FREE MOVEMENT AND EUROPEAN UNION ENLARGEMENT: A SOCIO-LEGAL ANALYSIS OF THE CITIZENSHIP STATUS AND EXPERIENCES OF POLISH MIGRANT WORKERS IN THE UK

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by

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ABSTRACT

This thesis explores migration in the context of the 2004 European Union enlargement. Prior to enlargement the older Member States (the EU15) voiced concerns that labour market disruption and benefit tourism would occur upon extension of the right to free movement to nationals of the eight central and eastern European accession countries (the EU8). Consequently, the Treaty of Accession included transitional arrangements enabling the EU15 to derogate from the *acquis* on the free movement of workers for a maximum period of seven years. Given that the right to free movement is closely akin to the notion of citizenship under Community law (Articles 17-18 EC), it follows that EU8 nationals are granted a restricted version of Union citizenship during the transitional period (2004-2011).

The thesis analyses, from a socio-legal perspective, the citizenship status, entitlement and experience of nationals from the EU8 during the transitional period. Owing to the design of the transitional arrangements, which grant the EU15 Member States broad discretion over the measures put in place, the domestic dimension also plays an important role in shaping the status and experience of EU8 migrants. The thesis, therefore, focuses particularly on the UK post-accession regulatory system: the Workers' Registration Scheme. Furthermore, the theoretical analysis of the formal legal framework is complemented by empirical analysis of qualitative data obtained from a series of interviews carried out by the author with an indicative sample of Polish migrant workers in the UK. Extracts from interviews are drawn upon throughout the thesis to highlight the impact of the law.

By adopting an inter-disciplinary and multi-level approach the thesis is able to explore EU8 nationals' legal rights to access work in the EU15, their experiences of such work (in the UK) and their access to and engagement with broader family and social entitlement. Citizenship, therefore, is conceptualised not merely as rights but as a practice; a real 'lived' experience. The citizenship status of EU8 migrants is shaped by formal legal entitlement, law in action (as it is implemented by the Member Sates and 'accessed' by the migrants) and social and cultural perceptions and experiences 'on the ground'.

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S.C., Liverpool, December 2006

PREFACE

The empirical work referred to throughout this thesis (both in the UK and Poland) was carried out in 2004 and 2005.

The law is stated up to 1 November 2006.

Chapter one

INTRODUCTION

In May 2004 the European Union saw its membership increase from a club of 15, predominantly 'western' European countries to an alliance of 25 whose members are situated across a much wider geographical proportion of the continent. With the accessions of Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia and Slovakia the EU's population increased by 28% to more than 500 million people.[1] Thus, this fifth round of enlargement is regarded as significant due to its scale but it also has ideological and political significance for the eight post-communist central and eastern European (CEE) countries involved.[2] For example, some of the discussions surrounding the 2004 enlargement were couched in quite symbolic terms about the 'return' of these eight CEE countries to their rightful place in Europe.[3] Despite the positive emphasis in the literature on the unification of Europe, the existence of various transitional arrangements in the Treaty of Accession 2003[4] has meant that in reality accession did not occur overnight, but instead, is being staged over a number of phases.[5] One of the most notable areas subject to such initial phasing-in is the free movement of persons. The fifteen established

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[1] Vaughan-Whitehead, D.C., *EU Enlargement versus Social Europe? The Uncertain Future of the European Social Model* (Cheltenham: Edward Elgar, 2003), 31

[2] The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovenia and Slovakia

[3] Kengerlinsky, M., 'Restrictions in EU Immigration Policies towards New Member States', (2004) 2(4) *Journal of European Affairs,* 12; Maas, W., 'Free Movement and EU Enlargement', Paper prepared for the Fifth Biennial Conference of the European Community Studies Association, Toronto, Canada, 31 May-1 June 2002

[4] Treaty of Accession 2003 [2003] O.J. L 236/17

[5] For example such transitional arrangements exist in relation to, *inter alia*, the free movement of workers, the Common Agricultural Policy and the free movement of capital. See further, Inglis, K., 'The Accession Treaty and its Transitional Arrangements: A Twi-Light Zone for the New Member States' in Hillion, C. (Ed.), *Enlargement of the European Union: A Legal Approach,* (Oxford: Hart, 2004), 77

Member States[6] are entitled to derogate from the *acquis* on the free movement of workers in respect of nationals from the eight CEE Member States for a maximum period of seven years.[7] Throughout this thesis the term 'EU8' is used to refer to the eight Member States to which such transitional restrictions apply.

The existence of transitional mobility restrictions seems to contradict the EU's established policy of promoting internal labour migration. The desire to encourage free movement has been the driving force behind long-established legal developments such as the mutual recognition of qualifications and the extension of social rights and family reunification rights to EU nationals exercising rights of free movement. Traditionally, such initiatives have been adopted as part of the overriding economic objective to establish a Common Market with mobile factors of production.[8] More recently, however, there have also been moves at EU level to highlight the professional, cultural and linguistic benefits of working in another Member State. For example, the European Commission designated 2006 the European Year of Workers' Mobility[9] and put in place various schemes and projects designed to emphasise the benefits of geographic mobility and to provide basic, practical information

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[6] Austria, Belgium, Denmark, Finland, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom

[7] Cyprus and Malta are not subject to such transitional restrictions

[8] Despite such initiatives it is widely acknowledged that rates of intra-Community migration have remained low. For example recent Eurobarometer surveys indicate that only 4% of EU nationals have taken up residence in another Member State. See Eurobarometer Survey on Geographic and Labour Market Mobility, Europeans and Mobility: First Results of an EU-Wide Survey, (Brussels: European Commission, 2006)

[9] European Commission Press Release, MEMO/05/229, '2006 – European Year of Workers' Mobility', Brussels, 30 June 2005. See the Commission's website devoted to the European Year of Workers' Mobility initiative <http://europa.eu.int/comm/employment_social/workersmobility2006/index_en.htm> (date of last access 17 September 2006)

about rights to work abroad.[10] It is somewhat ironic that such positively framed mobility projects have been put in place during a period which sees a significant proportion of EU nationals experience free movement restrictions.

The aim of this thesis is to explore the legal status and experiences of EU8 migrant workers during the operation of the transitional arrangements following the 2004 EU expansion. More specifically, as the right to free movement is closely associated with the notion of citizenship under Community law,[11] an objective is to analyse the relevance of Union citizenship for this group. Previously, academic research has analysed the position and rights of those EU nationals who have exercised mobility rights flowing from the free movement provisions[12] to work in another Member State.[13] Similarly, the status of third-country nationals in the EU, particularly following the introduction of the Treaty of Amsterdam which inserted Title IV on 'visas, asylum and immigration' into the EC Treaty, is an issue that has received the attention of academic researchers.[14] During

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[10] For example, an online European job portal with details of EU-wide vacancies was put in place: <http://europa.eu.int/eures/home.jsp> (last accessed 15 September 2006). Similarly, a European job fair was held 29-30 September 2006. The European Citizen Action Service also set up a free movement telephone hotline in 2006, European Citizen Action Service, Press Release: ECAS Hotline on Free Movement Rights, 25 August 2006 <http://www.ecas.org/file_uploads/1179.pdf> (last accessed 15 September 2006)

[11] Articles 17 and 18 EC

[12] In relation to workers the primary Treaty provision is Article 39 EC. Secondary legislation clarifies the contingent employment, family and social rights; in particular Regulation 1612/68 [1968] O.J. L257/2 and now Directive 2004/38 [2004] O.J. L158/77

[13] On the notion of Union citizenship see, *inter alia*, Fries, S. & Shaw, J., 'Citizenship of the Union: First Steps in the European Court of Justice', (1998) 4 *European Public Law*, 533; Shaw, J., 'The Interpretation of Union Citizenship', (1998) 61 *Modern Law Review*, 293; Everson, M., 'The Legacy of the Market Citizen' in Shaw, J. and More, G. (Eds.), *New Legal Dynamics of the European Union*, (Oxford: Oxford University Press, 1995), 73; O'Leary, S., *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship*, (The Hague: Kluwer, 1996); Faist, T., 'Social Citizenship in the European Union', (2001) 39 *Journal of Common Market Studies*, 37; Kostakopoulou, D., *Citizenship, Identity and Immigration in the European Union: Between Past and Future*, (Manchester: Manchester University Press, 2001)

[14] See Kostakopoulou, T., 'Long-term Resident Third-Country Nationals in the European Union: Normative Expectations and Institutional Openings', (2002) 28(3) *Journal of Ethnic and*

the transitional period (2004-2011) EU8 nationals are clearly not granted complete access to the rights of free movement accorded to 'ordinary' internal EU migrants; therefore, the citizenship status they occupy is not immediately analogous to that of EU15 nationals. Neither is the status of EU8 nationals equivalent to that of most third-country nationals as they are, as nationals of EU Member States, citizens of the Union in spite of the imposition of transitional mobility restrictions. Consequently EU8 migrants occupy a unique status under Community law. They may be Union citizens by formal definition but in practical terms one of the main components of meaningful Union citizenship is missing, or at least restricted, from their repertoire of rights: the ability to move as a worker to another EU Member State. As a result, the 2004 enlargement provides an interesting lens through which issues of labour migration and the citizenship status of migrant workers can be examined.

Inevitably, this thesis has had to stop short of considering some broader issues of relevance in the interests of engaging in a focussed socio-legal analysis of the status and experience of EU8 migrant workers. For example, there is insufficient scope to examine in any depth the potential impact of EU8 migrant workers on the employment and migration experience of third-country nationals.[15] Further, the thesis deliberately glosses over the debate, prominent in some migration theory literature, about the correct use of terminology and the distinctions between various labels such as 'migration', 'incomplete migration' or 'mobility'. Instead it

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Migration Studies, 443; Kostakopoulou, T., '"Integrating" Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms', (2002) 8 *Columbia Journal of European Law*, 181; Barratt, G., 'Family Matters: European Community Law and Third Country Family Members', (2003) 40 *Common Market Law Review*, 369; Guild, E. and Harlow, C. (Eds.), Implementing Amsterdam: Immigration and Asylum Rights in EC Law (Oxford: Hart, 2001)

[15] A 'preference clause' in the provisions of the Accession Treaty setting out the transitional rules obliges EU15 Member States to give preference to EU8 nationals over third-country nationals in respect of labour market access. Therefore, it is likely that the transitional arrangements have impacted on the status of third-country nationals in the EU Member States' labour markets. Chapter three explains the detail of the transitional rules

classifies as 'migration' all situations of EU8 nationals working and residing in the UK regardless of the length of their stay.

The following chapters of the thesis set out to explore EU8 nationals' legal rights to access work in the EU15, their experiences of such work, and their access to and engagement with broader family and social entitlement. In that sense, citizenship, is conceptualised not merely as a bundle of rights but as a practice; a real 'lived' experience. The citizenship status of EU8 migrants is shaped by formal legal entitlement, law in action (as it is implemented by the Member Sates and 'accessed' by the migrants), and social and cultural perceptions and experiences 'on the ground'. The interaction of this group with the various aspects of legal provision is assessed in the light of the position of EU15 migrants (and by extension migrants from Malta and Cyprus) who are not subject to any transitional mobility restrictions. The juxtaposition of formal legal status and practical experience throughout the thesis contributes to our understanding of the overall citizenship status of EU8 migrants. In adopting this approach the research aims not only to critique the specific status granted to EU8 migrants, but also to reflect more generally on the notion of Union citizenship as expressed formally in the EC Treaty. In particular it challenges the perception of citizenship as a universally applicable concept and demonstrates how certain types of free movement by particular kinds of migrant citizen are valued to a much greater extent than others.

1. Research strategy

The research on which this thesis is based is of a socio-legal nature and therefore combines analysis of the formal legal framework shaping the citizenship status of EU8 migrants with empirical investigation of the migrants' practical experiences. This empirical element aims to both complement and contextualise the more black letter exploration by

providing some tangible examples of how the law shapes the migration process and experience.

In order to provide an in-depth picture of the formal legal status of EU8 migrants, the analysis is carried out on a number of levels, taking into consideration the various layers of regulation impacting on the free movement rights of the group. At the supranational level, the focal point is the Treaty of Accession and the detail of the transitional arrangements. In order to consider this in a meaningful context, however, the detail of the transitional rules are critiqued in the light of the provisions of Community law on free movement and citizenship that govern the rights of EU nationals generally. At the national level, the EU15 Member States' implementation of the transitional arrangements is considered. Such domestic implementation also has a significant impact on the extent of EU8 migrants' entitlement, experience and status as the design of the transitional arrangements bestows a considerable degree of discretion upon the EU15. The research, while adopting Community law as a wider frame of reference, focuses on the specific context of the UK legal framework put in place to regulate EU8 migration following enlargement. In this respect, the research represents an attempt to challenge and move beyond the media-projected images of Polish workers that have dominated the debate in the UK since the decision was made by the government to extend labour market access rights to EU8 nationals.[16]

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[16] The attitude of the British press has varied since the 2004 enlargement. Initially the UK government was heavily criticised after making the decision to allow EU8 nationals to work in the UK, for example: Smith, S., 'Immigration hysteria: What they said about ... immigration and the EU – Tabloids threaten 'flood' of Gypsies', *The Guardian*, 21 January 2004; 'Passport to the Promised Land', *Daily Mail*, 29 April 2004; 'Britain's Not Ready for this May Day Madness', *The Sun*, 29 April 2004. Accusations and suspicions of 'benefit tourism' against EU8 migrants have also been present in the press coverage of the issue, for example, Hall. M, 'Britain 'a Magnet for all Scroungers', *The Express*, 8 November 2006. There has, though, also been some recognition of an apparent good work ethic demonstrated by Polish migrant workers and celebration of the idea that they have been working in occupations not filled by UK nationals, Righter, R., 'Britain is Enriched by its Poles of Growth', *The Times*, 28 August 2006; Foggo, D. and Habershon, E., 'Invasion by Poles Hits Lazy Britain', *Sunday Times*, 14 May 2006. Although more recently, with the accession of Bulgaria and Romania drawing nearer, the tone of the debate

The empirical work focussed on labour migration from Poland to the UK and the experiences of Polish migrants. Therefore, the empirical research essentially provides a case study of Polish migrants who worked in the UK in the post-accession environment. This case study on Polish workers complements the legal analysis which applies more broadly to the wider category of EU8 migrant workers. Semi-structured, qualitative interviews were conducted with: Polish migrants working in the UK, Polish nationals who had worked in the UK but had since returned to Poland, representatives of employment agencies who assisted Polish nationals in finding work abroad, and various 'key informants'. This research deliberately sought to implement a qualitative approach in order to explore the migration experience from the perspective of the migrants involved. Notwithstanding the overall commitment to a qualitative approach, the value of quantitative-based analyses is also recognised and statistical secondary data is utilised throughout the thesis to contextualise the more qualitative examples.

The findings from the empirical work are drawn upon throughout the thesis to highlight particular experiences of Polish migrant workers in the UK and to emphasise how the legal framework and the formal status they are granted shapes these experiences. In total, 53 semi-structured qualitative interviews were carried out. This sample does not claim to present a representative picture of the overall experience of the population of post-accession Polish workers in the UK, but to provide an interesting and rich qualitative insight into the experiences of some of those that moved in the aftermath of the 2004 EU enlargement. Furthermore, some broader

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on accession migration in the tabloid press appears to have become a little more strained. For example, Nicolson, S., 'GPs Swamped by Migrants', *Daily Mail,* 8 September 2006; Ingham, J., 'EU Influx Brings New Menace on our Roads', *The Express,* 4 September 2006

conclusions can be drawn when the experience of the sample is coupled with the statistical information.

The research, in striving to apply a genuinely inter-disciplinary approach, has drawn on approaches and concepts that span different disciplines in order to develop a more holistic understanding of the status and experiences of EU8 migrant workers; the concern of doctrinal legal studies is to analyse and critique the general legal position; whereas, the sociological interest lies in the pursuit of the study of the individuals and their engagement with the host society.

2. Thesis structure

The following chapters seek cumulatively to contribute to a more theoretical analysis of the legal, social and methodological structure that lay the foundations of the research. Extracts from the respondents' accounts are integrated throughout the analysis to highlight the personal impact of migrating in the post-accession climate.

Chapter Two provides the backdrop to the later chapters by discussing in detail the methodological issues relating to the research. First, it describes the inter-disciplinary approach adopted to study the topic of migration in the enlarged EU by examining the meaning and nature of socio-legal scholarship and the benefits such an approach can bring to European Union Legal Studies. The research context is then explored in greater detail highlighting in particular the cross-national nature of the research. The chapter moves on to consider the practical research design and the rationale behind the adoption of a qualitative approach. Practical details such as how the sample was accessed and how the interviews were conducted are detailed. A major component of this discussion centres on the interview dynamic and the interaction between interviewer and interviewee. Finally,

the ethical principles that guided the research design, such as consent and confidentiality, are discussed. The discussion critiques the tendency in migration research, especially that which has focussed on EU enlargement, to be dominated by quantitative, statistical methods.

Chapter Three analyses the legal framework that sets the parameters of the migration space which has emerged since the 2004 EU enlargement. In doing so it seeks to analyse the potential of EU8 nationals to qualify as migrant workers during the period when transitional restrictions on the free movement of persons apply. First, EU law governing EU8 nationals' ability to access work in the EU15 Member States is discussed. Principally, this involves analysis of the transitional arrangements on the free movement of persons contained in the Treaty of Accession 2003. Secondly, attention turns to the national implementation of the transitional rules. In particular, the UK's Workers' Registration Scheme put in place to regulate post-accession labour migration is examined. Finally, the chapter explores some of the practical strategies and networks migrants rely on to access work in the UK, notably, agencies, employer-organised schemes and informal social/familial networks. In the process, the discussion exposes how the particular legal regime in the UK, and the confusion that has surrounded it, appears to have encouraged and entrenched reliance on such migration 'facilitators'. Consequently, this in turn has had the effect of increasing the EU8 migrants' exposure to exploitative employment relationships.

Chapter Four extends the analysis undertaken in chapter three by moving on from the discussion about how EU8 nationals access employment to analyse their status and experiences once they are working in the UK. The chapter begins by outlining the profile of post-accession migrants and moves on to discuss the work undertaken by EU8 migrants in the UK. The

concept of de-skilling is then explored and considered in the context of this category of migrants. In particular, aspects of the regulatory framework contributing to the devaluation of the migrants' skills and qualifications are highlighted and examined: first, the UK's regulatory system (the Workers' Registration Scheme) and, secondly, the EU's mutual recognition of qualifications regime. The chapter then proceeds to explore the gender-dimension of skill-degradation and the particular (professional) consequences of migration for female Polish migrants. Specifically, the discussion considers the differential gender-impact of formalised employer-driven migration schemes which operate in traditionally male-dominated sectors. The chapter concludes by questioning whether the devalued position typically occupied by new EU8 migrants in the UK may have any long-term consequences for the migrants' labour market activity and professional progression. It does so by speculating on the potential for re-skilling should the migrants remain in the UK or return to their home state. As the analysis progresses there is consideration of whether the EU is concerned about the 'type' of mobility it wishes to encourage. The apparent 'brain waste' from the EU8 region in the aftermath of enlargement stands in contradiction to recent initiatives – tied in to the Lisbon Agenda - aiming to increase intra-Community 'knowledge circulation' by promoting highly-skilled mobility.

Chapter Five moves the thesis on from the employment experience of EU8 migrant workers to examine how moving to the UK for the purposes of work impacts upon the family lives of migrants. Migration, either for a temporary period or long-term, is often a household strategy utilised to enhance the family unit's prosperity. The objective here is to explore the implications of such migration decisions for family units. The entitlement of EU8 migrant workers' family members to join the worker in the UK is detailed and, additionally, the wider social entitlement of the family unit is

considered as the ability to access certain welfare benefits in the host state may be important for sustaining the family and its members. The EU free movement provisions are the primary frame of reference when discussing the experience of (re)unified families but, in the case of EU8 migrants, this entitlement must be considered in the light of certain aspects of the transitional restrictions on the free movement of persons and placed within the specific context of the UK. The chapter proceeds to examine the apparent culture of family separation which currently characterises Polish migrants' family life. The notion of transnational family life is explored in relation to post-accession Polish migrant workers in the UK who maintain active cross-border links with family and kin despite being separated by the migration process. The fundamental point which the discussion seeks to stress is that the model of family reunification espoused by the free movement of persons provisions does not fit with the current patterns of migration from the EU8 Member States. Given that the predominant image, revealed in the secondary statistical data and confirmed by this research, is that of a single worker spending temporary periods of time abroad, perhaps receiving assistance from more 'distant' relatives and kin who have settled in the host state but leaving any immediate family in the state of origin, the notion of the transnational family better reflects EU8 migrants experience of family life.

Chapter Six builds on the discussions in the previous chapters by examining the relevance of the concept of Union citizenship to EU8 migrants. Given that mobility rights and the contingent social entitlement of workers and their families flowing from the free movement of persons provisions are a central facet of Union citizenship, the chapter explores the impact of the restricted mobility rights on the citizenship status of nationals from the EU8 countries. It opens with a discussion of the meaning of Union citizenship and the significance of free movement to the concept.

Then there is examination of the impact of the transitional restrictions on the traditionally privileged category of economic migrant workers who, inevitably, occupy a downgraded citizenship status during the transitional period. The discussion then moves on to look at the potential significance of Article 18 EC and the broader free movement rights that flow from it to EU8 nationals. In examining the links between the citizenship status of EU8 nationals and the different sites of free movement in the EC Treaty there is also scope to trace the development of Union citizenship from a predominantly market-based status to a more inclusive and social conception of citizenship with scope for economically inactive migrants to gain a degree of access to the status and the valuable rights that append to it. Finally, the chapter links with earlier parts of the thesis by focussing specifically on the UK as a frame of reference. There is analysis of the potential impact of the developing law on citizenship and its application to EU8 migrants who are not economically active in the context of the UK post-accession rules which seek to deny new arrival workseekers and former workers rights of residence and equal treatment. This includes a case study on migrant workseekers and speculates on the impact of more recent citizenship caselaw, as well as the recent Directive on citizens' free movement rights. Overall, the analysis highlights the discrepancy between the objective of bringing Europe 'closer to it citizens' and the exclusion of the new citizens from the full package of citizenship entitlement.

Chapter Seven, the concluding chapter, draws together the material and analysis from the preceding chapters to emphasise how the complexity endemic in the legal framework has translated to the migrants' practical experience of living and working in the UK. As a result of the interaction between the various layers of legal context considered throughout the thesis (the transitional arrangements contained in the Accession Treaty; the free movement of persons and formal citizenship provisions as interpreted

by the Court of Justice; the domestic implementation of transitional rules; and the migrants' engagement with various actors connected to the system), EU8 migrants have experienced a novel typology of citizenship in the aftermath of the 2004 enlargement. Primarily, the self-interest of EU15 Member States, employers and agencies has been a principal determinant of this group's status and experience. The accession of Bulgaria and Romania is incorporated into the debate as the chapter reflects on the position of both the EU and the UK in relation to the next round of enlargement. The discussion also ponders the potential for the transitional arrangements to have a longer-term impact on the citizenship status and identity of those they address (beyond the expiry of the transitional period). Finally, the chapter reflects generally on the research methodology and offers a perspective on potential future avenues of research in the area.

Chapter two

DEVELOPING A SOCIO-LEGAL METHODOLOGY TO EXPLORE THE STATUS AND EXPERIENCES OF POLISH MIGRANT WORKERS

1. Introduction

The concern in this chapter is to provide a detailed overview of the methodology adopted to explore the legal status and experiences of EU8 migrant workers during the operation of the transitional arrangements. By combining doctrinal legal analysis with forms of empirical investigation predominantly associated with social-science based disciplines, the research hoped to develop an innovative approach to the study of migration in the aftermath of EU enlargement. In particular, the adoption of a qualitative and socio-legal methodological approach has sought to uncover the impact of EU law and policy on the migrants themselves.

The empirical research essentially provides a case study of Polish migrants who worked in the UK in the post-accession environment. This complements the legal analysis which applies more broadly to the wider category of EU8 migrant workers. Semi-structured, qualitative interviews were conducted with 20 Polish migrants (11 female; nine male) working in the UK in 2004 and 2005. These respõndents had either moved within the year leading up to the date of the 2004 enlargement (that is, from May 2003) or following Poland's accession in May 2004. Two focus groups (of four and five participants) were also carried out with male bus drivers working in Scotland. In order to add a cross-national element to the empirical work and to gain a greater understanding of the complexities relating to post-accession migration from Poland, qualitative interviews were also carried out in Poland (in August 2005) with 15 return migrants

(five male; ten female) who had moved to the UK (during the same time period as those workers mentioned above) but who had since returned to Poland. A further interview was conducted with a woman who had moved to the UK as the spouse of a migrant worker (they had since returned to Poland). Overall, 44 respondents had, at some point following accession, held the status of migrant worker in the UK and a further one had resided there as the spouse of such a worker.

The empirical work preceded the analysis, or 'theory building', at the conceptual-abstract level; therefore the reasoning was inductive in nature.[1] The qualitative interviews with migrants, agencies and key informants did not set out to 'test' any pre-determined theory regarding the impact of the EU legal framework on free movement and migration. Rather the data was used to construct a theory; the theory was 'grounded' in the data collected.[2] Glaser and Strauss, who first developed grounded theory stressed the importance of developing analytical interpretations of data throughout the research process, and of refining the developing theoretical analysis.[3] Important facets of the grounded theory approach include simultaneously collecting and analysing data, coding, using comparative methods, memo writing and sampling to refine the emerging theoretical ideas:

'Grounded theory methods do not detail data collection techniques; they move each step of the analytic process toward the development, refinement, and interrelation of concepts'.[4]

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[1] De Vaus, D., *Research Design in Social Research*, (London: Sage, 2001), 6

[2] Glaser, B.G. and Strauss, A.L., *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Chicago: Aldine, 1967)

[3] *Ibid.*

[4] Charmaz, K., 'Grounded Theory: Objectivist and Constructivist Methods' in Denzin, N.K. and Lincoln, Y.S. (Eds.), *Strategies of Qualitative Inquiry,* (London: Sage, 2003), 251

An application of this grounded approach in the present study is demonstrated by the use of purposive or theoretical sampling. For example, during the interviews in the UK many of the migrant respondents mentioned that they had enlisted the services of an employment agency to help them find work. As a result, the decision was taken to also interview representatives from a small number (five) of such agencies in Poland. These interviews were designed to explore further the role played by agencies in facilitating the movement of Polish nationals. A further three 'key informant' interviews were carried out at various points throughout the course of the research when it was felt that the research could benefit from such additional input. One such interview was with a manager of a transport company that had recruited a high number of Polish workers; another was with a legal practitioner with experience of advising migrants from the central and eastern European area; and a further key informant had worked on a project in Poland that ran a telephone helpline designed to provide information about the post-accession system in the UK.

The remaining discussion in this chapter seeks to present and explain both the practical and theoretical details connected to the planning and execution of the research project, such as accessing a sample of respondents and conducting the qualitative interviews, and also to place the research strategy in its particular context. The discussion begins, therefore, with examination of the key theoretical characteristics that guide the research. This involves exploration of the socio-legal, cross-national and qualitative nature of the investigation. The chapter then moves on to consider the practical research strategy itself and examines the various methods of data collection utilised. Due to the significance of its role in the research design the qualitative interview and various issues related to it is analysed in greater detail. Finally, the various ethical considerations that

guided the design, implementation and analysis of the research project are considered.

2. The research context: socio-legal, qualitative and cross-national

There are various theoretical and methodological perspectives that inform and shape the approach taken to the research on which this thesis is based. Particularly, it is a distinctly socio-legal piece of research with a cross-national dimension.

2.1. The project's socio-legal focus

As yet there is no agreed definitive understanding of the meaning of the term 'socio-legal'; however it is generally understood to refer to approaches that are multi or inter-disciplinary in nature:

> *'Our theoretical perspectives and methodologies are informed by research undertaken in many other disciplines. Traditionally socio-legal scholars have bridged the divide between law and sociology, social policy and economics'.*[5]

Essentially, socio-legal scholars endeavour to take legal study outside the legal 'office' to investigate 'law-in-society'.[6] Importantly, this often involves evaluating the law and its operation by applying some form of data collection techniques to the phenomenon under consideration. This particular inquiry adopts both legal and social-science based strategies to evaluate the migration experience and status of EU8 migrant workers. The aim is to examine the multi-level legal framework governing the free movement of persons from the EU8 Member States and to place these

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[5] As quoted on the Socio-Legal Studies Association website < http://www.kent.ac.uk/slsa > (last accessed 9 November 2006)

[6] Bradshaw, A., 'Sense and Sensibility: Debates and Developments in Socio-Legal Research Methods' in Thomas, P.A. (Ed.), *Socio-Legal Studies*, (Aldershot: Dartmouth, 1997), 99

findings into context by uncovering the social and personal impact of such legal measures.

A critical component of the study, given the importance of data collection to socio-legal research, is the use of empirical research methods which complement the analysis of the legal framework. In this instance the series of qualitative interviews conducted with Polish migrant workers, employment agencies and key informants constitute the main empirical component. Baldwin and Davis have described empirical research in law as:

'*...the study, through direct methods rather than secondary sources, of the institutions, rules, procedures, and personnel of the law, with a view to understanding how they operate and what effects they have'.*[7]

This empirical element is important as it illustrates the application of social science methods to legal phenomenon. The result of this combination can be the exposure of the nature or consequences of particular laws or legal regimes. In the case of this particular research the desired outcome is to highlight some of the human consequences of migration under the legal regime governing free movement in the aftermath of enlargement. The research, therefore, combines examination of the formal legal framework shaping the citizenship status of EU8 migrants with empirical investigation of the migrants' practical experiences. This empirical element complements the legal analysis but also contextualises this more traditional exploration by providing some 'real life' examples of how the law shapes the migration process and experience. Cotterrell emphasises this idea of

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[7] Baldwin, J. and Davis, G., 'Empirical Research in Law' in Cane, P. and Tushnet, M. (Eds.), *The Oxford Handbook of Legal Studies,* (Oxford: Oxford University Press, 2003), 880

exposure and suggests that socio-legal scholarship carries out the vital function of 'illumination'. Essentially such research provides a deeper insight into the law as it demonstrates 'what law as an institutionalised doctrine means in the varied local contexts of social life, where its ultimate value and significance must be judged'.[8] Socio-legal research is concerned with giving the law a social context.

2.1.1. EU-level socio-legal analysis

This research project involved socio-legal analysis of various levels of legal regulation. The law and policy of the European Union, especially that relating to enlargement, provides the primary focus of the investigation. The national law of the Member States, however, constitutes another important tier of analysis contributing to a fuller understanding of the status of EU8 migrant workers.

As regards the EU-level analysis, the transitional arrangements on the free movement of persons contained in the Treaty of Accession 2003 constitute the first tier of evaluation. It is not only the transitional mobility restrictions that provide the EU perspective, however, as broader provisions of Community law, such as the free movement and citizenship provisions, also constitute important pillars within the analysis. This research, then, represents a genuine attempt to apply a socio-legal methodology to EU legal research. In doing so it hopes to complement the body of academic literature on the topics of free movement and citizenship but also to provide a new perspective on an area that is often dominated by traditional doctrinal research.

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[8] Cotterrell, R., *Law's Community: Legal Theory in Sociological Perspective,* (Oxford: Clarendon Press, 1995), 296

Shaw argues that legal scholars need to embrace a more inter-disciplinary approach when studying European Union issues:

'There is still relatively little published work on EC law which does not take a predominantly traditional and doctrinal approach'.[9]

This author goes on to make the point that legal studies concerning the issue of Europe have developed away from the broader, more mainstream, 'European studies'.[10] The result of this isolated development is the predominance of the 'doctrinal approach' in EU legal scholarship. Indeed, this is a point that can be made as regards legal studies in general. Arguably, the aim of a more desirable 'European Union legal studies' approach is to understand law in its 'broadest and most flexible sense'[11] and to 'move beyond the traditional doctrinal paradigm'[12] by incorporating both legal theory and broader notions of European studies. This study attempts to adopt this more inclusive approach in that it seeks to combine the benefits of legal scholarship on the EU with 'the tools of inter-disciplinary scholarship'.[13]

Free movement of persons constitutes a major part of EU law and the right to move to another Member State to take up employment represents one of the tangible ways in which people engage with the EU. Consequently, examination of migrants' experiences in the various Member States can enhance our understanding of citizenship and illustrate the personal impact of EU law and policy. In keeping with the focus of this study, it is the

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[9] Shaw, J., 'Introduction', in Shaw, J. and More, G. (Eds.), *New Legal Dynamics of European Union*, (Oxford: Clarendon Press, 1995), 1, 2

[10] *Ibid.*, 10

[11] *Ibid.*

[12] *Ibid.*, 5

[13] *Ibid.*, 1

restriction of EU8 nationals' access to the right of free movement which provides the backdrop; therefore, the socio-legal methodology is designed to explore the impact the transitional mobility restrictions have on the groups' experiences and citizenship status (and hence engagement with the EU).

There are some excellent examples of socio-legal research projects examining aspects of EU law (aspects of citizenship in particular).[14] Often, however, empirical work is practically difficult to carry out owing to the size of the EU and the various cultural and linguistic differences across the Member States. Furthermore the EU itself, and the law it produces, is a more problematic entity to apply a socio-legal methodology to than that of a domestic legal system:

'[The EU is] *a particularly challenging object of study for social scientists in terms of theory, hypotheses, and research design, as well as in terms of access to qualitative and quantitative data for the testing of such hypotheses'.*[15]

While the EU is the frame of reference the law and policy it creates must filter through the various national legal systems of the Member States and thus its implementation is not homogenous in nature. It is for this reason that the research adopted a multi-level analysis of the law regulating migration from the EU8 Member States. As a result of the design of the transitional arrangements, which grant the Member States a wide margin of

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[14] See Ackers, L., *Shifting Spaces: Gender, Citizenship and Migration in the EU,* (Bristol: Policy Press, 1998); Ackers, L. and Stalford, H., *A Community for Children? Children, Citizenship and Internal Migration in the EU,* (Aldershot: Ashgate, 2004); Ackers, L. and Dwyer, P., *Senior Citizenship? Retirement, Migration and Welfare in the European Union,* (Bristol: The Policy Press, 2002)

[15] Nyikos, S.A. and Pollack, M.A., 'Researching the European Union: Qualitative and Quantitative Approaches' in Börzel, T.A. and Cichowski, R.A. (Eds.), *The State of the European Union: Law, Politics and Society,* Vol. 6, (Oxford: Oxford University Press, 2003), 313

discretion,[16] the implementation of these restrictions across the EU15 Member States also constitutes an important point of reference for the research. In particular, the domestic implementing law of the UK has served as a case study of a post-enlargement legal regime.[17]

In addition to the observation that there is a lack of socio-legal or inter-disciplinary work in EU research there have also been suggestions that there has not been a great deal of legal comment on enlargement generally. For example, Maresceau argues that 'for one or other strange reason, only very few EU law academic experts have been concentrating on EU enlargement'.[18] It would be incorrect to suggest that the academic literature is completely devoid of scholarship focussing on enlargement.[19] To a large extent, of course, a perceived lack of legal comment on enlargement is symptomatic of the timing of this research project and the reality that enlargement is an ongoing process. The dominance of political and economic commentary in the accession process, however, does seem to be evidenced by the abundance of research reports which attempted to forecast post-enlargement migration from the EU8 countries.[20] On the other hand, the free movement provisions have attracted a vast amount of EU legal scholarship. A socio-legal approach, therefore, appears particularly apt for a research project on migration in the enlarged EU as the research can draw on existing sources (from law and other disciplines)

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[16] This is discussed further in chapter three

[17] Furthermore, within the UK there exist again different levels of analysis. For example, in some regions there is much greater availability of support infrastructures such as migrant organisations

[18] Maresceau, M., 'Pre-accession', in Cremona, M., (Ed.), *The Enlargement of the European Union,* (Oxford: Oxford University Press, 2003), 9

[19] In particular see Hillion, C. (Ed.), *EU Enlargement: A Legal Approach,* (Oxford: Hart, 2004)

[20] Kaczmarczyk, P., 'Migration in the New Europe: East-West Revisited' in Górny, A. and Ruspini, P. (Eds.), *Migration in the New Europe: East-West Revisited* (New York: Palgrave Macmillan, 2004), 65; Bocri, T. and Brücker, H., *The Impact of Eastern Enlargement on Employment and Wages in the EU Member States*, (Berlin: European Integration Consortium, 2000); Wallace, C., *Migration Potential in Central and Eastern Europe*, (Geneva: International Organisation for Migration, 1998)

but also make a unique contribution by examining the topic from a fresh perspective.

2.2. Adoption of a qualitative approach

'Qualitative' is a label that covers a wide range of research methods, such as observation, documentary analysis and interviews, and is utilised in many different epistemological approaches. Broadly, a commitment to qualitative research demonstrates a desire to examine social phenomenon in an in-depth and rich fashion; the emphasis is on 'why' a particular phenomenon occurs rather than 'what' occurs. The following description is provided by Denzin and Lincoln:

> *'Qualitative research involves an interpretive, naturalistic approach to the world. This means that qualitative researchers study things in their natural settings, attempting to make sense of, or to interpret, phenomena in terms of the meanings people bring to them'.*[21]

This research project aims to gain an insight into the phenomenon of post-EU enlargement migration from the perspective of the migrants themselves. The objective is to reveal and understand some of the human consequences of migration that are often hidden behind migration statistics. It has its province in 'the world of lived experience'.[22] Migration research has largely been dominated by studies that rely on statistical data. Indeed, Singleton has pointed to the 'positivist imperative' that results in researchers continuing to favour the quantitative approach over others.[23] There have been attempts by some researchers, notably

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[21] Denzin, N.K. and Lincoln, Y.S., *Collecting and Interpreting Qualitative Materials* (2nd Ed.), (London: Sage, 2003), 5

[22] *Ibid.*, 12

[23] Singleton, A., 'Combining Quantitative and Qualitative Research methods in the Study of International Migration', (1999) 2(2) *International Journal of Social Research Methodology*, 151, 156

Ackers and Stalford, however to move analysis of migration away from disciplines such as Geography and Demography. These researchers have taken a qualitative approach to migration research, focussing on the migrants' own experiences and interpretation of migration.[24] This study follows such research in attempting to 'get behind the numbers' and look at the real impact of EU law on the ground from the perspective of those the law seeks to address.

Of course, the use of both qualitative and quantitative research has specific advantages and drawbacks. Advocates of qualitative research techniques accept (and sometimes emphasise) the value-laden or subjective nature of research. The emphasis is on the meaning and the validity of the data produced which strives to be rich in detail. In contrast, advocates of quantitative research tend to stress the importance of reliable, representative data and the replicabilty of studies is valued. Quantitative researchers emphasise the importance of seeking to achieve a degree of objectivity through analysis of variables which lend themselves to numerical measurement. Such trends are considered to be less susceptible to contamination by subjective factors.[25] The positivist school of thought is traditionally associated with quantitative research. From this perspective, social inquiry should strive to be scientific and rigorous; consequently, the criticism most widely levelled at qualitative research relates to the 'unreliability' of the resulting data. The data is often limited to a very specific situation in terms of sample and location. In this

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[24] See for example Ackers and Stalford, *Op. Cit.* n.14; Stalford, H., 'The Citizenship Status of Children in the European Union', (2000) 8(2) *International Journal of Children's Rights*, 101; Ackers, *Op. Cit.* n.14; Reinsch, P., *Measuring Immigrant Integration: Diversity in a European City*, (Aldershot: Ashgate, 2001); Heer, D., *Undocumented Mexicans in the United States*, (Cambridge: Cambridge University Press, 1990); Romaniszyn, G.K., 'The Invisible Community: Undocumented Polish Workers in Athens', (1996) 22(2) *New Community*, 321; Iosifides, T., 'Immigrants in the Athens Labour Market: A Comparative Survey of Albanians, Egyptians and Filipinos' in King, R. and Black, R. (Eds.), *Southern Europe and the New Immigrations*, (Brighton, Sussex Academic Press, 1997)

[25] Denzin and Lincoln, *Op. Cit.* n.21, 13

instance, of course, the data is based on interviews with Polish migrants only (as opposed to a sample of migrants from all of the EU8 Member States). On the other hand, quantitative research produces data that is vast in breadth but not depth; essentially it neglects the social and cultural construction of the relevant variables to a greater extent.[26]

Despite the overall commitment to qualitative research, secondary quantitative data is used throughout the thesis to give background detail and geographical context. In particular, statistics from the UK's Workers' Registration Scheme are used to point out trends in the personal characteristics and employment patterns applicable to EU8 migrant workers in the UK more broadly.[27] Thus, this research adopts the pragmatic view espoused by Silverman:

'Qualitative research does imply a commitment to field activities. It does not imply a commitment to innumeracy'.[28]

Qualitative and quantitative techniques can be effectively combined; here the triangulation of methods enables a more rounded picture of the migration experience in the enlarged EU to emerge. Nyikos and Pollack support this viewpoint and state that triangulation can result in a far richer understanding of phenomenon emerging.[29] Thompson puts it as such:

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[26] Silverman, D., *Interpreting Qualitative Data: Methods for Analysing Talk, Text and Interaction* (2nd Ed.), (London: Sage, 2001), 29. For a contemporary perspective on the tensions between qualitative and quantitative research see Denzin, N.K., Lincoln, Y.S., Giardina, M.D., 'Disciplining Qualitative Research', (2006) 19(6) *International Journal of Qualitative Studies in Education*, 769

[27] Use of these statistics is discussed below

[28] Silverman, D., *Op. Cit.* n.26, 35

[29] Nyikos and Pollack, *Op. Cit.* n.15, 320

'Neither quantitative nor qualitative research can reach its full potential without drawing on each other's strengths'.[30]

As a result of the use of broader statistics to complement the narrower focus of the empirical research it is anticipated that, in spite of the qualitative data being typical of Polish respondents, the wider research conclusions are relevant also to the situation of EU8 migrant workers.

2.3. The cross-national nature of the research

In a seminal article on cross-national research Kohn defined it as 'any research that transcends national boundaries'. More specifically he went on to restrict the concept to 'studies that utilize systematically comparable data from two or more nations'.[31] Hantrais and Mangen, whose work has developed the theoretical base of cross-national comparative research immensely, suggest that certain requirements should be fulfilled if research is to be accepted as cross-national:

'[The researchers] *should set out to study particular issues or phenomena in two or more countries with the express intention of comparing their manifestations in different socio-cultural settings, using the same research instruments, either to carry out secondary analysis of national data or to conduct new empirical work'.*[32]

The research on which this thesis is based encompasses cross-national elements relating to both the secondary analysis that informs it and the

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[30] Thompson, P., 'Researching Family and Social Mobility with Two Eyes: Some Experiences of the Interaction between Qualitative and Quantitative Data', (2004) 7(3) *International Journal of Social Research Methodology*, 237, 241

[31] Kohn, M.L., 'Cross-National Research as an Analytic Strategy' (American Sociological Association, 1987 Presidential Address), (1987) 52(6) *American Sociological Review*, 713, 714

[32] Hantrais, L. and Mangen, S., 'Method and Management of Cross National Social Research' in Hantrais, L. and Mangen S. (Eds.), *Cross-National Research Methods in the Social Sciences*, (New York: Pinter, 1996), 1

qualitative empirical work that was carried out. Although the UK framework constitutes the main second-tier of analysis and served as a case study on the experiences of Polish migrant workers, the various transitional arrangement implementing regimes across the EU15 are examined to provide a more comprehensive and comparative understanding of EU8 nationals' free movement rights.[33] Furthermore, although the empirical work was essentially a case study examining the experiences of Polish migrant workers in the UK (as opposed to a selection of EU15 Member States) this phase of the research is also characterised by a distinct cross-national dimension. Qualitative interviews were not only conducted with Polish nationals working in the UK but also with return Polish migrants in Poland. This group had worked in the UK in the post-enlargement climate but had since returned to Poland. Interviewing both groups about, *inter alia,* their current employment experiences and their enjoyment of family life enabled comparisons to be drawn between the experiences of Polish migrants in the UK and in their country of origin following return.[34]

2.3.1. Contextual issues raised by cross-national EU research on migration

When attempting to research in a cross-national fashion the issue of context is extremely significant. Context broadly refers to the circumstances in which the research takes place; more specifically it is a 'source of values and reference points' that permeate the research matter.[35] In a study such as this which sets out to examine EU law and migration there are a number of contextual factors that influence the research process. EU law itself is multi-dimensional and operates on different layers:

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[33] This is discussed in chapter three, section 2.2

[34] This is particularly evident in chapter four which examines the implications of de-skilling following initial outward migration and upon return to Poland

[35] Ackers and Stalford, *Op. Cit.* n.14, 14

'By comparison with established domestic political systems, the EU is a complex, multinational, and multilingual political system, characterised by a vertical and horizontal separation of powers, and operating across several European capitals'.[36]

The national systems of the Member States which implement the law not only inject different legal variances, which impact on the manner in which EU law and policy filters through, but also different cultural, linguistic and socio-economic variables that shape the relevant context. These contextual factors are of heightened significance when researching migration and EU law as 'it is not only the policies themselves that operate transnationally but also the recipients of policy'.[37] Clearly, the EU is comprised of 25 different states which vary considerably in terms of culture, language, historical roots and, to an extent, economic status. The Union does not have the shared sense of history and principles that, for example, the United States of America have; diverse dynamics are at work within each jurisdiction. A study of migration necessarily travels across national boundaries and hence needs to have an appreciation of the various national cultures.

The approach to the issue of context adopted in this study resembles the societal approach advocated by Hantrais.[38] This strategy is the result of an attempt to develop a compromise between the traditionally polarised 'universalist' and 'culturalist' approaches which are regarded by Hantrais as having had a stifling effect on the progression of cross-national research by adopting very rigid principles on the issue of context. While

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[36] Nyikos and Pollack, *Op. Cit.* n.15, 313

[37] Ackers and Stalford, *Op. Cit.* n.14, 14

[38] Hantrais, L., 'Contextualization in Cross-National Comparative Research', (1999) 2(2) *International Journal of Social Research Methodology*, 93

universalists advocate the view that social phenomena can exist independently of specific context, culturalists believe that all research is very much culture bound.[39] The societal approach, however, suggests that all social phenomena must be examined with consideration being given to the particular political, cultural and economical context in which the issue under investigation is situated. If it is accepted that both actors and the structures in which they exist are socially constructed and cannot be disentangled then context can be employed as an 'explanatory variable' and does not become a bar to comparison.[40] Essentially, this is because there is an element of uniformity flowing from the reality that all forms of social phenomenon are part of a national political, economic and cultural structure and dynamic.

Hantrais identifies 'possible contexts'[41] within which phenomena can be studied and the one that is obviously most closely connected to the current research is the 'legal framework'. The EU-level legal framework clearly provides the overall context to the research while the domestic implementation, of the UK in particular, provides additional layers of context. It is important, however, for legal researchers not to neglect the social aspects of migration. Ackers and Stalford express disappointment with the failure of many lawyers to take into account the wider social context in which the law is transposed and put into practice.[42] In this research, then, efforts were made to recognise the varying contexts of the EU15 Member States as regards the implementation of the transitional periods. Using the societal approach, it was possible to compare the various post-enlargement free movement regimes while drawing out

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[39] *Ibid.*, 94-96

[40] Ackers and Stalford, *Op. Cit.* n.14, 16

[41] Hantrais, *Op. Cit.* n.38, 101

[42] Ackers and Stalford, *Op. Cit.* n.14, 20

particular national peculiarities which influenced the existence of that very national system.[43] Of course, the nature of the empirical work has the effect of rendering elements of the findings context-specific. To some extent, this is a consequence of undertaking empirical research as a sole doctrinal researcher with limited resources: it was simply not realistic to undertake more wide-ranging empirical investigation encompassing a greater number of Member States. Thus, the case study on Polish workers complements the legal analysis which applies more broadly to the wider category of EU8 migrant workers and includes examination of the EU15 (as opposed to the UK alone).

Finally on the issue of context, it is crucial to recognise that the migrants as movers have themselves been exposed to varying cultures, depending on how many times they have migrated and where they have moved in the past.[44] It is impossible to completely 'capture' the influence that context and culture wields over the research process. In essence it is vital for researchers to honestly discuss the 'messiness' of the research process. Problems encountered must be explicitly acknowledged to avoid research being portrayed as a 'mystical' practice.[45] While this section has emphasised the broad approaches which inform the research design, the following section seeks to discuss further the practical, sometimes 'messy', implementation of the methodology.

3. Putting the research strategy into action

The aim here is to consider the methods of data collection that were used to implement the research: doctrinal analysis of the legal provisions;

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[43] An obvious example is the desire of the UK government to fill labour market shortages influencing the implementation of the Workers' Registration Scheme (discussed in chapter three)

[44] Ackers and Stalford, *Op. Cit.* n.14, 28

[45] Stanley, L. and Wise, S., *Breaking Out Again: Feminist Ontology and Epistemology*, (London: Routledge, 1993)

secondary analysis of migration-related statistics; and interviews with Polish migrant workers, agencies and key informants.

3.1. Analysis of legal and policy framework

In order to provide an in-depth representation of the formal legal status of EU8 migrants, multi-level legal analysis is carried out. This focuses on both the provisions of Community law and the domestic law of the UK which shape the group's status during the transitional period. Inevitably the starting point is the Treaty of Accession and the detail of the transitional arrangements on the free movement of persons. For this analysis to have any meaningful impact, however, it is paramount to juxtapose this transitional legal regime with broader Community law that governs the free movement rights, and hence citizenship status, of EU nationals generally. Thus, the free movement of persons provisions and the formal citizenship provisions in the EC Treaty also constitute an important point of reference.

The way in which the transitional arrangements are designed bestows a considerable degree of discretion upon the EU15 Member States. Consequently, the exact nature and extent of EU8 migrants' rights to access the labour markets of the EU15 differ depending on the individual Member State at issue. The national implementation of the transitional arrangements therefore has a significant input into shaping the entitlement, experience and status of EU8 nationals. For this reason the research focuses also on the specific context of the UK legal framework put in place to regulate EU8 migration following enlargement. Exploration of these two legal regimes, and the interrelationship between them, evidences the formal framework and new migration space inhabited by EU8 nationals.

3.2. Secondary examination of migration-related statistics

Statistics, from various sources, are drawn on throughout the thesis to complement the qualitative analysis. This statistical information is included in order to provide some broader context to the more focussed qualitative investigation.

The main secondary source relied on in this respect is the Accession Monitoring Report which details the statistical data connected to the operation of the UK Workers' Registration Scheme (WRS). The report has been published quarterly by the UK government since the May 2004 EU enlargement and provides details about those EU8 nationals that have registered as workers under the WRS.[46] The reports have been an invaluable source of information on the employment activity of EU8 migrants across various occupations (including hours of work and wages), the characteristics of the EU8 workers in the UK (in terms of factors such as age, gender and percentage of those with dependants in the UK), and the extent to which EU8 workers have sought access to certain welfare benefits in the UK.

In spite of the value of this information there are certain methodological features of the data included in the Accession Monitoring Report that need to be acknowledged. First, the data covers only those EU8 workers who have formally registered their employment on the Workers' Registration Scheme since 1 May 2004. It does not include within its ambit the (unknown) number of EU8 migrants who have taken up work in the UK without fulfilling this registration requirement. Neither does it measure the number of EU8 migrants who do not fall within the category of 'employed' (such as the self-employed). It does, however, include some students as

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[46] For the latest report see Joint Report by the Home Office, Department for Work and Pensions, Inland Revenue and Office of the Deputy Prime Minister, *Accession Monitoring Report, May 2004-June 2006*, 22 August 2006. The reports from the series can be accessed at <http://www.ind.homeoffice.gov.uk/aboutus/reports/accession_monitoring_report> (last accessed 8 November 2006)

EU8 migrant students who work part-time are not exempt from the registration requirement. Furthermore, the data from the WRS is by no means an estimate of net migration to the UK from the EU8 Member States as it only presents a cumulative figure of those that have applied to the scheme from the date of accession. It does not measure to any extent the outflow of EU8 migrants as there is no requirement for those who leave to 'de-register' from the scheme.[47] It would appear then that the figure of 427,000 (the number of WRS applications recorded between 1 May 2004 and 30 June 2006) overestimates the actual number of EU8 migrant workers in the UK at any one time and, resultantly, that reliance on the figures may be misleading.[48] Certainly, compared to the International Passenger Survey's estimation that, in 2005, the net inflow of EU8 migrants 'coming into the UK for a period of at least a year' was 64,000,[49] the WRS statistics appear to significantly overestimate the number of EU8 migrant workers in the UK.[50] On the other hand, one of the findings of this predominantly qualitative study has been that considerable numbers of EU8 nationals working in the UK have, for one reason or another, not registered their employment.[51] Therefore, the WRS statistics clearly do not present an accurate representation of the number of EU8 migrant workers in the UK. Despite these limitations information from the Accession Monitoring Report is included in the thesis as it represents a wide ranging data-set of extreme relevance to the research topic. At the very least, it is a

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[47] Notes on the data are provided in the report, see *Accession Monitoring Report, Ibid.* 3

[48] Particularly since it is common for many EU8 migrants to migrate for a short temporary period, see chapters four and five

[49] Reported in National Statistics, *News Release: Over 500 A Day Gained Through Migration to the* UK, (London: National Statistics, 2006). Unlike the WRS data the International Passenger Survey does encompass both in-flow and out-flow

[50] Although, the International Passenger Survey has its own specific methodological drawbacks. See Rendall, M.S., Tomassini, C. and Elliott, D.J., 'Estimation of annual international migration from the Labour Force Surveys of the United Kingdom and the continental European Union', (2003) 20(3-4) *Statistical Journal of the United Nations Economic Commission for Europe*, 219

[51] See chapter three

helpful tool that can be used to point to general trends in the profile of the EU8 workers and in the type of work carried out by those who have registered.

In addition to the data from the Accession Monitoring Report various statistics from Commission reports and the Statistical Office of the European Communities (Eurostat) are referred to.[52] The data, although useful, is again treated with the necessary caution that official statistics typically demand.[53]

In the context of statistical data on migration there is perhaps even greater need to question the reliability of the patterns that are apparently shown. Often the statistics obtained from Eurostat are comprised of national data that individual Member States provide on a regular basis. Singleton, herself a Eurostat statistician, draws attention to the fact that:

'The data, supplied by national statistical institutes and ministries, are products of more than 60 different legislative, administrative and data collection systems across the EU'.[54]

The significance of this is that the data from across the EU is not harmonised; definitions, such as the key concept of international migration, are not comparable across the Member States. Singleton points out that the national definitions vary considerably as there is no unified approach to the measurement of migration.[55] Consequently, existing methodological limitations in the data at national level are transferred to the collective

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[52] Chapter three refers to data from the European Labour Force for example

[53] Levitas, R. and Guy, W., 'Introduction' in Levitas, R. and Guy, W. (Eds.), *Interpreting Official Statistics*, (London and New York: Routledge, 1996), 6

[54] Singleton, *Op. Cit.* n.23, 151

[55] *Ibid.*, 152

European level. Kupiszewski has acknowledged the difficulties in compiling comparable statistical information on migration and, by way of example, emphasises the absence of people who migrate for temporary periods from statistical data sets such as those who 'commute' cross-border or migrate for seasonal employment. The statistics take no account of this 'incomplete' migration nor do they represent the existence of illegal migrants in the country in question.[56]

Despite such criticism it is suggested that statistics can play a useful role in showing general trends in migratory movement and employment patterns thus helping to sketch a profile of migrants' characteristics on a wider scale. As Ackers and Stalford found in their research on the migration experiences of children, statistics can place the Community law and the qualitative research with the migrants themselves into a 'geographical context'.[57] As such, by combining qualitative and quantitative data each approach can complement the other and, therefore, fulfil a 'checks and balances' role. Here the statistical information is used to evaluate parts of, and develop, the analysis flowing from the qualitative data.

3.3. Qualitative semi-structured interviews: planning, undertaking and analysing

This section examines in greater detail the issues that arise in relation to the qualitative interviews. It discusses practical matters such as finding a sample of respondents then moves on to consider the interviews themselves, in particular, the impact of the interactional relationship between interviewer and respondent on the resulting data is examined.

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[56] Kupiszewski, M., 'How Trustworthy are Forecasts of International Migration between Poland and the European Union?', (2002) 28(4) *Journal of Ethnic and Migration Studies*, 627, 628

[57] Ackers and Stalford, *Op. Cit.* n.14, 15

3.3.1. Gaining access to a sample of respondents

The sample of respondents, the total of which is 53, that took part in this research was outlined at the outset of this chapter. Interviews (including two focus groups) were conducted with Polish migrant workers in the UK; return migrants in Poland who had worked in the UK; representatives of Polish employment agencies; and, other 'key informants'.

The characteristics of the Polish respondents, and the work carried out by them, are discussed in greater detail throughout the thesis as the particular focus of the substantive chapters demand. For now, it is sufficient to note that the sample is mainly comprised of migrants working within the realm of the service sector (for example as hotel and restaurant staff, cleaners, drivers and shop workers). Arguably, the service sector is an interesting area to examine in relation to migration because of the structural dynamics at work. Hjarnø[58] has traced changes in the international division of labour which have led to a situation whereby there is a concentration of migrant workers in the service sector. This trend for de-industrialisation has led to a rise in unemployment levels in the former industrial centres. Simultaneously however, restructuring has also led to the development of a specialised business sector 'built on the ruins of the former industrial centres'.[59] Hjarnø points out that this restructuring created employment not only for the highly skilled specialists but also for the lower skilled workers who, essentially, 'service' these specialists through cleaning, working in hotels and restaurants, and transport. This service sector dominates in the age of post-modern capitalism. As a group often discriminated against within employment, migrants often find themselves

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[58] Hjarnø, J., *Illegal Immigrants and Developments in Employment in the Labour Markets of the EU*, (Aldershot: Ashgate, 2003), 5

[59] *Ibid.*

working in this sector.[60] Other research projects have relied on the service sector as a window through which to obtain an insight into the migration experience. Research by Waldinger and Lichter, for example, concentrated on the employment of migrants in the low-skilled sector in Los Angeles. In particular they examined work in hotels, restaurants and hospitals.[61] Their focus, however, was on the actual employment practices and they carried out in-depth interviews with the employers as opposed to the migrants themselves.

Gaining access to a sample of Polish migrants residing in the UK proved to be a time-consuming and challenging task. Obviously there was no public register or list that could act as a sampling frame from which a representative sample could be drawn. In addition it is likely that many migrants, in general, are wary of identifying themselves to a researcher due to a desire not to attract attention. Clearly, as a result of the absence of a representative sample, the research findings cannot be relied on to make 'scientific' generalisations to the wider population from which the sample was drawn.[62] Finding such a sample, however, is often unrealistic for small-scale or qualitative research.[63] Certainly it would not have been feasible in the case of this research project. In addition, due to the qualitative and in-depth nature of the research it was simply not possible to obtain a larger sample as the interview process (planning, undertaking, transcribing and analysing) was a time-consuming one. Further, as the research was very much a single-researcher PhD project there were time and resource constraints. Bearing in mind these practical limitations, the

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[60] This is certainly true of EU8 migrants, see chapter four

[61] Waldinger, R. and Lichter, M., *How the Other Half Works: Immigration and the Social Organisation of Labour*, (Los Angeles: University of California Press, 2003)

[62] In a probability sample all members of the target population have an equal and independent chance of being selected

[63] Arber, S., 'Designing Samples' in Gilbert, N. (Ed.), *Researching Social Life* (2nd Ed.), (London: Sage, 2001), 58, 62

findings and data from the interviews do indicate certain inclinations and identify patterns among Polish migrant workers. In turn, when combined with some statistical data, (tentative) inferences can be made about EU8 migrant workers. Furthermore, the sample of Polish workers, based on the statistical information in the *Accession Monitoring Report*, appears rather typical of the wider population in terms of the migrant workers' age, occupation and number of dependents. This further supports the assertion that some broader conclusions can be drawn from the qualitative data.

In an attempt to make contact with the Polish community in the UK initially letters were sent to migrant organisations, cultural centres and language schools. Visits were also made to such organisations, many of which agreed to display information about the research on notice boards. A transport company known by the researcher to have recruited in Poland was also approached. Advertisements in Polish newspapers and on Internet forums also proved to be useful methods of initiating contact with Polish migrants. While the response rate was not overwhelming, a small number of respondents did get in contact. These respondents were the first to be interviewed and many proved to be extremely valuable and informative contacts who were able to provide introductions to other respondents (both in the UK and in Poland). Ultimately, therefore, the most effective way of obtaining the sample of migrant respondents proved to be via the method of snowball sampling. This reflects the adoption of a flexible approach, often required in migration research. Zulauf, who conducted research into the occupational integration of EU migrant nurses in Britain, Germany and Spain, also concludes that snowballing would seem to afford the best methodological choice for a study on EU migration.[64] This argument is supported by research that points to the

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[64] Zulauf, M., 'Cross-national Qualitative Research: Accommodating Ideals and Reality', (1999) 2(2) *International Journal of Social Research Methodology*, 159

existence of 'networks' which 'direct and maintain international flows of people'.[65] Research by Waldinger and Lichter has examined extensively the existence and operation of migrant networks. These theorists stress how social ties between migrants 'lubricate and structure' transition from one society to the next'.[66] Migrant networks[67] provide 'durable conduits' for the flow of resources needed to give newcomers the information and social support for moving to a new home and getting started.[68]

The respondents that did come forward, then, were able to act as informants and introduce other members of the population. In turn the nominated respondents could identify further members. Interestingly, many of the respondents interviewed in the UK were able to provide contact details for individuals who had previously also been working in the UK but had since returned to Poland. This was the most appropriate method in the circumstances since the population under consideration is difficult for a non-Polish researcher to access without some 'inside knowledge'. Snowballing is also 'useful when the potential subjects of the research are likely to be sceptical of the researcher's intentions'.[69] The weakness of this approach is that the sample of respondents includes only a connected network of individuals; thus there is bias in that the sample includes nobody without links to other Polish migrants.[70] This is an especially valid point in relation to the focus groups which involved workers from the same company. This, however, is a necessary compromise which in balance adds to the vitality of the research. After all

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[65] Fawcett, J.T., 'Networks, Linkages and Migration Systems', (1989) 23(3) *International Migration Review*, 671

[66] Waldinger and Lichter, *Op. Cit.* n.61, 11

[67] Polish migrant networks are discussed in chapters three and five

[68] Waldinger and Lichter, *Op. Cit.* n.61, 11

[69] Arber, *Op. Cit.* n.63, 63

[70] *Ibid.*

it is more worthwhile to actually find and interview a significant number of migrants, than to seek to maintain some abstract notion of methodological purity.

As was mentioned in the introduction section of this chapter, the research is rooted in the grounded theory approach. From this perspective the lack of a representative sample and the use of snowball (or purposive) sampling is not problematic. Rather, it demonstrates the use of 'theoretical' sampling. This approach selects respondents on the basis of who will prove the most useful in terms of the theoretical development.[71] The selection of key informants and employment agencies is an example of this type of purposive or theoretical sampling. As the data analysis was ongoing it became apparent that employment agencies were playing a significant role in the migration experiences of many individuals. It was also clear that the research could benefit from the input of certain 'expert' or key informant respondents. Consequently, theoretical sampling was utilised to help develop emerging categories of analysis and to clarify and refine ideas. Therefore, after some of the data from the work with migrant workers had been compared and provisional coding completed, additional empirical work was conducted to examine further issues of particular interest.[72] The employment agencies and key informants were approached directly about the research. The three key informants were identified as part of the natural evolution of the research process, for example through discussion with individuals also interested in the topic (in particular other researchers and the migrant respondents). As regards the employment agencies in Poland, one of the respondent migrant workers was able to provide details of a Polish website which listed information about such

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[71] Glaser, B.G. and Strauss, A.L., *The Discovery of Grounded Theory: Strategies for Qualitative Research,* (Chicago: Aldine, 1967)

[72] Charmaz, *Op. Cit.* n.4, 265-267

agencies operating across Poland.[73] She also provided invaluable assistance with translation. Letters detailing the research were then sent to a large number of agencies in the months leading up to the planned trip to Poland and interviews were arranged with the five that responded.

Efforts were made to ensure that the respondents interviewed, both in the UK and Poland, were based in a variety of different regions so that the sample had differing experiences in respect of matters such as support infrastructures and their exposure to local employment markets. London was the first location that was targeted due to its large migrant community and the existence of many migrant organisations and centres. Interviews were also carried out in Glasgow, Bath, Manchester and Liverpool.[74] None of these locations are of a rural nature; however, there are still significant differences between them as regards the availability of 'migrant' services. For example, respondents in London and Glasgow had frequently received valuable information, assistance and cultural contact through Polish social clubs. In contrast, those in Bath spoke quite extensively about their unhappiness regarding the lack of such organisations. Interestingly, two respondents interviewed in Liverpool also spoke of their isolation. Since then, a more vibrant and active Polish community seems to have been established in Liverpool; Polish social and religious events are much more visible. Although not strictly relevant to the discussion here it does raise interesting issues relating to the progressive cultural impact that enlargement migration is having on cities and regions across the UK. Moreover, it is testament to the dynamic nature of the research which, essentially, has had to feel its way through the phenomenon of post-enlargement migration 'as it happened'. This was not a retrospective piece of research and it examined the experiences (and the law) as it unfolded.

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[73] < http://www.praca.gov.pl/index.php?page=posrednictwo&status=1b > (last accessed 9 November 2006)

3.3.2. The interview dynamic

The interviews were designed to elicit qualitative data that was rich in detail but, in order to ensure that they were focussed and that the data obtained from them was somewhat comparable, they were semi-structured in nature. Therefore, a variety of interview schedules were designed which set out a series of subject matters to be discussed with the different respondents. The interviews with the migrants were designed to explore issues such as: how they had arranged to move to the UK and the methods they had used to find work; their awareness of the law which governed their status in the UK; experiences of working in the UK; family life following migration; and, engagement with various services in the UK. The interviews with return migrants followed a similar pattern but also invited opportunities to discuss why they made the decision to leave the UK; their experiences of employment in Poland since working in the UK and their overall experience of living in the UK. The interviews with employment agency representatives were designed to explore the extent of the agencies' involvement in arranging work abroad for Polish nationals and the individual agency's approach and attitude towards the workers (prior to and subsequent to the move).

The interviews were carried out, in the main, on a one to one basis. The length of the interviews ranged from thirty minutes to two hours. On a small number of occasions couples were interviewed together (usually where one of them was not as confident in their ability to express themselves in English).[75] In order to ensure the safety of the researcher, who organised and carried out the interviewees alone, the decision was made to carry out the interviews in public places. Although, those

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[74] In Poland interviews took place in Warsaw, Krakow, Wroclaw, Bydgoszcz, Torun and Szczecin

[75] The 'language issue' is discussed below in section 3.3.3

respondents for whom it was more convenient to be interviewed in work (such as employment agency representatives and key informants) often were able to arrange for a quiet meeting room to be available. Otherwise, attempts were made to find quiet places amenable to discussion even though the public setting for most interviews was sometimes less conducive to open discussion on more sensitive issues. With the consent of the respondents the interviews were recorded on a digital recorder[76] for the purposes of transcribing.

The focus groups followed the same design schedule as the interviews but obviously the discussion occurred in a more dynamic, interactive group setting where the respondents could share their views with each other as well as with the researcher.[77] The two groups involved four and five participants respectively along with the researcher and another Polish worker of the company who was employed specifically to work on the Human Resources issues relating to the recruitment of EU8 workers. She attended the focus groups as a translator as not all of the participants spoke English.

When conducting interview-based research like this it is vital to consider the dynamics at work during the course of the interviews. The relationship between interviewer and respondent(s) impacts upon the eventual outcome, that is, the data itself. This issue is especially significant in research involving migrants as there are additional factors, such as culture, ethnicity and linguistic ability, which impact upon the relationship. Interviews are interactive encounters and the nature of the social dynamic shapes the knowledge generated:

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[76] One respondent's interview was not recorded at their request

[77] Morgan, D.L., *Focus groups as qualitative research,* (London: Sage, 1997); Stewart, D.W. and Shamdasani, P.N., *Focus groups: theory and practice,* (London: Sage, 1992)

'Each interview context is one of interaction and relation; the result is as much a product of this social dynamic as it is a product of accurate accounts and replies'.[78]

Generally, the relationship is hierarchical in nature; the interviewer assumes a position of power by virtue of the fact that he or she is the one asking the respondent to divulge information. Lee sums up the power-relationship succinctly by stating that there is 'a disparity of disclosure rights' in the interview scenario.[79] The respondent is automatically in a vulnerable position as they are expected to speak freely about matters relating to themselves. This vulnerability is heightened further when 'sensitive' topics are under discussion. Arguably migration is one such topic as it is an issue that evokes varying viewpoints in contemporary society; indeed it is a contentious area. Despite the relevance of this power-relationship to certain interviews conducted for this research project there were also circumstances in which the researcher assumed a (potentially) more vulnerable role. For example, in the focus groups described above which involved a translator much of the discussion was conducted in Polish. As a result the researcher was completely dependant on the translator and, for certain periods, was outside the realm of the discussion. Furthermore, for the majority of the interviews the researcher travelled alone and the interviews, although in public places, were frequently carried out in surroundings much more familiar to the respondents than to the researcher.

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[78] Denzin and Lincoln, *Op. Cit.* n.21, 64

[79] Lee, R.M., *Doing Research on Sensitive Topics*, (London: Sage, 1993), 107

One consequence of the interview-respondent relationship is the propensity of respondents to try and give 'socially desirable responses'.[80] Inevitably this impacts on the validity of the data. Interviewer bias, which is discussed further below, is another source of error that surfaces when interviews are used. Implicit assumptions can direct the researcher's attention to some aspects and not to others.[81] Interviewers themselves have expectations about what certain categories of respondents may say or think. Interviews, then, are clearly not neutral tools, they occur within a specific context. Literature has acknowledged that in reality an interview is a 'negotiated text' constructed by interviewer and respondent.[82] Essentially this viewpoint sees the interview as a 'linguistic event' whereby the meanings of questions and responses are contextually grounded and jointly constructed. Following on from this point, and as a result of this research focussing on migration, linguistic and cultural factors also impact on the interview dynamic.

3.3.3. Interviewing across cultural and linguistic boundaries

The impact of cultural and contextual factors was discussed earlier in relation to the cross-national nature of the research. In addition to the implications of the specific context and culture within which the research and the respondents are situated, it is also important to recognise the potential impact of the researcher on the direction and analysis of cross-national research. Researchers themselves carry their own cultural bias to the nations they study; it is inevitable that 'researchers have their own culturally and linguistically determined assumptions and their own

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[80] Fontana, A. and Frey, J.H., 'The Interview: From Structured Questions to Negotiated Text' in Denzin, N.K. and Lincoln, Y.S. (Eds.), *Collecting and Interpreting Qualitative Materials* (2nd Ed.), (London: Sage, 2003), 6, 69

[81] Raleigh-Yow, V., *Recording Oral History: A Practical Guide for Social Scientists*, (London: Sage, 1994), 9

[82] Holstein, J.A. and Gubrium, J.F., *The Active Interview*, (London: Sage, 1995), 14

mindsets'.[83] Gudykunst[84] has conducted extensive work into inter-cultural encounters and suggests that communication between people of different cultures is hampered by the operation of cultural stereotypes. Gudykunst's argument is that inaccurate and unfavourable stereotypes of other cultures cause us to misinterpret the messages we receive from members of these cultures. Expectations regarding how people from other groups will behave are based on how they are 'categorised'.

This idea of having 'expectations', which anticipate and predict the behaviour of people from different cultures, was of relevance to this research. Prior to the 2004 'eastern' enlargement of the EU the messages and stereotypes of accession nationals conveyed in the UK and wider EU15 territory were not favourable. For example, the majority of the British tabloid press portrayed the category of respondents as opportunists who would 'head west' in their thousands, predominantly out of a desire to take advantage of social benefits.[85] It was crucial as a researcher to be aware of and to confront the stereotypical images of migrants from the EU8 before the interviews took place. This enabled the communication to occur within a more open-minded environment.

This research project involved the sole researcher acting, on the whole, as a 'safari' (as opposed to an indigenous) researcher. First, as regards the interviews carried out in the UK the researcher was native to the country; however, given that the majority of respondents were obviously non-natives (i.e. Polish migrant workers) it is true to say that many of the factors relevant to the safari approach were pertinent here. For example,

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[83] Hantrais, L., *Op. Cit.* n.38, 103

[84] Gudykunst, W.B., *Bridging Differences: Effective Intergroup Communication* (4th Ed.), (Thousand Oaks: Sage, 2004)

[85] Examples of headlines in the British press include 'May day for the Mob' and '1.6 million Gypsies ready to flood Britain', quoted in Smith, S., 'Immigration Hysteria: What they said about... Immigration and the EU – Tabloids threaten 'flood' of Gypsies', *The Guardian*, 21 January 2004

there was an unfamiliarity with the Polish culture which meant that it was necessary to work slightly harder to gain access to the community than it would have been had a Polish research partner been involved. From this perspective, then, the researcher was an 'outsider' to the particular community despite being a national of the host nation. Secondly, as regards the empirical phase that took place in Poland, the approach was akin to that of a safari researcher investigating in a context where she had little awareness of implicit cultural meanings or knowledge of the native language.

As a consequence of the cultural and linguistic dilemma that arises as a result of the safari approach, the involvement of Polish research partners may have been a desirable inclusion in the research project. Such partners, with their implicit understanding of the community, may have been able to access, for example, a greater number of respondents or different types of respondents that did not feel comfortable talking to an 'outsider'. The most beneficial quality brought to the study by a research partner, though, would arguably have been the ability to conduct the interviews in the respondents' mother tongue. As part of a study on immigrant integration Reinsch interviewed Moroccan and Turkish migrants in Holland.[86] He discusses the linguistic dilemma that faces researchers who interview migrants and concludes that in reality there is no way to be certain of how much information is lost in translation.[87] In the current research the majority of the interviews were conducted in English, obliging the respondents to communicate in a language that was not their mother tongue. In small-scale sole-researcher work such as this pragmatic compromises need to be made. Language management is such an area that necessitated compromise as time and financial restraints meant there was

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[86] Reinsch, *Op. Cit.* n.24

[87] *Ibid.*, 75

no realistic way, in the majority of cases, to employ translators or research partners. The implications of this are twofold. First, the representative nature of the sample is weakened due to the immediate exclusion of EU8 migrants who cannot speak English. Secondly, it means the 'communication gap' is likely to be wide; there is no guarantee that interviewer and respondent understand the meaning of a question in the same way. The 'culture-bounded' nature of concepts has been emphasised by Mangen who describes each language as a particular style of discourse.[88] Lawrence also suggested researchers need to be wary of what he described as the 'dangers of the fallacy of self-fulfilling equivalence'.[89] One should not assume a term has the same connotation across cultures. When interviewing, therefore, it was necessary to frame the discussion in a way that gave the respondents optimum time and space to construct their responses in their own words. For example, the interviewer was careful not to 'put words into the respondent's mouth' when a respondent appeared to struggle to find the correct English phrase to express him or herself.

While it was not feasible (from a resources perspective) to employ Polish research partners, it was possible to try and counter some of the problems connected to safari research by enlisting the support of Polish contacts who were willing to offer support and advice. Many of the respondents were generous in this sense, as the discussion above in respect of the worker who acted as a translator during the focus groups demonstrates. As a result of her input the focus group, and hence the sample as a whole, was able to involve respondents who would otherwise have been excluded because of language constraints. Obviously, the use of translators brings problems of

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[88] Mangen S., 'Qualitative Research Methods in Cross-National Settings', (1999) 2(2) *International Journal of Social Research Methodology*, 109, 111

[89] Lawrence, P., 'In Another Country' in Bryman, A. (Ed.), *Doing Research in Organisations*, (London: Routledge, 1988), 96

its own as the responses of the respondents must filter through the translator's interpretation. This was a particular problem during the focus groups as the one translator was responsible for interpreting the group's response. Inevitably, therefore, some of the responses were lost.

In any event there are some advantages to adopting a safari approach as the researcher, although perhaps not aware of implicit cultural nuances and linguistic phrases, is, conversely, not blinded by his or her own inherent cultural conditioning. Essentially, a safari researcher does not take any of the cultural interaction as 'given' but comes to the research with a fresh perspective.

3.3.4. Analysing the qualitative data

The first step in the process of analysing the interview data was to transcribe the interviews. Although transcription is a time-consuming process it did enable immediate engagement and familiarity with the data. Theoretically speaking this approach also conforms to the grounded theory method as it encourages immediate and ongoing analysis of the data. In order to assist with the analysis the computer software package NVivo was utilised. This enabled the data to be managed electronically through the use of memos and coding.

Qualitative analysis involves systematic, rigorous consideration of the data in order to identify themes and concepts that will contribute to the understanding of the particular social phenomenon.[90] Themes and concepts were identified and coded, then compared and contrasted with any similar material in the other interviews. New themes that emerged demanded further consideration and analysis of previous interviews. This

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[90] Fielding, N. and Thomas, H., 'Qualitative Interviewing' in Gilbert, N. (Ed.), *Researching Social Life* (2nd Ed.), (London: Sage, 2001), 123, 137

tactic is often referred to as the constant comparative method.[91] A contrast can be drawn with quantitative research which requires data to fit into preconceived codes. Consistent with the grounded theory approach the codes were allowed to 'emerge' from the data. For example, the notion of de-skilling emerged from analysis of the interview transcripts, and became a 'code', after it became increasingly apparent that many of the migrant workers were working in jobs of a far lower status than the ones they had occupied in Poland.[92] This was then checked against the available statistical data which appeared to corroborate the idea. In turn, the socio-legal analysis developed as an extension of the observed empirical experiences; therefore, the qualitative data grounded the emerging theory. The coding started 'the chain of theory development' and the analysis and comparison of the data developed simultaneously with the inductive theory.[93]

Qualitative data has been described by Miles as an 'attractive nuisance';[94] it is often applauded for its richness and depth, although the sheer volume of data that can be accumulated in the course of a qualitative research project makes it very labour intensive. In addition to this 'problem' there is no accepted set of defined conventions available to researchers who set out to analyse qualitative data. Some would argue it is more of an 'art'.[95] Fundamentally, it is the researcher's interpretations of data that shape the emergent codes, theory and all round analysis.[96]

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[91] Charmaz, *Op. Cit.* n.4, 259

[92] This is discussed fully in chapter four

[93] Charmaz, *Op. Cit.* n.4, 258

[94] Miles, M.B., 'Qualitative Data as an Attractive Nuisance: The Problem of Analysis', (1979) 24 *Administrative Science Quarterly*, 590

[95] Robson, C., *Real World Research* (2nd Ed.), (Oxford: Blackwell, 2002), 456

[96] Charmaz, *Op. Cit.* n.4, 258

The issue of interviewer bias has been considered in relation to the actual interviews but is also relevant to the analysis phase. Robson lists some 'deficiencies of the human as analyst' which include the tendencies to ignore information that conflicts with themes and ideas already held, and to give less attention to information which is more difficult to access. In addition, Silverman refers to what he terms the problem of 'anecdotalism', said to occur when a research report refers only to a few 'telling' examples of the apparent phenomenon without an attempt to analyse the contradictory or less clear data.[97] This practice has an impact on the validity of the reported data and efforts have been made in the analysis of the qualitative data to avoid such over-reliance on specific quotes or 'snippets' of information. Interview extracts selected for inclusion in the thesis have been chosen on the basis that they represent an experience or an opinion applicable more broadly to the sample (unless, of course, it is explicitly stated that the relevant quotation represents the minority viewpoint). Bias itself, however, is clearly impossible to overcome in its entirety since interpretation is such an important part of qualitative research.

4. Ethical considerations

At all stages of the research process ethical standards were considered and informed the research design. Ethical considerations in social research centre on researchers' responsibilities towards participants. The Socio-Legal Studies Association's (SLSA) First Re-statement of Research Ethics,[98] which emphasises the significance of maintaining integrity in research, was consulted throughout the research process. Of fundamental importance for this research was Principle 5 of the code which stresses the importance of ensuring that the wellbeing of research participants is not

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[97] Silverman, *Op. Cit.* n.26, 34

[98] Available at <http://www.slsa.ac.uk/download/ethics_drft2.pdf> (last accessed 9 November 2006)

adversely affected. Additionally, Cook provides a list of what he terms 'questionable practices involving research participants'.[99] Such practices include: coercing people to participate; involving people without their knowledge; withholding the true nature of the research; deceiving; invading the privacy of respondents; exposing participants to physical or mental stress; failing to show participants consideration and respect; and leading participants to commit acts that diminish their self-respect. Every effort was made to adhere to these guidelines and to make the process as open and accessible to participants as possible.

The main ethical considerations raised by the empirical research related to obtaining the informed consent of the participants and ensuring the confidentiality of the resulting data. Bulmer describes informed consent in the following terms:

'(P)ersons who are invited to participate in social research activities should be free to choose to take part or refuse, having been given the fullest information concerning the nature and purpose of the study, including any risks to which they personally would be exposed, the arrangements for maintaining the confidentiality of the data, and so on'.[100]

Research relationships should ideally be based on the notion of trust.[101] Crucially, consent should be informed and, therefore, there is a responsibility on the researcher to explain the aims of the research to the respondents. In the current research every effort was made to achieve openness with respondents. Prior to the interviews all respondents were

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[99] Cook, S., 'Ethical Implications' in Judd, C.M., Smith, E.R. and Kidder, L.H., *Research Methods in Social Relations*, (London: Harcourt Brace Jovanovich College Publishers, 1991), 477, 485

[100] Bulmer, M., 'The Ethics of Social Research' in Gilbert, N. (Ed.), *Researching Social Life* (2nd Ed.), (London: Sage, 2001), 45, 49

[101] Principle 5.1, Socio-Legal Studies Association, First Re-statement of Research Ethics, *Op. Cit.* n.98

informed by letter or email of the aims and objectives of the research, and the particular topic areas of interest to the researcher, such as work, family life and social welfare. More in-depth background information was available to those who so desired it. The participants were also given the opportunity to ask further questions regarding the nature of the research over the telephone prior to the interviews. This approach follows that of Raleigh-Yow, who argues that researchers who wish their respondents to be open and honest with them should divulge fully the project's goals and methods.[102] At the beginning of each interview respondents were told that at any time they could refuse to answer a question without having to provide an explanation.

Of course, the issue of language is important in relation to the issue of informed consent. Principle 6.1 of the SLSA's Ethic's code, on obtaining consent, emphasises that the research should be explained 'in terms meaningful to participants'. The disclosure of the aims and details of the research was carried out in the language in which the interview was conducted (English in the vast majority of the cases). It was only in the focus groups that the translator was able to explain the research in Polish.[103] Therefore, care had to be taken to ensure that the respondents whose interviews were in English were aware that the research was for the purposes of a PhD, that they understood what it was aiming to achieve and that they were happy for the audio recording to be transcribed. Bearing in mind the use of English it was necessary to take a reasonable amount of time at the beginning of each interview to ensure that this process was completed thoroughly. Furthermore, the respondents were asked if they were happy for (anonymous) extracts from the interviews to be used in the

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[102] Raleigh-Yow, *Op. Cit.* n.81, 90

[103] Care had to be taken here to ensure that all the focus group participants had the opportunity to ask any questions they had

thesis and in any future academic articles. Academic articles which incorporated elements of qualitative data by other scholars were shown to them by way of example.[104]

As stated earlier, many of the respondents were accessed either by making contact with migrant organisations or by snowball sampling. Some, however, were contacted via their employer (a transport company). This use of an employer as a gatekeeper raises additional ethical issues which are perhaps made more pertinent as a consequence of the interviews taking place on the employer's premises. First, it was paramount to make clear that the respondents were in no way obliged or required to take part in the research. This was achieved, first, by the employer being provided with leaflets detailing the nature of the research sometime before the date of the planned research visit. This was distributed to the Polish workers along with a letter which stressed the voluntary nature of the interviews. On the day the interviews were carried out it was made clear that the research was not conducted on behalf of the employer and that the interview responses would not be relayed to the employer. The interviews were on a one-to-one basis although, as already stated, the focus groups did involve another employee acting as a translator. In taking this approach, the research sought to adhere to the SLSA's ethical code which suggests that when gatekeepers are used researchers should 'adhere to the principle of obtaining informed consent directly from research participants'. Additionally, however, it is also important to take 'account of the gatekeepers' interest'.[105] In this respect, during the interviews with the Polish employees it was also necessary to emphasise the 'neutrality' of the researcher so as not to give the impression that the research aimed to evoke

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[104] All respondents agreed to such use of the data

[105] Principle 6.5, Socio-Legal Studies Association, First Re-statement of Research Ethics, *Op. Cit.* n.98

sentiments of opposition to the employer. The idea here was not to disturb the relationship between the respondents and the gatekeeper unnecessarily.[106]

The ethical standard of respecting the privacy of the respondents is interesting in the context of research which relies on interviews for the reason that the very nature of the interaction is to find out about the personal experiences of the participants. Thus the researcher was in danger of invading the respondents' 'private space'.[107] The obtaining of consent prior to the interview sought to rebalance any invasion of privacy. It is more difficult to measure and control the occurrence of any mental stress or diminishment of self-respect on the part of the respondents. It is possible that material covered in the interviews may have caused discomfort to some of the respondents, for example participants may have felt lower 'self worth' after discussing their de-skilled status.[108] In an attempt to counteract such feelings the researcher tried to adopt a non-judgmental and open demeanour. At the closure of the interviews the researcher conducted a 'debriefing' with all participants in which they were thanked for their cooperation and reassured of the value of their experiences in relation to the comprehensiveness of the study. Participants were again given the opportunity to ask questions and were told that they could contact the researcher at any point to clarify any concerns.

The responsibility towards the respondents did not end at the closure of the interviews as respecting the respondents' privacy is also a major ethical consideration.[109] Practical steps were taken to maintain the anonymity and

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[106] *Ibid.*

[107] Kelman, H.C., 'Privacy and Research with Human Beings', (1977) 33 *Journal of Social Issues*, 169

[108] See chapter four

[109] Principle 7, Socio-Legal Studies Association, First Re-statement of Research Ethics, *Op. Cit.* n.98

confidentiality of the data. The qualitative data was anonymised so that comments made during the course of the interviews could not be attributed to the respondents. Code numbers were used routinely as a means of identifying respondents and storing the data, and this extended also to the audio tapes and transcripts of the interviews. Furthermore, all information relating to matters such as areas of residence and employers was kept to a minimum in the research reports.

Finally, after the empirical phase of the research, and as the data analysis and writing up of the project continued, attempts were made to ensure that the respondents who signalled a desire to be kept informed of the project findings were updated by email and telephone. This dissemination is consistent with the SLSA's recommendation that research results should be made available to those they have researched and,[110] moreover, is in line with the transparent approach to research participants that the research tried to implement.

5. Conclusion

This chapter has set out the methodological framework and tools that have been used to research the phenomenon of migration in the enlarging European Union. The predominant aim is to take a qualitative look at migration from Poland in the aftermath of EU enlargement. However, quantitative secondary data is also used to provide background and context to the legal and empirical analysis.

The discussion has drawn out the socio-legal nature of the research and emphasised the benefits of this inter-disciplinary approach, namely the ability to examine a topic in a more holistic fashion. When investigating migration the potential impact of contextual and cultural factors on the

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[110] Principle 2, Socio-Legal Studies Association, First Re-statement of Research Ethics, *Op. Cit.* n.98

research findings is heightened due to the mobile, cross-national nature of law, the policy and the actors involved. The societal approach, favoured here, aimed to appreciate the particular context under examination at any one point whilst still maintaining the ability to make cross-national comparisons. The discussion also considered the nature and strength of qualitative research methods, and specifically the issues that arise when using qualitative interviewing techniques, before examining the ethical guidelines that directed the research.

This chapter has attempted to integrate the practical strategies adopted throughout the course of this research project with discussion of the theoretical perspectives that have informed it. By designing and implementing a socio-legal and qualitative research project to examine the status and experiences of migrants from the EU8 Member States the investigation has sought to be innovative. Furthermore, the methodology is also novel as a result of the timing of the research. The research planning began in late 2003, a year before the accession of the EU8 took place, allowing the research to develop and unfold alongside the law that it sought to examine. For example, the UK's Workers' Registration Scheme was devised as late as 2004 but has played a major part in the direction of this research. Further, many of the EU15 Member States altered their policies in May 2006 to coincide with the expiry of the first phase of the transitional period. Therefore, the area has remained a very active one throughout the entirety of the project's life. As a result, the journey the research has taken has, in many respects, mirrored that of the respondents who took part in the research. Both have had to deal with and 'feel' the law 'as it happened' rather than analyse it retrospectively. This is demonstrated by some of the empirical work findings; for example, the initial confusion surrounding the operation of the registration scheme in the UK came across very prominently in the interviews carried out in the early

stages (May – August 2004) whereas in the later interviews this was less of a concern as the detail of the law had filtered through to a greater extent.[111]

The May 2004 enlargement represented a historical and constitutional turning point in the EU's development and the research has utilised this as an avenue to explore further the issue of free movement. Essentially, the research has scoped the free movement rights and status of EU8 migrant workers before, during and post enlargement and the methodology has had to incorporate this dynamism. In line with the grounded approach, the analysis of the qualitative data and the 'theory' developed simultaneously. The remaining chapters set out the substantive results achieved as a consequence of the implementation of this methodological approach.

[111] This is discussed in chapter three

Chapter three

EU8 MIGRANTS' LABOUR MARKET ACCESS DURING THE TRANSITIONAL PERIOD: EU TRANSITIONAL RULES AND NATIONAL IMPLEMENTATION*

1. Introduction

This chapter explores the factors which shape how EU8 migrants access the UK labour market. It seeks to highlight both the legal rules at EU and domestic level which determine EU8 nationals' formal rights to work in the UK, and how migrants interact with this legal framework. To help achieve this, some of the practical strategies adopted by the migrants to help them find work are examined. The central aim of the discussion here, therefore, is to analyse the potential of EU8 nationals to qualify as migrant workers in the aftermath of accession when transitional restrictions on the free movement of persons apply to this group.[1]

The chapter begins with an examination of the EU legal framework that determines EU8 nationals' formal mobility rights during the transitional period: the transitional arrangements on the free movement of persons. These temporary restrictions, enshrined in the Accession Treaty,[2] allow the EU15 Member States to derogate from elements of the free movement *acquis*. The effect of these temporary restrictions is to deny EU8 nationals full access to the, usually far-reaching, Community law right to move to

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* A version of parts of this chapter has been published in Currie, S., ''Free' movers? The Post-Accession Experience of Accession-8 Migrant Workers in the UK', (2006) 31 *European Law Review*, 207

[1] Cyprus and Malta acceded on the same date as the EU8 (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, the Slovak Republic, and Slovenia) but transitional restrictions do not apply to these two Member States, see below, section 2.1

[2] Treaty of Accession 2003 [2003] O.J. L 236/17

and reside in another Member State for the purposes of work; instead, the national law of the EU15 initially governs EU8 nationals' labour market access.

In the second part, the chapter moves on to look at the domestic level rules in the UK that build on the status accorded to EU8 nationals under the Accession Treaty - primarily, the Workers' Registration Scheme (WRS). Due to the terms of the transitional arrangements it is the national implementation and interpretation of the transitional arrangements that principally shape the degree of free movement entitlement available to EU8 nationals in the UK. Finally, the chapter attempts to complement the discussion of the legal framework with exploration of some of the practical methods through which migrants find work in the UK, most notably, reliance on agencies, employer-organised schemes and kinship networks. Interestingly, the particular legal regime in the UK, and the confusion that has surrounded it, appears to have encouraged and entrenched reliance on such migration facilitators. Arguably, this in turn has had the effect of increasing the possibilities for migrants from the EU8 to find themselves in exploitative employment relationships.

2. The EU legal framework: transitional arrangements on the free movement of persons

The free movement of persons proved to be one of the most controversial topics to be negotiated in the run-up to the signing of the Treaty of Accession in 2003, 'since in most Member States the possible influx of workers from the Acceding Countries remains unpopular among the general public'.[3] Certain of the older Member States were concerned about what impact migration of the new 'less-privileged' EU citizens would have

[3] Farkas, O. and Rymkevitch, O., 'Immigration and the Free Movement of Workers after Enlargement: Contrasting Choices', (2004) 20(3) *International Journal of Comparative Labour Law and Industrial Relations*, 369

within their own territories;[4] essentially, the transitional arrangements on the free movement of persons represent a compromise negotiated into the Accession Treaty.[5] The first part of this section looks at the background and rationale behind the imposition of transitional mobility restrictions in the aftermath of the 2004 enlargement. In the second part the provisions themselves, as included in the Accession Treaty, are examined and in the third part the national implementation of transitional restrictions across the EU15 is considered.

2.1. The rationale behind temporary mobility restrictions

The accession in 2004 of a group of new Member States considered as 'poor' in comparison to the old and 'wealthy' EU15 forced the EU institutions and the old Member States to grapple with the complex prospect of migration in an enlarged European Union with significant economic disparities between east and west. Reservations centred on the possibility of increased migration flows to the EU15 from the EU8 in the light of the new citizens being granted rights to free movement. Kvist summarises the (economic) argument as such:

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[4] See Dougan, M., 'A Spectre is Haunting Europe... Free Movement of Persons and the Eastern Enlargement' in Hillion, C. (Ed.), *EU Enlargement: A Legal Approach,* (Oxford: Hart, 2004), 111. For an examination of EU15 concerns to do with welfare tourism see Kvist, J., 'Does EU enlargement start a race to the bottom? Strategic interaction among EU member states in social policy', (2004) 14(3) *Journal of European Social Policy*, 301

[5] Treaty of Accession 2003 [2003] O.J. L236/17. Article 24, Act of Accession [2003] O.J. L236/33 refers to a series of Annexes that contain details of the transitional arrangements in respect of each accession Member State (Annexes V-XIV). For example in relation to Poland see Annex XII [2003] O.J. L236/875. Each transitional regime concerning the EU8 has been negotiated in the same way and the arrangements concerning free movement of persons are found in Part 2 of each annex. The term 'Annexes' will be used from herein when referring to the transitional arrangements that apply to the EU8

'Comparatively less wealth in acceding countries is seen as a push factor for migration, and the higher wealth of older member states as a pull factor'.[6]

High east-west wage differentials combined with high unemployment rates in (some) of the EU8 Member States gave way to fears that an 'influx' of EU8 nationals would head to the EU15.[7] Concerns were expressed in the old Member States about the potential for disruption to occur in the national labour markets. For example, German trade unions lobbied extensively for transitional arrangements on free movement, arguing that the arrival of workers from the EU8 would lead to a reduction in wages in the territory and entrench further the problematic unemployment rate.[8] Furthermore, the potential for social dumping, with businesses benefiting financially from establishing their offices in the EU8 where the cost of premises and wages are significantly less than in the EU15, was another adverse consequence foreseen prior to enlargement.[9] The notion of social tourism was also prevalent in the debates. It was suggested that differences between social welfare systems in the old and new Member States would encourage migration by people primarily motivated by the desire to claim generous social benefits while making little contribution to the host society in return.[10] Migrant workers are perceived to be a particular threat in this

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[6] Kvist, *Op. Cit.* n.4, 305

[7] For example, compare the 2003 monthly minimum wage in Poland (201 Euro) and the Czech Republic (199 Euro) with the UK (1105 Euro) and France (1154 Euro), see Clare, R. and Paternoster, A., 'Minimum Wages: EU Member States and Candidate Countries, January 2003', Eurostat, *Statistics in Focus*, (Brussels: European Communities, 2003). Furthermore, in 2003 the unemployment rate in the EU15 was 8.1% whereas in the new Member States it was 14.5%. In some Polish regions, however, the unemployment rate was above 20% (in particular, Kujaw sko-Pomorskie, Lubuskie and Zachodniopomorskie), see Mladý, M., 'Regional Unemployment in the European Union and Candidate Countries in 2003', Eurostat, *Statistics in Focus*, (Brussels: European Communities, 2004)

[8] See further, Jileva, E., 'Visa and Free Movement of Labour: The Uneven Imposition of the EU *Acquis* on the Accession States', (2002) 28(4) *Journal of Ethnic and Migration Studies*, 683, 694

[9] Kvist, *Op. Cit.* n.4, 305; Dougan, *Op. Cit.* n.4, 112

[10] Kvist, *Op. Cit.* n.4, 306

respect due to the relatively low threshold, set by the Court of Justice, that must be reached in order to activate the principle of non-discrimination on the ground of nationality in the area of social advantages.[11] To qualify as a worker exercising a right to free movement under Article 39 EC, and thus be eligible for the right not to be discriminated against, one must be classed as undertaking effective and genuine work, under the direction of an employer, for which one receives remuneration.[12] Crucially for those that subscribe to the argument that welfare tourism is a likely consequence of EU eastward expansion, the Court has held that those working part-time, those carrying out work that falls below a state's minimum subsistence level and those claiming benefits in conjunction with working can still constitute 'workers' under Article 39 EC.[13] Furthermore, the type of welfare benefits available to workers is extremely broad due to the wide definition assigned to the concept of 'social advantage' in Article 7(2) of Regulation 1612/68;[14] essentially, it has come to be understood as referring to almost any form of social welfare available to the state's own nationals.[15]

The 2004 enlargement was not the first time such concerns of mass migration to 'the west' have been voiced; indeed, similar fears were expressed in the aftermath of the fall of the Berlin Wall in 1989. Thränhardt points out how various researchers, journalists and politicians in western Europe and the United States predicted 'Russian floods' of up to

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[11] Pursuant to Article 7(2), Regulation 1612/68 [1968] O.J. L257/2

[12] For example, Case 66/85 *Lawrie-Blum* [1986] E.C.R. 2121; Case 196/87 *Steymann* [1988] E.C.R. 6159; Case C-456/02 *Trojani* [2004] E.C.R. I-7573

[13] See Case 53/81 *Levin* [1982] E.C.R. 1035; Case 139/85 *Kempf* [1986] E.C.R. 1741; Case C-357/89 *Raulin* [1992] E.C.R. I-1027

[14] Case 207/78 *Even* [1979] E.C.R. 2019

[15] For example, Case 32/75 *Fiorini v SNCF* [1975] E.C.R. 1085; Case 65/81 *Reina* [1982] E.C.R. I-33; Case 59/85 *Netherlands v Reed* [1986] E.C.R. 1283

25 million migrants.[16] Movement on such a large scale, however, did not occur from Russia or from other parts of the Commonwealth of Independent States (CIS).[17] Instead it seems that certain European countries, such as Germany, actively recruited from the region in the early 1990s in order to fill labour shortages.[18] In addition to these east-west fears, apprehension regarding increased flows of migrants - and the perceived likelihood of welfare tourism and labour market disruption – also surrounded the 'southern' accessions of Greece (1981) and Portugal and Spain (1986). Like the EU8, these Member States, which also had comparatively lower wage levels,[19] were subject to a transitional period throughout which the mobility entitlement of their nationals was restricted.[20] Greek migrant workers were subject to a six year transitional arrangement whereas Spanish and Portuguese nationals initially faced a seven year restriction on mobility. However, as no significant movement occurred, this transitional period came to an end slightly earlier than was originally anticipated (after five years).[21] Hence in these cases the anxiety was unfounded. Moreover, in all three of the southern Member States that acceded in the 1980s the overwhelming trend was for emigration rates to

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[16] Thränhardt, D., 'European Migration from East to West: Present Patterns and Future Directions', (1996) 22(2) *New Community*, 227

[17] Mayhew, A., *Recreating Europe: The European Union's Policy towards Central and Eastern Europe,* (Cambridge: Cambridge University Press, 1998), 332

[18] Thränhardt, *Op. Cit.* n.16, 228-230. A trend that appears to have continued post-accession with the EU15 allegedly 'cherry picking' highly-skilled workers from the EU8, see Vaughan-Whitehead, D.C., *EU Enlargement versus Social Europe? The Uncertain Future of the European Social Model,* (Cheltenham: Edward Elgar, 2003), 441

[19] Though income differences between the old Member States and Greece, Spain and Portugal were not as great as the differences between EU15 and EU8 in 2004, see Tamas, K. and Münz, R., 'Labour Migration and Transitional Regimes in the European Union', Paper presented at the COMPAS International Conference, 'International Labour Migration: In Whose Interests?', *University of Oxford, 5-6 July 2006*

[20] Treaty of Accession 1979 [1979] O.J. L291/5 (Greece); Treaty of Accession 1985 [1985] O.J. L302/23 (Portugal and Spain). The current Member States will again have the option to impose transitional restrictions following the accession of Bulgaria and Romania in January 2007. The Treaty of Accession 2005 contains transitional arrangements identical to those discussed here in relation to the EU8 ([2005] O.J. L157/11)

[21] Vaughan-Whitehead, *Op. Cit.* n.18, 413

other EU Member States to fall in the years following enlargement. All three quickly became, and remain, countries of immigration as opposed to countries of emigration.[22]

Academic opinion has diverged on the issue of whether the accession of the EU8 can be compared to the experience of Spain, Greece and Portugal. For example Orłowski and Zienkowski, despite recognizing certain cultural and social differences, accept that the accessions of Greece, Spain and Portugal provide an adequate model for projecting EU8 migration due to the similar income differentials. Additionally, these authors point out that significant numbers of workers from the southern European accession countries had already moved to EU Member States prior to accession, establishing the basis for networks which can help facilitate further mobility. The same is true of nationals from the EU8.[23] If this reasoning is accepted, it would appear that the transitional arrangements are not responding to any real threat of large scale migration and instead only pander to unfounded fears in the EU15. In actual fact, based on the southern experience, it would appear that the EU8 can expect flows of in-migration to increase following accession as a result of both return and new migrants.[24] Furthermore, enlargement may actually deter emigration as the economic prospects of the region begin to show signs of prosperity and as more comprehensive social legislation is introduced, leading to improved social conditions.[25] On the other hand, Vaughan-Whitehead has argued it is misleading to extrapolate experience from the previous EU

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[22] See further, Kraus, M. and Scwager, R., 'EU Enlargement and Immigration', (2003) 42(2) *Journal of Common Market Studies*, 165, pp.169-171; Ackers, L. and Dwyer, P., *Senior Citizenship? Retirement, Migration and Welfare in the European Union*, (Bristol: The Policy Press, 2002)

[23] Orłowski, W.M. and Zienkowski, L., cited in Kaczmarczyk, P., 'Migration in the New Europe: East-West Revisited' in Górny, A. and Ruspini, P. (Eds.), *Migration in the New Europe: East-West Revisited,* (New York: Palgrave Macmillan, 2004), 65, 71

[24] *Ibid.*

[25] Ardittis, S., 'East-West Migration: An Overview of Trends and Issues', in Ardittis, S. (Ed.), *The Politics of East-West Migration,* (New York: St. Martins Press, 1994), 5; Jileva, *Op. Cit.* n.8

enlargements, citing a number of factors. First, while the southern accession states did have lower levels of economic development than the rest of the EU Member States at the time of accession, the EU8 economies lag behind the EU15 to a more significant extent:

'At the time of entering the EU in the early 1980s, the Southern countries had attained about two-thirds of average EU per capita income, well above the countries of central and eastern Europe, which have reached about one-third of the EU average.[26] *This is a substantial difference that could lead to completely different migration behaviour, and in particular to a different scale'.*[27]

Secondly, the 2004 enlargement was on a larger scale than the previous accessions as it created 75 million new Union citizens. When Greece joined in 1981 the EU's population increased by 10.5 million and in 1986 Spain and Portugal had a combined population of 49.4 million.[28] Arguably the greater number of people involved injects a different dynamic into the accession of the EU8 that was not present in previous accessions, particularly as many of the EU8 countries are even more geographically proximate to EU15 Member States (Germany and Austria in particular) and share common borders. From this perspective comparisons are less useful and, as migration patterns from the EU8 are more difficult to predict, transitional restrictions can be viewed as more justifiable. Furthermore, there is a marked political and cultural disparity between the EU8 Member States and those southern accession countries. The comparative weaker social and political infrastructure of the EU8, as a consequence of their post-communist status, is perceived as another factor

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[26] This data relates to 2003

[27] Vaughan-Whitehead, *Op. Cit.* n.18, 419-422. See also Henderson, K., 'The Challenges of EU Eastward Enlargement', (2000) 37 *International Politics*, 1

[28] *Ibid.*

that would prompt a greater incidence of migration. In any event, it is this viewpoint which prevailed despite the report by Boeri and Brücker, carried out at the Commission's request, concluding that there would be no substantial increase in migration towards the western states following the granting of mobility rights to accession state nationals and that fears of 'swamping' were unfounded.[29] In reality, concerns about negative public reaction to the immediate extension of mobility rights to EU8 nationals appear to be the primary factor motivating transitional restrictions rather than any convincing evidence of probable labour market disruption and welfare tourism.

The following section moves on to the detail of the transitional arrangements but, before doing so, it is helpful to provide some further context by briefly mentioning the Community's input into the system that governed migration between the EU8 and the EU15 prior to the 2004 enlargement. Before acceding to the EU in 2004 the EU8 had concluded Europe Association Agreements with the Community (and the Member States).[30] The aim of the Europe Agreements was to facilitate the development of free trade with the associate countries. They were very much a stepping stone to the eventual accession of the EU8 countries, and they helped to shape the rights of migrants from the region in the EU.[31]

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[29] Boeri, T. and Brücker, H., *The Impact of Eastern Enlargement on Employment and Wages in the EU Member States,* (Berlin: European Integration Consortium, 2000). Prior to enlargement numerous studies, using a variety of methodologies each with their own strengths and weaknesses, attempted to predict the future extent of migration from the EU8 to the EU15. Some researchers, such as Boeri and Brücker used economic, model-based studies whereas others designed studies based on surveys of EU8 nationals for example Wallace, C., *Migration Potential in Central and Eastern Europe,* (Geneva: International Organisation for Migration, 1998). For a comprehensive overview see Kaczmarczyk, *Op. Cit.* n.23; Vaughan-Whitehead, *Op. Cit.* n.18, 414-418. For discussion of the evidence emerging post-accession see Tamas and Münz, *Op. Cit.* n.19, Boeri, T. and Brücker, H., *Migration, Co-ordination Failures and EU Enlargement,* Discussion Paper 1600, (Bonn: Institute for the Study of Labour, 2005)

[30] For example, Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, [1993] O.J. L348/3

[31] See further, Mayhew, *Op. Cit.* n.17

Each Agreement included a Title IV which dealt with the movement of workers, establishment and supply of services. While EU8 nationals were able to establish businesses in the EU Member States on the same basis as nationals,[32] the Agreements did not create any right of *entry* for workers. Rather, they provided that those lawfully admitted to the labour market under national law were entitled not to be discriminated against on the basis of nationality in the areas of working conditions, remuneration or dismissal.[33] This extended valuable protection to those CEE nationals in work, especially given that the ECJ held the provision to be directly effective,[34] but the Agreements did not positively facilitate the movement of workers and in reality offered relatively modest commitments[35] to CEE nationals seeking to work in the pre-enlarged EU.[36] Jileva argues that by framing the Europe Agreements in this way the EU Member States effectively safeguarded themselves against labour migrants from the CEE countries.[37] It is quite pertinent then, but perhaps not surprising, that the old Member States have sought to continue to 'protect themselves' from migratory movements from the CEE region following the accession of the EU8.

2.2. The detail of the transitional arrangements

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[32] Article 44(3), Europe Agreement with Poland [1993] O.J. L 348/2

[33] Article 37(1), *Ibid.* This effectively afforded those who did work in the EU15 the same *in-work* protection as EU migrant workers under Article 39 EC and Regulation 1612/68 [1968] O.J. L257/2

[34] Case C-162/00 *Pokrzeptowicz-Meyer* [2002] E.C.R. I-1049

[35] Article 41 did *encourage* Member States to improve the existing facilities of access to employment accorded under bilateral agreements

[36] Hedemann-Robinson, M., 'An Overview of Recent Legal Developments at Community Level in Relation to Third Country Nationals Resident within the European Union, with Particular Reference to the Case Law of the European Court of Justice', (2001) 38 *Common Market Law Review*, 525, 571

[37] Jileva, *Op. Cit.* n.8, 692

The transitional arrangements[38] operate by permitting the EU15 to derogate from Articles 1-6 of Regulation 1612/68 for a maximum period of seven years in respect of EU8 nationals.[39] By granting entitlement to EU nationals to access the labour markets of the other Member States these provisions are the main source of an EU migrant worker's mobility and employment rights. EU15 Member States are not, therefore, entitled to control migration in general from the EU8. They are, however, permitted to decide the conditions under which EU8 nationals access employment in their territories. Once that access is secured, however, EU15 Member States are not entitled to restrict any of the benefits which flow from the employment status. For example, EU8 nationals who do find work are entitled to equal treatment with nationals in respect of terms and conditions of employment,[40] access to housing,[41] and importantly, to social and tax advantages.[42] EU8 migrants will also be able to utilise the provisions on the aggregation and exportability of social security benefits under Regulation 1408/71,[43] as these measures are not subject to any transitional rules.

Nationals of Cyprus and Malta, despite acceding to the EU at the same time as the CEE states, were accorded full free movement rights immediately upon accession. The smaller size of these countries combined

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[38] *Op. Cit.* n.5

[39] The transitional period runs from 1 May 2004 - 30 April 2011

[40] Article 7(1) Regulation 1612/68

[41] Article 9 Regulation 1612/68

[42] Article 7(2), Regulation 1612/68. There is an abundance of case law on the issue of 'social advantages' and the Court has stressed the concept should be interpreted broadly: Case 207/78 *Even* [1979] E.C.R. 2019. 'Social advantages' has been held to include discretionary benefits: Case 65/81 *Reina* [1982] E.C.R. I-33, and benefits granted after employment has been terminated: Case C-57/96 *Meints* [1997] E.C.R. I-6689. It also covers benefits not directly linked to employment, such as a right to be accompanied by an unmarried partner: Case 59/85 *Netherlands v Reed* [1986] E.C.R. 1283

[43] Regulation 1408/71, last consolidated text published [1997] O.J. L28/1

with their geographic positioning and (alleged) higher standard of living has been used as justification for the distinction made between the EU8 and EU2.[44] Precisely because of its small size, Malta is entitled to impose its own safeguards if it suspects large-scale movement into its territory by nationals of other Member States.[45] The EU8 have the right to retaliate against the EU15 by adopting reciprocal restrictive measures as regards access to their labour markets by nationals of the old Member States.[46]

Clearly, the permitted derogations focus predominantly on workers as a category of migrant citizen (those whose status flows primarily from Article 39 EC) and leave unscathed the mobility rights of EU8 self-employed persons.[47] Consequently, the distinction between workers and self-employed persons is of the upmost importance during the transitional period as those classified as having established in an EU15 Member States are able to access full free movement entitlement.[48] This can be a problematic distinction to make as modern patterns of employment often involve people moving from a status of employment to one of self-employment (and back again) regularly.[49] In some instances it seems that EU8 nationals have registered in an EU15 Member State in a self-

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[44] Although Hillion has questioned whether the standard of living of (reunited) Cyprus would be higher than that of Slovenia, see Hillion, C., 'The European Union is Dead... Long Live the European Union... A Commentary on the Treaty of Accession 2003', (2004) 29 *European Law Review,* 583, 597

[45] Para. 2, Annex XI (Malta)

[46] Para. 13, Annexes. Currently Poland and Hungary apply reciprocal restrictions, see European Commission (DG for Economic and Financial Affairs), *Enlargement: Two Years After: An Economic Evaluation,* European Economy Occasional Papers no. 24 (Brussels: European Commission, 2006), 71

[47] Article 43 EC

[48] If a migrant works under the direction of another in return for payment (s)he is a worker and falls under Article 39 EC, see *inter alia* Case 196/87 *Steymann* [1988] 6159. Those that are self-employed operate independently outside a relationship of subordination, under their own responsibility; and in return for remuneration paid to them directly (it is for the national court to decide if these conditions are satisfied). See, *inter alia,* Case C-268/99 *Aldona Malgorzata Jany* [2001] E.C.R. I-8615.

[49] Chalmers, D., Hadjiemmanuil, C., Monti, G and Tomkins, A., *European Union Law Text and Materials*, (Cambridge: Cambridge University Press, 2006), 701

employed capacity in an attempt to circumvent the restrictions on workers despite in fact being employees.[50]

The free movement rights of EU8 nationals providing or receiving services in the EU15, on the whole, remain intact during the transitional period.[51] Austria and Germany, however, are entitled to restrict the provision of services in certain regions because of the potential for serious labour market disturbances to occur in sensitive sectors, such as construction and industrial cleaning.[52] In addition, the transitional arrangements leave intact the ability of EU8 nationals to exercise rights of free movement as economically inactive migrants pursuant to Article 18 EC. Self-sufficient EU8 nationals are able to reside in an EU15 Member State on the basis of Article 18 EC and hence will be entitled to non-discriminatory treatment in respect of matters falling within the scope of the Treaty, under Article 12 EC.[53] It is sufficient to note at this stage that economically inactive migrants who exercise rights of free movement as citizens under Article 18 EC enjoy a much less secure status in a host state than do traditional 'economic' migrants. Crucially the right to reside is subject to the conditions of having sufficient financial resources and comprehensive medical insurance.[54] The focus in this chapter, however, is limited to the category of workers as the aim here is to examine how EU8 nationals gain access to the status of migrant worker (specifically in the UK) during the transitional period. Essentially, the concern at this stage is to explore the climate within which EU8 migrant workers have had to operate as a result

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[50] See Tamas and Münz, *Op. Cit.* n.19

[51] Article 49 EC

[52] Para. 13, Annexes

[53] Case C-85/96, *Martinez Sala* [1998] E.C.R. I-2691. The self-sufficiency requirement is subject to the principle of proportionality: Case C-184/99 *Grzelczyk* [2001] E.C.R. 6193. Chapter six considers the impact of the transitional regime on the broader citizenship status of EU8 nationals

[54] Article 7, Directive 2004/38 [2004] O.J. L158/77; previously Directive 90/364 [1990] O.J. L180/26, Article 1

of the interaction between Community law (in the form of the transitional arrangements on free movement) and the implementing domestic law.

The transitional arrangements last for a maximum of seven years and the system works on a 2+3+2 basis:[55] from 1 May 2004 until 30 April 2006 the old EU15 Member States were able to govern migration from the EU8 through 'national measures' or through rules stemming from bilateral agreements.[56] Essentially, national immigration law could continue to regulate labour migration from the EU8 during this time period. This was, however, subject to the standstill clause which provides that any national measures put in place should not be more restrictive than those in force on the day of the signature of the Accession Treaty.[57] After the initial two-year period the old Member States then decided, again unilaterally, whether they were to continue with these national measures or grant full labour market access to EU8 nationals for the next three years (1 May 2006 - 30 April 2009).[58]

Generally the intention is that from 1 May 2009 all national measures relating to labour market access will come to an end and that EU8 workers will enjoy complete mobility rights. However, the old Member States are given discretion to continue applying national measures beyond 2009 for a further two years if they encounter 'serious disturbances' in the labour market *or* 'a threat of serious disturbances'.[59] Finally, from 1 May 2011,

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[55] Paragraphs 2-12 of the Annexes provide details of how the transitional arrangements operate in practice. See also European Commission (DG Enlargement), *Free Movement for persons – A Practical Guide for an Enlarged European Union*, (Brussels: European Commission, 2002)

[56] Para. 2, Annexes

[57] Para. 14, Annexes. The prior regime governing EU8 migration was based on the Europe Agreements, *Op. Cit.* n.30

[58] Member States had to notify the Commission of their intentions before the initial two-year period expired: para. 3, Annexes

[59] Para. 5, Annexes. Again, the Commission must be notified

EU8 nationals will be entitled to full free movement of workers entitlement.

Throughout the whole of the transitional period, those Member States that have not continued or, indeed, never implemented national measures and opened up their labour market immediately, continue to have the option of invoking the 'safeguard' clause in the Accession Treaty. This allows the Member State to submit a 'request' to the Commission that the application of Articles 1-6 of Regulation 1612/68 be suspended in its territory and that transitional restrictions on workers' mobility be restored.[60] Member States wanting to make use of this provision should notify the Commission that it 'undergoes or foresees disturbances in its labour market which could seriously threaten the standard of living or level of employment in a given region or occupation'. Strictly, the Member State should await the Commission's formal Decision[61] but in 'urgent and exceptional cases' the Member State can unilaterally suspend the mobility rights and provide a 'reasoned ex-post notification' afterwards.

There are certain EU8 nationals who are 'immune' from the transitional provisions: those who have lived and worked in one of the old EU Member States for an uninterrupted period of 12 months or more prior to accession can continue to reside and work in that particular Member State on the same basis as other EU15 workers.[62] This applies also to those who are admitted for 12 months uninterrupted following accession.[63] The rights that these migrants enjoy are strictly limited to the particular Member State

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[60] Para. 7, Annexes

[61] The Commission is obliged to notify the Council of its decision. Within two weeks from the date of the decision any Member State can request the Council to annul or amend the Decision: Para 7, Annexes

[62] Para. 2, Annexes

[63] This 12 months can be a mixture of time before and after accession, provided it is continuous

that originally granted them access. Thus, although they have continued access to their host state's labour market they cannot then move to another Member State and take up work there. Furthermore, if they 'voluntarily leave' the labour market of the Member State within the initial 12 months, they forfeit the right to reside and work there.[64] An interesting contrast can be drawn here with the position of third-country nationals under the Long Term Residents Directive;[65] third-country national migrants who obtain the status of long-term resident in one Member State are entitled to take up subsequent residence in another Member State and enter employment there.[66] Recent Community initiatives have attempted to promote the integration of third-country nationals within the Member States.[67] This makes the comparatively exclusionary treatment of the newest Union citizens seem all the more anomalous. There is, however, a clause which obliges the EU15 to give preference to EU8 nationals over third-country nationals in respect of labour market access.[68] Presumably this classification of third-country nationals is not intended to include the European Economic Area Countries (Iceland, Liechtenstein, and Norway) or Switzerland as nationals of these countries clearly enjoy more

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[64] Para 2, Annexes

[65] Directive 2003/109/EC [2004] O.J. L16/44. Ireland, the UK and Denmark are not bound by this Directive. For discussion see Kostakopoulou, T., 'Long-term Resident Third-Country Nationals in the European Union: Normative Expectations and Institutional Openings', (2002) 28(3) *Journal of Ethnic and Migration Studies*, 443

[66] Article 14, Directive 2003/109/EC [2004] O.J. L16/44. Subject to the residence conditions set out in Article 15 which includes a provision that allows Member States to require third-country nationals to comply with 'integration measures'

[67] Following the communitarisation of parts of the third pillar in the Treaty of Amsterdam, creating Title IV, Part Three, of the EC Treaty in 1997. See Tampere European Council Presidency Conclusions, 15-16 October 1999; see also Directive 2003/86/EC on the right to family reunification [2003] O.J. L251/12. For further discussion of the status of third-country nationals in the EU Member States see, *inter alia*, Hedemann-Robinson, *Op. Cit.* n.36; Kostakopoulou, T., '"Integrating" Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms', (2002) 8 *Columbia Journal of European Law*, 181; Barratt, G., 'Family Matters: European Community Law and Third Country Family Members', (2003) 40 *Common Market Law Review*, 369; Guild, E. and Harlow, C. (Eds.), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law*, (Oxford: Hart, 2001)

[68] Para. 14, Annexes. Thus, the transitional arrangements may inadvertently impact on the status of third-country nationals in the EU Member States' labour markets

favourable mobility rights than EU8 nationals during the post-accession transitional period.[69]

The defining feature of the transitional arrangements which apply to the EU8 is the almost unlimited discretion enjoyed by the EU15 Member States. Prior to enlargement it was suggested that the flexible design of the transitional measures permitted the old Member States to unilaterally adapt the rules to suit their own labour market needs.[70] The post-accession evidence, limited though it may currently be, appears to support this proposition. Research carried out by Tamas and Münz suggests that migration from the EU8 to the EU15 following the 2004 enlargement has been predominantly demand-driven with migrants moving to the regions and sectors with labour market shortages.[71] From the perspective of the EU15 Member States, therefore, the flexible design of the transitional arrangements has been a welcome factor and the transitional measures, as a whole, a success. The following section examines the national implementation of the transitional arrangements in order to consider how this discretion has been utilised.

2.3. Implementation of transitional restrictions across the EU15

The national context is an important part of any discussion of transitional arrangements since the decision whether to implement restrictions is a unilateral one for each of the EU15 Member States and they are given significant discretion regarding the length and scope of any such restrictions. This section first examines the immediate response of the EU15, in the first two-year period of the transitional period, and then

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[69] EEA Agreement [1994] O.J. L001/3; Agreement between the European Community and its Member States and the Swiss Confederation on the Free Movement of Persons [2002] O.J. L114/6

[70] Vaughan-Whitehead, *Op. Cit.* n.18; Adinolfi, A., 'Free Movement and Access to Work of Citizens of the New Member States: The Transitional Measures', (2005) 42 *Common Market Law Review*, 469

[71] Tamas and Münz, *Op. Cit.* n.19. This is discussed further below, in section 2.3, in relation to the national implementation of transitional restrictions

moves on to look at the approaches adopted subsequently, after the Commission reported on the functioning of the transitional arrangements and the transitional period moved into its second stage (May 2006-April 2009).[72]

2.3.1. EU15 labour market policies immediately following EU8 accession

Essentially the EU15 Member States can be grouped into four categories in terms of free movement policy immediately post-accession: first, Austria and Germany have been firm and constant supporters of transitional restrictions and these two Member States adopted a strict stance in the first instance. Then German Chancellor, Gerhard Schröder, was steering the debate on the need for implementation of transitional arrangements as far back as 2000:

'Many of you are concerned about expansion of the EU... The German Government will not abandon you with your concerns... We still have 3.8 million unemployed, the capacity of the German labour market to accept more people will remain seriously limited for a long time. We need transitional arrangements with flexibility for the benefit of both the old and the new member states'.[73]

Germany and Austria can effectively be labelled as the 'shepherds' who guided the debate at EU level. Continuing with this analogy, it follows that the second group can definitely be categorised as the 'sheep'. This category is comprised of those Member States that did not initially intend to impose mobility restrictions but decided later to implement protectionist measures, effectively following the example set by the 'shepherds' and,

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[72] Details correct as of November 2006

[73] Chancellor Schröder speaking on 18 December 2000, 'Schröder seeks delay for East bloc workers', *Herald Tribune*, 19 December 2000

indeed, each other or, more appropriately, the 'flock'.[74] As more states made policy U-turns and announced that transitional measures would be implemented, those still resisting found themselves under increased national pressure to follow suit. In the months running up to enlargement transitional restrictions spread across the EU15 in the manner of a domino effect producing, effectively, a 'race to the bottom'. During this period the Member States imposing transitional periods adopted various regimes based on their national systems. Tamas and Münz point to the existence of work permits, annual quotas, bilateral agreements, seasonal permits or permits giving EU8 migrant labour access only to a particular sector.[75] In particular they point out that Austria maintained national restrictions but issued temporary work permits to EU8 nationals on the basis of labour market-based needs tests and discretionary decisions of the government. Germany continued to apply its bilateral seasonal labour agreements which are often utilised by Polish nationals.[76] Thus, even the two Member States who most ardently supported transitional restrictions were content to turn to EU8 migrant workers in order to sustain their own labour markets.

The UK constituted the third category. This Member State resisted calls to impose transitional restrictions, at least in the manner of those enshrined in the Accession Treaty, opting instead to grant labour market access to EU8 nationals provided they registered on a Workers' Registration Scheme. However, this 'open' free movement policy has been accompanied by changes to the test determining entitlement to various welfare benefits[77]

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[74] The EU15 Member States that fall into this category are: Belgium, Denmark, Finland, France, Greece, Italy, Luxembourg, the Netherlands, Portugal and Spain

[75] Tamas and Münz, *Op. Cit.* n.19, 2

[76] *Ibid.*

[77] Benefit claimants in the UK are required to be both habitually resident and 'lawfully resident' (which, for EU8 nationals, means they must either currently be in work or have built up a year of continuous work). The is discussed further below, section 3.4, and in chapter six, section 3

and restrictions on the residence entitlement of EU8 migrants who, for whatever reason, cease to be employed. The common perception is that open labour market access is tantamount to a liberal or even generous policy. In actual fact, this system is not as liberal as it appears to be and is arguably the most exploitative post-accession free movement regime to have emerged such that this Member State may be best described as a 'wolf in sheep's clothing'.[78] By denying EU8 migrant workers full access to the rights and benefits that normally accrue to migrant workers after the employment relationship has expired under Community law, the UK profits from the national insurance and tax contributions paid by the EU8 workers,[79] usually situated in sectors of the labour market with 'hard-to-fill' jobs, but does not shoulder responsibility for their welfare, in return, should they later fall on hard times.

Ireland, which held the EU Presidency at the date of enlargement, and Sweden have implemented the most liberal transitional free movement regimes. Both have allowed immediate and unrestricted free movement of labour from the EU8 without any concomitant requirement to register (as in the UK). Initially, though, it looked as though Sweden would implement transitional restrictions. The Swedish government had prepared a proposal whereby EU8 nationals would have been required to have an open-ended

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[78] The exploitative nature of the UK's post-accession regime is a theme which emerges throughout the thesis. Further below in this chapter the UK rules are explored in greater detail. In addition, chapter four looks at the work undertaken by EU8 migrants in the UK and suggests that often the workers' status is de-skilled and devalued in the labour market despite the jobs they do contributing positively to the UK economy; chapter five examines the family life of EU8 migrants and suggests that restricted welfare entitlement in the UK may prevent some EU8 workers from having their family members join them; and chapter six, on Union citizenship, suggests that the UK's denial of welfare assistance to EU8 work-seekers and former workers may be in contravention of Community law

[79] Gilpin, N., Henty, M., Portes, J. and Bullen, C., *The Impact of Free Movement of Workers from Central and Eastern Europe on the UK Labour Market,* Department for Work and Pensions, Working Paper No.29, (Leeds: Corporate Document Services: 2006)

job waiting for them in Sweden.[80] However, these proposals were defeated by Parliament just two days before accession.[81] These two Member States, therefore, applied Community free movement law fully in the initial two-year period.[82]

2.3.2. Initial labour market effects and EU15 policies after 1 May 2006

In accordance with the requirements of the Accession Treaty, in April 2006 the Commission produced a report on the functioning of the transitional arrangements.[83] The Commission confirmed that during the initial two years diverse national measures had been put in place across the EU15 resulting in legally different regimes existing for access to the labour markets of the Member States.[84] Consequently, the lack of uniformity created a complex and, arguably, confusing state of affairs for any EU8 nationals seeking to migrate to the EU15.

In the report the Commission stressed that migration flows between the EU8 and the EU15 in the initial two year period had been limited and were not significant enough to have an adverse affect on the EU labour market.[85] Interestingly, the report concludes that transitional arrangements have not been the primary determinant of mobility flows into the EU15, but rather

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[80] European Industrial Relations Observatory Online, (EIRO) 'Parliament rejects transitional rules', available at <http://www.eiro.eurofound.eu.int/2004/05/feature/se0405103f.html> (last accessed 15 November 2006)

[81] *Ibid.*

[82] Ireland did introduce a habitual residence test in respect of non-contributory social assistance: Chow, K., *Report on the free movement of workers in EU-25. The functioning of Transitional Arrangements – two years after enlargement,* (Brussels: European Citizens Action Service, 2006). However, as this test applies to EU8 nationals on the principle of equal treatment as regards Irish (and EU15) nationals this is not contrary to Community law.

[83] European Commission, *Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004-30 April 2006)*, COM(2006) 48 final

[84] *Ibid.*, 4

[85] *Ibid.*, 13

that the individual Member State's labour market conditions have been the principal factor influencing migration:

'There is no evidence to show a direct link between the magnitude of mobility flows from the EU10 Member States and the transitional arrangement in place. Ultimately, mobility flows are driven by factors related to supply and demand conditions'.[86]

Further, the report emphasises the positive effects that EU8 migrants, and the work carried out by them, is having on the economies of the EU15. In particular, migrants from the accession countries have helped to alleviate skills bottlenecks in EU15 labour markets.[87] This explains why even the most zealous supporters of transitional arrangements have continued to operate temporary migration schemes in various sectors in an attempt to fill vacant positions and, again, emphasises how the flexible design of the transitional measures have worked for the benefit of EU15 Member States. EU8 migrant workers appear to be playing a complementary role in the labour market by carrying out work nationals have neither the desire nor the skills to do. Despite fears of overcrowding and labour market disruption, the experience of those Member States that immediately opened up their labour markets suggests that the extension of mobility rights to EU8 nationals has not impacted negatively on the employment rates of nationals.[88]

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[86] *Ibid.*, 14. The demand-driven nature of EU8 migration is confirmed by Tamas, K. and Münz, R., *Labour Migrants Unbound? EU Enlargement, Transitional Measures and Labour Market Effects*, (Stockholm: Institute for Futures Studies, 2006)

[87] Commission Report. *Op. Cit.* n.83, 14. Various reports focussing on the UK confirm this, eg. Tamas and Münz, *Ibid.*; Gilpin *et al*, *Op. Cit.* n.79; Joint Report by the Home Office, the Department for Work and Pensions, the Inland Revenue and the Office of the Deputy Prime Minister, *Accession Monitoring Report, May 2004-June 2006*, 22 August 2006

[88] Commission Report. *Op. Cit.* n.83, 14. Again, research has confirmed these findings in relation to the UK, see Gilpin *et al*, *Op. Cit.* n.79

This notion of demand-driven migration resonates with the market-based migration theory devised by Favell and Hansen.[89] This theory contends that the market is, and has been, the primary driver behind migration processes in the EU and its Member States:

> *'Despite the nation-state's continued attempt to define migration as a political phenomenon - controlled by categories of 'legal' and 'illegal' migration, the granting (or not) of nationality and citizenship rights, and so forth - migration in Europe is in fact beginning to resemble more the scenario of labour market theorists, who point to self-regulating supply and demand factors as the ultimate determinants of why people move and where they end up'.*[90]

From this perspective the existence of transitional arrangements will have little impact on migration flows because the ultimate dynamic shaping mobility patterns will be the market economy and the labour markets within. Furthermore, it appears that many of the Member States that have imposed transitional restrictions have encountered increased numbers of EU8 migrants working in the irregular, black labour market in the aftermath of enlargement.[91] Arguably, such workers who take up work in the shadow economy are also responding to a demand for low-skilled and flexible labour in the EU15 Member States that have implemented transitional measures.

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[89] Favell, A. and Hansen, R., 'Markets against Politics: Migration, EU Enlargement and the Idea of Europe', (2002) 28(4) *Journal of Ethnic and Migration Studies*, 581

[90] *Ibid.*, 597

[91] European Commission (Directorate-General for Economic and Financial Affairs), *Enlargement, Two Years After: An Economic Evaluation*, Occasional Paper 24, (Brussels: European Commission, 2006)

While the transitional arrangements in place may not be the primary determinant of migration patterns into a particular Member State one would obviously expect those Member States with (more) open labour market access to experience greater inflows of migrants. Patterns of migration into Ireland and the UK would appear to support this view. The Commission's report draws on data from the European Labour Force Survey which provides that EU10[92] nationals made up 0.4% of the total working age population in the EU15 in 2005 (as compared to 0.2% prior to accession in 2003).[93] In the case of Ireland, however, in 2005 EU10 nationals accounted for 2% of the working age population.[94] Meanwhile, in the UK the figure has risen from 0.7% in 2003 to 1.4% in 2005. Interestingly, there has not been such an increase in the percentage of EU10 nationals making up the working age population in Sweden (the other EU15 Member State with an 'open' labour market): it has remained constant at 0.2% from 2003-2005.[95] Tamas and Münz use this as evidence to support the view that legal labour market access does not automatically lead to large migration flows and that, in fact, demand for labour is a much greater factor.[96] This view is clearly an influential one. The discussion here has already suggested the UK and Ireland had labour market shortages. However, other social factors are likely to also be influential. For example, it is telling that, out of the three Member States which opened their labour markets following EU enlargement, the two (predominantly) English-speaking Member States experienced the greater inflows. In addition, in the case of the UK at least, there is a history of migration from

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[92] The report includes Malta and Cyprus within its ambit and hence refers to the EU10 as opposed to the EU8

[93] All statistics taken from Commission Report. *Op. Cit.* n.83, 8-9

[94] No comparable data exists in relation to 2003

[95] Of course, the European Labour Force Survey has methodological drawbacks, particularly as regards comparability as each Member State collects and provides its own data

[96] Tamas and Münz, *Op. Cit.* n.86. This also corroborates Favell and Hansen's argument *Op. Cit.* n.89

Poland which is likely to have led to the creation of migration networks and migration diasporas, helping to facilitate and ease the burdens associated with the migration process.[97]

There is scope here only for a brief sketching of the, still emerging, labour market trends in the aftermath of accession.[98] The general conclusion from the studies thus far is that those pre-accession fears of labour market crowding and welfare tourism have not materialised.[99] Instead, those Member States with open employment access have reported positive results for the labour markets. The remaining chapters of this thesis, and the qualitative empirical work upon which they are based, support the view that in the UK EU8 migrants have taken jobs in the lower echelons of the labour market that have been left vacant by nationals, despite often being overqualified for these roles,[100] and have demonstrated little desire to claim welfare benefits for themselves or their families.[101]

Following the expiry of the initial two-year phase an even more complex geometry of free movement entitlement has emerged in the EU15. The positions of Germany, Austria, Ireland, the UK and Sweden did not change after 1 May 2006; therefore, the Member States at opposite ends of the

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[97] On migration networks see, *inter alia*, Faist, T., *The volume and dynamics of international migration and transnational social spaces*, (Oxford: Clarendon Press, 2000); Waldinger, R. and Lichter, M.I., *How the Other Half Works: Immigration and the Social Organisation of Labor*, (Los Angeles: University of California Press, 2003); Rees, A., 'Information Networks in Labour Markets', (1966) 56(1/2) *The American Economic Review*, 559; Choldin, H.M., 'Kinship Networks in the Migration Process', (1973) 7(2) *International Migration Review*, 163; MacDonald, J.S. and MacDonald, L.D., 'Chain Migration, Ethnic Neighbourhood Formation and Social Networks', (1964) 24 *Milbank Memorial Fund Quarterly*, 82

[98] For more detailed discussion see Tamas and Münz, *Op. Cit.* n.86; Commission Report. *Op. Cit.* n.83; European Commission, *Op. Cit.* n.46

[99] Although at times media commentary in the UK would suggest otherwise. Obviously, it is not clear what would have emerged if transitional arrangements had not been implemented in any EU15 Member State

[100] See chapter four

[101] See chapter five

labour market access scale have remained stable. Amongst the Member States in the middle group, however, there have been changes in labour market regulation with many of the countries which applied transitional restrictions initially relaxing the rules to allow EU8 nationals greater access to work. Greece, Finland, Portugal and Spain stated early in 2006 that they would allow full labour market access from 1 May 2006. Meanwhile, Italy opened up its labour market in July 2006, reversing the earlier decision of the Berlusconi government. The remaining EU15 Member States – Belgium, France, the Netherlands, Denmark, and Luxembourg – maintain a variety of labour market restrictions, of varying degrees of severity, such as quota systems, work permits and temporary schemes in certain employment sectors.[102] All of the EU15 Member States are entitled to rely on the safeguard clause until the transitional period fully expires in 2011. In turn, the EU8 are able to maintain reciprocal measures against the EU15. Since the expiry of the initial two-year phase only Hungary and Poland continue to have such reciprocal mobility restrictions in place.

The case remains that the number of different regimes in place across the EU15 creates a somewhat complex and highly differentiated patchwork of free movement rights. From the perspective of EU8 nationals who wish to explore the migration opportunities available to them in the EU15, comprehensive and accurate information may not be easy to access and the various systems create the potential for confusion. This has been recognised by the European Citizen Action Service (ECAS) which, in

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[102] See Traser, J., *Who's Still Afraid of EU Enlargement*, (Brussels: European Citizen Action Service, 2006); Tamas and Münz, *Op. Cit.* n.19; Euractiv, 'Free Movement of Labour in the EU-25', 14 August 2006 < http://www.euractiv.com/en/enlargement/free-movement-labour-eu-25/article-129648 > (last accessed 15 November 2006); BBC News, ''Old' EU eases Labour Barriers', 2 May 2006 < http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/3513889.stm > (last accessed 15 November 2006); Mahony, H., 'Italy Opens Up Labour Market to Eastern Europeans', *EUobserver*, 24 July 2006 < http://euobserver.com/9/22149 > (last accessed 15 November 2006)

August 2006, set up a hotline on free movement rights.[103] The initiative, which responds to both emails and telephone calls, is part of the activities ECAS planned in 2006 to coincide with the European Year of Workers' Mobility[104] and aims to provide migrants and potential migrants with information about exercising mobility rights throughout the EU.

The following section examines the labour market rules in the UK under the transitional regime in greater detail. The primary component of the UK regime is the Worker Registration Scheme and, as will be demonstrated, uncertainty and confusion appear to have accompanied the implementation of this system.

3. The UK's post-accession regulatory system: the Workers' Registration Scheme

This section aims to develop the discussion above by examining the domestic rules implemented in the UK to govern labour migration from the EU8. As a result of the discretion granted to the EU15 Member States under the Accession Treaty the national context is an essential part of any discussion of migration in the enlarged EU. The UK provides an especially interesting framework due to the particular stance it adopted: labour market access rights have been left largely intact (subject to registration) but the legal test governing access to benefits, the habitual residence test, has been modified in an attempt to ensure welfare tourism does not occur. Given the particular focus of this chapter, it is the Worker Registration Scheme's rules that provide the basis for the majority of the discussion; however, because the UK system links the issues of

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[103] European Citizen Action Service, Press Release: ECAS Hotline on Free Movement Rights, 25 August 2006 <http://www.ecas.org/file_uploads/1179.pdf> (last accessed 29 August 2006)

[104] See the Commission's website devoted to the European Year of Workers' Mobility initiative <http://europa.eu.int/comm/employment_social/workersmobility2006/index_en.htm>

employment, lawful residence and benefit entitlement there is also some mention of the altered social benefit rules.

The WRS system is problematic in a number of respects. The difficulties relate to the various conditions imposed by WRS, in particular: registration deadlines for employees and employers, a 12-month rule for benefit entitlement, and certain other bureaucratic rules that appear to have culminated in the creation of an atmosphere of uncertainty. The prevailing uncertainty, in turn, has encouraged migrants to seek information about their rights to work in the UK and available job opportunities by relying on various other actors and methods. For example, employment agencies based both in the EU8 and in the UK, appear to have played a prominent role in facilitating migration in the post-accession environment.[105] Individual employers seeking to benefit from the availability of EU8 workers in order to fill vacant positions have also been active players in the new migration space. Many employers have established recruitment schemes in the EU8 specifically to target workers. In addition to seeking assistance from 'official' sources such as these migrants are continuing to rely on informal migrant networks for information about job opportunities, and life generally, in the host state. Thus, in addition to the WRS rules the section explores these methods of finding work and considers the implications of reliance upon them from the migrants' perspective.

3.1. The background to the UK's approach towards EU8 migrants

In the lead up to accession a decidedly negative image of potential migrants from the EU8 was portrayed by quarters of the British press. Much emphasis was placed on the 'threat' posed to the benefits system and

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[105] Ward, K., Coe, N., and Johns, J., *The Role of Temporary Staffing Agencies in Facilitating Labour Mobility in Eastern and Central Europe,* (Manchester: Vedior, 2005)

labour market by migrants.[106] The pressure exerted on the UK government to impose restrictive measures was heightened as the majority of Member States announced transitional restrictions. The UK, however, was in a different position to many of its EU15 counterparts, notably because the UK economy appeared to be in need of foreign labour across a number of different sectors of the employment market. David Blunkett, then Secretary of State for the Home Department, asserted on 23 February 2004:

'We currently have more than 500,000 vacancies and will benefit from the skills, flexibility and willingness to work of those new migrant workers'.[107]

As already mentioned above, this rationale appears to have been justified in the light of post-accession evidence which suggests that EU8 workers have plugged gaps in the UK labour market that would not otherwise be filled by nationals.[108] One of the first installments of the Accession Monitoring Report series, published by the Home Office, stated that:

'The vast majority of workers are young and single, and many are doing key jobs to support public services... Accession workers are continuing to go where the work is, helping to fill gaps in our labour market'.[109]

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[106] For example, Smith. S., 'Immigration Hysteria: What they said about ... immigration and the EU – Tabloids threaten 'flood' of Gypsies', *The Guardian*, 21 January 2004

[107] Hansard, HC, vol. 48, col.23 (23 February 2004)

[108] It should be noted, however, that despite such benefits being recognised the UK has decided not to extend its policy of open labour market access to nationals of Bulgaria and Romania following the accession of these countries in 2007. The secondary legislation had not been drawn up at the time of writing but the broad policy was set out in a statement by Home Secretary John Reid on 24 October 2006, see Hansard, HC, vol. 450, col. 84 (24 October 2006). The reasoning essentially appears to be that the economy may have benefited from the presence of EU8 workers but to continue the policy in respect of the new EU2 would place pressure on certain local infrastructures (in respect of language training and housing for example). This is discussed in the concluding chapter

[109] Joint Report by the Home Office, the Department for Work and Pensions, the Inland Revenue and the Office of the Deputy Prime Minister; *Accession Monitoring Report, May 2004-March 2005*, 26 May 2005

Anderson *et al,* in their research on central and eastern European migrants working in the UK, report that employers of EU8 migrants had often persistently attempted unsuccessfully to recruit UK workers prior to accession.[110] Essentially, the authors found that many UK workers were not prepared to accept employment in the type of sectors EU8 migrants have occupied following accession including: hospitality, agriculture and food processing, which are characterised by low wages, long hours and physically-demanding work.[111]

It seems that the UK approach is the result of a political balancing act; the government was keen to allow accession migrants to work in the country to help fill labour shortages but at the same time it wanted to be seen to be responding to concerns connected to the benefit system, to limit political damage. Thus in the same statement Mr Blunkett also stressed the importance of preventing abuse of the welfare system:

'Whether they are plumbers or paediatricians, they are welcome if they come here openly to work and contribute. At the same time, it is clearly not right that people should be able to come here, fail to get a job and then enjoy access to the full range of public services and social security benefits'.[112]

The WRS attempts to knit together the issues of employment, legal residence and access to social benefits for EU8 migrants. The effect of the system is to make legal residence dependent upon being in employment

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[110] Anderson, B., Ruhs, M., Rogaly, B. and Spencer, S., *Fair Enough? Central and East European Migrants in Low-wage Employment in the UK*, (Oxford: Compas, 2006), 65-70

[111] *Ibid.* More detail about the type of jobs EU8 migrants have taken in the UK is provided in chapter four

[112] Hansard, *Op. Cit.* n.107, col. 24

and, in turn, access to social benefits is restricted to those legally resident, i.e. those in work. The details of this system are enshrined in two statutory instruments: the Accession (Immigration and Worker Registration) Regulations 2004;[113] and the Social Security (Habitual Residence) Amendment Regulations 2004.[114]

The UK has not restricted the ability of EU8 migrants to access employment in its territory and thus it has not derogated from Articles 1-6 of Regulation 1612/68. However, the WRS does create a legal requirement for EU8 migrants to register their employment. In fact, the employment status of EU8 nationals is only considered to be legal upon registration.[115] Furthermore, the Worker Registration rules limit the right of residence for EU8 workers to the effect that an EU8 national is only considered to be legally resident when in work and registered on the scheme (at least for the first 12 months of residence). An EU8 national who is unemployed, either as a new arrival workseeker or a former worker, only has a right to reside under UK law if they can demonstrate economic self-sufficiency.[116]

3.2. The registration process: obligations of employees and employers

With regard to the practicalities of registering on the WRS, once in employment there is a deadline of 30 days within which the EU8 worker must apply to the WRS.[117] To register the migrant must complete a registration form and provide a letter from an employer as confirmation of

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[113] Referred to here as 'Worker Registration Regulations', (WRR) SI 2004/121

[114] Referred to here as 'Social Security Regulations', (SSR) SI 2004/1232

[115] Some EU8 nationals are exempt from the requirement to register: those that had leave to enter on 30 April 2004 (reg. 2(2) and (3) WRR); those working legally in the UK for a period of 12 uninterrupted months ending after 30 April 2004 (reg. 2(4)); those family members of an EU15 national already in the UK (reg. 2(6)); and self-employed EU8 nationals (reg. 2(5))

[116] Regulation 4(3), WRR

[117] Regulation 7(2)(b)(i), WRR

the employment relationship.[118] An employer is only an 'authorised employer' if the worker complies with the registration process and applies for a registration certificate,[119] which includes paying an initial registration fee of £70.[120] Therefore, an EU8 national working without registering on the WRS is classified as an illegal worker and as being unlawfully resident. It is important to note that EU8 nationals are required to register on the scheme in respect of every job they take up. If they have more than one job simultaneously they must hold a registration card for each of these jobs.[121]

It is apparent that a significant number of EU8 migrants have not registered on the WRS. For example, of the 33 respondents who took part in this study that were required to register only ten of them had done so.[122] The research on central and eastern European workers by Anderson *et al* confirms this trend for non-registration. Amongst their sample of 217 workers 75 had not registered.[123] In some cases, this is sometimes the choice of the individual migrant; many of those interviewed were unhappy with the registration fee which, especially in the initial phase after arrival, was viewed as being very costly. Some also stressed that there was 'no point' in registering as they did not intend to stay longer than a few months and had no interest in accumulating uninterrupted months of lawful employment. For others non-registration had not been a conscious decision, they were simply not aware about the requirement to register or

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[118] Regulation 8(4), WRR

[119] Regulation 5(2) WRR

[120] Regulations 7(2)(b) and 8(4)(a) WRR, respectively. The original fee in May 2004 was £50

[121] Regulation 7(2)(c), WRR

[122] More than 33 respondents took part but those who had worked in the UK for a continuous period of 12 months prior to accession were not required to register: regulation 2(4), WRR

[123] Anderson *et al*, *Op. Cit.* n.110, 97

were misinformed about the applicability of the scheme to them.[124] Anderson *et al* point to the lack of incentives for EU8 migrants to register, in particular the low probability that the UK authorities would actually carry out a deportation against such EU8 nationals (despite this being a theoretical possibility):

> *'While working for longer than one month without registration does constitute "illegal work" the sanctions on workers are... complex to enforce. It may well be that certain groups of A8 workers, most particularly those who are not intending to stay for very long in the UK, and who are not concerned with claiming benefits at any time in the future are not motivated to register'.*[125]

On the other hand, it appears that in some instances it is at the employer's (or agency's) insistence that workers do not register. Despite the fact that employers commit an offence by employing unregistered EU8 workers,[126] there are very few checks conducted and enforcement of this law is weak. It is generally the case that levels of prosecution against employers for violations of immigration law are low and this trend is prevalent also in the operation of the WRS.[127] This is interesting since part of the rationale underpinning the WRS was to eradicate, to an extent, the black labour market and to promote legitimacy:

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[124] The degree of confusion surrounding the scheme is elaborated on below

[125] Anderson *et al*, *Op. Cit.* n.110, 97

[126] Regulation 9(1) WRR

[127] Anderson *et al*, *Op. Cit.* n.110

'By taking these measures [implementing the WRS] we will ensure that those arriving in Britain can work for their living openly and honestly and are not drawn into the sub-economy'.[128]

The following respondent was aware of the need for EU8 nationals to be educated about their employment rights, but he also gives an example of how unofficial employment can place migrant workers in a weak bargaining position:

"Many employers don't care about rights but we shouldn't give permission for people to treat us like slaves. My friend [who was unofficially employed] *started work but after two days the employer said 'you are not enough good for me' and he didn't get any wages"* (interview 001.JK).

Research carried out by Anderson and Rogaly found that some migrant workers in the UK are subject to such levels of exploitation and control that they fall within the international legal definition of 'forced labour'. Even migrants who can legally work in the UK, such as EU8 nationals, are exploited 'because they are unable to enforce their legal rights because of the power employers often have over them'.[129] Part of their research specifically looked at the position of EU8 nationals in the UK and the report found that some employers had refused to register EU8 workers on the WRS.[130] It is likely such employers prefer to keep workers away from the 'legitimacy' associated with registration; after all, it is easier to offer poor work and pay conditions to those who exist outside of the official

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[128] David Blunkett MP, Hansard, HC, vol. 418, col. 25 (23 February 2004)

[129] *Ibid.*, 7

[130] *Ibid.*, 48

scheme away from even the most basic checks and balances.[131] The empirical work would support this assertion as there were a number of examples given by migrant workers of employers who preferred to 'keep the work illegal'. For example the following respondent, who worked in a café, was very aware of her employer's reasoning behind the decision to employ only irregular workers:

"I must confess that it was an illegal job because I didn't pay any insurance or tax or register myself. The money wasn't very good. I worked with a girl from Hungary and a girl from Brazil. It was illegal and I think that a lot of people work like that. Even though now it is legal you know the employers don't want to hire people legally because they can then pay less to workers and in such places there are only foreigners working there because no English people would accept that. It is not nice but they can always say: 'if you don't want a job there are plenty of people who would take your place'" (Interview 304.P).

Employers and their actions were a constant source of enquiries to a telephone helpline in Poland set up by the International Organisation for Migration (IOM). It was funded by the UK government under a scheme entitled 'Not All Roads Lead to Britain' which aimed to inform people of the right to work while also highlighting the lack of social assistance available. One of the IOM representatives, who had worked on the helpline, recounted details of experiences she had been told about:

"Some employers took all the documents away from the staff and locked them in a safe, or kept people in very bad conditions in a remote village

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[131] EU8 workers should benefit from the protection of Directive 93/104/EC on the organisation of working time [1993] O.J. L307/18; as well as from the equal remuneration provisions (Article 7(1), Regulation 1612/68)

and made them clean all day. There were clear examples of criminal behaviour" (Interview 102.INFO).

There is also an issue of visibility in relation to employers of EU8 migrants. By providing the necessary confirmation of employment under the WRS employers identify themselves to the authorities as being responsible for such matters as tax and national insurance contributions. Tamas and Münz draw a contrast between Sweden, which is regarded as having particularly strong labour market enforcement, and the UK, which has significantly weaker labour market regulation. Though both have opened up their labour markets to workers from the EU8, albeit with different outcomes in respect of the EU8 migrant inflow, research suggests that instances of employer abuse and irregular work in Sweden have been particularly low, whereas in the UK concern has been expressed, for example by Trade Unions, that some EU8 workers continue to be exploited by employers in terms of low-paid work, poor safety standards and insufficient enforcement of employment rights.[132]

As EU8 nationals are only legally resident if they are in work and registered within 30 days of arrival it follows that they are technically required to arrange employment before moving to the UK or find work quickly. The practical reality is often quite different. The ability to pre-arrange employment will depend upon the level of information about employment opportunities in the UK, available in the country of origin.

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[132] Tamas and Münz, *Op. Cit.* n.19, 15. In the UK both the TUC and the TGWU have sought to highlight such cases of abuse, for example TGWU Press Release, *Shop steward suspended for speaking out against agency workers' abuse,* 27 June 2006 <http://www.tgwu.org.uk/Templates/News.asp?NodeID=92616> (last accessed 31 September 2006); TGWU Press Release, *T&G Polish Members Join Nationwide Tesco Protest*, 3 September 2005 <http://www.tgwu.org.uk/Templates/News.asp?NodeID=91843> (last accessed 31 September 2006); TUC News Release, *Polish PM urged to join forces with UK to tackle bad employers*, 24 November 2005 <http://www.tuc.org.uk/h_and_s/tuc-11110-f0.cfm> (last accessed 21 September 2006)

The 'Not All Roads Lead to Britain' campaign, which also distributed information leaflets and ran workshops for potential migrants, may have highlighted this requirement to some and, arguably, may have increased the numbers of people who did seek employment before arrival, most likely with the help of an employment agency.[133]

This requirement to register is not imposed upon national workers or other EU migrant workers in the UK. Therefore, it is clear that EU8 migrants workers are treated differently by being required to register. However, in the light of the transitional arrangements, it is unlikely that the requirement to register would be considered as unlawful discrimination under Community law; after all, the UK is entitled to regulate the conditions under which nationals from the EU8 access employment,[134] and the registration scheme is regarded as a condition of access. Moreover, in the light of the ability of the EU15 to invoke the safeguard clause,[135] it appears that the UK is justified in introducing such a scheme for the purpose of monitoring the numbers of EU8 migrants in the labour market.[136]

What is not so clear-cut is whether the UK is entitled to confer the status of 'unlawfully resident', which carries the implicit threat of deportation, upon a person who does not register. An analogy can be drawn with the Article 39 EC caselaw relating to registration requirements. It is settled Community law that expulsion cannot be an automatic consequence of a failure to comply with administrative formalities on entering a Member

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[133] See Spitzer, D., 'Britain Strives to Limit Immigrants', *The Prague Post*, 22 April 2004, <www.praguepost.com/P03/2004/Art/0422/news5.php> (last accessed 30 September 2006). One of the respondents interviewed had helped to implement the campaign

[134] Para. 2, Annexes

[135] Para. 7, Annexes

[136] Para. 6, Annexes

State.[137] Arguably a lesser sanction, such as a small fine, would be a more appropriate and proportionate consequence of non-registration.[138] The legitimate consequences of non-registration of Member State nationals under Community law is clearly limited in scope and, as the UK has purportedly extended free movement rights to EU8 workers, it seems that such principles are relevant despite the existence of transitional restrictions. Under Article 39 EC expulsion by a Member State of a migrant worker can only be justified in very limited circumstances.[139] During the operation of the transitional period, of course, the safeguard clause can be relied upon to justify the imposition of labour market restrictions in relation to EU8 workers. What is not clear, however, is if it would justify the expulsion of any EU8 workers previously admitted to employment. Arguably, if a Member State did invoke the safeguard provision in the wake of significant labour market disruption it would apply only prospectively. In any event, a Member State is unlikely to deport an EU8 national in employment but the transitional arrangements do suggest that those that are *voluntarily* unemployed forfeit their rights in that Member State.[140]

It is clear that the UK rules place obligations on both the workers and employers in relation to the registration requirement but the balance of power is tipped in favour of the employers. While for some EU8 workers non-registration is a positive choice, for others their employer's tendency to favour irregular workers can disadvantage them in terms of the working conditions they experience. Additionally, in the longer term, non-registration may harm the worker's ability to access certain social

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[137] See Case 48/75 *Royer* [1976] E.C.R. 497, para. 38

[138] See Case 118/75 *Watson and Belmann* [1976] E.C.R. 1185

[139] Article 39(3) EC states that Member States may restrict free movement on grounds of public policy, public security or public health. Article 27, Directive 2004/38 [2004] O.J. L158/77 now gives further details replacing Directive 64/221 [1964] O.J. 850/64

[140] Para. 2, Annexes

advantages and benefits in the UK, should they fall on hard times at a later date, because the UK rules purport to restrict full applicability of worker's rights (under Community law) to those who have worked – and been registered - continuously for 12 months.[141]

3.3. The 12 month rule

The registration requirement applies for the first 12 months of an EU8 national's employment in the UK. Once such a worker has accumulated 12 months of uninterrupted legal employment the requirement to register ceases and residence is no longer contingent upon employment. After complying with the registration process for a year the worker will then be eligible for an EEA residence permit.[142] An EU8 worker who ceases to work during the first year of employment can retain the months already accumulated by finding alternative work and re-registering within 30 days from the date the worker's right of residence terminates.[143] Home Office statistics show that 49% of the 427,000 WRS registrations between 1 May 2004 and 30 June 2006 were for temporary contracts,[144] so it seems that this 30-day deadline is likely to be an issue for these temporary workers. On expiry of a temporary contract, if new employment is not found within 30 days, the worker's residence terminates and, formally at least, they are obliged to return home.

These requirements also rule out casual, cash-in-hand posts that are often more readily accessible to migrants through informal migrant networks.[145] Ironically, formal advertised posts often take longer than 30 days to

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[141] See below in section 3.4

[142] Regulation 5, WRR

[143] Regulation 2(4), WRR

[144] Accession Monitoring Report, *Op. Cit.* n.87

[145] Waldinger and Lichter, *Op. Cit.* n.97

arrange, with the result that the deadline for registration may not be met. Again, employers' input can be crucial here. An employer who does not supply the necessary confirmation letter pending the official start date of the job consigns the worker to a status of 'illegality'; an employer who delays providing the necessary confirmation until after the 30-day deadline may cause the worker to forfeit the all-important months of uninterrupted employment already accumulated.[146] The following respondent had changed jobs after six months of work with one employer and, although she was aware of the need to re-register on the WRS, her new employer had not acted quickly enough and had exceeded the 30-day deadline:

"I gave the letter to my employer at the time and I am still waiting for it so I haven't got a clue what will happen because I was told 30 days is the deadline and I have passed the deadline" (Interview 011.MW).

Technically this respondent was working illegally and had no right to reside under UK law. In addition she had lost six months of uninterrupted employment that could have counted towards the required 12, even though she had no actual break between the two contracts of employment. It is questionable, however, whether the position of UK law is compatible with the terms of the Accession Treaty. Indeed, a distinction can be drawn between what the UK *purports* to do, in this instance deny a right of residence after the expiry of a deadline, and the restrictions that Community law may impose on the UK. Surely it would be difficult for the UK to claim that the situation in which the above respondent found herself was simply 'one of those things' or a necessary inconvenience. After all, following cases such as *Baumbast*[147] the Member States are required to take into account the principle of proportionality when seeking

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[146] Regulation 8(4), WRR

to place limits on the right to reside of a migrant worker. It would certainly seem that the denial of residence following the passing of a registration deadline would be a disproportionate response on the UK's part.[148]

3.4. Implications of the link between registration of employment and residence: EU8 migrant workers' entitlement to social welfare benefits

Earlier on in this chapter the point was made that the UK has sought to prevent EU8 migrants who find themselves without work from accessing benefits in its territory by changing the test which governs benefit entitlement. While the compatibility of this component of the UK regime in the light of Community law is discussed later on in chapter six it is useful here, given that an aim is to describe the detail of the UK system, to note the connections between registration of employment, lawful residency and the consequent ability to access benefits on the basis of non-discrimination. In this respect, the Social Security Regulations[149] work alongside the Worker Registration Regulations by changing the eligibility criteria in social security legislation to the effect that claimants need to satisfy a 'legally resident' residence test, in addition to the standard habitual residence test in order to access certain social benefits.[150] Habitual residence is designed to establish which individuals are sufficiently connected to the territory to qualify for means-tested benefits. Previously, habitual residence was the sole threshold an applicant, whether a UK national or EU migrant, need overcome before gaining access to social benefits. The concept is not defined in any legislation, and, while it is beyond the scope of this discussion to provide a comprehensive overview

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[147] Case C-413/99 *Baumbast* [2002] E.C.R. I-7091

[148] The potential impact of Community law on the UK's post-enlargement regime (specifically regarding workseekers' residence and social welfare rights) is discussed in chapter six, section 3

[149] The Social Security (Habitual Residence) Amendment Regulations SI 2004/1232, referred to here as SSR

[150] Although the intention was to prevent EU8 nationals from abusing the benefits system the changes to the habitual residence test apply to all potential claimants

of the relevant caselaw,[151] it is worth noting the following comment by White on the operation of the habitual residence test:

'Decision makers are required to determine whether, taking account of all the circumstances of the case and having regard to the length, continuity and general nature of the actual residence together with the person's intentions, there is evidence of a settled and viable pattern of living in the United Kingdom as a resident'.[152]

Additionally, however, applicants must now satisfy the requirement of being 'lawfully resident'. In order to fulfil this limb of the test an EU8 applicant must show they have a right to reside in the UK by virtue of their registration certificate or that they have already completed 12 months of continuous, registered work.[153] The benefits triggered by this additional residence condition include: income support, income-based jobseekers' allowance, housing benefit, council tax benefit, pension credit, child tax credit, child benefit[154] and housing and homelessness assistance.[155] This further residence requirement serves to exclude EU8 new arrival workseekers and workers who cease employment during the first year of employment from entitlement to the social benefits mentioned above by virtue of the fact that EU8 migrants have no right to reside under UK law unless they are in work or have accumulated 12 months of continuous

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[151] Habitual residence has never been given a decisive definition by the UK courts, this is likely to be a deliberate position to allow for some flexibility on the courts' part. See *Nessa v Chief Adjudication Officer* [1999] 4 All ER 677. The main ECJ decision on this point is Case C-90/97 *Swaddling v Adjudication Officer* [1999] E.C.R. I-1075

[152] White, R., 'Residence, Benefit Entitlement and Community Law', (2005) 12 *Journal of Social Security Law*, 10, 22

[153] Regulation 3(c), SSR

[154] Tax Credit (Residence) (Amendment) Regulations 2004 SI 2004/1243; Child Benefit (General) (Amendment) Regulations 2004 SI 2004/1244

[155] The Allocation of Housing and Homelessness (Amendment) England Regulations 2004 SI 2004/1235

lawful employment. The compatibility of this approach under Community law, in light of developments in the Court's citizenship caselaw, is dubious at best.[156]

EU8 workers who do comply fully with the WRS satisfy the new legal residence requirement. As a consequence registered EU8 workers are treated no differently from general EU15 migrant workers as regards access to 'social advantages' on the basis of the principle of non-discrimination on the ground of nationality, in compliance with Article 7(2) of Regulation 1612/68, as long as they continue to fulfil the conditions of the WRS. UK social security legislation treats EU (including EU8) migrants working in the territory as automatically satisfying the habitual residence test.[157] Registered EU8 workers are therefore eligible to receive in-work benefits, such as tax credits for example. If, however, an EU8 worker leaves work before accumulating 12 months of uninterrupted employment and does not undertake alternative employment within 30 days, as they no longer fulfil the condition of lawful residence, he or she is not entitled to receive social benefits.

From this perspective, it seems that many EU8 nationals are denied the opportunity to claim certain benefits despite being in work as a consequence of non-compliance with the registration requirement. In reality, the benefits to which EU8 workers are entitled on paper are, so far, not being used to any great extent. That said, it is paradoxical to grant people in work the right to claim income-based job seekers' allowance and

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[156] EU8 workers who cease to work during first year of employment are only lawfully resident for the remainder of month in which they worked (reg. 5(4)(b) WRR). The incompatibility of the UK system is discussed in detail in chapter six, section 3. For example, Case C-85/96 *Martinez Sala* [1998] E.C.R. I-2691, Case C-138/02 *Collins,* [2004] E.C.R. I-2703 (new arrival workseekers) and Case 39/86 *Lair* [1988] E.C.R. 3161 (former workers who are now unemployed). Also Directive 2004/38 [2004] O.J. L158/77

[157] For example, The State Pension Credit Regulations 2002, Regulation 2(a), SI 2002/1792

workers generally have little need for benefits such as homelessness assistance.[158] As the whole basis of their legal right to claim rests on being in work it is unlikely that EU8 nationals will be entitled to receive, for example jobseekers' allowance, even during the 30 day period of grace 'in-between' jobs. In any event, from a practical perspective, it is unlikely that the process of obtaining jobseekers' allowance could be completed (from application through to obtaining the benefit) within a time as short as 30 days. The profile of registered workers corroborates the view that benefits are not playing a meaningful role in the majority of EU8 migrants' experience in the UK. A predominant characteristic of EU8 nationals working in the UK is youth: 83% of the EU8 nationals registered as working in the UK are below the age of 34. Furthermore, only 2% of EU8 workers have dependents living with them in the UK.[159] Hence there would appear to be no great demand for old age or family-related benefits.[160]

The author's qualitative work with Polish migrants supports the argument that claiming social welfare is neither a primary migration motivation nor an expectation. The following statement from a respondent represents a common viewpoint articulated in the interviews:

"We are not allowed to claim lots of benefits, but, actually it is useless for us anyway. Mostly, people from the new countries come here just for a short period to earn some money. The idea of claiming benefits has never entered my mind" (Interview 002.PZ).

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[158] This is supported by the finding that 97% of registered workers are in full time employment: Accession Monitoring Report, *Op. Cit.* n.87

[159] Accession Monitoring Report, *Op. Cit.* n.87

[160] The issues of family reunification, welfare and sustaining families post-migration are discussed in chapter five

Now that the regulatory system put in place in the UK to address EU8 migrants' labour market access, and the various rules relating to it, have been set out attention can turn to the manner in which migrants have negotiated the evident complexity in the system.

4. EU8 migrants' navigation of the regulatory regime in the UK

The WRS appears to have effectively created a maze of bureaucracy that both workers and employers have had to navigate. The details of this system are complex and information regarding the scheme is not easily accessible. The WRS application forms and the accompanying guidance notes are provided in English only. Moreover, the documents relating to the WRS are not readily available in hard copy and must be downloaded from the government's 'Working in the UK' website (presuming the EU8 worker has access to the internet and a printer).[161] The last-minute nature of the UK's response to the accession 'problem' complicated this information-shortage, as there was very little time prior to accession for any widespread publicising of the scheme.[162]

This layer of bureaucracy has generated widespread uncertainty among EU8 workers and UK employers alike. Many of the Polish respondents interviewed were aware that the UK had opened its borders, often because of what they had read in Polish newspapers or been told by friends, but many were unaware of the specific details of the WRS scheme. The following interview was carried out in August 2004 and the respondent had been working in the UK since May 2004. Since he had not registered, his employment and residence in the UK were technically illegal according to

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[161] Available at <www.workingintheuk.gov.uk/working_in_the_uk/en/documents/all_forms.html> (last accessed 15 November 2006)

[162] The government's decision on the position regarding transitional measures was taken comparatively late. Announcements of the broad policy were made in February 2004 but it was not until March/April that the specific nature of the legal provisions began to emerge. See Hansard, HC, vol. 48, col.23 (23 February 2004)

national law.[163] The respondent had lost the opportunity to accumulate three months of continuous legal employment, twelve of which would enable him to enjoy security of residence and full access to social benefits should he subsequently become unemployed:

"I was trying to get to know what is my position here but they [the Home Office] *didn't respond... They didn't answer my emails. What am I supposed to do? Am I supposed to register myself?"* (Interview 016.D).

The atmosphere of uncertainty surrounding the scheme was referred to on several occasions by respondents. Additionally, the IOM representative stated that the scheme was frequently the reason why people resorted to their telephone helpline. She confirmed that in the beginning, from May 2004 until August 2004, they received approximately 350 calls per day. Queries regarding the WRS were a common cause for concern and the following respondent's experience supports the view that the information was not readily available:

"After some weeks of the campaign people got to know about this registration scheme and some questions started about registration. For example, where can I get the WRS forms? Why is it only on the internet? This was a prohibitive restriction for people. If you are poor and have no Internet access and want to go to London to work as a cleaner, or you are already there, getting access to the Internet and filling in four or five pages of questions in English is not an easy task. This was kind of a restriction to the market" (Interview 102.INFO).

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[163] His employer was also committing an offence by employing an unregistered EU8 national under regulation 9(1), WRR

The Home Office itself seemed to have experienced some teething problems, particularly in the initial stages of the operation of the WRS. The following extract provides an example of an employer who was very aware of the need to find out about the status of EU8 nationals working for him after 1 May 2004. The Home Office, unfortunately, was unable to offer any clear response:

"My employer chose me for the position before 1st May and he did absolutely everything to find out. He phoned the Home Office every day and they kept saying 'we don't know yet, we don't know yet. You have to be patient'. But it was a week until 1st May and they still said they didn't know" (Interview 007.LR).

The employer in this case had taken active steps to educate himself about the status of EU8 workers after 1 May 2004. However, when there is uncertainty legitimate employers are more likely to err on the side of caution and refuse to employ EU8 nationals. This is especially true of smaller businesses without human resources departments, which are often the very places where EU8 nationals will seek work, as the following respondent pointed out:

"For registration we need a letter from an employer but when you go to a coffee shop looking for work sometimes people don't know about it and they think if you don't have certificate already then you don't have permission to work so they don't want to speak with you... You can't start work because you're not registered but you can't register because you're not in work" (Interview 012.GP).

It seems therefore that the general lack of awareness on the part of employers, migrants and even Home Office officials alike regarding the

rights of EU8 nationals can leave people in a catch 22 situation when seeking employment.[164]

A further consequence of the confusion surrounding the system is that it provides the potential for exploitative actors involved in the migration process to take advantage of a migrant's uncertainty of the national framework. The perpetrator may be an employer, as illustrated above when the point was made that some employers prefer to employ unregistered workers, or it may be an agency which a migrant has approached to seek out job information.[165] It also seems, however, that opportunistic, 'unofficial' third parties have used the complexity of the system to their own benefit. For example, a particularly unsavoury aspect of the uncertainty created by the introduction of the WRS relates to the online guidance notes and application forms. The representative from the IOM confirmed that the telephone helpline had received a number of calls from people who said that the forms, which can be downloaded free of charge, were being sold unlawfully in London for £50. When this sum is considered alongside the actual registration fee, which at the time was also £50,[166] it is clear that some people had to part with quite a considerable amount of money unnecessarily when they first arrived in the UK.

The crucial point for the focus of this chapter is that this level of uncertainty, most prevalent in the initial post-accession months, has had an impact on the services accessed by EU8 citizens and the actors to whom they have turned when seeking to migrate to the UK or to access information. Those who are unsure of their rights to reside or work in a state may be particularly reluctant to seek advice from the authorities for

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[164] More recent initiatives, such as the ECAS hotline mentioned earlier, may have had a more positive impact on levels of awareness more latterly

[165] Agencies are discussed further below

[166] As already mentioned it later rose to £70

fear of exposing themselves to the threat of deportation and, instead, may rely on third parties for advice and 'security'. Such third parties may include agencies, employers or other migrants who have been established in the host state for a longer period.

4.1. Agency involvement in the migration process

Employment agencies, both in the EU8 prior to the migration and the UK after arrival, appear to play a particularly central role in facilitating migration from the EU8 to the UK. 'Agency' as a concept covers a variety of different businesses, each with different consequences for the type of employment relationship in which the worker finds him or herself.[167] Here, the discussion focuses on two types of employment agency: first, those based in the state of origin that act as a link between the employer in the state of destination and the worker seeking to migrate to that state. These agencies can place single applicants in employment abroad but many also have partnered employers with whom they have an ongoing relationship. It is via these agency-employer partnerships that organised schemes operate with a single business in the UK recruiting groups of EU8 nationals. Secondly, after migrants have made the move to the UK, many look to domestic agencies that specialise in finding workers temporary work placements. This type of agency, in contrast to those based in Poland described above, is usually classified as the legal 'employer'. Therefore, a triangular employment relationship is usually in existence: the agency is the employer but the workers are based in other organisations, under the supervision of another business, when carrying out the work.

4.1.1. Agencies based in the home state

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[167] Forde, C., 'Temporary Arrangements: The Activities of Employment Agencies in the UK', (2001) 15(3) *Work, Employment and Society*, 631

Ward *et al* have drawn attention to the role of home-based agencies in facilitating mobility from central and eastern Europe in the post-accession climate.[168] Large multinational employment agencies have established offices in EU8 territories with the primary aim of providing potential migrants with information about jobs across the EU. Arguably such businesses thrive on potential migrants' uncertainty about legal rights to work in another country and evidence suggests that these agencies themselves are a growing and profitable market within Poland.[169] Moreover, as the UK only grants a right to reside to those EU8 nationals in work there is increased pressure to arrange employment before arrival. Even without this legal incentive to find work quickly migrants are inclined to start the job search prior to the move in order to reduce the anxiety that often goes hand-in-hand with moving away from the home state.

There are clearly potential problems when migrants rely on such agencies to provide information about the host state. As agencies are not subject to stringent quality assurance assessments some are not appropriate bodies to provide ongoing information. The respondent below experienced a number of problems with the employer to whom she was sent by an agency in June 2004. In particular she was paid below the national minimum wage and was made to work excessive hours in a hotel. She contacted the agency in Poland for advice but they were not forthcoming. This was quite a common experience described by the respondents:

"The agency gave me the address of my employer but later on if you had any problems they never were on your side. They were protecting themselves. This is a business I understand" (Interview 013.EW).

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[168] Ward *et al*, *Op. Cit.* n.105

[169] Ward *et al*, *Op. Cit.* n.105, 27

The empirical findings certainly support the view that migrants are increasingly relying on agencies. Specifically, 23 out of 44 migrant workers confirmed they had approached an agency in Poland to help them find work in the UK. Prior to accession, in April 2004, an Act regarding the promotion of employment and labour market institutions was passed by the Polish parliament.[170] This law included the rules governing the registration of employment agencies. Employment agencies in Poland are obliged to have a state-issued certificate in order to act as a middleman between the Polish jobseeker and foreign employer. Additionally, the Polish law provides that employment agencies are forbidden to charge the job seeking person for their services. The potential employer is the party supposedly responsible for paying the agency. While this is the legal position in Poland, given the increasing number of employment agencies being established[171] it is likely that these rules are infringed on occasion. In reality, it is likely that many 'agencies' operate unofficially and are not subject to regulation. This is certainly a view supported by the migrant workers interviewed as three had been charged unlawfully by a Polish-based agency. For example:

"I paid a lot of money, it was around £800 to organise a job here" (Interview 016.D).

The respondent who had worked on the IOM telephone helpline also confirmed this:

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[170]See EIRO Online, 'New Labour Market Legislation Adopted', <http://www.eiro.eurofound.eu.int/2004/05/feature/pl0405105f.html> (last accessed 15 November 2006)

[171]There are no comprehensive statistics on the number of employment agencies in Poland. However it seems that the number is rising. Ward *et al* state that in 2002 there were 25 officially registered and that in 2004 the number had increased to 70, *Op. Cit.* n.105, 18. By contrast, the International Confederation of Private Employment Agencies (CIETT) contends that in 2004

"In Poland we have the same law as in Britain that employment agencies cannot take money from the job seeking person, instead it gets its money from the employer. There were some people who mentioned on the phone that they were charged by an employment agency. I remember the price mentioned was 4000 zlotty[172] *and this is quite a lot because it is double the average wage in Poland. There were examples of people who were cheated by employment agencies and left with nothing in London at Victoria station"* (Interview 102.INFO).

The following respondent had paid money in Poland to an apparently informal and clandestine agent only to be asked for more when he arrived in the UK in May 2004. He eventually secured employment independently by meeting with other Polish workers:

"I just looked for an agency advertisement in Polish newspaper and found this number that said 'Go to the United Kingdom' or something like this and I phoned and spoke about getting a job... I paid money and someone gave me an address, name and phone number for someone... and then, when I arrived here, I paid again to find accommodation, to find work for first time but after two weeks I left this place. I didn't have a very bad experience but I heard about people who take passport and take lots of money from you and make you work in a factory like it was 100 years ago" (Interview 001.JK).

The representative from the IOM who had worked on the telephone helpline suggested that it was her experience that people were prepared to

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Poland had a total of 138 employment agencies, CIETT, *Agency Work Statistics for 2004*, available at < http//www.ciett.org > (last accessed 1 November 2006)

[172] Approximately £715

pay to have a degree of security once they arrived in the country of destination, despite knowing the agency was acting unlawfully:

"It was a common attitude that they would prefer to pay, even though it is illegal to charge them, they would rather pay and have a job than not pay and not have a job. People are very pragmatic, especially in small villages or towns, where they have no prospects and there is no industry in town; they are willing to do what it takes to get a job" (Interview 102.INFO).

That is not to say that all agencies operate in such an illicit manner; many of the migrants who took part in the research were happy with the service they received and clearly the majority are reputable. Certainly the five that took part in the study claimed to place the best interests of the migrant workers as a high priority. However, many agencies are ill-equipped to provide workers placed abroad with the required degree of assistance and this can leave some people in a potentially vulnerable situation if the employers to whom they are sent are not entirely legitimate. Indeed, one of the employment agency representatives interviewed expressed regret that they were unable to guarantee the respectability of employers they dealt with in the UK:

"Of course we try to check but you know you can't always be sure. In January we started to cooperate with a company who needed drivers. They even came for two days so we had twenty drivers here in our office and they recruited some of them. They gave tests, talked with them and did some driving. They chose five or six to go so they went to the UK but then there were no jobs for them! The employer kept saying they would find something in a few days. After a week or so they started to work in the warehouse but it was only two days a week and still not driving. I know that two of the drivers came back to Poland because they couldn't stand it

and, I think, eventually only two stayed. The most terrifying thing is that the boss of this whole company was so rude. When he came here he seemed very nice and we thought he was alright but then when my boss started to call him when the candidates were in England and ask him why they didn't have a job he started to be very rude, he used really horrible language about the candidates. We were shocked and then we were afraid about the other employers that we don't even meet in person, only over the phone; we can't even think how they will act" (Interview 404.PRO).

On some occasions it was apparent that the agency relied on the employer to provide information to the workers, for example regarding the WRS, when it could itself have done so:

"It is for the employer to tell them things like [registering under the WRS and setting up bank accounts]. We count on them to do that. We could do it but it is more expensive for us" (Interview 403.ITC).

Often employers and agencies form a partnership to operate an organised migration scheme. It has already been noted that the decision of the UK government to open up its labour market to EU8 nationals was very much based on the notion of plugging labour market gaps. Accordingly, therefore, it has become increasingly popular for employers with significant staff shortages to look towards the CEE accession countries for recruits. This process of internationalisation is becoming a common strategy adopted by employers who experience trouble recruiting at national level.[173] Such schemes involve an employer making contact with a partner of some kind, usually an agency, in Poland (or other EU8 Member State) and the subsequent recruitment of a group of migrants.

The empirical work included a case study on a transport firm which recruited over 100 Polish bus drivers. The interviews conducted with employment agency representatives in Poland also confirm that such schemes have been carried out in a number of sectors. The five agencies involved in the study had helped to arrange such schemes for employers requiring the following: factory workers, doctors,[174] drivers (including bus and delivery), engineers and IT professionals. A manager at the transport company confirmed that the motivation behind setting up such a scheme was to counteract the low level recruitment of national workers they had been experiencing for some time. Indeed, the company had enjoyed the support of the Local Authority Council and local newspaper because the shortage of drivers had previously disrupted bus services in the area.

The schemes across the sectors have certain shared characteristics. For example, it is extremely common for the employer and agency to arrange intensive language training prior to the move and once the migrants are in employment. It is often part of the agreement that employers arrange and cover the costs of travel and provide accommodation for the workers (at least in the initial post-migration period). It is clear that such schemes can be of considerable benefit to migrants as they can help to overcome some of the practical hurdles associated with moving to a new country (language and housing in particular).[175] This is not to suggest that, once in the UK, such workers will never experience any problems with their employer or their conditions of work. Rather, the crucial point here is that the migrants

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[173] Salt, J., 'Migration Processes among the Highly Skilled in Europe' (1992) 26(2) *International Migration Review*, 484, 485

[174] See also, Ward *et al, Op. Cit.* n.105, 26-27

[175] The gender and family-related implications of such schemes are discussed in chapters four and five respectively

involved in the schemes often receive valuable assistance in 'setting up'. The manager of the transport company described part of the process:

"We usually rent a coach and put all of the people, about 20-40, to one coach and drive them directly to the place where they work. Then we've got the person who arranges their accommodation so someone takes them from the coach and gives them keys to their accommodation" (Interview 101.RBC).

Furthermore, as groups of Polish workers had moved out at different stages, a 'buddy' system had been set up so that new arrivals were assigned to longer established workers who could help them settle into the job.

In some instances these schemes may foster a degree of dependency on the employer and agency involved as, effectively, 'everything is taken care of' and there is little impetus for the migrants to research their rights in the host society unless a specific problem arises. When a worker moves individually they themselves often have the task of finding out about issues such as accommodation, and the greater control they have over the process helps to increase the degree of autonomy and self-assurance felt in the host society. There is greater scope for the migrants' rights awareness to be dictated and for them to be deliberately misled when they move as part of a scheme. There was a limited example of this amongst the respondents who took part in the study. For example, one man had moved to Liverpool with a group of workers with the support of such a scheme to take up employment in a care home for the elderly. Although he enjoyed the work he was unhappy due to the poor relationship he had with one of his co-workers. When asked if he had considered looking for an alternative job he reported that he was waiting until he had worked for a year as his employer had informed him that, should he leave within the first year, he

was required to pay a fine of £1000.[176] Essentially, the dependent status of such workers places them in a less autonomous situation and renders them more vulnerable to exploitation.

There is an interesting dichotomy here in relation to the role of such agencies based in Poland and the connection they have to the culture of uncertainty described earlier. Sometimes securing employment before moving is an effective way in itself of negotiating the complexities of the UK system as the agency and employer between them can help to navigate the workers around the various WRS requirements and other practicalities. This would account for the popularity of such agencies amongst migrants. This is dependent, however, on both the employer and agency being well-informed, legitimate and law-abiding. On the occasions where one, or both, of the parties is rather ambivalent in its attitude to the migrants, or has insufficient knowledge of the system, it may well be that the uncertainty of the migrants in the host state is compounded.

4.1.2. Temporary work agencies in the UK

For a significant number of EU8 migrants, agencies also have an impact on their access to and experience of the UK labour market after they have moved into the territory. These domestic level employment agencies, which produce employment relations often referred to as temporary agency work (TAW),[177] differ from those based abroad that were discussed above. The defining feature of employment arising out of contact with these domestic agencies is its triangular nature:

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[176] Interview 010.JF

[177] Arrowsmith, J., *Temporary Agency Work in an Enlarged European Union,* (Dublin: European Foundation for the Improvement of Living and Working Conditions, 2006)

'Although the agency is the normal legal employer of temporary agency (TA) workers... the work that they do and the workplaces to which they are assigned are the responsibility of other organisations'.[178]

Unlike the agencies in the state of origin, which simply arrange work, these agencies are employers. This type of employment is becoming increasingly prevalent in the UK, one of the biggest users of TAW in the EU.[179] For example, Forde points out that between 1984-1999 the number of temporary agency workers increased from 50,000 to 250,000.[180] The rise in prominence of TAW is linked to the so-called flexible labour market in the UK and research has noted how such employment relations have enabled employers to avoid risks flowing from longer-term employment, such as sick pay, maternity pay and holiday pay.[181] Due to the temporary nature of the work such agency workers can be easily dispatched should their presence no longer be required or should they become too expensive to employ (so that cost outweighs value). In the UK the position of those who work under this type of arrangement is particularly precarious. The Employment Agencies Act 1973[182] defines agencies that directly employ workers who, in turn, work under the control of others as 'employment businesses'.[183] The majority of such businesses opt to engage their workers under a 'contract for service', as opposed to a 'contract of

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[178] *Ibid.*, 5

[179] *Ibid.*, 5-7

[180] Forde, *Op. Cit.* n.167, 631

[181] Allen, J. and Henry, N., 'Fragments of Industry and Employment: Contract Service Work and the Shift towards Precarious Employment' in Crompton, R., Gallie, D. and Purcell, K. (Eds.), *Changing Forms of Employment: Organisations, Skills and Gender*, (London: Routledge, 1996), 65

[182] C.35

[183] C.35, Employment businesses (s.13(3)) are distinguished from 'employment agencies' which seek to find people permanent employment (s.13(2)). See also Conduct of Employment Agencies and Employment Business Regulations 2003 SI 2003/3319

service',[184] under the Employment Rights Act 1996. Consequently, while agency workers fall within the grouping of 'worker' under UK law they often do not fall within the scope of the 'employee'[185] category. This is significant as 'employees' are those with a contract of employment, for the purposes of the Employment Rights Act 1996,[186] which offers much greater access to statutory rights and greater protection from dismissal.[187] Moreover, the UK has no licensing scheme to register or control the activities of these agencies; rather, the industry is self-regulating under the management of the Recruitment and Employment Confederation (REC).[188] While this representative body undoubtedly works to improve the standards of employment for those engaged by such temporary work agencies by, for example, establishing a Code of Good Practice,[189] it falls short of a rigorous, legal licensing authority.[190]

Temporary agencies are common in the (low-skilled) sectors in which migrants are concentrated (such as agriculture, hospitality and the wider service sector). Furthermore, due to its flexible nature, this type of work is often readily available upon arrival to a host state, it is not surprising then that a number of EU8 migrants have resorted to temporary agency

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[184] S.230(2) Employment Rights Act 1996

[185] S.230(1) Employment Rights Act 1996

[186] C.18

[187] Although in certain limited circumstances it may be possible to demonstrate that an individual working for such an employment business does actually qualify as an employee as a result of an implied contract of employment between them and either the agency or the end user. See, *inter alia*, *McMeehan v Secretary of State for Employment* [1997] ICR 549; *Montgomery v Johnson Underwood Ltd* [2001] IRLR 269; *Brook Street Bureau (UK) Ltd v Decas* [2004] EWCA Civ 217; Arrowsmith, *Op. Cit.* n.177, 17-19; Reynolds, F., 'The Status of Agency Workers: A Question of Legal Principle', (2006) 35 *Industrial Law Journal*, 320

[188] < http://www.rec.uk.com >

[189] REC Code of Professional Practice, available at < http://www.rec.uk.com/rec/about-the-rec/code-of-practice-2006.pdf > (last accessed 3 September 2006)

[190] According to Arrowsmith *Op. Cit.* n.177, 29, the REC represents 67% of the temporary agency industry and all members are obliged to abide by the Code of Practice.

employment.[191] Indeed, 49% of the work registered on the WRS was for temporary contracts.[192] Many of the respondents interviewed for this study had at some point been engaged in TAW (seemingly, without being aware of the restricted nature of their employment rights as a result of working under such a contract).

Again, relying on a body such as a temporary work agency may be perceived as a way to negotiate the UK's regulatory regime. UK law by requiring EU8 migrants to find work quickly and as a result of the uncertainty which has surrounded the detail of the system has undoubtedly contributed to the factors encouraging people to make use of services offered by recruitment agencies. The triangular contract that frequently emerges may, however, add further layers of complexity and confusion to an EU8 worker's interaction with the labour market. Anderson and Rogaly agree that:

'Migrants are often engaged through a bewildering array of subcontracting chains and agents, all of which can make it difficult to claim and safeguard their basic human and labour rights'.[193]

In addition to this issue of restricted labour rights, the qualitative data demonstrates how such agencies have, both purposely and inadvertently, misled migrants in respect of their obligations flowing from the WRS. For example, there were three instances of agencies mistakenly telling migrants

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[191] Anderson *et al*, *Op. Cit.* n.110

[192] Accession Monitoring Report, *Op. Cit.* n.87, 17 but it is not clear how many registered with a TAW

[193] Anderson, B and Rogaly, B, *Forced Labour and Migration to the UK,* (Oxford: Study prepared by COMPAS in collaboration with the Trades Union Congress, 2005), 7

they did not have to register.[194] As a result the workers had lost the opportunity to start accumulating months of legal employment.

Finally on the issue of agencies, it seems many, both the Polish-based employment agencies and the UK-based temporary work agencies, found the UK system a complicated regime to comprehend.[195] Yet many of the migrants assumed that they could rely on these bodies to safeguard their legal position. For example, the following extract portrays a common outlook:

"To be honest I don't worry about it... If I worked for a normal employer - not the agency - then maybe I should've known about it [the WRS] but the agency is responsible for that. It is their job to know" (Interview 019.KS).

Such levels of faith placed in the actions and knowledge of the agencies could have potential negative effects in the long-term. For example, a migrant may seek to enforce the full rights of residence that flow to those who have worked lawfully in the UK for one year (having been registered on the WRS continuously for this period) only to be denied the opportunity as a result of an agency's (or employer's) failure to comply with the WRS.

4.2. Networks as information disseminators

In addition to the formal channels of information provision, such as the various types of agencies, migrants have also turned to more informal sources of information to find out about employment opportunities, and life generally, in the UK. Networks constitute the most significant informal

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[194] Interviews 019.KS, 304.P, 015.RO

[195] Anderson *et al*, *Op. Cit.* n.110, 101

providers of information.[196] A classic definition of networks in action, or, 'chain migration' as it is referred to by MacDonald and MacDonald:

'That movement in which prospective migrants learn of opportunities, are provided with transportation, and have initial accommodation and employment arranged by means of primary social relationships with previous migrants'.[197]

It would appear that there are two types of network that new arrival Polish migrants can activate in order to help find work in the UK: there is the long-established, 'traditional' community, many of whom moved in the aftermath of the Second World War; but, already it seems that there is a younger, post-accession community developing and providing fresh potential for networks to thrive.

The vast majority of the migrants interviewed had family, friends or 'friends of the family' in the UK prior to moving and had received some form of assistance upon their arrival. In turn, many of these migrants subsequently acted as facilitators in the migration chain, helping new arrivals in much the same way. The most common sort of help is that which involves finding new arrivals work. In addition, migrant networks can also help new arrivals financially, or by introducing them to new social connections or providing them with a place to stay.[198] One family that took part in the study,[199] for example, had joined friends in Edinburgh. Not only did the more established migrants provide accommodation for the

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[196] There has been an abundance of research on the notion of networks within the context of migration, see *Op. Cit.* n.97

[197] MacDonald and MacDonald, *Op. Cit.* n.97

[198] Choldin, *Op. Cit.* n.97, 167. See the discussion in chapter five, section 2.3.2. which stresses the importance of extended family in this regard

[199] A married couple and their baby son, Interviews 307.P and 308.O

new arrivals but the man had also secured a job for his friend as a kitchen porter in the same hotel in which he himself worked.

The qualitative data provides numerous examples of migrants utilising social connections to secure labour market access. This involved very close family relations in some cases but also more distant and general Polish connections in others:

"When I arrived my uncle told his friends that I was here and he asked around saying that anyone who had work should let him know... and they did" (Interview 012.GP).

"Basically, Polish people are everywhere around. There are plenty of people so I just kept asking, asking, asking and I found a job in central London no problem. I worked on the building site but the problem was the language. They couldn't explain to me exactly what they wanted so I had the Polish supervisor on top of my head all the time at first" (Interview 016.D).

It was also apparent from the interview data that many of the migrants had relied upon networks of friends and, to a lesser extent, family to access information about the WRS. For example, many had been told about the need to register and the practicalities of registering, such as where to get the form and how to complete it.

It is not just the migrants who rely on networks to find jobs; employers, also, benefit from networks. Migrant workers are often able to recommend new migrant arrivals to employers and this type of informal recruitment practice is often more cost-effective and efficient than formal recruitment

procedures.[200] The following view was expressed on a number of occasions during the interviews:

"My manager says he likes Polish people because we are very hard workers so whenever we are short staffed he asks me if I've got any friends who need a job. Soon I think all my friends will be working here which may be a problem as I want to improve my English!" (Interview 012.GP).

Interestingly, the organised schemes employers have set up with the help of partner-agencies may have laid the foundations for the development of migrant networks. By recruiting large groups of migrants in a short period it would appear that the workers' transnational links to kin back in Poland may have been activated on quite a significant scale. The flow of information from the early arrivals about job opportunities available appears to have had an almost immediate impact on the number of new migrant workseekers, who are not involved in any formal employment scheme themselves. For example, one of the respondents who was herself working for a company that had recruited a large number of Polish drivers explained how, in the aftermath of the formal scheme they had operated, word had apparently spread about the potential availability of jobs:

"Half of them came through an agency and half of them came here by themselves... they just turned up. I remember the first day I got the phone call because seven just appeared here. Later on another 14 came so suddenly everything crashed because they needed training and everything had to be organised quickly. Now we have about 60 Polish drivers" (Interview 013.EM).

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[200] Waldinger and Lichter, *Op. Cit.* n.97, 89

Finally, it should also be noted that only two migrants interviewed recounted negative experiences as a result of relying on networks.[201] In both instances the individuals moving to the UK had been put in touch with a 'friend of a friend' who had pledged to help them meet other Polish nationals and to find work upon arrival. In both cases the individuals had been disappointed with the actions of the supposed aide. The following respondent recounts quite a stressful experience, although from another perspective, it also provides a positive example of how a transnational network[202] was able to share information quickly and provide assistance to the new arrival:

"I got a phone call from my friend in Poland asking me "can you help me because the cousin of my wife has arrived at Victoria station, and someone was supposed to come and pick her up, but he didn't. She's desperate and she's crying. Can you put her up for one or two nights?" I said "okay, it's going to be difficult because we don't have spare bed but give her my telephone number and we can arrange it." So she arrived and it turned out that her cousin had put her in touch with someone who was supposed to come to Victoria station and pick her up and he didn't, he just didn't show up" (Interview 014.KW).

On the whole, therefore, migrant networks seem to play quite a positive and crucial part in assisting migrants in negotiating the complexities of the system. Not only do they inform people of employment opportunities and available accommodation, the traditional functions of a network, they also help to disseminate information to EU8 workers about the WRS and other peculiarities of the UK system.

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[201] Interviews 007.LR and 014.KW

[202] Transnational family networks are discussed in chapter five

5. Conclusion

This chapter has covered a variety of material in its attempt to explore EU8 migrants' access to the labour markets of the EU15 during the transitional period. In order to give a comprehensive overview it has been necessary to examine the different layers of entitlement which emanate from the transitional arrangements on the free movement of persons; the detail of the Accession Treaty provisions, and the varied implementation of the mobility restrictions across the EU15. In addition various actors exist outside of the formal legal framework which also shape the ability of individuals to find employment in a host state.

The focus here has clearly centred on the UK where it is apparent that the complexity of the system, by adding a further layer of bureaucracy, has compounded the difficulties faced by migrants. As a result migrants have looked to agencies, employers and networks of fellow migrants in order to find work and make sense of the regulatory framework. Of course, turning to such third parties does not guarantee the appropriateness or indeed accuracy of the advice given. Indeed, relying on others, agencies and employers in particular, may result in EU8 migrant workers inadvertently failing to comply with the legal requirements of the WRS. In turn, this may have negative effects for their future status under UK law. This may occur as a result of genuine confusion on the part of a legitimate third party as it would appear that uncertainty about the operation of the WRS has been a common feature of formal actors' understanding of the post-accession regime. On the other hand, the lack of clarity surrounding the WRS does seem to have enabled, or encouraged, the development of exploitative working relationships. Enforcement actions against employers (or agencies) continuing to restrict EU8 migrants' employment activity to the black labour market have been practically non-existent. Moreover, the lack of any widespread understanding has increased the likelihood of the

migrants' rights awareness being hampered by a party in a stronger bargaining position than them.

There is a certain degree of self-interest that shrouds the two levels of regulation that have been discussed in this chapter. First, the transitional arrangements by their very nature are designed to protect the interests of the EU15 Member States. They have complete discretion over who they admit to their labour market. Inevitably, therefore, they are much more inclined to grant mobility rights to those who can fill shortages in specific industries. The UK, by opening up its labour market may appear on the surface, to be acting altruistically but, as the discussion has demonstrated, it did so in order to fill job positions that were proving unpopular with the national workforce.[203]

Additionally, restrictions on the mobility of a large group of EU citizens does not sit well with the objective of instilling a European 'mobility culture', proclaimed most forcefully through the European Year of Workers' Mobility in 2006. [204] It is ironic that the EU has sought to publicise job opportunities and encourage EU15 nationals to work in other Member States during a period where such a large proportion of EU citizens have limited mobility rights. It would seem only movement by some is currently perceived as desirable. Furthermore, transitional restrictions on the free movement of persons look set to be on the agenda for some time to come. The Accession Treaty which governs the accession of Bulgaria and Romania, scheduled to occur on 1 January 2007, contains a

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[203] The UK's decision to open the labour market instead of 'cherry-picking' in the style of other EU15 Member States was based on the perceived wide-ranging need for labour in 2004 (as opposed to a concentrated number of sectors)

[204] MEMO/05/229, '2006 – European Year of Workers' Mobility', Brussels, 30 June 2005

transitional regime identical to that outlined here in relation to the EU8.[205] Therefore, the present Member States will again enjoy a wide discretion as to the labour market access they accord to nationals of Bulgaria and Romania.[206] Indeed, nationals of these accession states will have to manage an even more complex geometry of free movement entitlement as, for this enlargement, the *EU25* will be given the opportunity to implement transitional measures. The EU8 Member States will be in the dichotomous position of being able to impose movement restrictions on the new accession states while, simultaneously, withstanding ongoing mobility restrictions in relation to their own nationals.[207]

This chapter provides the foundations for many of the remaining chapters. In addition to examining the legal rules that sit at the heart of the research project it has introduced themes which will be developed further throughout the thesis. For example, an understanding of how EU8 migrants gain access to the UK labour market is extremely important for the discussion of the migrants' status and experience whilst in employment, the focus of the next chapter.

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[205] Treaty of Accession 2005 [2005] O.J. L157/12; Article 23, Act concerning the accession of Bulgaria and Romania [2005] O.J. L157/203 and the respective annexes: Annex VI, transitional measures, Bulgaria [2005] O.J. L157/278; Annex VII, transitional measures, Romania [2005] O.J. L157/311

[206] Transitional arrangements would also certainly form a big part of the debate should the prospect of Turkey's accession become more of an immediate reality. Croatia and the Former Yugoslav Republic of Macedonia, as the other current candidate countries, also face the possibility of transitional mobility restrictions upon accession

[207] The concluding chapter, reflects generally on the accession of Bulgaria and Romania. In particular, it examines the decision of the UK government in October 2006 to retreat from the policy of open labour market access and impose transitional restrictions as regards the free movement of Bulgarian and Romanian nationals

Chapter four

DE-SKILLED AND DEVALUED: THE LABOUR MARKET STATUS AND EMPLOYMENT EXPERIENCE OF POLISH MIGRANTS IN THE UK*

1. Introduction

In this chapter the discussion moves away from the legal factors which determine an EU8 migrant's entitlement to access employment in the UK and, instead, seeks to examine the status accorded to such migrants within the UK labour market once access has been secured. Drawing upon both the personal experiences of Polish respondents interviewed and the wider inter-disciplinary literature on the recognition of migrant workers' skills and experience in host countries, the chapter explores the notion of de-skilling in relation to EU8 migrants who took up work in the UK in the aftermath of EU enlargement.

The eastern enlargement of the EU raised concerns about the potential for 'brain drain' from the accession countries as the opportunities for highly-qualified personnel to move to the EU15 Member States and take advantage of higher salaries, prestige and more comfortable working conditions increased.[1] Primarily, the focus has been upon medical

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[1] While the notion of east-west 'brain drain' became popularly associated with the 2004 EU enlargement it is an issue which has been researched and commented on over a longer period, especially since the collapse of Soviet regime in the CEE region. See Arditis, S., 'The New Brain Drain from Eastern to Western Europe', (1992) 27(1) *The International Spectator*, 79; Vizi, E.S., 'Reversing the Brain Drain from Eastern European Countries: The "Push" and "Pull" Factors', (1993) 15, *Technology in Society*, 101

professionals such as doctors, dentists and, to a lesser extent, nurses.[2] Scientists have also been researched within the context of the CEE 'brain drain'.[3] This image of the highly-qualified migrant leaving his or her home country in order to increase their earnings abroad stands in contrast to the image of the hard-working but low-waged migrant working in the lower-skilled (or at least lower-status) sectors of the labour market. In the UK media there has been some emphasis on the benefits EU8 migrants have brought to the economy by performing work that nationals are not willing to do.[4] The discrepancy between the accession states' concerns about the loss of their highly-qualified and the host societies' celebration of low-skilled workers raises the question of whether the accession states' brain drain leads to any notable brain gain for the receiving state or whether, in actual fact, there is a significant degree of 'brain waste'[5] currently occurring as the migrants' expertise and skills are devalued and downgraded in the UK.[6]

The discussion begins by sketching the employment profile of EU8 migrants in the UK in the post-accession environment. The notion of de-skilling is then explored in relation to EU8 migrants who took up work in the UK in the initial period following enlargement. In particular, the legal factors contributing to the devaluation of the migrants' skills are

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[2] Vlad, I., 'European views about accession', *BMJ Careers*, 6 March 2004; McLaughlin, D., 'Doctors go west in Polish brain drain', *The Observer*, 15 May 2005

[3] Dickson, D., 'Mitigating the Brain Drain is a Moral Necessity', *Science and Development Network*, 29 May 2003; Gill, B., 'Science in central and Eastern Europe; Higher Education, Labour Markets and Highly Skilled Migration. An Overview', Centre for the study of Law and Policy in Europe, Research Report No. 7; Ackers, H.L., 'Moving people and knowledge: the mobility of scientists within the European Union', (2005) 43(5) *International Migration*, 99

[4] Shennan, P., 'Why Poles do jobs we hate', *Liverpool Echo*, 21 July 2005; Grice, A. and Brown, J., 'How Immigrants Sustain Britain's Economic Growth', *The Independent*, 23 August 2006

[5] Morokvasic, M. and de Tinguy, A., 'Between East and West: A New Migratory Space' in Rudolph, H. and Morokvasic, M. (Eds.), *Bridging States and Markets. International Migration in the Early 1990s*, (Berlin: Sigma, 1993), 245

[6] Some writers prefer to use the term 'brain abuse', for example Bauder, H., '"Brain Abuse", or the Devaluation of Immigrant Labour in Canada', (2003) *Antipode*, 699

highlighted and examined: the UK's regulatory system (the Workers' Registration Scheme) and the EU's mutual recognition of qualifications regime. Attention will then turn to the gender-dimension of skill-degradation and the particular consequences for female migrants. Again, this is examined from the discrete perspective of recent EU8 migration and the chapter considers the differential gender-impact of formalised employer-driven migration schemes. Finally, the chapter concludes by questioning whether the devalued position occupied by migrants in the UK may have any long-term consequences for the migrants' labour market activity and professional progression should they return to their home state.

It should be noted that the intention in this chapter is not to suggest that de-skilling is necessarily a permanent feature of the migrants' experience.[7] The evidence cited here has been collated within a very specific time-frame following the actual event of enlargement, thus the migrants involved had only been in the UK for a short period of time. It may well be that, given time, post-accession EU8 migrants will experience some upward occupational mobility in the UK and effectively re-skill. Further, as is demonstrated below, a significant number of EU8 migrants appear to make the move to the UK for a temporary period only. Therefore, despite experiencing a form of de-skilling, the impact on many migrant workers - in terms of professional standing, progression and personal contentment at work - is less likely to be permanent. What this chapter seeks to do is to explore the process of initial de-skilling that certainly appears to have occurred.

2. EU8 workers in the UK labour market

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[7] This is considered in greater detail below

As the discussion in the previous chapter demonstrated, the nature of the political debate in the UK prior to enlargement on the granting of labour market access for EU8 migrants focussed very much on 'what they can do for us'.[8] From the outset the suggestion was that migrants from the EU8 would 'fill the gaps' in the labour market and, consequently, their rights to access employment have been shaped by this proposition.

2.1. The work undertaken by EU8 migrants

The Accession Monitoring Report has been an important source of information on those EU8 migrants who have registered in the UK as workers under the WRS.[9] Between May 2004 and June 2006 there were 427,000 registrations on the WRS; Polish migrants accounted for the majority (62%) of registrations during that time period.[10] The ten occupations in which registered EU8 workers are most frequently employed are categorised in the report as follows: process operative (factory worker), 37% (95,865); warehouse operative, 10% (25,215); packer, 9% (24,130); kitchen and catering assistants, 9% (24,090); cleaner/domestic staff, 8% (20,430); farm worker/farm hand, 7% (18,105); waiter/waitress, 6% (15840); maid/room attendant (hotel), 5% (13,835); care assistant and home carers, 5% (12,610); and sales assistant, 4% (10,535).[11] When these occupations are considered alongside the finding that 78% of the registered workers earn £4.50-£5.99 per hour,[12] it is clear that the majority of post-accession EU8 workers are currently situated within the lower echelons of the UK labour market.

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[8] Hansard, HC, vol. 48, col.23 (23 February 2004)

[9] Although it does have certain methodological limitations (discussed in chapter two)

[10] Joint Report by the Home Office, the Department for Work and Pensions, the Inland Revenue and the Office of the Deputy Prime Minister, *Accession Monitoring Report, May 2004-June 2006*, 22 August 2006, 8

[11] *Ibid.*, 15-16

[12] *Ibid.*, 17. Since 1 October the minimum wage in the UK for workers over the age of 22 is £5.35 per hour; for those aged 18-22 the figure is £4.45

Taking the health sector as an example, it is interesting to note that, despite the attention often placed on staff shortages within the UK health service,[13] only a very small minority of EU8 workers have registered on the WRS as health professionals. For example, of the 427,000 registrations only 150 fell within the category of hospital consultant. Furthermore, 410 registered as hospital doctors, 80 as GPs, 230 as nurses and 310 as dental practitioners. Considering that there were 12,610 registrations under the care assistant category, it would seem that EU8 migrants are (currently) concentrated in the lower-status and lower-paid occupations within the health service.

Of the 44 Polish respondents interviewed by the author who were either employed in the UK labour market, or who had been employed in the UK but had since returned to Poland,[14] a majority were employed in the hospitality and catering industry (15 respondents).[15] Bus drivers were the second most represented occupational group in the sample (13 respondents).[16] A further six were employed in administrative/clerical roles. The sample also includes two care assistants, two domestic workers, a cleaner, a human resources manager, a construction worker, a nursery assistant, a shop worker and an agency worker who gave advice to other Polish migrants.[17]

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[13] Buchan, J. and O'May, F., 'Globalisation and Healthcare Labour Markets: A Case Study from the United Kingdom', (1999) *Human Resources for Health Development Journal*, 1

[14] 45 migrants were interviewed but only 44 had worked in the UK. The remaining 1 was the spouse of an EU8 migrant worker

[15] Either in hotels or restaurants

[16] Note that in the WRS data from the *Accession Monitoring Report* there were 885 registered bus drivers, along with 1315 drivers of delivery vans and 1920 HGV drivers, *Accession Monitoring Report, Op. Cit.* n.10, 38

[17] Note that the occupations referred to here relate to the either the migrant's job at the time of interview or, in the case of return migrants, the last job they had before leaving the UK

Traditionally, the positioning and experiences of migrants within the labour markets of EU Member States differed depending on their status as either privileged, internal EU-nationals or non-privileged, third-country nationals. There has been a general acceptance that third-country nationals have been undertaking the 'degrading, dangerous and dirty' work in the Member states that EU-nationals 'are no longer prepared to do'.[18] Kofman *et al* have acknowledged the existence of a dual labour market, 'one for EU nationals and one for nationals of third countries who provide cheap and flexible labour power'.[19] The most recent EU enlargement has altered this established order within the EU on a scale unlike any accession that has gone before it as it involved the accession of a large number of countries with significantly poorer-performing economies. The evidence emerging post-accession would suggest that the newest EU citizens continue to occupy the lower-rungs of the labour market, thus their current employment status is more akin to that of third-country nationals than that of nationals from the older EU Member States.[20] There is no longer a simple labour market split between third-country nationals on the one hand and EU nationals on the other. Following the 2004 accession it would appear that divisions also exist within the traditionally 'privileged' group of EU nationals with regards to the work they undertake as migrant workers. Indeed, a discussion paper prepared on behalf of the 2005 UK Presidency by Patrick Veil used this trend as an argument to support the lifting of labour market restrictions on EU8 migrants by the rest of the EU15:

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[18] Kofman, E., Phizacklea, A., Raghuram, P., Sales, R., *Gender and International Migration in Europe: Employment, Welfare and Politics,* (New York: Routledge, 2000), 119

[19] Kofman *et al, Ibid.,* 122

[20] It would be misguided, however, to suggest the status and labour market experience of third-country nationals and EU8 nationals are analogous. For example, the experience of third-country nationals in the labour market may be shaped by other variables, such as the existence of racism (although forms of racism may also be experienced by EU8 nationals)

'The countries who continue to close their labour markets find themselves in a counter-productive situation; with new European citizens immigrating anyway and working illegally. In the EU states that have opened their labour market, the new European citizens fill the jobs that are fulfilled in the rest of Europe by illegal migrants, either from the new Member States or non EU countries'.[21]

Effectively, a new layer of disadvantaged migrants has been added to the hierarchy. The position of EU8 migrants in the UK's secondary labour market effectively mirrors the secondary status granted to them at EU-level under the transitional arrangements on the free movement of persons. Seemingly, the position of third-country nationals has been further exacerbated as, in the UK at least, they are competing against EU8 migrants for certain jobs.[22]

2.2. The phenomenon of de-skilling

Despite this concentration in the lower rungs of the employment market there is evidence to indicate that a significant proportion of the post-accession migrants are highly qualified and work in occupations not commensurate with their skills and levels of education. Research across

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[21] Weil, P., *A Flexible Framework for a Plural Europe*, Centre National de la Recherche Scientifique, Discussion paper prepared for the UK Presidency, Paris, 2005

[22] Particularly as the transitional arrangements oblige employers to give preference to EU8 nationals over third-country nationals in access to jobs: para. 14, Annexes (see chapter three, section 2.2). The issue may not be quite so straightforward, however, due to the recent Directive on the position of third-country national long-term residents (Directive 2003/109/EC [2004] O.J. L16/44). This Directive grants the right of equal treatment as regards access to employment to third-country nationals who have resided in an EU Member State for five years or more. Thus, in the older Member States fully applying the transitional restrictions on free movement, EU8 nationals will occupy an inferior status to third-country nationals who fulfil the conditions in the Directive for securing long-term resident status. The date for implementation was 23 January 2006. Note that the UK, Ireland and Denmark have opted-out and hence are not bound by the Directive. See Rettman, A., 'EU law leaves new member state workers in third place', EU Observer, 20 January 2006, < http://euobserver.com/15/20739 > (Last accessed 20 November 2006). See more generally on the Directive, Halleskov, L., 'The Long-Term Residents Directive: A fulfillment of the Tampere Objective of Near-Equality?', (2005) 7(2) *European Journal of Migration and Law*, 181

the disciplines has acknowledged the widespread phenomenon of de-skilling that often accompanies migration.[23] Bauder expresses this by stating 'they are highly educated, yet accept work for low wages in occupations outside of their formal training'.[24]

Morokvasic and de Tinguy's work has highlighted the incidence of 'brain waste' from the CEE region as professional migrants find themselves concentrated in lower sectors of the labour market than they previously occupied.[25] The concept of 'occupational skidding' was coined by Morawska and Spohn to describe the fall experienced by some migrants in terms of their occupational status.[26] These researchers point out that during the 1980s, only approximately 30% of highly-skilled Polish migrants were in an occupation which corresponded to their level of education.[27] There are indications that this trend prevails in the post EU8 accession climate. The WRS data illustrates that 82% of workers who registered between May 2004 and June 2006 were under the age of 34[28] and it is reasonable to suggest that many of the recent migrants are educated to a high standard.[29] A report by the European Foundation for the Improvement of Living and Working Conditions pointed to the occurrence of both youth and brain drain in the enlarged EU and defines a 'typical'

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[23] Erel, U., 'Skilled Migrant Women and Citizenship' in Morokvasic, M., Erel, U. and Shinozaki, K. (Eds.), *Crossing Borders and Shifting Boundaries. Vol I: Gender on the Move*, (Opalden: Leske and Budrich, 2003), 261; Raghuram, P. and Kofman, E., 'Out of Asia: Skilling, Re-skilling and Deskilling of Female Migrants', (2004) 27 *Women's Studies International Forum,* 95

[24] Bauder, *Op. Cit.* n.6

[25] Morokvasic and de Tinguy, *Op. Cit.* n.5, 245

[26] Morawska, E. and Spohn, W., 'Moving Europeans in the Globalising World: Contemporary Migrations in a Historical-Comparative Perspective (1955-1994 v. 1870-1914)' in Gungwu, W. (Ed.), *Global History and Migrations*, (Oxford: Westview, 1997), 23, 36

[27] *Ibid,* 38

[28] *Accession Monitoring Report, Op. Cit.* n.10, 10

[29] Commission research confirms that post-accession migrants from the EU8 resident in the EU15 have high levels of educational attainment, see European Commission, *Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004-30 April 2006)*, COM(2006) 48 final, 12

EU8 migrant as 'young, well-educated or studying in third-level education and living as a single, non-cohabiting person'.[30]

Certainly, of the 44 migrant workers interviewed, 28 had graduated from university in Poland and were overqualified for the jobs they occupied in the UK. To illustrate the point with two specific examples: one male respondent was a qualified medical doctor in Poland but worked as a care assistant in a private care home in Manchester; furthermore, a female respondent who worked as a chambermaid in Glasgow was a qualified special needs teacher in Poland. These findings also corroborate those of a research project conducted by Anderson *et al* on CEE migrants working in low-skilled sectors in the UK.[31] The research report acknowledged the 'significant mismatch' between EU8 migrants' qualifications and skills and the skills required to competently carry out their primary job.[32] Qualitative examples, similar to those given above from the research conducted for this thesis, are also given of migrants with a de-skilled status; such as an accountant working as a waitress and a philosopher working as a labourer.[33] The post-accession move to the UK (thus far), therefore, appears to have incorporated an element of de-skilling for many EU8 migrants. The policy in the UK of allowing regularisation of previously unlawful labour market activity may partly account for the low-status position of some EU8 migrants in the job market as, once a worker has been integrated into the black labour market, it is likely to be difficult to escape from that particular type of work. However, although this may

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[30] Krieger, H., *Migration Tends in an Enlarged Europe,* (Dublin: European Foundation for the Improvement of Living and Working Conditions, 2004), 3

[31] Anderson, B., Ruhs, M., Rogaly, B. and Spencer, S., *Fair Enough? Central and East European Migrants in Low-Wage Employment in the UK*, (Oxford: COMPAS, 2006). Project website <http://www.compas.ox.ac.uk/changingstatus> (last accessed 21 November 2006). The project incorporated both quantitative and qualitative analysis

[32] *Ibid.*, 36

[33] *Ibid.*, 37

account for the de-skilled position of those migrants who arrived prior to May 2004 it does not help to explain the position of those who moved legally post EU enlargement.

A majority of the respondents who took part in the study recognised their diminished social status and expressed disappointment with their social ranking in the UK. The following respondent had been a teacher in Poland:

"I am working as an office assistant which is a real downfall for me from what I was doing before... it's a bit of a shock for me because it's just like you cross a couple of borders and then your social status falls like a lead balloon" (Interview 011.MW).

It seems correct to classify the change in social status connected to this initial de-skilling as 'contradictory class mobility'.[34] This stems from the fact that whilst there is a fall in social status in the UK, on the other hand, there is also an increase in financial status since wages are often higher than those obtained in Poland. This was also recognised by some of those who were interviewed. The following respondent had worked as a waitress in a hotel and housekeeper for a wealthy family and when she returned to Poland she took up a position in the civil service:

"It is difficult in London to get a proper job. After two years the only jobs we could get were like waiters or something like this. There is no way of getting a job in a good company, so we decided to just come back. The

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[34] Parreñas, R., 'Transgressing the Nation-State: The Partial Citizenship and "Imagined (Global) Community" of Migrant Filipina Domestic Workers', (2001) 26(4) *Signs*, 1129

funny thing is that we had more money from being waiters than we do here for doing proper jobs" (Interview 312.G).

Effectively, during their time in the UK, many of the migrants appear willing to make a trade-off between professional investment and economic gain.

Before moving on to the legal factors contributing to the de-skilling of EU8 migrants, it is interesting to speculate on the extent to which this particular type of de-skilled migration fits with the EU's model of mobility. Given that 2006 was designated the title of 'European Year of Workers' Mobility' this is a particularly apt time to consider whether the EU is concerned about the 'quality' of free movement it promotes or whether its aim is simply to secure higher levels of intra-Community mobility at any cost.[35] On the one hand the occurrence of de-skilling appears to conflict with the long-term EU policies to encourage the mobility of students (through SOCRATES and ERASMUS initiatives)[36] and researchers, through the development of the European Research Area.[37] Indeed, the recent concern of the EU, tied in to the Lisbon Agenda aim of making the EU 'the most competitive and dynamic knowledge-driven economy by 2010',[38] appears to have focused on the movement of highly skilled persons between Member States:

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[35] See the Commission's website devoted to the European Year of Workers' Mobility initiative <http://europa.eu.int/comm/employment_social/workersmobility2006/index_en.htm> (last accessed 21 November 2006)

[36] Council Decision of 15 August 1987, [1987] O.J. L166/20. See also European Commission, Directorate-General for Education and Culture, *Socrates: European Community Action Programme in the field of education (2000-06),* Gateway to Education, (Brussels: European Commission, 2002)

[37] European Commission, *Towards a European Research Area: A New framework Programme for European Research*, (Brussels: European Commission, 2002)

[38] European Council, Lisbon, March 2000

'Promoting transnational mobility is a simple, particularly effective and powerful means of boosting European excellence... It creates opportunities for significantly improving the circulation and exploitation of knowledge, and helps to establish world class centres of excellence'.[39]

Curiously, in the context of post-accession mobility there seems to almost be some tacit approval of the de-skilling which is occurring. For example, in its report published in February 2006 the Commission cites evidence of the highly-qualified nature of migrants from the EU8.[40] In the same report, however, the point is made that these very migrants are helping relieve labour shortages in 'construction and in the domestic and catering services sectors that would risk not being filled otherwise in some countries'.[41] This acceptance of the usefulness of EU8 migrants for filling shortages in lower-skilled sectors contradicts somewhat the established objective of encouraging knowledge circulation throughout the EU. Indeed the initial post-accession employment trends involving EU8 migrants appear very far detached from another of the Lisbon Agenda's aims, that of creating 'more and better' jobs for Union citizens.[42] It seems that many EU8 workers in the UK have, at least in the early stages of the transitional period, exercised mobility rights within the context of 'more and worse' jobs.

3. Legal factors contributing to the skill-devaluation of EU8 migrants

The focus in this section is primarily on the legal and regulatory 'mechanisms of de-skilling'[43] which have contributed to the experience of

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[39] European Commission, *Op. Cit.* n.37, 20

[40] European Commission, *Op. Cit.* n.29, 12

[41] European Commission, *Ibid*, 13

[42] European Commission, *Working Together for Growth and Jobs A New Start for the Lisbon Strategy*, COM (2005) 24 final

[43] Erel, *Op. Cit.* n.23, 265

downward social and professional mobility for many EU8 migrants in the aftermath of enlargement.[44] That is not to deny, however, the existence of other social contributory factors, or 'mechanisms of de-skilling', of which constraints of space prevent any in-depth consideration. To summarise these briefly; forms of social and institutional discrimination play a part in the de-skilling or degradation of a migrant's labour market position as can the migrant's knowledge of the host society's language.[45] Kofman *et al* submit that migrants from the CEE region are racialised despite the lack of any colour differences between themselves and nationals of the host country. Public and employer perceptions about the group's alleged dependence on benefits and lack of ambition stigmatise the migrants and can contribute to the attainment of an inferior employment position.[46] Such stereotypical perceptions may well still shape the migration experience of EU8 nationals. However, as lawful EU migrant workers in the UK, they are now *legally* entitled to equal treatment with nationals as regards access to employment and conditions of work under Community law.[47]

3.1. The post-accession regulatory regime in the UK

The practicalities of the WRS have been discussed in chapter three with regard to how EU8 migrants access employment in the UK.[48] The concern here is to draw out how those conditions of access may contribute to the occurrence of de-skilling. It will be recalled that the registration rules limit

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[44] The importance of legal obstacles has been acknowledged by other scholars, for example Erel, in her study of migrant women in Britain and Germany, found that immigration legislation constituted a barrier to satisfactory labour market positioning, *Ibid.*, 265

[45] Linguistic competence is discussed further below

[46] Kofman *et al*, *Op. Cit.* n.18, 19

[47] Pursuant to Article 39 EC on the free movement of workers and Article 7 of Regulation 1612/68 [1968] O.J. L257/2. Article 12 EC embodies a general non-discrimination on the grounds of nationality provision

[48] Under the Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/121, referred to here as 'Worker Registration Regulations' (WRR)

the right of residence for EU8 migrant workers to the effect that an EU8 national is only considered to be legally resident when in work and registered on the scheme. There is only a 30 day period of grace within which a migrant can search for employment before UK law classifies him or her as being unlawfully resident.[49] Similarly, an EU8 worker who becomes unemployed during the first year can retain the months of work already accumulated by finding alternative work and re-registering within 30 days from the date the original employment relationship ceased.[50]

This 30 day deadline has consequences for the type of work EU8 migrants are initially able to access. As this thesis has acknowledged, migrants may seek employment in the UK before leaving the home-sate, usually via an employment agency.[51] However, those that do not do so and arrive without a pre-arranged job are faced with the pressure of finding work quickly to avoid being categorised as an irregular migrant. It is sometimes difficult to access professional occupations in the formal economy within 30 days since the recruitment process for such posts often extends over a longer time-frame. Human Resources have become increasingly formalised and many employers have detailed recruitment procedures which comprise a number of stages, utilise a number of different advertisement channels, and rely upon lengthy selection procedures.[52] By contrast, informal work in the lower-skilled sectors of the labour market is

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[49] Regulation 7(2)(b)(i), WRR. See chapter six, section 3, for discussion of the unlawfulness of this categorisation under Community law

[50] Regulation 2(4), WRR. This is important because after an EU8 migrant has complied with the registration process continuously for a year, the worker will then be eligible for an EEA residence permit under regulation 5, WRR and have access to social benefits. A gap in employment of over 30 days breaks the chain of continuity

[51] See chapter three, section 4, above and Ward *et al*, *The Role of Temporary Staffing Agencies in Facilitating Labour Mobility in Eastern and Central Europe*, (Manchester: Vedior, 2005)

[52] McKenna, E. and Beech, N., *Human Resource Management: A Concise Analysis*, (Harlow: Pearson Education, 2002), 140-151

often accessible more rapidly.[53] For EU8 migrants, taking up work in a low-skilled job may simply be the most pragmatic decision. For example, the following respondent had been hoping to secure work in marketing for which she holds a degree from Poland. However her priorities changed after moving to the UK; after searching for work for over a month she eventually found employment as a cleaner with the help of a London-based agency:

"I started to look for a job in July and it was very difficult. For almost one month and a half I couldn't find anything [in marketing] so I tried looking for other work. I left my CV in shops, in cafés and in bars. I was so depressed" (Interview 304.P).

Research supports the view that migrants can more easily gain entry into the informal economy than they can into the more regulated and formal sector.[54] Migrants make use of certain employment strategies which are open to them in the host society, such as: placing advertisements in newspapers; tapping into kin networks; making contacts in churches and NGOs; and, of course, relying on agencies.[55] The effect of taking these particular avenues into employment, however, is to restrict the employment opportunities available and consign the migrants to holding a particular type of occupation. The pressure on even highly qualified migrants to make use of these strategies is arguably more pronounced when faced with a deadline of just 30 days.

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[53] Düvell, F., *Polish undocumented immigrants, regular high-skilled workers and entrepreneurs in the UK*, (Warsaw: Institute for Social Studies Working Paper, 2004)

[54] Düvell, *Ibid*; Anderson, B., *Doing the Dirty Work? The Global Politics of Domestic Labour*, (London: Zed Books, 2000)

[55] Anderson, *Ibid.*, 34-39. On employment agency reliance see Currie, S., ''Free' movers? The Post-Accession Experience of Accession-8 Migrant Workers in the UK', (2006) 31 *European Law Review*, 207

The registration rules may also have a hindering effect on the migrant's ability to change occupation. The requirement to re-register,[56] again within 30 days, each time new employment is taken up was mentioned by a number of the EU8 migrants interviewed, for example:

"We have the necessity of registering every time we change job within 30 days... But what happens if I change job and I don't like the job and I leave after a week or two, I need to register every time, I mean it's absolutely stupid. That's actually what's keeping Polish people in jobs that they don't like and where they don't get treated well. They think: "we better stay now we've registered. If I change I have to re-register and what if the other job is worse and I need to change again?" It's just so much hassle... personally I don't see the point" (Interview 011.MW).

It seems this additional bureaucratic requirement may constitute a psychological, as much as a legal, barrier to the frequent changing of occupation thus preventing migrants from climbing up the social, professional and economic ladder. Of course, the WRS and the requirements that attach to it are time-limited and apply only until the EU8 migrant has accumulated one year of continuous employment. Therefore, although the system initially steers EU8 nationals towards low-paid jobs in the lower echelons of the employment market, this initial occurrence of de-skilling may not prevent them from later progressing to jobs which better reflect their levels of skills and qualifications.[57] Again, this raises the issue of the comparability of the status of EU8 nationals with that of third-country nationals. Despite the apparent similarities in the type of work carried out by both groups at present it may well be that in the future when

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[56] Regulation 2(4), WRR

[57] Although this does not necessarily mean that de-skilling will not occur as a result of other factors. Indeed, subsequent ascendance may be hampered by the fact that they have had a break in their career

transitional arrangements are lifted and the EU8 become more integrated into the EU, that the status and experience of the two categories of migrant will become more disparate.

3.2. Securing recognition of qualifications under Community law

A further factor contributing to the de-skilling of EU8 migrants relates to the problem of securing recognition of their foreign qualifications. The problem of non-recognition of qualifications and the subsequent exclusion of highly educated migrants from the upper sections of the labour market has been researched in a Canadian context. Bauder has argued that professional organisations adopt a protectionist stance which serves to exclude migrants from specialised occupations. On the whole, this is unlikely to be the result of any overt racism. Rather, it seems that there is an inherent scepticism regarding foreign qualifications that operates covertly. Such organisations adopt a much harsher assessment of the credentials of migrants than they do when examining those of nationals.[58] Man sees the lack of recognition given to international qualifications as originating from the very nature of capitalism so that:

> *'Regardless of education and experience, immigrants are treated as a source of cheap labour and relegated to low paid, menial positions'.*[59]

Clearly we should not stress too much the Canadian experience in this context because the EU, with its emphasis on ensuring free movement as a fundamental component of the Common Market, has developed a system of mutual recognition of qualifications and non-discrimination (at least formally). This system is of immediate application to EU8 migrants as the

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[58] Bauder, *Op. Cit.* n.6, 699

[59] Man, G., 'Gender, Work and Migration: Deskilling Chinese immigrant Women in Canada', (2004) 27 *Women's Studies International Forum,* 135

Treaty of Accession contained no transitional arrangements on the operation of Community mutual recognition rules.[60] The EU recognition system and its particular features, however, may still help to explain how EU8 migrants find their skills devalued when in a different Member State. The establishment of a system of mutual recognition of qualifications is an obligation imposed on the Member States, by the EC Treaty, under the provisions designed to ensure free movement of workers, the self-employed and those providing services in other Member States.[61] Thus, the system works primarily to ensure that professional qualifications are recognised, rather than general educational or academic qualifications.[62] While the Member States have been comfortable with the exercise of Community competence under Article 47 EC, the legal basis that enables measures to be adopted in order to make it easier for persons to take up and pursue activities as self-employed persons, there has been much less desire to relinquish sovereignty in the more general area of education. Thus Article 149 EC, which provides the basis for Community action in the education field, grants the Community only complementary competence and very much enshrines the subsidiarity principle.[63] Thus, the role of the Community is limited to encouraging Member State cooperation. The continuing prominence of national autonomy in the general sphere of education policy reflects the desire of the Member States to retain control over an area closely informed by cultural and political heritage.

Community policy early on adopted a vertical approach to the mutual recognition of professional education and a number of sectoral Directives

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[60] Treaty of Accession 2003 [2003] O.J. L 236/17

[61] Articles 39, 43 and 49 EC respectively

[62] See Stalford, H., 'Transferability of Educational Skills and Qualifications in the European Union: The Case of EU Migrant Children' in Shaw, J. (Ed.), *Social Law and Policy in an Evolving European Union*, (Oxford: Hart, 2000), 243; Peixoto, J., 'Migration and Policies in the European Union: Highly Skilled Mobility, Free Movement of Labour and Recognition of Diplomas', (2001) 39 *International Migration*, 33

[63] Article 5 EC

were enacted, on the basis of Article 47 EC, which covered mainly the medical professions and architects.[64] These Directives enable EU migrants to take up activity in the professional sectors under the same conditions as nationals who had qualified in that state. However, the long drawn out process of negotiating such Directives led to a change of approach by the Community and, rather than attempting to achieve a level of harmonisation via the vertical method, a horizontal system of mutual recognition was seen as a more suitable goal.[65] The Community has since sought to implement a general system for the recognition of professional qualifications via the adoption of three 'general system' Directives.[66] These Directives, rather than focussing on the qualifications required to take up a particular occupation, instead concentrate on the characteristics of the qualifications which can grant entitlement to take up a wide range of professional activities. For example, the basic design of Directive 89/48 is that, if a national of a Member State wants to pursue a regulated profession in another, the competent authorities in the host state cannot deny authorisation on the basis of inadequate qualifications if that person satisfies the conditions of having pursued a three year higher education

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[64] Directive 75/363 [1975] O.J. L16714 (Doctors); Directive 77/453 [1977] O.J. L176/8 (Nurses); Directive 78/687 [1978] O.J. 233/10 (Dentists); Directive 78/1027 [1978] O.J. L362/7 (Veterinary surgeons); Directive 80/155 [1980] O.J. L33/8 (Midwives); Directive 85/432 [1985] O.J. L253/37 (Pharmacists); Directive 85/384 [1985] O.J. L223/15 (Architects); and Directive 96/26 [1996] O.J. L223/15 (Road haulage and passenger transport operators). Note that these Directives are repealed by consolidating Directive 2005/36 [2005] O.J. L255/22

[65] See White, R.C.A, *Workers, Establishment and Services in the European Union*, (Oxford: Oxford University Press, 2004), 61-77

[66] Directive 89/48 [1989] O.J. L19/16 on a general system for the recognition of higher education diplomas awarded on completion of professional education and training of at least three years' duration; Directive 92/51 [1992] O.J. L209/25, as amended by Directive 2001/19 [2001] O.J. L206/1 on a second general system for the recognition of professional education and training to supplement Directive 89/48; and Directive 1999/ 42 [1999] O.J. L201/77 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general system for the recognition of qualifications. Note that these Directives are repealed by a consolidating Directive 2005/36 [2005] O.J. L255/22

course in the Community and has completed the necessary professional training in order to be qualified to take up the regulated profession.[67]

Clearly, the key distinction between the two systems is that whereas recognition follows automatically from the sectoral Directives, under the general system recognition is contingent upon the individual's training being considered equivalent by the host Member State and thus there is a lesser degree of legal certainty.[68] Where there are discrepancies in training, compared to the training undertaken by the state's own nationals, the state can require the migrant to undertake a period of adaptation or an aptitude test.[69] A new Directive on the recognition of professional qualifications has recently been adopted which consolidates the law on mutual recognition and repeals fifteen sectoral Directives and the three general system Directives.[70] Although this Directive merges the law on the two systems into a single legal document the distinction between them remains very much intact.

3.2.1. The role of professional organisations

A defining feature of the Community's system of mutual recognition is that it allows the professional bodies which regulate professions in the Member States to exercise a considerable degree of control over the process. The competent authorities in the Member States are able to supervise the process of recognition and the system is therefore 'heavily reliant on mutual trust and on the adoption of a non-protectionist attitude by national

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[67] Note that if a profession is unregulated in a Member State, and thus the general system does not apply, the Court has stressed that there must be a prompt, good faith assessment of the equivalence of qualifications followed by a reasoned decision which could be challenged in the national courts: Case C-164/94 *Aranitis* [1996] E.C.R. I-135

[68] White, *Op. Cit.* n.65, 77

[69] Article 4, Directive 89/48 [1989] O.J. L1916

[70] Directive 2005/36 [2005] O.J. L255/22 (Member States must ensure implementation into national law by 20 October 2007)

competent authorities'.[71] Thus, the above mentioned analysis of the Canadian context may hold significance after all. In particular, Bauder's research demonstrates that the tendency of such professional bodies, when carrying out this function of 'professional gate-keeping', is to devalue the foreign qualifications.[72] Essentially distinctions are made on the basis of where the qualification was obtained such that the 'foreign' skills of migrants are judged to be of less value.[73] While it may often be in the interest of some organisations to employ foreign labour, such practises masque deep-seated discrimination.

It could be argued that the national professional bodies in the EU Member States are less inclined to adopt such a differential assessment of qualifications from other EU states; after all, they have been socialised by the process of EU integration over a period of many years and should, in theory, have adapted to the system of mutual recognition. Furthermore, it has long been held by the ECJ that such bodies which are neither public nor private but, rather, are involved with regulating employment in a collective manner are duty bound to respect obligations of Community law, including the principle of non-discrimination on the ground of nationality,[74] contained in the Treaty.[75] Consequently, such bodies should be well aware of their duties under Community law.

It is questionable, however, whether professional bodies will readily accept the mutual recognition of *EU8 qualifications* in the wake of accession. Indeed, Kofman has pointed to the general devaluation of CEE education

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[71] Craig, P. and de Bürca, G., *EU Law. Text Cases and Materials*, (3rd Ed.), (Oxford: Oxford University Press, 2003), 780

[72] Bauder, *Op. Cit.* n.6, 703

[73] Bauder, *Ibid.*, 702

[74] Article 12 EC

[75] Case 36/74 *Walrave* [1974] E.C.R. 1405; Case C-415/93 *Bosman* [1995] E.C.R. I-4921

which occurs in western countries.[76] As this 'mindset' is unlikely to have altered in the short time since EU accession it seems that migrants from the EU8 may be at particular risk of facing difficulties ensuring their professional qualifications are recognised. This is not to say that such devaluation is specific to CEE educational qualifications as it appears that an undervaluing of foreign education occurs even between the EU15 owing to the closely related nature of education to the Member States' cultural heritage. White,[77] for example, refers to the *Dreessen* case as a 'remarkable' example of professional gate-keeping by a national competent body.[78] Dreessen was a Belgian national who held engineering qualifications from Germany and had later worked in architects' practices for a period of 25 years in Belgium. Despite clear evidence of his competence the Belgian authorities refused his application to practice as a self-employed architect on the basis of his German qualification which was not covered by the relevant sectoral Directive. The Court stressed the importance of the principle of equivalence which must be taken into account when dealing with a qualification not covered by the secondary legislation. The caselaw clearly states that such qualifications should be subject to a good faith assessment of their equivalence to national standards.[79] Despite this principle now being well-established, it would seem that some competent authorities continue to question the legitimacy of qualifications obtained in other Member states.[80]

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[76] Kofman, E., 'The Invisibility of Skilled Female Migrants and Gender Relations in Studies of Skilled Migration in Europe', (2000) 6 *International Journal of Population Geography*, 45, 55

[77] White, *Op. Cit.* n.65, 77

[78] Case C-447/93 *Dreessen* [1994] E.C.R. I-4087

[79] See Case 222/86 *Heylens* [1987] E.C.R. 4097; Case C-164/94 *Aranitis* [1996] E.C.R. I-135; Case C 340/89 *Vlassopoulou* [1991] ECR 2357; Case C-238/98 *Hocsman* [2000] ECR I-6623 (this case extended the obligation to consider the equivalence of qualifications to those obtained even in third-countries)

[80] In practice, a refusal of recognition may not prevent a migrant from working under a regulated profession's title (unlawfully) in the host Member State

Furthermore, it is well documented that the mutual recognition of qualifications is already a very poorly implemented area of Community law:[81]

'The number of preliminary rulings and infringement proceedings in this area is testimony to the continuing reluctance of Member States, and professional bodies within them, to recognise qualifications obtained in other Member states'.[82]

Bringing infringement proceedings against Member States for non-implementation or incorrect implementation of mutual recognition legislation has been a recurring task for the Commission.[83] Furthermore, it seems that such actions have not had any significant deterrent effect on the Member States. For example, infringement proceedings against seven Member States were brought for failing to fully implement the third general system Directive.[84] This reluctance to engage in a true system of mutual trust and to leave protectionism behind will only be compounded by professional EU8 migrants seeking to gain access to certain professional occupations. It seems, therefore, that the failures of the mutual recognition system may well be another contributory factor to the de-skilling of migrants from the EU8 in the UK.

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[81] See White, *Op. Cit.* n.65, 72; Pertek, J., 'Free movement of professionals and recognition of higher education diplomas' (1992) 12 *Yearbook of European Law*, 293; Peixoto, *Op. Cit.* n.62, 33

[82] White, *Ibid.*, 77

[83] For infringement proceedings relating to the first general system Directive (Directive 89/48 [1989] O.J. L 19/16) see Case C-365/93 *Commission v Greece* [1995] E.C.R. I-499; Case C-216/94 *Commission v Belgium* [1995] E.C.R. I-2155; Case C-285/00 *Commission v France* [2001] E.C.R. I-3801

[84] Directive 99/42 [1999] O.J. L201/77. The Member States concerned were Germany, Spain, Ireland, Italy, the Netherlands, Austria and the UK. See, for example, Case C-388/02 *Commission v Ireland* [2003] E.C.R. I-2173

Of the five Polish employment agency representatives interviewed as part of the study, four of them admitted that their organisation had found it difficult to understand the law on the recognition of professional qualifications. This suggests that the advice given to some EU8 migrants is not always reliable or comprehensive. The following extract from a Warsaw-based agency worker demonstrates the difficulties experienced when trying to grapple with the mutual recognition law, as well as the potential for conveying misleading information to professionals seeking to migrate:

"Nurses have to be registered with the College of Nurses and some of these women graduated this year and start work [in the UK] *straight away but sometimes there is a problem and we are told they need two years experience. At first it seemed that experience in Poland was not good enough but now we are not having a problem with this being counted. We've also started to recommend that pharmacists should work in Poland first after graduation and then apply for positions in the UK. To be honest with you we are not exactly sure that is correct"* (Interview 403.ITC).

Despite the confusion in some cases, it should also be pointed out that one of the Polish agencies (based in Krakow) that took part in the study had developed a very comprehensive workshop which provided practical information for doctors wanting to register with the General Medical Council.[85]

A further repercussion of the endemic 'professional gate-keeping' and the reluctance to recognise migrants' qualifications and skills is that, whilst migrants may gain access to their chosen profession, they also experience a downgrading *within* that profession. For example, research has suggested

[85] Interview 402.BEN

that foreign doctors in the UK often work in less-specialised areas of health care than they did in their home state.[86] Migrant nurses also experience a devaluing of their skills and experience, often being asked to undertake routine tasks and 'not being trusted' to perform certain medical procedures.[87] The implication is, then, that migrants are not only de-skilled between professions but also within a profession. A further finding is that, due to the difficulty of trying to access professional occupations, migrants sometimes volunteer their services in the hope that it may lead to a permanent, paid position later on.[88] This may either be for a reduced wage or for no wage at all consequently undermining the earning power and professional worth of the migrant worker.

3.2.2. The role of employers

The way in which employers assess skills and qualifications gained in the home state also has an impact on the migrant's labour market position. Under Community law EU migrant workers are entitled to equal treatment with national workers and thus should not experience discrimination on the grounds of nationality in the course of employment.[89] Indeed, Article 6 of Regulation 1612/68 provides that nationality discrimination should not be perpetrated against migrants in the form of 'vocational or other criteria' which are not applied to nationals who wish to pursue the same activity.[90]

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[86] Kofman, *Op. Cit.* n.76, 49

[87] Matiti, M.R. and Taylor, D., 'The cultural lived experience of internationally recruited nurses: a phenomenological study', (2005) 2 *Diversity in Health and Social Care*, 7. If access to the nursing profession proves difficult the women may instead transfer their skills to the precarious sector of domestic work, Kofman, E., 'Female 'Birds of Passage' a Decade Later: Gender and Immigration in the European Union', (1999) 33(2) *International Migration Review*, 269, 283. Domestic work is also discussed later on in this chapter

[88] Bauder, Op. Cit. n.6, 712-713

[89] Article 39 EC; Articles 1-6 Regulation 1612/68. As already states, nationality discrimination is prohibited by Article 12 EC, and Union citizens have a right to equal treatment under Directive 2004/38 [2004] O.J. L158/77

[90] Although this is tempered somewhat by the inclusion of an employer's right to request the migrant undergo a vocational test, if such a request is made when making the offer of employment

Thus, from a legal perspective, in assessing qualifications discrimination is strictly prohibited. Research by Erel on the migration of skilled women to the UK and Germany has, however, uncovered the tendency of employers to underestimate and undervalue migrants' qualifications and, instead, to recognise only their linguistic abilities.[91] A migrant's ability to communicate in the language of the host state is clearly an important consideration for employers.

Linguistic competence is a factor which can stifle a migrant worker's performance in the host labour market.[92] For example, the doctor in the sample who was working as a care assistant in a private care home for the elderly did express an intention to register as a doctor in the future,[93] however, at the time of the interview he did not feel his proficiency in English was at an adequate standard which would enable him to fulfil his duties. Similarly, the following extract is taken from an interview with a Polish employment agency representative who had experience of assisting people arrange a move to the UK:

"It's weird because a lot of people who we send are really well educated. Sometimes they've got medical degrees but they work in factories on the line because they need to learn English first" (Interview 405.NEW).

Linguistic competence is an interesting issue because a migrant's lack of language proficiency can provide employers with the opportunity to legitimate, otherwise prohibited, discrimination on the grounds of nationality as regards access to employment. Article 3(1) of Regulation 1612/68 allows 'conditions relating to linguistic knowledge required by

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[91] Erel, *Op. Cit.* n.23, 270

[92] Erel, *Ibid.*, 268

[93] Interview 009.BS

reason of the post to be filled' to be imposed on migrant workers employed by public bodies. This was successfully relied on, in the case of *Groener*,[94] by the Irish government. Here a Dutch woman had been teaching at an Irish design college but was refused a permanent position as a result of her lack of proficiency at speaking Gaelic. The language requirement was upheld, despite the fact that Gaelic was not needed to actually perform the duties of the post, because there was a government policy to promote the use of the Irish language as a means of expressing national culture and identity.[95] Education, and teachers in particular, were to play an important part in the implementation of this policy and, therefore, the language requirement was lawful.[96] The relevant point for the discussion is that employers are entitled to impose language conditions if the post so requires linguistic knowledge. *Groener* suggests that even if the post does not require actual linguistic knowledge then there may still be circumstances where linguistic competence is a prerequisite of employment. Although Article 3(1) itself applies only to 'provisions laid down by the laws, regulations or administrative action or administrative practices of Member States', private employers, who are also bound by the principle of non-discrimination under Article 39 EC,[97] will have the opportunity to justify any language requirements on the basis of the objective justification test which applies to indirect discrimination.[98]

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[94] Case 379/87 *Groener v Minister for Education* [1989] E.C.R. 3967

[95] *Ibid.*, paras. 18-19

[96] Provided that the level of knowledge was not disproportionate to the objective pursued (para. 21). For discussion on the impact of this judgment on migrant workers in Ireland see Ackers, L., *Shifting Spaces: Women, Citizenship and Migration within the European Union*, (Bristol: The Policy Press, 1998), 204-208

[97] See Case C-281/98 *Angonese* [2000] E.C.R. I-4139

[98] That the requirement is justified by objective factors unrelated to the nationality of the persons concerned and in proportion to the aim legitimately pursued. Note that an employer cannot require the linguistic capabilities to be obtained within the host Member State, see *Angonese*, *Ibid.*

In any event, as this chapter seeks to demonstrate, language is not the only factor that contributes to the de-skilling of migrant labour. The following extract from an EU8 worker demonstrates this point:

"My experience is that Polish people coming over here do jobs that other people are not interested in and actually a lot of Polish people are really well educated and they work below their qualifications. I speak fluent English so theoretically I should have the same opportunities as British people but I don't" (Interview 011.MW).

Employers, in addition to having concerns about a migrant's proficiency in English, may also express doubt about the suitability of foreign qualifications. Two of the five agencies interviewed as part of the study put forward the view that the British employers they dealt with had a particular preoccupation with National Vocational Qualifications (NVQs).[99] The suggestion was that many employers had been unconvinced of the suitability of some Polish candidates who did not have such a qualification:

"Polish school isn't seen as being as valid as NVQs. When someone finishes school in Poland it is a problem because we can't describe what he can do. It would be easier for us to say he has an NVQ in something but we haven't got this system. So we need to check these people are qualified and their qualifications are ok and then try to persuade the employer of this" (Interview 405.NEW).

As a form of vocational qualification NVQs may come under the mutual recognition regime via the third general system Directive.[100] This

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[99] A vocational qualification accredited by the National Council for Vocational Qualifications (NCVQ) in the UK and based on the assessment of specific competencies in the workplace in accordance with a prescribed national standard

[100] Directive 1999/42 [1999] O.J. L201/77

Directive relates to a wide array of occupations, ranging from hairdressing to mining, whether pursued in an employed or self-employed capacity. Thus, it would be open to a migrant with some Polish vocational qualifications relating to a particular profession to attempt to gain recognition of them as equivalent to NVQs under this Directive. Moreover, in the absence of such a regulated profession falling within the scope of the Directive, there is still the possibility of reliance on the principle of equivalence which has been discussed above in relation to the role of professional organisations.

The problem with relying upon the obligation to undertake a good faith assessment of the equivalence of foreign qualifications is that this principle has developed out of the caselaw on the right of establishment, not the free movement of workers.[101] In *Vlassopoulou,*[102] for example, the Court made clear that Article 43 EC (concerning the freedom of establishment) imposed an obligation on the national authorities responsible for granting access to professions, in this case the legal profession, in that they were required:

'...to take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in order to exercise the same profession in another profession by making a comparison between the specialised knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules'.[103]

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[101] As discussed above in relation to professional organisations. See Case C-164/94 *Aranitis* [1996] E.C.R. I-135; Case C 340/89 *Vlassopoulou* [1991] E.C.R. 2357; Case C-238/98 *Hocsman* [2000] E.C.R. I-6623; Case C-447/93 *Dreessen* [1994] E.C.R. I-4087; Case 222/86 *Heylens* [1987] E.C.R. 4097

[102] Case C-340/89 *Vlassopoulou* [1991] E.C.R. 2357

[103] *Ibid.*, para. 16

Thus, although the duty is imposed on the competent authorities in a Member State when an EU national is seeking to gain access to a profession it is not entirely clear whether the principle can apply in a horizontal fashion against private employers. Arguably, however, it is not outside the realms of possibility to suggest that the positive obligation to assess the equivalence of foreign qualifications can also apply to such employers. The Court, in the case of *Angonese*, has already established that the prohibition of discrimination on grounds of nationality in Article 39 EC applies to private employers.[104] Therefore if the principle of horizontal application of the free movement provisions, from *Angonese*, is combined with the duty to consider the equivalence of foreign professional qualifications, from *Vlassopoulou*, it would appear that, when it comes to professional qualifications at least, in principle employers do have an obligation to consider in good faith the equivalence of qualifications obtained abroad. Effectively, the duty to consider the equivalence of qualifications amounts to an extension of the obligation not to impose indirectly discriminatory restrictions on access to employment, as the failure to take into account foreign qualifications will obviously affect migrants in a disproportionate manner. From this perspective, the additional responsibility on the private employer can be absorbed into the duties they are already required to comply with under the Treaty. This principle, however, is problematic in a number of respects.

First, it can be criticised on the basis that it imposes an unfair obligation on the private employer who may well be unaware of a Community obligation to compare the equivalence of qualifications from other Member States with that of domestic diplomas.[105] Perhaps more importantly, one may

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[104] Case C-281/98 *Angonese* [2000] E.C.R. I-4139

[105] Although, of course, certain directly effective Community law can be horizontally binding against private parties, an example being Article 141 EC (ex 119) on the principle of equal pay, see Case 43/75 *Defrenne v Sabena* [1978] E.C.R. 1365

also wonder how an employer would actually set about establishing whether or not the qualifications were equivalent. It is not clear what steps an employer would have to take or how far they would 'reasonably' be required to go. These considerations, which relate to the fairness of the obligation, would no doubt be relevant to an objective justification assessment. Thus, although in principle employers may be bound by a *Vlassopoulou*-type obligation, they would have the opportunity to justify their failure to undertake such a comparison. A second problem relates to the workability of the horizontal application of the mutual recognition of qualifications. It is not clear how an individual would prove that an employer had failed to consider the equivalence of qualifications obtained in a home state and, moreover, it appears unlikely that an EU8 migrant would mount a legal challenge on this basis.[106] Thus it does appear that there is scope legally, for a migrant to be able to challenge an employer's devaluation of a foreign qualification but, in practice, this route poses significant difficulties.

The implication of this is clearly that employers do have a part to play in the devaluing of EU8 migrants' qualifications and hence lowering of their labour market position. Even if it is accepted they have an obligation not to discriminate on the basis of qualifications, it is not a well-enforced one. The following extract from an interview with a male return migrant in Poland (a History graduate) provides an example of how he perceived his relationship with his employer in London:

"When I was working in the hotel as a waiter I applied for a better job in the office as a secretary. Actually I applied a few times for different jobs in the hotel and they always said no. I feel like I could go to only one level. It

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[106] For a number of reasons including resources, access to legal representation and, again, actual awareness that such discrimination has occurred

was like I could be a waiter or a housekeeper but I couldn't go to a higher level. They were not interested in what I had done in Poland. I know about my rights but there is something that stops you getting higher" (Interview 311.D).

Similarly, the following respondent (a Psychology graduate who worked as a shop assistant in London) describes his perception of how employers place a higher premium on British qualifications:

"I met lots of educated Polish people including lawyers and psychologists and all of these people are working in the jobs at the level of, for example, retail or restaurants. I couldn't do it for long time. I knew I wouldn't get a better job. I think if you want to get proper job in London you need an English degree. I only worked in a shop and they asked about English qualifications!" (Interview 301.B).

These two extracts bear testimony to the existence of a form of 'glass ceiling'[107] which prevents some migrants from experiencing any significant upward professional mobility in the workplace. Although the attitude of employers is likely to be only one of many contributory factors to this phenomenon, it would certainly appear that their views of migrants' qualifications, skills and experience are significant.

3.2.3. Gaining access to further educational studies

The professional focus of the EU mutual recognition regime also has ramifications for those migrants who seek to take up additional studies once they are working in the UK. The ability to access educational courses whilst working in the host state may be particularly important as a

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[107] Li, P.S., 'The Market Worth of Immigrants' Educational Credentials', (2001) 27(1) *Canadian Public Policy*, 23

mechanism for improving one's labour market position and essentially achieving a form of 're-skilling';[108] after all, it is clear from the discussion above that employers do value national qualifications. However, it may be difficult for migrants to access certain educational courses in the host state on the basis of their previously-obtained Polish qualifications, as Stalford points out:

'Current provision... does not address the situation in which nationals are required to possess specific qualifications to gain access to certain systems of education, and how qualifications obtained from other Member States will be regarded'.[109]

It is important to recognise the distinction between academic recognition and professional recognition. Community law, as it currently stands, provides no binding mechanisms for the recognition of academic qualifications outside of the 'professional occupation' context and thus it can be extremely difficult to transfer purely academic qualifications from one country to another.[110] This may prevent the migrants from building on qualifications obtained in the home state by gaining access to a higher-level educational course which requires prior completion of particular qualifications. Seven of the forty-five migrants interviewed expressed a desire to gain a qualification during their time in the UK. The following extract is taken from an interview with one woman who had actually taken steps towards this and provides an example of how lack of recognition can be a barrier to re-skilling. She graduated with a Masters degree in English Literature and had been a teacher in Poland; at the time of the interview she

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[108] Erel, *Op. Cit.* n.23, 269; Raghuram and Kofman, *Op. Cit.* n.23, 95

[109] Stalford, H., *Op. Cit.* n.62, 246

[110] In relation to the difficulties in transferring secondary level educational qualifications see Stalford, *Ibid.*, 246

was working as an administrative assistant in London and was hoping to be able to complete a PhD part-time:

"I was thinking of doing my PhD here part time but it turns out that my Masters [degree] *will not be recognised as a Masters here. I spoke to a university and they told me my Masters will only count as a Bachelor's degree which was really surprising to me, so it depends whether I will be accepted on the basis of that. The people who warned me that my diploma would not be recognised were right"* (Interview 011.MW).

Despite the absence of binding Community rules on the recognition of academic qualifications the National Academic Recognition Information Centres (NARIC Network) was established to provide higher educational institutions and individuals with information concerning the validity of qualifications in other Member States.[111] In relation to gaining access to university courses on the basis of Polish qualifications, therefore, there is a system in place to provide assistance and advice although higher education institutions have significant discretion on how to apply and interpret equivalence guidelines. A contrast can be drawn here with the position of employers (as discussed in the above section) who are unlikely to be as familiar with the system. In addition, universities will often have a set policy on the recognition of foreign qualifications which enhances the transparency of the decisions. There is a greater degree of ambiguity when employers make judgements about the value of qualifications.

Importantly, the Court has indicated that it is willing to *encourage* the recognition of academic qualifications. In a number of cases involving discrimination as regards access to Higher Education the ECJ has made clear that indirectly discriminatory measures which require university

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[111] Council of Ministers of Education Resolution [1976] O.J. C38/1

applicants to have completed their secondary education within the host Member State fall foul of Article 12 EC.[112] Therefore Member States should take the necessary measures to ensure that holders of secondary education diplomas awarded in other Member States can gain access to Higher Education under the same conditions as those who have obtained their previous education in the host state.[113] Arguably then, academic recognition is binding so far as it falls within the scope of application of the principle of indirect discrimination. This principle is still in the relatively early stages of development but it does appear that it can potentially be far-reaching, especially when considered within the context of the caselaw on equal treatment of Union citizens. In *D'Hoop*,[114] for example, it was held that Belgian rules which denied an individual access to a tideover allowance on the ground that she had not completed her secondary education in Belgium were unlawful. Therefore, not only are individuals entitled to have their secondary education in their home Member State taken into account when seeking to access university courses in the host Member State, but they are also entitled to expect that their home education will not be used as a condition to deny them access to related benefits within that host state.[115]

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[112] Read in conjunction with Articles 149 and 150 EC which provide the legal basis for Community action in the area of education. Case 65/03 *Commission v Belgium* [2004] E.C.R. I-6427; Case C-147/03 *Commission v Austria* [2005] E.C.R. I-5969

[113] Case C-147/03 *Commission v Austria* [2005] E.C.R. I-5969, para. 75

[114] Case C-224/98 *D'Hoop* [2002] ECR I-6191

[115] The status of migrant students generally has been fortified as a result of the Court's interpretation of Union citizenship. See Case C-209/03 *Bidar* [2005] E.C.R. I-2119 on equal treatment as regards subsidised student loans. This is also discussed in chapter six. For a detailed discussion of the status of students see Dougan, M., 'Fees, grants, loans and dole cheques: Who covers the cost of migrant education in the EU?', (2005) 42 *Common Market Law Review*, 943

The focus here on universities may blur the distinction between the status of migrant worker and migrant student.[116] However, it has been included to illustrate the current lack of formal Community regulation in the area of academic recognition and how this may be challenged by judicial developments in the area of discrimination as regards access to higher education in a citizenship context. Furthermore it has demonstrated that, despite the lack of binding Community input, services offered by initiatives such as the NARIC network, perhaps in combination with other aspects of the developing European Education Area,[117] may help de-skilled EU8 migrant workers to re-skilll by providing information about accessing higher education in the UK on the basis of their Polish (or other EU8) qualifications.

Moving away from the focus on higher education and shifting attention back to workers, it should be acknowledged that migrant workers are able to access 'training in vocational schools and retraining centres' under the same conditions as national workers.[118] This may provide an opportunity to re-skill for some de-skilled workers. However, this is restricted to training linked to occupational activity and will not normally extend to studies at university:

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[116] A migrant may continue to be a migrant worker whilst studying, provided that the work constitutes an effective and genuine economic activity and is not marginal or ancillary, see for example Case C-357/89 *Raulin* [1992] ECR I-1027

[117] As a result of the Bologna Process, the Member States have made a commitment to reform their higher education systems in order to create convergence at the European level. The aim of the Process is to establish a European Higher Education Area by 2010 in which academic staff and students could move with ease and have quick fair recognition of their qualifications. See the Bologna Declaration of 19 June 1999

[118] Article 7(3), Regulation 1612/68 [1968] O.J. L257/2. Children of migrant workers have broad rights to education in the host state under Article 12 of this regulation. See Stalford, *Op. Cit.* n.62, 243; Stalford, H., The Developing European Agenda on Children's Rights', (2000) 22 *Journal of Social Welfare and Family Law*, 229; Stalford, H., 'The Citizenship Status of Children in the European Union', (2000) 8(2) *International Journal of Children's Rights*, 101

'It should be noted that in order for an educational institution to be regarded as a vocational school for the purposes of that provision, the fact that some vocational training is provided is not sufficient. The concept of a vocational school is a more limited one and refers exclusively to institutions which provide only instruction either alternating with or closely linked to an occupational activity, particularly during apprenticeship.[119]

This quite limited approach to Article 7(3) has been circumvented by the panacea of Article 7(2) of the same regulation. This may help workers to achieve a level of re-skilling. The Court has held that this provision enables migrant workers to access 'all advantages available to [national] workers for improving their professional qualifications and promoting their social advancement'.[120] In *Matteucci* the Court held that the social advantages provision granted a migrant worker entitlement to a maintenance grant in an institution not falling within the Article 7(3) definition.[121] Van Der Mei argues that:

'It may be assumed that all forms of education not covered by Article 7(3) can be regarded as social advantages in the sense of Article 7(2) of the Regulation'.[122]

Thus a migrant worker still in employment could make use of his or her right to equal treatment as regards social advantages in order to help gain

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[119] Case 39/86 *Lair* [1988] E.C.R. 3161. Note that university study is not excluded from the definition of vocational training *per se* but in order to qualify the course must aim to prepare people for occupation rather than simply improving their general knowledge, see Cases 24/86 *Blaizot* [1988] E.C.R. 379 and 197/86 *Brown* [1988] E.C.R. 3205

[120] Case 39/86 *Lair* [1988] E.C.R. 3161, para. 22

[121] Case 235/87 *Matteucci* [1988] E.C.R. 5589; See also Case C-337/97 *Meeusen* [1999] E.C.R. I-3289

[122] Van Der Mei, A.P., *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits*, (Oxford: Hart, 2003), 349

access to a wider variety of institutions and obtain assistance that would facilitate a degree of re-skilling.[123]

With regard to those EU8 migrants who seek to access educational courses after a relationship of employment has terminated, a distinction must be drawn between those who are voluntarily unemployed and those who are involuntarily out of work. EU8 migrant workers are not entitled to voluntarily leave the employment market in order to access such social advantages that enable take up of an educational course.[124] This is in contrast to the position of EU15 nationals following *Lair*.[125] Here the Court held that voluntarily unemployed people could retain their worker status so long as there was an element of continuity between the previous occupation and the course of study. Conversely, EU8 migrants who become involuntarily unemployed are entitled, under Community law, to rely on the continuing worker-status and make use of the equal treatment provision in Article 7(2) in order to take up studies to help them re-train[126] or, using the terminology of this chapter, re-skill. This does, though, need to be read in the context of the UK national dynamic as the post-accession domestic regulatory regime works to deny EU8 workers this opportunity. As a consequence of the WRS rules, once an EU8 worker is unemployed the residence and non-discrimination rights under national law expire whether the unemployment is voluntary or involuntary.[127]

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[123] The ability to impose transitional restrictions on the movement of EU8 workers only allows derogation from Articles 1-6 of Regulation 1612/68. Once access is granted there can be no derogation from the social rights contained in the remainder of Regulation 1612/68. For details of the transitional restrictions see the annexes referred to in Article 24 of the Act of Accession [2003] O.J. L236/33 (discussed in chapter three)

[124] A provision in the Accession Treaty allows EU15 Member States to withdraw the rights of EU8 nationals who become voluntarily unemployed during the transitional period: para 2, Annexes

[125] Case 39/86 *Lair* [1988] E.C.R. 3161

[126] Case 39/86 *Lair* [1988] ECR 3161. This has been embodied in Article 7(3)(d), Directive 2004/38 [2004] O.J. L158/77

[127] See chapter three, section 3.4 for details on this restriction and chapter six, section 3 for a critique of the UK law's compatibility with Community law. Such a worker could seek to rely on the

4. The gender dimension of de-skilling among EU8 migrants

The decision to explore the gender dimension of de-skilling is justified by the findings of research which suggest that the phenomenon of de-skilling can manifest itself in distinctly gender-specific ways.[128] It has been suggested that there is a greater tendency for female migrants to be de-skilled and this has been exacerbated by the global shift towards a service economy.[129] This in turn has lead to an increased demand for 'female' labour in some of the most precarious sectors of the labour market (such as domestic workers).[130] This demand increases the likelihood of female migrants being de-skilled and hence being subject to poorer conditions of employment. This is despite evidence to suggest that female migrants are now often more highly educated than their male partners.[131] Other researchers have confirmed that de-skilling is not gender-neutral and add that gender stereotyping about 'appropriate' women's work contributes to the occurrence of female migrants' 'brain waste'.[132]

Of particular relevance for the discussion of EU8 migrants in the UK labour market is the assertion that de-skilling can have specific consequences for CEE women migrants.[133] Morokvasic[134] has emphasised

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Community law rights directly (assuming they can access legal advice and have the practical resources to do so)

[128] Kofman *et al*, *Op. Cit.* n.18; Kofman, *Op. Cit.* n.87, 269; Campani, G., 'Labour Markets and Family Networks: Filipino Women in Italy' in Rudolh, H. and Morokvasic, M. (Eds.), *Bridging States and Markets. International Migration in the Early 1990s*, (Berlin: Sigma, 1993), 191; Phizacklea, A., 'In the front line', in Phizacklea, A. (Ed.), *One Way Ticket. Migration and Female Labour*, (London: Routledge, 1983), 95; Raghuram and Kofman, *Op. Cit.* n.23, 95

[129] Campani, *Ibid.*, 192

[130] This is explored further below

[131] Kofman, *Op. Cit.* n.76, 54

[132] Raghuram and Kofman, *Op. Cit.* n.23, 95

[133] Friese, M., 'East European Women as Domestics in Western Europe – New Social Inequality and Division of Labour among Women', (1995) 6 *Journal of Area Studies,* 194

[134] Morokvasic, M., ''Settled in Mobility': Engendering Post-wall Migration in Europe', (2004) 77 *Feminist Review,* 7

the historical context which has increased the tendency of women from the CEE region to migrate westwards and thus also increase their chances of experiencing some degree of de-skilling. Under the socialist regimes paid employment was a norm for women. Thus when the Soviet economic and political system in the CEE region collapsed and unemployment levels rose, women looked elsewhere (often to the then EU12) for work in order that they could continue to fulfil their role as family carers by generating income.[135] This is a trend which has continued. The majority of such women, however, were unable to access regular employment as readily as men in the host societies and instead turned to the informal economy. Such informal 'female' employment includes, *inter alia,* work as domestic helpers, carers or prostitutes, occupations within which women typically experience some form of status demotion.

De-skilling is, of course, not specific to the experiences of *EU8* women. Ackers, in her research on the experiences of EU15 national migrant women within the EU Member States, found that women with established professional careers in the state of origin often suffered a 'significant loss in status'.[136] To be more specific, Ackers draws a distinction between those women whose motivation to migrate was based on their own career and those who migrated for the purpose of their partner's career. Whilst the former group often achieved a degree of career-progression, the latter were more likely to suffer skill devaluation and downward occupational mobility.[137] This distinction between employment experience, based on migration motivation, may well be relevant to migrant women *in general* and, therefore, also hold significance for women from the EU8.

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[135] Indeed in the 1980s, Polish women migrants outnumbered men: Kofman, *Op. Cit.* n.89, p.282

[136] Ackers, *Op. Cit.* n.96, 183

[137] *Ibid.*

Before the discussion moves on it is useful to reflect, briefly, on the decision of the ECJ in *Rinke*.[138] This case is of relevance as it knits together two of the issues that this discussion has set out to explore (i.e. gaining access to a profession and the greater likelihood of women to be de-skilled). Ms Rinke challenged the legality of Community secondary legislation, governing the mutual recognition of training and qualifications relating to the profession of doctor,[139] on the ground that the legislation itself was contrary to the principle of equal treatment on the grounds of sex. The argument centred on the requirement that, in order to be recognised in another Member State, part-time medical training must include a certain number of full-time training periods.[140] The Court accepted that the requirement impacted negatively on a greater number of women than men as men clearly have greater opportunities to undertake such full-time training due to the 'unequal division of domestic tasks' and, hence, the condition could be considered indirectly discriminatory.[141] However, it verified the validity of the legislation on the basis that the full-time training requirement could be objectively justified. Essentially, the Court found that it was reasonable for the legislature to require doctors to have fulfilled the periods of full-time training as a means of demonstrating they had sufficient levels of medical experience.[142] This case demonstrates that migrant women who seek to gain access to the medical profession in another Member State may find it more difficult than men to fall within the application of Community law and, consequently, are more likely to be excluded from accessing the occupation they held in their home state.

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[138] Case C-25/02 *Rinke* [2003] E.C.R. 8349

[139] Directive 86/457 [1986] O.J. L267/26; Directive 93/16 [1993] O.J. L165/1

[140] Article 5, Directive 86/457; Article 34(1), Directive 93/16

[141] *Rinke*, para. 35

[142] *Rinke*, para. 40

The remainder of this section explores the phenomenon of de-skilling further in relation to the experiences of migrant women from the EU8 in the post-accession environment.[143] In particular it seeks to demonstrate that women from the accession countries may still face greater difficulties than men in accessing regular employment and hence are still at greater risk of entering the informal and private economy. This, in turn, can have serious implications for the degree of de-skilling they experience and the conditions of employment they face.

4.1. Employer-organised migration schemes

Chapter three has already pointed out that in the light of EU enlargement and the subsequent decision of the UK government to open up its labour market to EU8 nationals, it has become increasingly popular for employers with significant staff shortages to look towards the CEE accession countries for recruits. This process of internationalisation is becoming a common strategy adopted by employers who experience trouble recruiting at national level.[144] Such schemes involve an employer making contact with a partner of some kind, usually an employment agency, in Poland (or other EU8 Member State) and the subsequent recruitment of a group of migrants.[145] The majority of schemes set up so far appear to be based on male-dominated industries and, as will be demonstrated below, this has consequences for the migration opportunities available to women in the EU8.

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[143] The ratio of male:female migrants who registered on the WRS between May 2004 and June 2006 was 58:42. Thus a sizeable proportion of those EU8 migrants working in the UK are female, *Accession Monitoring Report, Op. Cit.* n.10, 13

[144] Salt, J., 'Migration Processes among the Highly Skilled in Europe', (1992) 26(2) *International Migration Review*, 484, 485

[145] Such schemes were discussed in chapter three in relation to how EU8 nationals access employment

The research included a case study on a transport firm which recruited over 100 Polish drivers although interviews conducted with employment agency representatives in Poland confirms that such schemes have been carried out in a number of sectors. The five agencies involved in the study had helped to arrange such schemes for employers requiring the following: factory workers, doctors, drivers (including bus and delivery), engineers and IT professionals.[146] It is clear that such schemes can be of real benefit to migrants as they can help to overcome some of the hurdles associated with moving to a new country: language and housing in particular.[147] In addition, they often involve no 'occupational skidding'[148] because the migrant is employed in the UK in the same profession they occupied in Poland. It seems, however, that these schemes may be operating in a gender-specific way thus excluding many migrant women from such beneficial assistance.[149] The employment agency representatives interviewed confirmed that the majority of migrants they sent to the UK as part of such employer-organised 'group' schemes were male.[150] This is undoubtedly related to the fact that many of the sectors in need of labour are associated with 'men's work'. Arguably then, these schemes favour

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[146] Based on Interview 401.SO, Interview 402.BEN, Interview 403.ITC, Interview 404.PRO and Interview 405.NEW

[147] This is not to deny that some agencies can be exploitative migration intermediaries, see Currie, *Op. Cit.* n.55. The employment agencies interviewed in Poland were all included on a national register and thus subject to, at least some, regulation. The same obviously would not apply to 'rogue' agencies in Poland and the UK

[148] Morawska and Spohn, *Op. Cit.* n.26, 36

[149] This mirrors the way in which IT shortages in the 1990s favoured male migrants, see Kofman, E., 'Gendered Global Migrations', (2004) 6(4) *International Feminist Journal of Politics*, 643, 654

[150] As part of the empirical work the author visited a bus depot in the UK which had 60 Polish drivers working for them, only one of whom was female. There is insufficient scope here to consider the issue but one may wonder whether the gender-specific employment schemes can be linked to a weak enforcement of the gender equality *acquis* in Poland (or the EU8 in general). On the gender *acquis* see Velluti, S., 'Implementing Gender Equality and Mainstreaming in an Enlarged European Union – Some Thoughts on prospects and Challenges for Central Eastern Europe', (2005) 27(2) *Journal of Social Welfare and Family Law*, 213. See also the Enlargement, Gender and Governance project, based at Queen's University Belfast, which has country reports on the EU8 available to download: < http://www.qub.ac.uk/egg/ > (last accessed 20 November 2006)

male migrants and do not offer women the same opportunity to work in the occupation they already occupy.[151] When confronted with such obstacles women are more likely to turn to casualised work in the informal sector carrying out cleaning and domestic work and, as a result, can experience a greater degree of de-skilling:[152]

'Demand for migrant women seems to concern the lowest levels of the employment hierarchy in sex-segregated labour markets'.[153]

In addition, the lack of regulation by a formal agency or official employer and the absence of any official employment contract can leave migrant women in a particularly vulnerable situation. Women who take up casualised employment find themselves in a more isolated set-up with few formal support networks to turn to should problems arise in the host society.

Particularly precarious employment situated in the informal economy is that which operates largely in the private sphere and is consequently hidden from any rigorous public scrutiny. Such employment includes domestic and sex work, two areas that women, and migrant women in particular, dominate.[154] One of the employment agency representatives remarked that they frequently encouraged women who wished to move to the UK to consider moving as an au pair when they had no other suitable work to offer them.[155]

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[151] Research also confirms that women have less access to training schemes adapted to labour market demand, see Morokvasic, *Op. Cit.* n.134, 13 and also to overseas company transfers, see Kofman, *Op. Cit.* n.76, 50

[152] Morokvasic, *Op. Cit.* n.134, 13

[153] Campani, *Op. Cit.* n.128, 191

[154] Anderson, *Op. Cit.* n.54

[155] Interview 404.PRO

The following subsection specifically examines domestic work and explores its continuing relevance to EU8 migrant women in the UK.[156] Furthermore, it examines how the migration process results in *highly qualified* migrant women being de-skilled to such a degree that they undertake work within the informal sphere.

4.2. Women in the informal sphere: domestic workers

'Domestic' work[157] encompasses a variety of tasks connected to the 'home', including housework and childcare.[158] It is widely documented that a considerable number of these workers face poor living and exploitative working conditions and exist outside of any legal regulation.[159] There has been increased demand for female domestic workers in western industrialised countries, such as the UK, due to various demographic and social changes, the most notable of which are an ageing population and increased levels of female employment:[160]

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[156] Space prohibits a review of the issue of sex trafficking but note that there is evidence that women from the EU8 appear to be victims of such instances, see BBC News Report: '19 women rescued from 'brothel'', 30 September 2005, <http://news.bbc.co.uk/go/pr/fr//1/hi/england/west_midlands/4296412.stm> (last accessed 20 November 2006); see also Kofman, Op. Cit. n.87, 282-283; Morokvasic, Op. Cit. n.134, 18

[157] For the purposes of this discussion the label of 'domestic work' is used in a broad sense to refer to both 'domestic workers' and 'au pairs' as categories of migrant who primarily exist within the informal sphere and in private homes. This is not to deny that significant distinctions exist between the two categories. In addition it should be noted that in the UK a very limited definition is given to the term 'domestic worker' as it applies only to those workers given permission to enter the territory with their employer. The term is used in a wider sense here. On the experience of au pairs see, Williams, A.M. and Baláž, V., 'From private to public sphere, the commodification of the au pair experience? Returned migrants from Slovakia to the UK', (2004) 36 *Environment and Planning,* 1813

[158] Anderson, *Op. Cit.* n.54, 15

[159] See for example, Schwenken, H., *"Domestic Slavery" versus "Workers Rights": Political Mobilizations of Migrant Domestic Workers in the European Union*, Centre for Comparative Immigration Studies, University of California, Working Paper 116, 2005

[160] Friese, *Op. Cit.* n.133

'The demand of 'unprotected' female workers for employment in private households grows in the same measure as the trend of western middle-class women towards employment continues with increasing levels of education'.[161]

The sample of migrants who took part in the study includes two female domestic workers employed by private households (one lived-in) and one female employed as a cleaner in a private household. In addition, three other women had previously worked as live-in domestic workers.[162] None of this work, located in the domestic sphere, had been registered under the WRS.[163] This appears to confirm Schwenken's argument that even when methods of regularisation are open to domestic workers, the majority hold an irregular status and are thus located firmly in the informal sphere with an absence of any tax or social security contributions.[164] As a result of the hidden nature of this work it is difficult to estimate accurately the number of EU8 national women engaged in such employment. The WRS statistics tell us that 20,430 EU8 nationals registered under the occupation category of 'cleaner/domestic staff in the first two years.[165] Furthermore, it was estimated that there were 14,300 foreign (including third-country national) domestic workers in the UK in 2000.[166] This, coupled with the view that the number of domestic workers registered is probably an under-

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[161] *Ibid.*

[162] Each subsequently took up the posts of nursery assistant, administrative assistant and waitress respectively

[163] The women technically held an illegal status

[164] Schwenken, *Op. Cit.* n.159, 2

[165] *Accession Monitoring Report,* op cit n.10, 16. There is no gender or occupation breakdown given of this figure

[166] Crawley, H., *Refugees and Gender, Law and Process,* (London: Jordans and Refugee Women's Legal Group, 2001)

representation of the true figure,[167] suggests that the number is likely to be sizeable. It may also be correct to say that there is an element of cultural heritage at work here. For example, statistics on the au pair scheme in the UK[168] show that 3,490 of the 15,300 au pairs in the UK in 2003 were from Poland.[169] Given that a further 4,560 were from the Czech Republic and 2,690 were Slovakian it would appear that the trend for EU8 women to work in a domestic capacity has continued post-accession and, additionally, this cultural heritage of domestic work may have shaped the expectations of what constitute 'appropriate' jobs for EU8 women.

Due to the informal nature of this type of work it would seem that the WRS plays a less valuable role here with regard to the monitoring of EU8 migrants. More importantly, from the perspective of the (predominantly female) migrants who undertake such work, they are excluded from the *benefits* associated with registering in the UK. Once registered, EU8 workers are entitled to equality of treatment as regards access to certain social welfare entitlement under UK law.[170]

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[167] It is generally accepted that this is a sector where the estimates are likely to be inaccurate, see Kofman, E., Raghuram, P. and Merefield, M., *Gendered Migrations: Towards gender sensitive policies in the UK*, Institute for Public Policy Research, Asylum and Migration Working Paper 6, 2005

[168] The UK scheme, established by the Immigration Rules made under section 3(2) of the Immigration Act 1971, C.77 enables single people between 17-27, with no dependents, come to the UK 'to study English' for up to two years while living with a family. The au pairs can help in the home for up to five hours per day and, although they do not receive a salary, they should be given an 'allowance' (£55 per week is recommended). They must not require any assistance from public funds and must not stay in the UK when the au pair period comes to an end. The EU8 countries were covered by the scheme prior to 2004 and, even though the scheme no longer formally apples to them, EU8 nationals can still enter the UK as au pairs (as can all EU nationals). For information on the working of the scheme see <www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/schemes_and_programmes/au_pairs.html>

[169] Home Office, *Control of Immigration: Statistics United Kingdom 2003*, (London: Home Office, 2003), 30

[170] The Social Security (Habitual Residence) Amendment Regulations SI 2004/1232. For discussion of the UK law's compatibility with Community law see chapter six

Domestic work is a sphere in which a significant degree of de-skilling occurs. Certainly the six respondents mentioned above who had experienced this type of work were all Polish graduates. Studies confirm that the women carrying out domestic work are often just as highly educated, if not more so, than the women they relieve from domestic tasks so that they can gain better access to the labour market.[171] It would appear that 'whilst domestic labour is classified as unskilled, many of those who do it are not.'[172] In private households with a domestic worker the housework and childcare, or 'reproductive labour',[173] remain 'women's work' but it is transferred to a female migrant worker.[174]

Anderson's research on domestic workers has identified certain 'routes' into domestic work which are usually relied upon if avenues into more regular employment are closed off.[175] This would seem to apply to the case of EU8 migrant women who have more restricted access to organised schemes, such as those mentioned above. Indeed when we consider the male-focussed migration schemes alongside the obstacles discussed earlier (such as qualification recognition) in relation to de-skilling generally, it is not difficult to see that currently taking up a form of domestic labour may appear to be the only available option. Despite the degree of de-skilling it may represent 'getting a foot in the door' to the UK labour market.[176] The routes into domestic work open to EU8 women include placing (or

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[171] Sassen, S., 'Women's Burden: Counter-Geographies of Globalization and the Feminization of Survival', (2000) 53(2) *Journal of International Affairs,* 503, 510

[172] Kofman, op cit n.76, 55

[173] Newcombe, E., *Temporary Migration to the UK as an 'Au Pair': Cultural Exchange or Reproductive Labour?*, Sussex Migration Working Paper no. 2, Sussex Centre for Migration Research, 2004

[174] See Ehrenreich, B. and Hochschild, A.R. (Eds.), *Global Woman: Nannies, Maids and Sex Workers in the New Economy,* (New York: Granta Books, 2003)

[175] Anderson, *Op. Cit.* n.54, 28-39

[176] Anderson, *Ibid.*, 28

reading) a personal advertisement in a newspaper in the host country, accessing informal networks (such as friends working as domestics whose employer has contact with people requiring a worker), or relying on an agency that places workers in private households. The migrant women involved with the study had found domestic employment via all of these methods.[177]

This is an area of employment where the consequences of de-skilling can be particularly negative, exploitative or even dangerous, precisely because the migrant worker is situated in the informal sphere. Of the six respondent domestic workers who took part in the study one had found it to be a wholly negative experience. The following woman worked as a domestic worker for one year in London and had since returned to Poland to work as a librarian. She describes the manner in which the close proximity with her employer, which goes hand in hand with 'living in', led to her working excessive hours and essentially never being able to 'escape':

'They wanted someone to be a housekeeper and to take care of an old woman who was ill. She was from Poland and so that's why they wanted a Polish worker. She couldn't speak very well so it was very hard work... maybe not physical hard work but mental hard work. This woman had MS and she was also very depressed. I had only one free day, Sunday, and even then I was asked to do things for them. I had no time to myself' (Interview 316.M).

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[177] One had found her job by reading the advertisements posted on the so-called 'wailing wall' in Hammersmith, London (a window situated by the Polish Social and Cultural Association). This has become a popular place for Polish migrants to exchange information about employment. Another two women had accessed their employment in the private sphere through an informal friendship network and three had made use of London-based employment agencies

The remaining domestic workers in the sample spoke in a more positive way about their time living in private households. Three expressed their relationship in the terms of being 'part of the family' although the literature suggests that this common perception may work against domestic workers.[178] For example, Hess and Puckhaber have demonstrated that the more integrated a worker is into the family, the more difficult it becomes for them to take issue with poor working conditions. Furthermore:

> *'As 'one of the family,' employers could ask the au pairs to work more than the hours agreed upon, their argument being, 'we are one family, you cannot leave us alone with the childcare'. In so doing, they disguised the working relationship by using the discourse of the moral economy emphasising cooperation and mutual responsibility'.*[179]

There is plenty of scope for exploitation, whether intentional or inadvertent, when the private household becomes a place of work. Kofman *et al* cite a particular example of how domestic workers' dependency on their employers can result in hidden mistreatment.[180] In the 1980s the UK government enabled migrating foreign employers and repatriated British professionals to bring their domestic workers with them to the UK. However, these workers had no independent legal status in their own right and thus, in what was effectively a form of modern slavery, they were completely tied to their employers. The authors point out:

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[178] Hess, S. and Puckhaber, A., ''Big sisters' are Better Domestic Servants? Comments on the Booming Au Pair Business', (2004) 77 *Feminist Review*, 65

[179] *Ibid.*, 73

[180] Kofman *et al*, *Op. Cit.* n.18, 123

'The system was widely abused with one agency alone handling over 4000 reported cases of imprisonment, physical and sexual abuse, as well as widespread under and non-payment of workers by their employers'.[181]

This example, in some respects, is specific to the scheme operating at the time but it does provide an illustration of the vulnerable and potentially dangerous situation some domestic workers find themselves in as a result of the domestic sphere's isolation from the mainstream. Employers are largely able to determine the worker's rights on their own terms and hence the workers are dependent on the good nature of their employers.

4.3 Domestic workers as Community 'workers'

One final issue should briefly be considered before the discussion moves away from the notion of informal labour market activity. It is not entirely clear whether or not EU8 women occupying domestic positions would be entitled to access certain rights in the UK, perhaps as a means of alleviating hardship caused as a result of their de-skilled status, by means of reliance upon the provisions of Community law applicable to workers. The definition of worker under Community law is now well established, the Court has defined features of an employment relationship as follows:

'The essential feature of an employment relationship... is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'.[182]

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[181] *Ibid.*

[182] Case 66/85 *Lawrie Blum* [1986] E.C.R. 2121, para. 17

The Court has also stressed the importance of activities being 'effective and genuine' rather than 'on such a small scale as to be regarded as marginal and ancillary'.[183]

The problem with domestic work is that it is commonly considered to fall outside the scope of so-called 'real work'. If one considers the position of au pairs in the UK, for example, the immigration rules stress that they are not to receive a salary. Rather, they are to be granted a 'reasonable allowance' of around £55 per week.[184] If such work did fall outside the definition of migrant worker established by the Court of Justice then, consequently, migrants undertaking such work would not be able to access the equal treatment principle enshrined in Article 39 EC (and Article 12 EC) and would be prevented from claiming the panoply of social rights accorded to those migrants who qualify as workers.[185] Perhaps even more significantly, domestic workers face the possibility of falling outside the scope of protection offered by employment equality legislation.[186] For example, they may be denied access to work-related rights, such as parental leave and pension rights, or work in conditions that do not meet adequate health and safety standards. Importantly for the particular situation of EU8 migrants, if an EU8 migrant does not qualify as a 'worker' under Community law, those working in the informal, domestic sphere may be denied the opportunity to rely on Community law to rebut

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[183] Case C-357/89 *Raulin* [1992] E.C.R. I-1027

[184] See <www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/schemes_and_programmes/au_pairs.html> (last accessed 20 November 2006)

[185] Pursuant to Article 7(2), Regulation 1612/68 which entitles migrant workers to the same 'social and tax advantages' as national workers (now supplemented by Article 24(1), Directive 2004/38). Article 7(2) has been interpreted broadly, see Case 207/78 *Even* [1979] E.C.R. 2019; Case 32/75 *Fiorini v SNCF* [1975] E.C.R. 1085; Case 65/81 *Reina* [1982] E.C.R. I-33; Case 59/85 *Netherlands v Reed* [1986] E.C.R. 1283

[186] Extended to those qualifying as EU migrant workers on the basis of Article 7(1), Regulation 1612/68 which provides that the principle of non-discrimination covers conditions of employment

the UK's attempt to deny them rights of residence and social entitlement should they find themselves involuntarily unemployed.[187]

EU8 migrants denied access to the security of the worker status, however, would have the opportunity to enforce rights of residence and equal treatment in the UK, despite the UK's transitional restrictions, by virtue of their status as Union citizens under Articles 18 and 12 EC.[188] Although very valuable, citizens' rights in a host Member State are not as secure as workers' rights. In particular, the right of residence is subject to the requirements of possessing sufficient resources and medical insurance and, in turn, the right to equal treatment is contingent upon such lawful residence.[189] Domestic workers could benefit from the worker classification as it applies in a very absolute fashion without any scope for the Member State to rescind the right to reside if they consider the migrant has become an 'unreasonable burden' on the public purse. The important point here is that, given that the majority of domestic workers are women and that EU8 men have had greater opportunities to migrate under schemes connected to their area of employment, those affected mostly by this (possible) exclusion from EU worker status would be women.

Although it is important to recognise this potential scope for denying migrants in the domestic sphere the rights granted to workers, or perhaps more correctly, the potential for the UK authorities to argue that such migrants are not workers, it is also vital to stress that the Court has been

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[187] Discussed in chapters three (section 3.4) and six (section 3)

[188] See for example, Case C-85/96 *Maria Martinez Sala* [1998] E.C.R. I-2691; Case 274/96 *Bickel and Franz* [1998] E.C.R. I-7637; C-184/99 *Grzelczyk* [2001] E.C.R. I-6193; Dougan M, and Spaventa E, 'Educating Rudy and the (non-)English Patient: A Double Bill on Residency Rights Under Article 18 EC', (2003) 28 *European Law Review*, 699; White, R.C.A., 'Free Movement, Equal Treatment, and Citizenship of the Union', (2005) 54 *International and Comparative Law Quarterly*, 885. Citizenship is discussed in more detail in chapter six

[189] Previously Directive 90/364 O.J. [1990] L180/26, see now Directive 2004/38 O.J. [2004] L158/77

keen to apply the definition broadly.[190] One case of particular relevance is *Steymann.*[191] Here, a German national in the Netherlands was contributing to the life of a religious community by carrying out general housework and plumbing. Although Steymann did not receive a salary he did receive an element of 'pocket money' from the community which also provided for his keep. It was held by the Court that his activities could be considered as economic in nature by virtue of the of the value the community gained from them. Furthermore, and potentially of particular relevance to au pairs in the UK, a wide reading of the 'remuneration' concept was adopted:

'...the services which the [community] *provides to its members may be regarded as being an indirect quid pro quo for their work'.*[192]

This suggests that being paid 'in kind', something those in the domestic sphere often experience,[193] may not prevent a migrant from falling within that all-important worker definition. Ackers has acknowledged the potential importance of *Steymann* for those workers, mostly women, engaged in more marginal forms of employment.[194] However, she also makes the point that it is not clear how significant the fact that Steymann carried out plumbing work was in the Court's eyes:

'The significance of the plumbing work is unclear, and the extent to which it may be interpreted as distinctively different to other forms of domestic or

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[190] Holding that part-time work, work falling below the host state's minimum subsistence level, and work carried out in conjunction with benefit claiming can still constitute 'work' under Article 39 EC. See Case 53/81 *Levin* [1982] E.C.R. 1035; Case 139/85 *Kempf* [1986] E.C.R. 1741; Case C-357/89 *Raulin* [1992] E.C.R. I-1027

[191] Case 196/87 *Steymann* [1988] E.C.R. 6159

[192] *Steymann*, para 12

[193] Hess and Puckhaber, *Op. Cit.* n.178, 65

[194] Ackers, *Op. Cit.* n.96, 115

caring work may simply reflect yet another example of the ways in which women's unpaid work is accorded low status'.[195]

Thus, it is possible that domestic, 'female' tasks would be considered less like 'real work' and be more likely to fail the 'effective and genuine' test than would 'male' activities such as plumbing.

5. De-skilling: a permanent feature of EU8 migrants' labour market experience?

Clearly, it is important to consider whether de-skilling of highly qualified migrants is a permanent feature or whether migrants, once established in the labour market, are able to re-skill and subsequently obtain employment commensurate with their education. There are obvious drawbacks of using the data collected for the purposes of this study to consider this issue as the data was collected around the time of enlargement (2004/5). Thus, there is no longitudinal analysis of consequent occupational mobility. Many of the respondents who did not plan to return to Poland in the short-term did express a desire to reach a higher level of employment in the UK. Often they stressed the temporary nature of their current work and, in particular, emphasised that they anticipated progressing once their grasp of written and spoken English had improved. So that the issue of re-skilling may be addressed speculatively, the first part of this section examines the evidence (limited though it currently is) relating to the potential for migrants to re-skill in the UK. The second part of the section then analyses the labour market position of return migrants in Poland in an effort to consider whether the de-skilled status in the UK had any implications once the migration experience had ended.

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[195] *Ibid.*

5.1 Upward occupational mobility in the UK

There were a small number of instances of occupational mobility *within* a sector. For example, one female respondent who had been a chambermaid was working in a restaurant at the time of interview and, in addition to earning a higher wage, felt her social status had improved.[196] Similarly, the following male respondent had experienced internal occupational mobility, albeit to a modest extent:

"For three months I was a kitchen porter and then I became a waiter in the same hotel, it was kind of a promotion!" (Interview 307.P).

This mirrors Düvell's findings of Polish migrants' occupational mobility in the 1990s. He points out that (limited) upward mobility was a common feature of migrants' experiences and that they could increase their earnings by being promoted or changing jobs.[197] He gives the following examples:

'A woman who started on £1.50 an hour in a fish factory in 1994 was by 1998 earning £3.50 an hour working for a fish wholesaler. A man who started sewing in a factory for £2.50 an hour was earning £6 an hour in another factory less than two years later'.[198]

The key point here is that the internal occupational mobility witnessed in the above author's research did not result in a full re-skilling which led to an occupational position that corresponded to their highly qualified status. The migrants' experiences described by Düvell to illustrate the supposed

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[196] Interview 012.GP

[197] Düvell, *Op. Cit.* n.53, 10. Of course, Düvell's research was conducted within a different context because the Polish migrants he studied were irregular and it is not clear how EU enlargement and the regularisation of migration from the EU8 has impacted on the dynamics of occupational mobility. However, given that this discussion has suggested that the current trend is for pre-accession conditions to prevail for Polish migrants in the UK, the comparison is still valuable

[198] Düvell, *Ibid.*, 11

phenomenon of upward mobility do not display any significant degree of re-skilling. The conditions of employment, although an improvement on the original position, continue to be poor.

There were three instances of upward professional mobility within the sample that did represent a more genuine form of re-skilling Interestingly, the circumstances of all three such respondents share a common characteristic in that their 're-skilled' work was connected in some way to the Polish migrant community.[199] First, one female respondent had begun work in the UK as a chambermaid and was paid below the national minimum wage and subject to longer hours. She later found employment as a Human Resources manager for a company which operated an organised scheme to recruit a large number of Polish drivers and her role predominantly centred around these drivers.[200] Secondly, a woman who had started working as an administrative assistant later found work as the manager of an office, set up by the Polish Social and Cultural Association in London, to advise Polish migrants about their rights in the UK and to give information about the WRS.[201] Finally, a man who had worked as a labourer on a construction site was able to find work as the manager of a bar in a Polish social club in Scotland. Thus the migrant community provided an opportunity for some skilled, bi-lingual migrants to provide services and fulfil an occupational role more commensurate with their qualifications. This phenomenon has been acknowledged by Kofman, who also suggests that this avenue to re-skilling may be particularly accessible to women due to the perception of them having better inter-personal, social and caring skills.[202] Despite the positive impact that the Polish community

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[199] They were also all Polish graduates

[200] Interview 013.EM

[201] Interview 014.KW

[202] Kofman, *Op. Cit.* n.149, 652

had on the migrants' ability to re-skill the fact that the upward occupational mobility only occurred at the instigation of other migrants illustrates the quite limited nature of these examples. They are clearly very isolated cases and such opportunities will not be extended to the vast majority of migrants working below their level of educational attainment.

5.2 Re-skilling upon return to Poland

One of the predominant trends in migration from the CEE region is temporary migration patterns as opposed to long-term or permanent movement.[203] The sixteen return migrants interviewed as part of the study all corroborate this viewpoint as all had returned to Poland after spending between six months to two years in the UK. All of the return migrants were graduates; in the UK eleven had been employed in various occupations within the hospitality and catering industry (hotels and restaurants), three had been employed privately by households as either a cleaner or domestic worker, and one worked as a shop assistant. Upon return to Poland,[204] two of the migrants were unemployed, although the vast majority (11) were in employment commensurate with their level of education and,[205] on the whole, were satisfied with their work. To provide two examples: a man who had worked as a kitchen porter was working for an advertising agency;[206] and a woman who had worked as a domestic worker was a teacher of English.[207]

Migrants' decision to return to Poland was often a frustrated response to their lack of labour market progress in the UK, for example:

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[203] Okólski, M., 'Recent trends and major issues in international migration: Central and East European perspectives', (2000) 52 *International Social Science Journal*, 329

[204] At the date of interview (July/August 2005)

[205] Note that two of the return migrants had taken up further study in Poland

[206] Interview 302.P

[207] Interview 313.K

"I decided I didn't want to be a waiter for ten or more years because I have more ambition than that. I have studied here in Poland and I don't want to abandon that. I wanted to do something more interesting, more creative than be a waiter" (Interview 307.P).

It would seem that the de-skilled status held in the UK did not impact negatively on the subsequent employment upon return to Poland. A link can be drawn with the work of Williams and Baláž who researched the experiences of return migrants from Slovakia who had worked as au pairs in the UK.[208] This research found that during their time as au pairs, an occupation that may be considered unskilled within the context of this chapter, the migrants gained a variety of skills which could be utilised to later increase their occupational standing in the state of origin:

'Migrant workers acquire financial capital, human capital, social capital, and cultural capital from working abroad, but these have different values in the spaces of destination and origin'.[209]

Such skills, which have a higher degree of marketability in the home state,[210] include English language skills, interpersonal skills and a greater degree of self confidence.[211] The experiences of return migrants in the author's study corroborate these findings. For example, one woman who had worked as a kitchen assistant in the UK had been able to secure employment within the marketing department of an international company in Warsaw, precisely because of her strong grasp of English. Thus she was

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[208] Williams and Baláž, *Op. Cit.* n.157, 1813

[209] Williams and Baláž, *Ibid.*, 1814

[210] In the home state the migrant does not face the mechanisms of de-skilling described above which work in the host state to devalue their qualifications

[211] Williams and Baláž, *Op. Cit.* n.157, 1823-1824

able to secure employment in the field in which she had graduated from university:

"The reason they took me was because I speak English so well... so my plan worked! I actually applied for a job on the reception desk but they said "your qualifications are better than you think" so it worked out well for me" (Interview 309.I)

This illustrates the potential value of international experience, regardless of what that actually entails. Furthermore, many of the return migrants framed the general benefits of the migration experience as being good 'life experience'. This would seem to confirm the argument that the migration experience can provide an opportunity to gain a greater degree of self confidence and enhance interpersonal skills. The following extracts are representative of the majority's view:

"I think moving for a while is good for everyone because it's very important to get good experience. It will stay with you forever. I think everybody should do it!" (Interview 302.P).

"When I was there [in London] I needed to survive somehow but I think that getting a job and all of the things you have to do to find a job is a good experience to go through" (Interview 313.K).

Therefore, the de-skilled position occupied in the host society may actually itself constitute a form of re-skilling, which builds upon the qualifications they already have, and helps to increase the opportunities available upon return to the home state.[212] It seems that migrants are able to make the trade off between professional investment and economic gain (mentioned

[212] Raghuram and Kofman, *Op. Cit.* n.23, 97

earlier) without harming their labour market status at home. In fact, despite the skill-degradation they experience in the host state, their labour market potential in the home state may be enhanced after the migration experience, it appears that the migration experience provides the return migrants with an advantage over those who have not exercised mobility rights. When this international experience is included on a return migrant's CV it is likely to hold particular weight in countries such as Poland with a high unemployment rate and greater competition for jobs.[213]

6. Conclusion

By exploring the status and experiences of Polish migrants working in the UK this chapter has attempted to demonstrate how the documented brain drain from the EU8 countries is effectively becoming de-skilled labour in the UK.[214] The legal regime adopted by the UK is facilitating this brain waste, as is the ineffective enforcement of mutual recognition of qualifications at Community level. In addition to these legal obstacles there are also certain ideological barriers which prevent migrants from the EU8 realising their occupational potential. These obstacles flow from a tendency by employers to continue to categorise EU8 migration in a similar way to third-country national migration. This inclination is, arguably, influenced by the current imposition of transitional movement restrictions by a majority of the EU15 Member States. This EU-level legal restriction appears to have reinforced the hierarchy between different groups of migrants by espousing the notion that EU8 nationals are not (yet) 'full' citizens of the EU. Therefore, EU8 nationals are not accorded an equal status with EU15 nationals. This 'second class' status has

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[213] Keune, M., *Youth Unemployment in Hungary and Poland: Action Programme on Youth Unemployment*, International Labour Organisation, Employment and Training Paper 20, Switzerland, 1998. In 2003 the unemployment rate amongst under 24s in Poland was 34%, see Vaughan-Whitehead, D.C., *EU Enlargement versus Social Europe? The Uncertain Future of the European Social Model* (Cheltenham: Edward Elgar, 2003), 31

[214] Man, Op. Cit. n.59, 145

implications even in the UK, a Member state which did open up its labour market. The differential treatment of migrants by the law clearly has implications for the labour market status they are accorded.[215] However, even formal equality of legal status would only go so far in remedying the disadvantaged labour market position of EU8 migrants; in order to remedy the deeply embedded discrimination against foreign labour it would be necessary also to pursue a long-term strategy of cultural reconditioning to complement legal rights to equal treatment. Currently, for example, the discretion granted to employers in the area of mutual recognition of qualifications masques the propensity to discriminate on the basis of nationality.

Furthermore, the de-skilling of EU8 migrants does not appear to be a gender-neutral phenomenon. Shortages in specific employment sectors and the subsequent propensity of employers to arrange migration schemes seem to offer more favourable migration conditions to men than to women. With less opportunity to access these formal schemes it appears that women from the EU8 may be drawn to domestic work in the UK and, hence, often experience a significant degree of de-skilling in the private sphere. Despite the quite negative emphasis on de-skilling, however, there is also evidence to suggest that migrants can benefit from their (short-term) experiences in the lower echelons of the employment market, on return to Poland. One question that remains is whether, given time, EU8 migrants currently in low-skilled work will be able to re-skill and access work commensurate with their skills and qualifications *in the UK*. Not only does this have implications for the UK, but it is also of importance for the wider European Union because it has ramifications for the issue of whether the inferior status granted to EU8 migrant workers (and by extension future

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[215] The extent of the differential treatment, or downgraded citizenship status, promulgated by the formal provisions (the transitional arrangements) is discussed in chapter six

accession-national migrants) is a temporary or more permanent feature within the Member states.

Finally, the discussion has raised the issue of whether the EU is concerned about the type of mobility it wishes to encourage in the light of Lisbon agenda and the development of the European Research Area. The 'brain waste' from the EU8 region, and the acceptance of this phenomenon on the part of the Commission, contrasts markedly with recent initiatives to increase intra-Community 'brain circulation' by promoting highly-skilled mobility.

Chapter five

FACILITATING FAMILY LIFE IN THE AFTERMATH OF POST-ACCESSION MIGRATION TO THE UK

1. Introduction

The emphasis of the discussion in this chapter moves away from the employment experiences of EU8 migrant workers to look at how moving to the UK for the purposes of work impacts upon the migrants' experiences of family life. The very reason people often make the decision to migrate as workers is to try and enhance the living standards and life chances available to themselves and their family members alike by earning higher salaries. Thus, migration may be a household/family strategy for increasing the available income.[1] The aim here is to explore the implications of such migration decisions on the family units and family life of EU8 migrant workers.[2] Particular attention will be drawn to the implications of cross-national mobility for relationships between family members and the provision of care within families and, importantly, to methods of sustaining families following migration.

First, the discussion details the entitlement of EU8 migrant workers' family members to join the worker in the UK. The EU free movement provisions are the primary point of reference but, in the case of EU8 migrants, this formal entitlement will be juxtaposed with certain aspects of the transitional restrictions on the free movement of persons. Furthermore, despite the existence of formal family reunification rights, the empirical

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[1] Boyd, M., 'Family and Personal Networks in International Migration: Recent Developments and New Agendas', (1989) 23(3) *International Migration Review*, 638, 645

[2] Like elsewhere in the thesis the experiences of Polish migrant workers provide a case study of the broader 'EU8' group

reality suggests that to date EU8 migrants in the UK have not relied to a great extent on such privileges. Secondly, the wider social entitlement of the family unit is considered as the ability to access certain welfare benefits and services in the host state may be important for sustaining the family. The engagement of EU8 workers and their families with such benefits, however, must be placed within the specific legal and social domestic context of the UK. The discussion, therefore, examines some constraints on the exercise of family reunification (and related) rights by EU8 workers that flow from the UK's post-enlargement regulatory regime.

The final part of the chapter then proceeds to explore the applicability of the notion of the transnational family, evident in the research literature on transnational kinship, to post-accession EU8 migrant workers in the UK. Despite the apparent culture of family separation it appears that Polish migrants who have adopted such a strategy maintain active cross-border links with family and kin. It seems that the transnational family model better fits with the patterns of migration from the CEE region, where the predominant image is that of single workers spending temporary periods of time abroad,[3] to a greater extent than the family-reunification model promoted by the EU free movement provisions which largely works on the basis of family unity.

2. The relevance of family reunification rights to EU8 migrant workers

In this section the concern is to examine the experience of those EU8 migrant workers in the UK who have family members living with them. This may occur as a result of entire family migration,[4] where the family and worker migrate as a unit, or alternatively it may be that the worker has

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[3] Kofman, E., 'Family-Related Migration: A Critical Review of European Studies', (2004) 30(2) *Journal of Ethnic and Migration Studies*, 243, 250

[4] *Ibid.*

migrated initially and the family members have subsequently joined them in the host society. Attention first turns to the legal provisions that establish the parameters of EU8 migrants' rights to family reunification and, secondly, the rights of those who do qualify as family members to work in the host Member State are considered. Thirdly, evidence relating to the extent to which such family reunification entitlement is being utilised is examined.

2.1. The right to reunification: which family members are covered?

Given that the transitional arrangements on the free movement of persons relate only to the ability of EU8 nationals to access work in the EU15 territory it follows that EU8 migrants are entitled to exercise the same right of family reunification that applies to EU15 migrants.[5] The starting point when discussing the right of family members to install themselves with the migrant worker is now Directive 2004/38, the recently-adopted Directive on the free movement rights of citizens and their family members, which came into force on 30 April 2006.[6] Prior to this, the position of family members was primarily governed by Articles 10-12 of Regulation 1612/68.[7] Under the new regime the following family members (regardless of nationality) are entitled to reside with the migrant citizen, or for the purposes of the discussion in this chapter, the migrant worker in the host state: the spouse; the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the

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[5] Although, as will be mentioned below, the transitional arrangements do allow for restrictions to be placed on family members' access to the labour market

[6] [2004] O.J. L158/77

[7] [1968] O.J. L257/2. Note that the ECJ's interpretation of the free movement provisions has also been beneficial for family members, see for example Case 59/85 *Netherlands v Reed* [1987] 2 C.M.L.R. 448 were the ECJ interpreted Article 7(2), Regulation 1612/68 to extend a right of residence to the unmarried partner of a migrant worker

conditions laid down in the relevant legislation of the host Member State; children of the worker who are under the age of twenty one or dependant and those of the spouse or partner (with whom a registered partnership has been conducted); and dependant parents of the worker and those of the spouse or partner (with whom a registered partnership has been conducted).[8]

The definition of family under Directive 2004/38 is wider than that of the previous Article 10 of Regulation 1612/68. First, it applies to children of either the worker or the spouse/partner whereas the previous definition referred to only the children of the worker and the spouse. Secondly, the new definition extends to partners with whom the worker has conducted a registered partnership (provided such partnerships are legally recognised by the host state) where previously only those married to the worker could make use of the family reunification provisions. The previous definition of the family had been subject to much criticism on the basis that its insistence on heterosexual marriage and biological children or, otherwise, relationships of (economic) dependency on the (assumed) breadwinning migrant worker was simply outdated and out of touch with modern society.[9] The more recent definition has attempted to address these concerns.

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[8] Article 2(2), Directive 2004/38

[9] Case 316/85 *Lebon* [1987] E.C.R. 2811, here the Court asserted that dependency was a matter of fact evident when a worker supported a family member. Economic dependency is discussed in section 3.1. in relation to family members' social entitlement. For criticism of the EU's conceptualisation of 'family' see Stalford, H., 'Concepts of Family Under EU Law – Lessons from the ECHR', (2002) 16 *International Journal of Law, Policy and the Family*, 410; Stalford, H., 'The Citizenship Status of Children in the European Union', (2000) 8 *International Journal of Children's Rights*, 101; Ackers, L. and Stalford, H., *A Community for Children? Children, Citizenship and Internal Migration in the EU*, (Aldershot: Ashgate, 2004), 69-75; Woods, L., 'Family Rights in the EU – Disadvantaging the Disadvantaged', (1999) 11(1) *Child and Family Law Quarterly*, 17; McGlynn, C., 'The Europeanisation of Family Law', (2001) 35(1) *Child and Family Law Quarterly*, 35

In addition to the definition in Article 2(2), Article 3(2) of the Directive provides that Member States, in accordance with their own national legislation, shall facilitate the entry and residence of any other family members who are dependants or members of the worker's household, or where serious health grounds strictly require the personal care of the family member. This implies a wider conceptualisation of dependency that stretches further than the previous economic construction. Article 3(2) then goes on to stress that Member States shall also facilitate the entry and residence of the partner with whom the worker has a 'durable relationship'. Interestingly, the Member State is able to undertake an extensive examination of the worker's personal circumstances when assessing the durability of the relationship and must justify any denial of entry or residence. Article 3(2) does not grant an automatic right of residence to these groups of family member. It merely encourages the Member States to examine the position of such people on the basis of their own national legislation. The status of the rights granted by this provision is, as Chalmers *et al* acknowledge, nebulous.[10] Furthermore:

'The provision anticipates that there are circumstances where dependants and long-term partners may be refused permission to reside in another Member State with the EU citizen. This seems extremely draconian'.[11]

Similarly, the inclusion in Article 2(2) of those who have a registered partnership as one of the categories of family member entitled to automatic residence is not unproblematic for those wishing to rely on it. The application of this provision is contingent upon the national law in the host state treating such partnerships as equivalent to marriage. This is

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[10] Chalmers, D., Hadjiemmanul, C., Monti, G. and Tomkins, A., *European Union Law Text and Materials*, (Cambridge: Cambridge University Press, 2006), 592

[11] *Ibid.*

essentially an application of the non-discrimination on grounds of nationality principle,[12] one of the key features of free movement law and a general principle of Community law. The origins of this approach can undoubtedly be seen in the reasoning adopted by the Court if Justice in the case of *Reed.*[13] Here, although refusing to interpret the term 'spouse' in the legislation to include partnerships, the Court was able to extend a right of residence to the unmarried partner of a migrant worker in the Netherlands on the basis of the equal treatment principle as regards social advantages under Article 7(2), Regulation 1612/68. The ECJ was able to hold that, as Dutch law treated those in a stable relationship with a working Dutch national as a spouse, this was a social advantage which could also be enjoyed by EU migrant workers as it would facilitate the worker's integration into the host society.

The Directive, therefore, does not place unmarried partners on an equal footing with spouses and is still open to criticism on this point.[14] Marriage provides for an automatic and absolute[15] right of entry across the EU. In contrast, the capacity of unmarried partners to qualify as a family member under the free movement provisions depends, for those without a registered partnership, on the discretion of the Member State which is entitled to 'extensively' examine the relationship. For those with a registered partnership, the right of reunification is dependant on the policy of the individual Member State and will, therefore, differ across the Member States.[16] The UK's Civil Partnership Act 2004[17] allows only same-sex

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[12] Article 12 EC

[13] Case 59/85 *Netherlands v Reed* [1987] 2 C.M.L.R. 448

[14] Note that partners of EU nationality are in a privileged position as they can qualify as free movers in their own right by taking up work or simply by virtue of their Union citizenship status. The position of third-country national spouses is more precarious

[15] Case 267/83 *Diatta v Land Berlin* [1985] E.C.R. 567

[16] Ackers and Stalford, *Op. Cit.* n.9, 89

[17] C.33

couples to register their partnerships. It would seem, then, that a migrant worker in the UK is automatically entitled to be joined by a same-sex partner with whom a registered partnership has been conducted. The status of a heterosexual couple in the same situation, however, is not as straightforward as national law does not allow for the possibility of registration of opposite-sex partnerships. Arguably the couple would have to rely on the 'nebulous' Article 3 to enforce a right of reunification.

None of the nine unmarried respondent migrant workers interviewed for this research who had partners also in the UK had directly attempted to enforce family reunification rights.[18] In the majority of cases both partners were employed and hence qualified as workers in their own right. In the event of one of the partners becoming unemployed, however, they would be unable to claim a right of residence on the basis of being a family member. This would not, formally speaking, be problematic for those who became involuntarily unemployed as Community law provides that such workers retain a right of residence in the host state beyond the expiry of the employment relationship.[19] The situation is complicated somewhat, however, by the UK law which (unlawfully) attempts to deny those EU8 migrants who are unemployed for thirty days or more, voluntarily or

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[18] Although at the time of the interviews the Directive was not in force so technically any unmarried partners who did seek to enforce a right of residence at this time would have relied on Case 59/85 *Netherlands v Reed* [1987] 2 C.M.L.R. 448. Some spouses did not work and thus did not qualify in their own right as workers. Unless they qualified in their own right under one of the other categories of EU citizen (such as student or financially independent person under Article 7, Directive 2004/38) they were dependant on their status of family member. On the impact of divorce and family separation see Ackers and Stalford, *Op. Cit.* n.9; Stalford, H., 'Old Problems, New Solutions?: European Union Regulation of Cross-National Child Maintenance', (2003) 15 *Child and Family Law Quarterly,* 269; Stalford H, 'Regulating Family Life in Post-Amsterdam Europe', (2003) 28 *European Law Review,* 39. Now see Article 13 of Directive 2004/38 on the right to remain of family members following divorce. Although none of the respondents had a third-country national spouse, such a family member would be more dependant on their derived family status as they cannot qualify in their own right under the rules on citizens' free movement rights. See Article 13(2), Directive 2004/38 for the position of third-country national family members following divorce

[19] Previously, caselaw held that the worker status could continue after the employment has ceased, see Case 39/86 *Lair* [1988] E.C.R. 3161; now, the position is made clear in article 7(3), Directive 2004/38 [2004] O.J. L257/13. This is discussed further in chapter six

involuntarily, a right of residence.[20] If unmarried partners were able to access the status of family member on the basis of their partnership then, should they find themselves unemployed, they would have a strengthened legal status in the UK.

More precarious still is the situation of those unmarried partners of EU8 workers who voluntarily leave a job. Unless such an individual embarks on some vocational training related to the previous employment they relinquish the worker status.[21] Adding to the insecurity of this group is the Accession Treaty itself which actually sanctions the withdrawal of residence rights from those EU8 migrants who become voluntarily unemployed in one of the EU15 during the transitional period.[22] If one of the members of a partnership gave up working they would thus lose the worker status and, unlike a married partner, not enjoy the automatic protection that flows from qualifying as a family member. Alternatively, such individuals may be able to access some security of residence by qualifying, in their own right, under the more general category of Union citizen entitled to enjoy free movement rights.[23] Although this status is less secure than that of the economically-active worker[24] it can still be extremely valuable.[25]

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[20] Regulation 7(2)(b), The Accession (Immigration and Worker Registration) Regulations 2004 SI 1219

[21] Article 7(3)(d), Directive 2004/38

[22] Treaty of Accession 2003 [2003] O.J. L236/17; Article 24, Act of Accession [2003] O.J. L236/33, Para 2, Annexes

[23] Article 18 EC; Article 7, Directive 2004/38

[24] For example it is subject to the requirements of having sufficient resources and sickness insurance, Articles 7(1)(b) and 7(1)(c) of Directive 2004/38

[25] See, for example, Case C-85/96 *Martinez Sala* [1998] E.C.R. I-2691; Case C-274/96 *Bickel and Franz* [1998] E.C.R. I-7637; Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193; Case C-224/98 *D'Hoop* [2002] E.C.R. I-6191; Case C-413/99 *Baumbast* [2002] E.C.R. I-7091; Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613; Dougan M, and Spaventa E, 'Educating Rudy and the (non)English Patient: A Double Bill on Residency Rights Under Article 18 EC', (2003) 28 *European Law Review*, 699; White, R.C.A., 'Free Movement, Equal Treatment, and Citizenship of the Union', (2005) 54 *International and Comparative Law Quarterly*, 885; Hailbronner, K.,

One of the Polish migrant workers who took part in the study had been joined by his pregnant (also Polish) girlfriend in June 2004, a month after he arrived (and thus prior to Directive 2004/38 coming into force).[26] His unmarried partner was not working and therefore had an insecure residency status. She did not automatically qualify as a family member, under Community or UK law, and appeared to have no independent citizenship status as she was not a worker,[27] student[28] or, it seemed, financially independent.[29] Such partners who join a worker and who do not formally qualify as a family member, even now Directive 2004/38 is in force, may have difficulty in enforcing a right to equal treatment in the host state and, as a result, may be denied access to certain benefits and services.[30]

EU8 migrants who do gain access to employment in an EU15 Member State during the transitional period are entitled to rely on the definition of family in Directive 2004/38 during the transitional period to facilitate the entry and residence of their family members.[31] Interestingly, however, the UK legislation provides that EU8 workers are entitled to be joined only by the 'worker's spouse and his children who are under 21 or dependant on him'.[32] This is a significantly narrower definition than the one enshrined in

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'Union Citizenship and Access to Social Benefits', (2005) 42 *Common Market Law Review*, 1245. Citizenship is discussed in chapter six

[26] Interview 004.M

[27] Now Article 7(1)(a), Directive 2004/38

[28] Now Article 7(1)(c), Directive 2004/38

[29] In that she did not satisfy the conditions of having sufficient resources and sickness insurance, Article 7(1)(b), Directive 2004/38. For the potential significance of citizenship status for unemployed EU8 nationals in the UK see chapter six

[30] Article 24, Directive 2004/38

[31] Provided the date of implementation (30 April 2006) has passed. As will be mentioned below, the transitional arrangements do allow for restrictions to be placed on family members' access to the labour market

[32] Regulation 2(9)(c), The Accession (Immigration and Worker Registration) Regulations 2004 SI 1219

Directive 2004/38 and indeed is narrower than the previous definition provided by Regulation 1612/68. The effect of this on the migrants is unclear. The UK position stands in contradiction to Community law and so in the (unlikely) event of any legal proceedings it would be the Community definition that would be held applicable. The potential concern here is that some EU8 migrants may look only to the UK law or to information produced by the UK government and be misled about their family reunification rights. For example, as the UK legislation includes no provision that allows for the worker or his or her spouse to be joined in the UK by dependents in the ascending line, it is possible that an EU8 migrant only informed of the UK position would refrain from having his or her parents join the household in the UK. This could have an adverse impact on the parent(s) if, as the free movement provisions envisage, they move as dependants of the worker and rely on the family to provide care. Alternatively, the adverse impact could be felt by the worker directly as it would seem that, in actual fact, retired parents often move to assist their grown-up migrant children with the care of grandchildren.[33]

2.2. EU8 family members' right to work in the UK

The standard position in Community law is that a worker's family members, regardless of nationality, have the right to take up employment in the host Member State.[34] This is likely to be an important consideration when a family is making the decision to move. If family members are not entitled to work in a host state to help support the family unit the right to reunification will be rather redundant for many. During the transitional period, however, the EU15 Member States are able to derogate from this provision. Family members who resided with the worker in the host state

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[33] Ackers, L., 'Citizenship, Migration and the Valuation of Care in the European Union', (2004) 30(2) *Journal of Ethnic and Migration Studies*, 373

[34] Article 23, Directive 2004/38; previously Article 11, Regulation 1612/68

at the date of accession have immediate access to the right to work. However, any family members who join the worker after 1 May 2004 can be prevented from working for a period of 18 months or until three years after the date of accession (whichever date is earliest).[35] The restriction on the rights of family members to access employment is somewhat peculiar given that under the previous migration regime that governed movement from the EU8 to the EU15, the Europe Agreements,[36] there was no such time delay. This situation is all the more puzzling when considered alongside the standstill clause in the Accession Treaty which specifies that the post-accession conditions should not be more restrictive than those in place prior to the signing of the Accession Treaty.[37] It is unclear why the Accession Treaty itself sanctions harsher conditions than those in place prior to accession in respect of family members' right to work. Indeed it is paradoxical to grant EU8 migrant workers the right to family reunification yet at the same time allow Member States to restrict such family members' labour market access. Effectively, such a restriction renders the entitlement to reunification superfluous for many families who could not survive financially on the wage of the single worker. Furthermore, Directive 2003/86 on the right to family reunification[38] states that Member States must not exclude family members of a third-country national worker from the labour market for a period longer than 12 months. Thus, at Community-level, EU8 workers' family members are subject to harsher conditions than third-country national migrants' family members in relation to labour market access during the transitional period.

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[35] Accession Treaty, *Op. Cit.* n.22, para. 8, Annexes

[36] Article 37(1), Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, Final Act, [1993] O.J. L348

[37] Accession Treaty, *Op. Cit.* n.22, para. 14, Annexes

[38] Directive 2003/86/EC [2003] O.J. L251/12. Note that Ireland, the UK and Denmark are not bound by this Directive

In the UK, the operation of the WRS presumably means that family members of EU8 nationality can work in their own capacity subject to fulfilment of the same registration requirements as those applicable to the worker. What is not clear, however, is whether the UK would, lawfully under the Accession Treaty, seek to restrict the right to work of a third-country national spouse of an EU8 worker. As was stated above, amongst the sample of Polish workers the vast majority of married, and also the unmarried but partnered, couples were dual-earning. Therefore each member of the partnership had established their own individual, independent worker-status.

2.3. Emerging patterns of EU8 family reunification in the UK

In order to place the preceding legal detail into more of a context it is helpful to make some mention of the relevant data (both of the qualitative and the quantitative kind). Of the 44 Polish migrant workers interviewed for this research 18 described themselves as single and were living in the UK without any family members or, in the case of return migrants, they had done so for the period they were in the UK. The remaining 26 described themselves as either married or in a serious long-term relationship (17 were married).

With regard to the actual exercise of family reunification rights: five migrant workers had experienced the initial move as a family unit (entire family migration) and three of these had young children (under ten years old) who had moved with them.[39] A further six had been joined by family members some time after making the move to the UK. Of these family followers, one of the six was joined by his fiancée but had children from a

[39] Interview 007.LR, Interview 307.P, Interview 314.A

previous marriage who lived with their mother in Poland.[40] Another of the six was joined by his pregnant girlfriend[41] but none had children who joined them in the UK (instead the 'followers' were partners and spouses).

In respect of those who had not exercised family reunification rights: 15 of the 26 partnered or married respondents were currently separated from their partners/spouses and 14 of these also had children in Poland. It should be acknowledged, however, that a number of those interviewed whilst working in the UK (as opposed to return migrants in Poland) did express an intention to have their family members join them in the future. In particular, four out of nine male drivers who took part in focus groups appeared to have very concrete plans for their family to join them in the UK.[42]

The statistical data collected from those registering on the WRS does not give any details regarding the partnering patterns of post-accession EU8 migrants but it does state that 93% of workers who registered between May 2004 and June 2006 had no dependants in the UK (28,280 out of 427,095 did), and only 3% (19,270) had dependants under the age of seventeen in the UK.[43] To an extent this reflects the finding, already identified earlier in the thesis, that many of the migrants are young and single.[44] The low number of dependants may also indicate, however, that a significant number of EU8 workers in the UK have families (partners and children) at home from whom they are currently separated. If so, these migrant

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[40] Interview 001.JK. This illustrates that the issues to be discussed later on relating to transnational families can still be relevant to those who have been joined by family members in the host state

[41] Interview 004.M

[42] FG 201, FG 202

[43] Joint Report by the Home Office, the Department for Work and Pensions, the Inland Revenue and the Office of the Deputy Prime Minister, *Accession Monitoring Report, May 2004-June 2006*, 22 August 2006, 4, 14

[44] See chapter four

workers operate a transnational family life. In this case, the discussion later on in the chapter may be of relevance. Equally, the currently separated family members may later on become family 'followers' in the UK and install themselves with the worker thus rendering the discussion on reunification relevant to them.

2.3.1. EU8 family 'followers': trailing wives?

The research certainly corroborates the view that family mobility is frequently highly complex in nature, 'necessitating the temporary dislocation of family relationships as pressures to move are re-negotiated and family arrangements re-configured'.[45] It would appear that separated or 'staged' migration is a common strategy adopted by families involved in the migration process. For example, Ackers and Stalford draw attention to it in their sample of intra-EU family-movers and make the point that the temporary family separation was often as a result of the father's employment situation.[46] Thus, in the main, it was the male partner that 'pioneered' the move and was later joined by his partner/spouse and children. This tendency is reflected clearly in the author's sample of Polish respondents. Indeed all of those who were joined by their partners and/or children were male and the drivers, mentioned above, also had future plans to bring their families to the UK and may be classified as male pioneers.[47] This would seem to bear out the stereotypical image of the 'trailing wife' that has been evident in migration research.[48] Raghuram uses the notion of 'tied migration' to explain reunification after one member of the family has migrated because of labour market imperatives and points out: 'just as

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[45] Ackers and Stalford, *Op. Cit.* n.9, 55

[46] *Ibid.*, 146

[47] Although clearly bus drivers as a group are disproportionately male and hence this skews the gender balance somewhat

[48] Bailey, A.J. and Boyle, P., 'Untying and Retying Family Migration in the New Europe', (2004) 30(2) *Journal of Ethnic and Migration Studies*, 229, p.230; Ackers and Stalford, *Op. Cit.* n.9, 50-55

labour migrants are assumed to be men, so too tied migrants are assumed to be women'.[49] It is true that this image can be criticised for failing to recognise the existence of female 'pioneers' in migration flows and the contribution made by female labour migrants to households and markets.[50] However, it is also true that women continue to bear the main responsibility for domestic work and childcare within households. In this respect their own employment is often ancillary to that of their male partner's work. Using Bailey and Boyle's analysis, women are expected to make certain sacrifices and move as tied migrants as 'the family as a whole is expected to benefit from migration by maximising net household economic gain'.[51]

One of the female respondents interviewed had joined her husband, who was working as a bus driver in Bath, in August 2004 (four months after he arrived in the UK). Initially they had planned to live transnationally for a number of years but she found the separation difficult:

"It was very hard. I was thinking every day what is happening there? How is he doing? I felt ill all of the time" (Interview 005.S).

Her husband was able to arrange a job for her working for the same company. Thus, upon arrival the respondent became a migrant worker in her own right rather than a dependant family member. Clearly, as is apparent from the discussion above, this had important implications for her legal status.

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[49] Raghuram, P., 'The Difference that Skills Make: Gender, Family Migration Strategies and Regulated Labour Markets, (2004) 30(2) *Journal of Ethnic and Migration Studies*, 303, 304

[50] See Phizacklea, A., 'The Politics of Belonging. Sex Work, Domestic Work: Transnational Household Strategies' in Westwood, S. and Phizacklea, A. (Eds.), *Trans-nationalism and the Politics of Belonging*, (London: Routledge, 2000), 120; Breugal, I., 'The Trailing Wife: A Declining Breed?' in Crompton, R., Gallie, D. and Purcell, K. (Eds.), *Changing Forms of Employment: Organisations, Skills and Gender*', (London: Routledge, 1996), 235

The trailing wife, therefore, does seem to be a relevant label for some of the Polish migrant families that took part in the study. Furthermore, some of the sample clearly anticipated that their female partners would become family followers in the near future. Other research supports the view that the norm, when an international partnership requires mobility, is for the woman to move to be near the man.[52] At the opposite end of the spectrum, some of the respondents had no plans for reunification and instead had opted to conduct a transnational family life for the time being. Significantly, one of the given reasons for doing so in a number of instances was reluctance on the part of the male migrant worker to ask a female partner to leave her own employment in Poland. Certainly, and especially given the high incidence of de-skilling identified in chapter four, a number of male respondents described their partners as having secure and successful jobs in Poland and neither partner wanted to risk losing that in the near future.[53] A consequence of this, however, is that the women who do stay at home will often effectively be single parents with the double burden of work and childcare to deal with.[54]

Tied movers, or trailing wives, who follow the worker to the host Member State fall within the model of family life promoted by the EU free movement provisions that was described above. Although the evidence would suggest that this is a model of some relevance to EU8 migrant workers in the UK (and perhaps in the future it will hold even more

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[51] Bailey and Boyle, *Op. Cit.* n.48, 230

[52] Ackers and Stalford, *Op. Cit.* n.9, 55

[53] Interviews 002.PZ, 010.JF and 302.P

[54] Given the significant lack of available childcare facilities in Poland it appears that this may be quite a burden to cope with. In many instances it seems that it will be impossible for lone women with children to continue to work (unless there is informal childcare provided by family members). See Heinen, J. and Wator, M., 'Child Care in Poland before, during, and after the Transition: Still a Women's Business', (2006) 13 *Social Politics*, 189

significance) it is also apparent that the law does not accommodate other aspects of EU8 migrants' family reunification experience.

2.3.2. Reunification in the UK... but with which family and kin?

One common aspect of the migration experience that came across in the empirical work was a reliance on extended family members, and sometimes friends, to help facilitate the move to the UK. Many people made reference to, for example, aunties, uncles and cousins who were already in the UK prior to them and reliance on these extended family and kinship networks[55] helped them to settle upon arrival. New arrivals would frequently rely on these extended family members, and in some instances (family) friends, for a place to stay when they first arrived, some subsistence until they 'got on their feet' and perhaps some contacts who could arrange work. In addition to other post-accession migrants, the established Polish diaspora in the UK (at least in cities with a tradition of post-war Polish migration such as London and Glasgow) also provided a forum within which recent arrivals could receive valuable assistance. Polish centres and social groups were particularly significant in this respect.

These extended family members and diaspora communities, although not recognised by the EU model of family reunification, nevertheless fulfil a vital integrational function for migrants. For example:

"My uncle was here before and he was working here. Then there was a time when he said 'in a few weeks I'm leaving so if you want to come now I'll give you help and then leave', so that's why I decided to come when I did. He helped me a lot when I first arrived" (Interview 012.GP)

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[55] Boyd, *Op. Cit.* n.1

This was particularly true of the younger migrants (age 20-29) who moved to the UK alone. Although these migrants are not traditional family followers, in the sense that they were not moving to be with immediate family members in a manner envisaged by the free movement provisions, they did move to join some wider kin who had a beneficial impact on their migration experience and general wellbeing. Therefore, although it would not seem that EU8 migrants have made extensive use of their family reunification rights as of yet, this is not a reflection of the importance they place on family life. While some workers move immediately with their family, or are joined by them soon after, many are young and do not (yet) have their own immediate family. Furthermore, it also seems that some workers plan to stay in the UK for a temporary period of time and make a positive decision to sustain a transnational family life (which is discussed below) as reunification or entire family migration is simply not a practical option. Other families decide to live separately 'for the time-being' whilst the worker tries to establish him or herself in the UK and, if necessary, arrange for suitable family housing.

The premise upon which Community law initially extended rights to family members[56] was to encourage workers, as factors of production, to exercise their economic right to free movement.[57] The ECJ has consistently extended benefits to the immediate family members of workers on the basis that such assistance has an indirect benefit for the worker him or herself; the Court has asserted that such an approach was necessary in order to 'facilitate the migrant workers' migration to and integration in the host Member State'.[58] Importantly, in the absence of

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[56] More detail on the nature of the social rights granted to family members is given below

[57] Ackers and Stalford, *Op. Cit.* n.9; Ackers, *Op. Cit.* n.33; Stalford, H., 'The Citizenship Status of Children in the European Union', (2000) 8 *International Journal of Children's Rights*, 101, 107

[58] Stalford, *Ibid.* See, for example, Case 32/75 *Cristini* [1975] E.C.R. 1085; Case 63/76 *Inzirillo* [1976] E.C.R. 2057; Case 207/78 *Even* [1979] E.C.R. 2019

such immediate family members, it would appear that the majority of workers in the sample gained valuable assistance from other extended kin. Thus it would seem that such parties, although not recognised in the formal legal provisions, can also play an essential role in facilitating the mobility of the worker. From this perspective, the reality of kinship ties for EU8 migrants, which relies on wider kinship networks, is not accommodated by the family reunification model in the free movement provisions.

3. Sustaining the family unit in the UK: formal applicability of welfare provision and the empirical reality

The above discussion clarified which family members are entitled to exercise the right to reunification and speculated on the relevance of the right to those EU8 migrant workers in the UK. This section moves on to explore the welfare rights accessible to those workers who are joined by their (qualifying) family members and, in doing so, examines some of the methods of sustaining the family in the host state. Again, the extent to which the legal provisions are accessed by, or impact upon, EU8 migrants in the UK is drawn out.

3.1. Workers and family members' social entitlement

Once a family unit is established or (re)unified in a host state an issue that may become important, as a means of facilitating family life, is the ability of the family members to access certain social benefits. At Community level one of the most useful provisions has been Article 7(2) of Regulation 1612/68 which extends to the worker and his/her accompanying family the right to access the same 'social and tax advantages' as are available to nationals. The Court of Justice has given the notion of social advantages an extremely wide remit and, as a result, it has come to be understood as referring to almost any form of social welfare available to the state's own

nationals. In the early case of *Even*, for example, the ECJ defined social advantages to mean any benefits:

'which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence in the national territory and the extension of which to workers who are not nationals of other Member States therefore seems suitable to facilitate their mobility within the Community'.[59]

Earlier in the chapter reference to the *Reed*[60] case demonstrated the breadth of the social advantages provision where it was used to allow an unmarried partner to accompany the worker to Netherlands on the basis that it would facilitate the worker's integration into the host state. Workers have relied on Article 7(2) to gain access to numerous benefits while working in other Member States and the ability to do so has clearly enabled them to enjoy a 'consolidated economic and social status'[61] which, in turn, arguably benefits their families as well as themselves[62]. In addition to benefits for the worker him or herself, it was the use of this functional 'facilitating mobility' reasoning which enabled the Court also to extend access to various social benefits to the family members of workers; the Court's logic has been that by granting family members social advantages the worker indirectly reaps a benefit, thus becoming more integrated into the host

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[59] Case 207/78 *Ministère Public v Even* [1979] E.C.R. 2019

[60] Case 59/85 *Netherlands v Reed* [1987] 2 CMLR 448

[61] Stalford, H., 'Parenting, Care and Mobility in the EU: Issues Facing Migrant Scientists', (2005) 18(3) *Innovation*, 361, 366

[62] On 'social advantages' see Ellis, E., 'Social Advantages: A New Lease of Life' (2003) 40 *Common Market Law Review*, 639. In terms of caselaw see, for example, Cases 65/81 *Reina* [1982] E.C.R. 33 (subsidised childbirth loans); C-57/96 *Meints* [1997] E.C.R. I-6689 (payment to agricultural workers); C-35/97 *Commission v France* [1998] E.C.R. I-5325 (supplementary retirement pension points); 137/84 *Criminal proceedings against Mutsch* [1985] E.C.R. 2681 (criminal proceedings in defendant's own language); C-237/94 *O'Flynn v Adjudication Officer* [1996] E.C.R. I-2617 (social security payments to help cover the cost of funeral expenses)

society.[63] The rationale can be seen in the early case of *Inzirillo.*[64] Here the ECJ held that the son of an Italian migrant worker in France was entitled to claim disability benefit from the French authorities:

'If that were not the case, a worker, anxious to ensure for his child the lasting enjoyment of the allowances necessitated by his condition as a handicapped person, would be induced not to remain in the host state where he has established himself and has found his employment, which would run counter to the object sought to be attained by the principle of freedom of movement for workers'.[65]

The corollary of the facilitating mobility test, however, is that it has framed family members' rights within the context of (financial) dependency upon the migrant worker such that entitlement has become parasitic in nature:[66]

'The status of family members and workers differs in a fundamental sense, in that the former only have derived entitlement. Families thus gain their wider social entitlement indirectly through the economic contribution of the worker'.[67]

The derivative nature of the rights of family members has been criticised on the basis that it places the family in a potentially vulnerable position,

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[63] See, for example, Cases 32/75 *Fiorini v SNCF* [1975] E.C.R. 1085 (family discount rail card); C-278/94 *Commission v Belgium* [1996] E.C.R. I-4307 (tideover benefits); C-185/96 *Commission v Greece* [1998] I-6601 (attribution of large family status). This later line of caselaw is in contrast to the early decision in Case 76/72 *Michel S* [1973] E.C.R. 457, where it was held that social advantages were available to workers only

[64] Case 63/76 *Inzirillo* [1976] E.C.R. 2057

[65] *Inzirillo,* para. 17

[66] Ackers, L. and Dwyer, P., *Senior Citizenship? Retirement, Migration and Welfare in the European Union*, (Bristol: The Policy Press, 2002), 47. See, *inter alia,* Case 316/85 *Lebon* [1987] E.C.R. 2811. Of course, the caselaw is pre-Directive 2004/38

[67] Ackers and Dwyer, *Ibid.*

essentially at the mercy of the worker's continuing economic status and willingness to keep the family unit together and not divorce.[68] The Court, through the developing caselaw on citizenship, had gone some way to fortifying the status of family members.[69] Directive 2004/38 has now enshrined many of the principles established by the Court[70] and it would seem that family members now occupy a stronger position. Most notably, family members are explicitly entitled to access the equal treatment principle in Article 24(1) of Directive 2004/38. Therefore, family members of a worker do now enjoy an individual right not to be discriminated against in the host Member State rather than a simply parasitic one. Although, of course, EU8 family members' right to work is subject to (potential) transitional derogation as was considered above.

Article 7(2) of Regulation 1612/68 remains in force alongside Directive 2004/38.[71] At this stage it is not entirely clear what sort of relationship the social advantages provision, which applies only to workers and their families, will have with the wider equal treatment provision in Article 24(1) of the new Directive. Article 24(2), however, provides that the principle in Article 24(1) does not apply for the first three months of

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[68] For more information and critique of derivative family rights see Ackers and Dwyer, *Ibid;* Ackers, L. and Stalford, H., 'Children, Migration and Citizenship in the European Union: Intra-Community Mobility and the Status of Children in EC Law', (1999) 21(11/12) *Children and Youth Services Review*, 987; Ackers *Op. Cit.* n.33; Stalford, *Op. Cit.* n.57

[69] For example Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091 where the Court held that the former spouse of a Community migrant worker (who was a third-country national) could continue to reside in the host society on the basis of her status as 'primary carer' of the migrant worker's child who was continuing to access educational rights in the host Member State. See Reich, N., 'Citizenship and Family on Trial: A Fairly Optimistic Overview of Recent Court Practice with regard to Free Movement of Persons', (2003) 40 *Common Market Law Review*, 615. Note also the Court's consistent reliance on Article 8 of the ECHR to stress the fundamental principle of family life, see Case C-109/01 *Akrich* [2003] E.C.R. I-9607

[70] For example Article 13, Directive 2004/38 deals with retention of the right of residence by family members in the event of divorce, annulment or termination of registered partnership

[71] Although Directive 2004/38 repeals a lot of the secondary legislation in the area (including the three residency Directives: Directive 90/365 [1990] O.J. L180/28; Directive 93/96 [1993] O.J. L317/59; Directive 90/364 [1990] O.J. L180/26) it only repeals Article 10 and 11, Regulation 1612/68 (which governed family rights to join the worker and access employment)

residence. This would suggest, then, that initially the worker must gain his or her entitlement solely from Article 7(2) which, in turn, means that the family members cannot gain any individual rights and must instead rely on their derived entitlement. In this respect the parasitic nature of family rights has not been completely eradicated.[72]

EU8 migrants working in the UK, and their families, are entitled to rely on these Community law rights to facilitate the enjoyment of their family life in the UK. Of course, as the 'free movement pf persons' provisions are based firmly on an ethic of non-discrimination'[73] migrants are effectively entitled to 'national treatment' and thus can access the same family rights as nationals. In the UK, however, the evidence emerging so far suggests that only a limited number of post-accession EU8 migrants (and their families) have relied on their equal treatment rights to gain access to social benefits. The Accession Monitoring report concludes that:

'The numbers applying for tax-funded income-related benefits and housing support remain low. For example, only 5,943 applications for Income Support and Jobseeker's Allowance were processed between May 2004 and June 2006, and of these applications only 768 were allowed to proceed for further consideration'.[74]

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[72] Of course, family members that are also Member State nationals may be able to rely on residence and/or equal treatment rights flowing from their own independent citizenship status, see chapter six

[73] Stalford, *Op. Cit.* n.61, 366. The prohibition against nationality discrimination is enshrined in Article 12 EC and is a central feature of the free movement regime, as is demonstrated by its importance to the operation of the free movement of workers (Article 39 EC), establishment (Article 43 EC) and services (Article 49 EC)

[74] *Accession Monitoring Report, Op. Cit.* n.43, 4. The UK introduced an additional 'legally resident' condition to the already established habitual residence requirement for benefit entitlement in the light of accession. The effect of this is to exclude out of work EU8 migrants from benefit access, thus accounting for the low number of applications for JSA allowed to proceed. See chapters three (section 3.4) and six (section 3)

Of course, jobseeker's allowance is an 'out of work' benefit and so does not best illustrate the limited number of those actually in work seeking to access certain social benefits. The report does, however, also point out that during the same time period, despite the 427,000 WRS registrations, there were only 27,280 EU8 claimants of child benefit and 14,009 EU8 claimants of tax credits.[75] Certainly, the overwhelming sentiment from the respondents who took part in the qualitative study was that claiming benefits had not been a priority at the time the decision to migrate was made, for example:

"No I never thought about it [social benefits] at all, I don't really like the idea of getting them to be honest" (Interview 001.JK).

"I'm not interested in benefits actually. I don't think this is a really nice thing to be interested in. When I work 12 months in England I think Polish people can have the same as other European Union citizens but I don't think I'll need them for anything" (Interview 002.PZ).

None of the respondents had relied on the right to equal treatment to access social benefits at the time of interview. However, this tendency needs to be understood in the context of the UK's position on social welfare entitlement. As emphasised elsewhere in this thesis,[76] the UK has (unlawfully) curtailed the ability of post-accession EU8 migrants to rely on welfare when seeking work either as a new arrival or former worker. The ability of EU8 migrants to access social benefits, or 'social advantages', whilst in work has not been tampered with (providing they comply with the WRS requirement of registration), but it does seem that the message espoused by the UK government has impacted upon EU8 migrants'

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[75] *Ibid.*, 29

[76] Chapter six, section 3

perception of their entitlement in the UK. Clearly there are other contributing factors to the apparent low take-up of social benefits; for example temporary moves, which appear to be popular amongst EU8 nationals do not usually necessitate reliance on welfare. It does seem, however, that the campaign funded by the UK government, entitled 'Not All Roads Lead to Britain', may have obscured some of the issues relating to social welfare entitlement so as to give the impression that EU8 migrants had no rights to access benefits in the UK regardless of employment status. The campaign was implemented in the accession states by the International Organisation for Migration (IOM) prior to enlargement and the objective was to inform people in the EU8 countries of the Worker Registration Scheme operating in the UK. As part of the empirical work carried out in relation to this thesis a representative of the IOM who had worked on the campaign in Poland was interviewed. She had been involved in workshops, had distributed literature which gave details about the campaign, and had helped to run a telephone helpline to answer queries about the UK system. This respondent confirmed the 'tone' of the campaign:

"The message which came across was that only if you can support yourself can you go to the UK and there will be no access to benefits unless you can support yourself. That is funny because actually if you can support yourself then you don't need benefits. The intention of the campaign was to prevent social tourism or to stop people going to the UK with no work and accessing benefits" (Interview 102.INFO).

Many of the migrant respondents had picked up on this tone and were aware of the UK attempt to restrict their benefit entitlements. However, the majority of them were also under the mistaken impression that the prohibition on accessing benefits applied even when they were in work:

"Here we are supposed to be equal with English workers but we can't get any social benefits" (Interview 004.M).

"To Polish people and people from the new countries they just say no they don't even ask why they need it [social benefit] *even if you are working really hard they still say no"* (Interview 012.GP).

Given the added financial security that the availability of benefits can grant to a family unit in a host state[77] it is possible that a widespread perception of benefit unavailability, circulated in the EU8 states by methods such as the 'Not All Roads Lead to Britain' campaign, had the effect of discouraging family members from moving with a worker to the UK. Access to benefits may have been particularly conducive to the facilitation of family life in the aftermath of enlargement considering the low-paid and insecure nature of many of the sectors in which EU8 migrants are concentrated.[78]

One of the Polish respondents in the UK was herself working in a Human Resources department for a company that had hired Polish workers by setting up organised migration schemes. She recognised the concern of the workers to ensure their families access to benefits and services, such as health care, in the UK. Also she, despite occupying a position which required her to advise Polish migrants about their status, was under a false impression about the extent of the UK's welfare restrictions:

"When Polish people think about settling here and want to bring their family over they think much more about children and about support they

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[77] Stalford, *Op. Cit.* n.61, 366

[78] See chapter four

can have and health centres and things like that. They can go to the family doctor but here the father of the family or the mother, whoever is the worker, if he or she is sick and can't work they will not get any money from the government for the first (two or three) years so this is very difficult... These are the main questions they ask me all the time" (Interview 013.EM).

It was quite common in the interviews for respondents to link the notion of family reunification in the UK with the need to seek advice about welfare entitlement, reinforcing the potential importance of benefits to the facilitation of family life after migration:

"I haven't really thought about benefits before because I didn't think about staying here that long but now, because my boyfriend is planning to stay here and we are together, we will have to think about it, especially if we start a family. Maybe I would if I was entitled, I mean I have registered but I'm not really sure how it works to be honest. Probably I would have to get some advice" (Interview 019.KS).

"I know nothing about benefits or help we can get in the future but my girlfriend wants to find out about this for when the baby comes" (Interview 004.M).

One married couple had spent time in Edinburgh in the months following Poland's accession to the EU (June 2004-January 2005) with their one year old son.[79] The husband worked as a kitchen porter and later a waiter but his wife did not take up paid employment in the UK as she cared for the baby. Although the family would have been entitled to claim work-related benefits they were not aware of ancillary benefits such as Child Tax Credit

[79] They were interviewed in Krakow in July 2005

until later on when they had decided to return to Poland. The wife explained the impact of this:

"We went to an office, like a social or council office or something like that, and we were asking about everything. We thought he was very nice and he told us things but he didn't tell us about tax credits. This is a big regret for us because if we'd had tax credits we could have sent our son to a nursery and I could have gone to work, but I had to stay at home with him. It was the end of our visit when we found out about it" (Interview 307.O).

Therefore, had they been aware of the right to equal treatment as regards wider social advantages this would have enabled the woman to exercise her own right to work in the UK; this, in turn, would have added to the financial security of the family unit and elevated her own status to the more secure and individuated one of worker. Overall, a lack of accessible information combined with administrative obstacles has colluded to restrict EU8 migrant workers' access to such welfare entitlement despite those in work being *formally* entitled to claim.

Before moving on to examine EU8 migrants' engagement with wider welfare services attention should be drawn briefly to another mechanism of Community law that can be utilised by EU8 migrants to access financial benefits and potentially to facilitate family life. Regulation 1408/71[80] attempts to make benefits portable throughout the Community and,

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[80] Last consolidated version published [1997] O.J. L28/1. Note that a new regulation has been adopted which overhauls the coordination system somewhat: Regulation 883/2004 [2004] O.J. L200/1. This will enter into force when a new implementing regulation is finalised. See Pennings, F., 'The European Commission Proposal to Simplify Regulation 1408/71', (2001) 3 *European Journal of Social Security*, 45; Pennings, F., 'Inclusion and Exclusion of Persons and Benefits in the New Coordination Regulation' in Dougan, M. and Spaventa, E., *Social Welfare and EU Law*, (Oxford: Hart, 2005), 241

therefore, enables the worker and his or her family members[81] to export certain benefits from their home state on the basis that the right to receive a benefit attaches to the individuals regardless of national boundaries.[82] Examples of benefits covered by the scheme include *inter alia* sickness and maternity benefits,[83] invalidity benefits,[84] old-age benefits,[85] unemployment benefits[86] and family benefits.[87] The ability of EU migrants to export benefits can clearly, then, be a very valuable tool.[88] However, as the legislation is based on the principle of coordination rather than harmonisation of national systems there may be significant inequalities in the monetary value of certain benefits at the national level.[89] This can mean that transported benefits hold less value in comparison to the host state's national benefit standards than they would if utilised in the state of origin.[90] This would seem to be the case for the majority of EU8 migrants that choose to export, given the lower cost of living in CEE when compared to the UK. In any event, none of the respondents that took part

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[81] The ECJ confirmed that family members can rely on Regulation 1408/71 in Case C-308/93 *Cabanis-Issarte* [1996] E.C.R. I-2097. Note, however, that family members is defined by reference to national rather than Community law (Article 1(f))

[82] Article 42 EC, which urges the Community to facilitate free movement by securing for migrant workers and their dependants 'aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit of all periods taken into account under the laws of the several countries', provides the legal basis for this legislation

[83] Article 4(1)(a)

[84] Article 4(1)(b)

[85] Article 4(1)(c)

[86] Article 4(1)(g). The ability to export unemployment benefit is limited to a three month period (Article 69(1)). See Wikeley, N., 'Migrant Workers and Unemployment Benefit in the European Community', (1988) *Journal of Social Welfare Law*, 300

[87] Article 4(1)(h)

[88] For more information on the coordination of social security see Sakslin, M., 'Social Security Coordination: Adapting to Change', (2000) 2 *European Journal of Social Security*, 169; Moore, M., 'Freedom of Movement and Migrant Workers' Social Security', (2002) 39 *Common Market Law Review*, 807

[89] Ackers and Dwyer, *Op. Cit.* n.66, 125

[90] Alternatively, in some instances the transported benefits can have a very high value in the host state, see Ackers and Dwyer's work on retirement migration and the exportability of pensions, Ackers and Dwyer, *Ibid.*, 126

in the research had utilised the exportability provisions. Indeed, there was very little awareness of this legal framework amongst the sample.[91]

3.2. Access to welfare 'services': education, childcare and housing

It is not only access to certain fiscal benefits in the host state that can help to facilitate and sustain family life but also access to wider social and welfare services. As Stalford acknowledges:

> *'Access to benefits such as appropriate schooling, child-raising allowances, public funding for day care and crèche facilities, concessionary 'family' rates for public services such as transport, and favourable healthcare packages, all enhance the 'value' of the employment in a particular host state and, arguably, attract migrants to specific regions within that host state'.*[92]

This chapter has already emphasised the Community law principle of 'national treatment' upon which migrant workers' access to forms of social entitlement are based. This is true also of their ability to access the various welfare services mentioned in the extract above, largely due to the wide application of 'social advantages' but also because of some more specific provisions of secondary Community legislation which deal with, for

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[91] One guise under which the coordination of social security did come up in the qualitative empirical work, however, was in relation to the aggregation of pension rights (which some workers had concerns about). Pensions are clearly of great significance in later life when employment ceases and may fulfil a vital role in sustaining family life post-retirement. Regulation 1408/71, in addition to allowing migrants to export benefits already accrued, enables the aggregation of contributions made to accrue certain benefit rights. Pensions are covered by the coordination regime as 'old-age benefits' to the effect that when national insurance contributions (or equivalent) are paid in a Member State they are personal to the individual concerned and can, thus, be aggregated alongside periods of contribution made in other Member States and later, if necessary, exported (Articles 44-46). Problematically, however, occupational or supplementary pension schemes are excluded from the coordination regime which applies only to social security benefits provided by legislation. Currently a Commission proposal for a Directive on improving the portability of supplementary pension rights is on the table: COM(2005) 507 final. See further, Ferrera, M., *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection*, (Oxford University Press, 2005)

[92] Stalford, *Op. Cit.* n.61, 366

example, the right of children of migrant workers to access education in the host state under the same conditions as nationals[93] and workers' right to equal treatment as regards matters of housing.[94] This section speculates, largely on the basis of the empirical work, on post-accession EU8 migrants' engagement with these latter two aspects of welfare in the UK.

3.2.1. Education and childcare

With regard to children's access to schools, Article 12 of Regulation 1612/68 provides that children of a migrant worker 'who is or has been employed'[95] in the Member State are entitled to be admitted to 'general educational apprenticeship and vocational training courses' under the same conditions as nationals. The scope of the form of educational provision covered is broad:

'Article 12 covers all types and levels of education from pre-school through compulsory courses to vocational training, higher education and special needs provision'.[96]

Further, due to the approach of the ECJ, Article 12 has not only been instrumental in according children *access* to various educational establishments but has also been utilised to extend the 'ethic of equal opportunity'[97] to cover various forms of maintenance grant and public assistance.[98] In *Casagrande*, for example, the Court determined that

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[93] Article 12, Regulation 1612/68

[94] Article 9, Regulation 1612/68

[95] Cases 389 and 390/87 *Echternach and Moritz* [198] E.C.R. 723 (the child of migrant worker was able to continue his education in the host state following his parent's return to their country of origin)

[96] Ackers and Stalford, *Op. Cit.* n.9, 205

[97] *Ibid.*

[98] On the educational rights of children of migrant workers see Stalford, H., 'Transferability of Educational Skills and Qualifications in the European Union: The Case of EU Migrant Children' in Shaw, J. (Ed.), *Social Law and Policy in an Evolving Europeam Union,* (Oxford: Hart, 2000),

'conditions' included 'general measures intended to facilitate educational attendance'.[99]

Only one of the respondents who took part in the study had a child of school age who had joined her in the UK (the majority were younger). This respondent had moved to London with her six year old son, where she worked as a cleaner in a private household, in August 2004. Her husband had remained in Poland. They remained in the UK only until December 2004 due to the difficulties they had experienced as a result of the family unit being separated but from September-December the child did attend an English primary school. She explained that her son had found the experience to be quite traumatic and how she had been disappointed with the teacher's attitude towards him. Her overall opinion was that her son had needed greater assistance in settling in and, in particular, that his language needs had been neglected. This perception of events had played quite a prominent role in the decision to return to Poland.[100] This would support the view that:

'Problems of integration and progression at school are inextricably linked to the exercise of free movement and... lack of provision to aid this process potentially impedes mobility'.[101]

It could be argued that the provisions of Directive 77/486[102] may have been potentially useful in these circumstances. This Directive supplements

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243. This is also an area that the developing law on citizenship has impacted on, for exmple Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091 and Case C-209/03 *Bidar* [2005] E.C.R. I-2119

[99] Case 9/74 *Casagrande* [1974] E.C.R. 773 (son of deceased migrant worker was able to rely on Article 12 to claim a means-tested maintenance grant to continue studying after compulsory education ceased)

[100] Interview 314.A. In no way is this experience intended to be representative of the schooling experience of Polish or EU8 nationals in general. It is included solely to illustrate the particular experience of this family

[101] Stalford, *Op. Cit.* n.98, 248

Article 12 of Regulation 1612/68 and requires that Member States encourage the integration of children of migrant workers into the education system. In particular, Article 2 specifies that Member States should ensure that free language tuition is available.[103]

Many of the respondents who did not yet have children suggested that they had begun to think about the possibility of having children in the UK and the majority of opinion, represented by the following extract, suggests that concerns surrounding sending children to a 'foreign' education system may be a hindrance to the exercise of, or continuing exercise of, mobility rights:[104]

"The thing is that apparently the level of education is higher in Poland than here. This is what I have heard from a few people. Schools in Poland cover much more material in the first years of studying. Even in primary school they have more knowledge... it really makes me a bit worried about having children here and I think I would have to go back to Poland" (Interview 017.M).

Two families did have firm plans to educate their children in British schools and were happy to do so,[105] however, the majority of opinion expressed concerns regarding schooling in the UK. This, coupled with the low number of EU8 workers with dependants below the age of 17 in the UK,[106] suggests that the law on education is not of great significance to the

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[102] Directive 77/486 on the education of the children of migrant workers [1977] O.J. L199/139

[103] Implementation of this Directive has been disappointing across the EU, see Stalford, *Op. Cit.* n.98, 249

[104] For further information on how children's education can be a barrier to mobility, including the problems of enforcing recognition of academic qualifications, see Stalford, *Op. Cit.* n.98

[105] Interviews 004.M who were expecting their first child and 007.LR who had a child under one

[106] 3% of those who registered on the WRS between May 2004 and June 2006, Accession Monitoring Report, *Op. Cit.* n.43, 29

post-enlargement EU8 workers in the UK. It is true that in many instances the workers do not have children. The research carried out for this thesis, however, also implies that even those who do have children often move alone; essentially, there is a culture of family separation amongst EU8 migrants. From this perspective, a contrast can be drawn with Ackers and Stalford's findings in relation to EU15 workers. Amongst the sample of EU15 migrants there was a greater propensity to migrate with children and install them in a foreign school.[107] This is likely to be at least partially attributable to cultural factors, as the comments from respondents regarding the perceived inferiority of British education demonstrate. Indeed, more recent research by Ackers and Stalford, which examines migration from the CEE region, confirms the finding that often Polish migrants value highly their national education system at primary and secondary level, often believing it to be more rigorous and disciplined.[108] In addition, the specific features of the UK's post-accession regulatory regime and the social context within which EU8 migrant workers are living and working is also likely to have a significant impact. For example, the confusion described earlier surrounding the ability to access benefits in the UK may have prevented some workers from bringing their children to the UK.

Access to childcare, as opposed to formal education, is often also of paramount concern to migrant families. This is particularly true of dual-earner couples when women's continuing participation in the labour market, post childbirth, is often dependant on the availability and

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[107] Ackers and Stalford, *Op. Cit.* n.9

[108] By contrast, a western education at *undergraduate* level is perceived to carry reputational capital and is thus valued more highly. See Ackers, L. and Stalford, H., 'Managing Multiple Life-Courses: The Influence of Children on Migration Processes in the European Union', (2007) 16 *Social Policy Review*, (forthcoming)

affordability of childcare facilities.[109] Reference has already been made above to the married couple who only became aware of the availability of child tax credit immediately prior to their departure from the UK. It will be recalled that the woman here specifically stated that had they been able to access benefits it would have been used to pay for childcare so that both parents could work. Childcare in the UK, however, is often extremely expensive and is likely to be beyond the means of many of the recently arrived EU8 migrants given that 80% of the workers who registered on the WRS in the year following accession earned only £4.50-£5.99 per hour.[110] In 2005, the average weekly cost of a private nursery place for a child under two was £138 and in London this figure rose to £197.[111]

Access to formal public childcare provisions is available to workers on the basis of the equal treatment principle[112] so, again, availability differs across the Member States. As Stalford points out:

'While migrants enjoy equality of access to state-provided childcare under the free movement provisions, the extent to which they can actually take advantage of formal childcare depends first and foremost on the actual existence of a reliable system of public childcare'.[113]

Research suggests the UK only provides formal childcare for 2 to 3% of children under three; for three to six year olds the figure is 60%.[114] These figures demonstrate that the UK only offers minimum provision to the

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[109] Stalford, *Op. Cit.* n.61, 368

[110] *Accession Monitoring Report, Op. Cit.* n.43, 16

[111] Figures taken from the Daycare Trusts 2005 Childcare Costs Survey, available online at <http://www.daycaretrust.org.uk/mod.php?mod=userpage&menu=1001&page_id=7> (last accessed 24 November 2006)

[112] Article 7(2), Regulation 1612/68

[113] Stalford, *Op. Cit.* n.61, 370

[114] Papadopoulos (1998) cited in Ackers and Stalford, *Op. Cit.* n.9, 160

under three age group and, despite the figure being higher in relation to three to six year olds, in comparison to the other EU15 Member States this provision is also poor.[115] This low-level of availability coupled with the common necessity of early registration and long waiting lists for childcare facilities, such as nurseries, would suggest that EU8 migrants have not been able to access public childcare in any significant numbers.

One form of childcare often unavailable to migrant families on a day to day basis is the informal kind provided by other family and friends.[116] This couple of return migrants confirmed that, when in the UK, they had missed the support provided in Poland by the maternal grandparents:

"A big problem in Scotland is that there is no grandmother... It is much easier to have grandmother! In Poland grandmother is a very important institution. Right now we are both working because my parents look after our son" (Interview 307.O).

This couple went so far as to say that, although they would like to return to Scotland and had discussed the possibility extensively, the lack of this informal support was the main disincentive to a return. This corroborates research which has found that migrants, and migrant women in particular, miss the emotional and practical support provided by family networks in the state of origin.[117] In some instances grandparents themselves may move to the host state, ironically as the supposed 'dependant' family

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[115] Denmark, Belgium, France and Sweden offer the most comprehensive childcare in the EU15, *Ibid.*

[116] Drew, E., Emerek, R., and Mahon, E. (Eds.), *Women, Work and the Family in Europe*, (London: Routledge, 1998); Ackers, L., *Shifting Spaces: Gender, Citizenship and Migration in the EU*, (Bristol: Policy Press, 1998); Finch, J. and Mason, J., *Negotiating Family Responsibilities*, (London: Routledge, 1993)

[117] Stalford, *Op. Cit.* n.61, 368-370

members,[118] with the family unit in an effort to help facilitate family life. Ackers and Dwyer, in their research on retirement migration, found that:

'When parents moved to support their children it usually meant helping them to look after grandchildren and run the home in order to enable their children (especially daughters) to work and develop their careers'.[119]

This was not a strategy that any of the respondents in the study had yet utilised in a complete sense. However, there were a few instances of parents spending a period of time in the UK to help out during a particularly busy period such as the initial migration or a move to new accommodation.[120] Further, the respondent who had been joined by his pregnant girlfriend explained how they had plans for her mother to stay with them for a month following the birth of the child.[121] Given the availability of discounted air travel this type of visit is increasingly a viable option for migrant families seeking to rely on informal care from kin even though such arrangements are temporary in nature and not a substitute for sustained childcare provision.[122] EU8 migrants in the UK, therefore, are unlikely to access easily either (affordable) formal, or, informal childcare. This could restrict the ability of the family to receive a dual-income as one parent – most likely the mother – will be required to assume the bulk of the caring responsibilities, thereby limiting her own employment prospects and her ability to re-enter the labour market. This reduction in the economic status of the family is likely to increase their financial insecurity which, in turn, may have consequences for the enjoyment of family life in the UK.

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[118] Article 2(2)(d), Directive 2004/38

[119] Ackers and Dwyer, *Op. Cit.* n.66, 145

[120] Stalford recognises similar occurrences in a sample of migrant scientists, *Op. Cit.* n.61, 369

[121] Interview 004.M

[122] Stalford, *Op. Cit.* n.61, 369

3.2.2. Housing

'National treatment' is, again, the key under Community law when it comes to accessing housing in a host Member State. Equal treatment for migrant workers as regards all the rights and benefits accorded to national workers in matters of housing, including ownership and the right to be placed on housing waiting lists, is enshrined in Article 9 of Regulation 1612/68. The Court has recognised the importance of equal treatment in this area by holding that access to housing 'is the corollary of freedom of movement for workers'.[123]

The UK's post-accession regime, described throughout the thesis, attempts to place restrictions on the access of EU8 migrants to obtain various social housing benefits. These restrictions follow a pattern consistent with those that apply to other social benefits, such as jobseekers' allowance, in that they add an additional 'legal residence' requirement to the standard habitual residence test used to determine access to social housing and homelessness assistance.[124] This additional residence requirement serves to exclude EU8 new arrival workseekers, and workers who cease employment during the first year of employment, from entitlement to the benefits by virtue of the fact that EU8 migrants have no right to reside under UK law unless they are in work.[125] This chapter, however, is primarily concerned with those EU8 migrants that are in work and registered on the scheme in order to explore some methods of sustaining

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[123] Case 305/87 *Commission v Hellenic Republic* [1989] E.C.R. 1461, para. 18

[124] The Allocation of Housing and Homelessness (Amendment) England Regulations 2004 SI 2004/1235 amend the descriptions of persons who are to be treated as persons from abroad ineligible for housing assistance in the Homelessness (England) Regulations 2000 SI 2000/701. This in turn excludes out of work EU8 nationals from entitlement to homelessness assistance under part 7 of the Housing Act 1996, C.52. See chapter three, section 3.4

[125] EU8 workers who cease to work during first year of employment are only lawfully resident for the remainder of month in which they worked, Regulation 5(4)(b), Accession (Immigration and Worker Registration) Regulations 2004 SI 2004/121

and facilitating family life in the UK;[126] engagement with forms of welfare provision and services can be one such method. Registered EU8 workers are entitled to full equal treatment in matters of housing and the type of housing available can have consequences for one's ability to exercise family reunification rights.

The non-discrimination principle applies to those EU8 workers wishing to buy a property in the UK, to those wishing to rent from a private landlord, and to those who wish to access social (council) housing.[127] Amongst the respondents who took part in the study the majority were renting from a private landlord or were living in some form of employer-arranged housing. The overwhelming feeling was that of dissatisfaction with their dwellings and it was very common for groups to live together, even outside the scope of employer-arranged accommodation, to enable them to meet the cost of rent, for example:

"I lived in big house with ten other people. It is very expensive in London for people who first arrive but when you live with lots of people it is better and cheaper" (Interview 302.P).

"Now there are two people staying with me but before it was me and five more. So in total it was six people with one bedroom" (Interview 009.BS).

Housing is one area that demonstrates the limitations of the non-discrimination principle as the basis for the exercise of mobility rights. In itself the right to buy property is intact but, due to the notoriously high

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[126] On the status of workseekers and the economically inactive see chapter six on citizenship

[127] Case 63/96 *Commission v Italy* [1988] E.C.R. 29 (discriminatory restrictions on access to social housing held to be unlawful); Case C-302/97 *Klaus Konle v Republik Osterreich* [1999] E.C.R. I-3099 (right to equal treatment in relation to administrative procedures associated with the acquisition and lease of housing)

house prices in the UK,[128] it appears that many of the, predominantly low-paid, post-accession EU8 migrants have not been able to access it in practical terms. The woman quoted in the following extract moved to live with her husband. At first they considered buying a house but then realised it was not something they could afford. At the time of interview they were living in employer-arranged accommodation with other workers:

"At first we looked for a small house on our own but it was too expensive so we ended up living with other workers. We might look again but on our wages I just don't think it will be possible" (Interview 005.S).

Similarly, social housing, which is often more affordable than renting in the private sector, is in great demand and is very difficult to access due to long waiting lists (known as housing registers). Local authorities frequently operate points systems, whereby applicants for housing accrue points in accordance with the severity of their housing needs and the length of time they have been registered for housing with the council.[129] Clearly, this is not a viable option for the majority of post-accession migrant workers as it is unlikely that quite recent arrivals would rank highly on a points system which depends, to a large extent, on time spent registered. The Accession Monitoring report confirms this as between May 2004 and March 2005 there were only 43 Local Authority lettings to people of EU8 nationality and only thirteen of these had arrived in the UK after May

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[128] The average house price in the UK is £184,924, in London this figure raises to £306,664. These figures are cited on the BBC website and are taken from 2006 statistics produced by the Land Registry of England and Wales, Registers of Scotland Executive Agency and University of Ulster in partnership with Bank of Ireland <http://news.bbc.co.uk/1/shared/spl/hi/in_depth/uk_house_prices/html/houses.stm> (last accessed 24 November 2006)

[129] Holmans, A., Monk, S., Ni Luanaigh, A. and Whitehead, C., *Building for the Future (2005 Update)*, Shelter Housing Investment Project Series, (Cambridge Centre for Housing Planning Research, 2005). For more information see Shelter website <http://england.shelter.org.uk/policy/policy-961.cfm> (last accessed 24 November 2006)

2004.[130] Two of the respondents interviewed mentioned that social housing was something they would consider applying for in the future. Both associated their need for more suitable housing with their family situation: one was expecting a child and another had a young baby. The following respondent lived with his wife and baby above a Polish Social Club (where he also worked) with a number of other Polish migrants:

"At the moment we have a big room and I think we can spend the next year here. Anyway, a young baby always stays with the parents and we have got a kitchen and a toilet to share with others... after that I am going to have to apply to some housing association or something so we can live normally" (Interview 007.LR).

This discussion demonstrates the point made by Ackers and Stalford that Community law 'only delivers tangible benefits through its engagement with domestic welfare systems'.[131] Of course, the principle of equal treatment is valuable in ensuring that workers and their families are not discriminated against within a national territory. However, the right to non-discrimination effectively results in a 'postcode lottery' both between Member States and between regions within a Member State.[132] Conditions in the host Member State, although not discriminatory in nature, may prevent the realisation of the Community free movement rights by migrants. The difficulty of accessing affordable housing in the UK, although not falling foul of Article 9 of Regulation 1612/68, disrupts the ability of migrant workers to exercise their rights to family reunification

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[130] These figures are taken from an earlier version of the report as the most recent, published in August 2006, does not contain updated statistics on local authority lettings, Joint Report by the Home Office, the Department for Work and Pensions, the Inland Revenue and the Office of the Deputy Prime Minister, *Accession Monitoring Report, May 2004-June 2005*, 23 August 2005, 31

[131] Ackers and Stalford, *Op. Cit.* n.9, 275

[132] *Ibid.*

and, in turn, may be a hindrance to the exercise of mobility rights in general. Seemingly, then:

'The non-discrimination principle is unlikely to smooth the transition of families moving throughout the EU'.[133]

Earlier in this thesis the popularity with UK employers of organised migration schemes which enable them to recruit a number of EU8 workers was acknowledged.[134] One of the features of these schemes is employer-arranged housing were groups of workers often share accommodation. This can be extremely helpful in terms of cost as the rates are often reduced or subsidised by the employer and, given the preceding discussion on the difficulties of accessing housing, this is likely to appear a particularly attractive option. On the other hand, the conditions of living are often poor and many of the respondents who had moved as part of such a scheme spoke of cramped, unclean housing which was situated in an undesirable area. Such conditions, in particular living with other workers, are not amenable to the functioning of family life, particularly when children are involved, and it is arguable that this has discouraged some workers from exercising their right to family reunification.

An employer who had organised such a scheme for his own company confirmed the impression that arranged accommodation was not a privilege extended to the worker's family:

"Well, the company provide accommodation for the drivers but the people with families have to find their own" (Interview 203.RBC).

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[133] *Ibid.*

[134] Chapter three, section 4

Similarly, one of the employment agency advisers confirmed that, in her experience, many employers were not family-friendly:

"They [the workers] go on their own and this is what the employers, maybe 'require' is not the right word, but they can't take their family when they go because the employer provides accommodation only for the candidate. If it is a group of, say, maybe five drivers then the employer rents them a house but it is only for them. There is no space for a wife and kids" (interview 405.NEW).

Unsurprisingly, another employment agency adviser confirmed that those who were most likely to face this type of obstacle to family reunification were those working in the lower echelons of the labour market and, as a result, earning lower wages which did not allow them to break away from the employer and pay for their own housing:

"Very highly skilled people usually get a longer contract and their job conditions and wages are very good so they can take family. Less-skilled people on short contracts with less money? In my experience 99% go alone" (Interview 403.ITC).

This mirrors Raghuram's findings in relation to migrant domestic workers who are frequently required to live in the employer's household and, by doing so, limit the possibility of family reunification for themselves. The author continues to point out:

'They have to wait until they are able to secure some savings... and no longer have to 'live-in' with their employers'.[135]

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[135] Raghuram, *Op. Cit.* n.49, 306

Some of the migrants in the sample were experiencing a similar predicament at the time of interview. In particular, the bus drivers mentioned earlier who had plans for their wives and children to follow them were waiting until they had sufficient means to afford their own home. Similarly one man who had recently been joined in the UK by his fiancée had been prevented from doing so previously by his employer, with whom he lived, due to the lack of space in the employer's home. His official job was working in the employer's pub and restaurant but he also carried out numerous 'odd-jobs' around their home.[136] Eventually they had come to an agreement whereby his fiancée was able to live with him in the employer's accommodation, on the condition that she also carried out some work:

"I have spoken with my employer and I think she will start doing cleaning and then maybe start in the kitchen" (Interview JK.001).

The respondent mentioned earlier, who had been joined by his pregnant girlfriend, had initially been housed in employer-arranged accommodation with other workers. Knowing that his girlfriend would be arriving he had found a flat where they could live alone. However, they were not happy with either the conditions or the price of rent which they were finding difficult to meet:

"When we came here in May we had arranged accommodation from the company but I found it very uncomfortable because it was very small and not suitable. Because I was expecting my girlfriend to come, I decided to move out and find something on my own and I did it and now we live in a rented flat just the two of us but our accommodation conditions could be

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[136] This may reflect a similar phenomenon to that described in chapter four in relation to female domestic workers being 'part of the family' and, hence, never being 'off-duty'

better. We have to pay lots of money for rent, you know it is very expensive to live in Bath. I am wondering about moving to another city but for now I have to fulfil my contract with this company because I am obliged to work for two years here" (Interview 004.M).

The empirical examples given here illustrate that employers' preference for these organised schemes effectively restrict EU8 migrants' right to family reunification. Furthermore, such schemes allow employers to control the workforce to a much greater extent than would be possible if the workers did not live in the employer's premises; not only does such accommodation limit EU8 migrant workers' ability to have their family members live with them, it also represents a form of institutionalisation whereby the workers have restricted opportunity to have an independent existence away from work.

Prior to the adoption of Directive 2004/38 the issue of housing may have had legal as well as practical implications as, under the old regime, the entry of family members was conditional upon the worker having available for them 'housing considered as normal for national workers in the region where he is employed'.[137] This stipulation, which does not appear in the new Directive, applied only at the time of the family's entry. In a case that went before the Court of Justice the German authorities had made renewal of a residence permit conditional upon continued availability of reasonable housing. In holding this unlawful the ECJ referred to the importance of the principle of ensuring family life, as enshrined in Article 8 of the European Convention on Human Rights, and accordingly emphasised the importance of family reunion.[138] Had this provision still been in force it may well have prevented certain EU8 migrants in the UK from having their family

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[137] Article 10(3), Regulation 1612/68

[138] Case 249/86 *Commission v Germany* [1989] E.C.R. 1263, paras. 10-11

members join them. In any event, what this discussion appears to demonstrate is that, although the right of family reunification is formally applicable to EU8 migrant workers in the UK, in reality, it may not be accessible due to the propensity of some employers, who are playing a prominent role in the post-accession migration space, to dictate the living arrangements of their EU8 migrant employees. This is further evidence that the climate within which EU8 migrants have exercised mobility rights in the UK runs counter to the model of family reunification in the free movement provisions.

4. Living together apart: Implications of the culture of family separation

The discussion so far in this chapter has explored the legal framework governing the capacity of EU8 migrants to be joined in the UK by their family members and has sought to juxtapose this formal legal entitlement against EU8 migrants' practical ability to rely on it. Although, clearly, some migrants do move with their families immediately, or are joined relatively quickly by them, it also seems that post-accession migration is currently characterised by a significant trend of family separation. It will be recalled that out of 26 migrants who described themselves as either married or in a long-term relationship, fifteen were separated from their (household) family unit by the migration experience. Similarly, the statistics from the Accession Monitoring Report suggest that the majority of registered EU8 migrants moved without dependants. Separation may occur when the migration experience is intended only to be a temporary venture or where the family engages in staged migration and agree that the worker should be the first to move.

Temporary periods in other countries are said to be a distinguishing feature of migration in the CEE region and it was strongly evident in the author's

empirical work.[139] For example, the 16 return migrants interviewed had spent a relatively short period of time in the UK and many of the current workers spoke of an intention to return. In spite of this, it may be that in the future the migrants' degree of integration increases and they decide to stay on a more permanent basis.[140] Of course family separation may occur even if the migration experience is not intended to be temporary. Commonly, a parent may remain in the home state to avoid disrupting their children's education or to continue their own career.[141] The discussion above has identified a number of constraints on the practical reliance of the right to reunification stemming from the peculiarities of the UK system: the confusion surrounding the ability of EU8 workers to access benefits; the (negative) perception of the British education system; and the lack of appropriate 'family' housing are all factors that contribute to the current culture of family separation. Reunification will often not be practical. Additionally, at the EU level, the rather bizarre restriction on the right of family members to work contained in the Accession Treaty may prevent some from joining the worker.

This section takes a general look at the issue of family separation in that it does not specifically concentrate on either temporary or permanent separation but, rather, explores some of the methods used by families separated by migration to sustain the family unit and facilitate some form of family life. In examining these issues it applies the concept of the

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[139] Kofman, *Op. Cit.* n.3, 250; Okolski, M., 'Incomplete Migration: A New Form of Mobility in Central and Eastern Europe. The Case of Polish and Ukrainian Migrants' in Wallace, C. and Stola, D. (Eds.), *Patterns of Migration in Central Europe*, (New York: Palgrave, 2001), 105

[140] Two of the respondents, for example, described how they initially decided to stay only for a temporary period but had then met their partners in the UK: Interviews 020.H and 017.M

[141] Ackers and Stalford, *Op. Cit.* n.9, 57

transnational family[142] to the experiences of EU8 migrants in the UK. Bryceson and Vuorela define transnational families as:

'Families that live some or most of the time separated from each other, yet hold together and create something that can be seen as a feeling of collective welfare and unity, namely 'familyhood', even across national borders'.[143]

Elements of transnational family life have already been drawn upon in the preceding sections of the chapter. For example, the propensity of family members (often grandparents) to temporarily join their migrating family member(s) to provide help in times of need demonstrates reliance on a family network that transcends the boundaries of the host state. The concept of the 'transnational family' has emerged from the literature on transnationalism[144] that emphasises 'the attachments migrants maintain to people, traditions and causes outside the boundaries of the nation state to which they have moved'.[145] Kofman argues that use of the transnationalism as a conceptual framework for the study of migration encompasses the fluidity which stems from the migrants regularly crossing borders and is able to capture the part played by family networks and strategies.[146] Building on this, Silver recognises that migration, as a

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[142] The concept devised used by Bryceson, D.F. and Vuorela, U., 'Transnational Families in the Twenty-first Century' in Bryceson, D.F. and Vuorela, U. (Eds.), *The Transnational Family: New European Frontiers and Global Networks*, (New York: Berg, 2002), 3

[143] *Ibid.*, 3

[144] See Glick Schiller, N., Basch, L. and Szanton Blanc, C. (Eds.), *Towards a Transnational Perspective on Migration,* (New York: New York Academy of Sciences, 1992); Vertovec, S. and Cohen, R. (Eds.), *Transnationalism*, (Aldershot: Edward Elgar, 1999); Smith, M.P. and Guarnizo, L.E., *Transnationalism from Below*, (New Brunswick: Transaction, 1990); Boyle, P., 'Population Geography: Transnational Women on the Move', (2002) 26(4) *Progress in Human Geography*, 531

[145] Vertovec, S., *Transnational Networks and Skilled Labour Migration*, Paper presented at Migration Conference, Ladenburg, 14-15 February 2002, 4

[146] Kofman, *Op. Cit.* n.3, 244

transnational phenomenon, impacts not only on the migrant but on those family members that remain in the home state:

'Members of transnational families remain linked to one another and experience the process of migration on both sides of the border'.[147]

From this perspective family members are not 'left behind' as migrants consistently maintain ties and allegiances to their home state.[148] Family members continue to be active influences in the migrants lives despite the migration process separating them and modern communication technology, such as telephones and email, 'facilitate the ease of communication among families that span international borders'.[149] Consequently, the influence of family members is likely to be felt much more keenly by migrants today, in the 'informational society'[150] than previously. This was something recognised and appreciated by the respondents. For example:

"Nowadays things are developed so I have contact with my family all the time. We've got webcams so we can see each other, cheap phone calls and emails so I keep in touch quite regularly and it's not like we're confined to letters" (Interview 017.M).

Despite the ease of communication it is unlikely that a family life conducted via means of technology can equally substitute actual physical presence. It would be misguided to use the advent of new means of

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[147] Silver, A., *Families Across Borders: The Effects of Migration on Family Members Remaining at Home*, Paper prepared for the Population Association Meeting of America Annual Meeting, March 30-April 1 2006. Available for download at <http://paa2006.princeton.edu/abstractViewer.aspx?submissionId=61355> (last accessed 24 November 2006)

[148] *Ibid.*, 12

[149] *Ibid.*,42

[150] Bryceson and Vuorela, *Op. Cit.* n.142, 7

communication to undermine the reality that family separation during migration can be a stressful life event. Such separation can reduce the support available to both the migrant and the family members in the home state. There were numerous references made during the interviews to the difficult nature of family separation. The following respondent had been separated from his fiancée but she had recently joined him:

"Now we are closer but sometimes I phoned less because I got tired of giving out the same information like "I'm ok, I have work" and sometimes my fiancée would say "I need you, you must give me support"... I felt guilty. As a man I felt we must live together as a family and not be separated. I left Poland because we were struggling... and I think about making a better life for me and them, but I still felt guilty" (Interview JK.001).

The experience of feeling guilt after leaving family echoes the findings of research carried out on retirement migration by Ackers and Dwyer.[151] Likewise, the following man was separated from his girlfriend who had remained in Poland because of her job. The couple was experiencing some problems in adapting to a transnational relationship:

"A few days ago my girlfriend called me and said that she can't stand not being together... she is in Poland because she has a secure job but she said it is too difficult and she was crying, it was horrible. I thought about going back and, although it was very difficult to decide, I've decided to stay. I can't return to Poland because there is just market research waiting for me which is not really my thing... I told my girlfriend this and she is doing better now. She understood and I think it's going to be easier with time. I hope so because I'm going to stay here five years because I think this will

[151] Ackers and Dwyer, *Op. Cit.* n.66, 49

help the position of both of us for the future. There is high unemployment in Poland and it's very difficult to get a job and, when you get a job, you can't actually expect that you can earn enough money to live on" (Interview 002.PZ).

These are just two of the many instances of distress caused by separation of the family unit in the sample. Earlier on reference was made to a woman that moved to the UK with her six year old son. She found being separated from her husband difficult but it seems that the decision to return to Poland was primarily motivated by the sadness her son felt as a result of being away from his father. This respondent explained how her son used to cry a lot and how, even seven months since they returned to Poland, he often talked about how miserable he had felt in London.[152]

Notwithstanding the stress caused by separation, the overwhelming tendency among the sample of respondents interviewed was for family members to approve of the decision to migrate. In the main the migrant respondents felt that their family had understood, and agreed with, their reasoning that migration had become a necessary means of enhancing their economic status. Such reasoning was also often placed within the context of frustration about the chances of accessing secure and well-paid employment in Poland. Clearly, a supportive attitude on the part of family members can be extremely important for the migrants' sense of security and wellbeing when away from the family unit.[153] The following extracts are representative of the views emerging from the data:

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[152] Interview 314.A. This interview was not recorded at the respondent's request but notes were taken throughout (with the respondent's consent)

[153] Ackers and Stalford, *Op. Cit.* n.9, 140

"My father is very supportive but he wasn't very supportive when I came back! I think he feels that abroad you get a bigger perspective than you do in Poland and the work market is much better. Anyway, they are both liberal and they don't have anything against me moving, I never came across anything negative from them" (Interview 305.S).

"My girlfriend wasn't happy about me leaving but she knew that it was something that would be good for us. It was a decision we made together" (Interview 010.JF).

Migrants who form part of a transnational family and continue to feel a sense of belonging and obligation to the family unit 'back home' essentially live 'between two worlds'.[154] The next two sections will examine ways in which migrants continue to fulfil an obligation to the 'shadow household' in the state of origin during the migration experience.[155] First the issue of remittances is considered and, secondly, the propensity of migrants to return home to care for family is examined.

4.1. Remittances

The previous chapter made reference to the 'contradictory class mobility'[156] experienced by many EU8 migrants who, although experiencing a form of de-skilling, simultaneously experience an improved financial status due to the higher rate of wages in the UK compared to their country of origin. These comparatively higher wages are often partially remitted to separated family members and, therefore, enable the worker to

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[154] Morokvasic, M., ''Settled in Mobility': Engendering Post-wall Migration in Europe', (2004) 77 *Feminist Review*, 7, 16

[155] Boyd, *Op. Cit.* n.1, 643

[156] Parreñas, R., 'Transgressing the Nation-State: The Partial Citizenship and "Imagined (Global) Community" of Migrant Filipina Domestic Workers', (2001) 26(4) *Signs*, 1129

perform a duty to the family remaining in the home state.[157] According to Vertovec, remittances are an exemplary form of migrant transnationalism.[158] They come in the form of cheques/money sent to family members in the post, electronic money transfers or benefits in-kind, such as gifts of consumer goods from the host state.[159] Remittances are a way in which migrants link with their country of origin and, paradoxically considering the often de-skilled status occupied in the host state, can improve their class status (or the family's status) in the home state by providing a greater economic capacity.[160] Remitted funds may amount to a form of cross-national support of welfare or education, for example money used to provide health care for a family member or to cover the cost of private schooling. Ironically, in some instances it may be that a worker sends remittances to his home state to enable his partner to pay a migrant woman to undertake domestic tasks in the home – primarily childcare and household tasks – so that she herself can undertake paid work.[161] Thus, a Polish man in the UK may send money home so that his wife is able to go out to work and avoid the double burden of paid and domestic work by hiring a worker of, for example, Ukrainian nationality (working in Poland's own secondary labour market).[162]

León-Ledesma and Piracha have researched remittances within the specific context of eastern Europe and argue that remittances have played an

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[157] Silver, *Op. Cit.* n.147, 5

[158] Vertovec, *Op. Cit.* n.145, 4

[159] *Ibid.*

[160] Kofman, E., 'Gendered Global Migrations', (2004) 6(4) *International Feminist Journal of Politics*, 643, 651

[161] A situation which exemplifies Ehrenreich and Hochschild's 'global care chain', see Ehrenreich, B. and Hochschild, A.R. (Eds.), *Global Woman: Nannies, Maids and Sex Workers in the New Economy,* (New York: Granta Books, 2003)

[162] Koryś, I., *Migration Trends in Selected EU Applicant Countries: Poland*, (Warsaw: Central European Forum for Migration Research, 2003), 6

important role in poverty alleviation for migrant households.[163] They cite the statistic that in 1999 the total remittance credit for CEE countries was US$7 billion.[164] In Poland, figures from 2003, estimate that US$900 million is remitted by nationals working abroad.[165] There were numerous examples given in the empirical work of remittances being sent to family in Poland, for example:

"Sometimes I send £100 or £200 to Poland which is lot of money but here it's not too much. I try to live here very simple and save to send money but it's my decision to do that... I could also pay for my mother's doctor when she was ill so I think I spend money in a good way. Last month I sent £500 for my daughter because she needed braces and other dental treatment" (Interview 001.JK).

The following respondent had separated from his wife sometime before he arrived in the UK but he still felt an obligation to her as well as his son:

"I have a wife and son in Poland. We are not together anymore but I send money to Poland for them" (Interview 004.M).

In addition to remittances being used to facilitate and sustain family life across borders in the migrant worker's absence there were also a number of instances of migrants using savings upon their return to Poland for family or household uses. This was a popular strategy used by younger migrants who had not yet established any form of family household of their own before the migration experience.[166] For example, the following respondent

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[163] León-Ledesma, M. and Piracha, M., 'International Migration and the Role of Remittances in Eastern Europe', (2004) 42(4) *International Migration*, 65

[164] *Ibid.*, 78

[165] Koryś, *Op. Cit.* n.162, 6

[166] León-Ledesma, *Op. Cit.* n.163, 77

had worked in the UK, as had his wife. They used the temporary migration experience to save up and when they returned to Poland the savings were put towards the costs of buying their own home:

"We saved and we used that money for our house. Just 4 months ago we moved into our house so it was worth it!" (Interview 311.D)

Money earned in the host state, then, can help to sustain family life from a distance or, alternatively, can help to establish and facilitate family life later on.

In addition to the impact on the individual household or family, remittances also have certain socio-cultural and structural consequences for the home economy. For example, Koryś points out that while remittances may lift certain households in a society out of poverty, the corollary of this is that the society as a whole becomes more stratified.[167] The economic gulf between those households with workers abroad and those without becomes greater. In addition, remittances are transferred directly from the worker to the family and, as a result, bypass the national taxation system. From this perspective, they can be seen as representing lost wealth that could have itself been utilised to help strengthen the infrastructure of the home country and its services. A suggestion is that societies become reliant on remittances from migrant workers which, in turn, restricts the development of national business and limits opportunities for growth. Arguments of this nature have been framed largely in the context of developing nations.[168] In the case of Poland, and indeed the EU8 Member States as a whole, it is expected that EU membership itself will help to

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[167] Koryś, *Op. Cit.* n.163

[168] Hoddinott, J., 'A Model of Migration and Remittances Applied to Western Kenya', (1994) 46(3) *Oxford Economic Papers,* 459

strengthen the economies and lead to a gradual alignment of the social structure to a standard more akin to that in the EU15. Therefore it would seem that, although at the present time the trend for remittances is continuing, there is not such a pertinent risk of such long-term dependence on remittances. Indeed, it may be that future trends in relation to remittances fall below the pre-enlargement levels once economic standards in the EU8 have risen.

4.2. Returning home to care

Another key aspect of transnational family life is the phenomenon of caring for family, usually elderly relatives in this context, 'at a distance'.[169] The focus here, then, is not on the impact of separation within the immediate household family but is slightly wider and encompasses the continuing obligations migrant workers feel toward their parents in particular. The free movement provisions, in enabling dependant ascendant relatives to join the worker, assume that older relatives will move to be with the migrant worker should they require care. This is a valuable right and, as has been shown, it is frequently relied upon so that older relatives, typically parents, can *provide* care to grandchildren. This conceptualisation, however, does not appear to fit practically with the experience of some dispersed migrant families when the need to provide care to parents actually arises.[170] Frequently, for example, elderly relatives may not be able, or willing, to leave their country of origin and its familiar infrastructure, such as the health service with which they are linked,[171] and this feeling is likely to be pronounced during a time of illness and/or of

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[169] Ackers and Stalford, *Op. Cit.* n.9, 153; Ackers and Dwyer, *Op. Cit.* n.66, 150

[170] For some examples of successful reliance on this provision see Ackers, *Op. Cit.* n.116, 297

[171] Of course those ascendant relatives that do move to join the worker are entitled access to the health service of the host state on the basis of family members' rights to equal treatment in Article 24 of Directive 2004/38. Certain health care benefits can also be exported from the home state under Regulation 1408/71, *Op. Cit.* n.80. See Hervey, T.K. and McHale, J.V., *Health Law and the European Union*, (Cambridge University Press, 2004), 113-119

frailty. Elderly relatives, particularly those without knowledge of the host state's language, therefore, may not wish to undergo the disruption of a move to a new country.[172] Rather, research suggests that it is principally the migrant worker, or a member of the migrated family unit, who makes (often temporary) return moves to the home state to fulfil the caring obligation.[173] This, rather than the model of reunification enshrined in the free movement provisions, is often perceived as the most viable option to those that find themselves needing to provide care in a transnational context.[174]

The vast majority of the respondents interviewed for this study emphasised the importance of return visits home, often returning to Poland two or three times a year. Moreover, two of the respondents had made temporary visits home in order to care for parents who were ill. One woman had returned to Poland in order to help her mother look after her father;[175] and one man had made return trips to help his sister with the care of their mother.[176] The latter respondent's mother had subsequently died and he explained how he and his sister, who was also working in the UK, had arranged a timetable of care:

"When my mum was very ill in Poland we looked after her. For two months I would go and stay, then for two months my sister would go and stay. At the end my sister stayed for long time and she did most of the

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[172] See Ackers, *Op. Cit.* n.116, 299-301

[173] Ackers and Stalford, *Op. Cit.* n.9, 154; Ackers and Dwyer, *Op. Cit.* n.66; Baldassar, L. and Baldock, C., 'Linking Migration and Family Studies: Transnational Migrants and the Care of Ageing Parents', in Agozino, B. (Ed.), *Theoretical and Methodological Issues in Migration Research: Interdisciplinary, Intergenerational and International Perspectives,* (Aldershot: VR, 2002) 61, 70

[174] Ackers, *Op. Cit.* n.33, 384

[175] Interview 012.GP

[176] Interview 001.JK

caring then. My father was not a good carer for my mum and even now this makes me angry when I think about it" (interview 001.JK).

His acknowledgement that his sister shouldered the bulk of the caring responsibility towards the end, and his father's apparent unwillingness to engage in any meaningful care-giving, perhaps reflects the gendered nature of caring responsibilities which has been acknowledged elsewhere.[177] Of course this should not detract from the valuable contribution the respondent made towards his mother's care needs. It simply makes the point that, typically, female siblings carry out, and are *expected* to carry out, more of the care-giving than male siblings.[178] As Ackers points out, however, it is not always possible to make return trips as such occurrences may require the migrant to give work up in the host state and/or cause disruption to their immediate family unit who have joined them.[179] Parents, again women in particular, with young children attending school in the host state may be particularly restricted in their ability to 'up and leave' for temporary periods. In such instances it is common for the absent worker to contribute in other ways, such as by remitting funds to cover the costs of institutional care or helping to organise support by telephone or the use of online resources.

The obligation to provide care for kin (usually parents) transnationally, either physically or by other methods, is felt keenly by migrant workers. Thus it is not only separation from their own immediate household family members, such as a spouse/partner and children, but also separation from the family in general that can cause distress. Accordingly, those respondents in the sample that described themselves as single also may

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[177] Ackers, *Op. Cit.* n.116, 295

[178] *Ibid.*

[179] *Ibid.*, 302

have suffered as a result of family separation, albeit separation from extended family.

The data which has emerged in the post-accession UK environment so far suggests that the majority of migrants from the EU8 Member States are single and do not have dependant family members with them. Consequently, the transnational family model would appear to reflect the way in which many EU8 migrants have conducted their family life after migrating to the UK.

5. Conclusion

This chapter has sought to explore the various ways in which EU8 migrants facilitate and sustain family life after exercising the right to mobility and taking up work in the UK. The free movement provisions extend valuable rights of reunification and equal treatment to the worker's family members which, undoubtedly, allow many migrant families to maintain an effective family life after migration. Family reunification, however, is not always a model of family life accessible to all migrants as various constraints, social and legal, can work together to restrict the ability of family to join the worker. In the UK context, for example, it has been shown that the practical reality for many post-accession migrants who are housed in accommodation arranged by their employers is that there is simply not adequate space, or even suitable standards of living, for their family to join them. Again in the UK context, the ambiguities in the post-accession migration regime and confusion surrounding the benefit restrictions may conspire to convince to EU8 migrant workers that, should their family join them, they will have no entitlement to access any benefits or welfare services which are often of crucial concern, particularly for those with children. In this respect, the legal and social climate in the UK challenges the ideology behind the extension of family reunification (and

related) rights to EU migrant workers – that of facilitating the mobility of the worker. Despite the benefits of family reunification for a migrant worker's integration into the host society, it is often not realistic for EU8 workers to establish a family life in the UK. The discussion has also shown, however, that often extended 'non-household' family members, although outside the scope of the legal provisions, do fulfil such an integrative function.

Those who do exercise the right to family reunification, on the other hand, live in the host society within the operation of the non-discrimination principle. The right to equal treatment with nationals of the host state is an extremely worthy right and does enable the migrant family to access various services and welfare entitlements which contribute to the facilitation of family life and the welfare of its members. Arguably, however, on some occasions this principle may not provide migrant families with the resources or ability to fully integrate into the society and maintain a sufficiently high level of family life. Again, housing provides a good example within the UK context as the lack of affordable family housing is a feature of life in the UK and, arguably, EU8 migrants feel the impact of this just as much, if not more, than nationals do due to the apparent de-skilled status many currently occupy.

The various constraints on the ability of people to exercise rights to family reunification may be encouraging a culture of family separation with family members remaining, initially at least, in the home state. Of course, this is not to deny that many choose to maintain transnational links for reasons not related to the social and practical constraints on the right to reunification. For example, those who plan to stay only temporarily in the UK may have little interest in having family follow them and, again, temporary stays do appear to be quite a popular pattern of migration from

the CEE region at the current time. The qualitative work, however, did clearly evidence a longing on the part of workers for family members to join them which was being frustrated by housing constraints, and (often misguided) perceptions as to their welfare entitlement. Operating a transnational family life does enable migrant workers to sustain relationships with people, contribute financially to the family unit 'at home' and even, in some instances, continue to care for family members. In this respect the obligation felt towards family members does not diminish and with developed communication technology the influence of family in the home state on migrants is felt more than ever before. Physical separation, nevertheless, even for short periods can be a painful and stressful experience both for the migrant and the family who remain at home.

Like other phenomenon explored in this thesis the discussion about family life in the aftermath of post-accession migration to the UK is somewhat time-specific due to the timing of the qualitative work and reliance on statistics produced a year after the enlargement took place. An exploration of family life during this period is useful, nonetheless, as it provides an initial picture of the degree to which the Community's model of family reunification is being utilised by EU8 migrants. This can be compared to patterns and trends which emerge later on as the EU8 become more integrated and, importantly, as the transitional restrictions are lifted in other Member States across the Union.

Chapter six

CITIZENSHIP IN THE CONTEXT OF EU ENLARGEMENT: EU8 MIGRANTS AS UNION CITIZENS*

1. Introduction: Union citizenship as a concept and its link to mobility

The concern in this chapter is to take a closer look at the relationship between EU8 nationals and the evolving status of Union citizenship. The previous chapters have illustrated how mobility rights and contingent social entitlement of workers and their families flow from the free movement of persons provisions. As these provisions constitute a central, if not the central, facet of Union citizenship, one of the main objectives of this chapter is to explore the impact of restricted mobility rights during the transitional period on the citizenship status of nationals from the EU8 countries.

It is necessary, first, to determine what is meant by 'citizenship' in the context of the EU. Citizenship in a broad sense, although it remains somewhat of a contested concept,[1] refers to membership and participation in a community;[2] additionally, it denotes both entitlements and responsibilities which attach to the citizens who belong to the said community (usually the nation-state).[3] Citizenship then, formally, is a legal status but 'in its fullest sense it is the culmination of incorporation

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* A version of part of this chapter (section 3) has been published in Currie, S., ''Free' movers? The Post-Accession Experience of Accession-8 Migrant Workers in the UK', (2006) 31 *European Law Review*, 207

[1] Faist, T., 'Social Citizenship in the European Union: Nested Membership', (2001) 39(1) *Journal of Common Market Studies*, 37, 40

[2] Marshall, T.H., *Citizenship and Social Class*, (Cambridge: Cambridge University Press, 1950)

[3] Kofman, E., 'Citizenship for Some but not for Others: Spaces of Citizenship in Contemporary Europe', (1995) 14(2) *Political Geography*, 121, 122

into a society'.[4] Bellamy has identified rights, participation and solidarity as the key components of contemporary citizenship.[5] More specifically it is civil rights, particularly those that protect individual autonomy and family life; the right to engage in the political process; and to access social rights, such as education and social assistance, that are most crucial to an understanding of modern citizenship in its broad sense. This understanding, of course, has been established predominantly in the context of national citizenship. The notion of Union citizenship,[6] which has its own distinctive features, complements (rather than replaces) national citizenship[7] and is now formally articulated in Articles 17-22 EC after a chapter on citizenship was agreed and inserted into the Treaty of Maastricht in 1992.[8] The formal creation of the citizenship provisions was part of an aspiration to increase the legitimacy of the European project and to further the integration of EU nationals living in Member States other than their own.[9] Essentially, the policy concern, of the European Commission in particular, was to bring 'Europe closer to its citizens'.[10]

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[4] *Ibid.*

[5] Bellamy, R., 'Introduction: The Making of Modern Citizenship' in Bellamy, R. *et al* (Eds.), *Lineages of European Citizenship: Rights, Belonging and Participation in Eleven Nation States*, (Basingstoke: Palgrave Macmillan, 2004), 1, 6

[6] See Shaw, J., 'The Many Pasts and Futures of Citizenship in the European Union', (1997) *European Law Review*, 554; Shaw, J., 'The Interpretation of European Union Citizenship', (1998) 61(3) *Modern Law Review*, 293

[7] Article 17(2) EC

[8] For more detail on the background behind the inclusion of citizenship see O'Leary, S., *The Evolving Concept of Community Citizenship* (The Hague: Kluwer, 1996); also, the Tindermans Report on the European Union, produced at the request of the Paris summit in 1974, included a chapter entitled 'Towards a Europe for Citizens' (Bull.EC.(8) 1975 II no.12, 1)

[9] Chalmers, D., Hadjiemmanul, C., Monti, G. and Tomkins, A., *European Union Law Text and Materials* (Cambridge: Cambridge University Press, 2006), 566-568; Ackers, L. and Dwyer, P., *Senior Citizenship? Retirement, Migration and Welfare in the European Union*, (Bristol: The Policy Press, 2002), 16-18

[10] Ackers and Dwyer, *Ibid.*, 17. It is outside the scope of this chapter to give a detailed overview of the history of Union citizenship but see O'Leary, *Op. Cit.* n.8; Wiener, A., *'European' Citizenship Practice: Building Institutions of a Non-state*, (Boulder: Westview, 1998)

Article 17 EC clarifies who is able to access the status of citizenship of the Union. Perhaps it is more appropriate to say this provision makes clear that it is the individual *Member States* that determine which individuals gain access to the status as 'every person holding the nationality of a Member State shall be a citizen of the Union'. This demonstrates the exclusionary nature of Union citizenship as for the many third-country nationals resident in EU Member States it has been an unattainable status and a community within which they have not been able to attain full membership or participation. By its very nature citizenship lays down boundaries between those who are included and those who are excluded.[11] One issue that this chapter seeks to explore is whether EU8 nationals, despite now being nationals of a Member State, remain excluded from full membership and participation within the EU community.

The citizens' rights established in the 'citizenship chapter' agreed at Maastricht include, in Article 18 EC, the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down by the Treaty and the measures adopted to give it effect. There is also the right to vote in local and European elections in the host state (Article 19 EC);[12] the right to diplomatic and consular protection from the authorities of any Member State in third countries (Article 20 EC); and the right to petition the European Parliament and the right to apply to the ombudsman in any one of the official languages of the EU (Article 21 EC). This constitutionalisation of the notion of Union citizenship clearly resonates with the notion of free movement as the

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[11] Kofman, *Op. Cit.* n.3, 121

[12] It is not the intention here to discuss aspects of political citizenship. See Lardy, H., 'The Political Rights of Union Citizenship', (1997) *European Public Law*, 111; Shaw, J., 'Sovereignty at the Boundaries of the Polity' in Walker, N. (Ed.), *Sovereignty in Transition*, (Oxford Hart, 2003), 461; Shaw, J. and Smith, M., 'Changing Polities and Electoral Rights: Lithuania's accession to the EU' in Shah, P and Minski, W. (Eds), *Migration, Diasporas and Legal Systems in Europe*, (London: Routledge, 2006), 145

applicable rights, notwithstanding Article 18 EC itself, are exercisable only outside of the citizen's home state.[13] In addition, Shaw makes the point that the formalisation of Union citizenship at Maastricht:

'was essentially the beginning of a new stage in an on-going process of development of the status of the individual under Community law which had involved inputs from the Court of Justice, and especially its constitutionalisation of the free movement provisions and the right to non-discrimination on the grounds of nationality...'[14]

Citizenship, therefore, stretches further than the articulation in Articles 17-22 EC to incorporate the traditional 'economic' free movement provisions,[15] read alongside the extensive interpretation provided by the ECJ of the social rights of economic migrants. It also finds expression via the equal treatment principle in Article 12 EC and various pieces of secondary legislation.[16]

Union citizenship thus bestows a series of political, civil and socio-economic rights, which in some respects resembles the national citizenship model, but there can be no doubt that free movement is the trigger for any meaningful relationship with Union citizenship. Ackers and Dwyer stress that not only is mobility a right that citizens can access in itself, it also constitutes the trigger to other forms of social entitlement, a 'basket of goods', that come into play while that right is being exercised,[17] most

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[13] The Court has confirmed that the citizenship provisions are not applicable in wholly internal situation, see Cases 64/96 and 65/96 *Uecker and Jacquet* [1997] E.C.R. I-3171

[14] Shaw, J., 'The Many Pasts and Futures of Citizenship in the European Union', (1997) 22(6) *European Law Review*, 554

[15] Articles 39, 43 and 49 EC

[16] Now most notably Directive 2004/38 [2004] O.J. L158/77, and Regulation 1612/68 [1968] O.J. L257/2

[17] Ackers and Dwyer, *Op. Cit.* n.9, 3

notably welfare and family rights.[18] They go on to make the point that the development of citizenship has, essentially, taken place alongside the evolution of mobility rights:

'In the absence of mobility, citizenship of the Union contributes little to the social status and day-to-day experience of Community nationals'.[19]

It is this interrelationship between rights of mobility and citizenship that demands some discussion of the extent to which the transitional arrangements, by limiting the ability of EU8 nationals to rely on Article 39 EC and move as workers, effectively excludes them from full access to the status of Union citizenship. Section two of the chapter attempts to address this point. It opens with an examination of the impact of the transitional restrictions on the traditionally privileged category of economic migrant workers who, undoubtedly, occupy a less-privileged status during the transitional period. It then goes on to explore the relationship that EU8 nationals have with Article 18 EC and broader free movement rights that flow from it. Given that the Accession Treaty refers specifically to the right of Member States to restrict the free movement rights of *workers* it may well be that nationals from the newest Member States can rely on the right of EU *citizens* to move freely, albeit subject to the more stringent limitations and conditions. In examining the links between EU8 nationals and the different sites of free movement in the EC Treaty there is also scope to trace the development of Union citizenship from a predominantly market-based status (attaching only to those 'worthy' economic migrants connected to the functioning of the Internal Market) to an arguably more inclusive and social conception of citizenship. The latter understanding of

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[18] For example workers' rights of family reunification under Directive 2004/38 (discussed in chapter six), or entitlement to social benefits pursuant to Article 7(2), Regulation 1612/68

[19] Ackers and Dwyer, *Op. Cit.* n.9, 3

citizenship provides scope for economically inactive migrants to gain a degree of access to the status of citizenship and the valuable rights that append to it.

In section three the discussion links with earlier aspects of the thesis by focussing specifically on the UK as a frame of reference. There is examination of the potential impact of the developing law on citizenship and its application to EU8 migrants who are not economically active in the context of the UK post-accession rules. In particular, there is a case study on migrant workseekers and speculation about the impact of developments in the caselaw on citizenship, as well as the new Directive on citizens' free movement rights, for this group in the UK.

Union citizenship, with its reliance on free movement as a central trigger to entitlement, as opposed to a primary reliance on political rights,[20] appears to have quite different characteristics to the kind of national citizenship described above with reference to Bellamy's classification of rights, participation and solidarity.[21] However, as this thesis has already demonstrated, and as the discussion here will illustrate further, the free movement provisions have provided a fertile site for the development and extension of social rights seen as necessary to facilitate the movement and establishment of migrant workers.[22] Similarly, the recent caselaw interpreting Article 18 EC in conjunction with Article 12 EC has enabled welfare entitlement to be extended to non-worker migrants under certain conditions.[23] In this respect there is at least a modicum of 'solidarity'

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[20] Everson, M., 'The Legacy of the Market Citizen' in Shaw, J. and More, G. (Eds.), *The New Legal Dynamics of European Union,* (Oxford: Clarendon Press, 1995), 73, 74

[21] Although Articles 19-21 EC do provide some 'civil' rights and rights of political participation for those citizens in a Member State other than their own

[22] See chapter five, section 3 above

[23] Discussed below. See, for example, Case C-85/96, *Martinez Sala* [1998] E.C.R. I-2691; Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193

evident in the developing citizenship caselaw. Indeed, authors have drawn a link between the recent emphasis on a 'social Europe' and Marshall's seminal work on citizenship which highlighted the development of social rights as the maturity of a relationship between the state and the people.[24] There is then, it seems, a degree of social citizenship[25] evident in the evolving or maturing arena of Union citizenship. This chapter will touch upon the extent to which social solidarity under the auspices of free movement is, or may possibly be, extended to EU8 migrants. Citizenship, therefore, in the context of this discussion - and indeed the thesis as a whole – is measured in terms of the residence rights extended to migrants and the consequent ability to rely on the principle of non-discrimination in the host state in order to access various social rights and benefits.[26]

2. Second class citizenship? The status of EU8 nationals in the light of transitional restrictions on free movement

Some of the discussions surrounding the 2004 enlargement were couched in quite symbolic terms referring to the post-communist CEE countries' 'return' to their rightful place in Europe.[27] This literature portrays the extension of free movement rights as holding particular significance for the citizens of the EU8 Member States on account of the specific historical and

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[24] For example, Shaw, *Op. Cit.* n.14; Ackers and Dwyer, *Op. Cit.* n.9, 16

[25] On social citizenship see, Everson, *Op. Cit.* n.20

[26] Enshrined in Article 12 EC. Note that here the terms 'non-discrimination' and 'equal treatment' are used interchangeably to refer to the principle in Article 12 EC. The author acknowledges the point that, in practice, the right of individuals not to be discriminated against may not necessarily result in them being treated on an equal footing with nationals but there is insufficient scope in this thesis to consider this in any depth. See the literature on the 'substantive versus formal equality' debate including, *inter alia*, Barnard, C. and Hepple, B., 'Substantive Equality', (2000) 59 *Cambridge Law Journal*, 562; Fredman, S., 'Equality: A New Generation?', (2001) 30(2) *Industrial Law Journal*, 145. On the notions of equal treatment and non-discrimination in EU law see Numhauser-Henning, A. (Ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, (The Hague: Kluwer, 2001)

[27] Kengerlinsky, M., 'Restrictions in EU Immigration Policies towards New Member States', (2004) 2(4) *Journal of European Affairs*, 12; Maas, W., 'Free Movement and EU Enlargement', Paper prepared for the Fifth Biennial Conference of the European Community Studies Association, Toronto, Canada, 31 May-1 June 2002

socio-political background of the respective countries; specifically, under communism citizens of the CEE countries were subject to mobility restrictions, even between regions within a single state.[28] For example, prior to enlargement, in 2002, Maas argued that:

'For individual citizens in the candidate accession countries, freedom of movement is without a doubt a key symbol of the 'return to Europe' that EU accession represents. Citizens of applicant Member States regard the freedom of movement that EU citizens enjoy as remarkable when contrasted with the limits to movement they experienced under communism'.[29]

Given the symbolic importance of free movement, and the significance of mobility to citizenship, it is not surprising that the consequent failure to extend the right of free movement in full has led some to comment that EU8 nationals are, initially at least, relegated to a status of second class Union citizenship.[30] Reich, for example, comments that a seven-year postponement of free movement rights does not conform to the 'spirit of creating a greater Europe after the fall of the Soviet regime'.[31] The remainder of this section explores this assertion in greater detail.[32]

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[28] Petev, V., 'Citizenship and *Raison D'État.* The Quest for Identity in Central and Eastern Europe' in La Torre, M. (Ed.), *European Citizenship: An Institutional Challenge*, (The Hague: Kluwer, 1998), 83; Maas, *Ibid*

[29] Maas, *Op. Cit.* n.27, 2

[30] Maas, *Op. Cit.* n.27; Carrera, S., 'What Does Free Movement Mean in Theory and Practice in an Enlarged EU?', (2005) 11(6) *European Law Journal*, 699

[31] Reich, N., 'The European Constitution and New Member Countries: The Constitutional Relevance of Free Movement and Citizenship', Paper presented at the Centre for European, Comparative and International Law's Annual Lecture, University of Sheffield, 26 February 2004, 16

[32] Thus the discussion in section 2 is broader than that in the majority of the thesis (and indeed than the focus in section 3 of this chapter) as it extends to EU8 migrant citizens (as opposed to merely workers) and applies to the EU15 (not simply the UK)

2.1. Migrant workers under the transitional arrangements: downgraded citizenship status

The transitional arrangements on the free movement of persons allow EU15 Member States to derogate from Articles 1-6 of Regulation 1612/68[33] in respect of EU8 nationals.[34] It is these provisions which enable nationals of the Member States to access the labour markets of the other Member States and, hence, these provisions are the main source of an EU migrant worker's mobility and employment rights. By permitting the old Member States to deny labour market access to EU8 nationals the transitional restrictions have the effect of rendering the Community law status of 'worker' inapplicable to the vast majority of the new EU citizens. As has been demonstrated throughout the entire thesis, those who qualify as a worker[35] enjoy extensive citizenship rights in the form of secure residence in the host society[36] and, furthermore, contingent social rights such as family and welfare entitlement.[37] The extensive nature of migrant workers' citizenship standing under Community law is illustrated further by the ability of the status to have continuing effects after the employment relationship has come to an end.[38] Directive 2004/38, for example, now makes clear that the status of worker, which includes the right to reside and the attached social rights, continues to apply in the aftermath of a worker

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[33] [1968] O.J. L257/2

[34] See chapter three on the operation of the transitional restrictions on free movement

[35] Pursuant to the test laid down in cases such as Case 66/85 *Lawrie Blum* [1986] E.C.R. 2121 of 'for a certain period of time performing services for and under the direction of another person in return for which remuneration is received'

[36] Pursuant to Article 39 EC. Previously Directive 68/360 [1968] O.J. L257/13 articulated the procedural requirements connected to the right to reside, now Directive 2004/38 contains the relevant rules. See chapter four and the discussion on EU8 domestic workers in the UK

[37] Pursuant to the non-discrimination principle enshrined in Article 39 EC (and Article 12 EC) and expressed in specific provisions of the secondary legislation such as Article 7(2), Regulation 1612/68 (and ensuing caselaw), Case 207/78 *Even* [1979] E.C.R. 2019; Case 32/75 *Fiorini v SNCF* [1975] E.C.R. 1085; Case 65/81 *Reina* [1982] E.C.R. I-33; Case 59/85 *Netherlands v Reed* [1986] E.C.R. 1283. See chapter five for discussion of the family rights accessible to EU8 migrant workers who have entered the UK labour market

[38] Although this is one dimension of the worker status that the UK attempts to restrict during the transitional period, see chapter three and later on in this chapter

being made (involuntarily) unemployed, not being able to work due to illness or an accident, or embarking on vocational training.[39] This contrasts with the less secure situation of those migrants who move without any 'economic' link, discussed below, whose rights of residence are much more circumscribed.

Before the discussion examines the impact of the transitional arrangements on the citizenship status of EU8 nationals, the following subsection details the 'usual' typology of free movement entitlement that applies to the different categories EU migrant citizen.

2.1.1. Differentiated rights for Union citizens

Community law bestows different citizenship 'packages' on different categories of migrant citizens and, given the Union's economic origins, this has conventionally been determined by the particular category's degree of connection to the functioning of the Internal Market. Thus, the traditional approach to citizenship attaches primacy to the relationship between the individual and the labour market.[40] Ackers has argued that:

'A Community citizen's access to rights and benefits in the host Member State depends on them demonstrating membership of one or more 'classes'

[39] Article 7(3), Directive 2004/38. The provision enshrines the decision in Case 39/86 *Lair* [1988] E.C.R. 3161 so that in cases of voluntarily unemployment, were the migrant has enrolled on a vocational course, the training should be related to the previous employment. Note that a provision in the Accession Treaty allows EU15 Member States to withdraw the rights of EU8 nationals who become voluntarily unemployed during the transitional period: Article 24 of the Act of Accession [2003] O.J. L236/33, para. 2, Annexes. It is not entirely clear how the provisions relate but, in the event of an EU8 migrant worker leaving a job to take up a vocational course, the Member State may attempt to rely on the Accession Treaty during the transitional period to expel the migrant.

[40] Ackers and Dwyer, *Op. Cit.* n.9, 13

of persons, the membership of which gives rise to a distinctive citizenship status based upon an identifiable body of Community law'.[41]

Workers usually stand at the summit of the citizenship hierarchy[42] alongside the other citizens, the self-employed and those providing services, also exercising one of the Community's fundamental freedoms.[43] Also at the summit are those retired citizens exercising their right to remain in a Member State where they have worked.[44] Citizenship, as mentioned earlier, is usually thought of as conferring rights *and* duties. One way of interpreting the traditionally privileged status of market citizens is to view their economic activity as, essentially, a duty fulfilled. Under this analysis, it is their economic contribution to the host Member State that has granted them the right to claim the various social entitlements including access to the extensive non-discrimination principle.[45] However, the very 'absolute' nature of the worker status which emerges from the ECJ's caselaw undermines this understanding somewhat. The ECJ has adopted an extremely broad understanding of who will constitute a worker so that those who receive wages lower than the official subsistence level in a Member State,[46] or, those who require additional public funds to supplement their wages[47] still acquire the very privileged status despite the contribution they make, in economic terms, being limited in nature. If a worker is classified as undertaking effective and genuine work their

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[41] Ackers, L., *Shifting Spaces: Women, Citizenship and Migration within the European Union'*, (Bristol: Policy Press, 1998), 111

[42] *Ibid.*

[43] It is not the intention here to consider establishment or the provision of services in any detail

[44] Pursuant to Regulation 1251/70 [1970] O.J. Sp. Ed. L143/24

[45] Ackers, *Op. Cit.* n.41, 111. Although, as will be demonstrated, more recent developments in the citizenship law has led to those without such economic 'value' gaining access to the principle of equal treatment

[46] Case 53/81 *Levin* [1982] E.C.R. 1035

[47] Case 139/85 *Kempf* [1986] E.C.R. 1741

residence and equal treatment entitlement is (almost) unconditional in nature.[48]

Arguably, the family members of the market citizens described above have occupied the next rung down the ladder. Despite the derivative nature of family members' status it has been a far-reaching one (as was demonstrated in chapter five) thanks often to the ECJ's interpretation of secondary legislation which extended the worker's package of entitlement also to the family under the facilitating mobility test.[49] Directive 2004/38 has also solidified somewhat the status of family members by explicitly extending the right of equal treatment to them.[50]

Under the economic paradigm the bottom rung has been reserved for those with little, or any, connection to the Internal Market. This includes retired persons who exercise mobility rights after ending their occupational life in their own Member State (and thus have no 'right to remain' in any host Member State), students and the financially independent. The rights of these economically inactive citizens are dealt with in more detail below in relation to the status of EU8 non-workers; suffice it to say for now that the status is much less secure than that of the market-citizen worker. In particular, their rights of residence have been subject to the twin requirements of possessing sufficient resources so as not to become a burden on the public assistance of the host Member State and of having taken out a policy of sickness insurance in the host state for themselves and

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[48] Subject to the, strictly defined, derogations on the grounds of public policy, public security and public health now detailed in Article 27-33, Directive 2004/38; previously the position was dealt with under Directive 64/221 [1964] O.J. Sp. Ed. L850/64

[49] For example, Case 207/78 *Even* [1979] E.C.R. 2019. See chapter five

[50] Article 24, Directive 2004/38

their family.[51] The equal treatment rights of such citizens have also been more heavily circumscribed. In relation to students, for example, in *Brown* it was decided that, at that stage in the development of Community law, there was no anti-discrimination protection available in the area of maintenance or training grants.[52] Article 3 of Directive 93/96 confirmed this position. However, as will be demonstrated later, the ECJ was able to interpret the provisions of Community law to enhance the equal treatment rights of students (and other non-economically active citizens) following the introduction of Article 18 EC.[53] For our purposes here it is sufficient to note that such non-market citizens are accorded a less comprehensive status than workers.

One final group of migrants to be situated in the hierarchy are workseekers (this category is also important to the discussion later on about the citizenship status of EU8 migrants in the UK). Community law has traditionally regarded workseekers as semi-workers. The Court has held that if Member State nationals could only move for purposes of accepting offers of employment, then the free movement of workers would be significantly hindered.[54] EU nationals have, therefore, been afforded the right to move freely to other Member States and reside there for the purpose of seeking employment. The Court in *Antonissen* further secured the position of workseekers by stating that they should be granted a reasonable period in which to find work[55] and that, as long as the workseeker could show he or she was continuing to seek employment and

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[51] Retired persons: previously Directive 90/365 [1990] O.J. L180/28; Students: previously Directive 93/96 [1993] O.J. L317/59; Financially-independent persons: previously Directive 90/364 [1990] O.J. L180/26. Now the free movement rights of all citizens are set out in Directive 2004/38

[52] Case 197/86 *Brown* [1988] E.C.R. 3205

[53] For example, Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193; Case C-209/03 *Bidar* [2005] E.C.R. I-2119

[54] Case C-292/89 *Antonissen* [1991] E.C.R. I-745

[55] 6 months was suggested as a reasonable period of grace, *Antonissen*, para 21

had genuine chances of being engaged, the right of residence could continue.[56] Thus the residence status of workseekers appears relatively secure and one could argue that they sit just beneath workers on the citizenship ladder, especially given that they enjoy a (future) connection to the labour market. The equal treatment rights of this group, however, seem to more mirror those sitting at the bottom of the ladder. In effect, as with students, the approach of the ECJ was initially restrictive, holding that workseekers' rights of equal treatment only applied to accessing employment and not to any 'social advantages'.[57] Again, the Court's jurisprudence on the cumulative impact of Articles 18 and 12 EC has enabled workseekers to enjoy greater access to the non-discrimination principle thus enhancing their citizenship status.[58] As will be demonstrated below, however, the current status of this group (along with that of students) is complicated by the provisions of Directive 2004/38 which attempts to deny equal treatment as regards social assistance to workseekers (and as regards maintenance grants for students).[59] In some respects, then, for the time being the position of workseekers is slightly unclear as it is difficult to predict how the Court will interpret the provisions of Directive 2004/38. For now we will place them tentatively at the midway point, just beneath the family members of the market citizens as, although their status as regards the right to non-discrimination is ambivalent, their right to reside whilst genuinely seeking work is secure and not subject to the resources requirement.

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[56] Directive 2004/38, on the whole, confirms this position. Although the general right of residence applies for only 3 months (Article 6) it is made clear in Article 14(4)(b) that a Union citizen cannot be expelled so long as they are continuing to seek employment and have genuine chances of being engaged

[57] Case 316/85 *Lebon* [1987] E.C.R. 2811

[58] Case C-138/02 *Collins* [2004] E.C.R. I-2703

[59] Article 24(2), Directive 2004/38

2.1.2. The place of EU8 nationals in the citizenship hierarchy

As a result of the transitional arrangements on free movement EU8 migrants experience a different kind of citizenship status and an altered, and somewhat more complex, hierarchy emerges.[60] What the transitional restrictions do, essentially, is hamper the capacity of nationals from the EU8 Member States to migrate under the sponsorship of one of the traditional 'economic' Community provisions – Article 39 EC. Articles 43 and 49 continue to apply so that EU8 nationals are free to move to the EU15 to establish a business or to provide (or receive) services[61] but there can be no doubt that the denial of worker status dents the citizenship status of EU8 nationals; certainly, it reduces their potential to be *market* citizens.

The place of workers, as a category of free movers, is relegated on the citizenship scale during the transitional period. Furthermore, due to the particular design of the transitional arrangements workers do not have a uniform entitlement to residence across the EU15 Member States. As it is for individual EU15 Member States to determine whether or not they restrict labour market access, the citizenship status of EU8 nationals differs between Member States.[62] Furthermore, the transitional arrangements may have a negative impact on the citizenship status of EU8 migrants even in those Member States that have not restricted labour market access. The UK, for example, allows (and has encouraged) EU8 migration but simultaneously, under the supposed auspices of the transitional arrangements, attempts to limit the application of the 'worker' status

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[60] See Stalford, H., 'The Impact of Enlargement on Free Movement: A Critique of Transitional Periods', Paper presented at the Third Meeting of the UACES Study Group on the Evolving EU Migration Law and Policy, University of Liverpool, 5 December 2003

[61] Although, Austria and Germany are entitled to apply national measures to address serious disturbances or the threat thereof, in specific sensitive sectors of their labour market, see para. 13, Annexes

[62] See chapter three for an overview of the EU15 Member States' policies

strictly to the period when the migrant is in work and registered on the WRS.

One consequence of the transitional arrangement's focus on workers as a category of migrant is to enhance the importance of the distinction between workers and the self-employed. There may be a 'grey zone'[63] in some instances as to whether the work being carried out is under the direction of another, and hence is in the capacity of an employee, or is carried out independently and is thus is carried out as a self-employed person.[64] In any event, those EU8 nationals who do exercise a right to establishment (or provide services) are entitled to take their place at the top of the hierarchy.[65] Those EU8 workers called upon by certain of the EU15 Member States to fill gaps in their labour markets - such as the UK, Ireland and Sweden – and those who gain access to other of the EU15 Member States on an individual basis do (for example by means of obtaining a work permit), in theory at least, sit at the top of the ladder as once access is secured the principle of non-discrimination as regards social advantages[66] applies in full under the transitional arrangements.[67] However, the reality of such workers' experience may be quite different, as the UK's stance under the transitional arrangements demonstrates. The UK attempts to limit the citizenship status of EU8 workers by denying rights of residence

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[63] Adinolfi, A., 'Free Movement and Access to Work of Citizens of the New Member States: The Transitional Measures', (2005) 42 *Common Market Law Review*, 469, 490

[64] See, *inter alia*, Case C-268/99, *Aldona Malgorzata Jany* [2001] E.C.R. I-8615

[65] Although it does need to be acknowledged that the position of service providers (and recipients), as *non-residents*, is not completely analogous to that of *resident* workers and self-employed persons. See Van Der Mei, A.P., *Free Movement of Persons Within the European Community: Cross Border Access to Public Benefits*, (Oxford: Hart, 2003)

[66] Article 7(2), Regulation 1612/68 [1968] O.J. L257/2

[67] Note, however, the continuing application of the safeguard clause which enables the EU15 to resort to transitional measures at any point during the transitional period (Act of Accession [2003] O.J. L236/33; para. 7, Annexes). It is unlikely, however, that the invocation of this safeguard would sanction the expulsion of those that had already gained access to the status of worker in the territory

and equal treatment should the employment relationship come to an end which, as was mentioned earlier, is a privilege extended to migrant workers under Community law.

EU8 migrant students, retired persons and economically self-sufficient individuals enjoy access to a higher position in the hierarchy than do workers not required by the EU15 because the transitional mobility restrictions do not apply to these groups. This clearly demonstrates the reversal of citizenship fortune experienced by workers during the transitional period who, essentially, are downgraded to the bottom of the hierarchy.[68] As a corollary of the worker's demotion the family members of such citizens also occupy a less-privileged status during the transitional period. Indeed, the status of family members is downgraded to an even greater extent under the Accession Treaty as the transitional arrangements enable the EU15 Member States to prevent family members from working for a period of 18 months or until three years after the date of accession (whichever date is earliest),[69] whereas the standard Community law position is for family members to enjoy immediate labour market access.[70]

EU8 workseekers similarly occupy a lower citizenship status than their EU15 counterparts. Interestingly, however, residence rights of workseekers flow directly from Article 39 EC itself rather than from the secondary legislation.[71] Arguably then, workseekers' residence rights fall outside the scope of the permitted derogations in the Accession Treaty, the main focus of which is Articles 1-6 Regulation 1612/68 *not* Article 39 EC

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[68] Stalford, *Op. Cit.* n.60, 10

[69] Para. 8, Annexes

[70] Article 23, Directive 2004/38; previously Article 11, Regulation 1612/68. See chapter five, section 2.2

[71] Case C-292/89 *Antonissen* [1991] E.C.R. I-745, para. 13

itself.[72] On this reasoning it may be appropriate to suggest that EU8 migrants do enjoy a right to reside under Community law to seek work for a reasonable period. Admittedly, however, this argument appears unconvincing when one considers that the majority of EU15 Member States appear to circumvent Article 39 EC in this manner by denying residence to workseekers. Essentially, the very existence of the transitional restrictions renders it unlikely that an EU8 workseeker would have genuine chances of finding employment;[73] hence, workseekers sit below workers in the new citizenship hierarchy that emerges under the transitional arrangements.

Clearly EU8 migrants' citizenship status is downgraded as a result of the transitional restrictions. Hence, they are denied full membership and participation in the community that they have, formally, joined and are, accordingly, not fully incorporated into the EU 'society' while restrictions are in place. Furthermore, Stalford argues:

'The transition arrangements challenge more general, prevailing theories of citizenship which traditionally denote a common political, geographical, social and civil identity, implying a share in individual and collective rights and responsibilities'.[74]

Of course, the transitional restrictions are temporal in nature and are not a new phenomenon. After all, they were imposed following the accessions of Greece, Spain and Portugal (although they were lifted early). One wonders, however, whether the spirit within which the nationals of the

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[72] This is discussed in more detail later on but for now it is sufficient to note that the Commission shares this view: European Commission (DG Enlargement), *Free Movement for persons – A Practical Guide for an Enlarged European Union*, (Brussels, 2002), 6

[73] Note that the position of workseekers is likely to be different in those Member States that have opened their labour market, see the discussion of the UK later

EU8 countries have been introduced to the EU will have any longer-term effects for the newest citizens' experience and perception of Union citizenship. Citizenship as a concept was largely absent from the documents surrounding the enlargement process;[75] indeed, there is no mention of it in the Accession Treaty's transitional arrangements.[76] This is unusual given the frequent contemporary emphasis placed on the concept of Union citizenship, particularly by the European Commission. Furthermore, the rather discriminate way in which the restrictions are focussed on the eight post-communist states, leaving aside Malta and Cyprus, may be fuelling a perception of inequity in the EU8 Member States. It suggests a 'them and us' attitude on behalf of the EU15, with Malta and Cyprus perceived as being more like the old Member States, and thus being immediately entitled to full membership of the community, and the EU8 being viewed more suspiciously; accordingly, their nationals are excluded from membership and full participation in the Community. Moreover, the specific symbolic significance of mobility rights to those who have experienced stringent movement restrictions in the past adds weight to the argument that the initial exclusion from full citizenship will be felt particularly keenly by many of the nationals in the EU8 Member States and may be interpreted as a form of second class membership.

One particular criticism levelled at the transitional arrangements is articulated by Maas:

'Usually, the concept of citizenship is seen as a status that is unitary; either one is a citizen or one is not. That is not the way to think of citizenship in

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[74] Stalford, *Op. Cit.* n.60, 11

[75] Stalford, *Op. Cit.* n.60; Maas, *Op. Cit.* n.27

[76] Although the relevance of Article 18 EC is discussed below

this case; the current enlargement will feature a gradual process of extending rights to individuals'.[77]

Arguably, however, Maas' construction of citizenship is firmly based on a national model and displays a fundamental misunderstanding of the workings of Union citizenship. Despite the Court's, and now also the legislature's,[78] insistence that citizenship is destined to be the fundamental status of the nationals of the Member States,[79] the reality is that Union citizenship is highly differentiated and has never offered a unitary status.[80] The hierarchy of citizenship status sketched above corroborates this viewpoint. Advocate-General Léger's vision that 'every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations'[81] has certainly not yet been realised. As has already been pointed out here, the traditional distinction has been between the economically active groups of migrants 'protected by the Treaty's core provisions and long-established secondary legislation and those who fall into more marginal categories such as the unemployed, the disabled, tourists, students, pensioners and the independently wealthy'.[82] Those either side of the distinction have varying degrees of access to the principles of free movement and equal treatment.[83] The entrenchment of differentiated citizenship rights for all Union citizens under Community

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[77] Maas, *Op. Cit.* n.27, 15

[78] Recital 3, Preamble to Directive 2004/38

[79] Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193, para. 31

[80] Fries, S. and Shaw, J., 'Citizenship of the Union: First Steps in the European Court of Justice', (1998) 4(4) *European Public Law*, 533; Dougan, M., 'A Spectre is Haunting Europe... Free Movement of Persons and the Eastern Enlargement' in Hillion, C. (Ed.), *EU Enlargement: A Legal Approach* (Oxford: Hart, 2004), 111

[81] Case C-214/94 *Boukhalfa* [1996] E.C.R. I-2253

[82] Fries and Shaw, *Op. Cit.* n.80, 535

[83] Ackers, *Op. Cit.* n.41

law leads Dougan to the conclusion that the downgraded status of EU8 migrant workers is simply part of this ongoing trend:

'Even as regards nationals of the existing Member States, free movement rights vary according to distinctions drawn by the Treaty itself, under secondary legislation passed by the Community institutions, and through the caselaw of the Court – distinctions based on nationality, economic worth and financial status – whereby... some of the least wealthy and most vulnerable members of society are excluded from rights to free movement and residency across the EU'.[84]

The restricted citizenship status of EU8 nationals, then, simply adds to the norm of differentiation already inherent in Community law.[85] Presumably under this analysis EU8 nationals are not accorded second class membership or, if they are, it does not amount to any more of a disadvantageous position than that experienced by certain groups of EU15 nationals. Undoubtedly it is true that the citizenship provisions, and this is particularly evidenced by the caselaw on Article 18 EC, appear to privilege those migrants who have, on the whole, adequate financial resources but have fallen on *temporary* difficulties in fulfilling the terms of the secondary legislation.[86] However, while the less wealthy have been largely excluded from the broader citizens' right to free movement the Court's wide construction of the worker under Article 39 EC has opened up the fundamental right of mobility to those wanting to move to another Member State in search of economic and/or personal fulfilment. Unlike the free

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[84] Dougan, *Op. Cit.* n.80, 141

[85] Directive 2004/38 retains the distinction between market citizens on the one hand and students, the financially independent and retired persons on the other

[86] On students see Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193; on the independently wealthy see Case C-413/99 *Baumbast* [2002] E.C.R. I-7091. For further detail see Dougan, M. and Spaventa, E., 'Educating Rudy and the Non English Patient: A Double Bill on Residency Rights Under Article 18 EC', (2003) 28(5) *European Law Review*, 699

movement enshrined in Article 18 EC, residence under Article 39 EC is not subject to any 'limitations and conditions' and is not, therefore, dependant on the possession of such requirements as adequate resources and sickness insurance. Consequently, this provision has been accessible to the less wealthy nationals of the Member States.[87] With this in mind, it is arguable that the particular downgraded citizenship status imposed on EU8 nationals can be distinguished from the Community norm of differentiated free movement rights for all as the transitional restrictions deny access to one of the most valuable categories of market citizen: that of migrant worker. While it is open to less wealthy EU15 nationals to try to increase their economic status by exercising their right to mobility for the purposes of taking up work, EU8 nationals' ability to accomplish the same is significantly more restricted during the transitional period. Currently, the right to move as a *worker* is more of a central feature of Union citizenship, certainly it is more valuable to EU8 nationals, than the broader right to move as a *citizen*; thus, it is difficult not to conclude that EU8 nationals are subject to a second rate conception of citizenship during the transitional period. Moreover, whereas the hierarchy involving EU15 nationals has been predicated on the basis of each group's perceived economic capacity and value, the post-enlargement hierarchy involving EU8 migrants relies to a greater extent on nationality as a deciding factor. Therefore, the rationalisation behind the new typology of free movement is more difficult to rationalise.

The discussion in the following subsection turns to the broader impact of the citizenship provisions, access to which is not restricted by the Accession Treaty, on the mobility rights of EU8 nationals outside the scope of the free movement of workers. Although, in some circumstances,

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[87] See Cases 53/81 *Levin* [1982] E.C.R. 1035; 139/85 *Kempf* [1986] E.C.R. 1741; 196/87 *Steymann* [1988] E.C.R. 6159

the rights flowing from Article 18 EC can be valuable for certain migrants it is not an adequate replacement for access to the fundamental *market* right enshrined in Article 39 EC. There is no doubt that the ability to move to another Member State to work is an extremely valuable right which is often relied upon by those who wish to further their career, gain greater experience or perhaps provide a better standard of living for their family. Arguably, it is this capability that would be most cherished by many EU8 nationals. The empirical work drawn upon throughout this thesis demonstrates the desire of the Polish respondents to work in order gain life experience but, more particularly, to earn money to increase the life chances available to themselves and their families. Therefore, although the capacity of 'citizens' to move is left intact, and despite the fact that differentiated citizenship rights are the norm in Community law, the absence of the right to move as a *worker* is significant for EU8 nationals' citizenship status, and for the perception they have of their 'worth' in the eyes of the EU15.

2.2. EU8 nationals' citizenship entitlement as migrant citizens

The current transitional arrangements adopt an approach similar to the restrictions put in place following the accessions of Greece (1981) and Spain and Portugal (1986) in that they permit Member States to discriminate on grounds of nationality as regards access to employment. As has been acknowledged elsewhere in this thesis,[88] the focus on workers is an attempt by the EU15 to curb potential labour market flooding. In addition, the transitional restrictions represent a desire to avoid the situation whereby employees on low-wages gain automatic rights to social welfare in the host Member State.[89] What the Accession Treaty does not take into account is the existence of the formal citizenship provisions and

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[88] Chapter three

[89] See cases *Op. Cit.* n.87

the potential impact of the mobility rights enshrined in Article 18 EC (which extends a right to reside in other Member States to all citizens). The Court's requisite jurisprudence, which often applies the non-discrimination principle in Article 12 EC in conjunction with Article 18 EC, also has implications for the citizenship status of EU8 migrants.[90] As a result of such developments, which are elaborated on below, citizenship is 'nested'[91] across various sites in the Treaty and is therefore, at least in some form, accessible to EU8 nationals in spite of the transitional arrangements. Citizenship rights are no longer confined to the traditional 'Single Market' provisions, such as Article 39 EC.

At the time of the accessions of Greece, Spain and Portugal citizenship as a concept had not yet been constitutionalised by insertion into the Treaty. Hence, the 2004 enlargement is the first time the opportunity has arisen for the broader notion of citizenship to interact with the restricted status of market citizenship offered to accession migrants under the transitional arrangements. Despite the extension of more comprehensive free movement rights to *citizens* generally the transitional arrangements have persisted with the preoccupation, in line with previous enlargements, with *workers*. Consequently, the ability of the EU15 Member States to prevent the migration of nationals from the newest Member States is more constrained in the aftermath of this enlargement than in previous EU expansions.[92]

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[90] Including Case C-85/96 *Martinez Sala* [1998] E.C.R. I-2691 ; Case C-413/99 *Baumbast* [2002] E.C.R. I-7091; Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193; Case C-138/02 *Collins* [2004] E.C.R. I-2703; Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613

[91] On the concepts of 'nested' and 'multiple' citizenships see Faist, *Op. Cit.* n.1; Kostakopoulou, T., *Citizenship, Identity and Immigration in the European Union,* (Manchester: Manchester University Press, 2001), 66-67; Kostakopoulou, T., 'Nested "Old" and "New" Citizenship in the European Union: Bringing Out the Complexity', (1999) 5 *Columbia Journal of European Law,* 389

[92] Farkas, O. and Rymkevitch, O., 'Immigration and the Free Movement of Workers after Enlargement: Contrasting Choices', (2004) *International Journal of Comparative Labour Law and Industrial Relations,* 369, 373

First in this section, attention turns to the possibility of EU8 nationals relying upon the right to residency enshrined in Article 18 EC. Secondly, there is analysis of the access to the principle of non-discrimination in Article 12 EC which may be extended to those found to have a right to reside in an EU15 Member Stare. These entitlements constitute the two main components of Union citizenship extended to migrant citizens. Although they are closely related it is helpful to examine them individually in order that the potential application of both citizenship components to the situation EU8 nationals can be appreciated. This approach also mirrors the logic of the relationship between the entitlements: once it is established that a migrant citizen is resident in a Member State the right to rely on the equal treatment principle in Article 12 EC becomes active.

2.2.1. Rights of residence in the EU15

EU8 nationals are entitled from the outset to access the mobility rights attached to the non-economically active categories of migrant citizen, such as students and financially independent persons,[93] described above in relation to the hierarchy of citizenship status.[94] In order to present a complete picture of the residence rights available to EU8 nationals under these groupings (and the requisite rights of equal treatment examined below) it is necessary to discuss both the old regime in the form of the residence Directives and their relationship with Article 18 EC as determined in the caselaw of the Court, and, the new regime established by Directive 2004/38.

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[93] The status of retired persons is not discussed specifically here, although the rights (and obligations) of this group is analogous to those of financially independent persons in that the resources requirement is central to the grating of residence in an effort to ensure the host welfare state is not unreasonably burdened. Note also that Directive 2004/38 creates a category of permanent residents who, after lawful residence in a Member State for 5 years, are no longer subject to the resources requirement and enjoy fully the right to equal treatment: Articles 16-21

[94] In addition to the market citizen categories of self-employed person and service provider

Article 18 EC confers on all citizens of the Union the right to move and reside freely within the Member States, subject to the limitations and conditions laid down in the Treaty and the measures adopted to give it effect. It was just prior to the insertion of the citizenship provisions in the Treaty that the Community legislature had adopted the residency Directives which addressed economically-inactive migrants: Directive 90/365 (retired persons),[95] Directive 93/96 (students)[96] and Directive 90/364 (those persons able to support themselves).[97] Although this cluster of secondary legislation was intended to 'liberate the Community from its economic preoccupation and to prepare the way for a community of citizens',[98] all three Directives made clear that the right of residence was dependant on: the possession of adequate resources not to become a burden on the social assistance scheme of the host Member State; and, being covered by sickness insurance. Hence, the Member States were clearly concerned about the possibility of welfare tourism and sought to exclude from the right to reside those who would be unable to support themselves and their families in the host state. In the initial period following the insertion of the citizenship provisions by the Treaty of Maastricht it was not entirely clear what sort of relationship existed between the Directives' requirement of self-sufficiency and the 'limitations and conditions' on the right of free movement referred to in Article 18 EC. On the one hand, there was the argument that Article 18 EC simply codified the existing position under Community law to the effect that only economically-active and economically self-sufficient citizens could access mobility rights. On the other hand, there was also a sentiment expressed by some that Article 18 EC may have disentangled the links between the right to move freely

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[95] [1990] O.J. L180/28

[96] [1993] O.J. L317/59

[97] [1990] O.J. L180/26

[98] Hailbronner, K., 'Union Citizenship and Access to Social Benefits', (2005) 42 *Common Market Law Review*, 1245

and the need to be economically-active/self-sufficient to the effect that a separate right to mobility for all Union citizens had been created.[99]

Although there was a period of speculation,[100] the Court began to make important pronouncements on the effect of Article 18 EC and, in relation to the extent of the right of residence, *Baumbast*[101] and *Grzelczyk*[102] warrant particular attention and are discussed in detail below.[103] It was in the case of *Baumbast* that the Court first declared the right to reside in Article 18 EC to be directly effective.[104] This was despite the argument, put forward by the German and UK governments, that the 'limitations and conditions' referred to in Article 18 EC prevented the right from being free-standing.[105] The Court confirmed that the right of residence in Article 18 EC was sufficiently clear, precise and unconditional and, thus, conferred a right upon individuals.[106] In *Grzelczyk* the ECJ made the, now quite celebrated, statement that 'Union citizenship is destined to be the fundamental status of nationals of the Member States'.[107] This statement has now been codified in Directive 2004/38[108] which would suggest the formulation has been embraced also by the Community's political institutions. Additionally, however, in both of the aforementioned cases

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[99] For more detail on the uncertainty surrounding the effect of the citizenship provisions see Fries and Shaw, *Op. Cit.* n.80

[100] Fries and Shaw, *Op. Cit.* n.80, 534

[101] Case C-413/99 *Baumbast* [2002] E.C.R. I-7091

[102] Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193

[103] Note that these decisions came after the important judgment in Case C-85/96, *Martinez Sala* [1998] E.C.R. I-2691 which is discussed later in relation to the equal treatment rights of EU8 citizens. The focus here is on residence entitlement

[104] *Baumbast*, para. 84

[105] *Ibid.*, para. 78

[106] *Ibid.*, para. 86

[107] *Grzelczyk*, para. 31. This has been restated in numerous other decisions of the ECJ including, *inter alia*, Case C-138/02 *Collins* [2004] E.C.R. I-2703 and Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613.

[108] Recital 3, Preamble, Directive 2004/38 [2004] O.J. L158/77

the Court confirmed that the 'limitations and conditions' referred to in Article 18 EC did include the requirements of sufficient resources and sickness insurance found in the residence Directives. Thus, the Court confirmed here that Article 18 EC had not completely detached the right to free movement from the economic elements; indeed, in *Baumbast* the ECJ stated that the limitations and conditions set out in the residence Directives recognise:

'...that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of Member States. In that regard, according to the fourth recital in the preamble to Directive 90/364 beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State'.[109]

Before taking a closer look at the details and impact of these judgments on the residence rights of EU8 nationals the position of the law following the adoption of Directive 2004/38 needs to be acknowledged. With regards to residence, the Directive retains the twin requirements of sufficient resources and sickness insurance in respect of economically inactive migrants. Hence, the distinction between the economically active and economically viable, on the one hand, and the non-economically active, on the other, remains. The Directive does, though, provide that all Union citizens have a right of residence for up to three months *without any conditions or any formalities* other than the requirement to hold a valid identity card or passport.[110] Therefore, it is only after this three-month

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[109] *Baumbast*, para. 90

[110] Article 6, Directive 2004/38

period that the above distinction and the 'limitations and conditions' on the right of residence come into play.[111]

The existence of this three-month period in the new piece of secondary legislation is interesting when held up against the transitional arrangements in the Accession Treaty. Under the terms of the Directive EU8 nationals, as Union citizens, are entitled to make use of this right that allows them to enter and reside in an EU15 Member State without the necessity of fulfilling the resources requirement. Arguably, this was not envisaged by the EU15 at the time the transitional arrangements were drawn up but it would appear that there are no grounds to challenge this reading of the law. First, the Directive contains no statement of derogation to the effect that EU8 nationals are subject to any different rules as a result of the transitional period. Secondly, the very precise language adopted in the annexes to the Act of Accession,[112] which contain the details of the transitional restrictions, focuses solely on Articles 1-6 of Regulation 1612/68[113] and leaves very little scope for a wider interpretation of the transitional arrangements that includes other provisions of Community law. The restrictions only centre on allowing the EU15 to derogate from the provisions that usually require them to provide EU nationals with the opportunity to access their labour markets without experiencing discrimination. This ability to enter and reside for a period of three months may prove to be extremely useful for EU8 nationals who wish to seek work in an EU15 state, despite the imposition of transitional restrictions, as it essentially provides a short period of grace within which they can seek

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[111] But note the principle of equal treatment does not apply in full during the first three months as Article 24(2) provides that Member States are not obliged to confer entitlement to social assistance during this period. It is slightly confusing, then, that Article 14(1) specifies that the right to reside for 3 months is dependant on the individual (and family members) not becoming an unreasonable burden on the social assistance system of the host Member State

[112] Article 24 of the Act of Accession [2003] O.J. L236/33, para 2, Annexes

[113] [1968] O.J. L257/2

employment.[114] Once this initial three-month period comes to a close the right of residence for more than three months, in Article 7 of the Directive, becomes the operable provision and it is here that the various conditions relating to the different categories of migrant can be found.[115]

It is clear that those EU8 nationals fulfilling the conditions of residence attached to the categories of economically inactive migrant are able to rely on the right to free movement in Article 18 EC during the transitional period. This is a valuable right in itself and, in particular, it seems that many young EU8 nationals have taken advantage of their post-accession ability to move to the EU15 as students.[116] To gain a right of residence under Article 7 of the Directive students are required to have comprehensive sickness insurance and must assure the host Member State, by means of declaration,[117] that they have sufficient resources to avoid becoming a burden on the social assistance system. They must also be enrolled at a public or private establishment, accredited or financed by the host Member State, for the principal purpose of following a course of study (this includes vocational training).[118] Article 7 also confirms the twin requirements of sufficient resources and comprehensive sickness insurance continue to apply as regards those who aspire to reside on the basis of

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[114] Discussed further in the section on workseekers below

[115] Workers and the self-employed have an automatic right to reside (Article 7(1)(a)) that cannot be withdrawn on the basis that they are an unreasonable burden on the social assistance system of the host Member State (Article 14(4)(a)). Member States can restrict the residence rights of these groups on grounds of public policy, public security or public health subject to the details in Articles 27-33

[116] For example: in 2004/2005 8,390 Polish students took part in the Erasmus exchange program and 2,200 Polish nationals enrolled in British universities (compared to just 965 in 2003/2004). Further, in 2004/2005 Polish nationals constituted the second largest group of non-German students in Germany (after Chinese). Figures cited in Iglicka, K., *Free Movement of Workers Two Years After Enlargement: Myths and Reality*, (Warsaw: Centre for International Relations, 2006), 2

[117] This was also the position under Directive 93/96

[118] Article 7(1)(c), Directive 2004/38

being financially independent.[119] By analogy with the conditions of the three residence Directives under the old regime, the requirements now enshrined in Directive 2004/38 will be included in the 'limitations and conditions' that Article 18 EC is subject to.

In addition to those situations in which an individual complies fully with the requirements in the secondary legislation, however, the manner in which the ECJ has interpreted the caveat of 'limitations and conditions' (albeit under the old regime) indicates there may be occasions when an EU8 national does not comply with the letter of the law, in respect of having sufficient resources and comprehensive sickness insurance, yet is (theoretically at least) entitled to rely on a right to reside flowing from Article 18 EC. To explore this assertion further it is necessary to take a further look at the cases of *Baumbast* and *Grzelczyk.*

In *Baumbast*[120] the British immigration authorities refused Mr Baumbast's application for an extension of his residence permit on the grounds that he and his family were not insured for emergency medical treatment in the UK and so failed to comply with the requirement of sickness insurance in Directive 90/364. Mr Baumbast, a German national, had originally moved to the UK as a worker but later was employed by a German company that required him to work in Asia and Africa. His family, however, continued to reside in the UK where they owned a house and the children attended school. Although the Baumbasts did not satisfy the requirement of having health insurance in the UK they did have comprehensive medical insurance in Germany, where they returned to when they required treatment, and they had never sought to rely on the British welfare system. The UK court

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[119] Article 7(1)(c)

[120] See Dougan and Spaventa, *Op. Cit.* n.86; Van Der Mei, A.P., 'Comments on *Baumbast'*, (2003) 5 *European Journal of Migration and Law*, 419

sought guidance from the ECJ as to whether Mr Baumbast could derive a right of residence from Article 18 EC.

After making the pronouncements, described above, that Article 18 EC was directly effective but the Member States were legitimately able to ensure nationals of other Member States did not become an unreasonable burden the Court went on discuss further the notion of 'limitations and conditions'. Most crucially, the Court went on to note that the:

'limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular with the principle of proportionality'.[121]

Given that the Baumbasts had not been a burden on the UK's public finances (indeed Mr Baumbast had made a positive economic contribution in the past), that the family were well integrated after residing in the UK for a number of years, and that insurance was in place in another Member State, the Court concluded that:

'to refuse to allow Mr Baumbast to exercise his right of residence... on the ground that his sickness insurance does not cover the emergency treatment given in the host Member State would amount to a disproportionate interference with the exercise of that right'.[122]

Thus by virtue of the application of the principle of proportionality Mr Baumbast's right of residence remained intact despite not complying with the formal requirements of the secondary legislation.[123]

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[121] *Baumbast*, para. 91

[122] *Baumbast*, para. 93

[123] Dougan and Spaventa, *Op. Cit.* n.86, 703; Dougan, *Op. Cit.* n.80, 114

The decision in *Grzelczyk,*[124] while preceding the decision in *Baumbast*, displays a similar line of reasoning in relation to the requirement of sufficient resources for students in Directive 93/96. Rudy Grzelczyk, a French national, studied in Belgium and in the fourth year of his course he applied for the Belgian minimex (a non-contributory minimum subsistence allowance). By applying for such a benefit, of course, he indicated that he did not in fact have sufficient resources as stipulated by the Directive. In his previous years of residence Grzelczyk had worked part time; however, as he was in his last year he wished to be able to concentrate just on his academic studies. This case is important also for the discussion of the equal treatment principle but with regards to residence the Court stressed that refusal of a residence permit cannot be the automatic consequence of recourse to the host Member State's social assistance system.[125] The Court placed significance on the fact that Grzelczyk was merely experiencing 'temporary difficulties' and, as a result, he was entitled to expect to benefit from a degree of financial solidarity between nationals of the host Member State and nationals of other Member States.[126] On the basis of these cases, Dougan and Spaventa stress that:

'Baumbast... illustrates the application of proportionality to the "health insurance" requirement imposed by the three Residency Directives. The earlier case of Grzelcyk illustrates (though more in hindsight than in the explicit reasoning of the judgment itself) the application of the principle of

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[124] See Dougan and Spaventa, *Op. Cit.* n.86; Jacqueson, C., 'Union Citizenship and the Court of Justice: Something New Under the Sun? Towards Social Citizenship', (2002) 27(3) *European Law Review*, 260; Iliopouou, A. and Toner, H., 'Casenote on Grzelczyk', (2002) 39 *Common Market Law Review*, 609

[125] *Grzelczyk*, para. 43. This has since been codified in Directive 2004/38, Article 14(3)

[126] *Grzelczyk*, para. 44

proportionality to the requirement of "sufficient resources" set out in the Residency Directives'.[127]

Therefore, this application of the proportionality principle to the exercise of the Member States' discretion may allow the enforcement of a right to reside by an individual who does not actually meet the legislative requirements. Arguably, this remains so following the adoption of Directive 2004/38. The proportionality principle is not expressly codified; rather, Article 14(2) states that economically inactive migrants retain the right of residence so long as they continue to fulfil the conditions attached to that residence (i.e. sufficient resources and sickness insurance). However, the preamble does refer to the importance of migrants not becoming an unreasonable burden on the social assistance system of the host Member State[128] and this is essentially what the application of the principle of proportionality to the twin requirements in the legislation sought to achieve. On the basis of this analysis the stage seems set for the Court to continue to apply proportionality to the Member States' efforts to enforce their limitations and conditions on a right of residence, the determining factor remaining whether the individual has become an 'unreasonable burden'.[129]

Of course, by no means is the right of residence for the economically-inactive unlimited but the Court's use of proportionality has injected a greater degree of flexibility into the black-letter provisions and allowed it

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[127] Dougan and Spaventa, *Op. Cit.* n.86, 703

[128] Recital 10, Preamble, Directive 2004/38

[129] This concept is not quantified but whether or not an individual constitutes an 'unreasonable burden' is often related to the application of the equal treatment principle (described below) which extends the right to access various welfare benefits to resident Union citizens. This may result in lawful residence activating the right to equal treatment which, in turn, enables the migrant to access social assistance; at this point, the Member State may lawfully conclude the claimant is an unreasonable burden and withdraw the right of residence. See Dougan and Spaventa, *Op. Cit.* n.86, 708

to extend residence (and equal treatment) rights to some individuals that fell outside of the formal legislative regime. Applying this caselaw then to EU8 nationals, during the transitional period EU8 nationals with adequate resources can reside in the EU15; furthermore, the right is flexible and may not automatically be rescinded should they fail to fulfil one of the conditions in the secondary legislation.

The application of proportionality, though, clearly cannot assist all those economically inactive migrants who experience hardship and fail to fulfil the requirements of residency. A case which demonstrates this is that of *Trojani*[130] where the Member State's application of limitations and conditions was held to be proportionate. Trojani, a French national, was residing in Belgium in a Salvation Army hostel and had made an application to receive the Belgium *minimex* which had been refused by the national authorities.[131] In relation to the issue of whether or not Trojani could enjoy a right of residence by virtue of the right to free movement in Article 18 EC the ECJ confirmed that the requirement of sufficient resources was subject to the principle of proportionality.[132] However, the Court went on to note that, in Trojani's case, a lack of resources was precisely the reason why Mr Trojani sought to receive a benefit such as the minimex.[133] In contrast to the situation in *Baumbast*, then, Trojani could not derive a right to reside from Article 18 EC because 'there was no indication that... the failure to recognise that right would go beyond what

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[130] Case C-456/02 *Trojani* [2004] E.C.R. I-7573, see further Van Der Mei, A.P., 'Union Citizenship and the 'De-Nationalisation' of the Territorial Welfare State', (2005) 7 *European Journal of Migration and Law*, 203

[131] Note that part of the judgment discusses whether Trojani can be classed as a worker for the purposes of Community law, in which case he would have the right to equal treatment as regards social advantages (Article 7(2), Regulation 1612/68), as he carried out 'odd jobs' for the Salvation Army. The ECJ, after reiterating the definition of worker, ruled it was for the national court to assess whether Trojani fulfilled the criteria (paras. 13-29)

[132] *Trojani*, para. 34

[133] *Trojani*, para. 35

is necessary to achieve the objective pursued by... Directive [90/364]'.[134] It seems then that the application of proportionality would only be useful to those EU8 migrants who had previously fulfilled the conditions of the Directive, of having sufficient resources and sickness insurance, but later fell on hard times that were temporary in nature.[135] *Baumbast* and *Grzelzcyk* illustrate that the Court values those with a greater sense of 'belonging' to the host state.[136] Article 18 EC is unlikely to be of great benefit to those wishing to establish in the first instance residence in another Member State.[137] Further, despite not fulfilling the requirements in the secondary legislation, it is clear that the Baumbasts, in particular, were portrayed as 'worthy' beneficiaries of the right to reside given their clear financial autonomy and the unlikeliness of the family ever requiring social assistance.[138] Grzelzcyk, too, is described in terms of having worked hard in the past to finance his studies.[139] By contrast, those such as Trojani who, as Dougan and Spaventa claim, are the more 'vulnerable members of society' remain 'alienated' from the same right.[140]

Less-wealthy EU8 nationals will find it difficult to establish a right to reside in the EU15 longer than the initial three-month period of grace granted to all citizens under Directive 2004/38. Taking Poland as an example, considering the high rates of unemployment and the low rates of pay available in the country,[141] alongside the assertion that many wish to

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[134] *Trojani*, para. 36

[135] As Grzelczyk did

[136] Dougan and Spaventa, *Op. Cit.* n.86, 712

[137] Van Der Mei, *Op. Cit.* n.120, 432

[138] *Baumbast*, paras. 88-89

[139] *Grzelczyk*, paras. 10-11

[140] Dougan and Spaventa, *Op. Cit.* n.86, 712

[141] Keune, M., *Youth Unemployment in Hungary and Poland: Action Programme on Youth Unemployment*, International Labour Organisation, Employment and Training Paper 20, Switzerland, 1998

move in order to *increase* their wealth, it would appear that certainly many Polish nationals would fall into the 'vulnerable' group unable to enforce a right of residence in an EU15 state on the basis of Article 18 EC.

Clearly, the fundamental test remains that a non-economically active migrant should not become an unreasonable burden. If this threshold is reached the Member State is entitled to expel the individual. On this note, Dougan raises the example of a further interesting scenario.[142] The right of a Member State to expel an individual who no longer fulfils the residency requirements is, as we know, subject to the application of proportionality *and other general principles of Community law.*[143] Dougan suggests there is scope for an EU8 national, who does not satisfy the conditions of residence as either a self-employed person or self-sufficient citizen, to argue that expulsion would infringe the right to family and private life under Article 8 of the ECHR.[144] The Court has certainly demonstrated an increasing tendency to draw inspiration from this particular provision. For example, in *Akrich*[145] the UK's authorities had taken the decision to expel the third-country national spouse of a Community national.[146] The ECJ stressed that the UK must not violate the Akrichs' right to respect for family life:

'Even though the Convention does not as such guarantee the right of an alien to enter or reside in a particular country, the removal of a person from a country where close members of his family are living may amount

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[142] Dougan, *Op. Cit.* n.80, 118-119

[143] Case C-413/99 *Baumbast* [2002] E.C.R. I-7091

[144] Dougan, *Op. Cit.* n.80, 118

[145] Case C-109/01 *Akrich* [2003] E.C.R. I-9607

[146] See also Case C-60/00 *Carpenter* [2002] E.C.R. I-6279 which involved the third-country national spouse of a British national providing services, pursuant to Article 49 EC, in other Member States. The ECJ stated that the UK decision to expel Mrs Carpenter ran contrary to *Mr Carpenter's* right to respect for family life in Article 8 of the ECHR which was to be protected in his capacity as service provider (paras. 41-42)

to an infringement of the right to respect for family life guaranteed by Article 8(1) of the Convention'.[147]

Dougan argues that this line of argument may prove particularly accessible to those EU8 migrants that have demonstrated a desire for themselves and their family to integrate into the host society:

'If the claimant has lived in the host state for a significant period of time, perhaps with his/her family and children, such that the claimant has few remaining personal ties to the country of origin, and the host state has become his/her home for all purposes save nationality, expulsion might be held to strike an unfair balance between the legitimate interests of the Member State and the private rights of the individual'.[148]

This analysis is engaging and details another possible way, in addition to the application of proportionality, whereby an EU8 national could enforce a right to reside in an EU15 Member State despite the imposition of transitional restrictions. It is doubtful, however, that this will be applied in practice to any great extent. This thesis has suggested that the majority of EU8 nationals who have moved to the UK frequently move alone; hence, their family members remain in the home state and, furthermore, the migrants themselves retain active transnational links with their home society. On this understanding it seems unlikely that, at this stage, many EU8 nationals and their families will display sufficient degrees of integration in a host state to justify the protection of a right to reside by Article 8 of the ECHR. Furthermore if an EU8 family, despite having moved to an EU15 Member State, could integrate back into the home society relatively easily then arguably their expulsion would pass the

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[147] *Akrich*, para. 59

[148] Dougan, *Op. Cit.* n.80, 118

threshold in Article 8(2) of the ECHR of being in 'accordance with the law and necessary in a democratic society'.

This discussion has demonstrated that the right to reside in another Member State is no longer based solely on the carrying out of 'worthwhile' economic activity by virtue of Article 18 EC. All Union citizens enjoy a directly effective right to reside throughout the Union and, although this is subject to the conditions set out in the secondary legislation, the Court has injected some flexibility into the operation of these requirements through the application of the principle of proportionality (and other general principles of Community law). Consequently, there may be occasions where a claimant fails to fulfil the requirements yet still retains the right to reside. Despite the transitional restrictions on their movement rights as workers, then, Article 18 EC may well prove valuable for financially-independent EU8 nationals seeking to enforce a right to reside in the EU15; or, thanks to proportionality, the almost financially-independent. Article 18 EC still cannot assist the less wealthy in enforcing a right to reside and, in this respect, will not help those who wish to exercise mobility rights in order to better their living standards (and that of their families) by working. Thus, although it is interesting to speculate on the interplay between the right to reside as a *citizen* and the transitional restrictions on *workers'* residence entitlement, the practical impact of Article 18 EC on the experience of EU8 nationals is unlikely to be far-reaching.[149]

In any event, the right to reside under Article 18 EC remains significantly more constrained than that which is extended to workers. Despite the

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[149] Although the discussion here is restricted to those EU8 nationals who are not workers, such as students or the financially independent (as compared to Community migrant workers), Dougan puts forward a convincing argument about the potential application of Article 18 EC to those EU8 nationals who work *illegally* but satisfy the criterion of being economically active or financially independent, see Dougan, *Op. Cit.* n.80, 128-132

inclusion in Directive 2004/38 of the *Grzelczyk* statement that expulsion should not be the automatic consequence of a citizen's recourse to the social assistance system the host Member State is entitled to conclude, provided the principle of proportionality is respected, that the citizen no longer satisfies the conditions of having sufficient resources and sickness insurance. Furthermore, as will be discussed in the following section, citizens' rights to equal treatment are not as extensive or secure as those extended to market citizens.

2.2.2. The interplay between Articles 12 and 18 EC: EU8 migrants' access to the principle of non-discrimination on the grounds of nationality

We know that economically-active market citizens have an extensive right to residency which,[150] in turn, provides an all-encompassing right to equal treatment in the host Member State[151] that includes within its remit the ability to access a plethora of social welfare benefits.[152] Non-economically active migrant citizens have not traditionally, under the residency Directives, had such extensive rights to equal treatment.[153] This section will examine, however, how the Court's interpretation of the citizenship provisions, in combination with Article 12 EC, has enabled lawfully resident, albeit economically inactive, citizens to claim a greater stake in the right to equal treatment and, as a result, better access to a form of (European) social citizenship. Again, this is discussed within the framework of EU8 migration during the transitional period and the impact of Directive 2004/38 on the rights of equal treatment available to EU8 migrants is examined.

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[150] For example in relation to workers they flow from Article 39 EC and are articulated in Directive 2004/38 (previously Directive 68/360 [1968] O.J. L257/13)

[151] Article 24, Directive 2004/38

[152] Article 7(2), Regulation 1612/68. For example, Cases 249/83 *Hoeckx* [1985] E.C.R. 973; C-237/94 *O'Flynn* [1996] E.C.R. I-2617

[153] For example, Case 197/86 *Brown* [1988] E.C.R. 3205

Article 17(2) EC provides that citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby. One such right conferred by the Treaty is that contained in Article 12 EC – the right to be protected against discrimination on the grounds of nationality. It was the case of *Martinez Sala* which first established that citizens lawfully resident in a Member State could challenge unequal treatment they experienced, in comparison to nationals of the host state, on the basis of Article 12 EC.[154] Mrs Martinez Sala, a Spanish national, had moved to Germany as a child in 1968. She had been employed there, in a variety of jobs, until 1989 but since then had received social assistance from the city of Nuremberg. Up until 1984, Sala had been granted residence permits but, from then on, she was simply in possession of a series of documents certifying that she had applied for an extension to her residence permit. She was, again, issued with a residence permit in 1994 but in 1993 she had applied for, and been refused, a child-raising allowance. Her application was rejected on the basis that she did not have German nationality, a residence permit or residence entitlement. The Court, first, held that Sala, as a national of a Member State lawfully residing in the territory of another Member State,[155] came within the scope *ratione personae* of the citizenship provisions in the Treaty.[156] Secondly, the ECJ went on to state that such a Union citizen could benefit from the equal treatment principle in Article 12 EC in relation to all matters that fell within the scope *ratione materiae* of the Treaty.[157] The child-raising allowance was found to fall 'indisputably' within the material scope of the Treaty by analogy with the benefits available to workers under Article 7(2)

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[154] Case C-85/96, *Martinez Sala* [1998] E.C.R. I-2691. See Tomuschat, C., 'Comment on Maria Martinez Sala', (2000) 37 *Common Market Law Review*, 449; O'Leary, S., 'Putting Flesh on the Bones of European Union Citizenship', (1999) 24(1) *European Law Review*, 68

[155] On the basis of national law as opposed to Article 18 EC, see below

[156] *Martinez Sala*, para. 61

[157] *Martinez Sala*, para. 63

of Regulation 1612/68 and those qualifying as 'family benefits' under Article 4(1)(h) of Regulation 1408/71.[158]

Martinez Sala has had significant implications for the status of Union citizenship and its relationship with the principle of non-discrimination. O'Leary makes the point that:

'Martinez Sala confirms that Union citizenship explodes the "linkages" with EC law previously required for the principle of non-discrimination to apply, namely performance or involvement in an economic activity as workers, established persons or providers and recipients of services, preparation for a future economic activity as a student or stagiaire or some sort of relationship with an economic actor as a family member or dependant'.[159]

Lawful residence is thus the key to establishing a right to equal treatment as a Union citizen and, as Dougan and Spaventa point out:

'Equal treatment not only flows from lawful residency; it also makes the latter status more meaningful in practice'.[160]

Grzelczyk demonstrates this point nicely. We have already seen that Grzelczyk had a right to reside in Belgium on the basis of Article 18 EC and therefore he fell within the scope ratione personae of the Citizenship provisions. With regard to the refusal of the Belgian authorities to grant him the minimex the Court further held that this amounted to direct

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[158] *Martinez Sala,* para. 57. Tomuschat is critical of the application of principles developed in relation to economically active migrant workers to a non-economically active migrant citizen, *Op. Cit.* n.154, 452

[159] O'Leary, *Op. Cit.* n.154, 77

[160] Dougan and Spaventa, *Op. Cit.* n.86, 708

discrimination – comparable with the discrimination experienced by Martinez Sala - which was strictly prohibited by Article 12 EC:[161]

'It is clear from the documents before the Court that a student of Belgian nationality... who found himself in exactly the same circumstances as Mr Grzelczyk would satisfy the conditions for obtaining the minimex. The fact that Mr Grzelczyk is not of Belgian nationality is the only bar to it being granted to him. It is not therefore in dispute that the case is one of discrimination solely on the ground of nationality'.[162]

In relation to the scope ratione materiae, the ECJ in *Grzelczyk* again drew a parallel with Article 7(2) of Regulation 1612/68.[163] Further, the Court stated that, simply through students' movement and residence in another Member State, provisions of Community law relating to them fall within the material scope.[164] The ECJ was of the opinion that the introduction in the EC Treaty of the citizenship provisions and a chapter on education and vocational training,[165] alongside the existence of the Students' Residence Directive 93/96, had altered the position of Community law. In the earlier case of *Brown*[166] it had been decided that, at the stage of development Community law was at, there was no anti-discrimination protection

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[161] Indirect discrimination is discussed more specifically below in relation to the status of workseekers in the UK but, for now, it is sufficient to note that the Court does adopt a different approach when dealing with a national measure that is indirectly discriminatory on the grounds of nationality. Indirect discrimination can be justified by reference to objective justification under the doctrine of mandatory requirements. In particular, it appears that a Member State is entitled to require that an individual demonstrate a genuine link to the national territory before he/she is able to claim equal treatment as regards to welfare benefits: Case C-209/03 *Bidar* [2005] E.C.R. I-2119; Case C-224/98 *D'Hoop* [2002] E.C.R. I-6191; Case C-138/02 *Collins* [2004] E.C.R. I-2703; Case C-258/04 *Ioannidis* [2005] E.C.R. I-8275

[162] Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193, para. 29

[163] *Grzelczyk*, para. 27

[164] *Grzelczyk*, para. 35

[165] Title XI, Chapter 3 of Part three of the EC Treaty

[166] Case 197/86 *Brown* [1988] E.C.R. 3205

available in the area of maintenance or training grants.[167] Following *Grzekczyk*, then, *Brown* is no longer regarded as a correct statement of the law[168] and the elevated status of students as Union citizens means that the equal treatment principle can apply as regards social security and assistance benefits available to students under national law.

The ability to move as a student to an EU15 Member State may be an attractive option to EU8 nationals during the operation of the transitional arrangements on the free movement of workers. Furthermore, moving as a student may hold out the possibility of entering to reside via the 'back door' as there is somewhat of a grey area surrounding the right of EU8 students to access part time work in a Member State applying transitional restrictions. Students usually are allowed access to the labour market on the basis of the principle of non-discrimination but the position as regards EU8 migrant students in Member States applying transitional restrictions is more ambiguous; arguably, under the terms of the Accession Treaty, Member States are lawfully able to prevent labour market access by this group. Surely it will be in a Member State's interest to allow (genuine) students to access part time employment on their territory, although fears of bogus students using the status as a cover for labour market access may persuade Member States that it is safer to deny access. The UK requires EU8 students to fulfil the registration requirements of the WRS in order for their employment activity to be considered lawful.[169] In any event, the ability to move as a student may tempt some with the notion that labour market access will follow. In addition to this perceived attractiveness of moving as a student, however, the legal status is potentially quite a far-

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[167] Although pre-*Brown*, in Case 293/83 *Gravier* [1985] E.C.R. 593, the ECJ had held that there was a right to equal treatment in relation to fees for Higher Education

[168] Grzelczyk, paras. 34-35

[169] Thus subjecting them to the £70 fee

reaching one,[170] although the impact of Directive 2004/38 does need to be considered in this respect.

Following *Grzelczyk*, the extent of students' equal treatment rights was considered further in *Bidar*.[171] Mr Bidar, a French national, had resided in and been enrolled at a secondary school in the UK for three years before he entered university there. Whilst he was charged the same tuition fee rate as national students he was denied financial assistance to cover his maintenance costs in the form of a student loan. First, Bidar was clearly entitled to a right of residence in the UK under Article 18 EC read in conjunction with the general residence Directive 90/364 (not the Students' Directive) the conditions of which he satisfied.[172] As a result of his lawful residence Bidar was entitled to equal treatment as regards social assistance benefits (as in *Grzelczyk*) but the issue then was whether those benefits included assistance for maintenance costs through subsidised loans or grants. Once again the Court referred to the developments in Community law cited in *Grzelczyk*[173] before confirming that social assistance:

'whether in the form of subsidised loans or of grants, provided to students lawfully resident in the host Member State to cover their maintenance costs falls within the scope of application of the Treaty for the purposes of the prohibition of discrimination laid down in the first paragraph of Article 12 EC'.[174]

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[170] See further Dougan, M., 'Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education in the EU?', (2005) 42 *Common Market Law Review*, 943

[171] Case C-209/03 *Bidar* [2005] E.C.R. I-2119, see Barnard, C., 'Comment on Bidar', (2005) 42 *Common Market Law Review*, 1465

[172] *Bidar*, para. 36

[173] *Bidar*, para. 39

[174] *Bidar*, para. 48

This ruling, therefore, fortified the citizenship status of migrant students by confirming that developments in Community law had extended the scope of benefits they could access by virtue of the equal treatment principle. Despite this extension in the scope of equal treatment rights available to students the reasoning of the Court suggests it will be by no means easy for EU8 nationals who move during the transitional period to benefit from such equal treatment in relation to student loans (and grants). As the UK legislation at issue imposed a requirement of three years prior residency before a student could claim a loan it did not overtly discriminate directly on the ground of nationality; instead, the requirement was intrinsically liable to impact on more non-nationals than nationals and, hence, amounted to indirect discrimination. Thus, the ECJ confirmed that Member States can legitimately expect the individuals in question to display a degree of integration into the host society before granting them access to assistance covering the maintenance costs of students.[175] Therefore, EU8 nationals residing lawfully in the territory of an EU15 Member State during the transitional period would have to demonstrate a sufficient degree of integration and prior-residency before being able to access the type of benefits in *Bidar*. This is quite a high hurdle to overcome and, in effect, requires the migrant to reside in the host Member State for a significant period prior to the enrolment on a course. Thus, it is unlikely to assist those who moved from the EU8 to the EU15 after 1 May 2004 to study as they have not built up any residence, and hence rights to solidarity,[176] within that territory. Bidar himself did not gain access to the right of equal treatment by virtue solely of the status of migrant student. He had not moved *in order* to study; rather, his access to university stemmed from a long-term residence in the UK which he fulfilled as a

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[175] *Bidar*, para. 57

[176] Barnard, C., 'EU Citizenship and the Principle of Solidarity' in Dougan, M. and Spaventa, E. (Eds.), *Social Welfare and EU Law*, (Oxford: Hart, 2005), 157

financially independent person (he had lived with his grandmother, as her dependant). The circumstances were somewhat exceptional. In addition, even though the Court in *Bidar* spoke in terms of student 'grants and loans' this was in the context of Directive 90/364 not Directive 93/96 which specifically excluded maintenance grants from the scope of equal treatment.[177]

Those EU8 students who are integrated to a sufficiently high extent, perhaps by having gained entry prior to the 2004 enlargement, will probably be entitled to protection against discrimination in the area of maintenance loans or grants for students by analogy with *Bidar*. Furthermore, it should be remembered that those legally residing in a Member State for a year prior to accession are not subject to transitional mobility restrictions. This group, then, is privileged as compared to those EU8 nationals who moved after 1 May 2004. In any event, this discussion may be slightly superfluous following the entry into force of the citizenship Directive in 2006. Directive 2004/38 appears to step back from the decision in *Bidar* and, on a literal interpretation, provides that both maintenance grants and loans are excluded from the principle of equal treatment in Article 24 until the individual claiming entitlement has lawfully resided in the territory for five years and is, consequently, a permanent resident under Article 16 of the Directive.[178] To an extent this can be seen as a codification of the Court's stance in *Bidar* that an individual should be able to display a sufficient degree of integration into the host society, though five years is clearly a harsher test of integration than the three years specified in *Bidar*.

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[177] Article 3, Directive 93/96. Therefore the status of maintenance grants and loans, as opposed to general social assistance, under Directive 93/96 was unclear. For further analysis of the impact of *Bidar* (and *Grzekczyk*) on the exclusion in Directive 93/96, see Dougan, *Op. Cit.* n.170 and Barnard, *Op. Cit.* n.171

[178] Article 24(2), Directive 2004/38

Commentators such as Dougan[179] expect that the Court will continue to apply the *Baumbast*-style principle of proportionality to the terms of the new Directive so the five year threshold may not have to be met in all circumstances in order for the equal treatment principle to be activated in respect of maintenance grants and loans. Hailbronner, for example, makes reference to the Court's application of proportionality to the requirements in Directives 90/364 and 93/96 and suggests that:

'The principle of proportionality, devoid of any precise content if not applied restrictively and its proper systematic context, may again serve as an almost unlimited instrument to amend secondary Community law'.[180]

It would seem that at the point of five years residence the right to equal treatment accrues *de jure*, regardless of the level of actual integration. Prior to this point, the *de facto* degree of integration can be examined (via a test of proportionality) and may be held sufficient to invoke the equal treatment principle. Therefore, the notion of proportionality may be used again by the Court to justify a departure from the strict letter of the law. Given the emphasis in the caselaw, however, on the importance of integration as a key to unlocking the right to solidarity[181] it is likely to remain the case that those who show insufficient levels of integration into a host state, and/or have resided only for a short period of time, will not be able to claim student maintenance grants or loans even with the principle of proportionality being applied to the new legislative regime. *Post-*

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[179] Dougan, M., *Op. Cit.* n.170, 969, see also Hailbronner, *Op. Cit.* n.98, 1264; Dougan, M. and Spaventa, E., "Wish You Weren't Here...' New Models of Social Solidarity in the European Union' in Dougan, M. and Spaventa, E. (Eds.), *Social Welfare and EU Law*, (Oxford: Hart, 2005), 181; Dougan, M., 'The Constitutional Dimension to the Case Law on Union Citizenship', (2006) 5 *European Law Review*, 613, 627-633

[180] Hailbronner, *Op. Cit.* n.98, 1264

[181] Most notably Case C-209/03 *Bidar* [2005] E.C.R. I-2119 and Case C-456/02 *Trojani* [2004] E.C.R. I-7573

accession EU8 migrants thus are likely to be excluded from this right. There is a developing consensus in the literature that residence, as a symbol of integration, is not only the key to equal treatment but also the differentiator which determines the *extent* of the application of equal treatment to any one individual.[182] With this in mind Dougan argues that:

'It might still emerge from the caselaw itself that new or very recent arrivals cannot challenge apparently discriminatory restrictions on access to welfare benefits because they are not in fact in a comparable situation to own nationals or other Union citizens who have actually resided in the host state'.[183]

From this perspective new arrivals are entitled to equal treatment as regards access to certain advantages in the host Member State[184] but often will not be able to rely on the principle with regard to social welfare benefits. Barnard describes the situation, in terms of solidarity, as such:

'While Article 18(1) EC gives newly arrived migrants the right to move and reside freely in the host state there is insufficient solidarity between the newly arrived migrant and the host state taxpayer to justify requiring full equal treatment in respect of social welfare benefits'.[185]

This tendency of the Court, to use previous periods of residence as a means to measure the degree to which an individual citizen can access equal

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[182] In particular, Dougan and Spaventa, *Op. Cit.* n.179; Barnard, *Op. Cit.* n.176; Golynker, O., *Ubiquitous Citizens of Europe: The Paradigm of Partial Migration*, (Oxford: Intersentia, 2006)

[183] Dougan, M., *Op. Cit.* n.170, 969, on this comparability model see Dougan and Spaventa, *Op. Cit.* n.179

[184] Case C-274/96 *Bickel and Franz* [1998] E.C.R. I-7637 (the right to have criminal proceedings conducted in the citizen's mother tongue); Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613 (the right of the children of a Union citizen to take their mother's surname where the national law of the host state specified it had to be the father's surname)

[185] Barnard, *Op.Cit.* n.171, 172

treatment, clearly has implications beyond students as a category of migrant as it applies also in the realm of financially independent persons and workseekers. The transitional arrangements, although applicable only to workers and restricted to the equal treatment rights contained in the provisions granting labour market access, may have an indirect impact on the longer-term ability of EU nationals in general to benefit from the non-discrimination right in Article 12 EC. By denying EU8 nationals the right to reside in a territory to take up employment the Accession Treaty is denying them the ability to employ one of the main methods citizens have used to build up entitlement to equal treatment - integration into a society.[186] Moreover, the Court's reliance on residence as the main indicator of integration is by no means immune from criticism. For example, it may be that EU8 nationals who have taken up work in an EU15 Member State since accession, despite only having resided there themselves for a short period, have strong family ties to that host state.[187]

EU8 migrants who are (almost) financially independent and are lawfully residing in an EU15 Member State will have access to the principle of equal treatment in Article 12 EC. It would seem that the longer they have resided lawfully - and the extent to which they demonstrate assimilation into the host society - the more far-reaching this right will be. In particular, social benefits may require a high level of integration and, as we know, this may be difficult for post-accession EU8 migrants to attain currently. EU15 Member States troubled by the obligation to extend equal treatment rights to EU8 nationals may come to the conclusion that it is mutually beneficial for such individuals to work during the transitional period. In this scenario

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[186] Both *Martinez Sala* and *Grzelczyk* had been employed in the respective host Member States, a point that did not go unnoticed by the Court

[187] This would be in keeping with the findings of this research in relation to the role extended families have played in facilitating the integration of Polish workers into the UK (see chapter five)

the Member State benefits from the economic contribution of the taxpaying worker and the individual gains the more secure status of Community worker with a more protected equal treatment entitlement. In any event, those EU8 nationals that do obtain access to social benefits on the basis of their lawful residence may find themselves particularly at risk of losing their right of residence. It is only 'a certain degree of financial solidarity' that Member States must show to nationals of other Member States[188] and a host Member State remains entitled to take steps to prevent nationals from other Member States becoming an unreasonable burden on the social assistance system.[189] This illustrates the link between the notions of lawful residence, discussed above, and equal treatment:

'Lawful residency entitles them to equal treatment within the host territory; but exercise of that right to equal treatment might, depending on the circumstances, enable the Member State to consider that the claimant has become an unreasonable financial burden'.[190]

When assessing whether an unreasonable burden on the social assistance system of the host Member State exists the Court has, so far, adopted a very individualistic approach, applying the principle of proportionality to the particular circumstances of the claimant at issue.[191] This approach has been criticised by Hailbronner as being too narrow:

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[188] *Bidar*, para. 56

[189] Though expulsion cannot be an automatic consequence of recourse to social assistance, *Grzelczyk*, para. 43; Article 14(3), Directive 2004/38

[190] Dougan and Spaventa, *Op. Cit.* n.86, 708

[191] Case C-413/99 *Baumbast* [2002] E.C.R. I-7091; Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193

'In any individual case it will hardly ever be possible to show the unreasonableness of a burden. The social system as such cannot be substantially affected by one additional beneficiary'.[192]

Up until this point the potential cumulative effect of a number of similar cases, in Grzelczyk's position for example, has not been considered within the confines of the unreasonable burden test.[193] The 2004 enlargement may present the Court with the opportunity to incorporate such an element into to its reasoning, should it wish to and should the chance arise, as 'eastern enlargement clearly has greater *cumulative* implications for the existing Member States than they believed they had assumed'.[194] The transitional restrictions were adopted, partly, to prevent the Member States from having to deal with (potential) claims for social benefits by (presumably low-paid) EU8 migrant workers. Thus, the Member States are likely to be equally concerned about the potential impact of a large number of claims on the basis of Article 12 EC by (almost) financially independent EU8 citizens; conceivably, the transitional arrangements actually encourage reliance on this right thus increasing the potential cumulative impact. Therefore, should a situation come before the Court involving an EU8 national in a position similar to that of Baumbast or Grzelczyk, the Court may adopt a wider approach to the consideration of whether there is a threat of an unreasonable burden being imposed on the Member State's social welfare system and reach a different conclusion as to the proportionality of denying access to such benefits.

One issue not yet mentioned, which relates back to the *Trojani* case, is the possibility for migrants who cannot benefit from a right to reside by virtue

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[192] Hailbronner, *Op. Cit.* n.98, 1261

[193] Dougan and Spaventa, *Op. Cit.* n.86, 707

[194] Dougan, *Op. Cit.* n.80, 117

of Article 18 EC to derive such a right from the national law of the host Member State and then claim resultant access to the equal treatment principle. Trojani, the Court held, despite not fulfilling the conditions of Directive 90/364 appeared to be lawfully residing on the basis of Belgian national law as he had been issued with a residence permit.[195] The right not to be discriminated against attaches to those lawfully resident as a matter of either Community law, such as *Grzelczyk*, or national law, such as *Trojani*.[196] However, as Van Der Mei acknowledges, this residence under national law is at the discretion of the Member State:

'The ECJ merely said that if Belgium, for whatever reasons, decided to award Mr Trojani lawful residence status, it must also treat him equally as Belgian nationals'.[197]

A Member State in this situation is by no means obliged to continue to grant a right of residence to such an individual who does not meet the requirements of sufficient resources and sickness insurance.[198] This particular method of gaining access to the equal treatment principle is highly unlikely to be a viable option for EU8 nationals during the time that the transitional arrangements are in force. During this period the national law of the EU15 is likely to offer very limited opportunities for EU8 nationals to establish any form of residence.[199]

The discussion here has demonstrated how the citizenship provisions provided the Court with the foundations to develop the citizenship status of

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[195] Case C-456/02 *Trojani* [2004] E.C.R. I-7573, para. 37. The claimant in Case C-85/96, *Martinez Sala* [1998] E.C.R. I-2691 also derived her right to reside from the national law of the host state. On *Sala* see Fries and Shaw, *Op. Cit.* n.80

[196] *Trojani,* para. 39

[197] Van Der Mei, *Op. Cit.* n.130, 210

[198] *Trojani*, para. 45

[199] The position of the UK, discussed in section 3, exemplifies this tendency

economically inactive migrants by reinforcing the rights of residence and equal treatment available to them. In order to achieve this, the Court has relied on certain notions, such as 'proportionality', 'unreasonable burden' and 'financial solidarity' which have informed the application of the citizenship provisions. These concepts are ubiquitous in the Court's judgments on citizenship yet their actual meanings are not entirely clear and they largely remain undefined.[200] This may be particularly true for 'financial solidarity' which is historically contingent. Its meaning depends on the Member State under consideration (place) and the particular point in time. 'Proportionality' and 'unreasonable burden' encompass standards which will inevitably be heavily dependent on context rather than rules. As a consequence of the vague nature of these notions the Court has been able to maintain a degree of flexibility in the development and application of citizenship.

Certainly, the Court's interpretation of, and reliance on, these concepts has resulted in non-market migrant citizens enjoying greater access to a form of European social citizenship. Valuable though these mobility rights flowing from Articles 18 and 12 EC are, the distinction between economically active market citizens and the economically inactive remains very much alive and the difference in each group's access to the equal treatment principle reaffirms this distinction. EU8 nationals' inability to access the status of worker in the Member States imposing transitional restrictions clearly places them in a disadvantageous position, although in some circumstances this may be tempered by their ability to move under Article 18 EC (and perhaps claim equal treatment rights on this basis). There is greater potential for EU8 migrants to enhance their citizenship

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[200] For example, 'unreasonable burden' has never been quantified. As a general principle of Community law, however, the meaning of proportionality as a concept is clearer: Article 5(3) EC; Case C-331/88 *ex parte Fedesa* [1994] E.C.R. I-48663; Case 181/84 *ex parte Man* [1985] 2889

potential, or shift between the different (multiple)[201] citizenship statuses (from student to worker for example), than was available to those subject to transitional restrictions after previous enlargements. The Court's reliance on the notion of integration (on the basis of residence), however, is likely to be a major obstacle to access of the equal treatment principle in respect of social welfare benefits. The following section takes a more specific look at the citizenship status of EU8 nationals in the UK as a host Member State not applying transitional restrictions in the strict sense, but still attempting to restrict the citizenship status of those EU8 nationals working on its territory, so that they too are unable to access social welfare benefits in certain circumstances.

3. Consequences of the developing citizenship acquis for EU8 migrants in the UK

The UK has provided an interesting framework within which to study the experience of EU8 nationals largely as a result of the particular stance it has adopted towards EU8 migration during the transitional period.[202] The scheme devised by the UK, the Workers' Registration Scheme, attempts to knit together the issues of employment, legal residence and access to social benefits for EU8 migrant workers.[203] The effect of the system is to make legal residence dependent upon being in employment and, in turn, access to social benefits is restricted to those legally resident, in other words those in work. The aim in this section is to explore the possible impact of the developing Community law on citizenship, that has been already been discussed with reference to EU8 nationals' entitlement in the EU15 during

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[201] See Kostakopoulou (2001), *Op. Cit.* n.91; Kostakopoulou (1999) *Op. Cit.* n.91; Kostakopoulou, D., 'Ideas, Norms and European Citizenship: Explaining Institutional Change', (2005) 68(2) *Modern Law Review*, 233, 234

[202] The position of the UK was discussed in chapter three, section 3.4 specifically explained the links between registration on the WRS, lawful residence and entitlement to social welfare benefits.

[203] EU8 nationals fulfilling the requirements of one of the other categories of migrant citizen (such as student, financially independent person or retired person) can, of course, reside in the UK

the transitional period, upon those migrants who operate within the UK regime. A case study on EU8 workseekers will be conducted, first because this is a group particularly targeted by the UK's secondary legislation,[204] and secondly, because the Court of Justice's interpretation of the citizenship provisions has had implications for the status of this group under Community law.

It is important to consider citizenship in a national, as opposed to simply a Community, context as the delivery of citizenship rights to individuals is dependant on the Member State's national law and interpretation of the said Community rights. In order for citizens to access and experience Union citizenship in a meaningful sense it must filter through the Community sphere to that of the national. Ackers and Stalford stress that the study of citizenship requires 'consideration of the interaction of several layers of context'.[205] It is not the EU, for example, that provides citizens with welfare benefits; instead, the EU provides the framework of social rights which Member States must tangibly deliver.[206] This conceptualisation of citizenship effectively corroborates a model of 'nested' European citizenship. Faist argues:

'[European citizenship is] *a multi-tiered membership system consisting of a mixture of rights guaranteed by regional, state, inter-state and genuinely European institutions. [Although] the web of governance networks allows for enshrining a few new rights at the supra-national level these*

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[204] Accession (Immigration and Worker Registration) Regulations 2004 SI 2004/121, referred to here as Worker Registration Regulations (WRR); Social Security (Habitual Residence) Amendment Regulations 2004 SI 2004/1232, referred to here as 'Social Security Regulations' (SSR)

[205] Ackers, L. and Stalford, H., *A Community for Children? Children, Citizenship and Internal Migration in the EU*, (Aldershot: Ashgate, 2004), 19

[206] *Ibid.*

interconnect with and re-adapt social rights and institutions in existing welfare states'.[207]

Therefore, Union citizenship is 'nested' in various sites at both the EU level (for example in the different free movement 'sites' in the Treaty and ensuing secondary legislation and jurisprudence) and the national level. In order to gain a fuller understanding of EU8 nationals' citizenship status during the transitional period it is helpful to consider the interplay between the supranational and national levels.

3.1. A case study on EU8 migrant workseekers

The UK treats new arrival EU8 workseekers in the same way as it does former workers who seek employment after becoming unemployed; it denies both a right of residence (after the expiry of a 30 day period of grace) and, consequently, the ability to receive social welfare benefits. However, Community law draws a legal distinction between new arrivals and former workers who become unemployed and seek new employment.[208] It is interesting, then, to chart the interplay between the rules of the Community law system with those of the UK system which seeks to restrict the citizenship status of EU8 nationals by making attainment of 'worker' status reliant on continued participation in the labour market.

3.1.1. New arrival workseekers

It was mentioned earlier in relation to the citizenship hierarchy that Community law has traditionally regarded workseekers as holding the status of semi-worker.[209] Nationals of the Member States have been

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[207] Faist, *Op. Cit.* n.1, 46

[208] Case C-138/02 *Collins* [2004] E.C.R. I-2703

[209] Section 2.1

afforded the right to move freely to other Member States and reside there for the purpose of seeking employment.[210] The Court in *Antonissen* further secured the position of workseekers by stating that they should be granted a reasonable period in which to find work[211] and that, as long as the workseeker could show he or she was continuing to seek employment and had genuine chances of being engaged, the right of residence could continue. Directive 2004/38 confirms workseekers' residency rights, essentially, on the same terms.[212]

The UK unequivocally denies EU8 new arrival workseekers a right of residence.[213] On the surface this appears to comply with the transitional arrangements, the objective of which is to enable the EU15 to control the mobility of EU8 migrants. However, the transitional arrangements, as derogations to the free movement *acquis,* should be interpreted strictly.[214] Furthermore, residence rights of workseekers flow directly from Article 39 EC itself rather than from any secondary legislation.[215] Arguably then, workseekers' residence rights fall outside the scope of the permitted derogations in the Accession Treaty, the main focus of which is Articles 1-6 of Regulation 1612/68 *not* Article 39 EC itself. This interpretation seems to be shared by the Commission as its free movement guide, produced to provide information about the operation of the transitional arrangements, states:

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[210] Case C-292/89 *Antonissen*, [1991] E.C.R. I-745

[211] 6 months was suggested as a reasonable period of grace, *Antonissen,* para. 21

[212] Article 6 contains the initial three month period for all Union citizens and Article 14(4)(b) confirms that those genuinely seeking work and with genuine chances of becoming engaged can continue to reside

[213] Regulation 4(2), WRR

[214] See Hillion, C., 'The European Union is dead. Long Live the European Union... A commentary on the Treaty of Accession 2003', (2004) 29 *European Law Review,* 583

[215] *Antonissen*, para 13

'Discrimination is prevented at the job search stage... Indeed all job-seekers are entitled to search for work in other Member States'.[216]

On this reasoning it may be appropriate to suggest that EU8 migrants do formally have a right to reside under Community law to seek work for a reasonable period. Admittedly, this argument may appear unconvincing when one considers that the majority of EU15 Member States appear to circumvent Article 39 EC in this manner by denying residence to workseekers. But presumably, in an EU15 Member State with transitional restrictions in place an EU8 migrant would have no reasonable prospects of becoming engaged and the right to reside would expire.[217] EU8 workseekers in the UK would appear to have more secure rights to reside under Community law, as this is a territory which has opted to open the labour market on the very premise that it has job vacancies to fill. From this perspective it should not be inherently difficult for an EU8 workseeker to show they have genuine chances of finding employment. It seems, therefore, that as a matter of Community law, EU8 workseekers do enjoy a right of lawful residence and the UK's attempt to deny this is in breach of the Accession Treaty. If this particular argument is found wanting it remains a possibility that workseekers might successfully claim a right to reside in the UK. The UK has opened up the labour market and so is not technically utilising the transitional arrangements, therefore it presumably continues to be bound by the free movement *acquis* in its entirety.

Moving on to consider more specifically the denial of social welfare provision to workseekers,[218] the early position under Community law was

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[216] European Commission (DG Enlargement), *Free Movement for persons -- A Practical Guide for an Enlarged European Union*, (Brussels, 2002), 6

[217] Of course it also true that many EU8 migrants will purposely *not* seek work in a Member State that has transitional restrictions in place because they will not expect to be successful

[218] EU8 workseekers could rely on the coordinating provisions in Article 69 Regulation 1408/71 [1997] O.J. L28/1 to export unemployment benefits from their home state

uncompromising. In *Lebon*[219] the Court decided that workseekers were entitled to equal treatment only as regards taking up employment, not in relation to social and tax advantages. The decision of the ECJ in Collins, however, challenges this distinction.

Collins[220] was concerned with the UK rules requiring EU migrant workseekers to establish habitual residence as a precondition for access to social benefits.[221] Collins, who had dual Irish and American nationality, was refused income-based jobseekers' allowance on the grounds that he was not habitually resident in the UK. Collins had spent time in the UK sporadically between 1978-1981, during which he had studied and engaged in part time and casual work. He returned to the UK in 1998 and applied for jobseekers' allowance whilst he sought employment. This was refused on the ground that Collins was not habitually resident. On appeal, the Social Security Commissioner referred questions to the ECJ seeking to establish whether any provisions of Community law demanded payment of jobseekers' allowance to a claimant such as Collins.

The Court relied upon the developing caselaw on citizenship to strengthen the status of workseekers despite the fact that workseekers' rights of residence flow from Article 39 EC rather than Article 18 EC. The Court, therefore, held that the principle of equal treatment in Article 39(2) EC, which *Lebon* had found only extended to access to employment, itself had to be interpreted in the light of Article 12 EC which, as we know from the

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[219] Case 316/85 *Lebon* [1987] E.C.R. 2811

[220] Case C-138/02 *Collins* [2004] E.C.R. I-2703. For discussion of *Collins* see Dougan, M., 'The Court Helps Those Who Help Themselves... The Legal Status of Migrant Workseekers Under Community Law in the Light of the Collins Judgment', (2005) 7 *European Journal of Social Security*, 7; Golynker, O., 'Jobseekers' Rights in the European Union: Challenges of Changing the Paradigm of Social Solidarity', (2005) 30 *European Law Review*, 111; Oosterom-Staples, H., Annotation of Collins (2005) 42 *Common Market Law Review*, 205

[221] Of course this concerned the habitual residence rules as they stood prior to accession without the additional 'lawful residence' requirement

above discussion, is much broader and covers a variety of social benefits. In effect the Court overruled *Lebon* to the effect that workseekers are entitled to equal treatment as regards access to certain benefits:

'It is no longer possible to exclude from the scope of Article 39(2) of the Treaty – which expresses the fundamental principle of equal treatment, guaranteed by Article 12 of the Treaty – a benefit of a financial nature intended to facilitate access to employment in another Member State'.[222]

The habitual residence requirement, as a condition that would disadvantage a greater number of non-nationals than nationals, thus constituted indirect discrimination against EU migrant workseekers, as Union citizens, which the UK had to objectively justify.[223] In *Collins,* although the Court did accept that a person could be required to establish a connection, or 'genuine link',[224] with the employment market in the UK in order to become entitled to the means-tested unemployment benefit, this had to be balanced by certain conditions. In particular if the connection were to be established through a residence test it must be proportionate, it must rest on clear criteria known in advance, and the determination must be susceptible to legal challenge:

'While a residence requirement is, in principle, appropriate for the purposes of ensuring such a connection, if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective. More specifically, its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility

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[222] *Collins,* para. 63

[223] Indirectly discriminatory treatment can be justified if it is was based on objective considerations independent of the nationality of the person concerned and proportionate to the legitimate aim of the national provisions. See Case C-274/96 *Bickel and Franz* [1998] E.C.R. I-7637, para 27; Case C-224/98 *D'Hoop* [2002] E.C.R. I-6191, para 36

[224] *Collins,* para 69

of a means of redress of a judicial nature. In any event, if compliance with the requirement demands a period of residence, the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State'.[225]

This logic can be seen also in the Court's reasoning in *Ioannidis.*[226] Here the Court held a condition in Belgian national law which required applicants for a tideover allowance granted to unemployed young people to have completed their secondary education in Belgium to be disproportionate. After reiterating that it is legitimate for a host Member State to require that there is a real link between such a claimant and the national labour market[227] the Court emphasised the importance of ensuring this link is established in a proportionate manner:

'A single condition concerning the place where the diploma of completion of secondary education was obtained is too general and exclusive in nature. It unduly favours an element which is not necessarily representative of the real and effective degree of connection between the applicant for the tideover allowance and the geographic employment market, to the exclusion of all other representative elements. It therefore goes beyond what is necessary to attain the objective pursued'.[228]

The potential significance of the reasoning in *Collins* and *Ioannidis* for EU8 workseekers is clear. Under Community law EU8 migrants who are seeking their first employment in the UK may be eligible to claim benefits,

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[225] *Collins*, para. 72

[226] Case C-258/04 *Ioannidis* [2005] E.C.R. I-8275

[227] *Ioannidis*, para. 30

[228] *Ioannidis*, para. 31

such as jobseekers' allowance, after a reasonable period of genuine job hunting. This would clearly undermine what the UK post-accession system sets out to achieve. Of course, the points made above in relation to the emphasis placed on an individual's degree of integration remain relevant. An EU8 migrant would have to demonstrate that he/she had 'for a reasonable period, in fact genuinely sought work' in the UK. The situation of workseekers can possibly be considered in a different way to those whose rights flow from Article 18 EC as workseekers have some future connection to the labour market, a symbol of integration into society; accordingly, they may be entitled to expect a greater degree of solidarity from the Member State than an individual who holds out no such promise of future integration.

The UK restrictions operate across two 'layers': first, the habitual residence test has already been classified as indirect discrimination in *Collins* as it is capable of being met more easily by UK nationals.[229] This discrimination impacts upon EU migrants in general, not simply those from the EU8 Member States, and it can be objectively justified on the basis of ensuring a 'genuine link' to the territory under the *Collins* principle. Secondly, and of more interest, is the legal residence requirement. This requirement, although on the surface applying to *all* applicants, clearly sets out to prevent unemployed EU8 migrants from resorting to benefits. As a result of this test EU8 migrants are automatically excluded from consideration when UK nationals and EU15 migrants in a comparable situation would not be.[230] This layer, therefore, directly discriminates against EU8 nationals. Given that direct discrimination can only be justified by reference to derogations expressly

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[229] Case C-237/94, *O'Flynn* [1996] E.C.R. I-2617, para 18

[230] EU15 nationals in the UK have a right of 'legal residence' under UK national law, both as workseekers and former workers who are now unemployed: the Immigration (European Economic Area) Regulations 2000 SI 2000/2326

provided for in the Treaty,[231] in theory this should mean that the UK would not have the opportunity to justify this restriction.

However, the issue is not necessarily so straightforward. Like the UK rules on EU8 workers, the case of *Bidar*[232] was concerned with two layers of restriction which had both an indirectly and directly discriminatory impact. Although this case was concerned with migrant students it is useful to look analogously at how the Court dealt with the discrimination issue. Applicants for student loans in the UK were required to fulfil a test of being ordinarily resident in the UK for three years and an additional test of being 'settled' in the UK. The 'ordinarily resident' limb was more easily satisfied by UK nationals;[233] however, the 'settled' limb virtually amounted to a blanket ban on the ability of students from other Member States to obtain student loans and, hence, amounted to direct discrimination on the ground of nationality.[234] The advantage was reserved exclusively for students of UK nationality. Despite this direct discrimination against students from other EU Member States the approach of the Court was to take the two layers as a single bundle and subject it, as a whole, to the objective justification test. The Court, therefore, did suggest that the apparent direct discrimination was potentially justifiable, though it concluded in *Bidar* that the 'settled' layer of the requirement was disproportionate:

'It is common ground that the rules at issue in the main proceedings preclude any possibility of a national of another Member State obtaining

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[231] Such as public security and policy. Note that expulsion/discrimination must be based on personal conduct. Article 39 EC; Articles 27-33, Directive 2004/38; previously the position was dealt with under Directive 64/221 [1964] O.J. Sp. Ed. L850/64

[232] Case C-209/03 *Bidar,* [2005] E.C.R. I-2119

[233] *Bidar* , para. 53

[234] *Bidar*, paras. 60-63

settled status as a student. Thus they make it impossible for such a national, whatever his actual degree of integration into the society of the host Member State, to satisfy that condition and hence to enjoy the assistance to cover his maintenance costs. Such treatment cannot be regarded as justified by the legitimate objective which these rules seek to secure'.[235]

It is possible that, should it be called upon to review the UK rules on EU8 migrants,[236] the Court would adopt the same reasoning towards the bundle of rules and regard them as justifiable in principle but disproportionate in effect.

The practice of making legal residence reliant on being employed before EU8 nationals can claim social benefits certainly seems extreme. On the other hand, it could also be argued that there would be something slightly bizarre about the UK, a country commonly perceived as already being generous towards EU8 nationals by allowing them to work, being urged to go further and grant social benefits to those in its territory but unemployed. If the Court was reluctant to classify the rules as discriminatory it may be tempted to follow the *Kaba* line of reasoning;[237] essentially the Court could find that the residence situation of EU8 migrants is simply not comparable to that of UK nationals and hence there would be no need for the UK to justify the rules. This reasoning rests on the notion that migrants, unlike

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[235] *Bidar*, para. 61

[236] Either as a result of an Article 234 EC preliminary reference from a national court asked to decide upon the legality of the UK rules, or, as a result of an Article 226 EC Commission enforcement action against the UK's illegality

[237] Case C-356/98 *Kaba I* [2000] E.C.R. I-2623 and Case C-466/00, *Kaba II* [2003] E.C.R. I-2219

nationals, have only a conditional right to reside in a Member State.[238] The Member States are:

'...entitled to rely on any objective difference there may be between their own nationals and those of other Member States'.[239]

This could be a problematic stance, however, as should the Court proceed to reiterate the *Kaba* standpoint as regards the non-comparability of nationals and EU migrants it may risk encouraging Member States to rely on all manner of so-called 'objective differences'. Ultimately the Court risks undoing gains that have been made in relation to the application of the non-discrimination principle to EU migrants when exercising rights of free movement. For example, surely the sufficient resources requirement which applies to non-workers is such an 'objective difference' between nationals and non-nationals. Taken to its logical and full conclusion the *Kaba* line of reasoning risks rendering Article 12 EC ineffective.

In any event, there is a further dimension to the issue of discriminatory treatment against EU8 migrants: not only are EU8 migrants treated less favourably than UK nationals by the UK rules, they are also treated less favourably than EU15 nationals. It would therefore be extremely difficult to justify a *Kaba*-style argument in this regard. The Court has previously held that a Member State cannot reserve 'special treatment' for workers from a certain Member State whilst denying the same advantage to workers of other EU nationalities.[240]

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[238] *Kaba I*, para 30. The *Kaba* decision has been subject to criticism, see Peers, S, 'Dazed and Confused: Family Members' Residence Rights and the Court of Justice', (2001) 26 *European Law Review*, 76

[239] *Kaba I*, para. 31

[240] Case 235/87 *Matteucci* [1988] E.C.R. 5589 a bilateral agreement between Belgium and Germany reserved the eligibility of training scholarships for workers of either Belgian or German

Presuming that the Court would not be able to ignore the discriminatory treatment of EU8 migrants in the UK when compared with EU15 migrants, it is likely that the UK would be given the opportunity to provide objective justifications for the requirements as a bundle.[241] As we are already aware, habitual residence can be justified on the basis of ensuring the claimant has a 'real link' to the society from which he or she wishes to claim. The legally resident criterion, on the other hand, is more problematic as it is not clear what role this condition plays in ensuring such a degree of integration exists. Arguably it goes too far.

Before moving on, attention must be paid to the potential impact of Directive 2004/38[242] upon the rights of new arrival workseekers as, like with students, the new legislative regime attempts to restrict the available equal treatment rights available to workseekers. Article 24(2) states that the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence, or during the extended period of residence where the workseeker provides evidence that he or she is continuing to seek employment and has genuine chances of being engaged. This clearly seems to run contrary to the *Collins* ruling and, if accepted literally, will render a lot of the arguments put forward here superfluous now that the Directive is in force.[243] As was stressed in relation to the requirement in the Directive that students build up five years lawful residence before gaining the right to access maintenance grants and loans it seems likely that the principle of proportionality has a role to play here. Hence, the principle in Article 24(2), as a 'limitation and condition'

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nationality. This was held to be contrary to the principle of equality of treatment as regards social advantages in Article 7(2), Regulation 1612/68

[241] As in *Bidar*

[242] [2004] O.J. L158/77

[243] As of 30 April 2006

on free movement rights,[244] may itself be subject to the principle of proportionality[245] and thus should only be applied in so far as it is 'necessary to protect the Member State's legitimate interests'.[246]

Finally, one issue that has not been clear in relation to workseekers is whether their right to reside is susceptible to termination on the ground that they have become an 'unreasonable financial burden'. This test was obviously developed by the Court in relation to Article 18 EC and the requirements in the old residence Directives but workseekers derive their rights from Article 39 EC. Meulman and de Waele assume that the 'unreasonable financial burden' rule does apply because, arguing for the potential adoption of a cumulative interpretation of the test, they speak of the financial implications of 'multiple Mr Collins's' suggesting that this would amount to such a burden.[247] This would appear to be a mistaken interpretation under the provisions of the old legislative regime as, granted that workseekers' status gained benefits indirectly from Article 18 EC,[248] they fell outside the scope of Directives 93/96 and 90/364 – the principal site of development for the 'unreasonable burden' test. Arguably, this remains the case under the new legislative regime. Now, however, the single legislative regime set out in Directive 2004/38 potentially does extend the applicability of this test to workseekers. The preamble to Directive 2004/38 refers to the legitimate interest of the Member States in preventing migrants from becoming an unreasonable financial burden and, accordingly, states that the right to reside longer than three months is

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[244] As per Article 18 EC

[245] Case C-413/99 *Baumbast* [2002] E.C.R. I-7091

[246] See Dougan, *Op. Cit.* n.220, 21

[247] Meulman, J. and de Waele, H., 'Funding the Life of Brian: Jobseekers, Welfare Shopping and the Frontiers of European Citizenship', (2004) 31(4) *Legal Issues of European Integration*, 275, 287

[248] For example, in *Collins* it was as a result of the developments in the caselaw regarding Articles 18 and 12 EC that the Court felt able to overrule *Lebon*. From this perspective, workseekers'

subject to conditions.[249] As the Directive also seeks to deny workseekers rights to equal treatment as regards social assistance, even beyond three months, it seems that the Directive does incorporate some understanding of the potential for workseekers to burden the host state's social assistance scheme. If this understanding of the law is correct workseekers may now be open to assessment on the basis of the unreasonable burden test, including the potential for the Court to look at the cumulative implications, and this may limit somewhat the ability of EU8 workseekers in the UK to claim equal treatment rights and consequent social welfare benefits.

3.1.2. Involuntarily unemployed former workers

Workers who become unemployed[250] post migration have enjoyed complete access to worker status in the past, including the right to social advantages under Article 7(2) Regulation 1612/68. Once unemployed, although no longer Community workers in the fullest sense, they retain some of the benefits associated with the status:

> *'Persons who have previously pursued in the host Member State an effective and genuine activity as an employed person as defined by the Court but who are no longer employed are nevertheless considered to be workers under certain provisions of Community law'.*[251]

If an EU8 national becomes unemployed in the first year of residence the UK purports that they have relinquished their right to reside after 30 days and cannot claim social welfare entitlement. Essentially, the UK expects

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citizenship status can now be said to be 'nested' in Article 39 EC in conjunctions with Articles 18 and 12 EC

[249] Recital 10, Preamble to Directive 2004/38

[250] The focus here is on involuntary employment. The Accession Treaty allows the EU15 Member States to withdraw the rights of EU8 nationals who become voluntarily unemployed: para 2, Annexes

[251] Case 39/86 *Lair* [1988] E.C.R. 3161

EU8 migrants to be self sufficient during periods of unemployment or inability to work. Until they have completed 12 months of uninterrupted employment they are not entitled to out-of-work benefits such as council tax benefit and housing benefit,[252] income support,[253] jobseekers allowance[254] and state pension credit.[255]

Again, the approach of the UK appears unlawful in the light of broader provisions of Community law. Directive 2004/38 confirms that workers who become involuntarily unemployed continue to have a right of residence in the host state.[256] This has already been noted in an effort to demonstrate the depth of the worker's citizenship status. It follows that, under Community law, an EU8 worker who loses his or her job should continue to have a right of residence in the UK.

Moving on to consider this group's potential ability to claim entitlement to social welfare, it is clear that these ex-workers are in a different position to new arrival workseekers such as *Collins*. In *Collins* itself the Court touched upon this issue: Collins had previously worked in the UK but there had been a 17-year lapse since that time, such that he was classed as a new arrival workseeker.[257] On this basis Article 7(2) of Regulation 1612/68 did not apply to him. The corollary of this finding is that Article 7(2) *can* indeed apply to those who have recently become unemployed in the host Member State on the basis that they continue to have a 'sufficiently close connection' to the labour market.[258] This confirms the established law that

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[252] Regulation 2, SSR

[253] Regulation 3, SSR

[254] Regulation 4, SSR

[255] Regulation 5, SSR

[256] Article 7(3)

[257] C-138/02 *Collins* [2004] E.C.R. I-2703, para. 30

[258] *Collins*, para. 30

termination of an employment relationship does not automatically put an end to all rights enjoyed by a worker under Community law.[259] The Court in Collins explicitly confirms that those who have worked in a Member State but are no longer in an employment relationship, continue to be 'workers' and are thus entitled to access the same social advantages as national workers.[260] Directive 2004/38 enshrines these principles as Article 7(3) provides that the 'status of worker' will continue for no less than six months when a worker becomes involuntarily unemployed.

Following this line of argument EU8 nationals who lose their job in the first year should be entitled to rely on Article 7(2) and claim social welfare on the same basis as UK nationals. It seems to be disproportionately inequitable that an EU8 national who works in the UK in compliance with the registration scheme for a period as long as 11 months, and then becomes involuntarily unemployed, will have no ability to claim jobseekers' allowance.[261]

The Court's decision in *Ninni-Orasche*[262] may also be important for EU8 migrants. Here, the Court found that the expiry of a fixed-term contract can amount to involuntary unemployment.[263] This has interesting implications for EU8 workers whose temporary contract expires. This principle may be particularly relevant to EU8 workers given the high

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[259] *Collins*, paras. 27-31; Case 39/86 *Lair* [1988] E.C.R. 3161, an ex-worker was entitled to a grant as a social advantage on deciding to enter university education. See also Case C-413/01 *Ninni-Orasche,* [2003] E.C.R. I-13187

[260] *Collins*, paras. 30-31

[261] Despite having made tax and national insurance contributions for that 11 month period. See White, R., 'Residence, Benefit Entitlement and Community Law', (2005) 12 *Journal of Social Security Law*, 10, 25

[262] Case C-413/01 *Ninni-Orasche* [2003] E.C.R. I-13187

[263] Ninni-Orasche, para 42

concentration of them in temporary employment in the UK.[264] Stalford has emphasised the increasing tendency of western employers to impose short-term employment contracts[265] which provides employers with greater flexibility to meet short-term demands without the longer-term financial commitment to staff, which is not always viable.[266] Despite this preference for temporary contracts a migrant whose contract expires may be able to argue that he or she continue to be entitled to equal treatment as regards social and tax advantages under Article 7(2) Regulation 1612/68. Thus, there is potential scope for their (market) citizenship status to have a meaningful impact on them beyond the expiry of the actual exercise of the economic right to free movement.

Workseekers, in the form of new arrivals and former workers, now have a more comprehensive citizenship status than they did previously which affords them greater opportunity to access the principle of equal treatment. Undoubtedly, the introduction of the formal citizenship provisions and the ensuing interpretation by the Court has been the key to this broadening of entitlement and climbing of the citizenship ladder. These developments potentially have quite positive implications for the status of workseekers in the UK, where the post-accession regulatory regime clearly attempts to deny out-of-work EU8 migrants their full citizenship entitlement. Of course, in order for the Community law discussed here to have a tangible impact on an individual EU8 migrant he/she would, first of all, have to be aware of (or seek legal advice on) the disparity between the status of workseekers under national and Community law and, second, have the

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[264] 45% of registered workers are in temporary employment according to the Joint Report by the Home Office, Department for Work and Pensions, Inland Revenue and Office of the Deputy Prime Minister, *Accession Monitoring Report, May 2004-June 2006*, 22 August 2006

[265] Stalford, *Op. Cit.* n.60, 4

[266] Note that Directive 1999/70, which puts into effect the Framework Agreement on fixed-term work, may be important for EU8 temporary workers ([1999] O.J. L175/43). The Agreement contains a non-discrimination principle (clause 4) and a provision that requires employers to inform fixed-term workers about permanent positions in the workplace (clause 6)

resources and resolve to make a legal challenge in the UK's national courts as to the legality of the UK provisions.

4. Conclusion

Drawing on the established caselaw and literature on the notion of Union citizenship this chapter has attempted to incorporate the enlargement process into the discussion, and chart some aspects of the relationship between the developing citizenship *acquis* and the transitional mobility restrictions.

The discussion of Union citizenship here, and its application to EU8 migrants, would support the assertion put forward by Kofman that membership of the citizenship community is 'messy' in practice.[267] Everson argues that the European market citizen is the 'role which nationals of the Member States have been expected to play' to help achieve the 'legal and practical realisation of the internal market'.[268] This is not the role assigned to nationals of the EU8 Member States, at least in the initial phase of their formal membership of the Union. Instead they are expected to forgo participation in EU15 labour markets to ease the fears of the EU15. Ironically, although EU8 nationals do not have full access to the status of European market citizen by virtue of the transitional mobility restrictions this is tempered, to some limited extent, by their ability to move simply as Union citizens whose citizenship status has been fortified in recent years and, in some circumstances, can itself allow access to the equal treatment principle and bestow some aspects of solidarity. There is a further (cruel) irony, however, in that, as the EU is moving away from a citizenship conception construed only in economic terms, and when EU8 nationals can rely on the status of non-economically active Union citizen,

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[267] Kofman, *Op. Cit.* n.3, 122

[268] Everson, *Op. Cit.* n.20, 85

the status they appear to most desire, that of active market citizen, is not accessible to them.

The domestic context is also important when seeking to explore the citizenship status of a group such as EU8 migrants. The very nature of transitional arrangements is that there is frequently little in the way of a domestic environment within which to examine the experience of citizenship. The particular stance of the UK, which has not imposed transitional restrictions in the form envisaged by the Accession Treaty, therefore, provides an interesting extra layer of context to the examination of the citizenship status accorded to EU8 migrants. It certainly would appear that developments in the area of citizenship at Community level could, if accessed by an individual EU8 migrant, counter the UK's attempt to restrict the access of EU8 migrant workers in its territory to residence and social welfare rights.

The UK system gives with one hand, by opening up the labour market, but takes away with the other by restricting the residence and welfare entitlement of those who have worked but find themselves unemployed prior to building up a year of legal employment. EU8 migrants are unlikely to attempt to claim benefits whilst in work but if they do become unemployed in the first year they are automatically denied any social assistance, despite having made a contribution to the public purse. Surely given that the UK has wished to gain from the labour market activity of EU8 migrants, it follows that the UK should embrace its full responsibilities under Article 39 EC.

Finally, it should not be forgotten that citizenship of the Union, in the sense of the formal provisions, was introduced to increase the EU's legitimacy and bring Europe 'closer to its citizens' but the very existence of

transitional arrangements on free movement suggests that Europe does not desire to be close to all of its citizens – or, at least not as close to some as it is to others. After all, it is only through exercising rights of mobility that Member State nationals experience meaningful citizenship. As a consequence of this selective intimacy, the legitimacy of the EU in the eyes of some of its newest citizens may be damaged irrevocably as a result of transitional mobility restrictions.

Chapter seven

CONCLUSION

The objective of the research for this thesis was to explore the status, entitlement and experience of nationals from the 2004 CEE accession states who migrated to the UK in order to work while the transitional arrangements on the free movement of persons were in operation across the EU15 Member States. The research sought to be innovative in both the strategy it utilised and the group of migrants whose status it considered.

This thesis has looked to define and critically analyse the transitional arrangements on free movement in terms of the impact such mobility restrictions have on EU8 migrants' overall citizenship status and experience. It has sought to do so by incorporating migrants' personal accounts of their migration experiences. The Community law entitlement of EU8 migrants is neither analogous to that of EU15 migrants nor to that of third-country nationals migrants. Essentially, during the transitional period, EU8 migrants occupy a discrete status as regards mobility rights and citizenship experience. By examining this group's status and experience, therefore, an attempt has been made to fill an identifiable research lacuna.

The methodology developed and implemented throughout the research process combined analysis of the legal framework with in-depth qualitative empirical work (together with some examination of secondary statistical data). By adopting a socio-legal approach an analysis has emerged which not only offers a critique of the legal framework shaping the status of EU8 migrants but also places it within a specific social, cultural and economic context. For example, the migrants' personal accounts underline the

human implications of the transitional mobility restrictions and emphasise the significance placed upon the right to free movement by the newest citizens of the Union. In turn this importance placed on the right to move as a worker, apparent within the qualitative data, serves to highlight the practical hollowness of the citizenship package extended to EU8 nationals during the transitional period.

The substantive chapters of the thesis have examined EU8 migrants' labour market access (chapter three), experience and status when working in the UK (chapter four) and methods of sustaining family life subsequent to the exercise of mobility rights (chapter five). These are all elements that form constitutive parts of a Community migrant's citizenship entitlement; together they provide a more holistic exposition of the specific status occupied by EU8 migrants in the UK during the transitional period. Chapter six built on this analysis by exploring the relationship between nationals of the EU8 Member States and the evolving status of Union citizenship. The scope of the discussion in this chapter was somewhat broader than that in the preceding chapters as it sought to clarify the position of EU8 nationals as migrants *qua* citizens under Article 18 EC (in addition to Article 39 EC).

Analysis of EU8 migrants' interaction with the free movement provisions and the contingent social entitlement provides fresh insight into the development of Union citizenship more generally. Renowned contributions have already drawn attention to the hierarchical and differentiated nature of Union citizenship which continues to privilege those Community migrants making a traditional economic contribution to the host Member State.[1] Building on such work, this research has

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[1] Including but not restricted to: O'Leary, S., *The Evolving Concept of Community Citizenship* (The Hague: Kluwer, 1996); Shaw, J., 'The Many Pasts and Futures of Citizenship in the European Union', (1997) *European Law Review*, 554; Shaw, J., 'The Interpretation of European Union

advanced a critical account of the position of EU8 migrants subject to transitional mobility restrictions within the hierarchy. Indeed, EU8 migrants provide a striking example of the unequal application of citizenship entitlement which occurs across the different categories of Community migrant despite the formal definition in Article 17 EC which appears, on the surface, to imply a universality of status.

Previous contributions to the literature have explored the increasingly meaningful citizenship experience of those Community migrants who do not hold the status of market citizen but rather reside in a host Member State in a non-economically active capacity pursuant to Article 18 EC.[2] By incorporating an empirical element the research for this thesis has demonstrated how developments towards a more social construction of citizenship are unlikely to be of great tangible benefit to many EU8 migrants who, at least in the initial period following accession, have demonstrated most enthusiasm for the prospect of exercising mobility rights as a migrant worker in an effort to increase their own, and often their family unit's, income. Thus, the formal applicability of Article 18 EC largely appears to contrast with the empirical reality. This finding could be relied on to challenge the perception sometimes portrayed (by the media, for example) of large-scale welfare shopping by the economically inactive. The research has demonstrated however, in particular by applying

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Citizenship', (1998) 61(3) *Modern Law Review*, 293; Everson, M., 'The Legacy of the Market Citizen' in Shaw, J. and More, G. (Eds.), *The New Legal Dynamics of European Union*, (Oxford: Clarendon Press, 1995), 73; Ackers, L., *Shifting Spaces: Women, Citizenship and Migration within the European Union'*, (Bristol: Policy Press, 1998); Kostakopoulou, T., *Citizenship, Identity and Immigration in the European Union*, (Manchester: Manchester University Press, 2001); Kostakopoulou, T., 'Nested "Old" and "New" Citizenship in the European Union: Bringing Out the Complexity', (1999) 5 *Columbia Journal of European Law*, 389; Ackers, L. and Stalford, H., *A Community for Children? Children, Citizenship and Internal Migration in the EU*, (Aldershot: Ashgate, 2004)

[2] Dougan, M., 'The Court Helps Those Who Help Themselves... The Legal Status of Migrant Workseekers Under Community Law in the Light of the Collins Judgment', (2005) *European Journal of Social* Security, 7; Dougan, M. and Spaventa, E., 'Educating Rudy and the (non)English Patient: A Double Bill on Residency Rights Under Article 18 EC', (2003) 28 *European Law Review*, 699

developments in the ECJ's caselaw on citizenship to the legal regime adopted in the UK, that Article 18 EC (and the Court's interpretation of it in conjunction with Article 12 EC) could theoretically prove very beneficial as a means for an EU8 migrant workseeker to overcome the restrictive effects of the UK regulatory system as regards residence and social benefits. Therefore, the empirical reality does not detract from the theoretical possibility that citizenship can be applied to endow rights on those EU nationals subject to transitional mobility restrictions.

1. Reflecting on the analysis at EU level

As a result of the nature of the transitional arrangements contained in the Treaty of Accession a complex and differentiated patchwork of free movement rights has emerged across the enlarged EU. The complexity created by a system which enables each EU15 Member State to dictate the labour market access of EU8 nationals has led to high levels of uncertainty and confusion amongst those towards whom the transitional arrangements are directed. Moreover, from January 2007 an even more convoluted typology of mobility entitlement looks set to emerge. As a result of the Treaty of Accession concerning Romania and Bulgaria,[3] which grants the EU25 the right to impose restrictions analogous to those considered in this thesis,[4] some Member States will be in the position of applying transitional measures against the new(er) citizens while their own nationals' free movement rights remain curtailed.[5]

It has been difficult to access accurate, impartial and up-to-date information about the EU-wide policies on free movement in place after

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[3] Treaty of Accession 2005 [2005] O.J. L157/12

[4] Article 23, Act concerning the accession of Bulgaria and Romania [2005] O.J. L157/203 and the respective annexes: Annex VI, transitional measures, Bulgaria [2005] O.J. L157/278; Annex VII, transitional measures, Romania [2005] O.J. L157/311

the 2004 enlargement. NGOs at the European level, such as European Citizen Action Service (ECAS)[6] and Citizens Advice International (CAI),[7] have made concerted efforts to publicise and provide information about free movement rights generally and in the specific context of enlargement. The free movement 'hotline' set up by ECAS in 2006 to offer free advice to migrants on their rights (referred to in chapter three), for example, has notably appointed Lithuanian and Polish speaking staff to deal with queries from EU8 nationals (in addition to English, French, German and Italian speakers). Of course, the ability of a migrant to access such services is dependant on their awareness of the relevant programme's existence which, in turn, will be influenced by the availability of facilities (such as Internet access). Inevitably, it is often the most economically privileged and/or those with higher levels of education that are able to 'tap in' to such NGO resources, although awareness is also likely to travel via conduits created by migrant networks. Such schemes are obviously fulfilling a *valuable function but it also seems that they have been a later development,* partially in response to the evident confusion immediately following enlargement.

A well-publicised, EU developed programme earlier on in the process could well have helped EU8 nationals to navigate the complexity of the differentiated free movement system. On a positive note, there has been much more in the way of mobility promotion, rights awareness raising and general discussion about free movement from the EU institutions (predominantly the Commission) during 2006, the European Year of Workers' Mobility. This initiative and the linked EU-wide events, such as an EU-wide job fair, do suggest a commitment to enhancing the degree of

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[5] Although this already occurred to some extent as a result of the right of the EU8 to impose 'reciprocal measures' on the EU15 Member States applying restrictions

[6] See <http://www.ecas.org/> (last accessed 21 November 2006)

available information on mobility entitlement right across the enlarged EU. Presumably, the existence of these schemes will assist the nationals of the Member States involved in the next round of enlargement. Therefore, Bulgarian and Romanian nationals may have more extensive access to information regarding mobility entitlement than was initially available to EU8 nationals despite the overall patchwork of free movement rights becoming even more intricate after the 2007 enlargement. Such inclusive policy activities, however, contrast markedly with the legal provisions in the Accession Treaty establishing the seven-year transitional arrangements where it is clear that the balance of power rests with the EU15 Member States to the disadvantage of EU8 nationals.

It is not only in the EU arena that levels of uncertainty have thrived in relation to the operation of transitional restrictions. The case study of Polish migrant workers in the UK uncovered confusion surrounding various areas of the domestic regulatory system. Chapter three in particular acknowledged the ambiguity associated with the operation of the Worker Registration Scheme, particularly in the initial post-accession stages, and misconceptions surrounding it. For example it was pointed out how some migrants were unlawfully charged a fee simply to obtain a copy of the documentation relating to registration despite it being freely available online. Chapter five similarly pointed to the existence of such uncertainty with regard to the applicability of the right to access social benefits to those EU8 workers complying with the WRS requirements. Here, the confusion surrounding the system has conspired to (mistakenly) convince EU8 workers that they are not entitled to receive in-work benefits which, in turn, leaves some in a financially vulnerable situation unnecessarily and serves as a disincentive to the exercise of family reunification rights. Another area where the degree of complexity,

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[7] See <http://www.citizens-advice-international.org/> (last accessed 21 November 2006)

combined with the absence of sustained and accurate information-provision, has promulgated the degree of misinformation is the recognition of qualifications regime. Migrants, agencies and employers alike on many occasions have struggled to grasp the intricacies of this complicated system and the fallibilities of the system have seemingly contributed to the process of de-skilling that is accompanying the migration experience of so many of the early-stage EU8 movers.

The point has been made here that a more robust and timely information campaign on the part of the EU, implemented in the EU8 Member States to raise awareness of the operation of the transitional arrangements across the EU15, may have overcome some of these difficulties. Some attempt to disseminate information 'on the ground' in the EU8 countries was made by the UK government under the sponsorship of the 'Not All Roads Lead to Britain' campaign (discussed in chapters three and five). It is certainly true that this campaign succeeded in increasing awareness of the UK's domestic scheme in certain EU8 Member States. However, the tone and intention of this program, as the campaign's title suggests, was largely to dissuade migration rather than inform. This was particularly aimed at those contemplating a move who may have considered applying for social benefits when in the UK. From this perspective, this campaign appears to have contributed to the misinformation about the UK system. For example, chapter five pointed out that after being exposed to the 'Not All Roads Lead to Britain' campaign events in Poland, many migrants were left under the mistaken impression that EU8 migrants had no rights to access benefits in the UK regardless of whether they were working and registered on the WRS. An EU-level campaign would have overcome the problem of individual Member States tailoring such a program to reflect their own political objectives.

The self-interest of the EU15 in respect of the extension of free movement rights to EU8 nationals has in fact been prevalent throughout the course of the enlargement process. The very legal provisions setting out the transitional arrangements, by giving the EU15 a virtual free hand to determine how they regulate labour market access, embody this tendency. The implementation of transitional provisions across the EU15 has been governed on the basis of each individual Member State's labour market needs and demands. As a result of the 'supply and demand' sentiment embodied in the transitional arrangements EU8 migrants have effectively been assigned the role of a flexible reserve army of labour for the EU15 when labour shortages so require. The corollary of this is that the work such a reserve army is frequently called upon to do is situated in the secondary labour market and, as such, is characterised by poor working conditions, resulting in a degree of de-skilling for the migrant workers concerned. Chapter four highlighted the contradiction between this reality, evident in the context of enlargement, which appears to accept (and even condone) the occurrence of de-skilling as a means to fill labour market gaps in the EU15, and the wider EU policy of encouraging the circulation of knowledge. Indeed the initial post-accession employment trends involving EU8 migrants appear very far detached from a Lisbon Agenda aim of creating 'more and better' jobs for Union citizens.[8] It seems that many EU8 workers in the UK have, at least in the initial stages of the transitional period, exercised mobility rights within the framework of 'more and worse' jobs.

The reserve army notion also raises the issue of the relationship between third-country nationals and EU8 nationals in the post-accession climate. Previously, it has been third-country national migrants that have carried out

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[8] European Commission, *Working Together for Growth and Jobs A New Start for the Lisbon Strategy*, COM (2005) 24 final

much of the work in the EU15 Member States' secondary labour markets. EU8 nationals have made the formal transition from third-country national to EU national, but the reality is that their employment experience continues to be characterised in a manner similar to that of third-country nationals. This reflects their transitional citizenship status in the immediate aftermath of enlargement; they are not yet full members of the free movement community and, hence, cannot expect their labour market experience to alter to any great extent initially. It would be naïve, however, to assume that this will automatically alter on expiry of the transitional arrangements. Although at this point the formal status of EU8 nationals will mirror that of EU15 nationals it may be that longer-term social reconditioning will be necessary before stereotypes of what constitutes 'appropriate work' for EU8 migrants, and the linked discrimination, on the part of employers and/or professional organisations in the EU15 for example, are eradicated.

There are further thought provoking issues raised by this research relating to the relationship between third-country national migration to the EU15, on the one hand, and EU8 national migration, on the other. Despite EU8 workers having a similar employment experience to third-country nationals in terms of the work carried out, there are significant differences in the legal statuses accorded to the groups. EU8 nationals are officially Member State nationals and hence fall within the definition of Union citizen. Thus, although the rights of this group to work in the EU15 are subject to temporary restrictions they are entitled to access various other citizenship statuses throughout the transitional period's duration. For example they can move as a student, retired person or self-sufficient person and can rely on the concomitant right not to be discriminated against pursuant to Article 12 EC. Theoretically, EU8 nationals could shift between statuses to maximise the available migration opportunities. Furthermore those EU8

nationals that are granted access as a worker can, formally at least, claim access to the panoply of social and family rights in the host state that attach to the status. Third-country nationals clearly operate outside of this realm but the thesis has drawn on some anomalies; for example, chapter five demonstrated that EU8 workers' family members are potentially subject to harsher conditions than third-country national migrants' family members in relation to labour market access during the transitional period (in those Member States bound by the Directive on family reunification).[9] Similarly, under the Directive on long-term residents, third-country national migrants with the status of long-term resident in one Member State are entitled to take up subsequent residence in another Member State and enter employment there (subject to certain conditions being satisfied).[10] This contrasts sharply with the policy towards EU8 migrants during the transitional period as, even if such a worker obtains complete access to one of the EU15 labour markets, the rights they are accorded relate exclusively to that one particular Member State. Transitional arrangements applicable to EU8 migrants, then, are altering the traditional distinction between EU migrant workers and third-country national migrant workers; EU migrant workers are no longer a group with a unitary status and while the discrepancy between EU15 workers and third-country national workers remains intact the inter-relationship between EU8 nationals and third-country nationals is more complex. The preference rule in the transitional arrangements, however, does stand to remind us of the lower status of third-country nationals in the migrant worker food chain.

2. Reflecting on the analysis at national (UK) level

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[9] Directive 2003/86/EC O.J. [2003] L 251/12. Ireland, the UK and Denmark are not bound by this Directive

[10] Directive 2003/109/EC [2004] O.J. L16/44. Again, Ireland, the UK and Denmark are not bound by this Directive

The UK has promoted its own self interest amidst the implementation of the post-accession regulatory regime in quite a striking fashion. The thesis has shown how the underlying objective of the UK policy of open labour access was to fill labour shortages but, more poignantly, it has exposed the inequitable nature of this approach. From a legal perspective, the UK law purporting to implement the transitional arrangements does not comply with either the terms of the Accession Treaty or broader aspects of free movement and citizenship law. The system operates outside the terms of the Accession Treaty as it seeks to go further than derogate simply from the provisions that enable Community nationals to access work in other Member States. Chapters three and six, for example, have uncovered the unlawfulness of the UK's approach in relation to the denial of lawful residence and the right to equal treatment from those EU8 workers who do not fulfil the conditions of the WRS. By opening up the labour market to EU8 nationals while simultaneously restricting these workers' rights to social assistance should they become unemployed before the 12-month deadline, the UK is benefiting significantly from the presence of EU8 workers without fully embracing its obligations as a host Member State. The UK, which has been classified here as a 'wolf in sheep's clothing', has sought to gain from the presence of EU8 migrant workers without extending to the group the complete package of rights that attach to the status. The particular stance of the UK's (unlawful) domestic law, therefore, has a significant impact on EU8 migrant workers' citizenship status and entitlement – which can only become tangible once it is filtered through the national context - despite the fact that once a job has been secured they are formally entitled to a status analogous to that of EU15 migrant workers.

In its report on the functioning of the transitional arrangements, published towards the end of the first two-year phase, the Commission did not

explicitly criticise the dichotomous approach of the UK.[11] Arguably, it would be politically difficult to express disapproval of a Member State that is perceived as having implemented a lenient post-accession regime. A more public rigorous critique and exposure of the incompatibility of UK law with Community law, however, may have served to educate and inform the EU8 migrant community (or at least those in a position to advise them) about their potential status under Community law as opposed to simply the narrower one assigned to them by national law. It may also have gone some way to persuading the UK, and other EU Member States, that EU8 migrants admitted to the labour market – and nationals of those countries that accede in the future - should be extended the same level of protection as EU15 migrant workers. Admittedly, however, if the Member States' post-accession regimes faced harsher scrutiny it may have had the reverse effect of acting as a disincentive to the removal of transitional measures.

Throughout the chapters of this thesis the role played by employers and agencies in both facilitating and shaping the migration experience has been explored. These actors have clearly been prominent players in the migration space and their input links across and feeds into many of the research themes that have been mentioned here. Chapter three examined how the complex legal framework and the atmosphere of uncertainty surrounding the right to work in the UK has contributed to the popularity of agencies as people looked to such bodies to help them navigate the system. The empirical examples, however, also suggest that agencies and employers have contributed to the misinformation surrounding the legal regime. This has occurred both unintentionally - because the particular adviser did not have a full grasp of the law – or, in a deliberate attempt to

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[11] Commission of the European Communities, *Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004-30 April 2006)*, COM(2006) 48 final

take advantage of the migrant's uncertainty. Despite the possibility for EU8 migrants to hold a regular employment status in the UK, therefore, it seems a significant number are prevented from accessing the status of migrant worker due to the preference of some employers and agencies to employ workers without a legal status. This leaves the workers in a position in which they are potentially vulnerable to exploitation. Furthermore, access to certain rights may be curtailed. This was demonstrated in chapter five, for example, which revealed that the tendency of employers to arrange accommodation for the workers has implications for their capacity to exercise family reunification rights.

The issue of family reunification links with the culture of family separation that seems prevalent amongst those EU8 migrants that have moved to the UK during the initial post-accession phase. The point was made in chapter five that the model of family migration enshrined in the free movement provisions, based on the unification of the immediate family unit, is not one that is represented by the accounts of the respondents in this study. This is due to the preponderance, evident in the statistics collected from the WRS, of single migrants moving without dependents. What must be borne in mind, though, is that this trend is likely to be evident (partially at least) not just because much of the post-accession migration is temporary in nature but also as a result of migrants' uncertainty of their family rights (as a result of the confusion surrounding the system and the perceived lack of access to social welfare) as well as structural and physical constraints, such as low wages and lack of suitable accommodation, preventing the practical fulfilment of a family life in the UK.

In October 2006 the UK government announced that it does not intend to extend the policy of open labour market access to Bulgarian and Romanian nationals following the entry of these countries into the EU. Instead,

nationals of Bulgaria and Romania will need a work permit before taking up employment in the UK.[12] This is interesting considering that the evidence (referred to in chapter three) suggests that the migration of EU8 nationals has had a positive impact on the economy. Indeed, in his statement in the House of Commons, Home Secretary John Reid reiterated this point:

'[The WRS] *has been a success. Workers from the new member states have filled skills gaps, including in key public services such as the NHS and social care, and have contributed to UK growth and prosperity. Studies have found no evidence they have taken jobs away from British workers or undercut wages. Employers and customers alike have welcomed their skills. Very few have brought dependants and the proportion attempting to claim out of work benefits has been less than 1 per cent'.*[13]

After acknowledging the positive economic effect of the EU8 workers, however, the Home Secretary made reference to the existence of 'some transitional impacts' of the 2004 enlargement, namely: some schools having increased admissions, pressures on language schools providing English tuition, and Local Authorities reporting pressures on the availability of private housing.[14] Interestingly, these 'impacts' do not correspond to those that were put forward in support of transitional arrangements: labour market disruption and social tourism. These infrastructure-related effects are clearly connected to the perception that extremely large numbers of EU8 migrants have taken the opportunity to

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[12] See Home Secretary John Reid's written ministerial statement, Hansard, HC, vol. 450, col. 83 (24 October 2006). At the time of writing the secondary legislation which will clarify the legal position had not yet been drafted (27 November 2006)

[13] *Ibid.*

[14] *Ibid.*

work in the UK (it will be recalled from chapter three that 427,000 workers registered between May 2004 and June 2006).[15] From this perspective, the extension of the right to work to EU8 nationals has contributed to the imposition of work permit requirements on those citizens in the next round of enlargement. This trend for harsher conditions of access to apply to Bulgarian and Romanian nationals may be replicated in other Member States. This raises the possibility of an even more complex and differentiated patchwork of citizenship rights emerging.[16] Furthermore, there is an additional dimension to the transitional measures set to apply to Bulgarian and Romanian nationals: the decision of the UK government to impose transitional mobility restrictions on the nationals of these countries has been accompanied by the promise that all of the places on the low-skilled migration schemes will be reserved for this group:

'From 1 January 2007 we will be phasing out all low-skilled migration schemes from outside the EU. Places on the two low-skilled migration schemes (the seasonal agricultural workers scheme and the sectors based scheme which between them currently have 19,750 places) will now be restricted to nationals from Romania and Bulgaria'.[17]

This decision, which reflects the preference clause in the Treaty of Accession's transitional provisions,[18] undoubtedly demonstrates the potential negative impact of EU enlargement on the position of third-country nationals in the Member States. Moreover, it highlights the expectation held by some of the Member States about the role the new EU citizens will fulfil; essentially, they are expected to carry out the low-

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[15] Though this should be read in light of the methodological considerations referred to in chapter two

[16] Clearly this is an issue that is outside the scope of this thesis but it may be that a valuable future research project could explore the possibility of 'third class Union citizenship'

[17] Hansard, *Op. Cit.* n.12

[18] Discussed in chapter three

skilled, low-status and (presumably) low-paid work. It seems, then, that the UK will continue to provide a particularly interesting context to examine the issues of free movement and EU enlargement as the transitional work-permit measures applicable to Bulgaria and Romania will exist alongside the Workers' Registration Scheme (which will continue to apply to the EU8).

3. Looking forward

Overall, this thesis has demonstrated that the citizenship status and tangible experience of EU8 migrant workers is not only restricted by the transitional arrangements on free movement but also by the impact of the national law's interpretation of these said provisions and, furthermore, by the engagement and input into the process of various actors and migration facilitators. The restricted access of EU8 migrants to economic citizenship may be tempered somewhat by the developing notion of non-economic citizenship which is not subject to any transitional restrictions although, on the whole, the empirical reality suggests that most EU8 nationals seeking to exercise mobility rights wish to do so as a worker. Thus, in spite of the immediate extension of the broader free movement rights, the exclusion of EU8 workers from the mobility entitlement of primary importance to them means that for them the concept of Union citizenship is rather hollow.

From the point of view of the EU15 the transitional arrangements are no doubt regarded as a success. The old Member States have been able to protect themselves from the less desirable aspects of free movement, namely, labour market disruption and benefit tourism. Simultaneously they have been able to develop a policy to suit their own economic needs, be that open labour market access to counter shortages in the lower echelons of the employment market or 'cherry-picking' of the highly skilled in order to fill positions in the professional sectors. The extent to

which the transitional arrangements have reflected the EU15's greater balance of power, however, undermines significantly the concept of 'unity' upon which so much emphasis was placed in the build-up to enlargement.[19] The symbolic notion of EU enlargement creating a United Europe, unifying nations which once stood on opposite sides of the Cold War divide, has been weakened by the existence of transitional measures that grant Union citizens different access to the right of free movement as a worker on the basis of nationality. From an equality perspective therefore, particularly given the significance of the principle of non-discrimination on the grounds of nationality in Community law, transitional arrangements are less justifiable and legitimate.

From a legal point of view, after the expiry of the transitional period, the citizenship status of EU8 nationals will conform to that of EU15 nationals. The law on the free movement of workers will apply in full to all Member State nationals. What is not so clear is whether this formal equality will be sufficient to achieve a more substantive type of equality as regards the citizenship experience of EU15 citizens, on the one hand, and EU8 citizens, on the other. Of course, citizenship has never been a universal status. It has always drawn divisions based on different categories of migrants' perceived economic viability. Similarly, transitional arrangements are not new and it does not seem that they have had any negative, long-term implications for those Member State nationals previously subject to them. However, it does seem that there is greater potential for the most recent transitional arrangements to have a more far-reaching impact on the citizenship experience of those they address.

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[19] Kengerlinsky, M., 'Restrictions in EU Immigration Policies towards New Member States', (2004) 2(4) *Journal of European Affairs*, 12; Maas, W., 'Free Movement and EU Enlargement', Paper prepared for the Fifth Biennial Conference of the European Community Studies Association, Toronto, Canada, 31 May-1 June 2002

First, by explicitly targeting *en masse* the post-communist CEE Member States the message sent (both to those in the EU8 and the EU15) was that Malta and Cyprus were more akin to the EU15 and, hence, more 'welcome' members. Secondly, as a result of the mobility restrictions experienced under communism the right of free movement is of particular poignance to many in the EU8; by restricting this right the potential is there for the transitional arrangements to be perceived as a form of second class membership. This perception may continue long after the expiry of the transitional arrangements. Thirdly, unlike previous enlargements, the 2004 enlargement took place after the institution of Union citizenship had developed dramatically by being constitutionalised in the Treaty and interpreted expansively by the Court. Therefore, the exclusion of EU8 nationals from the full entitlement of free movement rights is arguably a harsher imposition in the post-citizenship era.[20] Fourthly, the manner in which the EU15 have relied on the new EU citizens as a reserve army of labour is likely to have particular repercussions. The tendency for EU8 nationals to work in the secondary labour markets of the EU15 (this is certainly the case in the UK) further entrenches the depiction of them as second class citizens. The effect of this portrayal may well have implications for the way in which EU8 migrant are perceived in the enlarged EU in the long-term. This research, by incorporating the empirical element, has exposed the low-skilled (and low-status) work-trap that EU8 migrant workers are currently caught in. It is doubtful that formal equality, in the light of the extension of full free movement rights, will remedy this situation. Cultural perceptions and stereotypes surrounding EU8 migrants are important factors shaping the experience of the group and the formal application of the law cannot alter (certainly not in isolation or over a short-time period) the impact of these social forces. While the

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[20] On the other hand, as has been demonstrated, the notion of multiple citizenship also offers greater opportunity to access at least some form of citizenship entitlement

transitional arrangements are not the root cause of such implicit assumptions and perceptions regarding the 'appropriate' role of EU8 nationals in the labour market, they do entrench a certain attitude, specifically, that migrants from the EU8 are not (yet) quite as worthy as those from the EU15 (plus Malta and Cyprus).

In addition to the impact of post-enlargement migration on EU8 workers in the EU15, the research also raises questions relating to the implications of the current trends for the sending regions. Clearly, the EU8 countries are currently experiencing increased outward flows; national commentary in Poland has expressed concern about the risk of brain, skills and youth drain as a result of post-enlargement migration of the 'young intelligentsia'.[21] In the longer-term, as conditions in the labour markets of the EU8 improve, one would expect the number of those migrating to fall and many of those who left to return to their home state.[22] The discussion of de-skilling in chapter four highlighted how the sample of return migrants had been able to access jobs commensurate with their skills on return to Poland. These findings however, were in relation to a sample that had spent a relatively short time in the UK (between six months and two years). What is not so clear is whether those who spend a longer period of time abroad, and work in a de-skilled capacity during this time, will be able to integrate so easily back into their profession upon return to the state of origin. Longer periods of absence may have a more damaging impact on a migrant worker's home career.

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[21] For example, Euractiv, 'Fear of brain drain makes Poland drop double taxation scheme', 23 October 2006. Available at <http://www.euractiv.com/en/mobility/fear-brain-drain-poland-drop-double-taxation-scheme/article-156916> (last accessed 21 November 2006)

[22] This would be consistent with patterns of mobility in the aftermath of the accessions of Ireland, Spain, Portugal and Greece, Stalford, H., 'The Impact of Enlargement on Free Movement: A Critique of Transitional Periods', Paper presented at the Third Meeting of the UACES Study Group on the Evolving EU Migration Law and Policy, University of Liverpool, 5 December 2003

Following on from the discussion above as regards the possibility that citizenship will not equalise (at least not immediately) after the transitional period expires, a criticism sometimes directed at research focussing on transitional arrangements is that the temporary nature of the restrictions undermines the significance of the findings. Of course, parts of the analysis in this thesis are time-specific but it is anticipated that the investigation also contains elements of broader interest and application. For instance, the findings provide a yardstick against which the future patterns of EU8 integration can be tested. Notably, the examination of de-skilling amongst EU8 migrants, of methods of facilitating family life post-migration, and the broader discussion of the citizenship implications of enlargement, provide a basis for future exploration of whether these trends have continuing relevance. Longitudinal studies can track the changes over time. For example, it will be interesting to discover if the current culture of family separation continues or whether more families follow the initial worker. In addition, it will be possible to explore how the passage of time impacts on the migrants' position in the labour market and whether their reliance on agencies diminishes. Essentially, the future experience of EU8 nationals can be compared to the findings of this research to decipher further if EU8 migrants do indeed remain a distinct group beyond the expiration of the transitional arrangements.

Enlargement, and by extension transitional arrangements, are firmly on the EU agenda. Analogous arrangements will apply to Romania and Bulgaria,[23] in the shorter term, and Croatia and Turkey in the longer term (assuming accession progresses). The Former Yugoslav Republic of Macedonia also gained candidate country status in December 2005. This research, by undertaking an in-depth investigation of the status and experiences of a group of migrants subject to such mobility restrictions, is

[23] Treaty of Accession 2005 [2005] O.J. L157/11

a useful tool of analysis for forecasting the potential impact of future transitional arrangements. In addition, this research could prove useful as a method of informing future policy to accompany the implementation of transitory free movement restrictions. For example, a sustained and comprehensive information campaign implemented by the EU in the accession countries could help to overcome the problems associated with the complexity, and consequent confusion of, the legal framework. In addition to targeting potential migrants, employment agencies in the accession countries could be involved in such a campaign as such actors have clearly played a significant part in facilitating the mobility of Polish migrants in the aftermath of the 2004 enlargement. Recognition of some of the pitfalls associated with agency reliance by migrants could prove useful for informing implementation of future EU programs.

Agencies and employers are, as private businesses, often concerned with promoting their own self interest. As a result many may not be willing to *voluntarily* carry out such exercises and put in place policies designed to promote the welfare of migrants. In addition to supporting implementation of soft measures, such as awareness-raising information campaigns, this research could also be used in support of arguments calling for stronger methods of regulation of these actors at both EU and domestic level.

The empirical work focussed on a concentrated group of migrants and employment agencies and thus sought to achieve an in-depth analysis of the experiences of an indicative sample of Polish migrants. A future avenue of research may be to further enrich the empirical analysis by a incorporating a more explicit comparative approach; for example, a comparison of the experiences of Polish migrants and migrants from another EU8 country, or alternatively, a comparison of the experiences of Polish migrants working in the UK and those working in another EU15

Member State,[24] could build on and extend the research conducted for this thesis. In particular, there is scope for a comparative analysis of the status and experiences of nationals from Bulgaria and Romania in the aftermath of the 2007 enlargement with that of EU8 nationals. Such further exploration will provide a more profound insight into understanding of the various tiers of citizenship within the context of enlargement. Up until this point the focus has been on the EU8 accession countries as a unitary group experiencing a form of downgraded citizenship, and it will be interesting to see if divisions exist between the status of this group of citizens and those from accession countries that accede in the future. Free movement and enlargement, therefore, is a fertile ground for the development of future research activity. It is hoped that the methodology developed throughout the research process here - which combines legal analysis, at EU and domestic level, with empirical analysis of the migrants' experience and allusion to inter-disciplinary literature – can be extended to make further innovative contributions to future academic and policy discussions in the area.

Finally, this research raises broader issues relating to the nature and value of EU enlargement itself. It will be interesting to explore further the relationship between enlargement and citizenship and, in addition, the issue of whether the restricted citizenship status of accession-country nationals has, in turn, any consequences for the policy of enlargement in the longer-term. Currently, and seemingly for some time to come, different tiers of EU membership exist with some Member States granted a more meaningful form of association than others. If the citizenship status of those subject to transitional arrangements does not, or is not felt to, equalise with those in the EU15 in the future, and certain citizens continue

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[24] Either one of those with a liberal free movement policy, such as Ireland or Sweden, or a Member State which has implemented labour market restrictions (in the form of quotas and work permits) such as Germany or Austria

to experience a form of devalued citizenship, the potential exists for the value of EU membership to be undermined. In other words, if citizenship continues to be a hollow experience the risk is that Member State relationships become more divided, the benefits of EU enlargement for the nationals of the newer Member States diminish or even disappear and, in conjunction, so too does citizen support in the CEE Member States for European integration.

APPENDIX

Sample of respondents

Sample of Polish migrants interviewed in UK:

Age	Male	Female	Total
20-29	7	10	17
30-39	9	1	10
40-49	1	0	1
50-59	1	0	1
Total	18	11	**29**

Sample of return Polish migrants interviewed in Poland:

Age	Male	Female	Total
20-29	4	8	12
30-39	1	2	3
40-49	0	1	1
50-59	0	0	0
Total	5	11	**16**

Employment agencies based in Poland: 5

Key informants (UK and Poland): 3

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