



The Free Movement Directive

less control over crime, borders, and social security

The new Free Movement Directive: less control over crime, borders, and social security

Executive Summary

Key points

A new EU directive on free movement of EU citizens - which was agreed in 2004 and came into force this week - will have serious implications for the UK's ability to control its borders, social security and crime. Crucially the UK was overruled at a number of key points during the drawing up of the directive.

1. It will make it very difficult for Charles Clarke to implement his proposal to deport all foreign nationals who are sex offenders or are given custodial sentences. It rules out blanket exclusions of certain categories of offenders. If the convicted criminal has resided in the UK for a number of years, under the directive the UK will only be able to deport them on grounds of "serious" or "imperative" public security. EU Commission officials have already warned the Government that any system of automatic expulsions would contravene the new directive.
2. It will weaken passport control, allowing anyone who claims to be an EU national or a family member of an EU citizen to enter the UK and demand a "reasonable period of time" to get their documents sent to them. The UK Government fought against this provision, saying it was "concerned that new wording may allow family members an indefinite time at ports of entry to obtain travel documents or visas", but the UK was overruled.
3. It creates a new automatic right of permanent residence after five years - meaning full access to benefits - even if the person concerned has not worked. The right simply applies as long as a person has not been forced to leave the country (and the directive makes it more difficult to do this). The UK Government also tried to have this changed but failed.
4. It also greatly extends the definition of "family" - meaning that someone coming to the UK will be able to bring *any* relative who is a member of their household (no matter how distant) to the UK if they are working, and their relative will be able to claim benefits. The Government told parliament: "We are concerned that this widening of definitions could lead to a substantial increase in the number of third country nationals gaining admission to the UK, which in turn could lead to an **increased social and financial burden on the UK**. We would therefore like the dependency requirement reinstated."¹ However the changes were not made.
5. More generally, the directive considerably extends the rights of nationals from other EU states to claim welfare benefits in the UK, even if they are not working and contributing to the British social security system. The Government wanted to be able to end a person's residence in the UK if they applied for welfare but this is expressly forbidden in the directive.

¹ European scrutiny committee 12th report 2001-2002

6. The UK Government now says it will attempt to limit the impact of the directive on the UK welfare system through domestic regulations but during the negotiations it "expressed doubts"² as to whether it would be able to. The European Court of Justice is likely to strike down any attempts by member states to discriminate against people from other member states. The Court has already made a series of rulings breaking down the distinction between workers' right of free movement and the right of non-economically active people to free movement. The new directive marks a significant further step in this direction.

The UK Government now claims that the directive is just a "consolidation" of previous legislation but when the proposal was first discussed the European Scrutiny Committee reported that the Government was concerned "that a number of the provisions could have a significant effect on social security rights, and could lead to increased abuse of the immigration control system."³

Experts, such as respected German economics Professor Hans-Werner Sinn, have predicted that the new directive will lead to "welfare migration" or benefit shopping.⁴ Professor Kay Hailbronner, Director of the Centre for International and European Law on Immigration and Asylum at Konstanz University, argues in a recent paper that the directive will be used by the Court of Justice to further erode the distinction between free movement of workers and free movement of the economically inactive.

Conclusion: Free movement of workers has been a major success - particularly in the UK. But undermining member states' rights to control the movements of criminals, their borders, and the access of economically inactive people to benefits is a mistake - not just because these changes are problematic in themselves, but because in the long run this will undermine public support for free movement of workers.

1) Undermining UK attempts to deport dangerous European criminals

- In response to the crisis over the non-deportation of foreign criminals Home Secretary Charles Clarke told the House of Commons that he would bring forward new measures which would enable the UK to deport all foreign nationals who were sex offenders or had received a prison sentence.
- Charles Clarke said that in his new measures, "The guiding principle will be that foreign nationals guilty of criminality should expect to be deported."⁵
- However, the directive makes clear that "Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty". (Dir. Art. 33. 1.) Thus the Government will not be able to deport an EEA national simply because they have committed a crime worthy of a custodial sentence as Clarke proposed.

² Interinstitutional File: 2001/0111 (COD)

³ European Scrutiny Committee, 38th report 2001-2002

⁴ Financial Times, 12 July 2004

⁵ Hansard, 3 May 2006

- The preamble to the Directive says that: "Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin."
- Indeed, EU Commission officials have warned the Government that any system of automatic expulsions would contravene the new directive.⁶
- Although the directive does allow the UK to expel European Economic Area (EEA) nationals, it rules out the use of a *general rule* of deportation, insisting that the individual circumstances of each case must be taken into consideration. Therefore the UK will be unable to deport undesirable EEA nationals just because they have committed crimes that fall within predefined categories.
- If the EEA national has been resident in the UK for a number of years the UK will only be able to expel them on grounds of "serious" or "imperative" public security.
- The number of criminals who would benefit from the new rights would be quite substantial. EU nationals comprised around 17% of all foreign nationals in UK prisons last year (i.e. 1612 EU prisoners).

2) Weakening passport controls for EU and non-EU nationals

- The directive states: "Where a Union citizen, or a family member who is not a national of a Member state, does not have the necessary travel documents or, if required, the necessary visas, the Member state concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence."⁷
- The UK Government raised an objection to the clause saying that they were "concerned that new wording may allow family members an indefinite time at ports of entry to obtain travel documents or visas."⁸ The Government failed to get the clause removed.
- However, this provision is likely to have even more far reaching effects than the Government suggests. There is no reason why the UK would be allowed to insist that individuals in this position should spend the "reasonable period of time" at the point of entry, (i.e. the port or airport) and the European Court would be likely to strike down such legislation on the grounds of non-discrimination.

⁶ Daily Telegraph, 4 May 2006

⁷ Article 5.4

⁸ European Scrutiny Committee, 38th Report 2001-2002

3) Permanent right of residence after five years - without having to work

- The new directive also specifies that any EU citizen or member of their family who lives in the UK for more than 5 years has to be granted a right of permanent residence, granting them full rights of UK citizenship and equal access to welfare benefits.
- This right is not linked to having worked in the UK at all and therefore the right of permanent residence is acquired by virtue of not being expelled within five years. The Government expressed concern about this, telling the European Scrutiny Committee that, "we have concerns that the current wording ... would allow EU nationals and their family members to gain permanent residence even if they had not met the conditions of Chapter III [Right of Residence] for four years by working, studying, or being self-sufficient."
- The Government promised that, "The UK delegation will push to ensure that the text is changed so that only those EU nationals and family members who met the conditions of Chapter III would be entitled to permanent residence."⁹ Unfortunately the Government did not succeed in getting these changes made.

4) Expansion of the definition of "family"

- The directive also extends the number of family members that a worker can bring with them into the UK - and such family members would also be eligible for benefits. The directive sweeps away the existing requirement that they be a spouse or a dependent and extends it to a much wider definition, which includes distant family members. As at present, family members can be non-EEA nationals.
- This will hugely widen the scope for people to migrate to seek welfare, and bring unemployed cousins etc. According to Eurostat, benefits for an average unemployed family of four in the UK are higher than the average wage for someone *in* employment in 6 out of the 24 other member states.
- The Government admitted: "We are concerned that this widening of definitions could lead to a substantial increase in the number of third country nationals gaining admission to the UK, which in turn could lead to an increased social and financial burden on the UK. We would therefore like the dependency requirement reinstated."¹⁰
- The Government also repeatedly called for a clause which allows non-EU family members to remain in the UK after divorce to be deleted but they were overruled.

5) New general rights of access to welfare for economically inactive people

⁹ European Scrutiny Committee, 32nd report, September 2003.

¹⁰ European scrutiny committee 12th report 2001-2002

- The UK Government says it is putting in place new domestic regulations which attempt to safeguard against welfare driven migration.¹¹
- However, these restrictions are highly likely to be overruled by the European Court of Justice, given the way the directive has been drafted, and the way the Court has dealt with previous provisions.
- During the negotiations the Government admitted as much when it “expressed doubts as to the guarantees given by the proposal that no social welfare benefits would be granted before permanent right of residence had been acquired”.¹²
- The Government wanted to be able to end the residence of any migrants in the UK who began to claim benefits, but the directive expressly forbids this.¹³
- The directive will give a new, automatic three-month right of residence in the UK to all EU citizens even if they are not employed and have no intention of finding a job in the UK.
- The original proposals would have created a right of residence for six months and the Government acknowledged the danger of this proposal when it argued that it “would lead to an increased burden on the social security systems of Member states.”¹⁴ However, the UK Government compromised and accepted a three-month automatic right of residence.
- While the directive explicitly states that member states are under “no obligation” to pay out benefits to those who have never worked in this initial three month period, legal experts have argued that this is likely to fall foul of a fundamental non-discrimination clause in the EU treaties, and will thus be overturned (see below).

6) Paving the way for the court to further expand access to benefits

- The European Court of Justice has argued (in at least four judgements) that European citizenship is “destined to be the fundamental status of nationals of EU member states.” In a series of cases it has worked to erode the distinction between migration of economically active people and economically inactive people.

These cases include:

- *Grzelczyk (2001)* - In which student assistance was awarded to a French national in the form of minimum income under Belgian law.
- *Trojani (2004)* - In which the ECJ ruled that a French national residing on a Belgian campsite, and then in a Salvation Army hostel was entitled to Belgian social assistance benefit on the basis that he had been lawfully resident for a set period of time, despite being economically inactive.

¹¹ [Written answer](#), 14 March 2006

¹² Interinstitutional File: 2001/0111 (COD)

¹³ Interinstitutional File: 2001/0111 (COD)

¹⁴ European Scrutiny Committee, 23rd report, 4 June 2003

- *Collins (2004)* - In which an Irish-American dual national was ruled to be entitled to UK jobseekers' allowance, on the basis of right to equal treatment of EU citizens. However, this entitlement remained conditional on a residence requirement.
- *Bidar(2005)* - In which a subsidised loan was awarded under British law to a French national cover student maintenance costs.
- Professor Kay Hailbronner, Director of the Centre for International and European Law on Immigration and Asylum at Konstanz University argues in a recent legal paper that: "The reasoning of the court has been basically following the same line. **Union citizenship is declared to be the fundamental status of nationals of the member states, enabling those who find themselves in the same situation to enjoy the same treatment regardless of nationality.** The court follows from the fundamental status of citizenship that a citizen lawfully resident in the territory of a host member state can rely on the non-discrimination clause of the treaty in all situations which fall within the scope *ratione materiae* of Community law." (our emphasis)
- The new directive paves the way for further expansion of the rights of the non-economically active. The directive states that all citizens will have the right of residence (and are therefore within the scope of community law for the first time) as long as they do not become an "unreasonable burden" on the UK (current free movement directives talk simply about a "burden"). Legal experts have argued that it will be impossible to prove that any one person has become an "unreasonable" burden on a country.
- As Professor Hailbronner argues: "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 an additional beneficiary".¹⁵ He argues that the clauses of the Directive "seem to follow the Court's line of reasoning that there are no conditions at all but only restrictions which are subject to the principle of proportionality."
- Furthermore, in recent rulings the ECJ has interpreted the idea of avoiding "unreasonable burden" to mean almost the opposite of what it means in common speech. For example, the case of *Grzelczyk* found the court ruling that this formulation in fact implies that national governments *accept that there is* "a certain degree of financial solidarity between nationals of a host Member state and nationals of other Member states".
- Under the directive, a job seeker or economically inactive citizen continues to enjoy the right of residence in the UK after three months as long as they do not become a "burden" on the nation's security system. However this requirement is effectively neutered by a clause which forbids member states from expelling EU citizens simply because they are claiming benefits.
- The citizen would then be left in a situation where they no longer have the right to reside in the UK, but they can not be removed from the country. It is unrealistic to assume that the UK would be able to refuse to provide any

¹⁵ "Union citizenship and social rights", from The future of Free Movement of Persons in the EU, Odysseus Network of Immigration and Asylum lawyers, forthcoming 2006.

assistance at all in this scenario. UK case law and the European Convention on Human Rights dictate that the Government would have to provide assistance equivalent to that given to asylum seekers on non-discrimination grounds.

- The directive states that once an EU citizen has done any form of employment in the host state, including a short fixed term contract, then he will be entitled for at least 6 months to the same social security benefits as a home national.
- Once an EU citizen has been employed for a year in the UK he will be entitled to equal rights to social security payments.

7) Will this lead to welfare shopping and pressure for harmonisation?

- Experts, such as the head of the respected Ifo Institute in Munich - Professor Hans-Werner Sinn - have predicted that the new directive will lead to "welfare migration" or benefit shopping.¹⁶
- This point was tacitly acknowledged by David Blunkett as Home Secretary when he said that proposals for a new citizens' pension would create an effect which would be "the reverse of the Costa del Sol. Instead of everybody going to Spain in retirement, they would all come to Britain."¹⁷
- In practice, if "benefit shopping" becomes a problem, the EU is likely to push for greater harmonisation of member states' systems to combat the problem. In 2008 the Commission is due to present proposals to allow "EU citizens to move within the European Union on similar terms to nationals of a Member state moving around or changing their place of residence in their own country."¹⁸

¹⁶ Financial Times, 12 July 2004

¹⁷ Daily Telegraph, 17 August 2005

¹⁸ Presidency Conclusions - Brussels, 4/5 November 2004, Annex 1

(1) Free movement - less power to deport criminals

The new directive will have serious implications for the UK Government's attempts to deport potentially dangerous criminals. The directive will severely restrict the Government's ability to deport serious criminals from other European Union countries along with those from the wider European Economic Area (EEA).

In response to the crisis over the non-deportation of foreign criminals Home Secretary Charles Clarke told the House of Commons that he would put forward new measures which would enable the UK to deport undesirable foreign criminals. He said that the government would aim to deport: "all criminals sentenced to imprisonment, all those convicted for an offence listed in an Order under section 72 of the Nationality, Immigration and Asylum Act 2002; all those on the Sex Offenders Register; repeat offenders and, of course, all those recommended for deportation by the sentencing judge."

Clarke told the House that "The guiding principle will be that foreign nationals guilty of criminality should expect to be deported."¹⁹

Unfortunately, the new directive on free movement, which came into effect just three days before his statement will stop him from being able to push through the necessary measures to deport all criminals from the EEA.

The directive makes clear that "Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty". (Dir. Art. 33. 1.) Thus the Government will not be able to deport an EEA national simply because they have committed a crime worthy of a custodial sentence, as Clarke proposed.

EU Commission officials have warned the Government that any system of automatic expulsions would contravene the new directive.²⁰

Although the directive does allow the UK to expel EEA nationals, it rules out the use of a general rule of deportation, insisting that the individual circumstances of each case must be taken into consideration.

"The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."(our emphasis)

- Dir. Art. 27.2.

This means that the Government will be unable to deport criminals from the EEA just because they fall into particular categories, such as sex offenders or repeat offenders, even if it wants to.

If the EEA national has been present in the UK for a number of years the directive puts further obstacles in the way of deportation. Article 28.1 on "Protection against expulsion" states:

¹⁹ Hansard, 3 May 2006

²⁰ Daily Telegraph, 4 May 2006

“Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.”

If the individual has lived in the country for 5 years and has therefore gained the right of permanent residence under the new directive they can not be expelled save for reasons of *“serious grounds of public policy or public security.”* (Dir. Art. 28.2)

If the criminal has lived in the UK for more than 10 years or is a minor the UK is powerless to expel them unless it can prove *“imperative grounds of public security”*. (Dir. Art. 28.1)

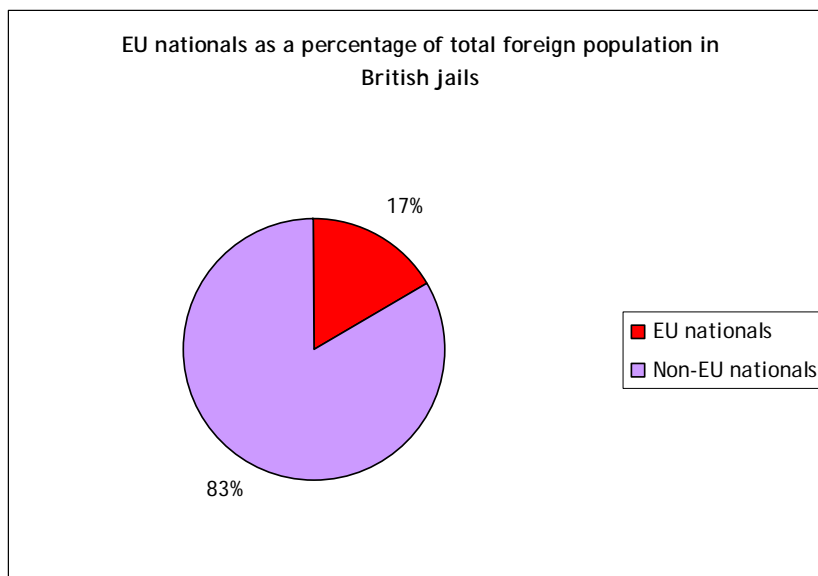
Article 31 grants the *“persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.”* The article also restricts the ability of the member state to deport during the appeals procedure.

The article also states that: *“Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security.”* (Our emphasis)

EU nationals in UK custody

EU nationals comprised around 17% (1612 prisoners) of all foreign nationals in UK prisons last year. This is significant in proportional and numeric terms, meaning that government power to transfer them to other Member States is an extremely important issue.²¹

²¹ Home Office, Population in Custody, Quarterly Brief, April to June 2005



The current situation

In his statement to the House the Home Secretary said, "Within the EU, we are strongly supporting the efforts of the Austrian Presidency to secure a Directive which will enable the repatriation of prisoners within the EU without requiring the consent of the prisoner."²²

This directive which is under discussion is known the "European Enforcement Order". It builds on the 1983 European Convention on the transfer of sentenced persons which allows sentenced persons to be transferred to their state of nationality, if the state and the person give their consent.²³

However, unlike most other EU states the UK has not signed up to the 1997 additional protocol to the aforementioned convention which allows deportation without consent if a judge has requested it.²⁴

The European Enforcement Order proposes to tighten this situation up:

*It should be established that there is a basic duty on the executing State to take charge of those of its nationals and those persons permanently legally resident in its territory who have been given a final custodial sentence or a detention order in another Member State, irrespective of their consent, unless there are specific reasons for refusal.*²⁵

²² Hansard, 3 May 2006

²³ Draft Council Framework Decision on the European enforcement order and the transfer of sentenced persons between Member States of the EU, preamble, par. 4

²⁴ Council of Europe, Additional Protocol to the Convention on the Transfer of Sentenced Persons 1997, Art 3, par. 1. Other EU states not signed up UK, Spain, Slovenia, Slovakia, Netherlands, Ireland and Cyprus.

²⁵ Draft Council Framework Decision on the European enforcement order and the transfer of sentenced persons between Member States of the EU, preamble, par. 5

(2) Is the UK losing control of its borders?

As well as making it more difficult to deport foreign criminals, the directive also restricts member states' ability to stop undesirables from entering the country. The directive states that "previous criminal convictions shall not in themselves constitute grounds" for denying entry to a national from another EEA state.²⁶

Given the level of public concern over recent cases of crimes committed by Europeans in the UK, such as the rape and murder of West London schoolgirl Jeshma Raithatha by a Latvian who had served sentences in jail for rape in his home country, it is worrying that the extension of the right of free movement contained in the directive does not contain any accompanying measures to improve border security. An obvious idea would be to require all those convicted of serious crimes to notify their member state of residence of their intention to travel to another member state, as is the case with sex offenders in the UK.

Indeed, when the Government was preparing for the most recent enlargement of the EU, David Blunkett assured the House of Commons that its Worker Registration Scheme (see below) would enable it to keep track of dangerous criminals as they entered the UK. He said that "the scheme will enable us to do so, and we will be able to cross-reference in relation to registration, which will be helpful in that regard."²⁷ Clearly this has not happened.

There is also a quite extraordinary clause in the directive which states that: "Where a Union citizen, or a family member who is not a national of a Member state, does not have the necessary travel documents or, if required, the necessary visas, the Member state concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence."²⁸

The Government actually raised an objection to the clause saying that they were "concerned that new wording may allow family members an indefinite time at ports of entry to obtain travel documents or visas."²⁹ But the Government failed to get the clause removed.

However, this provision is likely to have even more far reaching effects than the Government suggests. There is no reason why the UK would be allowed to insist that individuals in this position should spend the "reasonable period of time" at the point of entry, and the European Court would be likely to strike down such legislation on the grounds of non-discrimination *vis-a-vis* UK nationals.

²⁶ Dir. Art. 27.2

²⁷ Hansard, Column 36, 23 February 2004.

²⁸ Article 5.4

²⁹ European Scrutiny Committee, 38th Report 2001-2002

(3) Are member states losing control of social security?

The directive extends the principle of EU citizenship, and thereby the idea of an individual's legal status within the Union. Free movement and residency is now the right of all citizens, whether economically active or inactive. This far exceeds the original rationale for promoting the free movement of workers as a purely economic policy. Citizenship implies membership of an entity whose participants share in common rights, duties and identity; and which aspires to a status beyond merely economic union. Citizenship is normally associated with political union.

At a more immediate level, and as a result of this extension of the concept of Union citizenship, the welfare systems of member states could be placed under pressure from applicants from other states- whether they arrived as economically active migrants or not. This could happen because the directive clearly restricts the capacity of national governments to refuse residency to other EU nationals. It also weakens the safeguards previously available to national governments in refusing social welfare applications from EU migrants.

The UK Government now claims that the directive is just a "consolidation" of previous legislation but when the proposal was first discussed the European Scrutiny Committee reported that the Government was concerned "that a number of the provisions could have a significant effect on social security rights, and could lead to increased abuse of the immigration control system."³⁰

Residency and welfare rights in the directive

1. All EU citizens are given an automatic right of residence for up to three months in another member state with no strings attached, such as the need for self-sufficiency. (Dir. Art. 6)
2. Once an EU citizen has worked for a year in the host state then he is entitled to all the social security and other benefits of a home national. This can only be denied if the host state can show that either he was voluntarily unemployed or is not looking for work (Dir. Art. 7.3(a) and 24.1.)
3. Once an EU citizen has done any form of employment in the host state, including a short fixed term contract, then he will be entitled for at least 6 months to the same social security benefits as a home national (Dir. Art. 7.3(b) and 24.)
4. An EU citizen cannot be expelled simply because he is drawing benefit:

"An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member state" (Dir. Art. 14.3.)

This undermines the rights of the host state to demand that a non-working EU citizen must show that they are self-sufficient in order to be able to reside in the UK (Dir. Art. 8.4).

³⁰ European Scrutiny Committee, 38th report 2001-2002

5. As long as an EU citizen can say that he is genuinely looking for work, they and their family members cannot be expelled (Dir. Art. 14.4.)
6. EU citizens will retain their right to reside in another member state "as long as they do not become an unreasonable burden on the social assistance system". However, legal experts have queried whether it would ever be possible for national authorities to prove in Court that the burden imposed by one claimant or their family was "unreasonable". This is extremely significant, as the right to residence is the normal test of eligibility for most benefits. (Dir. Art. 14.1)
7. After 5 years of legal residence, an EU national is entitled to permanent residence and has full entitlement to draw benefits as enjoyed by home nationals (Dir. Art. 16.) As the right to reside is not linked to any status as a worker but to citizenship, all that is required for 5 years of legal residence is simply not to have been expelled.

Providing access to benefits for the non-economically active

As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member state they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system.

- Directive preamble, paragraph 16

It could be argued that there is no requirement under the directive for the UK to lend any support to a person who has never worked here. Eligibility to receive benefits in the UK is tested by two key criteria: whether the person is 'habitually resident',³¹ and whether the person has the "right to reside" in the UK.

The directive states that while all EU citizens, even those with no intention of working in the UK, have an initial right to reside for three months in the UK, only workers, the involuntarily unemployed, self-employed people and their families will be eligible to assistance during the first three months.

However, during the negotiations the UK delegation itself "expressed doubts as to the guarantees given by the proposal that no social welfare benefits would be granted before permanent right of residence had been acquired (Article 21(2)) and asked if residence could be ended if an EU citizen applied for welfare benefits".³²

If an economically inactive national from another EU member state wants to stay beyond the initial 3 months, they only continue to enjoy the right to reside if they can demonstrate a degree of self-sufficiency. But this does not mean that they will be unable to claim any benefits.

The directive clearly anticipates that *some social assistance* will be given as Art. 14.3 forbids the removal of people simply because they are drawing benefits:

³¹ The term 'habitual residency' has never been properly defined in UK law, it is a vague concept tied into integration in the labour market, length of stay in the UK and so on.

³² Interinstitutional File: 2001/0111 (COD)

“An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member state”.

It is therefore unrealistic to expect that the UK will not have to provide benefits to EU nationals even if they have not worked at all in the UK. Especially because under UK law and the European Convention on Human Rights it is impossible to deny all assistance.

It is unlikely that the ECJ would permit states to give EU citizens less assistance than is granted to asylum seekers waiting for claims to be determined. Such treatment would contradict the EU principle of non-discrimination³³ by treating EU citizens less favourably than non-EU citizens in an analogous legal position: a person who is lawfully living in the UK, but without a fully established positive right to remain.

The directive ties the British Government's hands in another way by not allowing the authorities to set a fixed amount that someone must have in order to be considered self-sufficient. It also states that the level must “not be higher than the threshold below which nationals of the host Member state become eligible for social assistance.”³⁴

Throughout the preparation of the directive the UK Government insisted that it should be allowed to set a minimum threshold for self-sufficiency but it was ignored.

Legal experts have also questioned whether the restrictions stopping jobseekers claiming in the UK within the first three months would actually be compatible with the ECJ's version of EU citizenship (see below for more detailed analysis of recent cases). Professor Kay Hailbronner, Director of the Centre for International and European Law on Immigration and Asylum at the University of Konstanz, has said that the restrictions are likely to fall foul of the non-discrimination principles in the EU treaties.

Professor Hailbronner has said it is “doubtful whether the exclusion rules for jobseekers will be considered as compatible with Union citizenship on the basis of the [European] Court's jurisprudence in *Collins*.”³⁵

In its ruling on the *Collins* case (discussed further below), the ECJ argued that in view of the establishment of citizenship of the Union “it is no longer possible to exclude from the scope of Art. 48 (2) of the Treaty - which expresses the fundamental principle of equal treatment, guaranteed by Art. 6 of the Treaty - a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member state”.³⁶

As all EU citizens will now have a right to reside in the UK for at least three months regardless of their economic status, it is likely that the ECJ will rule that denying non-British EU citizens jobseeker's allowance for three months is contrary to the principle of non-discrimination on grounds of nationality.

³³ As established by article 18 of the Treaty of the European Community

³⁴ Dir. art. 8.4

³⁵ “Union citizenship and access to social benefits”, Professor Kay Hailbronner, April 2005

³⁶ Op. cit. at para. 62

The ECJ has shown past consistency in upholding Treaty articles that guarantee the right of equal treatment of all Union citizens. This is reiterated in Article 24 of the directive, which states that all Union citizens shall be entitled to “equal treatment with the nationals of that Member state within the scope of the Treaty”. The directive also emphasises that “judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member state”. If social welfare is refused, therefore, it is likely that any ECJ ruling would favour the applicant’s claim to equal treatment, and equal access to social welfare.

“Unreasonable burden”?

It is stated at several points throughout the directive that EU citizens and their families should not become an unreasonable burden on the host nation while exercising their right to free movement.³⁷

However, legal experts have argued that it will be extremely difficult for a national authority to be able to prove that one person or their family is imposing an unreasonable burden on a member state.

In a recent publication, Professor Kay Hailbronner said that, “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 an additional beneficiary”.³⁸

Furthermore, as he argues: “There are no criteria whatsoever to decide whether an individual may ever become an unreasonable burden on the social system. Every dependence on a social system increases the burden. Whether that burden is unreasonable has to be decided in each individual case. In addition... While Art. 14 clearly makes the retention of the right of residence dependent on the conditions laid down in the Directive concerning the proof of sufficient resources, the other clauses seem to follow the Court’s line of reasoning that there are no conditions at all but only restrictions which are subject to the principle of proportionality.”

An indication of how the ECJ would rule in such a situation is the case of *Grzelczyk*, a case in Belgium where the ECJ ruled that a non Belgian EU national was entitled to social assistance. Directive 93/06/EC, which extended residency rights to students, stated that the student should not become an “unreasonable burden” on the host member state. The ECJ twisted this piece of legislation, which was intended to bar students from assistance, and ruled that it demonstrated that there was “a certain degree of financial solidarity between nationals of a host Member state and nationals of other Member states”.³⁹

³⁷ Paragraphs 10 and 16 of the preamble, Article 14.1

³⁸ “Union citizenship and social rights”, from *The future of Free Movement of Persons in the EU*, Odysseus Network of Immigration and Asylum lawyers, forthcoming 2006

³⁹ Case C-184/99 *Grzelczyk*, paragraph 44

(4) Expanding the definition of 'family'

"The Government has had long-standing problems with several of the proposed provisions... [including] the removal of the dependency requirement for family members of EU members [and] the ability of family members to remain in the UK following divorce"

- European Scrutiny Committee, 32nd report, September 2003

The new directive makes important changes to the definition of family members, which will serve to further loosen government control over the granting of residence. Under current legislation, family members of an EEA resident are defined as being either:

- (a) his spouse;*
- (b) descendants of his or of his spouse who are under 21 or are their dependants;*
- (c) dependent relatives in his ascending line or that of his spouse.*⁴⁰

For students, the definition is even narrower, encompassing solely a spouse and dependant children.

Up until now free movement has been restricted to family members. Under the new directive the scope is widened to "extended family members". The new legislation will broaden the definition to an extremely loose concept which will include any relative of either the migrant or their spouse/partner who lived in the EEA national's house in their home country or who is dependent on them.

This means that there is no longer a requirement for the extended family member to be dependent on the person with whom they are coming to the UK or a member of the direct family. They do not even have to travel with the EEA national and are thus able to join them at a later date.⁴¹

These provisions are extremely loose. In addition, they are effectively extended to the relatives of students.⁴²

This broadening of the definition is extremely significant because family members, including extended family members, are entitled to the same benefits as migrants who come to work in the UK. They would be entitled to the same benefits as any UK national who has not paid any national insurance contributions, such as income-support, tax credits and child benefit.

The UK Government admitted: "We are concerned that this widening of definitions could lead to a substantial increase in the number of third country nationals gaining admission to the UK, which in turn could lead to an increased social and financial burden on the UK. We would therefore like the dependency requirement reinstated."⁴³

Important changes will also apply to divorced partners of EEA nationals in the UK. For the first time they will be entitled to continued right of residence after the

⁴⁰ The Immigration (European Economic Area) Regulations 2000, par. 6

⁴¹ The Immigration (European Economic Area) Regulations 2006, par.8(1-4)

⁴² The Immigration (European Economic Area) Regulations 2006, par. 7(1.d) and 7(3-4)

⁴³ European Scrutiny Committee 12th report 2001-2002

termination of marriage even if they are not themselves an EEA national.⁴⁴ The UK Government was opposed to allowing divorced partners to remain in the UK and sought to have the clause removed at every stage of the negotiations, but they failed.

Taken together, these changes in the definition of family members amount to a further loosening in the controls and safeguards available to national governments over the granting of residency.

(5) New right of permanent residence

Under the new directive, once a person from another EU state has lived in the UK for a period of five years, or in some cases less than that, they are duly awarded permanent residence in the UK and will enjoy the same access to benefits as any other UK national. This is a fundamental change as it scraps the requirement, included in all previous legislation, for a person to show that they are self-sufficient or in work in order to gain permanent residence.

This new right is not linked to having worked in the UK at all and therefore the right of permanent residence is acquired by virtue of not being expelled within five years. The Government expressed concern about this, telling the European Scrutiny Committee that, "we have concerns that the current wording ... would allow EU nationals and their family members to gain permanent residence even if they had not met the conditions of Chapter III [Right of Residence] for four years by working, studying, or being self-sufficient."

"The UK delegation will push to ensure that the text is changed so that only those EU nationals and family members who met the conditions of Chapter III would be entitled to permanent residence."⁴⁵ Unfortunately, the Government did not succeed in making these changes.

This means that the right to permanent residence, which is scarcely short of full citizenship, does not arise from five years of productive work or contribution to the country, but simply from residing here. Given that after five years' legal residence the EU citizen would be entitled to become a UK citizen if they really wished to commit to this country, the right to permanently live here is really about EU law granting that citizenship without any commitment to the country being asked for or given.

It should also be noted that, given the Immigration Services workload, it is hardly likely to spend time rushing to expel EU citizens. The job of proving that citizens have no right to stay or are protected from expulsion (the directive mixes these concepts as if confusion were its aim) would be far too time-consuming. And in any case, if the Immigration Service left it long enough, they would go from overstaying immigrant to *de facto* citizen.

Once the right of permanent residence is acquired, the directive instructs that it will be impossible to expel a person "except on serious grounds of public policy or public security". The only way the right can be lost is through absence from the member state for a period of more than two consecutive years.

⁴⁴ The Immigration (European Economic Area) Regulations 2006, par. 10(5)

⁴⁵ European Scrutiny Committee, 32nd report, September 2003.

In the next section we look at how the ECJ has used the concept of EU citizenship, created by the Maastricht Treaty, to expand the rights of EU citizens to claim social assistance in other member states, before looking at the future pressures for the complete harmonisation of member states' social assistance schemes.

(6) Government spin: 'this is just a tidying up exercise'

The new directive clearly weakens the UK Government's ability to limit welfare migration. Although there are safeguards in the directive against job seekers claiming in a society to which they have made no contribution, it is unlikely they are strong enough to withstand a challenge in the ECJ. Despite this, the Government has claimed that the directive is a "consolidation" of existing rules.

Careful examination shows that the Government's response is disingenuous, if not misleading. Because the directive was introduced under QMV the Government was actually outvoted on many of its key proposals.

For example, until this legislation comes into force the UK's laws state that "On the occasion of the first renewal of a worker's residence permit the validity may be limited to one year if the worker has been involuntarily unemployed in the United Kingdom for more than one year." Sensible safeguards such as this that were put in place by the UK in order to limit any financial burdens on the UK system from non-UK nationals are simply swept away by this directive.

The new automatic right of residence for three months, regardless of the migrant's financial or employment status will undoubtedly lead to an increase in the number of claims. The original proposals would have set this right at 6 months and the Government acknowledged the danger of this proposal when it argued that it "would lead to an increased burden on the social security systems of Member states."⁴⁶ While the Government succeeded in reducing the automatic right of residence to 3 months it implicitly acknowledged that this new right will result in increased costs for UK taxpayers.

The Government admitted that it was worried that the extension of the definition of family members would lead to an "increased social and financial burden on the UK". It lobbied for the rules to be changed so that the EU national who brought family members would have to be the head of a household and that those accompanying him lived with him for at least a year. However the UK Government was ignored.

The Government also lobbied hard to restrict the rules allowing non-EU partners to remain in the UK in the event of a divorce. The Government said it was "unable to accept" the provision "which would allow a family member to remain in the UK following the family member's divorce from an EU national." But this provision is still in the directive.

The UK Government also attempted to get the problematic phrase "unreasonable burden" changed to "unreasonable charge on public finances". But it failed.

⁴⁶ European Scrutiny Committee, 23rd report, 4 June 2003

(7) The European Court of Justice and the creation of 'Social Citizenship'

That Union citizenship with its political dimension also implies some kind of a social integration can hardly be denied. Therefore, it would seem logical that if the Treaty recognised a general right of residence to all Union citizens regardless of their economic activities that equal access to social benefits cannot be denied.

-Professor Kay Hailbronner⁴⁷

The right to free movement is one of the fundamental freedoms of the EU and has been enshrined in EU law since the Treaty of Rome. However, until recently this right has only been available to those people who are economically active such as those with jobs or the self-employed.

After over a decade's worth of wrangling between member states, and just before the entry into force of the Maastricht Treaty and the new concept of Union citizenship, 3 directives were introduced which extended the right of free movement to economically inactive people such as the retired, students and the jobless. However, all "three directives took great care to provide residents rights only for those who can support themselves in order to exclude risks for the social systems in the Member states by immigration of persons who might become a burden on the social assistance systems of their host Member states."⁴⁸

Professor Hailbronner argues that the right to free movement of all EU citizens enshrined in Article 18 of the TEC, and Article 12, which outlaws discrimination based on nationality, have been used by the ECJ to develop a new concept of "social citizenship". This concept of 'social citizenship' can be defined as the right of all Union citizens, regardless of their economic activity, to take advantage of social systems in other member states. Under existing legislation, this right is limited by provisions in secondary EU law (transposed into UK law as outlined above) namely through the conditions regarding 'self-sufficiency' in long-term residence applications.

Hailbronner argues that the "Court made clear that it was determined to use Union citizenship as an instrument to overcome the existing basic distinction between economically active and non-economically active Union citizens" and their rights to social benefits.⁴⁹

The major example of the ECJ's attempt to do this is the case of *Sala*⁵⁰. A Spanish national who had moved to Germany lost her job and became permanently dependent on the German social security system. The ECJ ruled that by virtue of her having the right to reside in the country, she could rely on the equal treatment clause in the treaties and was therefore eligible to receive all the social benefits that fall under the remit of the treaties, such as child benefit.

This is far from being the only example, however. The ECJ has consistently used EU citizenship to expand the rights of EU nationals to other member states' welfare systems in a number of rulings:

⁴⁷ "Union citizenship and access to social benefits", Professor Kay Hailbronner, April 2005

⁴⁸ "Union citizenship and access to social benefits", Professor Kay Hailbronner, April 2005

⁴⁹ "Union citizenship and access to social benefits", Professor Kay Hailbronner, April 2005

⁵⁰ Case C 85/96 (1998) E.C.R. I-2691, *Maria Martinez Sala*

- Grzelczyk- 2001- student assistance was awarded to a French national in form of minimum income under Belgian law.
- Trojani- 2004- French national residing on Belgian campsite, then in a Salvation Army hostel- ECJ ruled that he was entitled to Belgian social assistance benefit on the basis that he had been lawfully resident for a set period of time, despite being economically inactive.
- Collins (2004)- Irish-American dual national ruled to be entitled to UK jobseekers' allowance, on the basis of right to equal treatment of EU citizens. However, this entitlement remained conditional on a residence requirement.
- Bidar- 2005- award of a subsidised loan under British law to cover student maintenance costs.

The explanation given by the ECJ has generally been that EU citizenship is "the fundamental status of nationals of the Member states, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality."⁵¹

Professor Hailbronner argues that the ECJ has used EU citizenship to promote its political aims, against the wishes of directives agreed by member states. He writes that the ECJ has a "tendency to ignore secondary Community law provisions like the requirement to have sufficient resources to avoid becoming a burden on the social system of the host state. Even if under secondary legislation there are clear rules for the exclusion of a specific type of social benefit, the Court has little scruple to attribute to Community law quite a different meaning that would follow from an unbiased interpretation on the basis of the objective wording of the provision, its systematic context and its purpose. Union citizenship and the principle of proportionality are used to rewrite relatively clear rules laid down in secondary Community law like the exclusion of non-economically active Union citizens from the general welfare system."⁵²

Hailbronner argues that the ECJ has used the non-discrimination clause "to develop a concept of "social citizenship" characterised by the right of all Union citizens, regardless of their economic activity, to take advantage of the social systems of the Member states".⁵³

However, the policies of national governments are clearly at odds with the notion of social citizenship, and have accordingly attempted to maintain the distinction between the economically inactive and active in the directive and their rights to benefits. However, despite national sentiment, the ECJ has consistently eroded the distinction between economically active and inactive Union citizens, and their right to stay in other member states and draw benefits. Combined with recourse to Article 12, prohibiting discrimination on grounds of nationality, these rulings have reduced the scope for national discretion in decisions on social welfare awards.

ECJ jurisprudence has crystallised upon a basic assumption of "equal treatment" for all EU citizens, suggesting the primacy of Union citizenship over national

⁵¹ See *Grzelczyk*, op. cit. at para. 31

⁵² "Union citizenship and access to social benefits", Professor Kay Hailbronner, April 2005

⁵³ "Union citizenship and access to social benefits", Professor Kay Hailbronner, April 2005

citizenship. These assumptions can only undermine the principle of national sovereignty over the granting of residence or welfare.

This agenda is clearly reflected in the preamble to the new directive: "Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member state would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union."⁵⁴ Residence is a key part of citizenship, entailing mutual obligation between state and subject (including such things as welfare entitlements). This directive, along with existing ECJ case law, seeks to shift the balance away from national citizenship, towards Union citizenship.

"Social citizenship"- by including all EU citizens within its scope, as opposed to merely economically active workers- is a clear progression from the idea of economic union to that of political union. It relies upon the notion of equal rights that are conferred by Union citizenship, and expects that Member states should equally share in a common social obligation to Union citizens, whatever their nationality. The directive will therefore limit the scope of the British government to direct its own residency and welfare policies, together with its ability to ensure that national privileges and/or resources are directed to those most in need.

⁵⁴ Preamble paragraph 17

(8) Will the directive lead to welfare migration?

In an article in the *Financial Times* last year Professor Hans Werner-Sinn, President of the Ifo Institute in Munich, described two different types of migration flows, one "good" and the other "bad".⁵⁵

Sinn explains that "good" migration is the movement of workers who are motivated to move to new countries in order to take advantage of higher wages and productivity levels. These immigrants will contribute to the society that they join and not impose a burden on the state.

On the other hand, Sinn argues that the directive on free movement will "open the gates for the "bad" kind - welfare migration". Because the directive allows economically inactive people to migrate, some will decide to move because of the higher welfare payments in other countries.

Welfare migration results in a 'lose-lose' situation. The migrants' home country loses a potential worker who could contribute to the country's productiveness and the host country gains an extra burden on its social security system. Even if the migrant gets a low paid job, it could take decades for them to pay off in taxes all the social assistance that they receive. The end result is a loss in overall GDP for both countries involved.

Disparities in welfare across the EU

The incentive to migrate is particularly accentuated by the large disparities in welfare regimes and wealth across the EU. The table below gives figures on welfare allowances and average household income in a selection of current EU states, and income data for Romania and Bulgaria, due to accede in 2007:

Member state	Basic welfare allowance (€ per month) for unemployed family of 4 ⁵⁶	Gross income per household (€ per month in 2004) ⁵⁷
Latvia	87	536.1591
Lithuania	141	547.232
Estonia	147	557.8323
Slovak Republic	271	647.9011
Czech Republic	351	840.9346
Poland	384	554.5915
Slovenia	439	1472.631
Portugal	455	1921.017
Italy	852	2585.393
France	877.54	3175.701
Germany	1078	2861.068
Sweden	1085	3317.421
UK	1112	3543.268
Belgium	1130	2910.424

⁵⁵ Financial Times, 12 July 2004

⁵⁶ Source- Eurostat

⁵⁷ Source- Euromonitor

Denmark	3108	3613.014
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2007 Accession Countries

Romania	—	330.4998
Bulgaria	—	333.7407

These figures give some idea of the immense contrast both in welfare provision (ranging from €3108 in Denmark to €87 in Latvia) and average income across the EU. Even within the EU-15, there are significant differences- Portugal offers levels of benefits far below those of other countries in Western Europe. Furthermore, the level of welfare payment in most western European countries is higher than the average earned income of most countries in Eastern Europe, serving to further incentivise welfare migration.

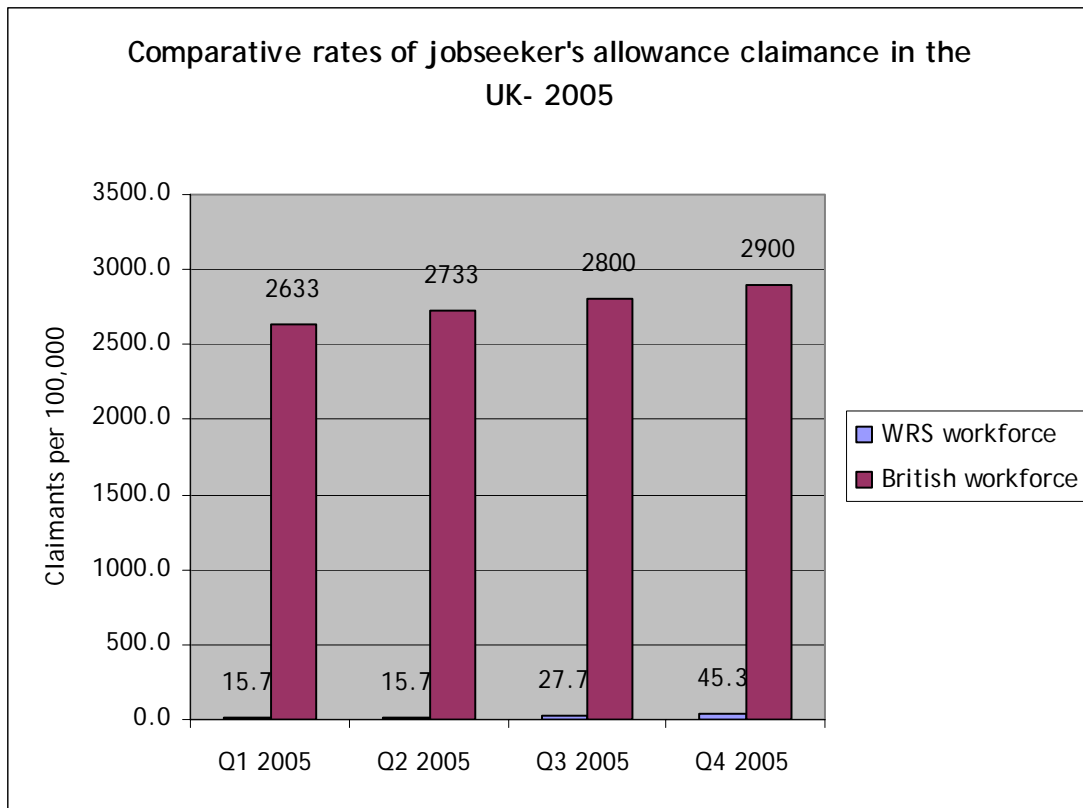
2009 could see a rise in welfare migration from the A8

Since the accession of the new member states in 2004 most of the 'old' member states, the EU-15, put in place restrictions intended to limit the number of workers who could migrate into their labour markets. These restrictions, which would normally be outlawed by EU legislation on non-discrimination, are allowed for a transitional period of up to 7 years by a derogation from the EU treaties passed in the treaties of accession in each member state. The only countries which didn't set a limit on migrants from the 'A8' countries were the UK, Ireland and Sweden.⁵⁸

In response to growing public concern in early 2004, the UK Government hurried legislation through Parliament which restricted the rights of workers from new member states to access social benefits in the UK until 2009. The Government introduced a new Workers Registration Scheme which only gave citizens from the A8 the right to reside in the UK whilst they were classed as a worker. Unlike other legislation such as the new directive on free movement, job seekers are not currently classed as workers. This means that while those in work are able to claim tax credits and child benefits they are unable to claim other benefits such as the job seekers allowance for their first year in the UK.

The chart below shows that the measures put in place have been effective in discouraging claims for benefits from migrants from the new member states.

⁵⁸ Malta and Cyprus were excluded from the transitional arrangements and citizens from those countries enjoy full rights of free movement



The Workers Registration Scheme is due to expire on 30 April 2006, but it is expected to be renewed for a final 3 years. While living standards in the A8 will undoubtedly experience some catch-up with the UK by that stage, it is unthinkable that they will reach even similar levels by 2009. The pressures of welfare migration will increase massively after that point. If the proportion of people claiming benefits such as jobseeker's allowance reaches anything near the levels of UK claimants, 2009 could see nearly a 100-fold increase in claims.

Will 'welfare shopping' lead to harmonisation?

As the number of people migrating across Europe in order to take advantage of more generous welfare payments increases, public hostility will grow, forcing politicians to act. Some, such as Professor Sinn, have argued that this will lead to a cut in social security payments across the continent: a race-to-the-bottom in payments in order to avoid becoming a target for welfare migration.

Given the difficulties 'old' European governments have had recently in pushing through even the smallest labour and welfare reforms it is more likely that some EU politicians will instead call for a greater 'coordination' - if not full-scale harmonisation - of EU social security systems. The EU has taken this approach with similar issues in the past. The original justification for the EU's common asylum policy was "to get away from the situation where you have effective asylum shopping between member states."⁵⁹

The plan would certainly have the backing of a number of EU states. For example, both French Interior Minister Nicolas Sarkozy and the German Finance Minister Peer Steinbrück have recently criticised some of the new member states for having low

⁵⁹EU 'source', *Times*, 27 May 1993

business tax rates. They have both called upon their counterparts to raise tax levels in order to ensure “fair tax competition” and to stop “tax dumping”.

It is not difficult to imagine that the EU, always keen to be seen reacting positively to public outcries, will propose a minimum set of standards, requirements and procedures to combat ‘benefit shopping’, when the situation arises several years down the line.

While this may be some years off, the EU Commission is already planning its next steps, which will see a further erosion of national government control over the free movement of citizens within the EU. In 2008 the Commission will present proposals to allow “EU citizens to move within the European Union on similar terms to nationals of a Member state moving around or changing their place of residence in their own country.”⁶⁰

One of the key points that will be reviewed by the Commission will be a proposal to extend the automatic right of residence to all EU citizens from 3 to 6 months. The period of 6 months was originally included in the new directive, and was supported by the European Parliament, but was reduced to three months after pressure from member states. If this was actually introduced it would, according to the Government, “lead to an increased burden on the social security systems of Member states.”⁶¹

It is clear, as with many of the EU’s projects, that this directive is not the last word and that the importance of EU citizenship will only continue to grow.

⁶⁰Presidency Conclusions - Brussels, 4/5 November 2004, Annex 1
<http://www.statewatch.org/news/2004/nov/hague-programme-final.pdf>

⁶¹ European Scrutiny Committee 23rd report 4 June 2003