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Between Law and Political Truth? Member State Preferences, EU Free Movement Rules and National Immigration Law

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Abstract
This article explores how Member States respond to the challenge of complying with EU law obligations, whilst remaining alert to the demands of domestic politics in the context of contentious areas of EU competence. It is argued that in the case of free movement we can see the United Kingdom drawing upon three overlapping strategies in order to tread the fine line 'between law and political truth': it exploits as much as possible any uncertainties within free movement law; it draws upon the proximate field of domestic immigration law in order to reinterpret free movement law; and it argues for new resources to be brought into the field of free movement, in particular resources which restrict the freedoms of Member States. A discursive frame of migration governance provides the analytical construction within which the argument is located. The article is therefore a contribution to debates about (legal) Europeanisation and compliance, as well as the more specific challenges facing the UK in the latter half of the 2010s, namely a renegotiation of and referendum on EU membership.

Keywords: citizenship, free movement, Europeanisation, compliance, Member State, immigration

I. INTRODUCTION

This article explores some of the legal responses given by Member States to the challenge of dealing with a field of EU law and policy that has become contentious at national level. It focuses on the case study of the free movement of persons in the

* Earlier versions of this article were presented at the UACES Conference in Cork, Ireland, September 2014 and the IMISCOE/EUI Conference on Mobilities, Florence, Italy, January 2015. I am grateful to the participants at those conferences and to the Editors of the Yearbook for their comments. The article draws on the results of two earlier projects: (1) an empirical research project which looked at the frictions between UK immigration law and EU free movement law entitled *Friction and Overlap between EU Free Movement Rules and Immigration Law in the United Kingdom*, Nuffield Foundation (Grant No OPD/36198). Final report: J Shaw et al, *Getting to Grips with EU Citizenship: Understanding the Friction Between UK Immigration Law and EU Free Movement Law*, Research Report, 2013, http://www.frictionandoverlap.ed.ac.uk/files/1693_fullreportlowres.pdf [last accessed 27 August 2015]; (2) a programme of work undertaken with Niamh Nic Shuibhne as Joint General Rapporteurs on Union Citizenship for the XXVI FIDE Congress, Copenhagen, May 2014. See N Nic Shuibhne and J Shaw, 'General Report' in U Neergaard et al (eds), *Union Citizenship: Development, Impact and Challenges* (DJØF Publishing, 2014). Notwithstanding the collective nature of these projects, all remaining infelicities are mine alone.

context of the United Kingdom (UK), with limited references to examples drawn from other Member States. Against the background of apparently unprecedented popular opposition to immigration generally and to (at least some aspects of) EU free movement specifically, this article examines three strategies that a Member State government can pursue if it wants to somehow change or limit the present legal effects of the free movement of persons (with consequent political messages delivered to attentive audiences), while remaining broadly compliant with its responsibilities under the Treaties. These strategies involve: exploiting the *internal* resources of EU law; importing *new* resources into EU law, for example, by making use of the proximity between free movement law and national immigration law; and attempting to *change* the resource base by bringing about amendments to existing EU law, or at least to EU law as it applies to the UK (eg through opt outs: see Part IV below). I argue that in the case of the UK, these strategies are sustained, in many cases, through a discursive focus on the proximity between 'free movement' and 'immigration', and between EU free movement law and national immigration law. This is combined with the use of residence tests in relation to various welfare benefits, in order to sort the population between those who are entitled and those who are not; one of several strategies to separate the 'good' migrant and the 'bad' migrant. While not strictly measures of immigration law, in practice rules governing entitlement to benefits will have a significant impact on the migrant experience, whether under UK immigration law or EU free movement law.

By pursuing these strategies, national governments and officials such as ministers can speak more effectively to the various competing audiences that demand action or change (or inaction) of different kinds. They can combine an appeal to populist politics with rule of law compliance, as required by the European Commission as the first level guardian of EU free movement law and as mandated by judgments of the Court of Justice of the European Union (CJEU). In such a manner, a government can navigate a pathway between what I term in this paper 'law and political truth' – that is, between the competing demands of the rule of law and compliance with EU law on the one hand, and a political reality (to be found in both public opinion and the public sphere) which appears to be profoundly anti-immigration and even sometimes anti-immigrant on the other.[1]

The argument is developed as follows. In Part II, I examine the shifting political and economic context for the evolution of free movement law in the EU, both at the EU level and at the national level. Part III provides the analytical framework for the case study focused on the UK. The article makes use of scholarly approaches which have framed EU free movement within the wider context of migration governance, looking at both *intra*-EU mobility (free movement) and immigration

[1] This is a variation on a comment by DP Hodges that politicians find themselves trapped, in relation to immigration between 'absolute and political truth'. D Hodges, 'Britons have become scared of the wider world', *Daily Telegraph*, 5 August 2014: http://blogs.telegraph.co.uk/news/danhodges/100282452/britons-have-become-scared-of-the-wider-world/ [last accessed 27 August 2015]; see further note 34 below.

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into the EU. At the same time, it also builds on strands in the Europeanisation and compliance literatures, which have focused, in recent years, on how Member States respond to those judgments given by the Court of Justice which require the adjustment of national law, sometimes in quite dramatic ways, and on how and why states often find means of complying in creative ways.[2] But national governments respond not only to CJEU judgments, but also to a range of other measures, including the underlying Treaties and legislation, as well as enforcement steps taken by the European Commission, not to mention the case law of national courts. In that sense, this article develops the creative compliance argument beyond the realm of compliance with judgments. Part IV then develops a case study focused on three strategies that national governments can pursue within the framework of migration governance before Part V offers some brief conclusions.

II. WHAT FUTURE FOR THE FREE MOVEMENT OF PERSONS IN THE EU?

EU free movement law is as old as the European integration process. The Treaty of Rome put in place the basic provisions that still govern the common or single market under the current treaties – the Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) – including the free movement of workers, freedom to provide services and freedom of establishment, alongside the other freedoms (goods and capital), as well as the right to non-discrimination on grounds of nationality. Even before the expiry of the transitional period at the end of 1969, important legislative measures were adopted to facilitate the substantive and procedural aspects of free movement, including freedom of movement for family members.[3] Since that time, numerous additional measures have been adopted, notably the so-called Citizens' Rights (or 'Free Movement') Directive of 2004 which updates and upgrades free movement rights in important ways. It institutes a status of permanent residence for those resident for five years or longer, and has further enhanced protections against deportation in particular for those resident ten years or longer.[4] However, it is not a complete code, and has encountered implementation difficulties at the national level, and interpretation challenges in the Court of Justice.[5]

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[2] Eg M Blauberger, 'With Luxembourg in Mind … The Remaking of National Policies in the Face of ECJ Jurisprudence', (2012) 19 *Journal of European Public Policy* 109; M. Blauberger, 'National Responses to European Court Jurisprudence', (2014) 37 *West European Politics* 457; S. Schmidt, 'Judicial Europeanisation: The Case of *Zambrano* in Ireland', (2014) 37 *West European Politics* 769.

[3] Council Directive 64/221/EEC [1964] OJ 850/64; Council Regulation (EEC) No 1612/68 [1968] OJ L257/2.

[4] Directive 2004/38/EC [2004] OJ L158/77.

[5] A detailed commentary on EU free movement law, or on Directive, lies beyond the scope of this article. For further details, see S Peers et al, *The EU Citizenship Directive. A Commentary*, (Oxford University Press, 2014).

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Supplementing this material, 1993 saw 'citizenship of the Union' enshrined in the EU treaties. This gives a 'constitutional' timbre to the principles of free movement and non-discrimination, and carries EU law away from the original focus on freedom of movement as applicable in relation to (economic) factors of production alone.[6] EU citizenship gives rise to questions about precisely where the edges of 'free movement' lie. As the Court of Justice has told us on innumerable occasions, 'citizenship is intended to be the fundamental status of the nationals of the Member States'.[7] But how far does this go? Does citizenship protect only completed movement, or does it include also anticipated movement? What solidarity should exist amongst the Member States to support those EU citizens who require shorter or longer term support from welfare benefits or personal care consequent upon disability or ill health. Is an EU citizen who commits a crime no longer to be regarded as a legitimate beneficiary of the rules, even if he or she has family in the host Member State? In recent years, the twists and turns of the Court of Justice's case law have been hard even for experts to follow.

But the problems go beyond the sphere of legal doctrine. Referencing one of the foundational documents of the European Communities, the Spaak Report,[8] a 2014 editorial in a leading EU law journal raised a pertinent question that is central to the future of the EU as an economic, political and legal integration project: '[H]as [Paul-Henri] Spaak's dream of free movement [of persons] become a nightmare – legally over-complicated, politically abused, allegedly costly and popularly misunderstood?'[9]

It is certainly true that the scale of EU free movement has risen, and as it has done so, the issues that it raises have become more contested. The numbers of EU citizens taking advantage of EU free movement rights are now somewhat higher than before the 2004 enlargement.[10] As the EU has now acquired a total population of over half a billion people across 28 Member States,[11] the numbers of 'free movers' actually sound quite large when set against the population of the smaller Member States (around 14.3m in 2014).[12] The population of EU free movers is also

[6] See J Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism', in P Craig and G de Búrca (eds), *The Evolution of EU Law*, 2nd ed (Oxford University Press, 2011).

[7] Eg in *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:124, para 41.

[8] Intergovernmental Committee on European Integration, *The Brussels Report on the General Common Market* (abridged, English translation of document commonly called the Spaak Report), June 1956, *Archive of European Integration*: http://aei.pitt.edu/995/ [last accessed 27 August 2015].

[9] Editorial Comments, 'The Free Movement of Persons in the European Union: Salvaging the Dream While Explaining the Nightmare', (2014) 41 *Common Market Law Review* 729, p 736.

[10] M Benton and M Petrovic, 'How Free is Free Movement? Dynamics and Drivers of Mobility within the European Union' *MPI Europe*, March 2013.

[11] See the data at http://europa.eu/about-eu/facts-figures/living/index_en.htm [last accessed 27 August 2015].

[12] See the most recent data at http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics (updated in May 2015 with most data referring to January 2014) and with more details (but older figures) on a wider variety of cross border activities: http://ec.europa.eu/

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spread unevenly: of those 14.3m, more than one third are in just two Member States, with around 2.5m non-national EU citizens in the UK, and over 3m in Germany. Nonetheless, 'free movers' (beyond those who undertake temporary cross border movement) remain a small percentage of the total population. Overall fewer than three per cent of EU citizens are resident outside the Member State of which they hold citizenship. Only in Luxembourg and Cyprus does the population comprise more than ten per cent EU citizens from other Member States, and in most Member States the numbers of non-national EU citizens is smaller, or much smaller, than the numbers of third country nationals. In 2012, non-national EU citizens made up around seven per cent of the total employed population across the Member States.[13]

Yet despite these relatively small numbers, free movement rights have gained unprecedented salience with national publics. They are now seen in a number of Member States as a problem that needs to be addressed. It is true that few Member States can muster the outright hostility that can be seen emanating from the government[14] and the media in the UK,[15] which has also led some sections of the commentariat to suggest that free movement might need, in certain ways, to be moderated[16] and has resulted in free movement being an element in the UK Government's 2015–2016 re-negotiation strategy, with a view to a UK referendum on membership of the EU. But nonetheless, a number of other governments (Austria, Germany, Netherlands) have been prepared to back the UK Government on issues such as alleged 'abuses' of EU law, and the phenomenon of 'poverty migration' as it is termed in Germany, or 'benefit tourism' as it appears in the UK discourse.[17] And in Belgium, where there has been a marked acceleration in the numbers of EU citizens seeing their residence permits removed because they are deemed to have become 'unreasonable

(F'note continued)
eurostat/statistics-explained/index.php/EU_citizenship_-_statistics_on_cross-border_activities [last accessed 27 August 2015].

[13] For further details see http://europa.eu/rapid/press-release_MEMO-14-9_en.htm, http://epthinktank.eu/2013/07/09/migration-in-the-eu/ and http://epthinktank.eu/2014/06/16/freedom-of-movement-and-residence-of-eu-citizens-access-to-social-benefits/ [last accessed 27 August 2015].

[14] Eg D Cameron, 'Free movement needs to be less free' *Financial Times*, 26 November 2013: http://www.ft.com/cms/s/0/add36222-56be-11e3-ab12-00144feabdc0.html#axzz39YJSsk5W, referring to 'vast migrations' [last accessed 27 August 2015].

[15] T Horsley and S Reynolds, 'United Kingdom', in U Neergaard et al (eds), *Union Citizenship: Development, Impact and Challenges* (DJØF Publishing, 2014). Examples of poor treatment of new Member States in particular include the *Daily Telegraph* describing the Visegrad countries in 2013 as 'EU accession countries': http://www.telegraph.co.uk/news/uknews/immigration/10484225/Eastern-European-immigrants-overwhelming-benefit-UK-economy.html [last accessed 27 August 2015].

[16] See, eg, the work of David Goodhart discussed at note 131 below in the context of his submission to the Balance of Competences Review report on free movement, and the weight placed upon this work by the report.

[17] Letter to the Irish Presidency from the Ministers of the Interior of Austria, Germany, the Netherlands and the UK, April 2013: http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf [last accessed 28 August 2015]. For further analysis see M Blauberger and S Schmidt, 'Welfare Migration? Free Movement of EU Citizens and Access to Social Benefits' (2014) October–December *Research & Politics* 1, http://dx.doi.org/10.1177/2053168014563879.

burdens' on the social system,[18] the Minister declared in December 2013 that 'll faut éviter qu'il y ait des gens qui profitent de notre système social'.[19]

But the picture is not all negative. If we were to define free movement as mobility with transaction costs reduced,[20] it would be easy to see why it is also amongst the achievements of the EU most prized by EU citizens, according to Eurobarometer polls.[21] Free movement manages to be simultaneously both prized and feared. Accordingly, just as there are some states setting out to challenge the shibboleth of free movement, so it has a number of prominent defenders, notably many governments amongst the states of Central and Eastern Europe[22] and the Nordic states.[23]

In sum, free movement is now a heavily contested issue among governments and other stakeholders within the EU and its Member States, after decades of relative quiescence, where this field of EU law largely flew below the radar and attracted little public attention.

There are a number of reasons that contribute to this changed political constellation. They include the impact of the 2004 and 2007 enlargements towards the states of Central and Eastern Europe which have undergone economic transition since 1989 (and in particular the different decisions taken by Member States around transitional periods) and the economic downturn experienced to a greater or lesser degree by all Member States in the aftermath of the financial crisis, and especially in those Member States where the financial crisis turned into a sovereign debt crisis.[24] This, in turn, necessitated the imposition of swingeing austerity measures, often at the behest of international institutions such as the IMF and the ECB, as well as the European Commission. These factors – combined with unemployment throughout Europe, but especially in the east and south of the EU, and very low growth rates in some of the 'old' Member States (eg France and Italy) as well as in those states whose economies have contracted dramatically because of the sovereign debt crisis – have resulted in EU citizens taking advantage of their free movement rights to a greater extent than before. We have seen mobility both from east to west and south to north,[25] including the return of some of those who had previously exercised

[18] See J-M Lafleur and M Stanek, 'Restrictions in access to social protection of mobile citizens in times of crisis: the case of EU citizens expelled from Belgium', IMISCOE/EUI Conference, Mobility in Crisis, January 2015.

[19] 'We must ensure that people do not profit from our welfare system': http://www.rtl.be/info/belgique/politique/maggie-de-block-il-faut-eviter-que-des-gens-profitent-de-notre-systeme-social-video–396658.aspx (trans. Shaw) [last accessed 28 August 2015].

[20] J Hampshire, 'Millions on the move' (August–September 2014) *The World Today* 13, p 14.

[21] Eurobarometer value of free movement.

[22] 'Migrants from Central and Eastern Europe have been hugely beneficial for the British economy', Joint Statement on the Free Movements of Persons by the Foreign Ministers of the Visegrad countries – Czech Republic, Hungary, Poland and Slovakia, November 2013, reproduced at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2017395%202013%20INIT [last accessed 1 September 2015]

[23] 'In times of crisis, we must safeguard free movement', Letter to the *Financial Times* from the EU Affairs Ministers of Sweden, Finland and Norway, 16 January 2014.

[24] See Benton and Petrovic, note 10 above.

[25] 'Germany revealed as main destination of EU migrants, as Poland vows to veto UK', *The Independent*, 2 December 2014: http://www.independent.co.uk/news/world/europe/germany-revealed-as-

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their free movement rights to their home states, although perhaps not as much new mobility as might have been expected given the severity of the crisis and the levels of unemployment in some states.[26] For some observers, a more mobile European workforce remains an imperative for Europe to work its way out of the crisis that continues to affect countries such as Greece.[27]

The particular factors affecting the EU have, moreover, also coalesced with broader concerns amongst electorates in the Member States regarding immigration more generally – including fears about the apparent lack of integration on the part of certain migrant communities which become linked in the public imagination to security concerns – which have led to increasing votes for anti-immigration and indeed anti-immigrant political parties. There is, furthermore, a perception that the EU's own liberalisation of service sectors has opened up possibilities for exploitation of pay and conditions differentials across the Member States by transnational corporations evading host state labour regulation requirements by 'posting' workers employed under home state conditions.[28] In that context, globalisation is a dirty word, and the EU's own single market is seen as complicit in this process of undermining the social compacts within individual Member States to the detriment of organised labour and 'ordinary working people'. Altogether, this amounts to a perfect storm in which free movement rights come to be seen as part of the problem (of a loss of sovereignty) rather than an element of the solution (through a pooling of sovereignty to combat challenges collectively rather than individually).

III. A CONTINUUM OF 'MIGRATION GOVERNANCE'

Against this background, should we assume that the problems (and thus also the solutions) relating to free movement lie in the sphere of politics and economics, and

(F'note continued)

main-destination-of-eu-migrants-as-poland-vows-to-veto-uk-9897327.html [last accessed 28 August 2015]. See R Verwiebe, 'New Forms of Intra-European Migration, Labour Market Dynamics and Social Inequality in Europe', (2014) 11 *Migration Letters* 125.

[26] E Recchi and J Salamońska, 'Bad Times at Home, Good Times to Move? The (Not So) Changing Landscape of Intra-EU Migration', in V Guiraudon et al (eds), *Europe's Prolonged Crisis. The Making or the Unmaking of a Political Union* (Palgrave, 2015).

[27] 'At the height of the Euro crisis there were times when more young Irish citizens were leaving their little homeland in search of work than all the Spanish and Italians together. … Workforce mobility is the only outlet for economic pressure, the only means that can halfway ensure that unemployment rates in the Eurozone converge instead of diverge. Europeans will have to emigrate from Helsinki to Brindisi just as naturally as they do from Hamburg and Berlin. In the absence of a transfer union, mobility should be significantly higher than it is in the US - and yet it is much lower. … What we urgently need, also in Germany, is a new policy on mobility: a policy that actively promotes language learning and job placements across Europe', from 'Her mit den neuen Gastarbeitern!' *Die Welt* 19 July 2015: http://www.welt.de/print/wams/debatte/article144181397/Her-mit-den-neuen-Gastarbeitern.html (English translation from http://www.eurotopics.net/en/home/presseschau/archiv/article/ARTICLE166613-Eurozone-needs-more-mobile-workforce) [last accessed 28 August 2015].

[28] See P Delivet, *The Free Movement of People in the European Union: Principle, Stakes and Challenges*, (Robert Schuman Foundation Policy Paper, European Issues No 312, May 2014).

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that those who hark back to the principles of EU free movement law and try to argue that free movement is somehow 'different' to 'ordinary' immigration, as it is regulated by the treaties and legislation under a framework of economic integration, are just hopeless romantics?[29] Do we now have to accept that whatever EU law might say at present, the free movement project has to be regarded as politically untenable in an enlarged EU, where free movement is generally constructed in the public imagination in the same way as immigration from third states? Can the situation only be recovered – from the perspective of governments and politicians – if states can regain that elusive control over free movement to the same extent that they seek to exercise it over many aspects of immigration from third states?[30] In other words, is free movement just an anachronism that will disappear in a 'reformed' EU, because it is no longer acceptable to public opinion? More pertinently for the UK, might we see the UK leave the EU after the referendum vote which is now scheduled following the victory of the Conservative Party in the 2015 General Election? It could be that this referendum could end up being contested largely around the axes of public hostility to and perceptions of immigration.

'Control' is a significant axis of the debate in the UK, and this extends to EU free movement as much as to immigration from third countries. It was an important leitmotiv in Prime Minister David Cameron's November 2014 speech on immigration:

> People have understandably become frustrated. It boils down to one word: control. People want government to have control over the numbers of people coming here and the circumstances in which they come. … People want a grip. I get that. They don't want limitless immigration and they don't want no immigration. They want controlled immigration and they are right.[31]

Of course, there can be legitimate debate over whether free movement is indeed unlimited and uncontrolled in the way that it is sometimes portrayed in popular discourse and in the media. In fact, as EU lawyers and others familiar with EU affairs well know, it is more accurate to state that free movement is subject to a

[29] It is not only EU lawyers who seek to insist on the difference between 'free movement' and 'immigration'. Proponents of the distinction include sociologists such as A Favell, 'The UK has been one of the main beneficiaries from free movement of labour in the EU', *LSE EUROPP*, 1 July 2014: http://blogs.lse.ac.uk/europpblog/2014/07/01/the-uk-has-been-one-of-the-main-beneficiaries-from-free-movement-of-labour-in-the-eu/ [last accessed 28 August 2015]

[30] Of course scholars of migration have regularly exposed the lack of control which politicians and bureaucrats have over many aspects of immigration control in modern democratic states, and thus the gap between rhetoric and messy reality: C Boswell, 'Migration control and the surveillance myth', *Policy Network*, 23 January 2011: http://www.policy-network.net/pno_detail.aspx?ID=3940 [last accessed 28 August 2015].

[31] Prime Minister's Speech at JCB Staffordshire, 28 November 2014: https://www.gov.uk/government/speeches/jcb-staffordshire-prime-ministers-speech [last accessed 28 August 2015] The webpage notes that the speech contains proposals made as leader of the Conservative Party during the 2010–2015 Coalition Government.

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complex set of regulations distinguishing between different categories of beneficiaries, and allowing certain exceptions for public policy and security reasons, as well as reasons related to welfare solidarity.[32] A full exposition of this point lies beyond the scope of this article. But arguments with a sufficient degree of subtlety to capture those complexities rarely have much traction in public opinion. Nor do 'facts'[33] about the contribution of migrants to the economy and to taxation, including their employment rate, their relative lack of reliance upon public services, and the paucity of evidence about their impact on the employment and wages of 'native' workers.

As a result, politicians are trapped, as the media commentator DP Hodges puts it, between 'absolute and political truth':

> It's easy to blame the mainstream party leaders for their vacillation and duplicity over immigration. They either find themselves accused of being party to a reactionary "arms race" on the subject, or of having a tin ear to a rising tide of public anger. But in reality they are trapped between absolute and political truth. … They know that migrant labour, at all levels of the economy, is vital to Britain's prosperity. They have seen the OBR [Office for Budgetary Responsibility] statistics that immigration is crucial to the recovery. And they know too that no one wants to hear it. That negative perceptions of the social, cultural and economic impact of migration are so embedded as to make any attempt to reverse them political folly.[34]

One response to this trap has been to call for 'fair movement not free movement',[35] although it is rare to find evidence about how free movement under such conditions is actually unfair to the UK. At most, it is sometimes suggested that, at a local level,

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[32] N Nic Shuibhne, 'Exceptions to the Free Movement Rules', in C Barnard and S Peers (eds), *European Union Law* (Oxford University Press, 2014).

[33] Deutsche Bank Research, Research Briefing, *Debate on Free Movement. Does the EU Need New Rules on Social Security Co-ordination?*, 20 March 2015 contains a brief review of most of the evidence on the alleged welfare magnet effects of free movement, as well as the fiscal impacts of EU migrants. See also J Wadsworth, *Immigration, the European Union and the UK Labour Market* (Centre for Economic Performance CEPPA015, May 2014) http://cep.lse.ac.uk/pubs/download/pa015.pdf and *Review of the Balance of Competences between the United Kingdom and the European Union Single Market: Free Movement of Persons* (HM Government, July 2014) https://www.gov.uk/government/consultations/free-movement-of-persons-review-of-the-balance-of-competences [last accessed 28 August 2015].

[34] See note 1 above. Whether or not this trap is of their own making is a different question, on which see M Goodwin, 'Why the "Immigration debate" is getting us nowhere' *New Statesman*, 27 November 2013: http://www.newstatesman.com/politics/2013/11/why-immigration-debate-getting-us-nowhere [last accessed 28 August 2015].

[35] This was a mantra regularly repeated by Labour Party shadow ministers during 2014, such as Ed Balls, Yvette Cooper and Dave Hanson: see 'David Cameron promises 'One last go' at EU migration curbs', *BBC News*, 16 October 2014: http://www.bbc.co.uk/news/uk-politics-29642604 [last accessed 28 August 2015]. It is also the terminology used by the IPPR, *A fair deal on migration for the UK* March 2014: http://www.ippr.org/publications/a-fair-deal-on-migration-for-the-uk and it has been picked up by former European Commissioner László Andor, *Fair Mobility in Europe* (Social Europe, Occasional Paper, Friedrich Ebert Stiftung, January 2015) http://www.socialeurope.eu/wp-content/uploads/2015/01/OP7.pdf [last accessed 28 August 2015].

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there may be effects on employment, wages and access to public services,[36] or that because the UK social security system is less contributions-based than systems in other EU Member States, this could mandate longer restrictions on in-work benefits for incoming EU citizen workers.[37] Is it fair or unfair to reduce the transaction costs of migration, such that, as James Hampshire says, free movement is actually more often circular than immigration from third states and thus may have less long-term impact upon the host society?[38]

Scholars such as Emma Carmel[39] and Regine Paul[40] have argued that it is now time to end the artificial bifurcation when thinking about migration governance in the EU context between, on the one hand, free movement and, on the other hand, immigration. While there may exist only a limited set of EU competences and measures in relation to immigration from third states, and indeed there are also high levels of variation in engagement on the part of the Member States with the laws and policies that have been enacted, with Ireland and the UK having opted out of many of the relevant measures (except most of those relating to 'illegal' immigration), none the less the two sets of measures regulate in large measure the same set of societal challenges regarding mobility, labour markets and inclusion/exclusion. For Carmel, the distinction between (intra EU) mobility and (from third country) migration is a distinction without a difference. The two phenomena belong together in a continuum of migration governance. She diagnoses a lack of reality around free movement at the present time, since 'Such mobility [ie free movement] is assumed, at Union level, to either be taking place unproblematically or, at most, to require member states' action to encourage more intra-EU mobility to generate liberalising benefits for the EU economy'.[41] At the present time, these assumptions – which saw the idea of EU free movement underpinned by twin logics of market freedom and citizens' rights[42] – can no longer be sustained as somehow separate from the logics of immigration under conditions of globalisation where similar claims to economic benefit and social progress/equity are often made by advocates of (more) open borders. Carmel, along with Paul, suggests that instead of the traditional mobility/

[36] See, eg, the discussion in the Balance of Competences review report in note 33 above, pp 42–45; J Portes, 'Labour Mobility in the European Union' in S Durlauf and L Blume (eds), *The New Palgrave Dictionary of Economics*, Online Edition (Palgrave, 2015), p 9.

[37] 'Open Europe report on reforming EU free movement: make it fair to keep it free' *Open Europe* 24 November 2014: http://openeuropeblog.blogspot.co.uk/2014/11/open-europe-report-on-reforming-eu-free.html [last accessed 28 August 2015].

[38] J Hampshire, see note 20 above.

[39] E Carmel, 'Mobility, Migration and Rights in the European Union: Critical Reflections on Policy and Practice' (2013) 34 *Policy Studies* 238.

[40] R Paul, 'Strategic Contextualisation: Free Movement, Labour Migration Policies and the Governance of Foreign Workers in Europe' (2013) 34 *Policy Studies* 122.

[41] E Carmel, 'With What Implications? An Assessment of EU Migration Governance Between Union Regulation and National Diversity' (2014) 11 *Migration Letters* 137, p 140.

[42] E Carmel, 'European Union Migration Governance: Utility, Security and Integration' in E Carmel et al (eds), *Migration and Welfare in the New Europe: Social Protection and the Challenges of Integration* (Policy Press, 2011), p 52.

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migration bifurcation we should use a detailed set of typologies of the rights and benefits enjoyed (or denied as the case may be) by different groups of non-citizen migrants, within a complex stratification of interests.[43]

Paul makes the important point that free movement impacts upon labour market immigration policies – ie vis-à-vis third countries. It is not simply the case that states 'accept' the lack of control imposed by free movement, and then concentrate their regulatory efforts on other forms of immigration alone. Within the broader framework of labour market immigration policies they have to respond to the specifics of free movement, which typically involves both skilled and unskilled mobility. In fact, one could go further and suggest that EU free movement is a species of labour market immigration policy, displaying a very distinctive mix of the elements that Martin Ruhs suggests we will find in all labour market immigration programmes, namely 'openness, skills and rights'.[44] Ruhs has argued that the EU's arrangements for free movement – which allow mobility for work *and* unrestricted access to the work-related aspects of the welfare system – are an important exception to the trade-off normally seen in labour immigration policies between mobility and rights.[45] To that extent, he highlights the political costs of free movement, as it may not be universally perceived to be sustainable, especially, one might add, in a larger and more diverse EU. This may account for many calls to restrict national welfare states, in the light of free movement.

While Paul argues that internal EU free movement and external EU immigration are connected, it is perhaps surprising that she seems to adopt an assumption that the relationship involves linear and unidirectional policy decisions – from (uncontrolled) free movement to (controlled) labour immigration – rather than iterative in character. For sure, there is some evidence of that direction of influence, especially when we look at the period under review by Paul, namely a period when there was quite a high degree of overlap between free movement and labour immigration policies as Member States made the choices about whether or not to impose transitional restrictions on those states that acceded in 2004 and 2007, with some doing so and some choosing not to. The evidence seems to show that the belief did pertain in the UK for a while that EU workers could take up the slack in relation to low skill migration from third countries that was increasingly restricted from that time onwards and, moreover, that this would happen with a minimum of controversy.[46]

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[43] E Carmel and R Paul, 'Complex Stratification: Understanding European Union governance of Migrant Rights' (2013) 3 *Regions & Cohesion* 56.

[44] M Ruhs, 'Ten Features of labour immigration policies in high-income countries', 15 January 2014: http://www.priceofrights.com/blog/post.php?s=2014-01-15-ten-features-of-labour-immigration-policies-in-highincome-countries#.U-ICGkjQQ70 [last accessed 28 August 2015]. For more detail see M Ruhs, *The Price of Rights: Regulating International Labor Migration* (Princeton University Press, 2014).

[45] M Ruhs, 'Is Unrestricted Immigration Compatible With Inclusive Welfare States? The (Un)sustainability of EU Exceptionalism' COMPAS Working Paper No 125, University of Oxford, 2015 with a shorter blog at http://www.priceofrights.com/blog/post.php?s=2015-06-25-eu-migration-and-welfare-benefits-is-unrestricted-labour-immigration-compatible-with-an-inclusive-welfare-state#.Va_kVbdzaKA [last accessed 28 August 2015].

[46] R Paul, see note 40 above, p 130.

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Of course, that is no longer an official or unofficial position in the UK. After the 2010 General Election, the Coalition Government committed itself to reduce net migration to less than 100,000 people per annum (including students and EU citizens, two groups of migrants that cannot really be 'controlled', not to mention the absence of restrictions on returning UK citizen emigrants).[47] It is also no longer a view of the Labour Party.[48] After the 2015 General Election, the Conservative Government quickly signalled its intention to push back on the remaining skilled migration from outside the EU, with the announcement of a review of the Tier 2 skilled migration route, led by the independent Migration Advisory Committee,[49] while putting key aspects of the treatment of free movement on the table in the negotiations it will lead for a putative reform of the EU in the lead up to a UK in/out referendum. Indeed, the most interesting question to consider is the extent to which the different dimensions of migration governance are co-constitutive, in complex ways, with immigration policy impacting as much on free movement as the latter does upon the former.

The existence of such a complex interaction between the different elements of migration governance is the premise against which this article aims to explore some aspects of the relationship between the EU free movement rules and the domestic implementation context (comprising the related fields of immigration law and welfare law, so far as it relies on sovereignty-based distinctions such as the 'right to reside') in order to help identify how the gap between law and political truth has been navigated by domestic political actors. It builds on earlier research that used a socio-legal approach in order to bring issues of (legal) culture into focus when we think about how and why EU law is or is not effectively applied at the national level.[50] Central to that work was an understanding of the dissonance between immigration law – based on a classic 'permissions' approach in which state sovereignty is central to how law is shaped and operates – and EU free movement law, based on treaty-grounded rights for individuals, including rights of residence, the right to non-discrimination and procedural rights including access to law and legal remedies. The further step to explore in this article is the insight that what may be *dissonant* in legal terms can also be *consonant* in political terms, posing a particular type of Europeanisation puzzle for Member States, a puzzle which is not fully captured by

[47] J Salt and J Dobson, 'Cutting Net Migration to the Tens of Thousands: What Exactly Does That Mean?', MRU Discussion Paper, UCL, November 2013: https://www.ucl.ac.uk/news/news-articles/1113/Salt_Dobson_291013.pdf [last accessed 28 August 2015].

[48] *Britain Can be Better*, UK General Election 2015 Labour Party Manifesto, pp 49–50.

[49] 'David Cameron unveils new non-EU migration crackdown', *BBC News*, 10 June 2015: http://www.bbc.co.uk/news/uk-politics-33082737; Migration Advisory Committee, 'Call for Evidence. Review of Tier 2' July 2015: https://www.gov.uk/government/news/migration-advisory-committee-mac-review-of-tier-2 [last accessed 28 August 2015].

[50] J Shaw et al, *Getting to Grips with EU Citizenship: Understanding the Friction Between UK Immigration Law and EU Free Movement Law* (Edinburgh Law School Citizenship Studies, 2013): http://www.frictionandoverlap.ed.ac.uk/files/1693_fullreportlowres.pdf [last accessed 28 August 2015]; J Shaw and N Miller, 'When Legal Worlds Collide: An Exploration of What Happens when EU Free Movement Law Meets UK Immigration Law' (2013) 38 *European Law Review* 137.

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any of the classic descriptive or interpretative theories of Europeanisation as a process of two-way adjustment to membership of the EU,[51] or presentations of Member States as either 'leaders' or 'laggards' when it comes to compliance with EU law.[52] Indeed, it is not entirely clear that the Europeanisation literature has fully caught up with the dynamics of Euroscepticism, at least in 'old' Member States such as the UK.

So long as the EU exists in its present form, ignoring or misapplying EU law in an institutionalised manner cannot be a realistic or long-term option for a Member State. The rule of law is deeply embedded in the Union's DNA and in that context Union law draws heavily upon the resource base offered by the constitutional systems of the Member States themselves, which are self-evidently grounded in the rule of law. There are few overt challenges to this element of the EU, at least not over the longer term. One of the most powerful elements in this equation is the obligation on national authorities and national courts to apply EU law that turns national courts, for example, into 'EU courts'. Of course, that does not mean that compliance is perfect, but it does ensure that in important ways the compliance process is embedded internally and constitutionally for these liberal legal states.[53]

The centrality of the rule of law to the EU is a premise generally shared between legal scholars, political scientists and scholars of international relations, even though they may well approach the significance of law and legal institutions within the framework of European integration in different ways. While legal scholars may point to the self-evident normative value of the rule of law in liberal constitutional systems searching for a basic norm, for scholars of politics and international relations the focus often falls on how states stick to their commitments precisely in order to ensure that they can retain credibility in the international sphere and to ensure reciprocity by their partners.

Given this premise, what steps can the government of a Member State take in order to achieve as many of its goals as possible in the political sphere and in particular appear, at least, to have some semblance of control over the issue of free movement? And, conversely, how do other actors (at national and EU level) react to these arguments, or present counter-arguments in the context of their political and legal mobilisation and litigation strategies? How does the European Commission, in its guise as guardian of the treaty framework and of EU law, react to these arguments and to the responses of others such as claimants at the national level, or political parties that highlight possible future strategies in relation to free movement? Finally, can we trace these arguments also into case law, and via that loop into proposals to change EU law itself via treaty change or legislative reform? I argue in what follows that the discursive construction of a migration governance space which brings into question both free movement and immigration is central, at least to understanding the strategies pursued by the UK government.

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[51] For discussion see J Shaw and N Miller ibid, pp 144–145.

[52] T Börzel, 'Pace setting, Foot dragging, and Fence sitting: Member State Responses to Europeanisation' (2002) 40 *Journal of Common Market Studies* 193.

[53] D Kelemen, 'Judicialisation, Democracy and European Integration' (2013) 49(3) *Representation* 295.

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IV. BETWEEN LAW AND POLITICAL TRUTH: A CASE STUDY ON THE UK

The migration governance space on which we focus in this article is the one in which UK governments since 2010 have found themselves. Conservative-led governments have identified the challenge of combatting the advances of a populist political party (United Kingdom Independence Party/UKIP),[54] and of appeasing apparently ever-growing negative popular sentiments on immigration, whilst avoiding stepping completely outside the parameters of EU law, because this could have substantial legal and political costs. This article argues that the UK Government has sought to maintain this balance by applying a 'continuum of migration governance' approach which allows it to make full use of the similarities and differences between EU free movement law and national immigration law, whilst speaking in sufficiently 'appeasing' voices to its various, often conflicting, audiences. In large measure, these narratives have been adopted not only by the principal government coalition party of 2010–2015 and party of government from 2015 onwards (Conservative Party) but also by the other large centrist UK-wide party, namely the Labour Party. The smaller coalition partner, the Liberal Democrats, has, by way of contrast, generally sustained a more pro-European stance in relation to issues of free movement more generally, but largely signed-up, by virtue of the Coalition Agreement to the 2010 pledge, to the task of 'managing' (for which read 'reducing') immigration, if without the fixation on numbers which proved something of a millstone around the neck of the Conservative Party during the Coalition Government.[55]

In exploring these strategies, this article sticks closely to the normative and narrative resources of the law, for it pays particular attention to the strategic use of legal arguments by certain privileged actors, as well as the standard texts of legal analysis – treaties, legislative instruments and case law. Of note are the positions taken by the government ministers, and by other Conservative Party politicians, as not only does the executive get to decide upon most applications made by EU citizens but it also has the prerogative of setting the tenor of much debate on EU free movement law, even though it is constrained by EU law in how it may act. Other political parties (especially the Labour Party and the former coalition partners the Liberal Democrats) have responded to this lead, even if they have been trying to steer slightly different courses. UKIP, meanwhile, has attempted to set a different agenda by rejecting EU free movement as wholly emblematic of a general failure to control UK borders that can only be corrected by the country leaving the EU.

Also relevant are the responses to the decisions and proposals of the executive which come from other stakeholders within the system such as claimants and their

[54] M Van Der Vardt, 'Desperate Needs, Desperate Deeds: Why Mainstream Parties Respond to the Issues of Niche Parties' (2015) 38(1) *West European Politics* 93.

[55] For a snapshot of Liberal Democrat party policy when junior Coalition partners, see Liberal Democrats leader Nick Clegg's immigration speech, 6 August 2014: http://www.libdems.org.uk/nick_clegg_s_immigration_speech [last accessed 28 August 2015].

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legal advisors, from the NGO/thinktank sector and from academic commentators, from courts (national and EU level) as the formal adjudicators upon the relationship between EU law and national law, as well as from EU level actors (EU institutions and civil society actors) and actors in other Member States. In the context of this argument, formal legal change (legislative change at the EU or the national level, and treaty change at the EU level) is seen as one possible output of such a dialogic process.

There are, I shall argue, three overlapping sets of strategies that governments can pursue when trying to steer a course between remaining 'rule-of-law bound' in relation to free movement law and facing down adverse public opinion or electoral responses at the national level, not least by providing a range of narratives which feed the interests of different, often competing, audiences. I describe this as navigating between 'law and political truth'.[56] The strategies are those of:

- Making use of the *internal* resources of EU law, by exploiting wiggle room, uncertainties and complexities within the law as it stands, and competing – with other actors – over the proper interpretation of EU law (Section A below);
- Exploiting certain *external* resources by reading across between national immigration law and EU free movement law, emphasising – as noted above – the continuum of migration governance (Section B below); and
- Seeking *changes* in the resources of EU law, by seeking legal change, whether unilaterally (eg through opt outs) or in partnership with the EU institutions and other EU Member States (Section C below).

There are fine lines of distinction between the three strategies, and some inevitable overlap between them. For example, it is sometimes hard to discern the difference between changes the UK introduces which are intended to exploit uncertainties and wiggle room, and those that represent the fruits of concerted action amongst the Member States. And sometimes exploiting wiggle room precisely means reading across the resources of immigration law. So the strategies are not closed categories by any means.

A. *Exploiting wiggle room and competing over meaning*

Despite (or perhaps because of?) the extensive legislative and judicial activity that has occurred in the field of EU free movement law, fundamental uncertainties remain. Legal commentators readily acknowledge the point.[57] Uncertainties are to be found everywhere in the free movement domain: in the EU level measures themselves; in the national implementing measures which, in the case of the UK

[56] This is a paraphrase of DP Hodge's comment that politicians find themselves between 'absolute and political truth' in relation to the 'trap' of immigration discourse, bringing in the rule of law as an additional element.

[57] Editorial Comments, see note 9 above, p 733. N Nic Shuibhne and J Shaw, 'General Report' in U Neergaard et al (eds), see note 15 above.

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(EEA Regulations[58]) are highly complex;[59] in the gaps between the EU measures and national implementing measures; in the case law of the Court of Justice. With such uncertainties, legal and related professionals possessed of 'internal legal learning'[60] hold a privileged position – courts, government lawyers and advocates, other legal professionals (eg working for NGOs or thinktanks), and of course legal academics. The process of dialogue between these groups is as lively at the EU level as it is in any other legal order, and it is even more complex than is the case in the municipal setting alone, because of the multi-level and plural nature of the legal system and structure of courts involving the EU and its 28 separate Member States. While the Court of Justice is the 'final arbiter' and authoritative interpreter of EU law, since it is given the role under Article 19 TEU to 'ensure that in the interpretation and application of the Treaties the law is observed', in practice the relations and dialogues between the different courts within the complex juridical structure of the EU are more complicated than that. Moreover, national data collected for FIDE highlight how national judiciaries have had to work hard 'to discern and to follow the twists and turns of jurisprudence-in-progress at EU level.'[61]

Member States will often exploit any uncertainties or space for unilateral action in order to restrict free movement rights. Sometimes, states may institute new measures, or attempt to develop certain arguments about the meaning of EU law, which will not 'hold', in the face of the prerogative of the Court of Justice to provide an authoritative interpretation of EU law, or indeed in the face of the determination of national courts to apply EU law as interpreted by the Court of Justice when cases are brought by aggrieved EU citizens. Nonetheless, the rhetorical and practical effects of making those arguments may be useful to the Member State that makes them, at least in the short term, especially if the approach can be seen, perhaps in the national media, as differing from the approach taken by the European Commission.

The point about the pliability of arguments can be illustrated with interview data from earlier research from a legal practitioner respondent who was asked about arguments that had been made by various barristers acting on behalf of the (then) UK Borders Agency and the Home Secretary,[62] in cases before both the national and European courts:

> What lies behind [these arguments] is what lies behind any argument led by an advocate on behalf of a client. The argument is designed to promote the policy interests

[58] The UK implementation of EU free movement rules explicitly extends all the same rights and legal frameworks to citizens of the EEA as well as the EU (ie Norway, Iceland and Liechtenstein), as well as Swiss citizens. The 'shorthand' to cover all these categories is the reference 'EEA'.

[59] Immigration (European Economic Area) Regulations 2006, SI 2006/1003. An unofficial but extremely useful copy of the consolidated Regulations is available here: http://www.eearegulations.co.uk/Latest/Index [last accessed 28 August 2015]. However, this should not be relied upon as a legal document.

[60] M Galanter, 'In the Winter of Our Discontent: Law, Anti-Law, and Social Science' (2006) 2 *Annual Review of Law and Social Science* 1, p 1.

[61] N Nic Shuibhne and J Shaw, see note 57 above, p 149.

[62] The UKBA was replaced in 2013 by UK Visas and Immigration (UKVI), and the work was taken back 'in house' within the Home Office.

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> of the client in a way which has some prospect of success for them. What is perhaps interesting from your point of view is that often Counsel's opinion may well be, you are more likely than not to succeed in this argument in the domestic courts and when there's a reference you are very likely to lose this argument. The government is often quite content to litigate a case on that basis. If you like, 'get away with it as long as they can' would be one way of putting it, or 'continuing to assert their different view of the effect of freedom of movement rights in Europe for as long as they can'. [Q35][63]

Political scientists Michael Blauberger and Susanne Schmidt have discussed the impact of uncertainty in relation to the heavily contested topic of access to welfare benefits on the part of EU citizens who are without work, or are seeking work, or are in low paid work, in the host state. They have argued that:

> the interaction of EU legislation and Court re-interpretation … results in significant legal uncertainty. … Legal uncertainty poses a challenge for member states' administrations in terms of workload and rule-of-law procedures. Domestic legislative reforms shift this uncertainty to EU citizens by raising the burden of proof required for these citizens to successfully claim social benefits.[64]

In what follows, I develop three brief examples that highlight how wiggle room and uncertainty are exploited over time within the domain of EU free movement law and how the costs of compliance are shifted effectively onto claimants.

The first example uses uncertainty generated by judgments of the CJEU concerned with the scope of EU citizenship itself, as opposed to the free movement rules. In the case of *Ruiz Zambrano*,[65] the Court of Justice held that Member States are required to have regard to the interests of EU citizen children, even those who have not previously exercised their free movement rights, in order to ensure that they are not deprived of 'the substance of their EU citizenship rights', eg as a result of having to leave the territory of the Union. Thus in a case involving a Colombian citizen resident in Belgium, with two Belgian citizen children, the state was obliged to give a residence (and a work) permit to the third country national parent, in order to ensure that the children would receive the care and support that they needed as dependents. For the children could not reside independently of the parents, and would have been forced to leave had the parents been deported. Many Member States were initially hesitant to implement quickly what seemed to be quite a dramatic intervention by the Court of Justice in the sphere of national immigration law, constraining their capacity to deport a person on the grounds of the EU citizenship rights of his or her children, who were resident in the same EU Member State as that of which they had citizenship. In fact, subsequent case law[66] has demonstrated that the ruling may be

[63] Quotations from interview data collected for the Nuffield Project on Friction and Overlap are identified by the same numerical identifiers used in the original research report, see J Shaw et al, note 50 above.

[64] M Blauberger and S Schmidt, see note 17 above, p 2.

[65] *Ruiz Zambrano* ECLI:EU:C:2011:124.

[66] *Dereci and Others*, C-256/11, ECLI:EU:C:2011:734*, O and S*, C-356/11 and C-357/11, ECLI:EU:C:2012:776.

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restricted for the most part to its specific facts and may have less resonance than might initially have been thought. The CJEU emphasised the exceptional nature of what amounted to an intervention in national immigration law, and focused on a threshold of *forced* departure from the *territory of the Union*, before it could be said that the genuine enjoyment of the substance of the rights of EU citizenship could be said to be at risk. Evidence from national courts seems to indicate a nuanced approach to the challenges posed by *Ruiz Zambrano* highlighting considerable 'wiggle room' for national authorities and challenges for claimants wanting to show that their situation falls within the scope of *Ruiz Zambrano*.[67] For example, a series of cases in the Netherlands highlighting a strict approach to the question of whether there is no other 'real' possibility for the child to stay within the territory of the Union other than the granting of a residence permit to a third country national carer[68] has culminated in another reference to the CJEU to ascertain the remit of the *Ruiz Zambrano* case law.[69] Likewise, in the UK, a further reference has been made covering in particular the issue of the coincidence of a *Ruiz Zambrano* type case with family breakdown and divorce, involving a third country national and an EU citizen from another Member State.[70]

As is implicit from these developments, it has been possible for the UK to limit the '*Ruiz Zambrano* carer' rights under the amended EEA Regulations to circumstances where both parents would be obliged to leave the territory of the Union, thus effectively preventing the children from residing there.[71] In other words, *Ruiz Zambrano* cannot be the basis for circumventing restrictive national family reunion requirements, where one parent is a citizen and the other parent is a third country national, and the children are citizens of the state of residence. There has to be a threat to the residence of the child on the territory. Furthermore, the UK has restricted housing assistance and welfare entitlements for the *Ruiz Zambrano* carers, so that such families (if not in employment) would be restricted only to residual protection under s17 of the Children's Act, which constitutes minimal assistance afforded by local authorities.[72] The lawfulness of this restriction under EU law, as well as the precise operation of the status of *Ruiz Zambrano* carer, including the key question of when the status arises, has been under review before the UK courts, with a reference to the Court of Justice to be anticipated in due course.[73] Meanwhile, of course,

[67] See N Nic Shuibhne and J Shaw, see note 57 above, pp 141–150.

[68] Noted in J Langer and A Schrauwen, 'The Netherlands', in U Neergaard et al, see note 15 above, pp 705–706.

[69] *Chavez-Vilchez*, C-133/15, pending.

[70] *NA (Pakistan)*, C-115/15, pending.

[71] Immigration (EEA) (Amendment) (No 2) Regulations 2012, SI 2012/2560; see T Horsley and S Reynolds, see note 15 above, pp 866–867.

[72] The Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012, SI 2012/2588; The Social Security (Habitual Residence) (Amendment) Regulations 2012, SI 2012/2587.

[73] *Sanneh v SSWP and others* [2015] EWCA Civ 49. See T Horsley and S Reynolds, note 15 above, pp 870–871 for discussion of the same case at an earlier stage of the proceedings. For discussion of the Court of Appeal case see D Rutledge, 'New Zambrano case: Good news and bad news for Zambrano

claimants continue to carry the burden of proving that they are *Ruiz Zambrano* carers in the face of a sceptical executive, and of sourcing sufficient assistance from the state (if unable for whatever reason to find employment) to provide for their children.

We turn now to a second example of uncertainty arising in part from the language of the Citizens' Rights Directive. Uncertainties are inevitable given the extent to which open-textured language, designed to ensure some degree of responsiveness to the different implementation contexts of 28 Member States, is employed within the EU measures and also because immigration as a legal field almost invariably contains provisions of great complexity, given the need to provide a code for decision-makers. For example, EU citizens who do not have a permanent right to reside must not become an 'unreasonable burden' (Article 14) upon social assistance system of the host state. If they do, they could be removed – although in practice there has, hitherto, been relatively little evidence of Member States actually removing such EU citizens in large numbers.[74] But what is 'unreasonable'? And what are – in the words of the Court of Justice – the 'genuine and effective chances of being engaged' (in employment),[75] which prescribe the right of a person seeking employment to remain in the host state (although not necessarily to receive any out of work benefits). And what type of process of review must Member States undertake to ascertain whether individuals still qualify under the free movement rules?

The UK has been quite active in this area, challenging the extent to which the non-discrimination principle protects EU citizens resident in a host state, placing substantial burdens on individuals who are sometimes quite vulnerable and often have little opportunity to seek recourse to law. It has done so against the backdrop of an evolving case law of the Court of Justice on the scope of Member State obligations which has suggested that the Court is quite sensitive to the concerns of the Member States over so-called 'benefit tourism'.[76] There has been a series of

(F'note continued)

carers' *Free Movement*, 10 February 2015: https://www.freemovement.org.uk/new-zambrano-case-good-news-and-bad-news-for-zambrano-carers/ [last accessed 28 August 2015].

[74] Perhaps the most high profile example has come from Belgium: see J-M Lafleur and M Stanek, note 18 above. For further details on the follow up from the European institutions see http://europa.eu/rapid/press-release_MEMO-13-122_en.htm (original infringement action) and http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-000356&language=EN (written Reply by Reding to a parliamentary question).

[75] *Antonissen*, C-292/89, ECLI:EU:C:1991:80.

[76] The November 2014 ruling in *Dano v Jobcenter Leipzig*, C-333/13, ECLI:EU:C:2014:2358 confirmed that Member States need not pay a non-contributory social security benefit which guarantees a level of subsistence to an EU citizen from another Member State who had not entered the country to look for work, and indeed who had never worked. It is important to compare this case with the Court's insistence on the right to equal treatment of a person who had been working, who was forced out of the labour market by constraints arising from the late stages of pregnancy and the effects of childbirth; that person remains a 'worker': *Saint Prix v Secretary of State for Work and Pensions*, C-507/12, ECLI:EU:C:2014:2007. For commentary see H Verschueren, 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in *Dano?*' (2015) 52 *Common Market Law Review* 363 and D Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens', (2015) 52 *Common Market Law Review* 17. For a comment on a separate concern that the Court of Justice has gone against its own constitutional

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announcements by UK ministers intended to reduce the benefit entitlements of mobile EU citizens, ostensibly in order to reduce the 'pull factor' (indeed 'magnetic pull'[77]) apparently exerted by the UK benefits system.[78] Since the end of 2013, changes have been made to the length of time that mobile job-seeking EU citizens must wait before being able to claim jobseekers' allowance as a result of amendments to the habitual residence test that they must pass, and they have seen restrictions to their entitlement to housing benefit and to the period of time during which they may claim jobseekers' allowance, capped initially at six months and then subsequently reduced to three months from November 2014 unless they can show that they have genuine chances of gaining work.[79] In addition, the Government has introduced a minimum income threshold for EU citizens working in the UK, before they are defined as a 'worker' in accordance with EU law and before they are able to access other 'in work' benefits in the UK.[80] Some or all of these steps taken by the UK Government may fall foul of EU law, and the European Commission may take enforcement steps, but as the example of an on-going enforcement action in relation to the right to reside test shows,[81] what may be most important to the UK Government at present may be that it has appeared to be 'tough' in the face of assumed benefit tourists and also in the face of possible intimidation by 'Brussels' (ie the European Commission). And from our perspective, what is interesting is how much it has been able to do by exploiting wiggle room within the existing EU regulations including the Citizens' Rights Directive, the EU Regulation on Social Security Coordination,[82] and other provisions of EU law guaranteeing the right to equal treatment for mobile EU

(F'note continued)

principles as regards the relationship between primary and secondary law in *Dano*, see N Nic Shuibhne, 'State-less' (2014) *European Law Review* 751.

[77] D Cameron, 'We're building an immigration system that puts Britain first' *Daily Telegraph*, 28 July 2014: http://www.telegraph.co.uk/news/uknews/immigration/10995875/David-Cameron-Were-building-an-immigration-system-that-puts-Britain-first.html [last accessed 28 August 2015].

[78] 'EU migrants and benefits: Frequently (and some less frequently) asked questions' *House of Commons Library Blog*, 2 December 2014, review of the situation by Second Reading: http://commonslibraryblog.com/2014/12/02/eu-migrants-and-benefits-frequently-and-some-less-frequently-asked-questions/ [last accessed 28 August 2015].

[79] For details of these changes, see note 9 above; M Evans, 'Will Cameron's immigration benefit crackdown clash with EU law?' *The Justice Gap*, July 2014: http://thejusticegap.com/2014/07/will-camerons-immigration-benefit-crackdown-clash-eu-law/ [last accessed 28 August 2015]; and E Sibley and R Collins, 'Benefits For EEA Migrants' (2014) 22 *Policy & Practice* 165. For a summary of the issue from an EU law perspective, see 'Freedom of movement and residence of EU citizens: Access to social benefits' *European Parliamentary Research Service*, June 2014: http://epthinktank.eu/2014/06/16/freedom-of-movement-and-residence-of-eu-citizens-access-to-social-benefits/ [last accessed 28 August 2015].

[80] Department of Work and Pensions, 'Minimum earnings threshold for EEA migrants introduced' 21 February 2014: https://www.gov.uk/government/news/minimum-earnings-threshold-for-eea-migrants-introduced [last accessed 28 August 2015].

[81] *Commission v United Kingdom* C-308/14, pending.

[82] Council and European Parliament Regulation (EC) 883/2004 [2004] OJ L 166/1.

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citizens. Sometimes 'wiggling' may spill over into non-compliance, but there is a grey area between the two that states can exploit.

The case of 'abuse' demonstrates this point very well. Along with the issue of welfare benefits, abuse was one of the topics that dominated the Balance of Competences Review report on the free movement of persons.[83] The Report provides detailed evidence of the UK Government's oft-articulated concerns about abuse and fraud involving non-EU citizens alleged to be taking advantage of EU law in various ways in order to circumvent UK immigration law. There is an EU law basis for this concern, in a broader doctrine of abuse of rights,[84] and specifically in the Citizens' Rights Directive.

Article 35 of the Citizens' Rights Directive dealing with abuse provides an example of a provision opening up substantial and quite legitimate space for competing interpretations. It is worth quoting in full:

> Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

Each and every term in this provision can be the subject of conjecture. The UK Upper Tribunal case of *Papajorgji*[85] closed off some of the 'wiggle room' being exploited by the UKBA, by insisting that Entry Clearance Officers (ECOs) examining whether to give a EEA family permit (ie a visa) to a third country national spouse to visit the UK with her EU citizen husband could not effectively put the burden of proof on the applicant to demonstrate that her marriage was *not* a marriage of convenience, or a 'sham' marriage. The UKUT re-emphasised its point – and its self-positioning within the orthodoxy of EU law as understood by the European institutions as opposed to the UKBA – by reprinting the guidance on sham marriages issued by that body as an annex to the judgment, in order to assist ECOs in their determinations.[86]

But scope for the UK immigration authorities insisting on the importance of the marriage scrutiny process was subsequently reopened by a report from the UK's Independent Chief Inspector (ICI) of Borders and Immigration (the first such report by the ICI focusing directly on the 'European' casework of the Home Office) warning of a significant problem of abuse of the EU rules and their UK implementing measures as a result of sham marriages and marriages by proxy.[87] In other words, the

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[83] Balance of Competences Review, see note above, pp 46–47.

[84] This is a principle common to many civil law systems, and it has found a basis in EU law. See generally R de la Feria and S Vogenauer (eds), *The Prohibition of Abuse of Law – A New General Principle of EU Law?* (Hart Publishing, 2011).

[85] [2012] UKUT 00038 (IAC).

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

[87] See J Vine *The Rights of European Citizens and their Spouses to Come to the UK: Inspecting the Application Process and the Tackling of Abuse* (UK Government, June 2014): http://icinspector.independent.gov.uk/wp-content/uploads/2014/06/European-Casework-Report-Final.pdf [last accessed 28 August 2015].

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fear is being raised that EU law and its benefits in relation to family reunion are being used to evade strict UK immigration controls (income requirements in particular) on marriage migration and family reunion. The ICI has reported – and indeed this point has also been picked up by the Home Affairs Committee of the House of Commons[88] – that the problem seems to occur where *naturalised* EEA citizens marry third country nationals (often from the same national or ethnic group), although this conclusion seems to be an inference that is drawn from the ICI's inspection of a sham marriage operation,[89] rather than a finding based on a proper body of evidence.

These reports and the other materials will continue to be used by the Home Office and by what is now UK Visas and Immigration (UKVI) as justification for a redoubling of their scrutiny and control efforts internally and externally. As vindication of the current approach, the UK authorities will seize upon the ICI's finding that over 89% of refusals of a family permit based on a belief on the part of the Entry Clearance Officer that there was a marriage of convenience were found to be reasonable on a review of the evidence during the inspection. That approach includes the introduction of additional measures in 2014 penalising those who sponsor or enter into sham marriages.[90] Such arguments can thus continue to be used in order to justify the high rate of refusals of requests for EEA family permits on the part of third country nationals married to EU citizens exercising, or wishing to exercise, their free movement rights in the UK, and the precautionary approach, arguably in violation of EU law, under which the UK authorities continue to require the submission of documents which seem to go beyond what is permitted in EU law.[91]

The third and final example of the exploitation of 'wiggle room' relates to the so-called '*Surinder Singh* route' within the free movement rules, which concerns the extension of the protective scope of 'free movement' to cover EU citizens not only

(F'note continued)

The office of the ICI was instituted in 2008 'to assess the efficiency and effectiveness of the UK's border and immigration functions' (http://icinspector.independent.gov.uk/about/). It is interesting to note that the first inspection report on EU citizens' rights was not issued until 2014.

[88] See House of Commons Home Affairs Committee, *The work of the Immigration Directorates* (October–December 2013), Third Report of Sessions 2014-2014, HC 237, July 2014.

[89] J Vine, *A short notice inspection of a sham marriage enforcement operation* (UK Government, October 2013): http://icinspector.independent.gov.uk/wp-content/uploads/2014/01/An-Inspection-of-a-Sham-Marriage-Enforcement-Operation-Web-PDF.pdf [last accessed 28 August 2015].

[90] Home Office Response: http://icinspector.independent.gov.uk/wp-content/uploads/2014/06/Home-Office-Formal-Response-to-ICI-Inspection-of-European-Casework-FINAL.pdf [last accessed 28 August 2015]. See the amendments to Regulation 19 and the new Regulations 20B and 21B of the EEA Regulations, reprinted in *The Rights of European Citizens and their Spouses to Come to the UK*, see note 87 above, pp 64–65.

[91] The materials provided at http://eumovement.wordpress.com/2014/08/07/is-uk-handling-of-eea-family-permit-visas-still-a-problem/ provide an admittedly partial view of the matter, but the same issue was reported on the Single Market Scorecard in more abbreviated form (http://ec.europa.eu/internal_market/scoreboard/feedback/concerns/index_en.htm#maincontentSec29) [last accessed 28 August 2015].

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when they leave their home state to live and work in another Member State, but also when they return to their home state. Because of the restrictiveness of national immigration law in relation to family reunion, in particular the rather high income or savings levels which are required for a family comprising a *UK citizen* and a *third country national partner or spouse* to enjoy residence together in the UK,[92] many claimants and their advisers have looked to EU law as a possible avenue for achieving reunion by bringing the UK citizen under the protective umbrella of EU law. The case of *Surinder Singh*[93] seemed to provide the answer, as it concerned the possibility for an EU citizen who had exercised his or her right to free movement to rely, when returning to the state of which he or she is a citizen, on the provisions of EU law as regards family reunion in order to enable the third country national to obtain the right of residence when returning to the UK with the returning UK citizen. This approach to navigating the restrictions of national immigration law on family reunion has also been quite common in Denmark and the Netherlands which also have restrictions on family reunion between citizens and third country national spouses.

Building on the basics set out in *Surinder Singh*, the Court of Justice has further clarified the conditions under which this right under EU law may be exercised in the case of *O & B*,[94] decided in 2014. In her Opinion,[95] Advocate General Sharpston suggested that the appropriate test regarding the movement of the EU citizen to another state would be whether the host state had become where the 'habitual centre of his interests lies' (before the return to the home state). However, this test did not meet with the approval of the Court of Justice in its judgment, which offered a clearer set of criteria. It referred to a requirement of 'genuine residence' in the host state, which it interpreted as a minimum period of three months (ie beyond the initial period of three months to which no conditions apply (Article 7(1) of the Citizens' Rights Directive), but that weekend visits and holiday visits did not contribute to this 'genuine residence'. It also stated the requirement that family life should have been created or strengthened during the time spent in the host state. In other words, it focused on the relationship, rather than the behaviour of the EU citizen, and it did not require some form of 'integration test', which is what the 'centre of life' test could be interpreted as being. The Court also made clear that the scope of Union law does not extend to cover abuses, where – despite formal observance of the requirements of free movement – the purpose of the rules is not attained, and there is, second, 'a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it.'[96]

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[92] For the detailed rules on financial requirements as of April 2015, see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420154/Appendix_FM_Annex_1_7_Financial_Requirement.pdf [last accessed 28 August 2015].

[93] *Singh*, C-370/90, ECLI:EU:C:1992:296.

[94] *O and B v Minister voor Immigratie, Integratie en Asiel*, C-456/12, ECLI:EU:C:2014:135.

[95] Delivered jointly in *S and G* v. *Minister voor Immigratie en Asiel*, C-456/12 and C-457/12, ECLI:EU:C:2013:837.

[96] *O and B*, ECLI:EU:C:2014:135, para 58.

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Over the years, the UK has rarely been swift in its implementation of Court of Justice case law requiring legal changes at the national level. This is illustrated by its conduct after the *Metock* case which made it clear that the UK could not maintain a previous requirement on the third country national family members of EEA citizens moving to the UK that they must have been previously resident in another Member State with the EEA family member.[97] This reluctance to implement has been described as 'heel dragging' by a practitioner respondent:

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

In stark contrast, the UK was very hasty in its implementation of new rules and guidance on the '*Surinder Singh* route'. Regulation 9 of the 2006 EEA Regulations was amended with effect from 1 January 2014.[98] The amendments were laid before Parliament on 5 December 2013 even before the Advocate General's Opinion (12 December 2013) and came into force before the judgment of the Court of Justice (12 March 2014). Presaging the terms of the AG's Opinion, the new Regulations implement a 'centre of life' test, which also takes into account where the principal residence of the EEA citizen is. In a letter responding to a complaint from a UK citizen, the European Commission swiftly indicated that it did not see the UK's approach as being in compliance with the CJEU case law, which means that it may eventually bring an enforcement action against the UK if it refuses to change its rules.[99] It is more likely that these will be tested in the UK and European courts in cases brought by aggrieved UK citizens and their partners long before any enforcement action reaches the Court of Justice, although once again the burden of compliance falls effectively on the applicants, not the UK.

B. *Reading across: how immigration law seeps into free movement law and brings external resources into play*

A major theme of earlier work on the relationship between EU free movement law and national immigration law[100] concerned the impact of the 'mindset' of immigration law and those responsible for its application. Immigration law offers a framework of narrowly drafted rules, systems of permissions and substantial scope

[97] *Metock*, C-127/08, ECLI:EU:C:2008:449.

[98] The Immigration (European Economic Area) (Amendment) (No 2) Regulations 2013, SI 2013/3032.

[99] Available at http://www.freemovement.org.uk/wp-content/uploads/2014/08/EU-Commission-letter-anon.pdf [last accessed 28 August 2015].

[100] See note 50 above.

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for executive discretion premised upon the centrality of national sovereignty in this field. This mindset has 'seeped' into the field of free movement law, which offers a framework of general rules, principles and rights with only very limited scope for executive discretion within a structure of shared or pooled sovereignty with other Member States, premised on a notion of economic integration and – since 1993 – a notion of 'European' citizenship. Evidence of how the 'immigration' approach, especially to the control of borders, influences decision-making on free movement can already be seen in the earlier discussion of the approach to EEA family permits and so-called sham marriages in the previous section. Indeed, there is a close relationship between the two strategies of 'exploiting uncertainties' and 'reading across', although in some cases the reading across of immigration law quite simply involves poor decision-making by national authorities which takes into account inappropriate elements which have no place in EU law.

Of course, this is not to claim that there is no overlap between immigration law and free movement law. There are some fields where Member States are explicitly permitted to apply their underlying immigration law in areas which touch upon free movement rights. One such example is Article 3(2) of the Citizens' Rights Directive in relation to the admission of extended family members of the EU citizen to the host Member State. And nothing prevents Member States from using the same administrative and judicial machinery to manage both 'immigration' and 'free movement', as the UK, in common with many Member States, in large measures chooses to do.[101] Only once the recently adopted Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers[102] comes into force in 2016 will the UK and other Member States be required to have *specific* institutions tasked with the role of providing assistance to Union workers and members of their families. However, earlier research has shown that the impact of immigration law on free movement law goes beyond the sharing of institutions, or instances where it is specifically permitted.

In earlier research, we found in interviews that legal practitioners often felt that tests or standards developed within the framework of immigration law – eg in relation to a person's poor 'immigration history' or in relation to their credibility as a witness – were readily carried across into the decision-making and adjudication processes in relation to free movement, in places where they did not belong:

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

[101] This is discussed in more detail in J Shaw and N Miller, see note 50 above.

[102] [2014] OJ L128/8.

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> before detaining the Indian guy because obviously he might be in a durable relationship but their first reaction is "let's detain him and if he's in a durable relationship then presumably he can make an application". [Q20]

Some interview respondents also suggested that this was a problem in judicial decision-making, particularly at the first tier tribunal level:

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

The weight that arguments about the vulnerability of the UK as a destination for irregular immigration can often carry in political and legal discourse within the UK becomes obvious from a review of the 2014 *McCarthy* case in the Court of Justice, along with the precursor ruling in the English High Court when the case was referred to the Court of Justice. This case – at both the national and the EU levels – saw the UK government continuing to advance the legal argument that it could refuse to recognise residence cards issued by (most) other Member States,[103] despite what many believed to be the clear provisions of the Citizens' Rights Directive, and indeed the compliance of almost all Member States with the interpretation of the relevant provisions given by the European Commission.[104]

The UK refused to accept that Article 5(2) of the Citizens' Rights Directive requires, in the case of third-country national family members of EU citizens travelling to the UK, that those who held a residence card of another Member State must be exempted from any visa requirement, and that this provision and only this provision, as implemented in national law, would govern the situation of such family members. This meant that it continued to require the Colombian spouse of a UK/Irish dual citizen resident in Spain to obtain a so-called 'EEA family permit' every time she wanted to travel to the UK with her husband. Such EEA family permits, which are the UK's variant on a visa for third country national family members of EEA citizens, have a six month duration, and obtaining them meant, for this third country national, travelling from the family home in Marbella to the UK Embassy in Madrid for a personal interview. Each time she applied, Ms McCarthy Rodriguez also had to fill in an extensive form providing *ab initio* information about her family relationship and about her finances. Furthermore, the Home Secretary had issued guidance to airlines indicating that failure to ensure that an EEA family member boarding a flight to the UK had a valid EEA family permit would attract carrier sanctions as per immigration legislation. The McCarthy family sought to challenge these arrangements, but brought the case not in the Tribunal but as a judicial review action, which meant that it started in the High Court in London. They requested that the national

[103] *McCarthy v SSHD*, C-202/13, ECLI:EU:C:2014:2450.

[104] See 'Free movement: Commission asks the UK to uphold EU citizens' rights': http://europa.eu/rapid/press-release_IP-12-417_en.htm?locale=en [last accessed 28 August 2015].

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court refer the relevant questions of EU law to the Court of Justice, on the grounds that the issues remained unclear and could not be resolved in the national court without clarification of key questions by the Court of Justice.

Understood as an attempt to interpret EU law, the judgment of Mr Justice Haddon Cave makes interesting reading. The judgment starts off with an extended, and almost breathless, consideration of evidence given by the Secretary of State and her officials to demonstrate her fears that 'residence cards' issued by other Member States were entirely unsatisfactory substitutes for UK-issued EEA family permits, because of the risk of fraud. The cards issued by almost all Member States did not meet international standards for personal documents, said the Home Secretary.[105] However, without access to the full text of the detailed submissions made, it would be hard to judge to what extent they were indeed composed of robust evidence, as opposed to being mainly assertions based on a relatively thin evidence base.[106] Moreover, no evidence on the same questions seems to have been presented to the national court by the applicants, since they concentrated, perhaps unsurprisingly, upon the individual effects of the UK's approach, as opposed to the alleged systemic problem. Against that backdrop, the judge professed himself to be persuaded that the UK was currently at significant risk because those fraudsters already exploiting the route of sham marriage to evade immigration restrictions could shift their business into the field of residence card fraud. Accordingly, he concluded:

> There is a palpable risk that a significant proportion of those currently engaged in the business of sham marriages *etc.* would switch to the business of fake EU *"residence cards"* in order to gain illegal access to the UK if such a route was open to them. For these reasons, in my judgment, the current stance of the UK Government, in refusing to allow EU *"residence cards"* to be used as a waiver to the 'visa entry' requirement, is clearly sensible, necessary and objectively justified on the facts.[107]

The judge then went on to consider the parties' submissions on the law, and it is perhaps unsurprising that he found on every point in favour of the Home Secretary, given his positive engagement with the evidence that had been led on her behalf

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[105] Exceptions were the documents issued by Germany and Estonia, and these are accepted by ECOs in lieu of an EEA family permit: The Immigration (European Economic Area) (Amendment) (No 2) Regulations 2013, SI 2013/3032.

[106] Additional evidence about the concerns of the UK government in relation to abuses of free movement rights can be discerned from the Balance of Competences Review Report on free movement (see note 33 above) and from evidence submitted to the European Commission following a request from that body that allegations of a problem of fraud and abuse should be backed up by evidence (*Evidence of Fraud and Abuse of Free Movement in the UK* (European Scrutiny Committee, 2014) and *Free Movement Rights – Initial Information for the European Commission (UK)*(Home Office, 2014): http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xxviii/8306.htm [last accessed 1 September 2015]), which also commented – like the Commission – that the UK's evidence tended to be qualitative, rather than quantitative in nature: 'HO (35590) The Free Movement of EU Citizens' (2014) 31st Report *European Scrutiny Committee*, para 2.13: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xxviii/8305.htm [last accessed 28 August 2015].

[107] *McCarthy v SSHD* [2012] EWHC 3368 (Admin), para 60.

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about the scope of the threat from fraud. The issue was whether the UK could find some justification for continuing to refuse to recognise residence cards issued by other Member States and to insist that family members of EEA nationals obtain EEA family permits. He concluded that Article 35 of the Citizens' Rights Directive could be used not only to justify action against an individual thought to be abusing his or her rights under EU law, but also to justify a generalised policy of refusing to accept certain documents because of a systemic risk of abuse – but he did so without considering any of the EU law materials concerned with abuse of rights which focus on individual not systemic risk.[108] Given his findings on the evidence, he was clearly prepared to accept that there was such a systemic risk. Until the position changed at the EU level (ie to force the Member States to issue fraud-proof residence cards), the judge found that it was 'reasonable, proportionate and necessary for the UK Government to require all non-EEA family members to obtain prior entry clearance'.[109] He furthermore found that Protocol 20 permitting the UK to maintain its border controls was a broad and permissive document which 'effectively sweeps EU law aside as an obstacle to the exercise of the [the UK's] discretion' in relation to controls to be applied at frontiers.[110] But despite having made those findings, Haddon Cave J decided that his conclusions did not satisfy the 'acte clair' test of 'no real doubt' that he set himself with regard to the interpretation of EU law necessary for the purposes of reaching a final judgment. Accordingly, he went ahead and submitted a reference for a preliminary ruling to the Court of Justice on whether the UK's position was lawful having regard to Article 35 of the Citizens' Rights Directive and Protocol 20. In view of the learned judge's somewhat scattergun approach to EU law, this conclusion came as something of a relief.

As befitted its significance and novelty, the case was heard by the Court's Grand Chamber. To put it another way, while informed EU law opinion was doubtful about both the case put forward by the UK Government and by the ruling of Mr Justice Haddon Cave, nonetheless there was no authoritative ruling of the Court of Justice on which to draw and these are certainly important and sensitive matters, and one was now needed. Both the Court and – before it – the Advocate General reached opposite conclusions on EU law to those put forward by Haddon Cave J. The Court concluded as preliminary point that the Citizens' Rights Directive was applicable, even though *McCarthy* concerned an EU citizen entering a Member State of which he was a citizen with his third country national family spouse, but from a state (Spain) where he had exercised his right of free movement. That meant that both Mr McCarthy and Ms McCarthy Rodriguez were 'beneficiaries' under the Directive, and hence able to benefit from Article 5, which exempts third country nationals who have a residence card from the need to hold a visa.

As to possible restrictions on entry, the Court pointed out that these were only possible under Article 27 (public policy, public security and public health grounds) or under Article 35 (abuse of rights). In both cases, the Court emphasised that the

[108] Eg see *Emsland-Stärke,* C-110/99, EU:C:2000:695, paras 52–53.

[109] *McCarthy*, see note 107 above, para 107.

[110] Ibid, para 76.

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refusal to allow the third country national to enter the territory of the Member State must be based on an individual assessment of risk, or fraud, and must not be part of a systematic policy, even if justified by an alleged systemic risk. The Court emphasised how the Directive confers rights on an individual basis, with redress against a denial of those rights possible under the provisions of the Directive in accordance with procedural safeguards. Thus without an individual examination of the case, a Member State could not deny the right to enter its territory of the third country national family member of an EU citizen, holding the residence card of a Member State. In the absence of a specific provision in the Directive making provision for such a systematic denial of rights, a Member State could not simply rely on what it regarded as a pattern of abuse, without enquiring into individual cases.

The Court reached a parallel conclusion in relation to the powers left to the UK under Protocol 20, so far as concerned the control of the UK frontiers. The provisions in question merely allow the UK to take such measures as are necessary to ensure that persons entering the UK have a right to do so under EU law (just as the Schengen states similarly have such a right if border controls are temporarily reinstated for any reason, as happens quite regularly). This means checking whether persons in the situation of Ms McCarthy Rodriguez are in possession of the documents mentioned by Article 5 of the Directive (ie passport and either visa (if required) or residence card). The UK can check the authenticity of individual documents. It cannot refuse to recognise an entire class of documents. The Court did not refer to the reasoning of the national judge, but one can only imagine what it thought of his argument that Protocol 20 simply 'sweeps away' EU law replacing it with a national right to control the frontiers.

The judgment was not welcomed by the UK government, which professed itself to be 'disappointed'.[111] Newspaper coverage of the judgment was predictably unclear, much of it confusing the issue of entry and the question of residence.[112] The ruling provided an opportunity for UKIP to attack the Government on the grounds of the laxness of EU law relating to residence permits.[113] A first reaction by UKVI[114]

[111] 'UK visa rules for some non-EU citizens illegal – European Court', *Irish Times*, 18 December 2014: http://www.irishtimes.com/news/crime-and-law/uk-visa-rules-for-some-non-eu-citizens-illegal-european-court-1.2042952 [last accessed 1 September 2015].

[112] 'UK cannot block non-EU family', *Daily Mail*, 18 December 2014: http://www.dailymail.co.uk/wires/pa/article-2878725/Judges-rule-non-EU-movement.html; ''Millions' more given the right to move to the UK after court rules EU workers free to bring their families… wherever they are from', *Daily Mail*, 18 December 2014: http://www.dailymail.co.uk/news/article-2878913/Millions-given-right-UK-court-rules-EU-workers-free-bring-families-from.html; 'European Court ruling threat to Britain's borders', *Daily Telegraph*, 18 December 2014, http://www.telegraph.co.uk/news/uknews/immigration/11300829/European-court-ruling-threat-to-Britains-borders.html [last accessed 28 August 2015].

[113] 'Top EU Court rules against Britain in visa dispute', *Deutsche Welle*, 18 December 2014: http://www.dw.de/top-eu-court-rules-against-britain-in-visa-dispute/a-18139527 [last accessed 28 August 2015].

[114] Response by UKVI, 20 January 2015: https://www.scribd.com/doc/253276166/UKVI-response-to-McCarthy. See also 'McCarthy Ruling', 19 December 2014, http://britcits.blogspot.co.uk/2014/12/mccarthy-ruling.html [last accessed 28 August 2015].

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indicated that the government wished to wait for the national court ruling in the case before implementing the ruling in full, and that it would be inclined to take a narrow perspective on the ruling, limiting it to its facts where an EU citizen resides in a country of which he or she is not a national, where the third country national has been issued with a residence card in that state, and where the third country national is travelling with, or to join, the EU citizen in the UK. In fact, the UK did quite rapidly, and in a low key manner, implement the judgment through a further round of amendments to the 2006 Regulations, extending the previous exemption given to holders of German and Estonian residence cards to holders of residence cards issued by any EU Member States.[115] However, it did so in the most restrictive way possible by limiting the recognition of residence cards only to those issued by Member States under EU law. Thus third country nationals residing with their family members in the Member State of which the EU citizen is a national, and holding residence documentation issued under national law, will continue to need EEA Family Permits if they visit the UK with the EU citizen family member. We remain a long way away from the mutual recognition of national immigration documentation which might ease the burden for third country nationals moving within the EU – except in cases where the EU's Long term Residence Directive (from which the UK and Ireland are opted out) applies.[116]

The 'read across' from immigration law is also visible in the impact of the increasing bureaucratic procedures that the UK imposes on those seeking to rely on their EU treaty rights. In January 2015, the Home Office introduced a 129 page form (subsequently extended to 137 pages, and then reduced in July 2015 to 91 pages plus guidance notes),[117] replacing a previous 35 page form, for family members of EEA citizens wishing to apply for residence cards (third country nationals) or registration certificates (EEA citizens). Such a form is bound to have a dissuasive effect on some applicants submitting applications for registration certificates or residence cards, and equally will lead to many rejections because of the complexity of the questions leading applicants to make mistakes. Some of these rejections will be challenged, quite probably successfully, because of the disproportionate and intrusive nature of the UK demands, or because the decision-making process was flawed. Even more frequently, refusals lead to repeated applications, with additional costs for applicants. Ironically subsequent government guidance has confirmed that the use of the form is not compulsory.[118] However, it would be a brave immigration lawyer who advised her client not to bother using the form. One immigration commentator and campaigner described the introduction of this form as

[115] The Immigration (European Economic Area) (Amendment) Regulations 2015, SI 2015/694.

[116] Council Directive 2003/109/EC [2003] OJ L16/44.

[117] See the new form EEA(FM) available via https://www.gov.uk/government/publications/apply-for-a-registration-certificate-or-residence-card-for-a-family-member-form-eea-fm [last accessed 28 August 2015].

[118] See 'Processes and Procedures for EEA Documentation Applications' 7 April 2015: https://www.gov.uk/government/publications/processes-and-procedures-for-eea-documentation-applications [last accessed 28 August 2015]. For comment, see 'Home Office confirms that EEA(FM) application form is not mandatory' *Free Movement*, 9 April 2015: https://www.freemovement.org.uk/home-office-confirms-that-eeafm-application-form-is-not-mandatory/ [last accessed 28 August 2015].

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amounting to the transference of the 'hostile environment',[119] which was promised as a means of keeping immigrants on the 'straight and narrow', into the sphere of EU free movement as well.[120] In that sense, the legal dissonance of EU free movement law and UK immigration law which strikes the legal scholar on first examination of the relationship between the two fields of law appears to have been entirely washed away by a high degree of political consonance between the two areas, when the perspective and approach of the UK authorities is examined in detail.

C. *Changing the terms of the debate and creating new legal resources: seeking legal change*

The third strategy that governments pursue in order to navigate a course between law and political truth is that of seeking legal change. In this section, we focus on legal change that would require action at the EU level, including some sort of concerted effort on the part of the Member States. Examples of solely domestic change were already highlighted in Section A. Legal change includes legislative reform, treaty reform and also efforts to persuade the Court of Justice to change the tack of its case law.

One example of the latter would be the progressively narrower interpretations that the Court has given to scope of its ruling in the *Ruiz Zambrano* case, noted in Section A above. These may have come in the wake of domestic criticism of this judgment. Such a retrenchment may limit the need for domestic changes as a result of what were initially seen as radical developments of EU citizenship principles by the Court of Justice.[121] It has also been argued that the Court of Justice has, through its judgment in *Dano* allowing Member States to refuse to give benefits to mobile EU citizens who do not have a right of residence under any of the categories provided for in the treaties or legislation, implicitly overruled the earlier judgment in *Brey*[122] concerning the obligations on Member States in limited circumstances to give social assistance benefits to EU citizens.[123] As has often been noted, judges do read newspapers, and are not impervious to arguments either that EU law has become overstretched, or that their rulings have created untoward difficulties at the national level. In fact, changes to the terms of EU law because of a shift in Court of Justice case law is by far the most common example of legal change at the EU level.

Other types of changes would be those that could be brought about as a result of amendments to the EU-level implementing rules such as amendments to the terms of Directive 2004/38 (which would require a qualified majority vote at the level of the

[119] 'Theresa May interview: "We're going to give illegal migrants a really hostile reception"', *Daily Telegraph*, 10 May 2012: http://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html.

[120] D Flynn, 'From Home Office application forms to refugee policy, the 'hostile environment' now affects all migrants', *Migrants' Rights Network*, 7 February 2015: http://www.migrantsrights.org.uk/blog/2015/02/home-office-application-forms-refugee-policy-hostile-environment-now-affects-all-migran [last accessed 28 August 2015].

[121] See note 65 above.

[122] *Brey*, C-140/12, ECLI:EU:C:2013:565.

[123] See note 76 above.

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Council of Ministers and the support of the European Parliament). Some of the changes that have been put on the agenda would, however, require treaty amendments (whether via the full or a simplified treaty amendment process), which in turn would require unanimous consent of the Member States and domestic ratification in accordance with national constitutional provisions, and thus much more complex and potentially expensive legal processes at both the EU and national levels, as well as the political costs that are associated with such change. Understandably, legal scholars sometimes disagree about what could be achieved by legislative change and what might require treaty change. It is important to note, of course, that any attempt to exempt the UK alone from the effects of free movement law would definitely require the unanimous assent of all Member States, as it would involve a change to the primary treaty level rules, just as other opt outs have been enshrined in previous treaties and protocols. Moreover, opening up the treaties to some amendments would surely lead to a wider set of demands for changes from Member States that hold objections to other aspects of EU law, and which would place these on the table as bargaining counters against any changes to EU free movement rules favoured by the UK.

The backdrop to debates about legal change in the UK is provided by the Review of the Balance of Competences,[124] which was foreseen in the 2010 Coalition Agreement between the Conservative and Liberal Democrat parties.[125] The Review was launched by the then Foreign Secretary William Hague in July 2012. Organised in a series of waves or 'semesters', evidence was invited, consultations with stakeholders organised, reviews prepared within government, with different departments taking the lead, and reports then published. Most of the reports were published in the same sequence as they were commissioned. The report on the Free Movement of Persons[126] was not published as expected with the second wave of reports, in February 2014, but was held over until the third 'semester', and published finally in July 2014. Rumours abounded about the delays, with the press suggesting that its conclusions were challenged internally by Ministers, especially Home Secretary Theresa May, on the grounds that they were too positive about the benefits of free movement, and did not dwell sufficiently on the purportedly negative aspects.[127]

The rumours were largely confirmed some time after the publication in July 2014, when a Liberal Democrat Coalition Minister (Lord) William Wallace was quoted in *The Observer*:

> On the free movement of labour report Home Office spads [special advisers] tried to remove nearly every reference to credible pro-free movement organisations like the EEF [Engineering Employers Federation] and the CBI, while stuffing the document

[124] See note 33 above.

[125] HM Government, *The Coalition: Our Programme for Government*, 2010, p 19: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf [last accessed 28 August 2015].

[126] See note 33 above.

[127] 'Government delays EU immigration report because it is too positive', *The Independent*, 10 December 2013: http://www.independent.co.uk/news/uk/politics/government-delays-eu-immigration-report-because-it-is-too-positive-8994264.html [last accessed 28 August 2015].

> with quotations from Migration Watch. They worked very hard to obstruct the use of evidence on the balance between inward and outward flows, including offering an estimate for the number of UK citizens living and working in other EU countries that was half a million lower than any otherwise-accepted figure.[128]

In fact, the final report is on the whole a balanced and reasonable examination of the complex field of free movement of persons. As with the other reports, the report does not articulate a wholesale clamour for a transfer of powers back to the UK. Moreover, none of the reports offers evidence as to what a renegotiation of the terms of the UK's membership of the EU might involve. A first assessment of the reports came from House of Lords Select Committee on the European Union, which read the reports as they came out, and wrote back to the Minister for Europe on each occasion with some initial thoughts. In relation to the third tranche of reports, which included the one on the free movement of persons, the Committee commented, *inter alia* in relation to that report, that 'We found those produced for the third semester to be largely balanced and evidence-based. We sensed a greater tendency, though, for the Government position and or particular Government negotiation achievements to be highlighted.'[129]

The members of the Committee were particularly unhappy at the failure of the reports to make sufficient use of their own much praised work, although this was not a criticism directed towards the report on the free movement of persons. However, the Committee was concerned about the evidence base for that report:

> While the range of stakeholders who submitted evidence to the Free Movement of Persons report was impressive, there was significant reference in Chapter 3 to evidence submitted by Demos and Open Europe, evidence which was closely aligned with the position of the UK Government. This is particularly surprising in the light of your [ie the Minister's] explanation to us that one reason for the severe delay in publishing the report was the need to gather a stronger, more up-to-date, evidence base.

The point is echoed by the commentary produced on the Review process and outputs by a team coordinated by the Brussels-based thinktank, the Centre for European Policy Studies. This commentary notes with relief that 'The report on free movement presents a far broader range of facts and analysis on this sensitive topic than is usually in evidence in Britain's debate on Europe.'[130] It notes that the Report goes on to consider some sensible and perhaps conceivable reforms around social

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[128] T Helm, 'Revealed: How Tories covered up pro-EU evidence in key Whitehall report', *The Observer*, 19 April 2015: http://www.theguardian.com/world/2015/apr/18/tories-covered-up-eu-evidence-conservatives [last accessed 28 August 2015].

[129] House of Lords European Union Committee, Letter to the Minister for Europe, 22 October 2014: http://www.parliament.uk/documents/lords-committees/eu-select/BoC/letter-to-minister-for-europe-third-semester.pdf [last accessed 28 August 2015].

[130] M Emerson (ed) *Britain's Future in Europe. Reform, Renegotiation, Repatriation or Secession?* (Rowman and Littlefield, 2015), p 31.

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security issues reflecting the greater diversity of an EU of 28 Member States. However, the commentary on the Review concludes:

> The Review's concluding passages lend conspicuous weight to the views of a single expert [David Goodhart, of Demos], who considers the UK's opening to Central and Eastern Europe in 2004 an historical error, arguing that free movement has dangerously unbalanced Britain's social contract. He argues that EU rules need to be re-cast to allow preference to be given to native workers in certain instances; that transitional arrangements for allowing new EU members access to Britain's labour market need to be based on more flexible criteria such as income disparity and economic convergence; and that governments should be free to impose caps on inward EU migration.[131]

The House of Lords Select Committee also conducted a short inquiry into the Review at the beginning of 2015,[132] culminating in a Report published in March 2015.[133] The Select Committee Report focused on two concerns: while the publication of the reports and the evidence submitted to the Review was to be welcomed, the Government had failed to draw out a synthesis of findings, and thus to make the material more readily available for a wider audience which would be eager to hear more fully reasoned argument about the pros and cons of the UK's EU membership than is generally presented in media and political debates. The second concern returned to the issue of evidence. The Committee quoted with approval Thomas Horsley's evidence to the Committee on this question, namely that 'any impression that these reports might have been doctored by political actors undercuts some of the real value they should have'.[134]

While acknowledging that point, it is important to see the Review of Competences in a broader political context in which, in the case of the free movement of persons, the feasible options for reform and renegotiation have been gradually narrowed down, while a number of stakeholder audiences, including the UK's fellow Member States as well as domestic political actors, have been the recipients of key messages. The range of audiences for proposals for EU level change is certainly greater than in respect of the exploitation of uncertainties or wiggle room, discussed in Section A above, which is primarily aimed at domestic audiences. Many of the initial suggestions floated for reform concentrated on importing 'immigration' approaches into the field of free movement.[135] There were proposals to impose quotas on EU

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[131] Ibid, pp 31–32.

[132] For details see http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/inquiries/parliament-2010/review-of-the-balance-of-competences/ [last accessed 28 August 2015].

[133] House of Lords Select Committee on the European Union, *The Review of the Balance of Competences between the UK and EU*, HL Paper 140, 25 March 2015: http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/news/balance-of-compentences-report-published/ [last accessed 28 August 2015].

[134] Ibid, para 24.

[135] E Guild, 'Cameron's proposals to limit EU citizens' access to UK: Lawful or not, under EU rules?' *CEPS Commentary*, 29 November 2013.

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citizen workers, to require a points-based system in order to eliminate much mobility by low-skilled or semi-skilled workers (or those prepared to be employed in such posts regardless of their skill or qualification level), and to allow for the possibility of an 'emergency brake' should Member States find that their domestic labour markets are being badly disturbed as a result of very high migration flows. All of these options were put forward, mostly informally, by a variety of actors,[136] although not by government ministers themselves – or at least not in public. Reactions to these 'kite-flying' exercises emerged – sometimes publicly, sometimes 'by attribution' – from other Member States and the EU institutions. For example, German Chancellor Angela Merkel was 'reported' as stating that she would prefer the UK to exit the EU than for the free movement of persons – a cornerstone of the EU's single market – to be effectively eliminated by measures such as quotas.[137] Commission President José Manuel Barroso was less circumspect, with his negative reaction to quotas or similar being made in public.[138]

A cautious appraisal of Prime Minister David Cameron's options also came in October 2014 from the thinktank Open Europe,[139] which is known to be sympathetic to the idea of renegotiation, but which has long warned that opting out of free movement altogether must necessarily mean leaving the EU.[140] Indeed, it had previously issued a set of proposed reforms for EU free movement that moved away from the immigration sphere towards the welfare sphere. It argued that these could largely be achieved by means of legislative amendment, not requiring treaty amendment.[141] These proposals (via a new Directive on Citizenship and Integration) focused on prioritising the access to the welfare state by national citizens over EU

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[136] Eg Boris Johnson writing in *The Telegraph* in December 2014, http://www.telegraph.co.uk/news/uknews/immigration/11157890/Boris-Johnson-calls-for-quotas-on-EU-migrants.html [last accessed 28 August 2015].

[137] 'Merkel: UK exit better than restricting free movement' *EU Observer*, 3 November 2014: https://euobserver.com/justice/126351 [last accessed 28 August 2015].

[138] 'David Cameron's plans to limit immigration through quotas for EU workers is illegal, European President says' *Daily Telegraph*, 19 October 2014: http://www.telegraph.co.uk/news/uknews/immigration/11172379/David-Camerons-plans-to-limit-immigration-through-quotas-for-EU-workers-is-illegal-European-President-says.html [last accessed 28 August 2015]. For a more general report see also 'EU skeptical about Cameron's quota for migrants', *Deutsche Welle*, 7 January 2014: http://www.dw.de/eu-skeptical-about-camerons-quota-for-migrants/a-17344631 [last accessed 28 August 2015].

[139] 'What are David Cameron's options on EU immigration?' *Open Europe*, 16 October 2014: http://openeuropeblog.blogspot.co.uk/2014/10/what-are-david-camerons-options-on-eu.html [last accessed 28 August 2015].

[140] See S Booth et al, *Tread Carefully: The Impact and Management of EU Free Movement and Immigration Policy* (Open Europe, 2012): http://archive.openeurope.org.uk/Content/Documents/EUimmigration2012_new.pdf [last accessed 28 August 2015].

[141] D Chalmers and S Booth, *A European Labour Market With National Welfare Systems: A Proposal For A New Citizenship and Integration Directive* (Open Europe, 2014): http://openeurope.org.uk/wp-content/uploads/2014/11/a_European_labour_market_with_national_welfare_systems_a_proposal_for_a_new_citizenship_and_integration_directive.pdf [last accessed 28 August 2015]. This may chime with the findings of M Ruhs (see note 45 above) regarding the political interconnection of inclusive welfare states and unrestricted labour immigration.

citizens, requiring a longer period of work and residence in the host state on the part of the latter (three years) before either out of work or in work benefits would be available. While EU citizen children could access childcare and schooling, health-care costs for the first three years would be borne by the home state, not the host state. In addition, national laws protecting the domestic labour force from the effects of the exploitation of migrant labour would be ring-fenced from most of the effects of EU law, except the principle of non-discrimination. All of this is intended to offset what the paper suggests are the 'contradictions, inconsistencies and perverse incentives created by existing EU law on free movement and citizenship'.[142]

Press reports made clear that Open Europe's suggestions were being taken very seriously by Number 10,[143] in the preparation of a major speech delivered at the end of November 2014 by Prime Minister David Cameron setting out his (ie his party's) negotiating options for free movement.[144] It was obvious that the speech itself drew on Open Europe's work in focusing on the so-called 'pull factors' and incentives for free movement which are not seen as fair towards a country such as the UK, and in the question and answer session with journalists which followed, Cameron cited Open Europe's research and described the evidence as 'pretty compelling'. Cameron effectively made the reform of free movement one of the centrepieces of the proposed renegotiation which would occur in the event of a Conservative Party victory in the May 2015 General Election, declaring changes to the welfare arrangements to be an 'absolute requirement'.[145] In other words, failure to deliver on elements of reform that would convince a sceptical press as well as many eurosceptical members of his own party would push him towards having to advocate the UK's withdrawal from the EU in the promised in/out referendum. However, by that stage those elements of the strategy that represented a direct attack on the principles of free movement had been dropped, in favour of a focus on welfare benefits for low income earners.

The key planks of Cameron's speech have been subject to review and further scrutiny, not only by Open Europe, which unsurprisingly found much to be happy about,[146] but also by critical commentators such as Steve Peers, who reached the conclusion that much more would require treaty amendment than Open Europe suggested.[147] With treaty amendment, the calculus changes, in terms of support from

[142] A European labour market with national welfare systems, see note 141 above, p 2.

[143] G Gibbons, 'Focus turns from EU quotas to 'pull' factors', *Channel 4 News Blog*, 3 November 2014: http://blogs.channel4.com/gary-gibbon-on-politics/focus-turns-u-quotas-pull-factors/29541 [last accessed 28 August 2015].

[144] See note 31 above.

[145] 'Cameron: Welfare reform to be 'absolute requirement' in EU deal' *EU Observer*, 21 May 2015: https://euobserver.com/political/128789 [last accessed 28 August 2015].

[146] 'What are the legal implications of David Cameron's proposed reforms to EU migration?' *Open Europe Briefing*, 11 December 2014: http://openeurope.org.uk/intelligence/immigration-and-justice/legal-implications-david-camerons-proposed-reforms-eu-migration/ [last accessed 28 August 2015].

[147] S Peers, 'Amending EU free movement law: What are the legal limits?', *EU Law Analysis*, 24 November 2014: http://eulawanalysis.blogspot.co.uk/2014/11/amending-eu-free-movement-law-what-are.html; S Peers, 'The nine labours of Cameron: Analysis of the plans to change EU free

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other Member States. In fact, the proposals are not limited to the welfare sphere, but do still contain further efforts to read across immigration principles into the area of free movement, which draw direct inspiration from the strategies of resistance described in the previous two sections. They include restrictions on in and out of work benefits for EU citizens for four years after arrival, removal of jobseekers if they do not find work after six months, the requirement that jobseekers should have a job offer before moving to the UK (which seems to contradict the previous proposal), removing the payment of child benefit in respect of children residing in a different state,[148] and a raft of restrictive measures on the entry of third country national family members, on the deportation of EU citizen offenders, and on the removal of rough sleepers and beggars.

It is sometimes difficult to untangle Cameron's proposals into those that are new, and those that are already underway, such as the removal of taxpayer support from jobseekers.[149] This is also true in respect of action against homeless and destitute EU citizens, where substantial new measures have already been introduced. A new Regulation 21B was added to the 2006 EEA Regulations with effect from 1 January 2014,[150] providing that those EU citizens who have been subject to removal under administrative powers on the grounds that they had no right of residence (eg because they had become homeless or were begging) can be precluded from returning to the UK for twelve months unless they can show that they are genuinely exercising treaty rights. It remains to be seen whether these new rules will be successfully challenged under EU law, given that EU law makes it clear that expulsion cannot be the automatic consequence of recourse to the welfare system of the host state and that a person must not be expelled if he or she is a workseeker with genuine chances of being engaged. Furthermore, at first sight re-entry bans seem to fall foul of Article 15(3) of the Directive which states that such bans can only be imposed if the expulsion was for some justified reason of public policy, public health or public security. Does Regulation 21B operate as a re-entry ban? One can assume that what Cameron proposes would be collective action at the EU level to permit such measures to be taken, which would render the question of whether the new UK measures comply with EU law no longer relevant.

Whatever the prospects for Cameron's menu of options being adopted at the EU level, they have actually been most successful at setting the terms of debate quite at the national level, with – for the most part – Labour and Liberal Democrat proposals and manifestos shadowing much of Cameron's restrictive rhetoric on welfare

(F'note continued)

movement law', *EU Law Analysis*, 28 November 2014: http://eulawanalysis.blogspot.co.uk/2014/11/the-nine-labours-of-cameron-analysis-of.html [last accessed 28 August 2015].

[148] This specific proposal may well be popular with the Germans: 'Exclusive: Angela Merkel may back David Cameron's plan to stop child benefits going abroad' *The Independent*, 21 December 2014: http://www.independent.co.uk/news/uk/politics/exclusive-angela-merkel-may-back-david-camerons-plan-to-stop-child-benefits-going-abroad-9939031.html [last accessed 28 August 2015].

[149] See note 78 above.

[150] Inserted by The Immigration (European Economic Area) (Amendment) (No 2) Regulations 2013 SI2013/3032.

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benefits, if not on the issue of administrative removals and re-entry bans.[151] This has been followed by a widespread political consensus, in the wake of the Conservative victory in the 2015 General Election, that an in/out referendum should be held. Thus we may soon need to consider the even more uncertain question of what would happen in the event of a UK in/out referendum leading to a vote to depart the EU, such as the impact upon the status of other EU citizens in the UK and of UK citizens resident in other Member States.

But until such time, it is important to note that by contrast with the measures discussed in Sections A and B, of course, the proposals considered in this section are just that: *proposals*. They do not directly change the terms of the legal status for EU citizens, although they can and do affect the tenor of the political debate, especially if they are thought of as fostering some sort of race to the bottom, involving ever greater stigmatisation of EU citizen migrants.[152]

V. CONCLUSION

The main aim of this article has been to provide a three way typology of how states navigate the gap between 'law and political truth'. This has helped us to understand more about how EU law applies in the UK, complementing earlier work on understanding some of the legal cultural reasons for why there remains this dissonance. This work highlights that Europeanisation is not just either a legal or a political phenomenon. On the contrary, it has to be seen via the interplay between the restrictions of law, and the possibilities of politics (or perhaps *vice versa*).

But the significance of how states navigate between the rule of law and political contingencies is not just a point for scholarly reflection. It is equally well understood by the 'consumers' of free movement law, such as Sean McCarthy, whose wife was repeatedly forced to travel to Madrid to obtain an EEA family permit, despite having a residence card issued by the Spanish authorities:[153] 'As a British national I had expected my country to play by the rules, and now the court has finally forced the UK to respect British and European citizens' free movement rights'.[154]

Furthermore, in the light of the increasingly contentious politics of EU free movement, some commentators have warned that the 'read across' between EU

[151] For analysis see M Morris, 'Reforming laws on free movement will be a headache for any future government', *Democratic Audit UK*, 1 April 2015: http://www.democraticaudit.com/?p=12112 [last accessed 28 August 2015].

[152] A Ghimis, 'Unconfirmed but still feared: the tidal wave of Bulgarians and Romanians one year later', *EPC Commentary*, 15 January 2015: http://www.epc.eu/pub_details.php?cat_id=4&pub_id=5192 [last accessed 28 August 2015].

[153] See note 103 above.

[154] 'European court gives UK visa direction', *BBC News*, 18 December 2014: http://www.bbc.co.uk/news/uk-30528189 [last accessed 28 August 2015].

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free movement law and national immigration law can have profoundly negative consequences for those who rely upon EU law:

> Politicisation may be defined as the making of a clearly-designated status precarious and ambiguous and the creation of noise and doubt that disrupts a taken-for-granted institutional reality and thus makes it susceptible to renegotiation. In official discourses in certain Member States, EU citizens became again "migrants" or "foreigners," and political parties on the right of the political spectrum did not hesitate to embark upon political campaigns advocating the restriction of EU mobility.[155]

Indeed, many of the proposals discussed in Section IV.C above, as well as the practices discussed in Sections IV.A and B will, or already have, rendered EU citizens and their families more vulnerable, not least because they seem to open the door to inappropriate or poor decision-making. We continue to need more research on how these restrictions operate in practice, and what new risks are engendered.[156] It is not surprising that some would argue that 'strengthened European citizenship' is the best response to the current challenges, not a defensive approach that accepts as the appropriate terms of the debate the widespread elision of immigration and free movement.[157] It has been suggested that the choice to term mobile EU citizens 'migrants' in itself has the effect of stigmatising them, of blurring the picture with regard to the law, and of decreasing their rights.[158]

It is easy to see how some of the measures recently introduced in the UK have created the conditions of a 'perfect storm', threatening the effective enjoyment of EU free movement rights. The implementation of the 'genuine prospects of work' test, introduced in 2013, sees the removal of access to benefits from jobseekers, eg those who have been made unemployed after a period of employment and even after quite long residence in the UK. That in turn can lead to homelessness and rough sleeping, as those without benefits cannot afford their rent. In turn, homeless persons may be summoned to meet with the Home Office and advised that they do not qualify under the EU free movement rules.[159] Some are subject to administrative removal, and will be served with what may amount to a re-entry ban under Regulation 21B.[160] The relative ease with which a challenge was brought against the application of these removal provisions in 2011 on behalf of a Czech citizen resident in the UK, with

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[155] T Kostakopoulou, 'Mobility, Citizenship and Migration in a Post-Crisis Europe' (June 2014) *Imagining Europe*, p 5.

[156] For some of the first results of a research project that aims to fill this gap, the EU Rights Project http://www.eurightsproject.org.uk see C O'Brien, 'The Pillory, the Precipice and the Slippery Slope: The Profound Effects of the UK's Legal Reform Programme Targeting EU Migrants' (2015) 37(1) *Journal of Social Welfare and Family Law* 111.

[157] P Delivet, see note 28 above.

[158] A Ghimis et al, 'Stigmatisation of EU mobile citizens: a ticking time bomb for the European project' *EPC Commentary*, 24 January 2014: http://www.epc.eu/pub_details.php?cat_id=4&pub_id=4096 [last accessed 28 August 2015].

[159] See J Shaw et al, note 50 above, pp 31–33.

[160] See note 150 above.

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support from the AIRE centre, seems unlikely to be repeated with the formalisation of the 'GPOW' test.[161] Furthermore, an increased criminalisation of vagrancy can also have an impact, as a form of summary justice in the form of the so-called Operation Nexus. This involves the police and immigration enforcement authorities and may see more EU citizens targeted for removal in a variety of circumstances where their removal can be said to make the UK 'safer'.[162]

There presently seems to be little scope in the UK debate for radical counter proposals to strengthen EU citizenship to gain traction, such as those coming from the European Citizens Action Service to turn the Citizens' Rights Directive into a regulation, thus making it a more effective – and directly applicable – EU instrument.[163] For the time being, the strengthening of EU free movement rules in the UK will continue to rely, as it has in large measure for many years, on the complex interplay between judges, decision-makers, litigants and their lawyers, and the civil society actors and academics who comment on these matters.

[161] 'Expulsion of homeless EEA national struck down on appeal' *Migration Pulse*, 30 July 2011: http://www.migrantsrights.org.uk/migration-pulse/2011/expulsion-homeless-eea-national-struck-down-appeal [last accessed 28 August 2015]. See M Williams, *Kapow to the GPOW: the "Genuine Prospect of Work Test" - (1) as a cause of homelessness for EEA migrants (2) arguments against the test* (CPAG, April 2015): http://www.cpag.org.uk/sites/default/files/CPAG-Kapow-GPOW-APR2015_0.pdf [last accessed 28 August 2015].

[162] Metropolitan Police, 'Operation Nexus launches', 10 November 2012: http://content.met.police.uk/News/Operation-Nexus-launches/1400012909227/1257246745756 [last accessed 28 August 2015]. For critical comment see J Camilo, 'Operation Nexus and migrant communities: questions and concerns' *Migrants' Rights Network*, 25 February 2013: http://www.migrantsrights.org.uk/blog/2013/02/operation-nexus-and-migrant-communities-questions-and-concerns [last accessed 28 August 2015].

[163] 'Right to move: Seven strategies to improve the EU's free movement rules' (ECAS/EU Rights Clinic): http://www.righttomove.eu/wp-content/uploads/2014/10/7-Strategies-for-Free-Movement-1.01.pdf [last accessed 28 August 2015].