigration work. The success rate seems to be higher than that for UKBA decisions generally (27% for appeals against UKBA decisions given in 2010).[34]

14. Clearly the UK authorities do not necessarily accept all the criticisms that are levelled at them,[35] and some of the legal propositions which underpin these criticisms continue to be tested in various courts. But, looked at objectively, it is still clear from the considerable body of evidence that EU law, as interpreted by the EU institutions and the UK institutions (certainly the UKBA/Home Office and – in some respects – also the UK courts), has not always been applied as would be required by the interpretations given by the EU institutions, and especially the CJEU. However, presenting the full legal evidence to back up this assertion would require a much more extended and detailed analysis of the law than is possible in this report, as well as a different approach to presenting legal material, and so this task must be left to other writers. But overall, we can conclude that in both a popular and a legal sense, we appear to be in a phase of increased friction between the systems. The impetus behind this research comes from the urgent task of improving our understanding of this **'friction'** or **'misfit'** between the systems.

33. This figure does not distinguish between appeals brought by the UKBA and appeals brought by the applicant.
34. Administrative Justice and Tribunals Council (AJTC) 2011 report *Right First Time*, June 2011, available from http://www.justice.gov.uk/ajtc/docs/AJTC_Right_first_time_web(7).pdf at 15.
35. For a public statement in defence of the *status quo*, which supplements the implicit statements that the UK government makes every time it defends its position in court, see the government responses appended to the end of the *Report on the Free Movement of Workers in the United Kingdom in 2008-2009*, October 2009, prepared by the Network of Experts on the Free Movement of Workers, http://ec.europa.eu/social/BlobServlet?docId=5040&langId=en.

Section 3: The UK, the Schengen zone and EU immigration and asylum law

15. The UK's current approach to issues of free movement needs to be placed, amongst other matters, in the context of its relationship with the Schengen zone (comprising 22 other Member States plus Switzerland, Iceland, Liechtenstein and Norway) and the broad powers that it has retained to opt out from the emerging body of EU immigration and asylum law and policy adopted under the TFEU. In this respect, in comparison to other Member States – with the exception of Ireland which has joined the UK in most aspects of its opt-outs – the UK has a uniquely insular approach towards the areas of EU immigration and asylum law which have seen an increasingly close connection being developed between the control and management of external and internal frontiers.

16. The UK's insularity – which takes the legal form of a body of opt-outs and possibilities for opt-ins - has a considerable impact upon both the policy context and also the detailed operational and legal work of public institutions such as UKBA case workers and the tribunal and courts systems, which have to navigate across a legally complex terrain in order to work out precisely which set of rules is applicable. The possibility of 'seepage' of ideas about or legal tests specific to issues of 'ordinary' immigration control (i.e. the areas which continue to fall within a reserved sphere of UK competence) or even areas where the UK and the EU now share competences (e.g. asylum) is discussed in more detail in the later sections of this report. It is therefore important to review in brief the significant and (in the UK) often misunderstood framework put in place to govern cross-frontier intra-EU mobility, external frontier control and some aspects of immigration from outside the EU into the Member States, because this is essential to understanding precisely how broader questions of immigration control operate as exogenous factors which affect the detailed application and implementation of the free movement rules in the UK.

17. Free movement, as established in the original Treaty of Rome and subsequent legislation such as Regulation 1612/68 and Directive 64/221, represented an important incursion into the immigration sovereignty of postwar European states. Member States could no longer apply ordinary immigration control *vis-à-vis* the citizens of other Member States, and so could not demand visas of them and were required to accept that citizens could cross borders on the production of an identity card, rather than a passport. As discussed in greater detail in the next section, they could also not restrict their right to work and to seek work within the host state, and to bring their families in the event of settlement. Nationals of the Member States were no longer 'aliens' but 'second country nationals' entitled to non-discrimination on grounds of nationality. However, this regime did not apply to third country nationals and Member States retained their own external frontier controls, visa regimes and restrictions on the activities and work of third country nationals (unless they were family members of Member State nationals). So long as there were separate external frontier controls, the Member States were unable to secure passport-free (or more accurately identity-check-free) travel at the internal frontiers for their own citizens. In other words, the free movement of persons could not live up to the ideals of the progressive establishment of the single market, as mandated by the Single European Act and its amendments to the original Treaty of Rome. According to what was introduced as Article 7a of the EEC Treaty (now Article 26 TFEU), 'the internal market shall comprise an area *without internal frontiers* in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty' (emphasis added).

18. It was achieving this parallelism between persons and other dimensions of the single market such as goods, where the removal of internal barriers to trade as a result of the completion of a common external trade regime was achieved after the Single European Act of 1986, that was the original motivation behind the Schengen Agreement. This agreement was first signed in 1985 by just five Member States (Belgium, Netherlands, Luxembourg, France and Germany) and supplemented in 1990 with a longer implementing Convention. Given the opposition of some Member States, including the UK, to achieving the aim of the removal of internal frontiers within the framework of the existing treaties, the idea was to create an external 'laboratory' of deeper integration amongst the limited number of Member States choosing to participate, comprising the commitment to remove internal frontiers, along with compensatory measures deemed necessary for the purposes of ensuring security within this zone (e.g. Schengen Information System). Gradually the zone has enlarged to cover 26 states, with 400 million citizens.[36]

19. The legitimacy issues which attached to the original external Schengen arrangements need not concern us here, but suffice it to say that as from date of the Treaty of Amsterdam which came into force in 1999, that part of the emerging field of Justice and Home Affairs law comprising EU competences in the areas of external borders, illegal and legal immigration and asylum was fully brought within the framework of the treaties and substantially 'communitarised'. This means that it was brought within what was then termed the 'first pillar' of the EU, i.e. the bodies of laws and regulations under the EC Treaty. By the end of the first decade of the twenty first century, after a further reform process in the shape of the Treaty of Lisbon, all these fields of policy-making, notwithstanding their sensitivity, were largely subject to 'ordinary' legislative and policy-making powers on the part of the EU institutions (although some of the most sensitive areas of competence still require a unanimous agreement in the Council of Ministers and involve only the possibility of EU action *complementing* national action), along with full jurisdiction of the CJEU to review EU measures and to judge national compliance subject only to a rider related to law enforcement and internal security.[37] But this substantial achievement in fields which touch upon the core of national sovereignty remains subject to the caveat that the participation of the UK and Ireland in Schengen (and thus in the removal of internal frontier controls and the creation of a common set of external frontier controls including a largely common visa regime) has been excluded since the Treaty of Amsterdam by an opt out set out in a protocol to the treaties, and a further protocol on participation in measures adopted in the policy areas of immigration and asylum law allows the UK and Ireland to choose not to participate on a case by case basis (i.e an opt-in).[38] It is important to point out that since the principle of the single market without internal frontiers is enshrined in the EU treaties, where passport controls are maintained this has to be seen as an obstacle to free movement, albeit one which is approved by a Protocol of equal legal weight to the treaty. Consequently, some have argued that UK measures in this area are subject to a test of proportionality,[39] although it seems unlikely that the Commission would try to test this point directly in the near future.

36. Of the EU Member States, Bulgaria, Cyprus and Romania also remain outside the Schengen zone, but this is not through their own choice. Denmark treats 'Schengen law' as international law, as a result of a complex opt-out protocol that it has negotiated, but it is operationally part of the Schengen zone so far as internal and external frontiers are concerned.

37. Article 276 TFEU provides: 'In exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.'

38. See generally S. Peers, 'EU Justice and Home Affairs Law (Non-Civil)', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, 2nd Edition, Oxford: Oxford University Press, 2011, 269-297.

39. See the ***Report on the Free Movement of Workers in the United Kingdom in 2008-2009***, above n.35 at p6.

20. The reasons why the UK and Ireland maintain an opt-out from Schengen, and have also chosen not to participate in substantial parts of the developing EU *acquis* in the area of immigration and asylum law relate, of course, to issues of sovereignty and autonomy. Notably, we see a strong desire on the part of the UK to maintain its own frontier controls as an island state, and the desire on the part of Ireland not to lose the common travel area with the UK.[40] The UK's strong 'border identity' is evident in many places including press coverage and political statements. The centrality for the UK of 'securing the borders' is one of the core messages in the political Foreword to the UKBA Business Plan 2011-2015, signed off by the Home Secretary, the Foreign Secretary and the Chancellor of the Exchequer and the same topic forms the first and longest chapter in the Plan itself.[41] The absence of any differentiation in that chapter of the Business Plan between EEA and non-EEA travel highlights that from the UKBA perspective 'securing the border' (i.e. effecting the right sorts of controls on entry and building an e-borders project which will result in enhanced information about exit) is seen as a generic task, without any immediate regard to the implications of or for EU law. So long as the UK continues to allow EU citizens to travel on their identity cards, then it is fulfilling its free movement related obligations in this area. In practice, as EU free movement law and the interface with the evolving body of EU immigration and asylum law grow more complex, the UK – opted out or not from the latter – will experience certain legal effects, even if only indirectly.

40. See B. Ryan, 'The Common Travel Area between Britain and Ireland', (2001) 64 ***Modern Law Review*** 831-854.
41. UKBA Business Plan, April 2011-March 2015, available to download from http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/uk-border-agency-business-plan/.

Section 4: EU free movement rules and their implementation in the UK

21. The legal framework governing the free movement of EU citizens in the Member States is surprisingly complex even though the basic principles are relatively simple, and this is matched by considerable complexity in the implementation arrangements at the national level. When two complex systems come into contact with each other, there are bound to be problems of implementation in practice. In this respect, this field of EU law does not differ from any other field that is dependent upon national implementation, such as consumer protection law or environmental law.

22. At the EU level the key elements of the framework comprise the treaty provisions on free movement and EU citizenship outlined in Section 2, plus the guarantee of non-discrimination on grounds of (EU) nationality contained in Article 18 TFEU. Most of the relevant treaty provisions are thus to be found in the TFEU, although these are buttressed by fundamental rights guarantees in the Charter of Fundamental Rights (CFR), given equal legal value to other treaty provisions by Article 6 TEU since the amendments introduced by the Treaty of Lisbon. At the level of legislation, the main provisions are now contained in the **Citizens' Rights Directive** (CRD), although this does not provide a complete code of protection for the rights of EU free movers. It did repeal most of the previous legislation, and sought to 'simplify and strengthen' the rights of EU citizens.[42] Other significant pieces of legislation include the provisions of Council Regulation 492/11 in particular those on equality in relation to 'social and tax advantages',[43] various measures relating to the free movement of services and of various professions and trades, measures on the mutual recognition of qualifications and diplomas, and finally measures on the 'posting' of workers. As these latter measures do not, for the most part, collide or intersect with UK *immigration* law, they were not discussed in detail in this research. They are, however, of immense importance in relation to the construction of what one might call a 'common citizenship area'.

23. In addition, of course, there has been a considerable body of case law in the CJEU, which has both elaborated upon and in some cases extended the extant treaty provisions and secondary legislative measures. Some of this case law has been reflected in *subsequent* treaty amendments and legislation. In other words, there has often been a circular relationship between the treaty provisions and legislative measures, on the one hand, and the case law of the CJEU, on the other. Although Citizenship of the Union now represents the foundational constitutional building block of the common citizenship area, in practice the CJEU only relies upon the citizenship provisions in its reasoning in cases which come before it where the facts do not allow it to give an interpretation of EU law based on the more specific free movement provisions of the treaty, or the secondary legislation. This has been in particular in respect of certain cases where there does not appear to be a direct link to the issue of free movement as such.[44] These cases, where reliance is placed

42. Paragraph 3 of the Preamble to Directive 2004/38.

43. Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on Freedom of Movement for Workers within the Union, OJ 2011 L141, replacing Regulation 1612/68.

44. See, for example, Case C- 34/09 ***Ruiz Zambrano*** [2011] ECR I-1177. The UK regulations reflect the scheme of the CRD itself by focusing on free movement issues by, for example, excluding from the scope of the Regulations a UK citizen who has not exercised a free movement right. In like manner, the CJEU, in cases such as ***Ruiz Zambrano*** has found that the provisions of the CRD do not cover all situations in which it considers the concept of EU citizenship to be under threat – in that case in respect of certain minor EU citizens resident in the state in which they were citizens, who risked being forced to leave the territory of the EU if their non-citizen parents were not permitted to stay by Belgium.

on the treaty itself or – indeed – on the Charter of Fundamental Rights (CFR), raise particular problems in the UK context as they fall outside the statutory scheme put in place to deal with the implementation of the free movement rules and so it is not always apparent what procedure of appeal should apply in such cases where admission to the UK is refused.[45] That is not to say that the Court never invokes citizenship when it decides cases on the basis of the CRD. Such was the case in *Metock*,[46] almost the first and perhaps the most important case thus far decided on the interpretation of the CRD, where the Court held that the correct interpretation of the CRD precluded national measures (such as those in force in the UK and Ireland at the time) which required prior lawful residence in *another Member State* by a third country national family member if they were to benefit from the protection of EU law, rather than remain subject to national immigration law. As Peers correctly noted, this is a fundamental question regarding the relationship between free movement and immigration control.[47]

24. At the UK level, implementation measures are centred on the **Immigration (European Economic Area) Regulations 2006**,[48] as amended in 2009[49] 2011[50] and 2012 (twice).[51] These Regulations should be read in the light of the Explanatory Memorandums prepared by the Home Office and also laid before Parliament. These accompanied both the original regulations[52] and the subsequent amendments. Despite the clarifications provided in the Explanatory Memorandums, the scheme of the Regulations does not follow closely the scheme of the CRD, and it is sometimes difficult to check one against the other to see exactly how the UK law implements the rights set out in the CRD. The approach of the Regulations seems to owe more to the heritage of UK immigration law with its 'leave'-based system, rather than to the approach of the CRD, which is a rights-based system reflecting the framework and approach of the treaties. Reading them together, there often seems to be something of a dissonance between the two legal frameworks. From the perspective of the EU lawyer, the wording of the Regulations seems exceedingly opaque in places, while for the UK lawyer the text of the CRD also seems opaque, with the Regulations merely mirroring difficulties to be found at the EU level. The Regulations have been amended on a number of occasions, but they have not always been amended as rapidly as might seem desirable even where this appears to be necessary in order to implement clear case law of the CJEU or indeed in such a way as to be likely to escape further negative scrutiny via CJEU case law.[53] The Regulations are supplemented by European Casework Instructions, which are applied by UKBA Entry Clearance Officers and other caseworkers. These instructions do not have a formal status in law, although they are more regularly updated than the Regulations. Although these are made available on the UKBA website,[54]

45. See ***M (Ivory Coast)*** [2010] UKUT 227 (IAC) where it was made clear to the Home Office in the Upper Tribunal determination that although the claim to enter the UK was upheld on the basis of a Treaty right under the ***Chen*** case (Case C-200/02 ***Chen*** v. ***Secretary of State for the Home Department*** [2004] ECR I-9925) rather than the EEA Regulations, the form of document to be granted to enable to applicant to enter the UK (the EEA family permit) should be the same as the one granted under the Regulations.
46. Case C-127/08 ***Metock*** [2008] ECR I-6241.
47. Peers, S. 'Free Movement, Immigration Control and Constitutional Conflict', (2009) 5 ***European Constitutional Law Review*** 173–196.
48. SI 2006 No. 1003.
49. The Immigration (European Economic Area) (Amendment) Regulations 2009, SI 2009 No. 1113.
50. The Immigration (European Economic Area) (Amendment) Regulations 2011, SI 2011 No. 1247.
51. The Immigration (European Economic Area) (Amendment) Regulations 2012, SI 2012 No. 1547; The Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012, SI 2012 No. 2560.
52. ***Explanatory Memorandum to the Immigration (European Economic Area) Regulations 2006***, No. 1003 http://www.legislation.gov.uk/uksi/2006/1003/pdfs/uksiem_20061003_en.pdf.
53. A good example is the introduction in the 2012 amendment regulations of a new type of 'derivative residence card', based on a 'derivative right of residence' for persons relying on the principles contained in the ***Chen*** case (n.45.), which have also been recognized and implemented by the courts in the UK (see ***M (Ivory Coast)*** above n.45.). This derivative right of residence cannot lead to a right of permanent residence under the Regulations. This restriction will undoubtedly be challenged in the UK courts. On the other hand, there are examples of swift implementation of CJEU decisions: the second set of 2012 amendment regulations implemented in November 2012 the finding of the CJEU in September in Case C-83/11 ***SSHD*** v. ***Rahman***, 5 September 2012 that in assessing whether or not an extended family member should be allowed to reside in the UK pursuant to Article 3(2) CRD the national authorities could not require that the family member had previously resided with the EEA national in another Member State.
54. http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/.

and can thus be reviewed and interpreted by applicants and their legal advisors, they are by no means easy to navigate. For example, the materials related to the issue of EEA family permits (i.e. visas) to third country national family members of EU citizens for entry to the UK are displaced to a separate section on 'modernised guidance'.[55]

25. The Home Office EEA Free Movement team[56] explains the more detailed approach taken in the Regulations thus:

> 'Directive 2004/38/EC sets out the rights of EU citizens to move and reside freely within the Union, but often in broad terms. The Immigration (European Economic Area) Regulations 2006 need to be more specific to be in-keeping with UK legislation and to provide guidance to UKBA caseworkers responsible for implementing and applying the provisions of the Directive.'
>
> Practitioners, likewise, recognise the difference in approach at the two levels:
>
> '...although in a number of places they're gold plated, it is generally a reasonably good transposition with a few flaws with my view. The main difference between the directive and the regulations is the extent of prescriptiveness within the regulations rather than a broader approach.' [Q1]

26. The use of the term '**immigration**' in the title of the Regulations is instructive. It reminds us that although EU free movement law is based on a set of facilitative principles and rights, rather than a structure of permissions, it has been enfolded, in certain respects, in the UK into the existing structures of immigration law. In some ways the overlap is inevitable, as in places the CRD, for example, does invite Member States to apply *national law*, for example in relation to the assessment of the entry of so-called 'other' family members (i.e. TCN members of the extended family of the EU citizen). But a more general enfolding of free movement law within immigration law in the UK is also immediately evident in the role that has been given to the UKBA, rather than a specialist administrative service, in this area. These observations have motivated our decision to construct the key tension within the framework of implementation of EU free movement as being that between **EU free movement law and UK immigration law**, leaving aside for the time being tensions with other areas of national law such as welfare law or family law.

27. At the strategic and policy level, we were supplied with details of how the UKBA works in respect of EU law and policy by the Home Office EEA Free Movement Team:

> 'EU migration and free movement policy is handled centrally by the Home Office's Strategy, Immigration and International Group (SIIG), providing a cross-cutting capability through a mixture of strategy and policy work and the management of external programmes. SIIG coordinates and liaises with colleagues across the department and externally (for example with the European Commission and other Member States).'

There is further coordination across Whitehall between departments with particular responsibilities relating to the operationalisation of EU free movement rights, such as the Department of Work and Pensions and the Department for Communities and Local Government.

28. Operationally speaking, responsibilities are spread across the five areas of operation into which the UKBA (prior to its ongoing division into two[57]) has been divided, with the international area handling requests for EEA family permits, the borders area handling border control and overseeing admissions, the immigration team handling requests for registration certificates and residence cards and the implementation of the labour market restrictions applied to nationals of EU Member

55. http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/07-eea-swiss-ec/.
56. Information supplied in writing, 16 November 2011, held on file by authors. Further information on the single written response provided by the UKBA to questions posed by the authors is provided in Section 6 below.
57. These arrangements may have changed since the further reorganization of the UKBA announced in March 2013.

States subject to transitional regimes, and the criminality and detention team, responsible not only for borders related crime, but also for deportations of EEA nationals and their family members. The immigration area within the UKBA also houses the European Operational Policy Team, which 'has primary responsibility for providing advice and guidance to caseworkers and stakeholders on the implementation of the Immigration (European Economic Area) Regulations 2006.'[58]

29. Decisions taken by the UKBA – effectively acting on behalf of the Secretary of State for Home Affairs – in respect of what the UK terms EEA nationals (i.e. EU citizens, plus citizens of the EEA states, plus Switzerland) are termed EEA Decisions and appeals against them can be brought within the unified tribunal system.[59] This would normally be before the Immigration and Asylum Chamber of First Tier Tribunal, and thence to the same chamber of the Upper Tribunal (UKUT (IAC)).[60] It is worth commenting that the Tribunal has made it clear that in some cases failing to take an explicit decision, such as where the UKBA has responded in rather vague terms to the application but has not made it explicit whether or not it has taken a decision, can amount to a decision for these purposes and can be challenged in the Tribunal.[61] Other types of EEA related appeals form a significant portion of the work of an ever busier Tribunal Service, with appeals against decisions which rely on immigration concepts (such as the right of residence) taken by social security authorities brought before the Social Entitlement Chamber of the First Tier Tribunal and thence to the Administrative Appeals Chamber of the Upper Tribunal. Limited appeals lie to the Court of Appeal and the Court of Session in Scotland. In limited circumstances, cases on EU free movement law questions can also come before the ordinary courts by way of judicial review, or writ of *habeas corpus*. The Special Immigration Appeals Commission is also relevant as it takes cases involving national security issues.[62] All of these courts or tribunals can make references for a preliminary ruling to the CJEU in order to seek an interpretation of a provision of EU law under Article 267 TFEU where this is necessary for the purposes of deciding the case. In practice, until quite recently the immigration and asylum judiciary had in place a self-limiting ordinance effectively centralising the power to make references with the President of the Tribunal/ Chamber.[63] However, the removal of this restriction has yet to have had a significant impact on the actual practice of referrals from the UK courts to the CJEU, with many of the batch of recent references having been made by the Upper Tribunal in cases in which the current President (since 2010), Mr Justice Blake, has been sitting.[64]

30. Oversight of implementation and enforcement of EU measures in the Member States is the primary responsibility of the European Commission, especially as it has the power to commence infringement proceedings against the Member States under Article 258 TFEU in order to ensure compliance. However, as is well established under EU law, individual vigilance and the capacity of aggrieved individuals to bring actions in the national courts, relying upon the direct effect and supremacy of EU law and the rights

58. See above n.56.

59. Tribunals, Courts and Enforcement Act 2007.

60. The language of immigration continues elsewhere in the statutory scheme: other types of decisions in relation to EEA nationals' entitlement to enter or remain in the UK in areas not covered by the 2006 Regulations are termed 'immigration decisions' by S109 of the Nationality, Immigration and Asylum Act 2002 which provides for regulations to be made to establish rights of appeal in other cases not covered by the 2006 Regulations.

61. ***Bee and another*** (permanent/derived rights of residence) [2013] UKUT 00083 (IAC).

62. E.g. ***ZZ*** v. ***Secretary of State for the Home Department*** [2011] EWCA Civ 440. It was noted by those who attended the hearing at the Court of Justice in Luxembourg that ZZ, who had been obliged to move his family out of the UK in order to continue to enjoy family life with them, was able to attend the hearing in his case (Case C-300/11 ***ZZ*** v. ***Secretary of State for the Home Department***, pending), which was held in open court, notwithstanding the approach taken in the UK in order to avoid disclosing to ZZ the grounds on which he has been excluded from the UK.

63. Some indication of the approach taken by Tribunal judges can be found in paragraphs 17-20 of ***HM and others (Iraq) CG*** [2008] UKUT 00331(IAC), which helps to explain the current position, although the substance of that decision was overturned on appeal.

64. Exceptions include two recent cases on the intersection between time spent in prison and the accumulation of periods of residence for the purposes of residence rights: Case C-378/12 ***Onuekwere***, pending, referred by the Upper Tribunal in ***Onuekwere (imprisonment – residence)*** [2012] UKUT 00269 (IAC) and Case C-400/12 ***MG***, pending, referred by the Upper Tribunal in ***MG (EU deportation – Article 28(3) – imprisonment) Portugal*** [2012] UKUT 00268 (IAC).

arising thereunder, is an important dimension of a system of dual vigilance. National courts may also make references to the CJEU under Article 267 TFEU to obtain clarification of questions of EU law. In some circumstances, national courts are under an obligation to refer. Not only must Member States implement relevant EU laws, such as the CRD into national law, but also national administrations are under a duty, under Article 4(3) TEU, faithfully to apply EU law in the context of their day-to-day work.[65]

31. Responsibility within the Commission for the free movement of persons, especially those aspects related to immigration, mobility and equality, is divided between various Directorates General: Employment and Social Affairs; Home Affairs and Justice. The Commission's work in relation to the implementation of any directive begins by scrutinising the implementation legislation that the Member States must introduce and also notify to the Commission. In pursuing its concerns, the Commission can rely on information that it gleans from complaints it receives or hears about via the SOLVIT system or via Your Europe Advice, or via the European Parliament Committee on Petitions. It also seeks to generate as much information as it can via national experts about national implementation issues. It has commissioned but not always published 'conformity checking' reports (national and horizontal) on the CRD. It also sponsors, supervises and funds a Network of Experts on free movement of workers within the European Union,[66] who produce national, European and thematic reports, publish an online journal, collate a collection of case law of the CJEU and hold events in the Member States on topical questions. Furthermore, in its work in this area it has been backed up by organisations such as ECAS – the European Citizens' Action Service. ECAS has conducted and published its own research highlighting the gap between theory and practice in relation to free movement rights.[67]

32. The Commission's work on the CRD has been quite frustrating. As it has admitted, there remain profound problems with national implementation of this measure. In its 2008 report[68] it stated baldly that

> 'The overall transposition of Directive 2004/38/EC is rather disappointing. Not one Member State has transposed the Directive effectively and correctly in its entirety. Not one Article of the Directive has been transposed effectively and correctly by all Member States.'

It subsequently produced Guidelines on better transposition and application of the CRD in July 2009,[69] and it has continued to maintain vigilance and begun to initiate infringement proceedings in order to push the Member States into compliance by issuing reasoned opinions. None of these actions has yet come before the CJEU, [70] and doubtless the majority of them will be resolved between the parties before reaching the formal adjudicatory process in keeping with the normal pattern in such cases. Key problems of incomplete or incorrect transposition and implementation as illustrated by the infringement proceedings that have thus far been announced by press release concern three main issues: the entry and residence of family members, including partners; the issuing of visas and residence cards for third-country national family members; and safeguards against expulsions. However, much of the Commission's enforcement work continues behind closed doors in negotiations directly with Member States, an approach which reduces the level of transparency which citizens enjoy.

65. J. Temple Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions Under Article 10 EC', (2008) 31 *Fordham International Law Journal* 1483-1532.
66. This Network is housed with DG EMP, although in practice it deals with issues which cut across the portfolio of DG JUSTICE. For details, see http://ec.europa.eu/social/main.jsp?catId=475&langId=en.
67. ECAS, *Mind the Gap: Towards a Better Enforcement of European Citizens' Rights of Free Movement*, December 2009.
68. COM(2008) 840, above n.14. at p3.

Section 5: The research problem and the framework for the empirical research

33. The legal topics covered in this report have been examined extensively in various scholarly literatures: on EU justice and home affairs law,[71] on EU free movement law[72] and on the implementation of EU free movement law in the UK.[73] However, the primary focus of most of these works has been on 'internal legal analysis',[74] concerned with the explication and interpretation of the law as it stands and, in some cases, proposing improvements in line with what are seen as the normative objectives of the EU integration process (i.e. promoting free movement and protecting the rights of those who move and their families).[75] Moreover, much of the work has focused on one legal system (EU or UK), to the exclusion of the other,[76] and little work has grappled – beyond the question of UK compliance from a legal perspective – with the precise character of the fit between the systems. In some cases, a more contextual approach to doctrine is taken. The works of Ryan and Toner, both of whom place EU free movement law in its wider political and social context, including that of national immigration law, represent good examples.[77] A stronger emphasis on the bridge between the systems can be gleaned from the work of the Network of National Experts on the Free Movement of Workers,[78] where the combination of national reports, thematic reports, European reports, and reports on the follow up to CJEU case law provide detailed information about these issues of implementation and interface between the systems. However, these works are primarily descriptive in character.

34. In our research, we have sought to offer something different.[79] We have worked from the assumption that the practical problems in

69. European Commission Communication to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2 July 2009, COM(2009) 313.

70. According to the Commission's Press Release 'Free movement: Determined Commission action has helped resolve 90% of open free movement cases', IP/11/981, 25 August 2011, infringement proceedings were launched (through the issuing of a reasoned opinion) against Austria, Cyprus, Czech Republic, Germany, Malta, Lithuania, Spain, Sweden, Poland and the United Kingdom over the period from March to June 2011. The free movement situation in Belgium has remained under analysis by the Commission. Three more sets of infringement proceedings were opened in the first half of 2012: against the Czech Republic and Lithuania: 'Free movement: Commission upholds EU citizens' rights', IP/12/75, 26 January 2012; against the UK: 'Free movement: Commission asks the UK to uphold EU citizens' rights', IP/12/417, 26 April 2012; and against Austria, Germany and Sweden: 'Free movement: Commission asks Austria, Germany and Sweden to uphold EU citizens' rights', IP/12/646, 21 June 2012. The specifics of the infringement proceedings launched against the UK in respect of the so-called right to reside test (especially media and political reactions) are discussed in more detail in Story Two below, and in the text accompanying n below.

71. For the standard treatments see S. Peers, *EU Justice and Home Affairs Law*, 3rd Edition, Oxford: Oxford University Press, 2011, P. Boeles *et al*, *European Migration Law*, Oxford/Antwerp: Intersentia, 2009 and K. Hailbronner (ed.), *European Immigration and Asylum Law: A Commentary*, Oxford: Hart Publishing, 2010.

72. UK-focused textbook coverage can be found in all the leading works, e.g. P. Craig and G. de Búrca, *Text, Cases and Materials on EU Law*, 5th Edition, Oxford: Oxford University Press, 2011, D. Chalmers, G. Davies and G. Monti, *European Union Law*, 2nd Edition, Cambridge: Cambridge University Press, 2010 and Wyatt and Dashwood's *European Union Law*, 5th Edition, London: Sweet and Maxwell, 2006. The periodical literature on the free movement of persons and EU citizenship is too extensive to cite in full but for reviews of how the key issues have evolved see J. Shaw, 'Citizenship: Contrasting Dynamics at the interface of integration and constitutionalism', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, 2nd Edition, Oxford: Oxford University Press, 475-609 and O'Leary, S. 'Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship', (2008) 27 *Yearbook of European Law* 167-193 (albeit before the recent cases such as *Zambrano*).

73. The leading textbook account is G. Clayton, ***Textbook on Immigration and Asylum Law***, 5th Edition, Oxford: Oxford University Press, 2012, Section 2. Other extended discussions of the application of EU free movement law in the UK include: H. Toner, 'New Regulations implementing Directive 2004/38', [2006] ***Journal of Immigration, Asylum and Nationality Law*** 158-178; A. Hunter, 'Family members: an analysis of the implementation of the Citizens' Directive in UK law', [2007] ***Journal of Immigration, Asylum and Nationality Law*** 191; R. McKee, 'Regulating the directive? The AIT's interpretation of the family members provisions of the EEA Regulations', [2007] ***Journal of Immigration, Asylum and Nationality Law*** 334; N. Rollason, 'The entry and residence of EEA nationals in United Kingdom', [2007] ***Journal of Immigration, Asylum and Nationality Law*** 186; R. Scannell, 'The right of permanent residence', [2007] ***Journal of Immigration, Asylum and Nationality Law*** 201; H. Toner, 'Legislative Comment: New Regulations implementing Directive 2004/38', [2007] ***Journal of Immigration, Asylum and Nationality Law*** 158; A. O'Neill, 'Free Movement of EU Citizens within the EU', Paper given to a Matrix Chambers Seminar on EU law and immigration, http://eutopialaw.files.wordpress.com/2011/12/free-movement-of-eu-citizens-within-the-eu.docx.

74. D. Feldman, 'The Nature of Legal Scholarship', (1989) 52 ***Modern Law Review*** 498-517.

75. Valcke's two part review of the affect of the Directive in the UK contains recommendations for the amendment of both EU and UK law: A. Valcke, ' Five years of the Citizens Directive in the UK - Part 1', [2011] ***Journal of Immigration, Asylum and Nationality Law*** 217-244; A. Valcke, 'Five years of the Citizens Directive in the UK - Part 2', [2011] ***Journal of Immigration, Asylum and Nationality Law*** 331-357.

76. An exception is provided by S. Carrera and A. Atger, ***Implementation of Directive 2004/38 in the context of EU Enlargement: A proliferation of different forms of citizenship?***, CEPS Special Report, April 2009 (available from http://www.ceps.eu/books), but its focus is on the EU as a whole, not just the UK.

77. E.g. B. Ryan, 'The Accession (Immigration and Worker Authorisation) Regulations 2006' (2008) 37 ***Industrial Law Journal*** 75; H. Toner, ***Partnership Rights, Free Movement and EU law***, Oxford: Hart Publishing, 2004.

78. See n.66. above.

79. For a fuller discussion of the grounding of the research in the existing scholarly literatures, see J. Shaw and N. Miller, 'When legal worlds collide: an exploration of what happens when EU free movement law meets UK immigration law', (2013) 38 ***European Law Review*** 137-166, especially pp144-147.

relation to the implementation and application of EU free movement rights need to be illuminated by going beyond the surface of the treaties, the legislation and the case law. We also wanted to avoid carrying out research that placed the question whether the UK is, or is not, in compliance with its EU obligations at the heart of its enquiry. The point of the research is not to play the blame game about the UK government's conduct in relation to its EU obligations, although issues of effective implementation and the performance of national administrators and courts eventually came to play a prominent role in our research. While the analytical techniques of legal research have done much to illuminate why EU citizenship rights do not seem to be effectively applied in practice in all cases, it was clear that further empirical research would be needed to map the precise contours of the ongoing conflicts between the systems, which have hitherto been poorly understood, and thus to begin to see how these problems might be overcome. In so doing, we have built upon a tradition of socio-legal work on EU free movement rights which has probably been stronger in the UK than in any other Member State.[80] We wanted to find an approach which engaged directly with the societal and political contestedness of issues around immigration and citizenship which are thrown up by the demands of EU free movement law upon the UK legal and constitutional system, but within that broader context we wanted to identify a specific focus for our research which examined how certain key actors understood the field in which they were working, and which also allowed us to highlight internal legal systemic and cultural questions which relate to the effectiveness of implementation.

35. In building this approach we have drawn upon a well-established tradition of socio-legal work in both (UK) immigration law and policy[81] and – to a lesser extent – EU free movement law. The core insights of such work are, of course, that the experience of law in action always differs from how it appears 'in the books'. Much of the work by Ackers and her collaborators on women, children and retirement migrants[82] and that by Currie on new Member State migrants[83] focuses on the *experience* of migration within the context of the exercise of EU free movement rights. The study by Kubal of Polish migrants to the UK after the 2004 enlargement and how they experienced, and negotiated their way around, the relevant rules and regulations has a similar focus.[84] This project, in contrast, turns the spotlight directly onto the *role of law and legal institutions* and those who work within them.

36. Elsewhere in the social sciences, the concept of **'Europeanisation'** provides a toolkit that can be used to classify the different ways in which Member States respond to their obligations under the EU Treaties. Distinctions between 'pace-setters', 'foot-draggers' and 'fence-sitters'[85] are commonly drawn. Alternatively, Radaelli has identified strategies of 'inertia, absorption, transformation, retrenchment' that mark Member States' reactions to the demands of implementation and compliance.[86] Belonging primarily within the disciplines of political science and international relations, the Europeanisation literature focuses on trying to tease out the causalities that occur in relation to

80. Political scientists and sociologists across the EU Member States have, however, been involved in a number of EU-funded research projects on mobility in recent years (e.g. PIONEUR: http://www.obets.ua.es/pioneur/; MOVEACT: http://www.moveact.eu/) which have sought to offer a better understanding of some of the everyday practices of free movement.

81. E.g. A. Hunter, ***Diversity in the Labour Market: The Legal Framework and Support Services for Migrants entitled to work in the United Kingdom***, ESRC/HWWI, etc. 2007; A. Woodfield ***et al***, Exploring the decision making of Immigration Officers: a research study examining non-EEA passenger stops and refusals at UK ports, Home Office Online Report 01/07; R. Thomas, 'Risk, Legitimacy and Asylum Adjudication', (2007) 58 ***Northern Ireland Legal Quarterly*** 49.

82. E.g. L. Ackers and H. Stalford, ***A Community for Children?: Children, Citizenship and Migration in the European Union***, Ashgate: Aldershot, 2004; HL Ackers and P. Dwyer, ***Senior Citizenship? Retirement, Migration and Welfare in the European Union***. Bristol: Policy Press, 2002.

83. S. Currie, 'De-Skilled and Devalued: The Labour Market Experience of Polish Migrants in the UK Following EU Enlargement', (2007) 23 ***International Journal of Comparative Labour Law and Industrial Relations*** 83; S. Currie, ***Migration, Work and Citizenship in the Enlarged European Union***, Aldershot: Ashgate, 2008.

84. A. Kubal, 'Why semi-legal? Polish post-2004 EU enlargement migrants in the UK', [2009] ***Journal of Immigration, Asylum and Nationality Law*** 148-164.

85. T. Börzel, 'Pace setting, foot dragging, and fence sitting: Member State responses to Europeanisation' (2002) 40 ***Journal of Common Market Studies*** 19.

86. C. Radaelli, 'The Europeanization of Public Policy' in K. Featherstone and C. Radaelli (eds.), ***Politics of Europeanization,*** Oxford: Oxford University Press, 2003, 27-56 at 37-38.

processes of EU policy-making and issues of national implementation. Is the key issue the 'downloading' of EU laws and policies into systems within which they do not always fit well, or one of the 'uploading' of national particularities and sensitivities? Although issues of culture are often mentioned, this is rarely specifically in relation to *legal* culture or issues which are particular to legal systems and courts as opposed to other sets of institutions. Thus the existing body of Europeanisation research provides few insights into the questions which we want to raise about the fit between the EU and national legal systems. On the other hand, it could be argued that its general toolkit, offering close attention to the task of breaking up the wider problem of compliance into a set of smaller engagements which can each better be understood in its own terms, can help us in our endeavour to understand more about how issues of misfit can arise because of differing legal-technical interpretations of provisions of EU law made by different stakeholders, or because of the different legal structures of EU law and national law.

37. It was against the backdrop of these different methodological frameworks within socio-legal studies and political science/ international relations that we drew up our research framework, comprising a series of research tasks. The first was to identify and to characterise the areas of friction between EU free movement law and UK immigration law, and both the legal and societal issues which these engage. The second was to conduct interviews with key informants in order to understand better how this (lack of) fit between the systems operated. Our interviews allowed us both to test out certain intuitions that the research team had developed as to how and why the misfit operated as it did, and also to give space to interviewees to suggest their own ideas. The final task was to draw some conclusions from the research.

38. In our research we chose to interview only **stakeholders** (judges, practitioners, representatives of advocacy and advisory groups) rather than the EU citizens themselves who take advantage of their free movement rights.[87] By definition, therefore, these professional groups will orient their perspective primarily towards the problems encountered by the minority who choose to consult a legal advisor or advocacy group or to bring a case before the courts because of the problems they encounter. However, we chose to look at this group because we wanted the initial focus of our work to be on the systemic issues relating to the interface between two legal systems and institutional structures. However, as the report outlines below, in some respects we were forced, through our research, to confront a wider range of factors which may help to the account for the problems of friction that seem to be arising between UK law and EU law in this area. This in turn suggests the space for a much larger enquiry than we have thus far been able to undertake.

87. Of course, this is not to say that this group themselves, or their family members, could not experience problems as mobile or static EU citizens, but we interviewed them primarily by reference to their professional activities, not their private circumstances. See the research reports from the PIONEUR, MOVEACT (n.80. above) and EUCROSS (http://www.eucross.eu/cms/) projects.

Section 6: Phase One Research Findings: the areas of friction between EU law and national law

39. To ensure that our socio-legal research was based on sound premises in relation to a swiftly changing field of law, we first needed to build a clear picture of the existing law. We found that the legal position was unfolding quite rapidly even as we evaluated it, through case law in both the national courts and the CJEU, and through shifts in policy positions and legislative amendments adopted by the UK authorities and clarifications emerging from the Commission. We have tried to work with a more dynamic picture of the relationship between UK immigration law and EU free movement law than has been used hitherto in studies of these issues which tend to try to provide a snapshot, and perhaps a critique, of the law at a given moment in time. This approach, which is sensitive to change through time, has helped us to **define the concept of friction or misfit in a way that was analytical rather than anecdotal, and which is contextual rather than merely legal.**

40. In a **first phase of research**, therefore, the project sought to tease out the key issues in relation to EU free movement law that have brought about conflicts or disagreements between the EU institutions and the UK authorities. Reviewing this evidence and placing it in the context of media coverage and various forms of stakeholder engagement and commentary, we concluded that the presence of most or all of the following features in a particular area marks it out as one where there is particular **friction or misfit** between the two legal systems:

- There are **clusters of case law** in the UK courts and the CJEU with interpretations of EU law which diverge from those given by the UK government enforcement and implementation agencies; in some cases, the UK courts and the CJEU have also diverged in their interpretations, although this tends to be a temporary phenomenon as new CJEU interpretations 'bed in' within UK judicial practice;
- There are (threats of) **Commission infringement proceedings** potentially resulting in litigation before the CJEU under Article 258 TFEU;
- A particular area of free movement law or its interface with UK law has become the focus for coverage in the **academic literature**;
- Anecdotal evidence suggests high levels of (individual) **strategic or opportunistic behaviour**, often based on legal advice about how to use EU law to work around national restrictions within immigration law;
- There are extensive campaigns and awareness raising by **NGOs** and other **civil society** organisations representing migrants;
- There is evidence of higher than usual levels of **press coverage** (bearing in mind that EU free movement law has historically been less politicised and therefore less present in the public eye than 'traditional' immigration law).

Together, these bullet points define the character of **friction or misfit** between the two legal systems which is the primary focus of this research, but they also opened out the possibility of illustrating how these frictions operated not only by reference to legal texts and interpretations, but also by reference to **'stories'**, that is evidence derived from a wider range of textual sources (and some interview data) about the precise character of these issues. The intention here is to place this material in its wider societal context, and to illuminate the issues in an accessible way. One **story** is developed in more detail for each of the four areas of friction, after a brief explanation of the main legal issues.

> **KEY FINDING 1: We found that there are four main areas of friction between EU law and UK law in relation to questions of free movement**

41. **Friction or misfit**, as defined in paragraph 40, arises most acutely in **four interlinked issue areas**. We outline these areas of friction with a very brief note of the legal issues that have arisen and a set of **stories** that have emerged in relation to these matters, in the media discourse that we have reviewed, and in interviews with key stakeholders.

> **Principal areas of friction between EU law and national law**
>
> 1. Problems in the area of residence rights for family members
> 2. Access to welfare benefits and the 'right to reside'
> 3. The area of 'probity': selecting the 'good' from the 'bad' migrants
> 4. The area of 'boundary zones' between different regulatory systems – transitional measures for new Member State citizens, Turkish migrants, etc.

Problems in the area of residence rights for family members

42. The application of EU free movement rules in relation to the **residence rights** of **third country national (TCN) family members of EU citizens** has led to the most acute problems. EU law brings TCN family members under the same protective umbrella as EU citizen family members, with the rationale that if family members, regardles of their citizenship, cannot travel and reside with a free moving EU citizen under the same conditions, then this will be an obstacle to the exercise of free movement rights by the EU citizen. In other words, the rights for third country national family members are derived from the rights of EU citizens. TCN family members do not have their 'own' rights under EU law, except in certain limited circumstances related to the death or departure of the Union citizen or after they have acquired the right of permanent residence. As regards these derived rights, problems arise both in respect of the initial access of such family members to the UK, and in relation to their continued residence and permanent settlement as family members.

43. The position is complicated as the CRD divides family members into two categories. Article 2(2) of the CRD covers the spouse, registered partner, and ascending and descending dependent family members. Other family members, covered by Article 3(2) are other dependent family members and the partner who has a durable relationship with the EU citizen. There are two respects in which the treatment of the groups differs. As regards the Article 2(2) family members, the only issues that can arise are around the issue of family relationship (e.g. is this a sham marriage? are the parties who they say they are?) and the question of dependency. Beyond that point, it is clear that the Member State must grant admission or residency, as the case may be, to the TCN family member. The argument made by some Member States including the UK that there needed to be 'prior lawful residence' of the TCN family member with the EU citizen in another Member State was laid to rest by the CJEU in the *Metock* case.[88] As regards those 'other' family members mentioned in Article 3(2), there are likewise questions of family relationship and dependency (and here there is a more complex formulation of dependency and need for personal care, plus a reference to 'in the country from which they come' which has caused considerable confusion). In addition the obligation on the Member States is limited: it is to 'facilitate' entry and residence 'in accordance with its own legislation', after undertaking 'an extensive examination of the personal circumstances' of any applicant. It must justify any refusal. This is clearly an area where even the CRD foresees an overlap between EU free movement law and national immigration law, and it is one that has become ever more controversial as Member States have sought to restrict other avenues of family migration in recent years. In keeping with this approach, the EEA Regulations also distinguish between 'family members', who

88. See n.46. above.

are defined in Regulation 7, and 'other family members', although Regulation 8 uses the term '*extended* family members'. The meaning of 'facilitate' has been controversial and is not yet fully settled despite some initial indications by the CJEU in the 2012 *Rahman* case emphasizing that national authorities must make their decision on the basis of the fullest assessment of the personal circumstances of the applicant.[89]

44. There have been many challenges for the UKBA in aligning its decision-making under the UK Regulations with the requirements of the CRD, in circumstances where both the CRD and the Regulations are drafted in terms which can give rise to some uncertainty. The UK courts too have struggled with some of these issues,[90] although more recently it is evident that the UKUT (IAC) in particular, in combination with a willingness to refer moot points to the CJEU, has started to clarify many of the most difficult questions.[91] The Commission did pick out two particular issues to follow up through a reasoned opinion, which is one of the procedural steps leading towards the bringing of infringement proceedings before the CJEU.[92] These concerned the refusal by the UK to allow extended family members of EU citizens to apply to have their residence in the UK considered under EU law when they were lawfully residing in the UK *before* the arrival to the UK of the EU citizen on whom they are dependent and the refusal by the UK to allow family members who hold a residence card from another Member State to travel to the UK without an EEA family permit. Article 5(2) of the CRD authorises the Member States to apply a visa requirement to such family members (in the UK parlance this is an EEA family permit), although the granting of these visas should follow automatically and without charge upon the proof of the family relationship and dependency issues, but an important exception exists where the family member holds a residence card from another Member State. The latter issue is rather complicated, as the UK insists that if the TCN family member were to arrive at the UK border they would be admitted if they can show that they fall within the 'family member' category. However, in practice, every person coming to the UK has to use a carrier, and the carrier liability rules applied by the UK mean that in reality persons without EEA family permits holding the residence card of another Member State will be denied boarding even though the carriers' liability would be waived if boarding were allowed and the person were admitted at the border under Regulation 11(4).[93] On the other hand, evidence of a constructive dialogue between the UK authorities and the Commission/CJEU can be gleaned from the fact that the UK Government rewrote the Regulations (for the second time in 2012) within two months of the *Rahman* case to remove the requirement of prior lawful residence in another Member State as a condition for taking advantage of Article 3(2) CRD.[94] That part of the infringement action will therefore fall.

45. Meanwhile, the question of family members' rights has often arisen for discussion and decision under the EU citizenship treaty provisions themselves, rather than the CRD, and the interpretation and application of these cases in the UK have also caused difficulties.[95] For example, it was only in the 2012 amendments to the EEA Regulations that the UK finally made full provision for the so-called *Chen* parents. *Chen* parents are

89. Case C-83/11 ***SSHD*** v. ***Rahman***, 5 September 2012. See C. Brown and A. Davies, 'Rahman – further fleshing out of the position of third country nationals under the Citizenship Directive', EUtopia Law, 29 November 2012, http://eutopialaw.com/2012/11/29/rahman-further-fleshing-out-of-the-position-of-third-country-nationals-under-the-citizenship-directive/.

90. E.g. ***KG (Sri Lanka) and AK (Sri Lanka)*** v. ***Secretary of State for the Home Department*** [2008] EWCA Civ 13; ***Bigia & Ors*** [2009] EWCA Civ 79.

91. ***MR & Ors (EEA extended family members) Bangladesh*** [2010] UKUT 449 (IAC) (referred to the CJEU as Case C-83/11 ***Rahman*** see n.89. above); ***Ihemedu (OFMs – meaning) Nigeria*** [2011] UKUT 340 (IAC); ***Moneke (EEA – OFMs) Nigeria*** [2011] UKUT 00341(IAC).

92. See IP/12/417, n.70. above.

93. The 2012 amendments to the Regulations (above n.51.), adding a further paragraph to Regulation 12 on the granting of EEA family permits appear in part to be an attempt to react to this challenge to UK law.

94. See the amendments introduced by the Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012, SI 2012 No. 2560 (above n.51.) as discussed in n.53. above.

the TCN parents of EU citizen children whose right to reside is derived from the 2004 case of *Chen*.[96] In fact, the amendments themselves may be problematic as they appear to deny the possibility that such persons could eventually acquire the permanent right of residence, and this raises questions as regards its compatibility with EU law which may be tested in the future.[97] These difficulties seem set to continue as the CJEU continues to explore rights of residence based not only on the treaty provisions themselves, but also the treaty provisions read in the light of provisions of the Charter of Fundamental Rights on family life, although the much anticipated case of *Iida* has not pushed at the boundaries of EU citizenship as some had expected after the Advocate General's opinion.[98] The UK has, in addition, faced challenges concerning the implementation of the *Ibrahim and Texeira* judgments, which originated in the UK courts,[99] according to which a parent caring for the child of a migrant worker who is in education in the host Member State has a right of residence in that State and that right is not conditional on the parent having sufficient resources not to become a burden on the social assistance system. These judgments were also finally implemented into UK law in the first set of 2012 amendments to the EEA Regulations.[100]

46. Such are the principal legal challenges in what remains a complex and dynamic area of the law. However, there have been additional problems with the practical implementation of the rules. As noted before, the UK authorities routinely take longer than they are permitted to decide upon applications by TCN family members,[101] have erred in the manner in which they have applied the rules relating to the evidencing of family relationships,[102] and have been less than careful in their management of documentation and correspondence.[103] All of this has contributed to the high rate of success in appeals against UKBA decisions brought before the tribunals, which was discussed in paragraph 13.

95. E.g. Case C-60/00 ***Carpenter*** [2002] ECR I-6279, Case C-413/99 ***Baumbast*** [2002] ECR I-7091; Case C-2002/02 ***Chen*** [2004] ECR I-9925; Case C-109/01 ***Akrich*** [2003] ECR I-9607; Case C-1/05 ***Jia*** [2007] ECR I-1 Case C-127/08 ***Metock*** [2008] ECR I-6241; Case C- 34/09 ***Ruiz Zambrano*** [2011] ECR I-1177; Case C-256/11 ***Dereci, Heiml, Kokollari, Maduike and Stevic***, 15 November 2011.
96. Case C-2002/02 ***Chen*** [2004] ECR I-9925.
97. A. Weiss, 'EEA Nationals and their rights - The new Changes to the Immigration Regulations 2006', ***Migration Pulse***, 1 August 2012, http://www.migrantsrights.org.uk/migration-pulse/2012/eea-nationals-and-their-rights-new-changes-immigration-regulations-2006. However, in ***Bee and another*** (permanent/derived rights of residence) [2013] UKUT 00083 (IAC) the issue of permanent rights of residence under the CRD and other provisions of EU law for carers with derived rights was considered by the IAC, and the case was rejected.
98. Case C-40/11 ***Iida*** v. ***Stadt Ulm***, Opinion of AG Trstenjak, 15 May 2012, judgment of the CJEU, 8 November 2012.
99. Cases C-310/08 and C-480/08 ***London Borough of Harrow*** v. ***Nimco Hassan Ibrahim***, ***Maria Teixeira*** v. ***London Borough of Lambeth*** [2010] ECR I-1065.
100. The issue of permanent residence for the carer in these cases is before the CJEU in a case referred by the IAC, Case C-529/11 ***Alarape and Tijani*** v. ***SSH***, pending (Opinion of AG Bot of 15 January 2013). This case concerns the claim for permanent residence made by a carer who derives his or her rights of residence from the fact that he or she is caring for an EU citizen child in education, focusing in particular on what happens after the child has reached the age of majority.
101. See above text accompanying n.25.
102. ***Papajorgji*** [2012] UKUT 00038 (IAC), discussed in paragraph 12.
103. ***AB*** v. ***Home Office***, 16 February 2012, discussed in paragraph 12.

Story One: Third Country National Family Members – The Experience of the UK and Ireland

Third Country National Family Members: Their Rights

Third country national (TCN) family members derive certain rights from their EU citizen family member, including, most significantly, the right to accompany or join the EU citizen family member in the Member State to which they move. The CRD expresses the need and motivation for certain rights to be extended to TCN family members of EU citizens; asserting in the preamble that,

> *"The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality".*

In order to benefit from these rights family members must simply prove that they have a relationship with the EU citizen for example by producing a marriage certificate to prove a spousal relationship.

The nature and extent of these rights are set out in the CRD, although, in parts, in fairly broad terms and as a result some Member States, in the process of transposing the CRD into domestic legislation, included more specific rules. It has therefore been necessary for the CJEU to clarify, through case law, whether these further rules are lawful, and to elaborate on where the limit to the derived rights of TCN family members lies.

It is the distinction between the UK and Irish response to the CJEU case law that illustrates the friction surrounding TCN family members in the UK.

The implementation of ***Metock*** in the UK and Ireland

In 2008 the CJEU handed down the Metock *judgment which is considered to be a milestone in clarifying the rights of TCN family members. It addressed the issue of whether or not it was permissible to require that TCN partners of EEA citizens be already lawfully resident in another Member State before exercising their derived right of entry and residence in a given Member State – in this case Ireland. The CJEU held that this requirement in Ireland, which was also a requirement of the UK's Immigration (European Economic Area) Regulations, was impermissible. We will turn in a moment to the implementation of this case in Ireland, where it originated, but we will consider first its implementation in the UK.*

Although the Court's judgment was handed down on 28 July 2008, the internal guidance used by UKBA was not amended to reflect the change until January 2009 and the EEA Regulations were not changed until June 2011, almost three years after the date of the judgment. The amending legislation, the Immigration (European Economic Area) (Amendment) Regulations 2011, asserts in its Explanatory Notes that:

> *'The UK Border Agency has been operationally compliant with this judgment [Metock] since November 2008.'*

104. ***R (on the application of Yaw Owusu)*** v. ***Secretary of State for the Home Department*** [2009] EWHC 593 (Admin).

105. Network of Experts on the Free Movement of Workers, ***Follow Up of Case Law from the Court of*** Justice, Thematic Report, September ***2010***, http://ec.europa.eu/social/BlobServlet?docId=6670&langId=en, at 12.

106. The Follow Up report of September 2010 (above n.105.) and a subsequent report by the Network of Experts, ***Follow Up of Case Law from the Court of Justice of the European Union***, Thematic Report 2010-2011, October 2011, http://ec.europa.eu/social/BlobServlet?docId=7738&langId=en provide detailed information about the implementation of the ***Metock*** judgment at the national level, including in Member States, such as Denmark, where the issue was highly politicised and saw extensive negative political comment and press coverage: see M. Wind, 'When Parliament comes first – the Danish concept of democracy meets the European Union', (2009) 27 ***Nordisk Tidsskrift for Menneskerettigheter*** 272–288. The point to note is that legislative implementation occurred in Denmark within months, despite the intense political struggles over immigration which were directly affected by ***Metock***.

This sits ill with a Court of Appeal judgment[104] which held the previous UK rules to be 'flagrantly unlawful' due to the 'the failure of the Secretary of State and its agencies in its obligation to give effect to Community Law'. Mr Justice Blake urged the Secretary of State to amend the Regulations, declaring, 'there remains the problem that until the offending rule is revisited and clarified to respect Community Law, as to the position of other people in a similar situation. I urge the defendant [the Secretary of State] to give it urgent consideration'.

This can be contrasted with the experience in Ireland where the equivalent regulations were amended immediately. The "Thematic Report on the Follow Up of Case Law from the Court of Justice" remarked that,

> *'The Irish Government reacted swiftly to the Metock judgment, adopting regulations amending the offending part of the European Union (Free Movement of Persons) Regulations (S.I. 226 0f 2006) only four working days after the Court delivered its judgment… in respect of family members who are not Union citizens, the requirement of prior lawful residence was removed'.[105]*

Furthermore, the applications of all those who had applied since 28 April 2006 (the coming into force of the CRD) for a residence card and had been refused because they did not have prior lawful residence were reviewed.[106]

Ruiz Zambrano *in the UK and Ireland*

In March 2011 the CJEU issued another landmark decision, elaborating on the rights of TCN family members. This time the rights concerned were those that flow directly from the EU citizenship provisions of the Treaty rather than from the CRD. In Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM) *the CJEU sought to refine the rights of TCN family members where the EU citizen (in this case a child) is dependent on the TCN family member but where the EU citizen is in his own Member State and has not exercised any free movement rights. Due to the length of time between the decision of* Metock *and the amendment of the UK Regulations, practitioners have anticipated a similar delay between the judgment of* Ruiz Zambrano *and the inclusion of the resulting new rule in UK legislation. To date, a year from when the decision was issued, there has been no legislative change in the UK. Instead an announcement on the UKBA website on the 21 September 2011 stated that the UKBA,*

> *'will be looking at putting regulations to reflect the Zambrano judgment in place before the close of 2011 at the earliest'.*

In the meantime, since the 19 September 2011, to benefit from the rights established in Ruiz Zambrano*, an applicant can apply to the 'European Casework business' section within UKBA. Where the UKBA finds sufficient evidence has been supplied by the applicant, it will issue a 'Certificate of Application' which permits the applicant to work pending its substantive consideration of the application which will take place once the Immigration (EEA) Regulations have been changed.*

Again, by contrast, in Ireland, on 21 March 2011, nine working days after the judgment, a public statement was made by the Minister for Justice, Equality and Defence. The statement set out how the Irish government intended to respond to the Ruiz Zambrano *judgment. As a result, government officials examined all cases that had already been lodged at court (approximately 120) involving Irish citizen dependent children to which the* Ruiz Zambrano *judgment may be relevant. The relevance of* Ruiz Zambrano *to others seeking to remain in Ireland also underwent examination. Decisions made by the end of 2011 had resolved 108 cases that were before the courts at the date of the* Ruiz Zambrano *judgment.*

2011, http://ec.europa.eu/social/BlobServlet?docId=7738&langId=en provide detailed information about the implementation of the *Metock* judgment at the national level, including in Member States, such as Denmark, where the issue was highly politicised and saw extensive negative political comment and press coverage: see M. Wind, 'When Parliament comes first – the Danish concept of democracy meets the European Union', (2009) 27 *Nordisk Tidsskrift for Menneskerettigheter* 272–288. The point to note is that legislative implementation occurred in Denmark within months, despite the intense political struggles over immigration which were directly affected by *Metock*.

47. Issues around rights of residence also arise from time to time for EU citizens, especially for EU citizens from post-2004 new Member States. However, as the UKBA rarely seeks the removal of EU citizens (except where there are issues of probity or lack of self-sufficiency which are discussed below at paragraphs 50-54), we will treat these issues of residence as relating primarily to the use by the UK authorities of residence tests as the basis for welfare rights (paragraphs 48-49). They also arise rather often in relation to EU citizens subject to transitional regimes (see paragraphs 55-56).

Access to welfare benefits and the right to reside

48. In the UK, **access to social benefits and welfare provision in many areas is conditional upon having, in particular, the 'right to reside'**. The question whether the UK has been within the scope of the limitations which it may legitimately impose under the CRD and other legislative measures on social security has been a contested one within the UK and the EU for many years and it has been the subject of considerable litigation and – now – infringement proceedings initiated by the Commission by the issuing of a reasoned opinion.[107] One issue that arises is that, when compared with previous EU legislative instruments on free movement, what is important about the CRD is that it focuses on different levels of 'residence right' on the part of EU citizens. This can sit quite uneasily with the evolving UK law in this area. Where the person in question is *also* a third country national family member of an EU citizen resident in the UK, there are often additional problems which arise cumulatively. In a link to the discussion of probity issues in paragraphs 54-55 and Story Three below, there also appears to be an increasing trend of using the absence of a 'right to reside' as the basis for removal, on the grounds that such a person is not a qualified person. However, in practice the route of removal – which is administratively complex, potentially costly and not the basis on which an EU citizen can be durably expelled from the UK – is rarely taken in such cases. On the contrary, the main focus lies on access to benefits, and the obvious impact upon ability to remain in the UK if benefits are withdrawn. *Patmalniece*,[108] the leading Supreme Court judgment, decided, by a majority, that while the UK measures were indirectly discriminatory on grounds of nationality, none the less that discrimination was justified by the need to protect the public pursue (Lord Walker dissenting). It is interesting to note that Baroness Hale referred in her opinion to a view put forward by the AIRE Centre[109] that it was wrong to 'starve them out'. The AIRE Centre view, presented on its website[110] and in its intervention before the Supreme Court, is that EU law does not foresee EU citizens being left destitute when UK citizens would not be in comparable circumstances, and that in fact the appropriate line of action for the UK authorities is to grant the benefits, but then to start proceedings for removal on grounds that the EU citizen is no longer a qualifying person under the Regulations and falls outwith the scope of EU law protections as regards free movement.[111]

49. An additional element to the issue of the 'right to reside', as Story Two shows, concerns the way in which the presentation of these questions reflects on the construction of EU migrants in the UK in the eyes of the media. Story Two presents the media coverage and we return to this issue below when we look at the external pressures upon the interface between EU free movement law and UK immigration law as part of our discussion of **Key Finding Four**.

107. IP/12/417, n.70. above.
108. *Patmalniece* v *Secretary of State for Work and Pensions* [2011] UKSC 11.
109. Advice on Individual Rights in Europe, a specialist law centre focusing in particular on EU law free movement and citizenship rights (http://www.airecentre.org/).
110. http://www.airecentre.org/news.php/18/uk-supreme-court-judgment-in-patmalniece.
111. But see also Valcke, Part 2, above n.75. at 350 on possible restrictions on removal derived from international law.

Story Two: 'Benefit Tourism' in the media

On 29 September 2011 the European Commission launched the first phase of an infringement action against the UK by issuing a 'reasoned opinion'. The 'reasoned opinion' requested that the UK end the application of the 'right to reside' test.[112] *The test appears in UK benefits legislation and is a means of confirming the eligibility of applicants for certain social welfare benefits.*[113] *The European Commission has requested an end to this test as it indirectly discriminates against citizens of other Member States. The potential outcome of infringement proceedings is that the Commission may decide to refer the UK to the CJEU. The British media reported on the European Commission's press release, the reaction of the Work and Pensions Secretary Iain Duncan Smith and other UK MPs and campaign organisations. Aside from the reaction of British politicians the media commentary itself reveals a dominant negative portrayal of EU migrants and of the EU institutions.*

The term 'benefit tourist' is frequently used to describe people who seek social assistance but who are not British citizens. The term suggests the need to be suspicious of the motives of non-UK citizens seeking social assistance and perpetuates a hierarchy suggesting that there may be a justification for denying subsistence to those deemed undeserving. The coverage is also similar to that given to asylum seekers. It is designed to focus on 'othering' the group where possible. In much of the press coverage, EU citizens are frequently designated as 'foreigners' or 'people from overseas' rather than being designated 'EU citizens' or 'EU migrants'.

'Benefit tourism'

*There seems to be a preoccupation across a wide spectrum of newspapers and news broadcasters with the idea that migrants are economically motivated and seek access to the welfare state in the United Kingdom. The phrase '**benefit tourist**' started to gain more traction in the British media in 2004 after the accession to the EU of the new Member States. The term is used liberally when reporting on the infringement action, playing into the fear that 'our' economic security as a country is being threatened by migrants.* The Telegraph *and* The Daily Mail *both headlined with the term 'benefit tourist': 'Brussels threatens to sue Britain to let in '**benefits tourists**' (*The Daily Telegraph*, 29 September 2011);*[114] *'We're throwing open doors to '**benefit tourists**': EU plan to let migrants claim as soon as they enter the UK is blasted' (*The Daily Mail*, 30 September 2011).*[115] The Daily Mail *went on to declare that 'Europe has given Britain two months to scrap its policies which prevent **benefit tourists** claiming billions of pounds in hand-outs' (*The Daily Mail*, 30 September 2011).*

*Other media sources, who are not known for anti-immigrant and anti-Europe reporting in the same way as The Telegraph and Daily Mail, also used the phrase in the content of their articles: 'Ministers fear taxpayers could be forced into handing out more than £2bn to EU nationals, including so-called "**benefit tourists**"' (*BBC*, 30 September 2011).*[116] The Independent *did not use the term but instead used a similar phrase 'benefits for migrants': 'The threat of legal action by the European Commission over Britain's restrictions on **benefits for migrants** risks "blowing the Government's immigration policy out of the water"' (*The Independent*, 30 September 2011).*[117]

112. Press Release, 'Social security coordination: Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific social benefits', IP/11/1118, 29 September 2011.
113. Child Benefit, Child Tax Credit, State Pension Credit, Income-based Allowance for Jobseekers, Income-based Employment and Support Allowance.
114. http://www.telegraph.co.uk/news/uknews/immigration/8798095/Brussels-threatens-to-sue-Britain-to-let-in-benefit-tourists.html.
115. http://www.dailymail.co.uk/news/article-2043519/Now-EU-orders-Britain-Let-migrants-claim-benefits-soon-arrive-UK.html.
116. http://www.bbc.co.uk/news/uk-15120522.
117. http://www.independent.co.uk/news/uk/politics/immigration-policy-under-threat-2363687.html.

'EU migrants' or 'foreigners'

EU migrants are presented as part of larger homogenous group of 'migrants' or 'foreigners'. This construction by the media fails to distinguish between the set of rights that third country nationals can acquire in the UK and the enhanced rights of movement, residence and access to benefits that EU citizens and their family members automatically possess. This is also very similar to the way asylum seekers have been constructed by the media for the past decade: they are seen as a large group (seen as much larger in the popular imagination than they actually are) who are defined by their movement and by what they seek to take away from the state and as a consequence as a group that threatens state interests.[118]

Thus the BBC wrote, 'The European Commission has threatened legal action against the UK, saying a test of eligibility for benefits discriminates against ***foreigners****' (*BBC*, 30 September 2011). The* Sky News *article began with an alarmist perspective, 'Tax payers could be left with a £2bn bill if the European Commission brings legal action over Britain limiting benefits for* ***foreigners,*** *according to ministers. The UK has been given two months to explain how it will fall into line with EU rules after being warned its "right to reside" test could discriminate against* ***people from overseas****' (*Sky News*, 30 September 2011).*[119] The Guardian *confused the issue entirely by saying those affected are "overseas": "Possible legal action by the European Commission over Britain's plans to limit benefits claims for those overseas could leave tax payers with a £2bn bill, the work and pensions secretary, Iain Duncan Smith, has said" (*The Guardian*, 30 September 2011).*[120]

118. A.J Innes, 'When the threatened become the threat: the construction of Asylum Seekers in British Media Narratives', (2010) 24 ***International Relations*** 456-777.
119. http://news.sky.com/story/886358/benefits-for-foreigners-uk-faces-2bn-bill.
120. http://www.guardian.co.uk/politics/2011/sep/30/eu-threat-uk-benefits-changes.

The area of 'probity': selecting the 'bad' from the 'good' migrants

50. EU free movement rights are not unconditional. Member States are able to restrict free movement rights by reference to reasons of public security and policy, but any measures taken must be related to the personal conduct of the EU citizens in question (and will also – as with such determinations in 'general' immigration law – be subject to human rights scrutiny in the courts). The test which much be applied by the Member States will also vary depending upon how long a person has been resident in the UK, and thus what rights they have. The interface of periods of imprisonment and the accumulation of the necessary years of residence in the host Member State has been an issue that has come quite frequently before both the UK courts[121] and the CJEU[122] in recent years. In any event, it is important to emphasise that Ministers do not have the power, as they have in relation to aliens, to exclude a person from the UK on the grounds that their presence is not conducive to the public interest.[123] In addition, Member States are permitted to enquire into certain family relationships, e.g. to prevent so-called sham marriages or indeed forged papers 'proving' family relationships being used in order to circumvent restrictions imposed within national immigration law.

51. It should also be noted that the coming into force of the CRD coincided with a period of intense public scrutiny of UK practices on deportation/removal, especially in relation to two categories – foreign national prisoners and persons who had had a claim for asylum rejected. In relation to the former group, there is scope for considerable overlap with the proper treatment of EEA nationals who have committed crimes and who are considered for deportation under the CRD. In relation to foreign national prisoners in general, the UK Borders Act 2007 introduced a higher degree of automaticity into the process of deporting foreign prisoners at the end of a custodial sentence of twelve months or more, albeit with saving provisions for those enjoying 'Community rights'.[124] However, in more general public statements from Government officials, including some made in Parliament, it was not always made clear that there are separate regimes in relation to those covered by EU law and those who are not. The Ministry of Justice service instructions on Immigration, Repatriation And Removal Services note that while EEA nationals normally have a right to live and work in the UK, they can be removed under certain circumstances. Thus 'all EEA nationals with a sentence of 12 months or more should be referred to UKBA who will determine whether they should be deported or removed.'[125] Cases such as that involving Learco Chindamo, who was sentenced to lengthy term of imprisonment for the murder of head teacher Philip Lawrence in London in 1996 and who was recommended for deportation after his release in 2006, show that the UK courts are able to apply the appropriate EU law standards, notwithstanding popular and press hysteria about the notion that prisoners may be enjoying human rights protection that they do not deserve.[126]

121. E.g. *SSHD* v *FV (Italy)* [2012] EWCA Civ 1199.

122. Case C-348/09 *PI* v *Oberbürgermeisterin der Stadt Remscheid*, 22 May 2012.

123. Compare the High Court judgment in ***Naik*** v. ***SSHD*** [2010] EWHC 2825 on the exclusion of a Muslim writer and speaker, a citizen of India, who had made statements in support of Osama bin Laden (Secretary of State's decision lawful as regards her personal power to exclude such persons) and the Tribunal determination in ***GW (EEA reg 21: 'fundamental interests') Netherlands*** [2009] UKAIT 50 on the attempt to exclude the radical Dutch politician Geert Wilders from the UK (decision not to admit Wilders successfully appealed). However, particular problems – now before the CJEU following a reference from the Court of Appeal (***ZZ*** v. ***Secretary of State for the Home Department*** [2011] EWCA Civ 440) – concern the operation of the Special Immigration Appeals Commission system and the difficulties for an EU citizen of appealing an exclusion decision where the authorities do not wish to reveal certain security sensitive information on the basis of which the decision was made: Case C-300/11 ***ZZ*** v. ***Secretary of State for the Home Department***, pending. This case raises significant questions about the applicability of the CFR in this area and of course its applicability in the UK.

124. UK Borders Act 2007, s33(4).

125. Prison Service instructions on ***Immigration, Repatriation And Removal Services***, PSI 52/2011, November 2011, available from http://www.justice.gov.uk/about/hmi-prisons. But see also Section Three of Chapter Eight of the European Casework Instructions, 'Enforcement actions taken against EEA nationals and family members', available from http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/.

126. ***LC*** v. ***Secretary of State for the Home Department (Learco Chindamo)***, IA/13107/2006, 17 August 2007.

52. Even so, despite the fact that relevant cases have not necessarily come to court, there is some evidence of EEA national prisoners having been caught in an initial 'crackdown' which occurred when the question of deporting foreign national prisoners first came to public prominence in the middle of the first decade of the 21st century. First of all, as the Thirty-Second report by the Joint Committee of the House of Commons and the House of Lords on Human Rights pointed out,[127] a recent attempted crackdown by the government on foreign prisoners was rejected by the courts in relation to EEA nationals. Effectively, the UK Government was forced to abandon the attempt to impose a presumption that EEA nationals who had served sentences of 24 months or more should be deported. And then, in a number of reports issued by HM Inspector of Prisons,[128] evidence came out of EEA national prisoners being swept up in rather indiscriminate trawls conducted by immigration officials of prisoners coming towards the end of their sentences, and being placed in immigration detention, or moved to higher security prisons as a result.

53. Finally it should be noted that there is some overlap between the issues of UK law relating to the deportation of foreign national prisoners (i.e. non-EEA nationals) and EU law, following the CJEU judgment in Ruiz *Zambrano* which made it clear that it would amount to a substantial deprivation of the rights of EU citizenship if a citizen of a Member State, even one who was resident in the state of which s/he was a citizen and had never exercised a free movement right, would be required to leave the EU altogether because of a decision made relating to the residency status of her/his parents on which s/he was dependent. These principles, along with the particular weight to be given to the presence of UK citizen children in all cases relating to the deportation of foreign national prisoners which were raised by the Supreme Court in *ZH Tanzania*,[129] were discussed at some length by the UKUT (IAC) in the determination in *Sanade*,[130] not least in order to give further guidance to First Tier tribunals.

54. Although it is clear there are many different issues arising under this heading, we can summarise this area of friction as engaging with issues of **'probity'** in its broadest sense. This would include not only attempts to deport those convicted of serious criminal offences, but also terrorism- and public security-related issues, as well as sham and forced marriages. Moreover, there is also an overlap with the previous issue, as Member States from time to time seek to effect the removal of EU citizens who are unable to maintain themselves, are homeless and often destitute and are perhaps housed in temporary accommodation or 'camps', on the grounds they do not qualify under the treaty rules. But when media commentators comment upon such cases, they often forget to add that EU citizens who have been removed because they are not deemed to be exercising their 'treaty rights' can simply return to the UK by exercising their 'ordinary' free movement rights which give them – unconditionally – a minimum of three months to remain in the UK every time they visit. They cannot normally be refused entry to the UK except by reference to specific individual characteristics and serious risks. These various categories of EU citizens who might be thought to be 'bad' migrants are thus conflated in careless media reporting, creating a link, in our analysis, between the two areas of friction concerning access to welfare rights and the issue of 'probity'.

127. See http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/27805.htm#a4.
128. HM Inspectorate of Prisons, ***Foreign national prisoners: a thematic review***, July 2006 ; ***Foreign national prisoners: A follow-up report***, January 2007.
129. ***ZH (Tanzania)*** v. ***SSHD*** [2011] UKSC 4.
130. ***Sanade and others (British children – Zambrano – Dereci)*** [2012] UKUT 00048.

Story Three: The UKBA Homelessness Pilot and the 'Bad Migrant'

Removal

EU law provides for the removal by Member States of an EU citizen and his or her family members where there are grounds to do so on the basis of 'public policy, public security or public health'. However, such a removal must only take place on account of 'the personal conduct of the individual concerned,' and that conduct must represent 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.

The Homelessness Pilot

In 2010, the UKBA piloted a scheme that aimed to remove EU citizens for a different reason: expulsion for those who were not exercising treaty rights (by working, studying or being otherwise self-sufficient) and who were homeless and sleeping rough in the UK.

The scheme was launched in April 2010 and was supported by local councils and housing and homelessness organisations who were facing difficulties as a result of an increasing number of 'A10' nationals (nationals of the new member states: the 'A8' states who joined the EU in 2004 and the 'A2'[131] states who joined the EU in 2004) who were homeless and sleeping rough. UKBA explains that the pilot 'sought to test the feasibility and resource implications of administratively removing individuals who were 'not exercising a treaty right'. The pilot was geographically limited to the city of Peterborough and parts of London.

During the pilot UKBA issued written notices to individuals informing them that they had been deemed 'not to be exercising a treaty right' and must therefore appear at a local police station for an interview to determine whether they had the right to remain in the country. It has not been disclosed how many notices were served and how many removals were carried out, although The Guardian *reported that within the first month of the pilot 200 people were considered, roughly 100 people were served with a notice, and 13 people had been deported (*The Guardian*, 20 July 2010). The pilot has now ended and UKBA are carrying out an evaluation that will conclude whether to extend the policy to other areas of the UK.*

Who felt the impact?

Although the Homelessness Pilot was not specifically aimed at citizens of the recently acceded Member States of the EU, the impact of the pilot was felt most by these Central and Eastern European nationals. This was due, on the one hand, to the rules set out in the transitional arrangements which limited access, for A8 and A2 nationals, to social assistance for a certain period. Without access to benefits or job seekers allowance, this group faced an increased risk of homelessness in times of financial hardship or unemployment. On the other hand, this group was more exposed, than other EU citizens, to being found 'not to be exercising treaty rights'. The transitional arrangements limit the circumstances where an A8 or A2 national will be deemed to be 'exercising a treaty right'. The key time an A8 or A2 national will be considered 'not to be exercising a treaty right' is where they are unemployed and cannot, for example because they have never been employed or are not seeking work, retain worker status or exercise

131. A note on terminology: the continued use of the terms A8 and A2 national, long after the respective states had acceded and even – in the case of the citizens of the eight central and eastern European states – after the expiry of the transitional period (May 2011) represents one way in which they have continued to be constructed as quasi-second class (EU) citizens. The terms A8 and A2 are only used in the text that follows because this was the terminology widely used to present and report upon the homelessness pilot.

rights as a job seeker. An A8 or A2 national will be considered to be 'exercising a treaty right' where the individual is working and the work is either 'registered' on the A8 Workers Registration Scheme or is 'authorised' as part of the Worker Authorisation Scheme and also when they are studying or are otherwise 'self-sufficient'.

Before the homelessness pilot, these categories were only relevant in the UK for determining eligibility for benefits. During the homelessness pilot these categories became relevant to the decision to remove an EEA citizen. Where UKBA found an EEA citizen 'not exercising a treaty right' and homeless and sleeping rough they sought to remove them to their home country on the basis that they were 'not exercising a treaty right'.

Even for the most at-risk group, non-economically active and homeless A8 and A2 nationals, campaign groups have argued that expulsion is unlawful. These individuals may be said to be exercising residence rights as self-sufficient individuals. To be self-sufficient, one must have: sufficient resources to avoid becoming a burden on the social assistance system; and comprehensive sickness insurance cover. In the only known legal challenge (an unreported first tier tribunal decision) the tribunal held that, amongst other things, such expulsions appear to be disproportionate in general because the only legitimate aim they might pursue, as a matter of EU law, would be to protect the social assistance system and the circumstances of A8 and A2 cases are that individuals are not eligible for social assistance.

The Irony

The pilot has a certain irony; it ignores the fact that EU citizens as a function of EU law have the right to return. As described by an interviewee,

> *'They don't in reality remove EU Citizens because they have the right to re-admission, so it's pointless because if you deport someone on the Eurostar they can turn round at the Gare de Nord and exercise their return ticket and come back in…*
>
> *There have been pilot schemes where the UKBA have been doing that with local authorities, Peterborough and Westminster, where one solution they've decided to go for with rough sleepers is to remove someone to a country like Poland or another accession state. But there is some evidence to suggest that when people have been removed, family members have paid for budget airlines to return the person to the UK because the very fact the person came to the UK, this is anecdotal, the very reason that they came to the UK is that their family don't want them in Poland; their family members who were supposed to support them send them back on a return coach trip or a return Easyjet flight or whatever it is.'*
>
> *So, you know, there's not really a solution to homelessness as such. It's just an out of sight out of mind policy.' [Q2]*

The serious problem

However despite the efficacy of the pilot perhaps being undermined by the ability of EU citizens to simply return to the UK, what is not in question is that a serious problem underlies this pilot: homeless and destitute EU citizens who are often vulnerable to exploitation. A study by the Combined Homeless and Information Network found that in London in 2011 28% of rough sleepers in London were from Central and Eastern European countries and one in ten of all new rough sleepers are Polish.

An interviewee described examples of people living in very desperate conditions,

'They are often people with an alcohol or a drugs problem. They're the hard to reach of the homelessness sector who annoy the local residents but who are also lying in tents with trench foot and such things.' [Q3]

A category of expulsion for the 'unwanted'

Where do these removals fit within the framework of EU law? The framework of EU law that provides for the removal of EU citizens on the grounds of 'public policy, public security or public health' and on account of the personal conduct of the individual concerned presenting a 'genuine, present and sufficiently serious threat affecting the fundamental interests of society'? The categories in which EU citizens and their family members can be excluded are unique and carefully litigated. However it appears that during the homelessness pilot the UKBA attempted to pry open a fourth category, another kind of 'bad' migrant or simply an 'unwanted' migrant. This is where issues of destitution elide with issues of delinquency, and where a category of unwelcome migrants emerges. Where a person is unable to maintain him or herself, one interviewee expressed that this, combined with a low skill level, is the 'defining point of being a "bad migrant"' in the eyes of the UKBA:

'As a Polish migrant or a Lithuanian migrant, I think it's probably got more to do with the skill level that they're operating with. Forty-five year old men who are working in agriculture and have got very intermittent records of employment, one week here and two weeks there and they have very insecure living circumstances, that's the defining point of being the bad migrant as far as the UK authorities are concerned and they're looking for some point of purchase for dealing with that group. The avenues that that's leading them to are actually closer collaboration with social welfare organisations, things like housing and homelessness organisations.' [Q4]

The final aspect of these cases that makes them problematic is that the categories of persons targeted are unlikely to have ready access to formal justice, in the sense of being willing or able to bring an action within the Tribunal system in order to test out the scope of EU law. A rare example of a case brought by a homeless Czech citizen who had in fact resided in the UK for some considerable time, with the assistance of the AIRE Centre, did in fact result in a successful appeal against the removal directions given by the Home Office.[132]

132. 'Expulsion of homeless EEA national struck down on appeal', 30 July 2011, http://www.migrantsrights.org.uk/migration-pulse/2011/expulsion-homeless-eea-national-struck-down-appeal.

The area of 'boundary zones'

55. The fourth area of friction directly engages the **'boundary zones'** to be found at the limits of EU law and of the EU's territory. It arises from the issues which emerge at the physical boundaries of the territory of the EU in respect of *new* Member States and in respect of a state which still aspires to membership but which has long had a legal relationship with the EU (an association agreement) which affects the status of those of its citizens who are resident in the EU (Turkey).

56. Particular problems have arisen in relation to the **special regimes** governing the cases of citizens of new Member States that joined the EU in 2004 and 2007. One of the issues raised by the Commission in the reasoned opinion sent to the UK government in April 2012 concerned the failure by the UK authorities to issue to Bulgarian and Romanian workers covered by the transitional regime in force until the end of 2013 the same residence permits as are issued to nationals of other Member States.[133] As the EU continues to enlarge, **transitional** regimes such as these are likely to be a permanent feature as is well illustrated by the case of Croatia which will accede to the EU on 1 July 2013,[134] and so will the question of what steps such transitional regimes allow Member States to take and where they must treat nationals of those states as 'ordinary' EU citizens with the usual range of citizenship rights. Moreover, this material is contextualised in its application by the EU's own emerging interventions in the field of immigration law as a legislature and – as such measures are implemented by the Member States – as judicial actor. This brings into play the interstitial case of Turkish migrants, whose situation is governed by the provisions of an Association Agreement, in particular the effects of its standstill clause as interpreted by the CJEU in the *Soysal* judgment.[135] The Association Agreement with Turkey (or 'Ankara Agreement') – unlike many measures under the EU's emerging immigration and asylum law – applies also to the UK.

133. IP/12/417, see above n.70.

134. The European Union (Croatian Accession and Irish Protocol) Bill 2012 (HL Bill 59 2012-2013 see http://services.parliament.uk/bills/2012-13/europeanunioncroatianaccessionandirishprotocol.html for details of its progress) was given a first reading in the House of Lords on 28 November 2012. It makes legislative provision for restrictions on access to the UK labour market (by means of regulations to be adopted by the Secretary of State), which are modelled on the approach taken in relation to Bulgarian and Romanian accession in 2007: see House of Commons Library Standard Note, ***The Croatia Accession Bill: an introduction***, SN6327, 14 May 2012. In October 2012, the Home Office also issued a Statement of Intent in relation to the transitional provisions to be introduced for Croatian citizens in relation to the UK labour market: http://www.homeoffice.gov.uk/publications/immigration/croatia-eu-accession/. Essentially, the UK will maintain restrictions on persons seeking to take up low skill work, while making it easier for Croatian citizens to take up high skill work, especially those who are already resident and working in the UK under the Immigration Rules.

135. Case C-228/06 ***Soysal*** [2009] ECR I-1031.

Story Four: The Ankara Agreement and the 'Special Status' of Turkish Workers

Special Regimes within EU law

EU law requires Member States to operate and manage a number of different systems of rights and obligations beyond those which govern the free movement rights of EU citizens and their family members. There are different arrangements between groups of Member States, such as the transitional arrangements operating as a result of the accession of the new Member States in 2004 and 2007, and there are agreements between Member States and non-EU states. An example of the latter is the system in place between the EU and Turkey under the Ankara Agreement 1963 ('The Agreement'). The Agreement was ratified in anticipation of Turkey's accession to the EU and the desire to consolidate a trade relationship between the EU and Turkey. As a result the Agreement has a protective effect which ensures that the momentum leads towards the integration of Turkish migrants, not against it. Many of the provisions have direct effect and Articles 12-14 provide that the contracting parties are to be guided by the relevant articles of the EC Treaty in progressively securing freedom of movement for workers, freedom of establishment, and provision of services. The rights do not include a right of entry as it was anticipated that the right of entry would be governed by the national laws of the Member States. Once lawful residence is established in a Member State the principle of non-discrimination applies as between Turkish nationals and EU citizens.

The life cycle of the Ankara Agreement

Other than a series of cases in the late 1980s and early 1990s that established the jurisdiction of the CJEU to interpret the Agreement and the accompanying Decision 1/80, the Agreement lay largely dormant until a reawakening moment in 2000, brought about by a preliminary reference from the UK to the CJEU. The Court confirmed in Savas[136] *that the 'standstill clause' in Article 41 of the Additional Protocol to the Agreement (relating to the right of establishment for self-employed persons and the right to provide services) was directly effective and prevented the UK from applying rules on the establishment of Turkish workers that were more restrictive than those which were in force at the commencement of the Ankara Agreement in 1963. For the UK this was 1973; from the point at which the UK joined the EU. In other words, if rules in 1973 were more favourable to that currently in force, then the older rules must be applied. This invigoration of the standstill clause meant that the potential scope in which Turkish workers could benefit from more favourable rules was suddenly increased.*

In the UK this occurred at the same time as, as one practitioner describes:

> *'an explosion of awareness, if you like, amongst Turkish nationals of the right to establish themselves, in business, on no less restrictive terms than 1973 which previously, by many, had been fairly unnoticed. This coincides with a lot of failed asylum seekers having exhausted their appeal rights and casting round for a different basis upon which to remain in the UK … I don't know what the numbers are but I would guess that there was a sharp increase in numbers, that might be wrong, you can see. But certainly there was a big increase in the number of judicial review applications about refusal of leave to remain on that basis.' [Q5]*

136. Case C-37/98 ***R*** v. ***Secretary of State for the Home Department, ex parte Abdulnasir Savas*** [2000] ECR I-2927.

The Ankara Agreement and the CJEU

The CJEU continued to enforce the Ankara Agreement, elaborating on the terms and function of the Agreement, most often in favour of promoting the integration of Turkish workers. For example, in Commission v. Netherlands,[137] *the Court held that the standstill clause extended not only to legislative measures but also to procedural measures imposed by the state. Therefore the standstill clause was applicable to charges imposed on Turkish nationals for the issue of residence permits concerning a first admission to the territory of a Member State or for the extension of such a permit. Further, the Court stated that any disproportionate difference in fees required of Turkish nationals compared with EU citizens would also be prohibited on the grounds of the equal treatment principle present in the Agreement.*

The Ankara Agreement and the UK

In the UK, responding to the revitalisation of the Ankara Agreement, the scope of the Agreement is now far more frequently litigated. Many were taken by surprise by the existence of the Ankara Agreement and the rights contained within it, as one practitioner explained:

> *'The Turkish applications are getting in through, what I think is being seen as the back-door, in that probably, when the UK joined the EC, nobody even knew about this Ankara Agreement, really. You can tell just from the history of the cases that have come up, Savas [2000] and then Tum [2008] and then Oguz [2011], it's relatively recent, even in our recent history of being in the EC. What is it, probably the last 10, 12 years that people have started arguing this because nobody really cottoned onto it.' [Q6]*

Turkish Workers: What Kind of 'Special Status'?

As the legal terrain is being tested in the CJEU and in the UK courts and as both the reach of the standstill clause and the terms under which the rights may be limited are being explored, the scope of the 'special status' of Turkish nationals seems uncertain: where do Turkish nationals fit within the scheme of EU law and free movement rights? They appear to enjoy a status halfway between the status of a national of a Member State and a third country national. What, if anything, is the impact of the Long Term Residence Directive 2003/109 (which does not apply in the UK) which would protect long term resident Turkish nationals in other Member States?[138]

When interpreting the rights within the Agreement the CJEU has been guided 'as far as possible' by EU free movement rules. This is an approach that is all the more justified as often the provisions are formulated in identical terms to the Treaty. However recent case law of the CJEU has somewhat undermined this approach.[139] *The Court decided that, rather than interpret the protection from expulsion of a Turkish national from a Member State in line with the protection from expulsion of EU citizens prescribed by the CRD, the threshold should instead be sought from the Long Term Residence Directive 2003/109 which provides a rule of 'minimum protection for all third country nationals who hold the status of long term resident'. The selection of the Long Term Residents Directive over the CRD as a 'framework for reference' was based on the distinction between the origins of the two directives; the former being the promotion of trade and the latter being the fundamental status of EU citizenship. This is a rational distinction although*

137. Case C-92/07 ***Commission v. Netherlands*** [2010] ECR I-3683.

138. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L16/44 harmonises national laws in respect of the residence of third country nationals and creates a single status of 'long term resident' for which third country nationals can qualify after five years of residence. It also provides equal treatment ***vis-à-vis*** EU citizens and nationals for long term resident third country nationals.

139. Case C-371/08 ***Ziebell*** v. ***Land Baden-Württemberg,*** 8 December 2011.

some commentators[140] have pointed out that it has a misleading element, since nationals of EEA states, and their family members, another special group of non-EU nationals, also benefit from the CRD along with EU citizens. This change in alignment leaves some uncertainty as to how the Turkish regime fits within the free movement framework for policy makers and decision makers and it poses a challenge to domestic institutions and to practitioners who have to work out how Turkish workers fit into the immigration system in the UK, given that the Long Term Residence Directive does not apply in the UK.

Concluding comments on the main areas of friction

57. The presentation of the four areas of friction and the legal and societal issues which these raise was intended to provide some dynamic context for the presentation of the key findings from the empirical research on the character and possible causes of these frictions. In fact, as many of our respondents observed, mapping out the relationship between EU law and UK immigration law in terms of these four areas of friction in practice covered much of the relevant legal terrain in one way or another. But in fact, the presentation of the legal issues is not exhaustive and is not intended to be and there are many fundamental questions as well as issues of detail dealt with in the CRD, the Regulations and the case law which are not addressed in the previous paragraphs or elsewhere in this Report. But this method of presenting the issues is helpful, because it emphasises the societal issues about immigration and perceptions of immigration which underpin the application of the EU free movement rules in the UK. For what these areas all have in common is that they lie at the **margins of EU free movement law** where **EU free movement law's reach gradually gives way to other regimes of national or EU immigration law**. Third country nationals generally have rights derived through their EU citizen family members, not autonomous treaty-based rights or rights rooted in EU legislation. Their position in the UK is an exception to the normal rule that third country nationals are aliens, who are subject to the full rigours of immigration control and thus must apply for leave to enter and remain. But in some cases the CRD actually invites Member States to apply their own national law (e.g. to 'other family members'). As entry points under national law (family migration, economic migration) are closed down, claimants have unsurprisingly turned towards EU law to see whether or not their situation might be differently treated under that regime. The UK will therefore need to draw a balance which allows it to detect fraudulent behaviour and to distinguish it from merely opportunistic behaviour. As Baroness Hale famously stated in her judgment in the House of Lords case of *Baiai*,[141] 'there are many perfectly genuine marriages which may bring some immigration advantage to one or both of the parties depending on where for the time being they wish to make their home. That does not make them "sham" marriages.' The same point can be made about the existence of a connection to EU law in any given immigration case.

58. In similar terms, the rights of those who are unable to support themselves without assistance from the state have always been restricted under EU free movement law, although in practice Member States have rarely sought to exercise their immigration sovereignty in order to remove this group, even though a formal procedure has existed in the UK since the mid-1990s.[142] Increasingly, as we have seen, the UK has used definitions imported from immigration law in order to restrict access to benefits. The freedom for Member States to designate (and even remove) those they regard as no longer qualifying for the protection of the

140. S. Peers, 'Expulsion of Turkish citizens: a backwards step by the Court of Justice?', [2012] *Journal of Immigration, Asylum and Nationality Law* 56–63.
141. *R (on the application of Baiai and others)* v. *SSHD* [2008] UKHL 53.
142. See originally Immigration (European Economic Area) Order 1994, SI 1895, para.15(2).

free movement rules because they are an unreasonable burden on the host state or to remove those who represent an unreasonable threat to public policy or public security also highlights the very edges of EU's citizens' free movement rights, as the field shifts towards the traditional control functions of immigration law. Here too, Member States have a difficult balancing act to undertake. Finally, transitional or special regimes are areas which lie between mainstream free movement law and traditional immigration laws, and thus pose some additional challenges to decision-makers and courts.

59. In that respect, of course, these areas of friction are not representative of the free movement experience for the majority of non-national EU citizens, but they do represent a useful way of capturing the pressure points (or 'pinch points' as one informant put it [Q11]) within the implementation framework. These pressure points will tend to consume a substantial proportion of the resources (administrative, judicial, support) devoted to the effective implementation of this field of EU law in the UK.

Section 7: Second Phase Findings: an enquiry into the character and causes of the areas of friction

60. The **second phase of our research** comprised an enquiry into the character and causes of the areas of friction identified and discussed in Section 6. To focus the attention of our stakeholder interviewees' on these issues, we used as a starting point certain **intuitions** as to why there continue to be difficulties in the implementation of EU free movement law, even forty years after the accession of the UK to the EU. As the research evolved, however, we found that the scope of the enquiry was broadened to encompass not only the (legal) cultural and systemic questions which had first attracted our interest but also certain factors which are external to the legal systems in question, which seem to have a substantial impact on the ongoing relationship between EU free movement law and UK law.

61. We found widespread agreement amongst most stakeholders who engage with the implementation of the system of EU free movement law in the UK as 'users' that there does indeed exist friction between the systems in respect of the areas outlined above as we had postulated on the basis of our original desk-based analysis. However, they did not necessarily agree about all of the features or causes of those frictions. We elaborate upon that point in the course of presenting three more **key findings**.

KEY FINDING 2: The evidence showed that particular problems arise as regards the extent to which the 'culture' of EU free movement law is effectively embedded into UK law. This has a more substantial impact where claimants are seeking to rely on the very 'edges' of free movement law or directly on EU citizenship rights or the Charter of Fundamental rights. Here lack of familiarity with elements of EU law beyond the confines of the EU's CRD and the UK Regulations plays a role and can limit the effective capacity of decision-makers and make it less likely that correct decisions are reached, within the timescales set down by EU law.

62. A common concern amongst practitioners was that they felt that UKBA decision-makers and tribunal judges rarely drew a clear enough distinction between EU free movement law and UK immigration law:

> 'I think the thing which creates the biggest areas, because it's not confined to just one general heading, is the failure of UKBA, the tribunal service and the higher courts to recognise that free movement rights are not a system of immigration control. And that the starting place for the assessment of an individual case is entirely different.' [Q7]

In similar terms, another practitioner respondent noted that

> 'seeing EU Law as a border control issue is probably the problem, it's not just an alternative source of migration control, it's a source of civil entitlement based on a common pan European concept of Citizenship and I think that's more than rhetoric.' [Q8]

The same respondent went on to highlight

> 'the extent to which the immigration authorities at almost all levels, almost including advisors concentrate on the immigration problem rather than the free movement solution to the problem.' [Q9]

63. Many respondents expressed a general concern that at the margins of free movement law, the areas where there is always going to be some contention about the precise meaning of the law and how it should be interpreted, there is a rather restrictive approach and spirit in the UK, shared not only by the UKBA in respect of its decisional role, but also by some parts of the judiciary. So one practitioner respondent commented:

> 'There's a tension between a genuinely more restrictive view of what freedom of movement rights entail at the margins which is common not just to the Home Office or UKBA but to much of the domestic judiciary as well.' [Q10]

This was echoed by a member of the judiciary offering a much broader perspective on the continuing 'struggle' with EU law:

> 'The pinch points are those interactions, they are those junctures... [M]ost cases ... get dealt with very straight forwardly, I don't know what the percentages are but it will be a high percentage of people who applied for an EU8 residence card, family member otherwise, they get granted, they apply from overseas for the family permit, they get granted. It's the minority ones where there's these questions about what is dependency, what is abuse ... whether there are conflicting rights, what's been met. Where the Home Office struggles in its decision-making and judges struggle in their decision-making and representatives struggle in presenting arguments, because at those points you're suddenly having to look at more general issues throughout the corpus of European Law. [Q11]

64. Particular challenges arise in relation to cases which require the courts to depart from the EEA Regulations because they do not accurately reflect the current interpretation of the CRD by the Court of Justice, which are based on measures such as Article 24 CRD (right to equal treatment) which are not explicitly transposed into UK law as regards immigration questions, or which are based on claims arising directly from the treaties, the CFR or some other legislative instruments. As one practitioner put it:

> 'There's a slight fetish made out of the immigration and European Economic Area Regulations, that if its not in them, it's not the law. In practical terms, of course it's true that you start with your transposing domestic instrument and see if you can accommodate the EU Right of Movement interpretation within their provisions there. But if you can't, and self-evidently all of these things which are not transposing the freedom of movement directive these are obviously not going to be in the regulations, then it becomes very difficult, not just in terms of law but of how you give effect to the appeal that's allowed in an immigration jurisdiction where there is no obvious way.' [Q12]

As another respondent put it,

> 'it's the treaty they [referring to the UKBA] don't recognise'. [Q13]

65. Others commented critically upon gaps in the CRD, feeling that these contributed to the absence of a clear body of law for claimants to rely upon. It is not a 'full code', as one informant commented [Q14]. For example, one informant explained his/her understanding of the CRD in the following terms:

> 'Well I started off with 2004/38 thinking that it was a comprehensive statement but the more I looked at it the more it's sort of bits, it's some bits from existing Directives. Some codification. So it's part consolidation, part codification, but only at the precise facts of cases rather than the principles.… I'm trying to look at it as a single comprehensive code and it just doesn't work. And the court certainly doesn't treat it like that. They're saying "This is merely an embodiment of an existing principle that carries on anyway behind it".' [Q15]

Yet some informants felt that compared to the UK transposition of certain measures in asylum law, especially the Qualifications Directive,[143] the implementation of the CRD was a model of clarity and simplicity. Ironically, however, these implementation failings have led judges to revert to the directive itself, rather than use the national legislation, which is the opposite to the usual way of dealing with the area of free movement and citizens' rights. Lack of familiarity with the EU treaties and the broader corpus of EU law and, the shifting nature of CJEU case law (e.g. from *Ruiz Zambrano* to *McCarthy*[144]) were also suggested by informants as reasons for uncertainty in decision-making.

66. The UKBA response expressed the view that there is concordance between EU law and national law, as Government believes that the CRD is correctly transposed by the EEA Regulations. This is a view not accepted by the majority of practitioners and NGOs we spoke to. However, the UKBA response did accept that EU law in this area is complex. The response also noted that 'the complexity and multiplicity of ... judgments [of the UK courts and the CJEU] can mean that it is difficult to maintain a steady state in European policy.' On the compatibility with EU law, the UKBA is clear:

> 'The UK takes its obligations under EU law seriously. We are confident that the Regulations correctly implement the Directive. Directive 2004/38/EC sets out the rights of EU citizens to move and reside freely within the Union, but often in broad terms. The Immigration (European Economic Area) Regulations 2006 need to be more specific to be in-keeping with UK legislation and to provide guidance to UKBA caseworkers responsible for implementing and applying the provisions of the Directive.'

This is clearly a responsible approach to take, and it was reflected also in the UKBA's commitment that it is aware of the need for resources to be directed towards decision-making.

67. It is worth amplifying that point, however, by reference to other published views of the UK Government: After the *Metock* case was decided,[145] the UK made a largely unsuccessful attempt to persuade its fellow Member States to adopt a more restrictive approach to free movement generally including a wider interpretation of what constitutes an abuse of free movement rights. This took the form of a proposal for a set of Council conclusions presented in November

143. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ 2004 L304/12.

144. Case C- 34/09 ***Ruiz Zambrano*** [2011] ECR I-1177; Case C-434/09 ***McCarthy*** [2011] ECR I-3375.

145. Case C-127/08 ***Metock*** [2008] ECR I-6241.

2008.[146] In the event, the UK's suggested conclusions were watered down into a very anodyne text adopted by the Council,[147] a text which omitted some key words from the UK's original proposal, in particular the view that '*only those exercising their rights in the spirit of the Treaty should benefit from freedom of movement*' (emphasis added).[148]

KEY FINDING 3: Internal system-level frictions represent a very significant challenge to an effective implementation of EU free movement law within the UK. These relate to the character of the two systems and the way in which rules are applied by decision-makers. Discussion of these aspects of friction led on to questions being raised about how the UKBA works, what resources it has and how it trains decision-makers, all as part and parcel of an administrative justice system, also involving the tribunal system.

68. Our legal analysis of the implementation of EU free movement law in the UK, combined with findings from stakeholder interviews, demonstrates that there are **substantial internal *system-level* frictions between EU free movement law and UK immigration law** although we accept that this is a position that the UKBA and the Home Office would be unlikely to agree with. By this we mean that there are problems that relate directly to the juxtaposition and – in some cases – intermingling of the two systems of EU free movement law and UK immigration law. From the perspective of UK practitioners and judges, the problems can arise not only in respect of issues within the UK system itself, in particular interpretations given by or on behalf of the UKBA, but also from EU law itself. We explored these issues in depth with our interviewees and their responses produced a wide range of aspects of system misfit which they felt impacted upon effective implementation, including resourcing issues, training, decision-making and the operation of the administrative justice system more generally.

69. The **differences between the two systems** are very stark and have long been recognised at the highest judicial level. It has been clear since *R* v. *Pieck*[149] in 1981 (a case referred from the UK courts to the CJEU) that 'Community nationals' must be treated differently to 'ordinary' aliens and allowed to enter without leave. The system of 'leave' at the point of entry has historically gone to the very heart of UK immigration law and the control of aliens. Lord Hoffmann, delivering the majority judgment in *Remilien and Wolke* in 1998 in the House of Lords (a much earlier skirmish in what we now understand to be the struggle over the right to reside test),[150] put it thus:

> '[The Immigration Act 1971] contemplates that persons who are not British citizens will be entitled to be present here only if they have been given leave to enter and that their right to reside in the United Kingdom will be a consequence of the terms of that leave. The whole scheme relies upon the exercise of control at the frontier and is part of the explanation for the insistence of the United Kingdom in retaining such controls… The immigration controls of most European countries with land frontiers operate in a different way. Under their systems, the primary question is whether the non-citizen has a legal right to be present in the country, reside there, be employed or follow an occupation. His right to enter is a consequence of his having the right to be there rather than the other way round.'

146. See Council of the European Union, Note from the UK Delegation, Free movement of persons: abuses and substantive problems - Draft Council Conclusions, Doc. 15903/08, 18 November 2008.
147. Council Press Release, 16325/1/08 REV 1 (Presse 344), Justice and Home Affairs Council meeting, 27 and 28 November 2008 at 27.
148. See Draft Council Conclusions, above n.146. at 3.
149. Case 157/79 [1980] ECR 2179. See generally C. Vincenzi, 'European Citizenship and Free Movement Rights in the United Kingdom', [1995] ***Public Law*** 259.
150. ***Remilien*** v. ***Secretary of State for Social Security; Chief Adjudication Officer*** v. ***Wolke*** [1998] 1 All ER 129; [1997] 1 WLR 1640.

The point was recognized more recently by Judge Rowland in the Administrative Appeals Chamber of the Upper Tribunal as he wrestled with problems thrown up by the right to reside test:

> 'Domestic immigration legislation does not expressly recognise the concept of a right of residence except in the 2006 Regulations, which implement Directive 2004/38/EC. However, leave to enter or remain, granted under the Immigration Act 1971, amounts to recognition of a right of residence. Unfortunately, the immigration authorities regard decisions under the 1971 Act as being matters of immigration "control", not applicable to most European Union citizens who are free to enter the United Kingdom under regulation 11 of the 2006 Regulations. They do not seem to appreciate that, since 2004 [when the right to reside test became applicable], it has been important for European Union citizens to have decisions that establish not merely a right to be present in the United Kingdom but also a right of residence and that decisions under the 1971 Act are not concerned only with lawful presence but also with lawful residence.'[151]

70. The differences between UK immigration law and EU free movement law are even starker. As one practitioner respondent put it:

> 'it's difficult for a lot of lawyers and judges to get their head round how EU law works because it is just so different to the domestic rules and so it's a completely different way of doing things. The starting points are different, so different.' [Q16]

In the first place, EU free movement law is rights-based, making it in some ways more similar to the immigration laws of other Member States as sketched by Lord Hoffmann, although the legal right to be present in the territory of a Member State stems from the Treaty not from a decision of a national authority. In addition, EU free movement law has generated a uniquely far-reaching set of obligations on the Member States which they have had to incorporate into their domestic systems to treat nationals of other Member States in the same way as they treat their own citizens. This has given rise to both systemic challenges (especially for the UK) and constitutional challenges (for all Member States) because it muddies the traditional distinction between alien and citizen and interferes with traditional notions of control and security. Moreover, one of the most important features of the EU system is that the documents that Member States issue are in no way constitutive of the rights themselves. They are merely evidentiary. Rather the rights flow from the treaties, not from the outcome of any process which non-national EU citizens must engage with *vis-à-vis* the host state in order to establish the right in question, and national authorities have very little discretion in the system, although they are entitled to check that the facts are as they are asserted by an EU citizen who wants, for example, a residence card for his or her third country national family member. This has consequences with regards to issues such as the burden of proof, and in our research was discussed by respondents in particular in the context of issues of sham marriage and alleged abuses of EU free movement rights.

71. It was also widely accepted amongst practitioner respondents that the **general tightening up of immigration law** has had an impact. As one respondent put it:

> 'The other thing that has happened is the immigration rules have become increasingly inflexible and increasingly constrictive as to what the criteria for qualification are.' [Q17]

151. ***RM*** [2010] UKUT 00238 (AAC) at para. 15.

Another respondent inclined to a very negative perspective on how the complexity of immigration law intertwined with what s/he saw as a **negative mindset** in decision-makers:

> 'I think it is fast-changing, it is complex. If there was [sic] a willingness to be a fair decision-maker, then it would have less of an effect that it is complex and fast moving because the legal representatives could explain the nub of the issue and could say "as you'll see in such and such a case the position is now this." Because you have complexity plus the ingrained suspicion plus the inclination to refuse applications which must be impacted on by the broader hostility to immigration then that's what you get the situation, you've got a perfect storm.' [Q18]

We return in the next section to the question of how changing public perceptions of immigration issues are impacting upon the implementation of EU free movement rules in the UK.

72. The context of 'normal' immigration decision-making for first tier judges undoubtedly also have an impact in the area of free movement. One respondent put it thus:

> 'when you insert EU Law through … national implementing measures and you give those to immigration judges … who are used to saying "The rules are god". They are used to looking it up in the rules and applying the rules because that's what they do, you know, that's what they've been doing since time immemorial and that's what they do and literally there is a jurisdiction which says they've got to be in accordance with the law, they hardly ever remind themselves or are reminded of Section 2 of the European Communities Act which says if the rules aren't up to it, chuck them out the window mate… It's a mindset and thing and it puts a premium on the regulations.' [Q19]

73. It was significant that some practitioner respondents felt that there was a degree of **'seepage' or 'leakage' between the two systems** through the **importation of immigration case reasoning into EU free movement cases** by decision-makers and sometimes judges, with the result that tests or standards which were incorrect or inappropriate were applied where they should not be. One general concern which was expressed in a number of cases was a willingness to take into account a claimant's poor immigration history, which in free movement cases cannot be used as the basis for exercising a discretion to refuse an application, but rather can only be relevant to an enquiry into the facts (e.g. does the claimant in fact enjoy the family life with the EU citizen which s/he claims?). Even so, a poor immigration history, a lack of 'credibility' (which is highly relevant in asylum decision-making) or indeed a generalised suspicion about the likelihood that the particular Member State's documents are more often the subject of forgeries, are issues which have to be carefully applied when it comes to the free movement and rights of residence of EU citizens.[152]

74. Anecdotal evidence supplied by practitioner respondents indicates that this can be a problem for EU citizens with third country national partners or spouses:

> 'The other situation is, both for the individual who doesn't know that they've got EU rights, the [TCN] who's in a durable relationship with a [non-national EU citizen] woman, they will just turn up on the door and arrest them even although the [EU citizen] is in bed with him when they arrived. There is no issue about "does this person have a right?" rather than "has this person proved that they have a right?" Because of the immigration system, the whole onus is on the individual to make out their claim rather

152. See for example the negative publicity that Aer Lingus received when it insensitively applied a language test to a Greek passenger travelling with her family from Spain to Cork, where she was resident: see 'A test just for Greek passengers', ***Athens News***, 16 March 2012, http://www.athensnews.gr/issue/13487/54165. Some press reports indicated that Aer Lingus had stated that 'it had been enacting a directive from the United Kingdom Border Agency issued in early 2011 that warned airlines about the increasing use of forged Greek passports by illegal immigrants in Spain and Portugal. The airline said the British agency supplied the tests, which asked a wide range of questions, including requests to sketch a ladder and a triangle', see 'Greek 'language test' protester wins free flights', ***Ekathimerini***, 18 March 2012, http://www.ekathimerini.com/4Dcgi/4dcgi/_w_articles_wsite1_1_18/03/2012_433460.

> than it being for the immigration authorities to enquire to how long the couple have been living together and what the nature of their relationship is before detaining the Indian guy because obviously he might be in a durable relationship but their first reaction is "let's detain him and if he's in a durable relationship then presumably he can make an application".' [Q20]

75. There are also similar practitioner concerns about some aspects of **judicial decision-making**. According to one practitioner:

> 'If the judge is inclined ... to hold someone's bad immigration history against them then they will be wanting to use those categories, that type of reasoning, even in a free movement case when it's not appropriate. It's not all judges by any means but there is [sic] a significant number of judges who will be inclined to refuse appeals. You find that in EU law just as strongly as you find it in immigration law.' [Q21]

The same respondent went on to suggest what s/he called a 'seepage' from the UKBA to the judiciary:

> 'What's disheartening is when you suspect some judges are not approaching things with an open mind. I talked about a seepage before, in the same ways there's a bit of seepage of disbelief from asylum into immigration. I think there's also a seepage of the culture of disbelief from the Border Agency into sections of the decision making in the tribunal. I don't think it's anything like as strong but it is there. You find it also in EU cases. That's why I talked about questions of resistance; if a judge is inclined to decide in a certain way, they will be resistant to drawing conclusions which seem obvious from the evidence, or they will be resistant to accepting a legal decision is binding if they don't want to implement it. That may be wrong in law, it may be possible to appeal them if you ever get to a higher court, but it is a factor in the first tier tribunal.' [Q22]

Another practitioner respondent reported similar problems in tribunal cases concerned with relationships between migrant EU citizens resident in the UK and non-EU citizens, and the rights of residence of the latter group in the UK:

> 'So you'll make your submissions and then you come out and [the judges have] rejected them for some credibility issue or something and the incredibility really is a mindset that they've got into from looking at the asylum appeals or from looking at some immigration cases where there's dodgy documents coming in from a country where they do need to test the credibility of the relationship.' [Q23]

76. This suggests that the approach to the abuse and fraud issues covered by the CRD and implemented into UK law owes more to experience in other areas of immigration law where sham marriages are under scrutiny, or to the relevance of the question of 'credibility' in the asylum field, than it does to the specific criteria applicable in EU law and the particular approach to basing decisions on facts demanded by EU law. For one practitioner, some members of the judiciary seem to have a 'mindset' which makes it hard to separate out EU cases from immigration cases:

> 'And so again you were finding these decisions being made where I think there's just a sense that they can't separate out the European cases from other cases. Maybe it's just the mindset in which they're always used to working. I don't know if it's that or if maybe there's a feeling that they're not harsh enough because they're used to harsher rules. I don't know if that's behind some of the decisions.' [Q24]

Judges have also recognised this phenomenon:

> '[it would be] some of the restrictive approaches within domestic immigration law, whether their sort of cold hand applies when it comes to looking at EU law and I think I wouldn't rule out that has happened. You know I've seen immigration judge decisions dealing with for example things like the durable relationship category which I almost think is a sort of hangover from some approach to the primary purpose rule under immigration law twenty years ago.' [Q25]

Some practitioners seem to have a rather sanguine view of what is now the First Tier Tribunal:

> 'Well first tier cases of immigration can resemble a sort of Western sometimes, somebody comes in the saloon and shoots from the hip, yes, you don't really know who's going to come into town. There is a bit more consistency over the years. The standard has risen in the immigration tribunals from when they were adjudicators. I think, there's more consistency in the upper tribunal immigration and asylum chamber .... I know certainly they've come on enormously but they were always quite good at certain things but certainly they've developed consistency and a standard which I think is better than it was, you know certainly a demanding environment as an advocate.' [Q26]

77. Indeed **recent case law of the IAC (UT)** will reassure observers that the Upper Tribunal is fully aware of the need to decide these types of borderline cases strictly on the EU issues. This is evident from *Idezuna* (*EEA – permanent residence*) *Nigeria*,[153] where the Upper Tribunal's determination made it clear that what the judge needs to focus on is the question whether first, the applicant had achieved the necessary five years of residence in the UK as the family member of an EEA citizen (including time before the CRD was passed or came into force[154]), without absences exceeding those permitted by the CRD, and whether second, the period which elapsed since that five year point had been achieved had itself not contained absences which would mean that the previously acquired right of permanent residence would lapse. In this case, the answers were respectively 'yes' and 'no', meaning that the UKBA should have issued the requested residence card and the judge in the First Tier Tribunal had erred in law. The problem arose in this case because the UKBA and the First Tier Tribunal both insisted on focusing on issues around the marriage and the marriage breakdown, plus the later conduct of the EEA citizen, which were irrelevant to the question whether the applicant had acquired a right of permanent residence. This comes from the way in which the UK system tends to construct the applicant's case as an application for a particular status judged by reference to the conduct of the applicant (and his former spouse) on the date of application, rather than a process of recognising whether or not a right has been acquired and not subsequently lost, and thus whether the relevant confirmatory paperwork should be issued.

78. In like manner the Upper Tribunal (IAC) dealt briskly with the failings of an Entry Clearance Officer who was too keen to apply what amounted to the 'ordinary' rules on marriages of convenience to the case of a TCN spouse of an EEA citizen in *Papajorgji*.[155] While accepting that Article 35 CRD allows Member States to adopt the necessary measures to deal with issues of fraud and abuse, including treating marriages of convenience as such, the tribunal insisted that there must be some evidence of abuse for the UKBA to raise before the applicant would be expected to show that his/her marriage was *not* one of convenience. The particular issue in *Papajorgji* was the failure on

153. [2011] UKUT 00474 (IAC).
154. Case C-162/09 ***Lassal*** [2010] ECR I-9217.
155. [2012] UKUT 00038 (IAC).

the part of the applicant to provide evidence of family life (e.g. family photographs) when she had not in fact been asked for this material. In any event, the tribunal was at pains to show that routinely requiring such material in an EEA case was not the right way forward, commenting negatively that:

> 'The impression we have obtained from various parts of the ECO's original reasons for the decision is that the ECO has applied a general policy of requiring applicants to prove that their marriage is not one of convenience, and in this context treats EEA applications in the same way as ordinary immigration applications under the Rule… We would emphasise that EEA rights of entry are not exercises of discretion generally afforded to Member States to formulate rules for the admission of aliens, but the exercise of Treaty rights to be recognised by states subject to the substantive and procedural provisions for preventing abuse and fraud.'[156]

The extent of the burden on the applicant is to prove that he or she is a family member – i.e. by producing basic documents. This she had done and this represented the end of the obligations to be placed on the applicant, unless the ECO could find some substantive reason to suggest that there might be a marriage of convenience (e.g. it was contracted shortly before the application was made; the applicant was not living at the same address as the spouse, etc.). To help the UKBA for the future with its decision-making, the Tribunal reproduced in an Appendix to the determination the relevant parts of the Commission's guidance on abuse and fraud, making it clear that the burden of proof is on the state.[157]

79. Common to many respondents were concerns about whether there are **sufficient resources** being put into the system to make it work properly because of the complexity of the rules to be applied. This is one of the issues, along with the question of **training** and whether decision-makers are applying the **correct principles**, which affect the quality of decision-making at all levels. An advisor respondent accepted that advisors themselves also need to be more aware of EU issues, now that these represent, in some areas of welfare work, up to 25% of the total case load [Q27]. The same respondent also commented that where decision-making in some areas – e.g. applying the right to reside test in order to determine entitlement to benefits – is decentralised, there are often problems:

> 'Because local authorities each have their own decision making teams, and tend to be a law unto themselves, we do see certain patterns of rogue decision making. You'll get very odd decisions of the same nature springing up at local authorities at certain times, which seems to be they've got it into their heads that certain groups should be refused on this basis. Usually it's very wrong headed thinking, but it's a long process to get that changed. If possible, we want to avoid going down appeal routes; it's time consuming for everybody and costly. Sometimes it can be effective that we just provide the advisor with the necessary references to the legislation or guidance…' [Q28]

Scottish respondents commented that there often seemed to be less familiarity with some of the key elements of EU free movement law, especially in the higher courts, in Scotland than in England, perhaps because there are fewer cases coming through the system. This can make the task of dealing with the relatively few cases that do come to trial even more challenging given the complex issues often raised.

156. ***Papajorgji***, paras. 21 and 22.

157. Part 4 of COM(2009) 313, above n.69. To the list of recent Upper Tribunal (IAC) cases clarifying the law one can also add ***Sanade*** above n.130. on the impact of ***Ruiz Zambrano*** on foreign national prisoner cases and ***Barnett*** 2012] UKUT 00142 [IAC] on issues of documentation and ***Ewulo*** v. ***SSHD*** (effect of family permit – OFM) [2012] UKUT 00238(IAC) on the proper approach to assessing a residence permit application by an 'other family member'.

Discussions of resources also led to some interesting speculations about the role of government officials in relation to free movement issues, an issue to which we will return in the conclusions:

> 'Yes, there needs to be better resources. The irony is I quite regularly talk to people who work within the DWP whose job it is to encourage people to come to the UK from other EU countries. His job is actually to tell them that they have a right to come here, they have a right to claim benefits should their income be low or they're out of work. Yet, the DWP doesn't provide support for the decision makers who are making the decisions on those benefits.' [Q29]

80. Aside from our interview data, it is also interesting that some practitioners have not hesitated to make their frustrations with the UKBA plain, through postings on the internet. In a comment on the recent case of *Bee*, where the Tribunal was happy to accept that a vaguely worded letter from the UKBA broadly rejecting the applicant's contentions constituted an EEA decision for the purposes of appeal rights, one solicitor blog commented as follows:

> The significance here is that the UKBA are very keen on rejecting perfectly correct EEA applications with a letter which says 'this is not a decision', but which often gives very detailed reasons why a person cannot get what they asked for. We have in various cases actually just decided to appeal these letters. This approach has been accepted by some Immigration Judges on the basis that the definition of 'EEA decision' has a pretty wide remit. Certainly writing on a bit of paper 'this is not a decision' isn't enough to deny the true character of the correspondence. Appealing can have a lot of benefits. Often applying to the EEA team with any application that involves any complexity is like banging your head against a brick wall, with repeated rejections. An appeal is a chance to have an authoritative assessment of the issues and an Immigration Judge's determination on whether the appellant has a right under the directive and corresponding regulations.[158]

81. Interestingly, the challenges posed by the interplay between domestic law and EU law were not felt by commentators to be exacerbated by the various sources of **human rights protection** that can be invoked in the same forum. CJEU reasoning in various citizenship cases has become more concerned with human rights arguments over time, especially those related to the right of family reunion, and the relationship between EU law and human rights protection is increasingly complex; a multiplicity of systems exist, including the EU Charter on Fundamental Rights, the prospect of future accession of the EU to the ECHR under Article 6(2) TEU and Article 59(2) ECHR, and the ongoing binding force of the ECHR for the Member States themselves. Yet, unexpectedly, given the frequency at which the EU is wrongly held responsible in the media and popular consciousness for judgments of the Court of Human Rights (and sometimes *vice versa*), the legal complexity that human rights protection appears to involve, was not felt, by any interviewee, to be a source of friction in free movement cases or to be behind the friction between free movement and immigration law in the UK. One practitioner was clear that complications did not occur as a result of any confusion in the application of the ECHR or the conflation between the EU and the ECHR:

158. 'New judgements from the Upper Tribunal', 27 February 2013, http://www.mcgillandco.co.uk/Blog/2013/02/27/new-judgements-from-the-upper-tribunal/.

> 'I wouldn't say in the tribunal, it's not something that I've come across. That would be a pretty crude mistake to make and it's not one that I've seen the judges make. Not being sure what the principals of EU law is a totally different matter.' [Q30]

Where confusion does exist it is in the public perception, where one interviewee explained the difficulty from the public's point of view of knowing the source of their rights,

> 'There is an overlap [with human rights], I would say, because you've got the convention rights on the right to family life. That for me is an overlap with the immigration rights of family members, there's an overlap there and then and so people don't do... I think most people are confused. Also the fact that they know that it's the European Convention of Human Rights they automatically intrinsically think that is something that falls within the remit of the EU and obviously things are even more complicated now given we've got the Charter of Fundamental Rights the kind that incorporates... So I think there is an overlap between human rights and immigration rights, as a result there's some kind of confusion in peoples' minds as to the source of their rights.' [Q31]

82. Familiarity with the instrument (i.e. the ECHR) is what lies behind the ease with which human rights decisions are executed by decision-makers, according to some interviewees. The system and the reasoning are familiar and it is argued and applied with confidence. However looking to the future, the Charter on Fundamental Rights and its status in law may present challenges to decision makers until it becomes an understood and familiar tool:

> 'I don't know whether the Home Office have done anything on it, it is likely to be raised in the future and judges will have to work out when it applies and then work out whether it's binding in a way which is different from the Human Rights Convention. I think there's going to be a lot of potential for a lot of argument on the issue because I don't think the terms are clear, the proliferation I think therefore could have a detrimental effect in some cases. My own expectations that people, that judges, will fall back for a long time to the Human Rights Convention or the Refugee Convention and it will be a long time before, and it could be ten, twenty years before the Fundamental Charter becomes the dominant legislation. I think it will take a very long time because there is already these established principles and established Conventions which want to actually, which people are more familiar with and therefore more confident in.' [Q32]

83. Information about precisely how the UKBA works sometimes seemed scarce even for those who engaged with it regularly. It was interesting to note that while the UKBA informed us that the casework division is based in the immigration section of the UKBA, even amongst practitioners dealing regularly with the UKBA this fact did not necessarily seem well known:

> 'The move of the European Directorate away from the immigration field to the nationality field within the structures of UKBA is very interesting because it really picks up again on this issue which I mentioned earlier about whether people are seen as co-citizens or as migrants. Obviously co-citizens, the rights based issue, the equality issues and everything else are going to be much more stronger, much more prevalent. Now that's only a recent development as far as I know. I'm not even sure how stable that arrangement is because there is so much change going on in UKBA so it might have been just a blip at one point but it's a matter that the EU Directorate moved up to Liverpool and was therefore within the nationality, sort of .. and managers who were used to dealing with nationality issues. So I think there is a change, well there has been a change but it doesn't fit in neatly anywhere because these are very big principles.' [Q33]

84. Some respondents expressed a fear that UKBA officials involved in policy-making relating to EEA cases are too heavily inculcated with a culture of immigration control because most of their previous careers have been spent in the latter area:

> 'and because they spent large parts of their career in immigration rather than EU, they've been working in immigration for 15, 20 years, it'd be very difficult for anyone with that background simply to say "we're still in the immigration department, still in UKBA but now I need to take an entirely different approach because people are accepted." Because people are conservative especially when they are going into something new that they're not necessarily massively familiar with, they've then got to pick it up and they just carry the baggage of where they've been.' [Q34]

However, the same respondent also accepted that case workers do not have the same level of career mobility and so should in principle have had longer to develop a deep expertise with EU law.

85. Two particular criticisms of the UKBA surfaced during the research. These were that it sometimes used certain arguments – typically restrictive of the rights of EEA claimants – , especially before the UK courts with an awareness that these would be unlikely to hold once the case reached the CJEU. The second concerned issues of delay in responding to new challenges posed by case law in the CJEU, exemplified in particular by the UKBA response to the *Metock* case.[159] As regards the first issue, the point is well explained by a practitioner respondent when asked about arguments that had been made by Counsel for UKBA:

> 'What lies behind [these arguments] is what lies behind any argument led by an advocate on behalf of a client. The argument is designed to promote the policy interests of the client in a way which has some prospect of success for them. What is perhaps interesting from your point of view is that often Counsel's opinion may well be, you are more likely than not to succeed in this argument in the domestic courts and when there's a reference you are very likely to lose this argument. The government is often quite content to litigate a case on that basis. If you like, "get away with it as long as they can" would be one way of putting it, or "continuing to assert their different view of the effect of freedom of movement rights in Europe for as long as they can".' [Q35]

86. With respect to the issue of **delay**, above and beyond the delays in routine decision-making which have been highlighted elsewhere in this Report and which have also received negative attention, e.g. on the part of the European Parliament,[160] a particular issue was thought to lie with the UKBA's delay in implementing the *Metock* judgment of the CJEU, which addressed the issue of whether or not it was permissible for the UKBA, in common with the authorities of several other Member States including Ireland, to require that non-EEA citizen partners of EEA citizen residents in the UK must have resided with their partners in another Member State prior to moving to the UK. This additional condition, held by the CJEU in *Metock* to be impermissible, had been included in the EEA Regulations on the basis that they had been approved in the *Akrich* case[161] and thus needed to be removed by amendment. This took a considerable time, and meanwhile practitioner respondents felt that there was stagnation in the UKBA decision-making processes. For example, one respondent told us:

159. Case C-127/08 ***Metock*** [2008] ECR I-6241.
160. See above n.25.
161. See above n.95.

> So it was very difficult to get anything out of the Agency on *Metock* and it's an ongoing battle with the Agency...saying to the Agency "You have to have from day one, as we did, a working reaction to it and you are sending your presenting officers into court, into the tribunal without a clear steer as to what they should say. They are standing up in different courts saying different things. That's not their fault they're being left to make it up as they go along but you are one body you need to speak with one voice on this. ... There isn't anything you can do about it, you were wrong. This is the position; it's very clear what should apply". It was heel dragging...' [Q36]

Extrapolating more generally, the same respondent felt that the UKBA needed to do more to show that it would respond quickly to the exigencies of EU law:

> 'You must give your presenting officers in court something to say. Really they ought all to be saying the same thing because you're one department." It's an area where there is a very long way to go…… That ability to extrapolate from the particular to the general which is part of the rule of law and understanding of precedent isn't there, it's not there.' [Q37]

87. In similar terms another practitioner respondent also highlighted the problem of 'delay' or 'drift' as a serious one within the system, highlighting what s/he saw as an unsatisfactory response to the challenge of change:

> 'I think where a court, whether it's a UK court or a European judgment like *Metock*, where it says 'no, you can't do this' then the default response of the border agency is to do nothing; to not make a policy for as long as possible and allow the decision making or the lack of decision making to drift until at some point somebody says 'well, we have to come up with a policy' or until they receive another court judgment which says 'you really have to come up with a policy or stop making these types of unlawful decisions.' Of their own volition, they're very resistant to that and I think the same factors are at play when we talk about EU citizenship law, *Zambrano*...' [Q38]

88. At the same time, this issue neatly illustrates the difficulties imported into the system by some of the **rapid developments and complexities** in CJEU case law and other EU law matters, a point explicitly introduced by the UKBA.[162] In similar terms, practitioners – who until recently found that EU free movement related issues were a relatively small part of their practice – have also encountered difficulties getting to grips with its complexities:

> 'It was an area which I ran away screaming from; if anybody asked me about it, I didn't really know about it. It actually came up very rarely in my work.' [Q39]

While the *Metock* judgment could, with all respect to the UK government, have been anticipated and should not have been difficult to respond to (even if it was not welcome), there have been other recent decisions, notably in *Ruiz Zambrano*, *McCarthy* and *Dereci*,[163] where the twists and turns of CJEU case law have placed huge strains on the system. As one judge commented:

> 'It's difficult when you look at the Luxembourg court decisions. Why sometimes do they take a completely teleological approach and other times a different approach. I mean it's interesting in a recent judgment in *McCarthy*, they actually talk about the literal, the purposive and the teleological, actually talk about three different approaches.' [Q40]

162. See paragraph 35.

163. Case C- 34/09 ***Ruiz Zambrano*** [2011] ECR I-1177; Case C-434/09 ***McCarthy*** [2011] ECR I-3375; Case C-256/11 ***Dereci, Heiml, Kokollari, Maduike and Stevic***, 15 November 2011.

89. But as one practitioner commented this is just part and parcel of an **administrative justice** system:

> 'Well that's what happens when administrations get controlled by judgments but that's part of the separation of powers and the application and interpretation of the law. For some reason they seem to find that difficult to grasp.' [Q41]

Yet this point may not be fully understood. One practitioner said that s/he felt that the niceties of the distinction between case law and statute law were not well understood through the UKBA and that

> 'The UK Border Agency struggles with precedent, that it has had a role in shaping [the law].... You're told you can't do this in one case so you don't do it in that case but you do it in another case and you have a go and that's just a little bit of a failure to understand the rule of law.' [Q42]

> **KEY FINDING 4: Problems of friction between the systems also stem from exogenous factors such as the politicisation of immigration and attitudes to the EU, media coverage of these issues, and the UK's powerful 'border identity'**

90. In addition to asking them about how the two systems fitted together as legal/institutional systems, we also asked our respondents to give us their impressions about what types of **exogenous factors** might affect the effectiveness of the implementation of EU free movement rules in the UK.

91. A clear theme that emerged in many interviews concerned what one practitioner respondent called the government's 'headline oriented' approach to **immigration policy**. The same respondent rather provocatively suggested that immigration policies are operated in such a way as to protect ministers:

> 'Since the whole Charles Clarke thing about foreign national prisoners, the extent of which UK immigration policy has been driven to protect the Minister from any risk has been absolutely overwhelming.' [Q43]

On the other hand, such a view about approaches to immigration is quite widespread amongst immigration commentators more generally, and was expressed more than once in the context of reactions to the critical report of the House of Commons Select Committee on Home Affairs on UKBA performance issued at the beginning of April 2012.[164] It should be noted that the Committee Chair was keen to reinforce, in media interviews, that this report was meant to deliver the message that the UKBA's problems were operational **('not fit for purpose')** not political.[165]

Clearly, in such an atmosphere it will continue to be difficult for the UKBA to make dealing with EEA cases a very high priority, given the pressures they are under elsewhere within their portfolio of work. Another practitioner commented on:

> '…the political angle which is obviously always to drive numbers of migrants down and so those officials are often under pressure directly ... they're often under direct political pressure from the minister who is concerned to get the result which will have the most beneficial effect on the numbers and particularly numbers who will then be able to access associated rights of being here by virtue of freedom of movement rights whether it's access to housing or benefits or whatever else.' [Q44]

92. This **political concern** was made abundantly clear with an intervention by the Secretary of State for Work and Pensions in the wake of the decision of the European Commission to bring an enforcement action against the UK in respect of the use of the 'right to reside' test as the basis for determining whether a person is habitually resident in the UK for purposes

164. ***Work of the UK Border Agency (August–December 2011)***, Twenty-first Report of Session 2010–12, 11 April 2012, HC 1722.
165. See the interviews with the Rt. Hon Keith Vaz MP at http://www.itv.com/news/story/2012-04-11/uk-border-agency-under-fire/.

of claiming certain welfare benefits governed by the EU rules on the coordination of social security rules. Iain Duncan Smith's arguments in the Daily Telegraph were, quite clearly, playing the 'benefit tourism' card: [166]

> 'The UK has no problem playing its part in supporting the free movement of labour in the EU. However, what the EU is now trying to do is get us to provide benefits for those who come to this country with no intention to work and no other means of supporting themselves, with the sole purpose of accessing a more generous benefit system.'

The claim of benefit tourism has, however, been refuted by other commentators, and the figures presented by Duncan Smith have been contested for their basis in fact.[167] Moreover, one respondent well versed in the operation of the UK benefits system suggested some scepticism as to whether so-called 'benefit tourists' were actually able to operate the benefit system to their advantage:

> 'They're always trying to stop the benefit tourist. I have to say I've never actually seen a benefit tourist. Maybe they don't appeal. But they tried with habitual residence they clearly had not ever discovered what habitual residence meant and it came as a shock when people started to tell them. So they abandoned that in favour of this [i.e. the right to reside] and I suspect that in a few years they will decide that they have not ever understood this and as more cases come out of European Court I think they will become depressed in DWP and they will try to come up with some other device for controlling access for other nationals to benefit.' [Q45]

93. One respondent connected the issue of delay in responses to some of the CJEU's challenging decisions such as *Metock* and *Ruiz Zambrano* with the greater politicisation of immigration in current political debates and widespread euro-scepticism in the UK:

> 'if you were an official in the Border Agency you'd be thinking 'now we have to make a public statement about this'. When we come up with a policy which gives effect to what the law now says, how is this going to play politically? If you live in a country where Euro-scepticism is very important, especially with the Conservative-Lib coalition, where I think it'd be fair to say Euro-scepticism is a stronger feature; then that must be a factor which enhances their tendency to drag their heels and do nothing.' [Q46]

Another respondent widened the issue to cover **press coverage** of what is always termed 'East European' immigration[168] since 2004:

> 'It [media coverage] moved into EU law at the time, at the A8 transition. There was a big move then. Historically ... Britain's first immigration act ever was called the Aliens Act 1905, the reasons the Aliens act 1905 came into being was as a result of a Royal Commission which issued the report in 1899 about the massive influx of East European Jews into London and whether or not that would dilute English blood and dissipate English blood. The reason the Royal Commission was set up was because of a newspaper campaign run by a number of newspapers including the Daily Mail. <laughs> So nothing has changed in 107 years.' [Q47]

166. See I. Duncan Smith, Brussels poses serious threat to our welfare reforms, ***The Telegraph***, 30 September 2011, http://www.telegraph.co.uk/news/uknews/immigration/8798443/Brussels-poses-serious-threat-to-our-welfare-reforms.html.

167. See the analysis of the Channel 4 News Fact Check team: 'Benefit Tourism Scare sent packing,' 30 September 2011, http://blogs.channel4.com/factcheck/factcheck-benefit-tourism-scare-sent-packing/8050 and G. O'Neill, 'Did Two Million Eastern Europeans sign up for UK Benefits?', 12 September 2011, http://fullfact.org/blog/immigration_benefits_eastern_europe_daily_express-2967. See also, more recently after a further round of claims by politicians about the impact of Romanian and Bulgarian migrants upon benefits, F. Coco, 'Migrants and benefits: let's call the whole thing off?', 25 March 2013, http://fullfact.org/factchecks/immigration_and_benefits-28846, citing, ***inter alia***, research that shows that migrants (of all origins – EU or third country) are less likely to claim benefits than UK citizens, even when controlling for factors such as level of education, etc.

168. This is what it is universally termed, but geographically and geo-politically speaking, the vast majority of those who have taken advantage of EU free movement rules since 2004 have been from Central, or East Central Europe. A Google search (17 December 2012) of "East European Immigration" revealed 147,000 documents on the internet, the vast majority of which seem to be concerned with the free movement of citizens of the EU from states which have joined the EU in 2004 and 2007 (with a small smattering of historical articles about immigration, especially of the Jews of Eastern Europe to the United States).

94. **Media coverage** of EU free movement issues cuts across two areas (namely immigration issues and attitudes to the European Union) which received attention in the 2012 Leveson Report[169] on the practices and ethics of the press. Lord Leveson felt that they were some of the areas 'where parts of the press appeared to prioritise the title's agenda over factual accuracy'.[170] Plenty of examples of problematic and irresponsible coverage were brought to his attention during the course of the Inquiry by witnesses who submitted evidence in relation to both immigration and the EU, including some references to East Europeans as immigrants or asylum seekers.[171] The Report comments negatively both upon sensationalist reporting that would tend to exacerbate community relations, e.g. between migrants and non-migrants or between different religious groups, and upon factually inaccurate reporting, all the while defending the right of those producing newspapers to express their own opinions freely.

95. In conclusion, one respondent nicely captured the likely challenges that stem from having a highly permissive system of free movement law and an increasingly restrictive system of immigration law with a strong internal sense of 'border identity' (paragraph 20) pointing out

> 'the big issues for the European Union which is that it's after all an area which is actively promoting the crossing of frontiers and borders. The extent of which there is just a sheer conflict between that happening and the objectives of national immigration rules.' [Q48]

This is reflected in a gradual splintering of the consensus around EU free movement, which has focused on issues such as the failure to impose more restrictive transitional restrictions beyond the Workers Registration Scheme on citizens from the Member States which acceded in 2004 and the prospect of the termination of the transitional restrictions on access to the labour market for Romanian and Bulgarian citizens at the end of 2013. The *Daily Telegraph* reported this in terms of the prospects for a new immigration 'surge' from Eastern Europe[172] and a number of elected representatives of the Conservative Party have voiced their concerns about this aspect of EU free movement openly, especially in the context of a Westminster Hall debate in Parliament (exclusively attended by Conservative MPs).[173] In fact, after flirting with the possibility of finding some basis for continuing the transitional restrictions, in November 2012 the UK Government confirmed that it was planning to lift the transitional measures on Bulgarian and Romanian citizens which have restricted their access to the labour market, as scheduled by the Accession Treaty.[174] In addition, the UK embassies in Bucharest and Sofia commissioned and published a review of the literature and of relevant data by the National Institute for Economic and Social Research, inquiring as to what would be the likely impact of the removal of the transitional restrictions on labour market participation at the end of 2013 on the part of citizens of those states, providing a balanced review of the presence and absence of various push and pull factors in those states and in the UK.[175] This provided an important corrective to some rather strident press coverage and exploitation of the issue by political parties such as the UK Independence Party.[176]

169. ***An Inquiry into the Culture, Practices and Ethics of the Press***, 29 November 2012, http://www.levesoninquiry.org.uk/ and http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp.
170. See above n.169. at 687.
171. Above n.169. at 672.
172. 'Britain facing new Eastern Europe immigration surge', 21 October 2012, http://www.telegraph.co.uk/news/uknews/immigration/9637967/Britain-facing-new-eastern-Europe-immigration-surge.html.
173. See the reports on the ***Immigration Matters*** website in December 2012, http://www.immigrationmatters.co.uk/mp-warns-that-bulgarians-and-romanians-will-flood-britain.html and http://www.immigrationmatters.co.uk/bulgarian-and-romanian-immigrants-the-uk-cannot-afford-euro-mp-claims.html.
174. 'UK will not extend Romania and Bulgaria migrant curbs', http://www.bbc.co.uk/news/uk-politics-20287061, 11 November 2012.
175. H. Rolfe ***et al***, ***Potential impacts on the UK of future migration from Bulgaria and Romania***, NIESR, 2013.
176. Ukip prepares to put fears over mass Romanian and Bulgarian immigration at heart of campaign strategy, ***The Independent,*** 14 January 2013, http://www.independent.co.uk/news/uk/politics/ukip-prepares-to-put-fears-over-mass-romanian-and-bulgarian-immigration-at-heart-of-campaign-strategy-8451447.html.

96. Even so, opposition to aspects of EU free movement is now firmly tied, at least in some people's minds, to a broader **anti-EU backlash**, with calls for a referendum on the UK's EU membership becoming ever louder.[177] In other words, EU free movement now stands at the crossroads of two issues which are regarded as very significant for voters, according to many opinion polls: relations with the EU and immigration.[178] Sometimes this spills over into a wider hostility and into racism.[179] Some commentators have highlighted that the fact that all the three largest parties acknowledge this fact in a rather uncomfortable way plays into the hands of UKIP, which plays on the fears of uncontrolled immigration and a sort of feral hostility to the EU as 'foreign interference'.[180] But free movement issues are here to stay, for so long as the UK is part of the EU. As Open Europe make clear in a recent report,[181] opting out of free movement must necessarily involve leaving the EU. On the other hand, it is clear that these exogenous factors have the capacity to offset some of the gains in relation to an improved application of EU law at least at the Upper Tribunal level, in partnership with the CJEU, because of the increased sensitivity attaching to many issues of EU law.

177. A. Olad, 'Tory MPs express fears about Romanian and Bulgarian migration to UK', Migrants' Rights Network Blog, 4 December 2012, http://www.migrantsrights.org.uk/blog/2012/12/tory-mps-express-fears-about-romanian-and-bulgarian-migration-uk. For an example of UK Government reaction to these pressures, see the ***Review of the Balance of Competences between the European Union and the United Kingdom***, CM 8415, July 2012, commissioned by the Foreign and Commonwealth Office.

178. P. Kellner, 'The perilous politics of immigration', ***YouGov***, 17 December 2012, http://yougov.co.uk/news/2012/12/17/perilous-politics-immigration/.

179. See 'No Eastern Europeans', Warwickshire sign reads', ***Daily Telegraph***, 10 April 2013, http://www.telegraph.co.uk/news/9983652/No-Eastern-Europeans-Warwickshire-sign-reads.html.

180. See A. Lazarowicz, 'A dangerous UK consensus', above n.15.

181. See Open Europe, ***Tread carefully:***
The impact and management of EU free movement and immigration policy, March 2012.

Section 8: Conclusions and recommendations from the research

97. The primary objective of our research was not to develop a plan to try to ensure a smoother working of the interface between EU free movement law and UK immigration law. We did not want to invite a 'blame game' *vis-à-vis* the UK government, placing the question of whether UK law complies correctly with EU law or not at the centre of the enquiry. We wanted, initially, to identify a way of how we can understand those relationships between legal systems and legal institutions better, and to that end we have applied a mixed method incorporating both doctrinal legal research and also empirical methods based on stakeholder interviews. Our primary intention was that uncovering the hidden dimensions of those relationships would already be an important contribution, and would be one that might lead those responding to the research to reassess their own strategies or working practices. None the less, it has become apparent that in two dimensions conclusions and recommendations stemming from our findings could usefully be put forward for consideration:

- In relation to enhancing the citizens' experience of free movement where it is currently being frustrated; and
- In order to embed a culture that can help to overcome adversarial relationships that have developed between some actors and thereby to enhance legal certainty and to alleviate the scope for mutual misunderstandings.

98. As our respondents commented, in large measure the application of the system of EU free movement, as with other aspects of the immigration system, has to be seen as a wider part of an administrative justice system. Such a system will work well, in general, where there is a clear statutory framework, but problems do seem to arise in the EU context with the different types of challenges that the EU poses – i.e. not just the CRD and its implementation, but also treaty rights, the concept of EU citizenship, the Charter of Fundamental Rights and the dynamic role of the CJEU. It is notable that the Administrative Justice and Tribunals Council (AJCT) report *Right First Time* noted high levels of appeals against UKBA decisions, but this failed to disaggregate between appeals against EEA decisions and other decisions.[182] In its Report the Council has emphasised (and continues to emphasise to the UKBA in another context, namely its response to the UKBA consultation on family migration[183]) the importance of getting administrative decisions 'right first time', and to do that it is important for administrative authorities to publish clear guidance.

99. The AJCT in its Report provides a useful checklist of principles which could also be helpful for the UKBA in its EEA decision-making, in view of the responses we have received from informants about the quality of its decision-making:[184]

- making a decision or delivering a service to the user fairly, quickly, accurately and effectively;
- taking into account the relevant and sufficient evidence and circumstances of a particular case;
- involving the user and keeping the user updated and informed during the process;
- communicating and explaining the decision or action to the user in a clear and understandable way, and informing them about their rights in relation to complaints, reviews, appeals or alternative dispute resolution;

182. June 2011, available from http://www.justice.gov.uk/ajtc/docs/AJTC_Right_first_time_web(7).pdf.

183. Response of the AJCT to the paper 'Family Migration – A Consultation', 6 October 2011, available from http://ajtc.justice.gov.uk/docs/ajtc_family_migration_consultation_final_response_(2).pdf.

184. Administrative Justice and Tribunals Council ***Right First Time*** 2011 available at http://ajtc.justice.gov.uk/docs/AJTC_Right_first_time_web(7).pdf.

- learning from feedback or complaints about the service or appeals against decisions;
- empowering and supporting staff through providing high quality guidance, training and mentoring.

Implementing these suggestions should take the pressure off the tribunal system, and alleviate concerns about access to justice which have also arisen.

100. What emerged during the course of our research was evidence of an increasingly adversarial relationship developing between the UKBA and its 'users' in the sense of practitioner and advocacy stakeholders whom we interviewed which seems inimical to the types of principles articulated by the AJCT, as well as those who are seeking to bring claims based on EU law. This adversarial character has even been commented in some cases by the judiciary. In *AB* v. *Home Office*, a case where things went awry because of initial UKBA failures in the way that paperwork was sent out and subsequent UKBA intransigence in relation to what should have been a relatively straightforward case to decide, Salter J commented on the 'unduly simplistic and adversarial approach to his task' of the Home Office official.[185] Such an adversarial relationship is not well suited to the task of fostering effective and constructive cooperation between the various parties involved. Even experienced practitioners seemed to be coming close to accusing the UKBA of displaying a lack of competence in its decision-making on EU free movement rules or, even worse, of bad faith. Without commenting on whether these views are justified or not, we none the less felt that it was important that they should be aired in our conclusions, and problems with decision-making do indeed seem to be evidenced by the figures on successful appeals (paragraph 13) and some of the case law reviewed above (e.g. in paragraph 77-78). One respondent pointed to the issue of **culture**, with a culture of suspicion crossing the internal borders of the UKBA first from the field of asylum decision-making to immigration decision-making more generally, and then to the field of free movement decision-making:

> 'That's where I see the friction as taking place, that it comes from the culture that exists within the Home Office, the way that they treat immigration applications and decision making. That culture is strongest in the sphere of asylum. There's long been the phrase 'culture of suspicion' or 'culture of disbelief' and my experience as a practitioner is that more or less has moved over into non-asylum immigration decision making; anything to do with spouses, anything to do with family members .... If that's the culture of the border agency then it would be strange if that didn't carry over into EU decision making. I think the Home Office has tried on various occasions to apply the same approach to free movement law that it applies to UK law'. [Q49]

101. Perhaps more surprisingly, some practitioners seemed to take a similar view with respect to some members of the immigration judiciary:

> 'I think, to be careful how I put it, a lot of immigration judges perceive themselves as being a sort of almost like a last line of defence so it's very much keeping out the wrong people and letting in the right people and sometimes, it's my perception that what the law says isn't necessarily that interesting to immigration judges. Their view of who's a right person and who's a wrong person and some of the judgments of the ECJ, some of the provisions of the Citizens Directive are perceived by immigration judges to be more generous than they should be and to be potential routes for abuse and therefore immigration judges approach those kinds of cases with quite a degree of scrutiny.' [Q50]

185. ***AB and MVC*** v. ***Home Office*** [2012] EWHC 226 (QB) at para. 100.

At the same time, the same respondent accepted that this may well be a minority problem:

> 'most [judges] have come to understand that EU law isn't about right people and wrong people.' [Q51]

Even so, noting that there is **no specific reference to EU issues** in the title of the tribunal chambers that deal with *immigration and asylum issues* led one practitioner to remark:

> 'It is an organisation that just doesn't do what it says on the tin.' [Q52]

However, our own judgment and observation of the outputs from the UT (IAC) led us to take a much more positive view,[186] and we thus felt that some of the comments that we received reflected a time lag between changes in judicial decision-making and perceptions amongst practitioners. We also felt that more cross-sitting between Chambers and cross-ticketing of cases, as is already being practised,[187] could lead to improved decision-making and awareness of the key issues. None the less, the fact that EU free movement issues do not have a titular 'home' in either the government/administrative structures or the UK's judicial structures does highlight how much this issue seems to be submerged within the broader pool of immigration and asylum law and policy, and how rarely it seems to receive direct attention.

102. Good examples of this **lack of direct and proper attention** (through the medium of a total absence of discussion) can be found in the House of Commons Home Affairs Select Committee report on the UKBA[188] and the UKBA's own Business Plan 2011-2015.[189] The absence of *any* discussion of EEA cases in this context raises the questions of how the UKBA can most effectively be held accountable for its work in this domain and also *which body* in the United Kingdom might wish to hold it so accountable.

103. In earlier years, when EU free movement rules were less in the public eye and less obviously contested than they are in the post-2004 EU, the situation where no one agency in the UK government had nominate responsibility for free movement issues and the associated human capital questions was perhaps not surprising. It certainly helped, in some ways, to keep this issue out of the public eye and perhaps this was in some ways a good thing because it reduced the level of conflict and politicisation. But our respondents themselves sometimes referred to the need for a more effective and cross-cutting decision-making framework for EU free movement issues, asking for

> 'some kind of departmental Government, cross departmental body which has the ability to look at these questions in context with their applications, in context with social systems, and documenting people, because with EU documents, we're not talking about giving your document in order to confirm right of admission, they have a right of admission by operation of law.... . It might be more sensible to have a body that's cross departmental and not basically UKBA and also so that the decisions are consistent.' [Q53]

186. See the text accompanying n.155. and following.
187. E.g. ***Nimako-Boateng (residence orders - Anton considered)*** [2012] UKUT 00216 (IAC).
188. See above n.164.
189. UKBA Business Plan, April 2011-March 2015, available to download from http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/uk-border-agency-business-plan/.

104. The UKBA's response, when asked to look positively towards the future is interesting, and fits well with our idea to give more visibility to EU citizenship issues, by focusing on the external EU dimension. It commented:

> 'The UK is already engaging with other Member States and the Commission to encourage a mature debate about free movement, the opportunities and the challenges. Better understanding of different positions and experiences and close collaboration mitigate against the emergence of 'frictions'.'

105. We would suggest that the experience of EU free movement in the UK – both for incoming and for outgoing citizens – is undermined by its rather hidden nature. If not necessarily in relation to decision-making, but at least in relation to promoting the visibility and take up of rights, the institution of a single **EU citizenship or free movement 'champion'** to whom aggrieved citizens could turn and who would proactively promote awareness and take up of rights would be a useful initiative for Government to consider. Building on the experience with organisations that have specific responsibilities for human rights or anti-discrimination policy, even without such extensive powers, such an Ombudsman-like office would have the capacity to raise a clear **EU flag** wherever decisions are being made on the free movement rules and the rights to which they give rise. Properly resourced, such an office would have the task of promoting a culture change in relation to how free movement is understood in the UK, emphasising those aspects which differ from immigration more generally (i.e. the key dimensions of a rights-based system premised on a notion of equal treatment) while accepting that some issues, e.g. around integration, may be shared between free movement and immigration more generally. The champion could assist in providing better quality information to those who seek to rely on free movement rights, and also facilitate coordination between departments of Government (e.g. in relation to the sharing of information about an applicant without prejudice to data protection rules). It could have a role to play in respect of both incoming and outgoing EU citizens, recognising the innate reciprocity of these principles in a **common citizenship area**. The office could also look closely at how immigration and free movement interact, assessing the claim put forward by some that there is a 'seepage' of immigration approaches (including a culture of permissions rather than a culture of rights) into the field of free movement.

106. Combining the evidence of our interviews with stakeholders with the important insights drawn from the AJCT *Right First Time* report suggests that there are also important gaps in the **information flow** from the UKBA/EEA team to those who are seeking decisions under the EU rules. This is backed up by the rather high appeal rates and the success rates in those appeals. This suggests that money is being spent by the UKBA on litigation which could more usefully be directed towards improving first line decision-making, or clarifying the information given to applicants and their legal advisors and advocates. Good guidance was credited by our interviewees as having a substantial impact on the speed, quality and consistency of decisions, and this point seemed to be demonstrated in the case law, and it was widely felt that this is one of the most effective and economically sounds mechanisms available to improve the experience of citizens and the quality of decisions. Judges in the Tribunal Service would also benefit from clearer communications and in particular a timely response by the UKBA to the challenges posed by new cases emerging from the CJEU. None of this, of course, militates against the need for continuous training and updating for all parties as EU law continues to evolve. As a first step, much clearer UKBA/Home Office website information should also be made available as this is usually the first point of contact for EU citizens wanting information about their rights.

107. The task of exploiting existing mechanisms at the Tribunal level to improve the application of EU law has already begun. The Upper Tribunal has initiated a process of prioritising EU law related cases and are delivering judgments that provide clear reasoning and application of the rules and it is exploring mechanisms such as cross sitting between relevant chambers of the Tribunal to bring coherency to its decisions. The First Tier Tribunal will be challenged to complement this endeavour by providing more training to judges. The effort would be to increase the familiarity with EU law that judges feel and which currently only exists in small pockets of the rather extensive First Tier of the Tribunal. Moreover, looking to the future, both tiers of the Tribunal will need to make preparations for the possible impact of the Charter of Fundamental Rights which may become a more regular dimension of litigation.

Section 9: The methods used in this research and methodological issues

A variety of methods of data collection and analysis were used in this research. In the first phase of our research, we reviewed extensively the relevant primary and secondary legal materials (cited in footnotes and in the list of principal sources) and we have also made extensive use of media coverage because this proved to be extremely helpful in isolating and characterizing the key areas of friction between the two legal systems. Using press materials also permitted us to respond to the changing legal and political climate as the research evolved. A selection of relevant media coverage has been brought together in a *Springpad* notebook.[190]

The structure of the research required us first to identify the key areas of friction and the legal issues which these raised, as we explained in Section 6. This was to give some structure to our interviews. We then combined this with a series of intuitions or hypotheses generated by the research team, as to what might be the causes or explanations of these areas of friction. We tested intuitions in semi-structured interviews with stakeholders, and our primary bank of research data from which much of this report is drawn is thus our body of 35 stakeholder interviews, reviewing and revising our intuitions as we proceeded, in line with the principles of empirical research based on grounded theory.[191]

A series of interviews were conducted with key stakeholders in the field of EU free movement law and UK immigration law throughout the UK and in Brussels, Belgium. Interviewees included

- UK (i.e. English and Scottish) solicitors, barristers and advocates;
- Former members of the Court of Justice of the European Union;
- UK Judges of the Upper Tribunal (Administrative Appeals Chamber) and of both tiers of the Immigration and Asylum Chamber;
- Representatives of NGOs and think-tanks in the UK and in Brussels;
- Stakeholders within the European institutions including officials at the European Commission and the European Free Trade Association Surveillance Authority.

Role	No. of participants
Judge	8
Legal Practitioner	8
NGO Representative	9
European Institution Representative	10

Officials and policy makers within the UK government (Home Office and United Kingdom Border Agency) were not available for interview but instead submitted written responses to a set of questions that the research team prepared (held on file).

In total thirty-five interviews were conducted between March 2011 and February 2012. The task of conducting the interviews was shared between the Research Team. Most of the interviews lasted approximately sixty minutes and were tape-recorded. Interview transcripts were coded by the researchers and analysed with the help of NVivo, a qualitative data analysis programme. This analysis assisted us in bringing out the main themes around which Section 7 of the Report is organised.

A draft of the Report was circulated to those interested in attending a feedback meeting for interviewees and other interested stakeholders that was held at the Nuffield Foundation premises in London on 25 May 2012. Both oral feedback at the meeting and written reflections on the text circulated were taken into account in the completion of the final text. These feedback processes also constituted part of our data sources in so far as they allowed us to cross check our findings and conclusions.

190. See http://sprng.me/hlql9.

191. J. Corbin and A. Strauss, 'Grounded Theory Research: Procedures, Canons and Evaluative Criteria', (1990) 19 ***Zeitschrift für Soziologie*** 418-427.

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