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Protection of the right to social security and free movement of persons in the European Union: law and practice in the UK

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Author's declaration:

"I declare that, where explicit reference is made to the contribution of others, that this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution."

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Abbreviations/acronyms

A2 nationals coming from Bulgaria and Romania

A8 nationals coming from Poland, Latvia, Lithuania, Hungary, Slovakia, Slovenia, Czech Republic, Estonia.

CJEU the Court of Justice of the European Union

CJ the Court of Justice (in short for the Court of Justice of the European Union)

ECHR the European Convention on Human Rights

EEA European Economic Area

EU the European Union

ILO International Labour Organisation

TS Tribunal Service - First-Tier Tribunal (Social security and |Child Support)

UT Upper Tribunal

WAS Worker Accession Scheme

WRS Worker Registration Scheme

List of legal instruments
List of EU and international legislation

Act of Accession 2003

Act of Accession 2005

Charter of Fundamental Rights and Freedoms of the European Union 2000

Charter of the United Nations 1945

Constitutional Treaty of 2004

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Citizenship Directive)

Directive 79/7 on equal treatment of men and women with regards to social security.

Directive 2000/43 prohibiting discrimination on grounds of race or ethnic origin.

European Social Charter (Revised) 1996

European Convention on Human Rights 1950

Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

Regulation (EC) No 987/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

Single European Act 1992

Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania,

Hungary, Malta, Poland, Slovenia and Slovakia (2003)

Treaty of Accession of the Republic of Bulgaria and Romania (2005)

Treaty of Amsterdam 1997

Treaty establishing the European Coal and Steel Community 1951

Treaty of Lisbon 2007

Treaty of Maastricht 1992

Treaty of Nice 2001

Treaty of Rome 1957

Treaty on the Functioning of the European Union 2007

Treaty on European Union 2007

Universal Declaration of Human Rights 1948

United Nations Convention the Rights of the Child 1989

UK legislation

The Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004/ 1219)

The Accession (Immigration and Worker Authorisation) Regulations 2006 (SI 2006/3317)

The Accession (Immigration and Worker Registration) (Amendment) Regulations 2009 (SI 2009/892)

Acts of Parliament: The Children Act 1989 (amended by the Children Act 2004 and then the Children and Social Work Act 2017); the Equality Act 2010; the Data Protection Act 1998 (replaced by the Data Protection Act 2018

The Employment and Support Allowance Regulations 2008 (SI 2008/749)
The Employment and Support Allowance Regulations 2013 (SI 2013/379)

The Housing Benefit (Habitual Residence) Amendment Regulations 2014 (SI 2014 No. 539)

The Immigration (European Economic Area) Regulations 2006 (SI 2006/1003)

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

The Immigration (European Economic Area) Regulations 2016 (SI 2016/1052)

The Income Support (General) Regulations 1987 ((SI 1987/1967)

The Jobseeker's Allowance Regulations 1996 (SI 1996/207)

The Jobseeker's Allowance Regulations 2013 (SI 2013/378)

The Social Security Administration Act 1992

The Social Security Act 1998

The Social Security Contributions and Benefits Act 1992

The State Pension Credit Regulations 2002

The Welfare Reform Act 2012

The Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 (SI 2002/2005)

The Tribunals, Courts and Enforcement Act 2007

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Chapter One: Introduction

1. Introduction

European migration was present in many political debates, especially due to Eurosceptic voices in the United Kingdom raising issues about the economic crisis and enlargements in 2004 and 2007. The result was that opposition towards free movement of persons within the EU grew with time. Initially, Member States had more power to decide upon whom to award social security rights, but more involvement of the EU and the case law of the Court of Justice of the European Union had increased the EU's competence over time and being economically active was not the only way to become eligible for social benefits. Big part in awarding social rights plays here European citizenship, legal residence in the hosting Member State with which the person has established the 'real links'. The comprehensive assessment allows to identify whether the person can be treated as a 'habitual resident' with 'centre of interests in that country. Considering the economic crisis in Europe, questions about sovereignty and solidarity between Member States arose. Member States often claimed that migrating EU citizens were posing high financial burdens on their national social systems. Some EU Member States, such as the United Kingdom, saw a great chance in further accessions to fill gaps in the employment market to boost the national economy. Thus, the UK fully opened the employment market for A8 nationals, introducing the work registration in the first year of an employment for monitoring purposes only.

With the accession of Romania and Bulgaria (A2), fear of benefit tourism grew. Especially in the UK, critics and politicians proposed to limit free movement and to introduce restrictions on migrant EU citizens' access to social benefits. Prime Minister Cameron even proposed to amend free movement rules, not only for economically inactive EU citizens, but also for all EU workers.[1] Cases of jobseekers and economically inactive EU citizens that wanted to access social benefits had given rise to several questions surrounding the concept of EU citizenship and EU citizens' rights to access social benefits.[2] Whilst the European Commission argued

[1] 2016 United Kingdom European Union membership referendum.

[2] David Cameron, 'Free movement within Europe needs to be less free', Financial Times, 27 November 2013. See also the proposals formulated on 28 November 2014 by UK Prime Minister Cameron, available on www.bbc.com/news/uk-politics-30224493 (last visited 21 April 2015). See also the letter sent in April 2013 by the UK Home Secretary and her Austrian, German and Dutch counterparts to the President of the Justice and Home Affairs Council regarding the strain on services and national welfare systems posed by the free movement of Union citizens and the

that the existing free movement[3] and social coordination rules[4] were effective instruments to combat benefit tourism and that there was in fact little statistical evidence of benefit tourism,[5] several Member States still called for strengthening of EU legislation further, but this request had been dismissed straight away.

This study will explore how the UK's legal regulations regarding access to social security benefits have been applied in cases involving EU migrants from A2 and A8 countries between 2010 and 2014. It will accomplish this by analysing empirical data drawn from cases involving social security claimants living in the Glasgow area and by contextualising that data with reference to the relevant legal, socio-economic and political frameworks.

This research comprises four principal stages. First, the EU free movement provisions are set out and their implementation in the UK explained.

Second, the UK's specific legal regime applicable to A2/A8 migrants during and post transition periods is explained. This is contextualised with reference to the relevant socio-economic and political factors.

Third, an assessment of outcomes of representative welfare claims rejected by the First-tier Tribunal Service to investigate how the UK's legal regulations regarding access to social security benefits have been applied in cases involving EU migrants from A2 and A8 countries between 2010 and 2014.

Finally, drawing conclusions that identified the key issues pertinent to free movement rights implementation, specifically affecting access to social benefits for selected group of EU migrants who settled in the UK and engaged with the employment market.

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response of Czech, Hungarian, Polish and Slovak Ministers, in December 2013, highlighting the beneficial nature of such movement for host Member State economies.

[3] Regulation 492/2011 on freedom of movement of workers within the Union; Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (The Citizenship Directive).

[4] Regulation 883/04/EU on the co-ordination of social security systems for people who move within the Union.

[5] ICF and Milieu Ltd (2013), 'A fact finding analysis on the impact on the Member States' social security systems of the entitlements of nonactive intra-EU-migrants to special non-contributory cash benefits and healthcare granted on the basis of residence', p. 276. The study is available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1980&furtherNews=yes (retrieved in January 2014).

2. Research objectives

Free movement of persons is one of the fundamental freedoms guaranteed by European Union law and includes the right of all EU citizens and their family members to live and work in another Member State.[6] The concept of free movement of persons has two interrelated dimensions: the economic dimension and the social dimension. The economic dimension is based on the idea that a worker is a mobile unit of production, who contributes to the creation of the single market and the economic prosperity of the European Union; while the social dimension portrays a worker as a human being who exercises his personal right to live and work in another country, without being faced with discrimination.[7]

As highlighted by the European Commission[8], the free movement of people is a fundamental freedom guaranteed by EU law. It includes the right for EU nationals to move to another Member State, not only to take up employment, but also to establish themselves in the host State with their family members, as beneficiaries of European unification and citizenship. It gives legal rights and privileges to nationals of Member States[9], including rights to equal treatment, access to social security, and benefit assistance in the host Member State. [10] These rights can be found in Citizenship Directive 2004/38.

According to Article 34 of the Charter of the Fundamental Rights of the European Union, everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages. It calls for implementation of those rights as social support for those who are facing the main social security risks, such as illness, old age, unemployment, health care, family, maternity, and employment injury. Those social security benefits are regulated by the social security coordination regime laid down in Regulation 883/04/EC and social advantages benefits - by the free movement of persons regime and Citizen's Rights Directive 2004/38/EC. The concept of 'social advantages' is interpreted by the CJEU very broadly and it covers not only all benefits connected with contracts of

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[6] Art 26 TFEU.
[7] Art 18 TFEU,
[8] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004–30 April 2006) /* COM/2006/0048 final */.
[9] C-184/99 Grzelczyk, para 31.
[10] O'Leary, S. 'Free movement of persons and services', in: Craig, P. De Burca, G. (2011). The evolution of EU Law (Oxford University Press), p. 510.

employment, but also all other advantages which are open to citizens of the host Member States.

The United Kingdom acknowledges those rights and refers to social security as cash payments, which are in majority means-tested, and do not need to be based on national contributions paid by the claimant but depend on the outcome of the habitual residency test dictated by the Immigration (EEA) Regulations 2006. It provides protection in the periods when a person is on low income and/ or unable to work.[11] However, how has the law been applied to A8 and A2 nationals in practice?

This research reveals that experiences of East European nationals residing in the Glasgow area cast doubts on both the co-ordination and correct implementation of national legislation on EU social security law, and in the protection of social security rights of persons who move within the European Union. It seems to suggest that practical and legal obstacles are still limiting the effective exercise of the right to free movement. This is rationale of this research.

This study will explore how the UK's legal regulations regarding access to social security benefits have been applied in cases involving EU migrants from A2 and A8 countries between 2010 and 2014.

To achieve this aim, the following specific objectives have been set.

This research attempts to:

1/ Identify EU legal regime on the free movement of persons;

2/ Outline the UK legal framework concerning this study group, and refer to relevant legal, social-economic and political context;

3/ Evaluate the representative cases and identify the UK's legal challenges while assessing the social security claims made by A8 and A2 nationals;

4/ Draw conclusions and propose solutions to problematic areas identified in this research.

This study focuses on legal implementation of social rights in its narrower sense, by evaluating multiple cases in the UK and evidence presented shows that this is

[11] Your social security rights in the United Kingdom, European Commission, 2013.

challenging for Member States due to economic costs. Those motives were visible during the Brexit debates that then had significant impact on the outcome of the Brexit referendum.[12]

The personal scope of this thesis concentrates on nationals coming from A8 countries[13] that joined the EU in 2004 and from A2 countries[14]- the EU's members from 2007. Both groups now come under the same category as all other EU nationals.

The material scope is focused on social security rights in a broader sense[15], which includes 'pure' social security[16], special non-contributory and social assistance benefits.[17]

The temporal scope of this study is placed on the period of 2010 and 2014 and illustrates how the UK's provisions have been applied towards A8 and A2 nationals exercising their free movement rights given by the Treaty provisions. This research does not deal with Brexit and its impacts.

The motivation for this study is informed by the need for understanding of the transitional regime, that will be discussed in the next chapter, and its implications and to learn from this experience.

Over many years while working at the advisory centre, I have witnessed many contradicting and challenging legal outcomes for A8 and A2 claimants attempting to access their rights. As a person who is passionate about the community and its potential, and as an advocate for those who were placed at disadvantageous position, I recognised the transitional regime as a legal obstacle for genuine enjoyment of the free movement rights.

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[12] British Social Attitudes 34 | The vote to leave the EU, http://www.bsa.natcen.ac.uk/media/39149/bsa34_brexit_final.pdf; Hutton, Robert, and Svenja O'Donnell. "Cameron Vows Curb on Welfare for Migrants, Threatens EU Exit." Bloomberg Business, November 27; http://www.bloomberg.com/news/articles/20141127/camerontosetoutplanstocutimmigrationamidukipthreat; Portes, Jonathan. "Benefit tourism: the Commission gives us some facts." National Institute of Economic and Social Research. October 14, 2013.

[13] Poland, Czech Republic, Slovakia, Slovenia, Hungary, Latvia, Lithuania.

[14] Romania and Bulgaria.

[15] Spicker,P. (2006). Social policy: theory and practice, Policy press.

[16] Within the material scope of Regulation 883/04/EC on the coordination of social security systems.

[17] All these benefits are falling under an umbrella of the social benefits.

I observed that the transitional regime added extra complexity to accessing minimum social security in times of risks faced by persons who previously worked. Therefore, I wanted to illustrate how this regime was interpreted and applied in the UK.

3. Methodology

3.1. Introduction

This is a legal implementation study that focuses on the EU free movement provisions and how they have been interpreted and applied in the context of the UK's rules regarding access to social security for A2/A8 migrants during and following the transition period.

This section discusses the key methodological and ethical considerations that guided this empirical study, brief descriptions of the research approaches adopted for data collection, presentation, and analysis, namely socio-legal study, and case study method.

3.2. Rationale for chosen study approach: socio-legal approach and the case study as a method

This research concentrates on investigation of problems faced by EU citizens from accession states that were previously subjected to transitional regimes, dictated by the Accession Treaties 2003 and 2005. Those regimes placed them in a disadvantageous position, in terms of access to social security rights, and in consequence, created obstacles to the free movement of persons.

In order to illustrate the reality of how EU law works in practice, namely how the UK's legal regulations regarding access to social security benefits have been applied in cases involving A2 and A8 migrants, a socio-legal approach has been chosen. This conception attempts to illustrate how law can be related to a "social situation".

Socio-legal studies often focus on the gap between law and everyday lives, and various forms of materialism that have had a significant impact on socio- and legal analysis. Academic legal analysts focus on the text from which they apparently

abstract themselves, occasionally assuming the 'social context' as if it were an independent variable.[18]

According to a socio-legal approach, analysis of law is directly linked to the analysis of the social situation to which the law applies and should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance and/or change of the situation. This study aims to illustrate how the UK's provisions have been applied towards A8 and A2 nationals exercising their free movement rights given by the Treaty provisions.

The EU legal framework on free movement of persons and then the UK's legislation binding those groups of migrants constitute the background for the evaluation of a representative sample of cases and of the issues arising from implementation of social security rights. This approach to the dynamics of law is sometimes termed "law in action" research and the rules and their presumptive nature must be known in order that their effectiveness can be evaluated.

The socio-legal examination was chosen for this study as the most appropriate approach for looking at the impact of law in real life.[19]

The socio-legal methodology seeks to gain empirical knowledge, providing further understanding of how law and legal proceedings affect the parties involved. The black letter approach would not give as much understanding of the implications of the application of the transitional regime towards A8 and A2 citizens at the national level.

The black letter approach concentrates mostly on the 'letter of the law'[20] and the primary aim of this method of research is to collate, organise and describe legal rules and offer commentary on those which are most significant to the objective being researched. Having said that, a socio-legal approach fills a lacuna in black letter methodology in the understanding of how the law works in action: in this study – how the UK's legal regulations regarding access to social security benefits have been applied in cases involving EU migrants from A2 and A8 countries

[18] Exploring the 'Legal' in Socio-Legal Studies' edited by Dave Cowan and Dan Wincott (Palgrave MacMillan, 2016).
[19] McConville, M., & Chui, W. H. (2007). Introduction and overview in research methods for law. Edinburgh University Press.
[20] Ibid, p 1; Manderson, D., & Mohr, R. (2002). From oxymoron to intersection: An epidemiology of legal research. Law Text Culture.

between 2010 and 2014. According to Richardson, these are critical issues: "...we need to know how law or legal decision making or legal enforcement really works outside the statute or text book."[21] Thus, we need to understand the impact that law and associated phenomena have on people, communities and societies, as well as the influence that various social, economic and political factors have on law, legal phenomena and institutions.

Legal developments in the field of social security have been diverse at both EU and national levels, but there have been few studies undertaken to address those issues that affect the UK's practical implementation of EU legal rights towards nationals coming from accession states, namely A8 and A2 nationals. This research considers these issues leading to non-compliance with EU law and reveals a complicated nexus of interrelated elements that affect the rights implementation. Political and ideological influences are very significant, especially when it comes to benefits payment from public funds. This has been acknowledged in Chapter Three and the final part of the thesis.

Given the focus on these nationals, resident in Glasgow, the case study approach was considered the most appropriate method to reflect the objectives of this study.

Case study has been seen as a common framework for conducting qualitative research[22]. Hartley[23] emphasised that case study research "consists of a detailed investigation, often with data collected over a period of time, of phenomena, within their context," with the aim being "to provide an analysis of the context and processes which illuminate the theoretical issues being studied". Specifically, the qualitative case study method has been used in this research as an illustrative tool for presenting how the UK's legal regulations regarding access to social security benefits have been applied in cases involving EU migrants from A2 and A8 countries between 2010 and 2014.

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[21] Richardson, G., in: Law in the real world: improving our understanding of how law works. Final report and recommendations, the Nuttfield Foundation, 2006.
[22] Stake, R. E. (2000). Case Studies. In: N. K. Denzin, & Y. S. Lincoln (Eds.), Handbook of Qualitative Research, p.435.
[23] Hartley, J. (2004). Case study research. In: Cassell, Catherine and Symon, Gillian eds. Essential Guide to Qualitative Methods in Organizational Research. London: Sage Publications Ltd, pp. 323–333.

The other purposes for using the case study are to get in-depth details as much as possible about an event, person or process to be then able to evaluate the information gathered and provide a constructive discussion about analysis of outcomes, as it allows for exploratory and explanatory analysis.[24]

The nature of this study, and the issues it seeks to address, calls for this type of case study. Yin argued[25] that "the distinctive need for case studies arises out of the desire to understand complex social phenomena […] the method allows investigators to retain the holistic and meaningful characteristics of real-life events." The representative case studies analysed in Chapter Four are exactly aiming to achieve this.

Data collection in case study method is one of the most significant activities in the process because of the richness and depth of what will be eventually known is contingent on the craft and effectiveness of the data collection method in uncovering relevant details about the situation.

The data collection for the purposes of this study was focused on access to archival records and database, tracing the relevant data and, analysis of specific documents that included a client's record sheet, notes reflecting the issues the service users presented with and were recorded by the officers from the advisory centre. The documents, accessed by the researcher, included the completed review or appeal forms, the submissions made to the Tribunal Service and the statements of reasons issued by the First-tier Tribunal Service. There was a dedicated appeals officer who dealt with all appeals and representation at the Tribunal Services and thus, the information also included his brief notes recorded in the database. The researcher did not advise or represent the study objects at the First-tier Tribunal, enabling author to maintain a neutral approach and at the same time, to sustain the integrity of the data used for this study.

3.3. Limitation of data and sample data used in this study

[24] Bryman, A. (2004). Social Research Methods, 2nd edition.
[25] Yin (2003).

As mentioned above, the empirical data has been gathered from the advisory centre's database and focused on the records containing quantitative data on rejected claims that were anonymised.

There limitation of the data has been observed as the quantitative data, which is available in public domain, is only recorded from year 2014 onwards and can be accessed in the Official Statistics, for instance, "Analysis of EEA migrants' access to income-related benefits measures."[26] However, this period was not subjected to this research. The author requested qualitative and quantitative data through the Freedom of Information Request but has been advised that there is no summed records reflecting the periods while transitional regimes were binding.[27]

The qualitative and quantitative data has been also requested from the Tribunal Service; however, the tribunal clerks have advised that the statistical information is not available, and the outcomes of the decisions are not in the public domain.[28]

Thus, the researcher has focused on large volume of data already available at the advisory centre after the written consent given by the organisation's chief executive officer before any data was accessed.[29]

The documents included refusals of the claims on varied stages of administration process. The cases contained initial decisions made by government officials, such as the DWP, the Financial Services of Glasgow City Council or the HMRC, and the documents concerning later judicial stages reviewing those decisions, namely review or mandatory reconsideration requests within those departments and the appeal papers that went through the hearing at the First-tier Tribunal Service.[30]

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[26] DWP has published two publications analysing migrants' access to benefits. These provide information on the number of Habitual Residency Tests (HRT) taken by EU national (including splits by EU2 and EU8 groups) for Jobseeker's Allowance, Employment and Support Allowance, Pension Credit and Income Support, with the numbers passing and failing these tests over the financial years 2014/15 to 2016/17. Please see: https://www.gov.uk/government/statistics/analysis-of-eea-migrants-access-to-income-relatedbenefits-measures;
https://www.gov.uk/government/statistics/analysis-of-migrants-access-to-income-relatedbenefits
Information regarding the HRT is only available from April 2014, as stated in response to the Freedom of Information Request made by the researcher.

[27] Please refer to the appendixes at the end of this thesis.

[28] As pe conversation with the Tribunal clerks made in July 2010.

[29] The CEO of money advice centre has provided a letter giving permission to access the data available. This has been included in ethics application.

[30] Further information on administration and appeal process in the UK is provided in Chapter Three.

Archival records of all documents accessed were always kept in secure confidential cabinets. There was no need to create an additional database, as regular access to the organisation's records was made available at all times. The files contained the exact and precise decisions on welfare claims heard by the First-tier Tribunal as they particularly represent issues illustrating the UK's approach towards A8 and A2 nationals during and post transition periods.

The available claimants' files have been collected, data retrieved, and grouped into themes, and then analysed. Mixing sources of data allowed the researcher to take detailed and closer investigation of interpretation of EU law and other associated factors having an impact on the final decisions on individual cases.

3.4. Sample data

This study illustrates how the UK applied social security law towards the A8 and A2 nationals, with focus on the reasons for rejection of the social benefits. This selection of data was focused on unsuccessful outcomes and the following questions were asked to collate the data.

To each refused benefit claim, the following inquiries have been made:

1. What was the claimant's nationality?
2. What were the appellant's circumstances at the date of the claim?
3. How long had the person resided in the UK and where was their main home ('the centre of interests') at the time of the claim?

By applying those questions, 100% samples were chosen, which were further assessed and went through a further data selection process. The sample frames selected were A8 and A2 nationals, who (previously) engaged with employment market and have not been able to access social security and assistance payments during and post- transitional periods.

Once the data containing refused social security claims was gathered, further inquiries were made to identify the reasons for unsuccessful outcomes.

The additional questions related to:

1/ the reason for refusal in each individual claim and

2/ how the UK's legal regulations regarding access to social security benefits have been applied in cases involving EU immigrants from A2 and A8 countries between 2010 and 2014.

By applying those questions, the typicality of cases has been achieved.

Data used for this study contained a total number of 253 cases, which include: 222 representative cases on social claims made by A8 and A2 nationals, while the transitional regimes were in force (collected over the period of 2010 to 2013), and 31 cases reflecting claims made after those transitional provisions had expired (collected in 2014 – a year of several welfare reforms in the UK), to compare the UK's approach towards A8 and A2 citizens as EU citizens residing in Glasgow area as a sample. More details on the qualitative data can be found in Appendix I and II.

From the sample of cases collected, common issues have been identified. The theme reflecting issues associated with the Worker Registration Scheme – requirement to register work by A8 nationals during transitional period - has been identified as the most common obstacle in accessing the social security rights by research subjects and thus, it has been selected for further analysis in Chapter Four.

3.5. Transitional regime selected for empirical examination

Despite the wide array of individual rights available in EU social security law, this study has purely focused on the assessment of the implementation of cases applying EU law during the transitional regime in the UK.

The theme relates to the transitional provisions and how they were applied to A8 and A2 nationals for the purpose of social security rights. This theme has been recognised as the most frequent reason for the refusal of social benefits to those two groups of nationals, and has been selected for three reasons:

First, employment registration under the Worker Registration Scheme or the Worker Accession Scheme was a powerful tool, used by the UK to exclude A8 or A2 nationals from the social security system.

Second, there has been little research in the context of the transitional regime and its practical application.

Third, this regime has been in use for several years and it was interesting to see whether the UK effectively implemented the EU's legal framework, and what was the impact on the access to social security rights in the context of free movement of persons.

3.6. Ethical issues

The main ethical consideration in case study research is to protect the confidentiality and anonymity of participants.

Before the fieldwork started, the project went through formal ethical review within the University of Glasgow, the College of Social Science. All the participants have been asked for the permission to look at their benefit claims decisions and they have signed the Informed Consent to access their data, and have been issued with the Plain Language Statement informing about the objectives of the project.[31]

The cases selected and presented in this thesis have been anonymised and no personal information was used that could in any way identify the participants. As already noted, the advisory centre has officially agreed to provide access to participants' files, which were always kept in secure filing cabinets and in a secure database. The participants have been informed that the use of their data was only for the purpose of research. Moreover, they were assured that their participation would not in any way affect the service they received or will receive from the advice centre in the future. All the research subjects have expressed their interest in the study not only to evidence personal experience in accessing their rights given by Treaty provisions, but also to find solution for fairer recognition of their rights in the future.

[31] Both documents enclosed in Appendices.

4. Structure of thesis

This thesis consists of five chapters.

The following chapter is Chapter Two that sets out the EU free movement provisions and their implementation in the UK. It refers to primary sources and secondary sources of law and academic literature.

Chapter Three provides a background, in which the UK's specific legal regime applicable to A2/A8 migrants during/post transition periods is explained. This is contextualised with reference to the relevant socio-economic and political factors at the time, political regimes, EU internal and external relations.

Chapter Four contains data for this study, examining the approach of the UK's Decision Makers assessing the social security claims for A8 and A2 nationals. Evaluation of representative cases aims to verify assumptions that the specific legal codes enacted to protect EU citizens, despite their choice of place of residence within the European Union are complicated in their interpretation and implementation. This has direct impact on EU citizens' enjoyment of their free movement rights.

The chapter specifically shows how the transitional provisions were applied to restrict social security rights in the UK. It argues for instance that registration of employment under the Worker Registration Scheme that was meant to be a tool monitoring the employment market and its potential disturbances, but in real times, it was a key factor for excluding A8 nationals from the social security system.

The final chapter of the thesis is Chapter Five. It summarises the research findings and concludes with recommendations. It sums up legal problems and identifies some issues arising from the EU's current free movement of persons framework and from the additional criteria imposed by the UK to restrict an access to social security rights for A8 and A2 nationals exercising their Treaty rights.

Chapter Two: Access to Social Security in the UK for EU Migrants

1. Introduction

Free movement of persons, as one of the core objectives of the European Union, has existed since the foundation of the European Economic Community in 1957. Initially, this freedom was essentially directed towards economically active persons[32] and their families, and with time, it has been extended to all EU citizens and their relatives.

Provisions related to the free movement of workers, services and the right to establishment are at the centre of the integration project. Despite the implementation difficulties faced by Member States, the European developments in the field of free movement of persons are a fundamental value of the European Union and they remain committed to the integration of the European Union area by removing internal borders to meet the objectives of the single market and to ensure EU mobility that is more effective.

This chapter sets out the EU free movement provisions and explains their implementation in the UK. It refers to primary and secondary sources of law and the academic literature.

2. Primary law

The fundamental freedoms – freedom of movement of workers, freedom of establishment, and freedom to provide services[33] - are set out in Articles 45, 49, 54 and 56 TFEU.

Free movement of workers is laid down in Article 45 TFEU and includes: the right to look for jobs in another Member State, the right to work in another Member State, the right to reside there for that purpose, the right to remain, the right to equal treatment in respect of access to employment, working conditions and all other social advantages which could help to facilitate the worker's integration in the host Member State. The same rights apply to worker's family members. Free

[32] This right was often described as the "free movement of workers" – a reference to the language used in Article 48 of the Treaty of Rome.
[33] There is also free movement of capital and goods, but not relevant for the discussion.

movement can be limited, and expulsions are allowed when justified on grounds of public policy, public security or public health[34].

Freedom of establishment, as set out in Articles 49 - 54 TFEU, enables an economic actor: a person or an undertaking,[35] to pursue economic activities, stably and continuously in one or more Member States, without impediments created by those Member States.[36] Unlike the freedom to provide services set out in Article 56 TFEU that deals with the pursuit of an economic activity by a person in another Member State without having the principal or secondary place of business in that State, freedom of establishment concerns permanent settlement in another Member State to pursue an economic activity. Those two freedoms nevertheless are closely related in relation to the way in which the non-discriminations provisions apply to them.[37]In its first paragraph, Article 49 TFEU abolishes any restrictions on freedom of establishment, including primary establishments such as companies as well as secondary establishments including agencies and branch offices. The first paragraph also sets out the scope of Article 49 TFEU establishing that it cannot be employed by nationals against their own member state, and in its second paragraph goes on to define freedom of establishment as the ability of the self-employed to be able to pursue their activities on an equal footing with the nationals of the Member State in which they are established.

Article 56 TFEU that refers to "freedom to provide services", states that restrictions in this area within the EU are prohibited in respect of nationals of Member States who are established in a State other than that of the person for whom the services are intended. Any discrimination on the grounds of nationality when it comes to the provision of services is prohibited directly by this Article.[38] Under Article 57 TFEU, services shall be considered as such where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. This Article also specifies that the provisions on the free movement of services cover

[34] Article 45(3) TFEU.
[35] Kaczorowska.A. (2010). European Union Law Routledge), p.715.
[36] Craig.P. and De Burca. G., 2003, pp. 772.
[37] Kaczorowska.A., 2010, p. 696 - 697.
[38] See case C-33/74, Van Binsbergen, reflecting on the direct applicability of the prohibition on discrimination in respect of the provision of services.

all activities of an industrial or commercial character or of craftsmen and the activities of the professions.

The free movement of persons is underpinned by broad sets of rights including the principle of protection against discrimination on the grounds of nationality (Art18 TFEU), with regards to employment, remuneration and other conditions of work and employment; and associated measures to facilitate free movement such as provisions on social security coordination, so that persons do not lose social security entitlements and benefits when they move between Member States for work, study, or retirement. This framework is included in the EU's domain.

The TEU Preamble emphasises the attachment to fundamental social rights, the will to deepen the solidarity between EU citizens and the need to facilitate the free movement of persons.

The EU also gives an opportunity to claim non-discriminatory free movement rights based on "lawful residence" of European citizen by virtue of Art 18 and Art 20 TFEU. This is an important right under EU law for European citizens who have a chance to improve their standard of living and job prospects; and who benefit from the single market by creating a flexible and efficient European employment market. At the same time, the establishment of the right to free movement of persons as EU citizens of the Union and eliminating the need for an economic justification for this right, gives more responsibilities for EU institutions to take further actions in this field.

With time, the right to free movement within the European Union has been widened beyond the economically active persons and extended to other groups of people and includes all EU citizens in general.

Acquired rights of EU citizenship are laid down in Articles 20 to 25 TFEU that give persons an access to legal rights, namely the right to free movement, settlement and employment across the EU, the right to vote in European elections and the right to consular protection from other EU states' embassies when abroad.

The rights of EU citizens to move and reside freely within the territory of the Union is enshrined in Article 21 TFEU that states:

'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.'

This article strengthens the conception of free movement for EU citizens and marks the movement to an internal market that is not only focused upon economic integration, but also social integration.[39] It has slightly diminished the traditional economic focus, but the free movement of the citizens is integrally linked to the movement of goods, services, establishment and workers.

Article 21 TFEU is further enshrined in the Charter of Fundamental Rights of the EU, which notes in Preamble that the EU "places the individual at the heart of its activities, by establishing a citizenship of the Union and by creating an area of freedom, security and justice" and in Article 45 that "Every citizen of the Union has the right to move and reside freely within the territory of the Member States".

Article 15(2) of the Charter provides that "every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State" and Article 34 states that "everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages".[40] In this meaning, EU citizenship is a concept giving an access to legal rights to all EU 'free movers' holding the nationality of EU Member State. In fact, without the protection of social rights, the protection of other rights, such as civil and political rights, would be only theoretical.[41]

The UK respects those legal provisions, but some practices seemed to be in tension with some of these fundamentals and some of examples are illustrated in Chapter Four.

3. Secondary law

The main secondary law instruments regulating the free movement of persons are:

[39] Harpaz, G 'European Integration in the Aftermath of the Ratification of the Treaty of Lisbon: Quo Vadis?' (2011) 17 EPL 73, 76.

[40] This provision, which explicitly deals with social security, can be cited at the national courts to support welfare claims of EU citizens exercising their rights in a State other than their country of origin.

[41] B. Brandtner and A. Rosas, 'Human rights and the external relations of the European Community: An analysis of doctrine and practice', 1998.

- Regulation 883/04/EU on the co-ordination of social security systems for people who move within the Union,

- Regulation 492/2011 on freedom of movement of workers within the Union,

- Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (The Citizenship Directive).

Those key legal instruments around social security and social assistance are important to focus on and discussed in turn. The distinction between those two categories of social benefits is often difficult to make due to broad terminology and complexity of social security systems.

Regulation 883/04/EC

Regulation 883/04/EC aims to connect different social security schemes for those, who are moving within the Union, are not disadvantaged because of exercising their free movement rights. Thus, there are certainly adaptive pressures on Member States as part of the requirements of coordination of benefit schemes that tend to pull Member States policies closer together. In consequence, these are the limits to freedom of action by Member States in relation to national rules on social security binding EU citizens exercising their free movement rights.

Three general principles that emerged from the complex rules of coordination that can be found in Regulation 883/2004/EC and the case law, assured that:

1/a national of a Member State is not to be disqualified from entitlement to benefits on the grounds of nationality or on a change of country or residence within the European Union;

2/ a national of a Member State may become entitled to a benefit by having contributions or qualifying periods of employment or residence in one Member State aggregated with those arising in another Member State;

3/ a national of a Member State should not be better off in relation to entitlement to benefits by reason of his or her exercise of rights to move freely between Member States.

In short, Regulation 883/04/EC on social security coordination aims to prevent the conflict of laws and the situations where 'the free mover' would be trapped between two (or more) systems or/and excluded from the right to social security because of movement to another EU country.

A crucial role in awarding the entitlements such as sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits, family benefits and special non-contributory benefits, listed in Article 3 of Regulation is played by the concept of residence.

Under the Regulation, the term 'residence' refers to 'habitual residence', which is the European Union concept.[42]An interpretation of this conception seems to be a key matter as it has further legal implications for the implementation of EU legal rights at the national level, as illustrated in Chapter Four.

Those criteria were primarily established by the Court of Justice in case Swaddling[43] that sets criteria for the comprehensive implementation of the right to social security based on habitual residence and Article 11 of the implementing Regulation 987/2009 contains the key definitions in the application of the co-ordinating rules. It explicitly determines residence of a person to whom the basic Regulation applies, where the institutions shall establish by common agreement the centre of interests of the person concerned, based on an overall assessment of all available information relating to relevant facts, such as the duration and continuity of presence on the territory of the Member States concerned and the person's situation. It suggests that assessment should consider the nature and the specific characteristics of any activity pursued, the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract; family status and family ties; the exercise of any non-remunerated activity or in case of students, the source of their income. Furthermore, the housing situation, how permanent it is and the Member State in which the person is deemed to reside for taxation purpose are important factors of the assessment.

[42] Habitual residence under European Union law, see Marinos v Marinos [2007] EWHC 2047 (Fam); 2 Family Law Reports 1018.
[43] Case Robin Swaddling v Adjudication Officer, C-90/97 [1999] ECR 1-1075, para 28-29.

Finally, the person's intention and the reasons that led the person to move, shall be decisive for establishing that person's actual place of residence.

National laws determine whether a person meets the conditions for affiliation to its social security system, for example, through thresholds for making contributions or being insured.[44]

The UK has implemented the habitual residency under the 'right to reside' test discussed in chapter Three.

Regulation 492/2011 on freedom of movement of workers within the Union

Regulation 492/2011, which superseded Regulation 1618/68, aims to secure and guarantee the equal treatment of migrant workers as regards access to social benefits, as enshrined in primary law, mainly in Article 45 TFEU. The Regulation specifically refers to "social advantages," defined in Art. 7(2) of Regulation 492/2011 and has been interpreted by the CJEU very broadly.[45] The term covers not only all benefits connected with contracts of employment, but also all other advantages, which are open to citizens of the host Member States and consequently are also open for workers primarily because of their objective status as workers or by virtue of the mere fact of their residence.

Access to social benefits in the host Member States is not seen as unconditionally available for all migrating EU citizens and members of their families. Therefore, consequently, as regards workers and members of their families, who prove to be genuinely active in the labour market of the host Member State, they are entitled to social benefits in this State. However, in relation to other groups of migrants, depending on the nature of certain benefits, it is possible to require from them to have a certain degree of economic integration in the host Member State to be entitled to certain benefits.

Regulation 492/2011 is directly applicable in all Member States and refers to social payments available to workers, but in practice, it is often difficult to classify

[44] Overview of 'Right to reside' cases is presented in SSWPv IA [2009] UKUT 35 (AAC); White, Robin C.A., The new European social security regulations in context, Journal of Social Security Law, 2010, 17 (3), pp. 144-163.
[45] E.g. Case Sala C-85/96, Case Hoekstra C - 75/63, Case Commission v. Netherlands C-542/09. [208] Discussed further on in this chapter.

certain social security benefits as social advantages as defined in this Regulation This distinction between social security and social advantages is challenging task to do because of quite broad meaning of those terms and complexity of social security systems that are designed by individual Member States.

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (The Citizenship Directive)

The Directive sets out the free movement rights and entitlements for EU citizens accordingly to their status.[46] In addition, with a view to facilitating the freedom of movement of persons, it grants dependent rights to their family members.[47]

The material scope of this instrument focuses on social assistance benefits that can be defined as financial support provided by the State at its discretion based on needs regardless of length of employment, affiliation or insurance, but requires some individual assessment.[48]

The Citizenship Directive recognises the free movement rights, including right to social assistance, respectively as per (economic) status, namely: worker, self-employed, student, self-sufficient person, and also, accordingly to the time of residency in the hosting country: up to three months, over three months or over five years.

Under Article 14(1) of the Directive, the initial three-month right of residence is dependent on EU citizen and family members not becoming an unreasonable burden[49] on the social assistance system of the host Member State. Member States are permitted under Article 24(1) of the Citizenship Directive 2004/38/EC to decide whether to give access to any social assistance during these first three

[46] The Citizenship (Free Movement) Directive 2004/38/EC.
[47] Non-EU citizens may also benefit where they are attached to an EU-based company which crosses a border in order to provide services in another Member State: Case C113/89 Rush Portugesa v Office National d'Immigration [1990] ECR I-1417.
[48] See: Case C – 139/82 Piscitello v INPS [1983], ECR I-1427.
[49] See case Brey.

months of residence (or for such longer period of entitled initial residence in the case of EU job seekers) to EU citizens.[50]

Article 7(1) of Directive 2004/38 provides that EU citizens and their family members, who either have sufficient resources (including comprehensive health insurance cover[51]) for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence or study, or who are workers or self-employed persons in the host Member State, shall have the right of residence for a period of longer than three months.

Finally, in Article 16(1) for EU citizens to claim a right of unconditional permanent residence in the host Member States for themselves and their families after a continuous period of five years without becoming subject to any expulsion measure or any economic conditions.[52]

An access to social assistance benefits regulated by the Directive depends on the relevant status of EU citizen that needs to be recognised by the decision makers and is very restrictive in its application towards non-British EEA nationals under free movement rules.[53]

Selected case law of the Court of Justice on the free movement of persons and their right to social security

Free movement of persons who are entitled to secure their social security rights, was frequently reviewed by the Court of Justice that has taken distinguished approach towards EU citizens. This treatment had direct impact on the legal practices in individual Member States. This research considers these issues leading to non-compliance with EU law and reveals a complicated nexus of interrelated elements that affect the rights implementation.

[50] Case C-292/89 Antonissen [1991] ECR I – 745.
[51] See W (China) v Secretary of State for the Home Department [2007] 1 WLR 1514 (EWCA) for a discussion as to whether this is a requirement for private health care insurance. In 2012 the Commission addressed a reasoned opinion to the UK, requesting it to consider NHS cover as sufficient sickness insurance when assessing whether a non-active EU citizen has a right to reside in the country.

[52] See: Joined Cases C-424/10 and C-425/10 Ziolkowski and Szeja [2011] ECR I-14035, para. 46; Case C162/09 Secretary of State for Work and Pensions v Taous Lassal [2010] ECR I-NYR.
[53] Further implications are discussed in Chapter Three and Four.

The selected cases have been chosen for the following reasons:

Swaddling case as it sets out the habitual residency concept applied to social security rights;

Case Brey as the proportionality principle and 'unreasonable burden' is discussed while assessing an entitlement to social assistance rights;

Baumbast, Chen and Zambrano case as it represents the direct effect of article 21 TFEU, that made it possible for EU citizens to rely on.[54]

These cases are briefly discussed in turn.

Swaddling case sets out the criteria of the habitual residence test. The Court added that the definition of residence laid down in Art. 1(h) of Reg 1408/71/EC (now Reg 883/04/EC) "has a Community-wide meaning."[55]It recalled and summarized the criteria established in Di Paolo and Knoch: The phrase "the Member State in which they reside" … refers to the State in which the persons habitually reside and where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances.[56] This assessment has to be made in each individual case concerning social security benefits.

In Brey, the Court went on to hold that the fact that an economically inactive EU citizen may be entitled to a means-tested benefit could be an indication that they do not have sufficient resources to avoid becoming such an unreasonable burden.[57]

However, that conclusion cannot be arrived at automatically. The Court held that there must be an individual examination of the burden *which 'granting that benefit would place on the national social assistance system as a whole, by*

[54] Sala case was the first case that opened the wave of genuine recognition of legal rights based on EU citizenship.
[55] Case C-90/97 Swaddling [1999] ECR, I-1075, para. 28.
[56] Swaddling, para. 29.
[57] Para 68.

reference to the personal circumstances characterising the individual situation of the person concerned'.[58]

At paragraph 77 the Court was clear that an automatic decision that a claimant who meets the means test for a benefit such as the compensatory supplement does not have a right to reside is unlawful as it precludes the necessary inquiry into the individual circumstances of the claimant:

'Such a mechanism, whereby nationals of other Member States who are not economically active are automatically barred by the host Member State from receiving a particular social security benefit, [...], does not enable the competent authorities of the host Member State, where the resources of the person concerned fall short of the reference amount for the grant of that benefit, to carry out – in accordance with the requirements under, inter alia, Articles 7(1)(b) and 8(4) of that directive and the principle of proportionality – an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned.'

Moreover, it added some more meaning on 'unreasonableness' taking into account those statements that assume that it would be impossible that a single individual claimant can become unreasonable burden on the finances of a whole Member State[59], and also those which suggested that the total number of benefit claims made by Union citizens in a host Member State could become 'unreasonable' for the host Member State's welfare system.[60]

The Court cited Brey's findings in case UK v European Commission that concerned the family benefits claimed by EEA nationals in the UK and cited that there is 'nothing to prevent, in principle, the granting of social benefits to Union citizens, who are not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State'.[61] On the basis of this sentence, it decided that

[58] Para 64.
[59] Kay Halbronner (2006), Union citizenship and social rigths, in: Jean- Yves Carlier and Elspeth Gild(eds.), The future of free movement of persons in the EU, Antwerp,: Bruylant,p. 65-79; Dorte Sindbjerg Martinsen (2007), The social policy clash:EU cross border welfare, Union Citizenship and national residence clauses, paper prepared for the EUSA Tenth Biennial International Cobnference, Montreal, 207.
[60] S. O'Leary, "Free movement of persons and services", p. 518.
[61] Brey, para 44.

disadvantageous treatment can be applied to family benefits. However, case Brey strictly related to social assistance benefit[62], as identified by the Court. Family benefits discussed in case Commission v the UK are social security benefits within the material scope of Regulation 883/04/EC, which aims to ensure that social security payment is made to EU citizens by their country of habitual residence, as comprehensively explained by the Court in case Swaddling. The Court never checked whether the right to reside, that is the gateway to access to social security for EEA nationals, is proportionate. This surprising outcome was published days before the Brexit referendum and could be seen as an encouragement for the UK's voters to vote to stay in the EU knowing that EEA nationals could be excluded from the UK's family benefits.

In Baumbast, the Court ruled that a citizen of the Union who no longer enjoys a right of residence as a migrant worker in the host member state, and thus no longer falls under the scope of what is now Directive 2004/38, can still enjoy a right of residence in the host member state as he is a citizen of the Union, and can directly on Article 21 TFEU. The limitations and conditions that article 21 TFEU is subject to according to the Treaty, must be interpreted and applied in accordance with Union law, in particular the principle of proportionality. [63]

After the Baumbast ruling, the Court confirmed in the Chen ruling that article 21 TFEU confers a directly effective right of residence on Union citizens, even when they do not fall within any other existing EU status category, as the citizen central to this case was a new-born baby. The Chen case revolved around the granting of residence rights to a Chinese mother in the United Kingdom based on the Irish nationality of her baby daughter. It was more usual for dependent relatives in accordance with article 2(2)(d) and 7(2) of 2004/38 to derive a right of residence through the EU citizenship of their provider, but in the case of Chen the reality was the other way around, with the EU citizen being dependent on a third country relative to reside in the member state. The Court eventually ruled that a refusal to grant a right of residence to the mother of EU citizen, who is the primary

[62] Regulated by Citizenship Directive 2004/38/EC.
[63] C-413/99 Baumbast, para 94.

caretaker of this citizen and enjoys sufficient resources and health insurance, 'would deprive the child's right of residence of any useful effect'.

Genuine or inclusive treatment of EU citizens can be observed in case Zambrano,[64]where the Court held that Article 20 TFEU was to be interpreted as meaning that it precluded a Member State from refusing a third country national and therefore, his children, who were Belgian and hence European Union citizens, who were dependent on claimant, a right of residence in Belgium as the Member State of residence and nationality of those children, and from refusing to grant a Belgian work permit to that third country national, in so far as such decisions deprived those children of the genuine enjoyment of the substance of the rights attached to their status as European Union citizens. Thus, the Court interpreted EU citizenship right set out in Article 20(2)(a) TFEU 'to move and reside freely within the territory of the Member States' as conferring — as a matter of EU law — on each and every EU citizen a primary right of residence within the Member State, of which the EU citizen was also a national, and from which the EU citizen's relatives could also derive secondary rights of residence, within that State without need for any prior exercise of EU free movement rights to other Member States. [65] The Court stated that 'Citizenship of the Union is intended to be the fundamental status of nationals of the Member States. … In these circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.'

Article 21(2) TFEU gives the legal basis for the EU legislature 'to adopt provisions with a view to facilitating the exercise' of the right 'to move and reside freely within the territory of the Member States'.[66]

As a result, national measures need to fit into EU law reflecting European citizenship and should give every opportunity to its holders for 'genuine enjoyment' of free movement rights, including the right to social security. At the

[64] Case C-34/09 Zambrano v Office national de l'emploi (ONEm) [2011] ECR I-nyr, para 41-2.
[65] In Case C256/11 Murat Dereci and others v. Bundesministerium für Inneres 15 November [2011] which concerned the situation of five applicants all third country nationals wishing to reside in Austria with his/her Austrian family member. None of the applicants' family members had exercised their right to free movement within the EU. See: para 68.
[66] On the other hand, in Case C-434/09 Shirley McCarthy v Secretary of State for the Home Department 5 May, [2011] ECR I-nyr, the CJEU held that Article 21 TFEU is not applicable to a Union citizen who has never exercised his/her right of free movement.

same time, this treatment would enable those nationals, who find themselves in the same situation, to enjoy the same treatment in law within the area of application, rationale and material of the Treaty, irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard.[67] In this meaning, the citizenship principle strictly connects with the prohibition of discrimination and equal treatment of its holders.

As can be discerned from this case law, Art 21 TFEU does create and confer a directly effective right for Union citizens to appeal to. This directly effective right expands the rights conferred to Union citizens, making it possible for non-economically active persons to move and reside in another member state because of their capacity as Union citizens. This marks a change for Union citizenship that is more inclusive and less market oriented.

In selected cases recalled above, we can observe often contradictory messages flowing from the rulings of the Court of Justice. In several decisions, the Court highlighted the fundamental status of EU citizens who were able to rely on their status to access legal rights. In others, more recent ones with market-orientated dimension, it excluded EU citizens from social rights, completely undermining the value of EU citizenship concept itself. Those actions are striking at the principle of legal certainty and legitimate expectation for persons who exercise their free movement rights. An extra obstacle in accessing the social rights was created by the transitional regime applied to A8 and A2 nationals during their transition phases.

4. Transitional regime for A8 nationals and A2 nationals

4.1. Introduction

The personal scope of this study is focused on A8 and A2 nationals (now EU nationals) who were initially subjected to the transitional framework. Thus, it is crucial for this research to be familiar with this legal regime applied to these

[67] Joined Cases C-76/05 & C-318/05 Schwarz and another v Finanzamt Bergisch Gladbach; European Commission v Germany [2007] ECR I-6849; C-184/99 Grzelczyk v Centre Public d'aide sociale d'Ottignies – Louvain-la-Neuve [2001] ECR-6193; C-413/99 Baumbast and R. v Secretary of State for the Home Department ECR I-7091; C-224/98[2002] D'Hopp v Office national de l'emploi ECR I – 6191.

groups of EU nationals, to understand the UK's interpretation of those legal regimes in Chapter Three and then, to practically assess them in Chapter Four.

The transitional provisions have been proposed by the European Commission to address concerns regarding the free movement of workers within the context of the EU's enlargements.

4.2. Transitional provisions for A8 nationals

From 1st of May 2004 to 30th of April 2011 transitional restrictions were applied to A8 nationals coming from the Czech Republic, Poland, Latvia, Lithuania, Estonia, Hungary, Slovakia, and Slovenia.[68] The specific measures were included in the Treaties of Accession and its Annexes applicable to each A8 Member State. They allowed for derogation from the rules facilitating the freedom of movement, which Member States had the option to implement during a seven-year transitional period. According to the Accession Treaties, the old Member States could have applied the derogations for an initial period of two years, with A8 countries being permitted to impose reciprocal restrictions on old 15 EU countries.

The United Kingdom along with Sweden and Ireland, decided not to apply restrictions on A8 nationals allowing full access to the labour market. However, the UK introduced its own additional measures restricting access to social security rights and these are explored further in the next chapter.

The purpose of derogations was to protect the employment markets of the old Member States from an influx of workers from the new Member States. Annex XII of each Accession Treaty provided an exhaustive list of specific EU provisions, which a Member State might have derogated from for the specified period. Paragraph 1 of Annex XII of the Accession Treaty for Poland, for instance, provided that Article 45 TFEU, in relation to the freedom of movement of workers only applied subject to the transitional provisions laid down in paragraphs 2 to 14.

Paragraph 2 of Annex XII provided for derogation only from Articles 1 to 6 of Regulation 1612/68, which dealt exclusively with the rules governing access to the host Member State's labour market. Therefore, it can be interpreted that Article

[68] Malta and Cyprus also joined the Eu in 2004, but those countries were exempted from the scheme.

45 TFEU, concerning workers and all attached rights and obligations that go with it, would have applied in full, except for these substantive provisions of the regulation.

The formula foreseen to control access to labour markets, and provided by the Annexes, was divided into three phases. The initial time for the application of national restrictions was two years, however, it could have been extended up to seven years. The EU foresaw the suspension of the free movement rights in the first two-year term just after accession. After this period, the Council was meant to review the situation in the field of free movement on the basis of a report from the Commission, which was notified by the Member States 'whether they [would] continue applying national measures or measures resulting from bilateral agreements, or whether they [would] apply Articles 1 to 6 of Regulation (EEC) No 1612/68'.[69] It is important to note that in the absence of such notification, the Regulation would have started to apply automatically, marking the end of the limitations imposed on free movement. In the case a notification on application of the national measures was submitted to the Commission, the second stage would have lasted for three years, during which the transitional restrictions still applied.

Upon expiry of the five-year transitional period, the Member States still had an opportunity to extend the application of the national measures, by submitting a notification to the Commission, which was similar to that submitted after the expiration of the first two-year period.[70] In such a case, the transitional period was extended to seven years. In the absence of such notification, Articles 1 to 6 of Regulation 1612/68 would have applied automatically. Concerning the second notification, the Annexes stated that it might have been submitted 'in case of serious disturbances of [the Member State's] labour market or a threat thereof'.[71] However, there was no obligation for the Member States to substantiate the claim that the threat to or disturbance of their labour market was real. Particularly, the Accession Treaties stated that: "When a Member State […] undergoes or foresees disturbances on its labour market, which could seriously threaten the standard of living or level of employment in a given region or occupation that Member State

[69] 2003 Act of Accession, Annexes V, VI, VIII, X, XIV – Art. 1(1); Annexes IX, XII, XIII – Art. 2(3).
[70] Ibid, Annexes V, VI, VIII, X, XIV – Art. 1(1); Annexes IX, XII, XIII – Art. 2(5).
[71] Ibid.

shall inform the Commission and the other Member States thereof and shall have supplied them with all relevant particulars. Based on this information, the Member State may request the Commission to state that the application of Articles 1 to 6 of Regulation (EEC) No 1612/68 be wholly or partially suspended in order to restore to normal the situation in that region or occupation."[72]

The Annexes further stated that the suspension could have been effected with an ex-post notification of the Commission.[73] Interestingly, by leaving it totally to the Member States to regulate the application or non-application of EU law to European citizens holding a nationality of the new Member States, the Acts contradicted the idea behind the EU's free movement policy.[74] The Annexes to the 2003 Act of Accession contained provisions enabling Member States to suspend the free movement of the new Member States' citizens preventing them from exercising their Treaty rights to move and reside freely. In consequence, dividing the Union citizens into two very distinct classes, de facto temporarily discriminated on grounds of nationality, and presented the idea of EU citizenship as a meaningless concept for the nationals coming from the accession States.

4.3. Transitional provisions for A2 nationals

Transitional restrictions were legally binding on A2 nationals coming from Bulgaria and Romania- countries that joined the EU on 1 January 2007 and applied up to 31st of December 2013. The specific provisions are outlined in Accession Treaty 2005 and its Annexes.

From 2007, A2 nationals can exercise their free movement rights in the EU. However, the terms of their Accession Treaties allowed the old Member States to impose restrictions on the free movement rights of Bulgarian and Romanian 'workers' for up to seven years following accession, to prevent disruption of their labour markets.[75]

Transitional restrictions could have been applied against other categories of A2 nationals, such as 'self-sufficient' or 'self-employed' persons.

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[72] Ibid, Annexes V, VI, VIII, X, XIV – Art. 1(7) (2); Annexes IX, XII, XIII – Art. 2(7) (2).
[73] Ibid, Annexes V, VI, VIII, X, XIV – Art. 1(7) (3); Annexes IX, XII, XIII – Art. 2(7) (3).
[74] Farkas and Rymkevitch (2004), at 371.
[75] Discussed further in Library standard note SN 4171 In brief: Restrictions under the EU Accession Treaty for Romanian and Bulgarian workers (October 2006).

The transitional restrictions, which were similar to those binding A8 nationals, were split into three phases.

For the first two years after accession (1 January 2007 - 31 December 2008) Bulgarian and Romanian workers' access to labour markets in other Member States depended on those states' national laws and policies.[76]

Member States could have continued to apply their national restrictions for a further three years (1 January 2009 - 31 December 2011) if they notified the European Commission of their intention to do so.

The old States could have extended the restrictions for a further two years (1 January 2012 - 31 December 2013) if they had experienced or anticipated "serious disturbances" in their labour markets and notified the European Commission. Member States could have lifted their transitional restrictions at any stage during the seven-year period or could have chosen not to apply any restrictions.

Under a 'safeguard' clause in the Accession Treaties, an old Member State could have re-introduced restrictions previously lifted during the seven-year transitional period in the event of a serious disturbance in the labour market. This option has been used by Spain, which invoked the safeguard clause on 28 July 2011 in order to reintroduce restrictions on Romanian workers' access to its labour market (which it had previously lifted in 2009).[77] However, the Accession Treaty did not include emergency provisions that would have allowed transitional restrictions to continue for longer than seven years. Therefore, all Member States had to end their transitional restrictions on A2 workers by the end of 2013.

5. Concluding remarks

As noted above, the limitations that applied during transitional phases, were included in the Acts of Accession and for that period targeted 'the core and origin of European citizenship' – the free movement right.[78] According to the Annexes V, VI, VIII, IX, X, XII, XIII and XIV to the 2003 Act of Accession, and Annexes VI and VII

[76] The 'standstill clause' in the accession treaty provides that Bulgarian and Romanians' access to Member States' labour markets cannot be any more restrictive than was the case when the accession treaty was signed (25 April 2005).
[77] See European Commission press releases, "The Commission accepts that Spain can temporarily restrict the free movement of Romanian workers", 11 August 2011; "Commission authorises Spain to extend existing temporary restrictions on Romanian workers", 21 December 2012.
[78] On the importance of the free movement right among other citizenship rights in the EU legal system see e. g. White (2005).

to the 2005 Act of Accession, the application of Articles 39 and 49(1) EC (now Art 45 and 55 TFEU) to the new Member States nationals was suspended, as part of the transitional measures.[79] A certain 'free movement' only existed for the new Member States nationals, willing to work temporarily, as defined in Article 1 of Directive 96/71/EC.

Since 1st May 2011 - A8 nationals, and since 1st of January 2014 – A2 nationals, are no longer restricted in their access to labour markets and state support systems within the territory of the European Union. Hence, those EU citizens are entitled to enjoy the same free movement rights as other European Union nationals.

It is important to note that whereas EU law on free movement of Union citizens (Directive 2004/38/EC) does allow Member States to limit access to social assistance, EU rules on social security do not permit for restrictions on social security benefit for EU nationals that are workers, direct family members of workers or habitually resident in the hosting Member State. This means that EU citizens should be able to access the latter category of benefits at the country of their habitual residence.[80]

The UK kept the employment market opened to accession states' workers from the very beginning, but concurrently, it has introduced additional legal tools that prevented or made it more difficult to access rights to social security. More details are provided in the next chapter.

[79] On the more detailed analysis of the transitional measures related to the free movement of workers included in the 2003 Act of Accession see Adinolfi (2005) and Farkas and Rymkevitch (2004). Act of Accession, Annexes V, VI, VIII, X, XIV – Art. 1(1); Annexes IX, XII, XIII – Art. 2(1).
[80] Further discussion in Chapter Three and Four.

Chapter Three: The Legal Regime for A2 and A8 Migrants

1.Introduction

The previous chapter sets out the law on EU free movement of persons as the areas under consideration of this study. It identified the main legal provisions and some challenges and requirements placed on all Member States hosting EU citizens exercising their free movement rights, and it explained EU transitional regime designed to monitor any potential disturbances of the labour markets caused by accessions in 2004 and 2006.

This chapter goes further to more local level and focuses on the UK's specific legal regime applicable to A2/A8 migrants during/post transitional periods. It refers to the relevant socio-economic and political factors.

Firstly, it starts with the transitional regimes applied to A8 and A2 nationals and refers to the political and socio-legal factors having a direct impact on the introduction of those measures. This is very important as its implications on practical access to social benefits is presented in the next chapter. Secondly, it lists the extra measures introduced towards all EU nationals after the transitional regimes expired. Finally, it discussed challenges around the UK's habitual residency test.

2. Transitional regime applied to A8 nationals

On 1 May 2004, ten new countries joined the European Union. During the negotiations about enlargement there was a debate across the EU about the implications of this expansion. As already pointed out in the previous chapter, as a result, existing Member States were given a transitional period, during which they could restrict the entry of people from the accession countries - which would normally be against EU rules on freedom of movement.

At the end of 2002, the UK Government announced that it would not take advantage of this transition period but would allow access to the UK labour market from the first day of accession. In 2003 there were many articles in the newspapers predicting that large numbers of people in the Eastern European accession countries were planning to come to Britain to claim benefits.

The UK chose to open the borders freely to A8 nationals as the British Government has seen this move as a chance to fill up the skills gap in the UK. The choice was

based on the UK government's view that the economy would benefit from the free movement of EU citizens originating in the new Member States. It stated:

'It makes sense for citizens of the new Member States to be able to work, contribute to the economy and pay taxes. They will expand the range of skills and supply of workers in the UK economy. It is true that some other Member States will not open their labour markets. It is because their markets are less open and less flexible than ours that they perform less well.'[81]

In light of the above, one would assume that imposing no restrictions to access the labour market would translate into an equal access to welfare rights dictated by the free market rules. However, this was not the case.

In February 2004 David Blunkett, the Home Secretary, announced changes that affected people from eight of the ten countries joining the EU (Cyprus and Malta were not in this group, and people from these two countries had the same treatment as people from existing Member States). There were two important changes that have affected people from the A8 countries since May 2004

- A new Worker Registration Scheme, and
- An amended Habitual Residence Test for means-tested benefits.

The UK imposed a more restrictive right-to-reside test towards A8 nationals who had to pass their right to reside test before they could access any social benefits. Additionally, these nationals had to satisfy the transitional criteria regulated by the Accession (Immigration and Worker Registration) Regulations 2004.

The stricter right to reside test[82] became legally binding for all EU nationals and it came into force on the same day that a Worker Registration Scheme (WRS) was introduced, which granted conditional access to the British labour market to workers from Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia. The effect of the 2004 amendments was that an A8 national who was required to register with the WRS, was treated as habitually resident in the UK, but only if he/she had a right to reside. Job seekers and those who are economically inactive – such as students, pensioners, or lone parents

[81] Baroness Scotland of Asthal, HL Debate Col 481 23 April 2004.
[82] Discussed further on in this chapter.

during the transitional period – had a right to reside provided they had sufficient resources to avoid becoming a 'burden' on the social assistance system.

The 2004 Regulations contained the national measures applied by the United Kingdom to workers from A8 countries in accordance with the derogation contained in the Accession Treaty. Regulation 7 of the 2004 Regulations provided that an "accession State worker requiring registration" was only permitted to work in the United Kingdom whilst working for an authorised employer and that person was required to register this employment within one month of starting work. Regulation 2(4) of the 2004 Regulations provided that such a person ceased to be an accession State worker requiring registration if he was legally working in the United Kingdom without interruption for a period of 12 months during the accession period. During that time, Regulation 5(2) stated that the person would have been treated as a worker for the purposes of the 2006 Regulations and those Regulations would apply accordingly[83].

The official purpose of the scheme was "to monitor the impact on the labour market of workers from A8 countries."[84] There was no more detailed explanation of the rationale for the scheme.

There was no restriction on the right of A8 nationals to work and settle in the United Kingdom, subject to the WRS. However, the registration scheme was merely designed to monitor how many workers were present in the UK and to identify the industries in which they were employed. The Scheme has not fulfilled its intended aim. In consequence, the WRS that was in principle merely an administrative hurdle to enable a counting exercise, acted as a barrier to accessing social security rights, as illustrated in the next chapter.

The UK granted free movement to A8 citizens without restrictions to access labour market and that is why many workers and employers were not aware of any extra requirement to register, as they were employed regardless of any extra paperwork.

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[83] http://www.legislation.gov.uk/uksi/2011/544/made; retrieved on 08/03/2013. See also: Explanatory memorandum to the Accession (Immigration and Worker Registration) (Revocation, Savings and Consequential Provisions) Regulations 2011.

[84] Review of the UK's transitional measures for nationals of member states that acceded to the European Union in 2004, Migration Advisory Committee Report, April 2009.

3. Transitional regime applied to A2 nationals

In 2007, following an unexpected inflow of EEA immigrants that had doubled net migration since 2004, the UK Government introduced strict immigration rules for citizens of Romania and Bulgaria and temporary restrictions in both work and social protection rights.[85] The Eurozone crisis, an increase in the unemployment rate and voices about 'benefit tourism' in the media played a significant role in introduction of further restrictions towards A2 migrants.

The transitional conditions, applied to Romanian and Bulgarian nationals, had a similar format to those binding A8 nationals. However, the measures were more restrictive than those applied to the A8 nationals. According to the Accession (Immigration and Worker Authorisation) Regulations 2006, which came into effect on 1 January 2007, A2 nationals needed to obtain an authorisation document prior to starting an employment in the UK. It would have been a criminal offence if they did not comply with these legal obligations.[86] A Romanian or Bulgarian citizen was defined by the regulations as an "accession State national subject to worker authorisation" in similar circumstances to A8 nationals. If a Romanian or Bulgarian was exempt from worker authorisation[87], the normal rules under the Immigration (European Economic Area) Regulations 2006 applied.

The Coalition Government that came to power in 2010 adopted a much tougher stance on immigration and access to social protection rights than its predecessor, as the increased flux of migrants in previous years pushed immigration to the top of the political agenda, together with an increasingly dominant political and media discourse on 'benefit tourism'.[88]

The complex transitional measures introduced by the UK strongly limited access to social security rights by those groups of migrants. Illustration of the varied issues around the practical application of those transitional regimes while claiming the social security rights is presented in the next chapter.

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[85] Shutes, I. (2016). Work related conditionality and the access to social benefits of national citizens, EU and non-EU citizens. *Journal of Social Policy, 45*(4), 691–707.
[86] Regulation 12 and 13 of the Accession (Immigration and Worker Authorisation) Regulations 2006.
[87] See: Regulation 2 of the Accession (Immigration and Worker Authorisation) Regulations 2006.
[88] Carmel, E., & Sojka, B. (2018). Social security and the management of migration. In J. Millar & R. Sainsbury (Eds.), *Understanding social security* (3rd ed.). Bristol: Policy Press.

4. Introduction of additional measures after the transitional regimes expired.

Due to concerns about the impact of lifting transitional restrictions on the rights of Romanian and Bulgarian nationals to work in the UK from 1 January 2014, the UK Government introduced extra measures to limit access to social benefits for all EU migrants[89] and to address what then Prime Minister David Cameron described as "the magnetic pull of Britain's benefit system."[90]

These included the introduction of a more rigorous 'habitual residence test' and several restrictions in accessing non-contributory benefits.

The main reforms included the following solutions:

- a "stronger, more robust" UK Habitual Residence Test for those claiming means-tested benefits (EU habitual residency test still applies to all EU Member States);[91] This contrasts with the EU habitual residency test which still applies.

- three months 'living in' rule for persons coming to the UK before they can claim income-based Jobseeker's Allowance;[92]

- EEA jobseekers or former workers need to show that they have a 'genuine prospect of finding work' and they need to provide 'compelling evidence' to continue to get JSA after three months (and if applicable, Housing Benefit, Child Benefit and Child Tax Credit). For those with a right to reside as a jobseeker the test is now applied after three months. There is no need for this the UK's extra measure as EU law advises about required proof of seeking work and having a chance for engagement with labour market, but the Citizenship Directive does not require the evidence to be 'compelling'.

- a new minimum earnings threshold to help determine whether an EEA national is or was in "genuine and effective" work, and so has a "right to reside" as a worker or self-employed person (and with it, entitlement to benefits);[93]

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[89] The Social Security (Habitual Residence) (Amendment) Regulations 2014; the Immigration (European Economic Area) (Amendment) (No.2) Regulations 2013 (S.I. 2013/3032).

[90] Kennedy, S. (2015a). *Measures to limit migrants' access to benefits* (House of Commons Library Briefing Papers, SN06889).

[91] This was not needed as the EU Habitual Residency Test has been already comprehensively explained in case Swaddling.

[92] The claimant should be covered by the Regulation 883/04/EC and Regulation 987/09/EC that should identify competent State to prevent losing an entitlement as a result of moving to another EU country.

[93] The worker status under EU law has been defined and the CJEU's case law presented in Chapter Two. This was to remind about comprehensive assessment required in each individual case to verify

- new EEA jobseekers, who made a JSA claim after April 2014, have been prevented from accessing Housing Benefits. This rule also concerns long-term residents whose circumstances have changed due to for instance job loss.[94] (This treatment contradicts Article 9 of Regulation 492/2011, which concerns the equal rights in terms of housing and provides that "worker (...) shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs).

- new jobseekers arriving in the UK would need to have lived here for three months to claim Child Benefit and Child Tax Credit.[95]

Most of those changes are included in Regulations in force from 1 January 2014[96] that amended the Immigration (European Economic Area) Regulations 2006 (EEA Regulations). From 10 June 2015, EU jobseekers have also been prevented from claiming Universal Credit, which is treated as social assistance benefit and for that reason is very restrictive in its application towards non-British EEA nationals.

Implementation of extra measures towards all EU citizens shows great resistance of the Member State to recognise an entitlement to social rights as an integral part of the free movement rights. Moreover, an introduction of additional limits towards well-settled EU citizens strikes at the principle of equality and legal certainly as people do not know what to expect and this makes them vulnerable.

Immigration and migrants' access to social protection were core political issues during the EU membership referendum campaign, and popular opposition to immigration was often argued to be a key factor in explaining the referendum results.[97]

5. Challenges around the UK's habitual residency test

As highlighted in the previous chapter, the EU's habitual residency test in the light of Regulation 987/2009 and the Swaddling case applies to social security and special non-contributory benefits within the material scope of Regulation

'worker' status that should be interpreted broadly to guarantee effective exercise of the free movement rights.

[94] This also strikes at the principle of legitimate expectation.

[95] Regulation 883/04/EC and Reg. 987/09/EC would need to identify a competent State.

[96] The Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2013 No. 3032.

[97] Clarke, H. D., Goodwin, M., & Whiteley, P. (2017). Why Britain voted for Brexit: An individual-level analysis of the 2016 referendum vote. *Parliamentary Affairs, 70*(3), 439–464.

883/04/EC. Social assistance benefits, on the other hand, are regulated by Directive 2004/38/EC that provides entitlements to those holding the status listed in Regulation 7.

The data set, collected for this study and analysed in the next chapter, identified this test, more specifically issues associated with the transitional regime, as the main obstacle in the way of accessing the social security and social assistance rights by EU nationals exercising their free movement rights in the UK. Thus, the design of the UK's social security system and the right to reside test is discussed next.

5.1. Design of social security system in the UK

This section briefly explains the classification of benefits in the UK[98] and the process of administration of the benefit claims.

Generally, social security system in the UK includes:

- the National Insurance Scheme, which provides cash benefits for sickness, unemployment, death of a partner, retirement for people who earn entitlement to these benefits by paying National Insurance contributions;

- the Child Benefit and Child Tax Credit schemes, which provide cash benefits for people bringing up children;

- non-contributory benefits for certain categories of disabled persons, pensioners or carers;

- the statutory payments made by employers to employees when their child is born or placed for adoption.[99]

Within the social security system, some social security benefits are contribution – based, which are dependent on the level of the national insurance contributions paid by the claimant. The social assistance benefits and those of mixed kind are fully funded from the public funds.

[98] Further details can be found in Appendix III that specifically groups the main UK social security and social assistance benefits.
[99] Your social security rights in the United Kingdom, European Commission, 2011.

The mixed type of benefits in the UK were listed in Annex X of Regulation 883/04/EC (amended by Regulation 988/09/EC[100]) and include State Pension Credit; income-based Jobseekers Allowance, Disability Living Allowance mobility component and income-related Employment and Support Allowance. The latter benefit has replaced Income Support[101], which is now treated as social assistance; however, it remained in Annex II of Regulation 1408/71 and then Annex X of Regulation 883/04/EC up to May 2012.

The Annex containing special non-contributory benefits has been regularly reviewed. For instance, in case Commission v European Parliament and Council,[102] the Court of Justice ruled that UK carer's allowance, attendance allowance and care component of a disability living allowance[103] are not special non-contributory benefits, but sickness benefits within the material scope of Regulation 1408/71 (now Regulation 883/04/EC), which are exportable.

More recently, the Welfare Reform Act 2012 introduced the Universal Credit – new welfare benefit that replaces many benefits,[104] including income-based Jobseeker's Allowance, income-based Employment and Support Allowance, it therefore should be treated as a special non-contributory benefit. However, according to Statement by the Secretary of State for Work and Pensions in accordance with Section 174(2) of that Act 2012, Universal Credit is outside the scope of EU Regulation 883/04 and, as such, is not exportable. It is within the scope of other EU legislation and there is a concern that this benefit can be implemented in discriminatory way towards EU migrants who could be placed on disadvantageous position compared to UK nationals.

5.2. Administration of social security claims

The benefit system is administrated by the Department for Work and Pensions,[105]Her Majesty's Revenue and Customs[106] and local authorities[107]. In

[100] Regulation (EC) 988/2009 of the European Parliament and of the Council of 16 September 2009 amending Regulation (EC) No 883/2004 on the coordination of social security systems, and determining the content of its Annexes

[101] Income Support has been replaced by income-related ESA and is now rolled into Universal Credit.

[102] Case Commission v European Parliament and Council, C- 299/05 [2007] ECR I – 8695.

[103] Case Barlett, Ramos and Taylor v Secretary of State for Work and Pensions, C – 537/09 [2011].

[104] Including Income Support, Working Tax Credit, Child Tax Credit and Housing Benefit.

[105] E.g. Pension Credit, Carer Allowance, DLA/PIP, Jobseekers Allowance, Employment and Support Allowance, income Support.

[106] Working and Child Tax Credits, Child Benefit.

[107] Housing Benefit and Council Tax Reduction, Scottish Welfare Fund.

practice, the Secretary of State for Work and Pensions is responsible for decisions on social security benefit entitlement that are made by the delegated decision makers.

In addition to ordinary benefit process, every claim made by A8 and A2 nationals during their transitional phases needed to go through an extra examination to verify the rights to reside for social security purposes. The EU Enlargement Team in Wick played important role in this, particularly in, assessing the Habitual Residency Test for those groups of persons.

The claimant had a right to challenge the decision through the review request and the appeal process if an error in law was observed. The Appeal system is run by the Ministry of Justice through First-tier Tribunals and Upper Tribunals.

The Tribunals make decisions by applying the law relevant to a particular social security claim. The legislation, which the HM Court and Tribunals Service is taking into account, consists Acts of Parliament and Regulations, and the judgements of the Upper Tribunal and the courts.[108]

If the decision showed non-compliance or misinterpretation of the UK decision maker with EU law, the appeal can be heard by the First-tier and then Upper Tribunal Service, where applicable. The Tribunal Service is the legal body having competence in overturning decisions that are breaching EU law or when the full evidence was not considered to make decision that is correct in law.

5.3. Habitual residency test

To start with, it is worth explaining that all social benefits in the UK are conditional upon satisfying the 'presence' and 'residence' tests.

The presence test requires the person to be present in Great Britain at the time they make a claim for social benefit, and to continue to be present.[109] Some benefits are dependent on the time already spent in the UK, before the relevant benefits can be accessed.[110]

[108] Tribunals, Courts and Enforcement Act 2007.
[109] There are specific rules for temporary absences and rules for being treated as of residing in the UK.
[110] According to present rules, three months for JSA or 2years for DLA, PIP, for instance.

The residency for benefits purposes means that a person needs to be ordinarily or/and habitually resident in the UK.

A person is ordinarily resident if they are normally residing in the UK[111], and their residence is voluntary and for settled purposes as part of the regular order of their life for the time being, whether for short or long duration.[112] The concept of "settled purpose" has been developed by the courts.[113] There may be one purpose or several, it may be specific or general, and it may be for a limited period. More recently, the Upper Tribunal has also added on that the need for the residence has to be lawful.[114]

In addition to ordinary residency, the person also needs to be habitually resident in the UK for the purposes of means-tested benefits.[115]

As the UK Decision Maker Guidance states:[116]

"The habitual residence test applies to Income Support, Jobseekers Allowance (Income Based), Employment and Support Allowance (Income Related) and State Pension Credit.

A claimant who is not habitually resident in the Common Travel Area, is a person from abroad and has an applicable amount of nil for IS, JSA(IB) and ESA(IR)[117] and is treated as not in GB for State Pension Credit."[118]

From 8 April 2013[119], claimants of disability living allowance, attendance allowance, personal independence payment and carer's allowance must also be habitually resident in the UK. Prior to this change, the claimants were only required to be present and ordinarily resident in the UK.

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[111] With some exceptions.
[112] R(IS) 6/96, [CIS/1067/1995], para19.
[113] R v Barnet London Borough Council ex parte Shah [1983] 2 AC 309; GC v HMRC (TC)[2014] UKUT 251 (AAC).
[114] MS v SSWP (DLA) [2016] UKUT 42 (AAC).
[115] A means-tested benefit is a payment available to people who can demonstrate that their income and capital are below specified.
[116] DM Guidance, Vol 2 Amendment 29 October 2014.
[117] Regulation 21(3) & 21AA of IS (General) Regulations 1987; Regulation 85(4) & 85A of JSA Regulations 1996,; Reg 70(1) & Sch 5 Part 1 para 11 of ESA Regulations 2008.
[118] Regulation 2 of State Pension Credit Regulations 2002.
[119] Regulation 2 of Social Security (Disability Living Allowance) Regulations 1991 No. 2890; Regulation 16 of Social Security (Personal Independence Payment) Regulations 2013 No. 377; Regulation 9 of Social Security (Carer's Allowance) Regulations 1976 No. 409; Regulation 2 of Social Security (Attendance Allowance) Regulations 1991 No. 2740.

The Habitual Residence Test was introduced in 1994 as a measure preventing "benefits tourism" and is applied to all people unless they are exempt[120], including returning British nationals who have recently arrived in the country, and who claim certain means-tested social security benefits.[121]

Due to the accession of ten new Member States to the EU in May 2004, the United Kingdom introduced an additional criterion – the "right to reside" test. The government hoped that this new requirement would prevent abuse of the benefit system by people who came to the UK 'for more than a short period to live on benefits'[122] There also was a political objective of assuaging concerns among the UK electorate about 'the issue of mass immigration'.[123]

Since then, a person cannot be 'habitually resident' unless they have the 'right to reside' in the Common Travel Area.[124] In other words, an outcome of the right to reside test determines an access to social benefits.

The right to reside in the UK for EEA nationals is governed by the Immigration (European Economic Area) Regulations 2006,[125] which transposed Directive 2004/38/EC on the right of citizens of the Union and their families to move and reside freely within the territory of the Member States. Under the 2006 Regulations, EEA nationals who are exercising Treaty rights are 'qualified persons' if they fall within one of five categories, namely: jobseekers, workers, self-employed persons, self-sufficient persons or students.

Only a 'qualified person' or a permanent resident, and family members of

'qualified person' or permanent resident had/ have a right to reside in the UK.

The lawfulness of the right to reside test has been regularly challenged at national and EU level[126].

[120] Welfare benefits and tax credits handbook, CPAG, 2016, p. 1524.
[121] Adler,M. (1995). 'The Habitual Residence Test: a Critical Analysis', 2 Journal of Social Security Law 179; Roberts,S., 'A strong and legitimate link' The Habitual Residence Test in the United Kingdom', in: Langer,R., Sakslin, M. (2004) (eds.) Co-ordinating Work-based and Residence-based Social Security ,University of Helsinki, pp. 67-92.
[122] DWP (2004), para 8.
[123] Larkin (2005) at p.447.
[124] The United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.
[125] SI 2006/1003; amended by Regulations 2013.
[126] See caseload in the previous chapter.

For instance, in case Patmalniece [127], the UK Supreme Court upheld the lawfulness of making entitlement to "state pension credit" (a means tested non-contributory benefit for pensioners) dependent on a right to reside in the UK.

In this case, the appellant argued that the right to reside test resulted in nationality discrimination, in breach of Article 3 of Regulation 1408/71 (now Article 4 of Regulation 883/2004). Her argument was based on the fact that nationals of the UK and the Republic of Ireland automatically satisfy the test, but other EU migrants only pass it if they are exercising certain free movement rights under EU law. The Supreme Court unanimously rejected the Appellant's argument that the right to reside test amounted to direct nationality discrimination. The Court accepted (Lord Walker dissenting) that this justification was independent of the nationality of the persons concerned and thus did not create direct discrimination, which is incompatible with Union law. Although a form of indirect nationality discrimination, the right to reside in the UK test was said by the court to have the legitimate purpose of ensuring that only those who were economically or socially integrated within the UK should have access to the UK's social assistance system. Lord Walker, dissenting, found that the right to reside test constituted unjustified indirect discrimination, since it was probably aimed at discriminating against economically inactive foreign nationals on grounds of their nationality. The imposition of this test was said to achieve the legitimate aim of safeguarding the UK's social security system from exploitation by those who had not contributed to its funds.[128]

The European Commission disagreed with the outcome, and on 29 September 2011 issued a "reasoned opinion" giving the UK two months to abolish the "right to reside in the UK" test, keeping only the EU's "habitual residence" test, and specifically noted:

"The concept of habitual residence has been defined at EU level as the place where the habitual centre of interests of a person is located. The Commission considers that the criteria for assessing habitual residence are strict and thus ensure that only those persons who have actually moved their centre of interest to a Member State are considered habitually resident there. This is a powerful tool

[127] Patmalniece v Secretary of State for Work and Pensions [2011] 1 WLR 783.

[128] Ibid, para 74-79.

for Member States to make sure that social security benefits are only granted to those genuinely residing habitually within their territory.[129]"

Due to no action having been taken in relation to the above, the Commission decided to take the United Kingdom to the Court of Justice as EU nationals who reside in the UK could not claim specific social security benefits, such as Income Support, child benefit or child tax credit.[130]

The case Commission v UK [131] was finalized in 2016, where the Court looked at the right to reside for Child Benefit and Child Tax Credit purposes only.

Similar proceedings were planned to challenge the right to reside for Income Support purposes, however the UK managed to shift Income Support (previously special non-contributory benefit listed in Annex X of Regulation 883/04/EC) onto the list of social assistance benefits in 2012.[132]

The Court in this case noted that the UK indirectly discriminated against EEA nationals, but this could be justified on grounds of the need for protection of public funds, but no request was made to evidence the threat to public finances, for this aim to be accepted as legitimate.

Second, the Court did not ask whether the test being applied to family benefits was proportionate or appropriate itself, but instead, it asked whether the checks conducted as part of the test were proportionate.

Family benefits, which were discussed in case Commission v UK,[133] are social security benefits within the material scope of Regulation 883/04/EC, which aims to assure that social security payments are made to EU citizens by their country of habitual residence. However, the Court ruled that the Citizenship Directive 2004/38/EC can adopt a wider definition of social assistance, but the equal treatment provision in Regulation 883/2004 is bound by limitations of Directive

[129] European Commission - IP/11/1118 (29/09/2011) Social security coordination: Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific social benefits.
[130] European Commission – IP/13/475 (30/05/2013.
[131] Action brought on 27 June 2014 – European Commission v United Kingdom of Great Britain and Northern Ireland, Case C-308/14.
[132] See: Sibley,E. Widmann,M. (ed.), Welfare benefits for marginalised EU migrants: special noncontributory benefits in the UK, the Republik of Ireland and the Netherlands.
[133] C-308/14 European Commission v United Kingdom [2016].

2004/38. Moreover, the judgment imported the personal scope of Directive 2004/38 into Regulation 883/2004, which has wider personal scope[134]. This means that many claimants would be left with no family benefit entitlement in any country due to broken links with country of origin and lack of recognition of legal status in the hosting state. This kind of approach, if regularly applied, would directly strike at the fundamentals of the EU, such as free movement of persons, EU citizenship and equality principle.

As per existing primary and secondary law, there are no provisions to suggest that social security benefits fall within 'social assistance' under the Directive.

As already explained in the previous chapter, the aim of the Regulation 883/04/EC was not only to prevent overlapping of benefits, but also to prevent the situation where a person is not covered by any Member State's social security system due to their exercise of free movement rights.

EU law clearly states that the social security benefits in question have to be granted to people on condition of their habitual residence. Member States at EU level unanimously reaffirmed this condition and the criteria for the determination of habitual residence in 2009 as part of an update of the EU's rules on social security coordination.[135] According to these criteria, in order to be considered genuinely habitually resident in a Member State, a person has to show that his or her habitual centre of interest is located there.

Whereas EU law on free movement of Union citizens (Directive 2004/38/EC) does allow Member States to limit access to social assistance, EU rules on social security do not permit for restrictions on social security benefit for EU nationals that are workers, direct family members of workers or habitually resident in the hosting Member State. This means that EU citizens should be able to access the latter category of benefits at the country of their habitual residence. Comprehensive habitual residency test was defined in Swaddling, in which the court stated:[136]

"The phrase `the Member State in which they reside' in Article 10a of Regulation No 1408/71 refers to the State in which the persons concerned habitually reside

[134] See: Case Christine Dodl and Petra Oberhollenzer v Tiroler Gebietskrankenkasse, Case C-543/03 [2005].
[135] Regulation EC/987/2009 laying down the implementing rules for Regulation EC/883/2004 on the coordination of social security systems.
[136] Case Swaddling C 90/97 [1999], para 29.

and where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances."

The Court of Justice previously ruled that Member States were not free to make up their own definitions of residence for benefit purposes. It also held that, since the amendment of Regulation 1408/71 in 1992, residence had become a crucial factor in the coordination of social security systems, and it followed that it could not be acceptable to have 'marked differences in the meaning ascribed to the concept of residence by the various national systems. [..] The concept of residence is a Community notion and as such its meaning cannot be adapted to suit the unilateral and uncoordinated preferences of the various national systems'.[137]

The judgment in Swaddling remains good guidance on how to assess an entitlement to SNCB/ social security benefits. Furthermore, applying the extra conditions in the form of the UK right to reside test to each benefit claim, including social security and SNCB, would not be proportionate and interferes with EU law, leaving EU citizens with no access to social support while exercising the freedom of movement in the UK.

6. Conclusion

This chapter provides an overview of the relevant UK law that shows resistance of the Member State towards A8 and A2 nationals (now EU nationals) to recognise their right to social security while exercising the free movement right given by the Treaty provisions.

Robust social security system in the UK offers a large volume of entitlements to eligible claimants and therefore the stricter rules around the conditions for welfare payments were introduced to prevent ‘benefit tourism’ as repeated by the policy makers.

However, the criteria giving the right to social benefits for A8 and A2 nationals were even more challenging to fulfil due not only to the complexity of the system

[137] Opinion of Advocate General Saggio, 29 Sept 1998, paras 15-16.

itself, but also due to the extra conditions applied during and after their transitional phases. Thus, illustration of treatment of A8 and A2 nationals in the UK based on specific issues gathered from the empirical data collected for the purpose of this study is presented in the next chapter.

Chapter Four: Protection of the right to social security and freedom of movement of persons - practice in the UK

1.Introduction

While Chapter Two provided background on the EU free movement provisions and their implementation in the UK and Chapter Three explained the UK's specific legal regime applicable to A2/A8 migrants during/post transition periods, this chapter in turn, illustrates the theoretical framework in practice based on an assessment of the empirical data representing the transitional regime.

The key part of this study provides the reader with a picture of how the UK's legal regulations regarding access to social security benefits have been applied in cases involving EU migrants from A2 and A8 countries between 2010 and 2014. In consequence, it illustrates the impact of this exercise on the free movement rights of this group of EU migrants.

As highlighted in the first chapter, social security rights are important to people exercising their free movement rights within the European Union. Thus, this chapter provides an empirical assessment of the UK's approach towards A2 and A8 nationals and provides a contribution to the limited, existing work in this area.

The examination of empirical data of social claimants in Glasgow, which constituted in total of 253 cases, consists of: 222 representative cases on social claims made by A8 and A2 nationals while the transitional regimes were in force and 31 cases after those transitional provisions expired, to compare accessibility to social security rights in those periods. The first group of 222 cases was collected over the period of year 2010 to 2013 and the assessment in this chapter will focus strictly on this period due to the limited capacity of this research.

During the transitional phase, the relevant EU provisions were meant to protect the labour markets of EU Members, as explained in Chapter Two. However, they were often used as tools for rejection of social rights and when the transitional regimes expired, the UK introduced the additional legal measures binding all EU citizens that have already been listed in Chapter Three.

All 253 claims had been refused at the initial decision-making stage and the majority of them were going through an initial appeal/review stage[138] within the HMRC or the DWP[139].

More details on the qualitative data can be found in Appendix I and II.

To illustrate how the UK's legal regulations regarding access to social security benefits have been applied in cases involving EU migrants from A2 and A8 countries, I have selected those cases that have been heard by the independent First-tier Tribunal as they clearly represent the quality of implementation of EU law at the national level.

The First-tier Tribunal is the legal body, which has the power to overturn the decision based not only on facts and national laws, but also on EU legislation, and to correct an error in law considering statutes and relevant legislation.[140]

Only 90 cases had been further challenged at the Tribunal Service. The number of appeals at the Tribunal Service was quite low due to the following reasons: the claimants decided not to challenge the decision further due to very lengthy process[141], heavy burden of proof; they were misadvised by the representatives about no ground for the appeal; could not cope with the pressure; moved address without notification or just left the country.

The Tribunal Service corrected 20 % of those claims that had been heard[142] and only three claimants had appealed further to the Upper-Tribunal, but decision remained unchanged as in two cases - the appellants were not in the position to provide the evidence requested and in third - the claimant deceased.

This chapter examines how the UK interpreted the social security provisions and the theme of the transitional regime has been chosen as the most problematic for accessing social security rights by the study subjects. This task is carried out through an evaluation of the representative cases examined in the light of the theoretical frameworks presented in Chapter Two and Three.

This theme was selected for three reasons.

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[138] Mandatory Reconsideration at present.
[139] Please see the administration/decision making process in Chapter Three.
[140] Tribunals, Courts and Enforcement Act 2007.
[141] In average between 9 to 12 months between 2010 and 2013.
[142] The type of errors or inconsistencies are discussed further in this chapter.

Firstly, registration of employment under the Worker Registration Scheme (WRS) or the Worker Accession Scheme (WAS) was a powerful tool for the UK to exclude A8 or A2 nationals from social security system. In particular, the examination highlights that the date of issue of the WRS document was treated as a start of employment rather than an actual start of work, which led to nonacceptance of the whole period of economic activity as legal for benefit purposes. Furthermore, late registration or lack of re-registration under the Scheme was a reason for UK decision makers to refuse the welfare payment. Finally, the data evidenced that even full compliance with the Schemes and a long history of authorised employment in the UK still did not guarantee an equal access to the social security or social assistance system in the country of economic activity.

Secondly, there has been no published research on the transitional regime context and its practical application.

Thirdly, this regime has been in use for several years and it was interesting to see whether the UK effectively implemented the EU's legal framework, and what was the impact on the access to social security rights in the context of free movement of persons.

2.Transitional regimes

2.1. Introduction of the theme

The EU old 15 Member States, including the UK, were permitted to impose restrictions towards the new accession states to control their labour markets, as already explained in Chapter Two.

While the UK freely opened its labour market, it further imposed additional restrictions with regards to access to social security rights, through the Worker Registration Scheme for A8 nationals and the Worker Accession Scheme for A2 nationals respectively. These conditions that were in addition to the stricter right to reside test (see chapter three), remained up to May 2011 for A8 nationals and up to December 2013 for A2 nationals respectively. The implications of these restrictions are discussed in this chapter.

In particular, the administration of the Worker Registration Scheme has been recognised as the most common barrier in accessing social security rights by A8 nationals in the UK[143] and thus the selected cases illustrate the common issues that prevented these EU migrants from claiming their rights.

The research data indicates that social security and social assistance payments were refused due to WRS requirements being unmet or not accepted in 79 cases. More specifically, social security payments were rejected due to late registration in 27 cases, lack of registration or re-registration in 22 cases, and gaps in registrations in 19 cases.

Rights to social benefits were also rejected in 11 cases, despite transitional provisions having been fulfilled. However, this was not recognised by the Decision Makers as a satisfactory factor and did not contribute to or had no impact on the outcome of the claim.

Each sample case represents an individual issue and contains the following headings: factual background, Decision Maker's provision, discussion on legal challenges and finally, an expected outcome in each benefit claim.

2.2. Late registration of employment under the Worker Registration Scheme

This section shows an example of late employment registration under the Worker Registration Scheme that resulted in refusal of the social security payment[144], in this case unemployment benefit.

Factual background of case C

Mr C is an A8 national who first came with his wife and two sons to the UK in January 2006. He was employed by a company for over one year, of which 11 months was registered under the Worker Registration Scheme. Immediately after, he worked as a sub-contractor on self-employment basis for another 6 months. He

[143] The Northern Ireland Human Rights Commission, SUBMISSION OF EVIDENCE TO THE UK BORDER AGENCY REGARDING THE IMPACT OF THE WORKER REGISTRATION SCHEME, 10 MARCH 2009; O'Neill R. Residence as a Condition for Social Security in the United Kingdom: A Critique of the UK Right to Reside Test for Accessing Benefits and How it is Applied in the Courts. *European Journal of Social Security*. 2011;13(2):226-246.

[144] This issue arose in 27 cases; please see Appendix II.

applied for Jobseekers Allowance in October 2007 when his work ended. However, after 2 months awaiting an assessment by the EU Enlargement Team in Wick, he was refused benefit on the grounds of not having a right to reside.

He appealed against the decision stating that he had been discriminated on the grounds of nationality and that he had completed 2 months of authorised employment, and also worked as a self-employed person[145] through another company. At the time of the claim, he was actively looking for work. Mr C had also registered his work under the HMRC Construction Industry Scheme as a sole trader and paid National Insurance Contributions. His intention was to settle down in he UK indefinitely, for work and study purposes. Moreover, his children had been attending full-time, non-advanced education[146] in Glasgow.[147] -

However, Mr C lost his appeal in the First-tier Tribunal Service and the decision remained unchanged. Following this outcome, he was refused family benefits, such as Child Benefit, Child Tax Credit and social assistance, namely Housing Benefit and Council Tax Benefit. As a result, his free movement rights were significantly restricted.

Decision Maker conclusion on JSA (DWP and then First-tier Tribunal Service)

The claimant does not have a right to reside from October 2007, and consequently was not found as habitually resident in the United Kingdom, and thus had no entitlement to social security benefits.

If the person is not a habitual resident, then he should be treated as a 'person from abroad'.

Person from abroad

The law states that [subject to paragraphs (2) and (309a)_(d) and (4)] in Regulation 21AA, a "person from abroad "means a person who is not habitually resident in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland

[145] WRS registration was not required for self-employed persons.
[146] For definition of full-time non-advanced education, see Child Benefit (General) Regulations 2006, Regulation 1, (3).
[147] He was primary carer of child in education; see: Case C-413/99, Baumbast and R v Secretary of State for the Home Department; Case C 310/08, London Borough of Harrow v Nimco Hassan Ibrahim, Secretary of State for the Home Department.

[known collectively as "the common travel area(CTA)]. A claimant is not a person from abroad if he or she is:

a) a worker or self-employed person or person with a permanent right to reside in the UK or a family member of a worker, self-employed person or person with a permanent right to reside in the UK pursuant to Council Directive no 2004/38/EC; or a person who is an accession state worker requiring registration, who is treated as a worker for the purpose of the definition of "qualified person" in Regulation 6(1) of the Immigration (European Economic Area) Regulations 2006 pursuant to Regulation 5 of the Accession (Immigration and Worker Registration) Regulations 2004.

According to the Decision Maker, [claimant C] does not fall within the prescribed exemption category set out in Regulations 1987, as amended by Regulation 6 of the Social security (Persons from Abroad) Amendment Regulations 2006.

The law states that no person shall be treated as being habitually resident if he does not have a "right to reside" in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland.

In conclusion- because Mr C is an EEA national, who does not fall in any category of 'qualified person', he does not have a 'right to reside in the UK' or is a 'qualified person' within those regulations, but does not have a right to reside other than a right to reside in paragraph (3)(a)-(b) and (4)(a)-(j) of JSA Regulation 85 A and cannot be 'treated as being habitually resident in the UK'[it will only be possible for him to be accepted as habitually resident in the UK if his circumstances change so that he acquires a right to reside in the UK (Mr C cannot acquire a right to reside in the UK merely by spending a period of time in the UK)]. Mr C is therefore a 'person from abroad' who has JSA applicable amount of £Nil at his date of claim.

In his letter of appeal, Mr C stated that he satisfies all criteria regarding the Habitual Residence Test as an A8 national and he had completed over 12 months of registered employment. He worked with [name of company] from February 2006 to March 2007. It is not in dispute that Mr C worked with [company name] for the period stated. Mr C did not apply for his Worker Registration Certificate until April 2006 and the document was only issued to him then. Accession State nationals are required to register their work within one month of job start date. If they fail do this the work can only be treated as being duly registered from the issue date of

the Worker Registration Certificate. This being the case, Mr C has not completed the required 12 months under the Worker Registration Scheme.

Points for discussion

The claimant had been exercising his rights to freedom of movement as worker for 13 months and as a self-employed person for another 6 months. The Decision Maker did not accept the full period of employment as legal due to the late registration under the Worker Registration Scheme. The date of issue of the Worker Registration certificate was treated as a start date of employment instead of the actual start date. Mr C has been paying income tax and National Insurance contributions for the whole period of nearly 2 years in total and he had no control on the registration process as his employer was dealing with this requirement on his behalf.

As per Regulation 9 of The Accession (Immigration and Worker Registration) Regulations 2004, "if an employer employs an accession State worker requiring registration during a period in which the employer is not an authorised employer in relation to that worker, the employer shall be guilty of an offence". As per regulation, it was the employer's fault that registration was not dealt with promptly, however it was an A8 worker who was punished through rejection from public funds in the period he was looking for another job.

This case represents a regular practice relating to refusal of social rights due to late registration of employment under the Worker Registration Scheme. It was a powerful tool for the exclusion of A8 nationals from social security payments during the transitional period. The Decision Maker has not recognised Mr C's worker status or retained worker status on grounds of involuntary job loss due to the administrative process not being completed within the prescribed period. To investigate this matter further, we need to look at the purpose of the Worker Registration Scheme and the Accession Treaty provisions.

Failure to comply with the registration requirements within one-month time should have just been disregarded. This matter was challenged in case Zalewska[148]. As observed by Mr O'Hara, the right to reside test that was applied, including the registration requirements for employment, was "unnecessary and

[148] Zalewska (AP) (Appellant) v Department for Social Development (Respondents) (Northern Ireland) [2008] UKHL 67.

disproportionate"[149]. The principle of proportionality requires that the means employed to achieve an aim recognised by EU law as legitimate correspond to the importance of that aim and are necessary for its achievement.

The legitimate aim was to enable the UK to monitor and review arrangements for access by A8 nationals to the labour market, in order that the UK could determine whether further steps needed to be taken to prevent disruption to the labour market during the accession period. The argument against the measures was that they were not proportionate to achieving this aim, specifically that the requirement to register for the second time was unnecessary. Baroness Hale noted that various parts of the scheme "could have been better designed and implemented"[150] for the purpose of the principal aim of monitoring. It was noted in Zalewska case that the one-month rule (Regulation 7(3) or Worker Regulation), could mean that some A8 workers were never counted; the long delay in issuing certificates of registration; and the fact that the £50, then £90 fee charged to applicants could be a deterrent to applying.[151] The implications of this treatment for example was non-recognition of the worker status, and at the same time, no recourse to public funds.

The question in case C arises whether the UK legislation, preventing someone from accessing benefits is compatible with EU law.

The main issue in the above case is whether A8 applicants should be entitled to income – related Jobseekers Allowance having worked in the UK for 12 months without interruption. The claimant was required to register his periods of employment. His employer dealt with this matter, but with a delay. The social security payment was disallowed due to the failure to register within the time that resulted in no right to reside for benefit purposes.

The purpose of the derogations was to protect the employment markets of the old 15 Member States from a flow of workers from the new Member States, as noted in Chapter Two. Annex XII of each Accession Treaty provided an exhaustive list of specific EU provisions from which a Member State might have derogated for a period of up to seven years. Paragraph 1 of Annex XII of the Accession Treaties provided that Article 39 TEC (now Article 45 TFEU) in relation to the freedom of

[149] Para 22.
[150] Para 55.
[151] Ibid.

movement of workers only applied subject to the transitional provisions laid down in paragraphs 2 to 14. Crucially, what paragraph 1 of Annex XII provided for was derogation only from Articles 1 to 6 of Regulation 1612/68, which dealt exclusively with the rules governing access to the host Member State's labour market. Interpreted literally, therefore, Article 45 TFEU, the progenitor of worker status for EU nationals and all attached rights and obligations that came with it, should have applied in full, with the exception of these substantive provisions of the regulation.

The Accession (Immigration and Worker Registration) Regulations 2004 constituted the primary legal framework for the movement of A8 workers to the

UK. The Accession Monitoring Report for May 2004 to December 2006[152] explained that only the first job for which a worker has registered was counted for the purpose of that report.

If monitoring of the labour market was the aim of the Worker Registration Scheme, then it was even more difficult to see how denial of benefits can be a necessary means of achieving this aim.[153] The consequences for the worker's right to freedom of movement were severe, as also presented in this case. The A8 migrants were allowed to come to the UK and to work for 12 months, but were denied an entitlement to social security when they were experiencing difficulties, such as illness, unemployment, etc.

Refusal of benefits to Mr C who had worked in the UK for nearly 2 years was not a suitable means for achieving the primary aim of the Worker Registration Scheme. The scheme itself did not satisfy the proportionality requirement and there could have been other sanctions applied, such as criminal proceedings against employers, than denial of benefits to the workers.

This case represents practice in the UK. Late registration under the Scheme was a big penalty for a worker whose employer failed to apply for the certificate within one month from the start of employment, perhaps due to lack of knowledge. Mr C had been already seen as 'legally working' as registered with the HMRC and paid

[152] Published by the Home Office, Department for Work and Pensions, HM Revenue and Customs, and Communities and Local Government, 27 February 2007, p 2.
[153] Please see for instance: SUBMISSION OF EVIDENCE TO THE UK BORDER AGENCY REGARDING THE IMPACT OF THE WORKER REGISTRATION SCHEME, Northern Ireland Human Rights Commission, 10 MARCH 2009.

the correct level of income tax and national insurance contributions from the first day of employment anyway, but it was insufficient to access his right to social security.

2.3. Lack of re-registration of employment under the Worker Registration Scheme
Lack of re-registration of employment under the Worker Registration Scheme has been observed as another reason for refusal of welfare payments, in this dataset – in 22 claims. The case presented below reflects this and outlines an impact of the scheme on applying for Income Support, the social benefit providing payment for those who were ill, lone parents or those who hd caring responsibilities. [154]

The requirement for re-registration was very confusing for both employees and employers who often assumed that there was no further need for registration if the accession worker already held the relevant card issued by the Home Office. The former workers often found out about this requirement after the claim for social security or social assistance payment was rejected. The case below exactly illustrates this. Moreover, the example below also outlines inconsistency in applying national employment law towards nationals from the accession states, who were subject to the transitional regimes.

Factual background

Mr B was an A8 national who came to the UK in April 2005 to work and intended to live in Glasgow for an indefinite period.

He had separated from his wife in March 2009. At the time of claim, she was a full-time employee from 2006 and registered under the Worker Registration Scheme.

When Mr B's Statutory Sick Pay paid by his employer had ended (after 28 weeks of sickness)[155], he had been awarded Incapacity Benefit as he had paid sufficient national insurance contributions to the Inland Revenue to allow an award. He also claimed Disability Living Allowance under special rules when he had been diagnosed with cancer.

[154] The Income Support (General) Regulations 1987.
[155] Accordingly, to the UK statutory employment law.

Mr B made a claim for Income Support from June 2009, which was refused, as the claimant had not passed the Habitual Residency Test, due to unmet transitional provisions. He provided his Worker Registration Card issued in June 2005 and had demonstrated his work in the UK from May 2005 to June 2009 (employed up to 2011). In addition, he provided evidence relating to his registration for work under the Worker Registration Scheme, which covered the period of August 2006 to June 2007. He also presented a letter from his employer stating that the registered employment should be treated as continuous from August 2006 to June 2009, as the company has been only internally reorganised, changed name and transferred into another one, however the workplace and the terms and conditions of employment remained unchanged.

The EU Enlargement Team in Wick and then, the Tribunal Service did not accept the fact of continuity of work and stated that the last employment should have been also registered under the WRS.

First-tier Tribunal conclusion

The above right to reside and habitual residence decision was made in accordance with Regulation 21A (1) and (2) of the Income Support (General) Regulations 1987.

Regulation 21(A) of the IS Regulations 1986, says that for the purposes of the definition of a person from abroad, “no claimant shall be treated as habitually resident in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland unless he has a right to reside in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland other than a right to reside which falls within paragraph (3) of the above regulation.”

As a national of a relevant accession state, Mr B is subject to the requirements of the Accession (Immigration and Worker Registration) Regulations 2004.

Regulation 2(4) states that “A national of relevant accession State who legally works in the UK without interruption for a period of 12 months failing partly or wholly after 30th April 2004 shall cease to be an accession State worker requiring registration at the end of the period of 12 months”.

According to the information available, Mr B has not worked “in the UK without interruption for a period of 12 months” for an authorised employer. Within the meaning of this legislation, authorised employment means employment registered

with the Worker Registration Scheme in accordance with Regulations 7 & 8 of the Accession (Immigration and Worker Registration) Regulation 2004. Accordingly, Mr B must be treated as "an accession State worker requiring registration".

Mr B is not "qualified person" as he does not satisfy any of the categories prescribed in Regulation 6 of the Immigration (EEA) Regulations 2006. Accordingly, Mr B is not entitled to reside in the UK under Regulation 14(1). European Community regulations apply directly in Mr B's Income Support claim and are part of the UK law.

In summary, because Mr B is an EEA national who does not fall within any category of 'qualified person' he does not have a 'right to reside in the UK'. It is not disputed that Mr B worked for the company for the period stated. Accession state nationals are required to register or reregister their work within one month of the job start date. If they fail to do so, the work can only be treated as being duly registered from the date of the Worker Registration Certificate. This being the case Mr B has not completed the required 12 months under the Worker Registration Scheme.

The First- tier Tribunal confirmed that decision of the Secretary of State issued was correct and that the appellant could have not been treated as a habitually resident in the UK because he did not have a right to reside in the UK. He was therefore a 'person from abroad' and his applicable amount for Income Support was Nil.

Discussion on possible challenges

This case is another illustration of the WRS administrative barriers or rather complexity of the Scheme, which prevented a person from accessing his right to social security.

Mr B had been refused Income Support top up payment, as the Decision Maker concluded that he had not worked "in the UK without interruption for a period of 12 months" for an authorised employer. In consequence, he was not classed as a "qualified person" as he did not satisfy any of the categories prescribed in Regulation 6 of the Immigration (EEA) Regulations 2006.

As he did not fulfil the requirements under the Worker Registration Scheme regulated by the Accession (Immigration and Worker Registration) Regulations

2004, he simply failed the right to reside test. For this reason, we should look at the reasonableness and fairness of this decision in the light of the Worker Registration Scheme obligations, and the definition of 'continuous employment'.

First of all, in terms of the UK's habitual residence test, EU principles have to be applied to the claimant, who falls within the scope of Regulation 1408/71,[156]because he had worked or been insured under national insurance legislation in the EU Member State. He had been denied entitlement to Income Support under UK habitual residence rule, on the ground that his employment could not have been counted as legal, given that he has not re-registered his new work with the Home Office under the Scheme. The document provided by the employer stating the continuity of employment, where company has not changed anything except its name and PAYE[157] number was not found as relevant. Moreover, Mr B had been working and paying National Insurance Contributions and income tax for the whole period since his arrival in the UK until he was diagnosed with terminal illness.

The case reveals some 'pickiness' of the Decision Maker who did not accept the continuity of the employment registration covering the period of August 2006 to 2009. The payment was refused as the Decision Maker failed to investigate why the employer had not re-registered the employment to prevent unfair treatment towards the A8 national.

As noted above, the legitimate aim of the WRS was to enable the UK to monitor and review arrangements for access by A8 nationals to the labour market. The argument against the measures is that they were not proportionate to achieving this purpose, specifically that the requirement to re-register was unnecessary. Baroness Hale noted in Zalewska case[158] that various parts of the scheme "could have been better designed and implemented"[159] for the purpose of the principal aim of monitoring.

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[156] Currently Regulation 883/2004/EC.
[157] 'Pay As You Earn - PAYE' A system of income tax withholding that requires employers to deduct income tax, and in some cases, the employee portion of social benefit taxes, from each pay check delivered to employees. Source: HMRC website.
[158] Zalewska (AP) (Appellant) v Department for Social Development (Respondents) (Northern Ireland)[2008] UKHL 67.
[159] Ibid, para 55.

As highlighted in Zalewska case, a more suitable and proportionate means of achieving it would be by criminal sanctions against employers.[160] The scheme provided for sanctions against employers and an extended time limit for prosecution applied, but there was no information about how vigorously this has been pursued (…). If employers had been clear that they would be prosecuted for every A8 worker they took on without a certificate, the claimants would not have been in the predicament[161] in which they found themselves when the risks arisen, such as job loss, illness, problem with childcare.

As also noted by Lord Diplock, while explaining the meaning of term

"irrationality", it was emphasised that a decision would need to be "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."[162]

In the sample case discussed above, non-acceptance of the fact that the employment had been continuous for a number of years, which would clearly give the claimant B the status of retained worker,[163] led to denial of equal access to the social security rights after four years of contributing to the economy.

The key matter in this case relates to non - acceptance of compliance with the WRS, which then led to non-recognition of the 'retained worker status' on grounds of illness. The rejection of benefit was a result of insufficient length of employment registered under the Scheme or rather no re-registration of new employment, which was seen by the employer and the claimant rather as 'continuity' of the old work.

The Employment Rights Act 1996[164] provides explanation of 'continuous employment'. It clarifies that some breaks in normal employment still count towards a continuous employment period. These include situations when an employee moves between associated employers or when a business is transferred from one employer to another.

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[160] Ibid, para 58.
[161] Ibid, para 58.
[162] Lord Diplock ([1985] 1 AC 374, 408 post letter E to 413 post letter B), in: David Pollard, Neil Parpworth, David Hughes, Constitutional and Administrative Law: Text with Materials, Oxford, 2007.
[163] Art.7 (3) (a) of the Directive, Regulation 6(2) of EEA Regulations.
[164] https://www.legislation.gov.uk/ukpga/1996/18/part/XIV/chapter/I.

In the sample case, the company had been internally reorganised and changed its name, as noted in the letter issued by the employer, therefore employment was continuous in the meaning of UK legislation.

As per Art(5) of Part III of The Accession (Immigration and Worker Registration) Regulations 2004, "registration certificate — is invalid if the worker is no longer working for the employer specified in the certificate on the date on which it is issued; (b) expires on the date on which the worker ceases working for that employer." Mr B had been employed up to 2011 according to P45 document issued at the end of employment.

This case explicitly illustrates rejection of social right based on lack of reregistration of employment under the Worker Registration Scheme, which should not be crucial anyway. The confusing criteria of the Scheme often resulted in misinterpretation of this requirement and in this case, refusal of social security rights even to those workers who fully complied with the national and EU legislation. The case was not challenged further at the Upper Tribunal as the claimant died.

2.4. Full compliance with the WRS and refusal of the sickness benefit

The selected case presented below outlines rejection of the benefit despite full compliance with the Worker Registration Scheme, as observed in 11 cases collected for this research. The document issued by the Home Office did not assist the claimant in applying for the right to social security and in recognising his status as a 'retained worker' temporarily unable to work due to illness.

Facts of the case

Mr A was an A8 national who came to work in the UK in 2006. He worked full-time for an authorised employer from October 2007 (Worker Registration Scheme certificate issued in January 2008) to July 2010.

When he had become temporarily incapable to work, he applied for Employment and Support Allowance on grounds of sickness from November 2010. He provided his WRS documents, Residency Card, a contract of employment, payslips and bank statements evidencing wages coming in. He was not in the position to provide the P45 document certifying the end of employment, as it was not issued by the

employer. Benefit was refused due to a failure of the Habitual Residency Test (HRT).

Decision Maker conclusion

Mr A was refused benefit, as according to the Decision Maker (EU Enlargement Team in Wick) and the Tribunal Service, "he has not demonstrated that he worked continuously for 12 months in registered employment and he does not have rights to reside in the UK; therefore, he could not be treated as being habitually resident in the UK". The Decision Maker stated that because the claimant could not be treated as being habitually resident in the UK, he was a 'person from abroad'. As such, his Employment and Support Allowance applicable amount was Nil, and his claim from November 2010 was disallowed. (…)

Regulation 5(3) of the Accession (Immigration and Worker Registration)

Regulations 2004 provides that an accession State national still requiring registration is unable to rely on the temporary sick provisions incorporated within the Immigration (EEA) Regulations 2006."

First-tier Tribunal statement of reasons

The decision of the Secretary of State issued on [date omitted] is confirmed.

The appellant cannot be treated as habitually resident in the UK, because he does not have a right to reside in the UK. He is therefore a 'person from abroad' and his applicable amount for Employment and Support Allowance is Nil.

Points for discussion

This case reveals the circumstances, in which the person was not able to sustain the free movement rights as a 'retained worker' and in result, denied his social security right after he fully complied with the transitional regime and held an official document certifying an authorised employment for minimum 12 months. Instead, he was classified as a 'person from abroad'.

Combination of the right to reside and habitual residence tests and definition of 'worker' status for A8 nationals incorporated into amended UK habitual residence test in 2004, was incompatible with EU law. Specifically, it was contrary to Art

45 TFEU and Article 7(2) of Regulation 1612/68 and was outside the scope of the derogation permitted by the Accession Treaty.

The person, discussed in this case, worked for an authorised employer for over 12 months and should have been able to retain his worker status. Under the case law of the Court of Justice of the EU, a broad approach to the definition of "worker" should have been applied.[165] Additionally, based on the domestic legislation, being a worker for the purposes of Regulation 1612/68 [now Reg 492/2011], would have made him exempt from the requirement to be habitually resident in Regulation 21. Consequently, the right to reside should have been recognised in the United Kingdom.

Article 39 TEC [now Art 45 TFEU] and Article 7 of Regulation 1612/68 [now Reg 492/2011] covered the claimant's circumstances, and ESA was a social advantage and covered by Regulation 1408/71 [current Regulation 883/04].

Therefore, the effect of the 2004 Accession Regulations was to discriminate directly against Accession State nationals on grounds of nationality, but Article 7 prohibited such outcome. The Treaty did not permit derogation from Article 7. The claimant should have been accepted as a retained worker both factually and for the purposes of Article 7(2) after his employment ended and should have been able to enjoy the same social and tax advantages as national workers. The appellant should not be refused benefit due to not having demonstrated 12 months of employment as he worked for this period and provided alternative documents confirming his fulfilment of the transitional conditions. He could have pursued onward appeal to the Upper Tribunal on the grounds of completion of at least 12 months of employment register under the WRS, but he decided to come back to his country of origin.

2.5. Unlawful requirement of the WRS after May 2009 to access the right to social assistance

EU Member States were allowed to implement restrictions to prevent disturbances to their labour markets, as explained in Chapters Two and Three. The UK's transitional restrictions, which were meant to monitor the labour market, did not

[165] E.g. Cases C-415/93 and C-519/04.

meet this aim, as A8 workers were able to work without registration and to pay national insurance contributions/ income tax as the system did not prevent them from doing this, but the transitional regime was rather a powerful tool to reject the right to social security. The UK government acted unlawfully when it extended the WRS for the period of 1 May 2009 to 30 April 2011[166], as this was incompatible with EU law. The case below represents rejection of social benefit (that assists with housing costs) due to non-compliance with the WRS after 2009, and in result, non – retention of the right to reside and non-acceptance of permanent right of residence.

Factual background

The person P was an A8 national, who came to the UK in 2008. She was a lone parent responsible for a pre-school age child. She worked for several employers over a six year period. The first employment lasted 9 months was registered under the WRS in 2010. She became unwell and applied for Employment and Support Allowance, Housing Benefit and Council Tax Reduction in May 2014.

She failed the medical examination and was found fit to work. Then she applied for Jobseekers Allowance to assist her financially, while she was looking for employment suitable to her health condition, during which she has also requested Mandatory Reconsideration of her ESA claim.

She received a Housing Benefit rejection letter on the basis that she was A8 national and due to her jobseeker status, she was not eligible for Housing Benefit. Her appeal on the grounds of permanent residency was not accepted as the WRS did not cover the minimum 12 months of employment.

Decision Maker's conclusion

You are A8 national who is currently in receipt of Jobseekers Allowance (Income Related) and classed as an EEA National Jobseeker.

Under the terms of Housing Benefit (Habitual Residence) Amendment Regulations 2014, effective from 1st April 2014, an EEA national jobseeker will not have access to Housing Benefit.

The appellant is not entitled to Housing Benefit from May 2014 to December 2014.

[166] The Accession (Immigration and Worker Registration) (Amendment) Regulations 2009/892.

Discussion on potential legal challenges

This case illustrates unlawful requirement of the Worker Registration Scheme after May 2009 that prevented the claimant from accessing social rights based on an alternative right, other than a job seeker status.

The person P would qualify for Housing Benefit, if over 6 years continuous employment in the UK was taken into account, as legal, and if her permanent residency status was recognised, according to Art 16 of Directive 2004/38/EC. Permanent residency opens the doors for full access to the social security and social assistance system in the host country without having to satisfy any extra conditions on habitual residency matters.

The fact that only one employment was registered with the Home Office in 2010 should not be crucial, since the Scheme applied after May 2009 was found as 'unlawful' and 'manifestly inappropriate'[167], as it did not meet its purpose of monitoring and protecting the UK's labour market but was used as a measure to reject social security rights of workers coming from A8 countries. In this sample case, the claimant was a couple of months short of the required period of employment to be accepted by the UK's authorities as lawful.

As noted, the Member States were allowed to impose restrictions on access to the labour market during the transitional period, which could apply up to 2011. However, in this case one can observe the WRS as a tool to reject any social payments to A8 nationals.

According to Annex V of the Act of Accession 2003 regarding the Czech Republic, "A Member State maintaining national measure or measures resulting from bilateral agreements at the end of the five year period indicated in paragraph 2 may continue to apply these measures until the end of the seven year period following the date of accession, in case of serious disturbances of its labour market or threat thereof, after notifying the Commission. In the absence of such notification, Articles 1 to 6 of Regulation (EEC) No 1612/68 shall apply."[168]

[167] TG v Secretary of State for Work and Pensions (PC) [2015] UKUT 0050 (AAC)
[168] ANNEX V, List referred to in Article 24 of the Act of Accession: Czech Republic, para 5.

In line with the Migration Advisory Committee report,[169] "the UK labour market was at the time it was written experiencing a severe disturbance (but not because of A8 migrants); and lifting the A8 restrictions would be likely to have little if any impact of this".

Moreover, the report noted that "the evidence reviewed indicates that the abolition of the WRS would not result in substantial changes in flows and therefore there would not be significant labour market impacts." It highlighted disproportionate treatment and negative impact on workers and employers.[170]

In other words, the purpose of the Worker Registration Scheme was mainly to inform government and did not prevent A8 national from legally working in the UK. In practice, A8 national working for the UK employer who was often not aware of this administrative requirement, paid income tax and National Insurance Contributions like every legally working person. As already noted above, restrictions on the free movement rights always must be interpreted in a way which is proportionate to the aim which they pursue. That is clear from cases, such as Baumbast,[171] when the Court held that the limitations and conditions to residence rights based on citizenship had to be applied proportionately.

The power to derogate from free movement rights for workers set out in Annex V was a power to restrict one of the fundamental freedoms on which the EU is based. As such, it falls to be interpreted restrictively: it certainly should not be allowed to operate for some purpose other than that which it is intended to serve.[172]

More importantly, in this specific sample case collected for the purposes of this thesis, the WRS in the period of post 1st of May 2009 was incompatible with EU law and should not have been used as a deciding factor for rejection of social assistance right. However, the claimant accepted the decision of the Tribunal as final and did not pursue further.

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[169] "Review of the UK's transitional measures for nationals of member states that acceded to the European Union in 2004", 2009; at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/mac/a8report/0409/review-transitional?view=Binary.

[170] "Review of the UK's transitional measures for nationals of member states that acceded to the European Union in 2004".

[171] Case C-413/99 Baumbast and R v SSHD [2002] ECR I-07091, para 91.

[172] See: Case 77/82 Peskeloglou v Bundesanstalt fur Arbeit [1983] ECR 01085.

3. Concluding remarks

As noted in Chapter Two, all Member States could have applied the restrictions in terms of access to labour market. The UK however has chosen to open the doors freely for A8 nationals, as the cheaper working class was needed to refill gaps in employment market, but at the same time restricted rights to social security.

Employment registration under the Worker Registration Scheme or the Worker Accession Scheme was a powerful tool, used by the UK to exclude A8 or A2 nationals from the social security system. The dataset identifies lots of issues around the Scheme that prevented A8 national from claiming social payments. For example, the date of issue of the WRS document was treated as a start of employment, rather than an actual date an employment started. This led to non-acceptance of their whole period of economic activity as legal for the purposes of their benefit claim. Furthermore, late registration or lack of re-registration under the Scheme was cited as a reason for refusal of welfare payment by the UK authorities. Finally, data showed that even full compliance with the Schemes, and a long history of authorised employment in the UK, still did not guarantee equal access to social security or the social assistance system in the country of economic activity.

A8 nationals were able to work for several years, with or without registration of employment[173], however, they were refused to claim social security rights at the time they faced difficulties, even after years of active contribution to the host country's economy. As noted above, the legality of the WRS has been challenged on several occasions and from different perspectives, for instance in Zalewska[174] or Szpak.[175] In Zalewska, the proportionality, design and aim of the scheme has been questioned. In Szpak, the consequences of the late registration has been discussed.

Finally, in the case of TG v Secretary of State for Work and Pensions,[176] the Scheme was recognised as an unlawful tool that did not meet its purpose of monitoring

[173] The registration could not have been completed without a letter of support issued by the employer.
[174] Zalewska v Department for Social Development (Northern Ireland) [2008] UKHL 67, [2009] 1 CMLR 24.
[175] Szpak v Secretary of State for Work and Pensions [2013] EWCA Civ 46.
[176] TG v Secretary of State for Work and Pensions (PC) [2015] UKUT 0050 (AAC).

and protecting the UK's labour market, however, was used as a measure to reject social security rights of workers coming from A8 countries.

The sample cases presented in this chapter illustrated the UK's approach towards nationals coming from accession states while processing their social security claims. There were many more issues identified while collecting the data, however this type of research did not allow the author to explore on all of them.

Chapter Five: Conclusions

This study illustrated how the UK's legal regulations regarding access to social security benefits have been applied in cases involving EU migrants from A2 and A8 countries between 2010 and 2014. This has been achieved by analysis of relevant EU and UK law and evaluation of empirical data drawn from cases involving social security claimants living in the Glasgow area.

This research comprised three principal stages.

First, the EU free movement provisions have been set out. Second, the UK's specific legal regimes applicable to A2/A8 migrants have been explained and contextualised with reference to the relevant socio-economic and political factors. Third, outcomes of representative welfare claims rejected by the First-tier Tribunal Service have been presented and analysed.

This study has involved socio-legal research, where EU law has been analysed to identify the main provisions in the area of free movement, with special focus on the transitional provisions legally restricting the right to work and social security for A8 and A2 nationals during their transition periods. This had direct implications for the implementation of law at the national level. The case study approach has been adopted to understand how the law works in practice, and more importantly, to practically illustrate how the UK applied EU law in social security claims made by A8 and A2 nationals.

As highlighted on several occasions, the Member States could have suspended an access to labour markets and at the same time, suspend the free movement rights for the workers from the new Member States at the initial phases straight after their accession to the EU. The UK decided to open their employment market from the very beginning, but concurrently, it introduced a requirement for employment registration that was designed to monitor any potential disturbances of the UK's labour market, but instead these registration schemes prevented or made it more difficult to access rights to social security.

Chapter Four dealt with an empirical examination of the data and has identified employment registration under the Worker Registration Scheme or the Worker

Accession Scheme as a powerful tool, used by the UK to exclude A8 or A2 nationals from the social security system. For example, the date of issue of the WRS document was treated as the start of employment, rather than the actual date when employment started. This treatment led to non-acceptance of the whole period of economic activity as legal for the purposes of benefit claims. Furthermore, late registration or lack of re-registration under the Scheme was a common reason for refusal of welfare payment by the UK authorities. Finally, data showed that even full compliance with the Schemes, and a long history of authorised employment in the UK, still did not guarantee equal access to social security or the social assistance system in the country of economic activity.

Rejection of social payments by the hosting State in which EU workers have settled, engaged with the employment market and established 'real links' strike at fundament legal principles such as EU citizenship, equality and right to movement without loss of social entitlements. This is the social security coordination Regulation 883/04/EC that takes care of the social security entitlements while moving to another EU country, so the person is not paid the same allowance by two Member States or is not left with nil award at all as a result of move. This is also Regulation 492/2011 whose importance has been completely undermined in the cases discussed in this study as all of them reflected workers legally employed and contributing to the economy.

Refusal of social security or social assistance would be more reasonable if those EU citizens were not employed or were not allowed to work in the UK. However, the persons from A8 and A2 countries were allowed to work but faced difficulties in claiming social security rights when they became unemployed or ill for instance.

The Swiss writer Max Frisch wrote "We called for workers; human beings came". This expression is quite relevant to the picture presented in this study.

As mentioned at the very beginning of this research, free movement of persons is one of the fundamental freedoms guaranteed by European Union law and includes the right of all EU citizens and their family members to live and work in another Member State. The concept of free movement has two interrelated dimensions concerning workers: the economic dimension and the social dimension. The economic dimension is based on the idea that a worker is a mobile unit of production, who contributes to the creation of the single market and the economic

prosperity of the European Union; while the social dimension portrays a worker as a human being who exercises his personal right to live and work in another country, without being faced with discrimination.[177]

The empirical data has shown a different approach.

Despite the development of rights to social security and social assistance over time, and its personal scope having been extended from workers only to include all EU citizens exercising their free movement rights, EU provisions by themselves are still of little benefit to EU citizens, unless an effective interpretation or an accurate administration for the implementation of such rights exist. It was shown that, in the majority of cases, the direct reason for refusal of social payment was non-compliance with the UK right to reside test due to issues associated with heavy burden of proof or administrative hurdles interrelated with the UK's transitional schemes. It is also crucial to remind ourselves again that old Member States were allowed to suspend access to their labour markets. However, those countries that decided to take on workers, should have shown more accountability and solidarity to those who contributed, but faced temporary difficulties.

Financial and political factors were found to be pertinent to the implementation process. The UK was in support of free movement of persons, thus opening up its borders, in order to fill the unemployment gap through cheaper labour across various industries. This was found to have a positive impact on the UK economy. At the same time, however, the same Member State introduced extra conditions in the form of transitional regimes and then implemented additional measures to limit access to social security, to protect its own public funds.

This thesis has proven that the right to free movement of persons is associated with the right to social security and therefore, the latter needs to be protected and respected to guarantee 'free' movement for those who lawfully exercise these rights.

As indicated in the introduction, findings from this study are extremely important for future policy makers to prevent further exclusions of EU citizens provided with rights that will be theoretical if not respected.

[177] Art 18 TFEU,

EU social security law is complex and the socio-economic tensions in caselaw of the Court of Justice has direct impact on implementation of law at national levels. It is very important to remember that EU law on the free movement of EU citizens and their cross-border access to social benefits on the one hand evolves around concepts such as ‘genuine activities’, ‘real links’ or ‘unreasonable burden’, which leave considerable room for interpretation by domestic law-makers and on the other, national authorities are required to apply these ambiguous concepts on a case-by-case basis, while any general restriction of EU migrants’ access to social benefits is very likely to be challenged in the Court, especially, in circumstances of discriminatory treatment. This creates great difficulties for national decision makers and individuals often trapped between two or more social security systems.

What, then, is to be said in summing up? The UK’s application of the transitional regime has been noted as the main obstacle in the way of accessing social security rights. As also highlighted, after those regimes expired, the UK has gradually introduced further restrictions or extra conditions that need to be met by EEA nationals to access social benefits. This was dictated by the UK’s socio-economic and political agenda that aimed to protect public funds and even to restrict the free movement of persons.

The study ends, then, on a note of caution! The complexity of EU social security law and socio - economic tensions in the caselaw of the CJEU on one hand showed the ambition of the Court of Justice to make EU citizenship the freestanding legal right to equal treatment that can be relied upon to fully enjoy the free movement rights, and on the other, took a purely economic approach leaving those who are (often temporarily) non-active economically with no right to social support. These often-contradicting messages, flowing from the caselaw, are having a direct impact on legal implementation at national levels. However, each Member State is required to show more solidarity and legal accountability for all EU citizens.

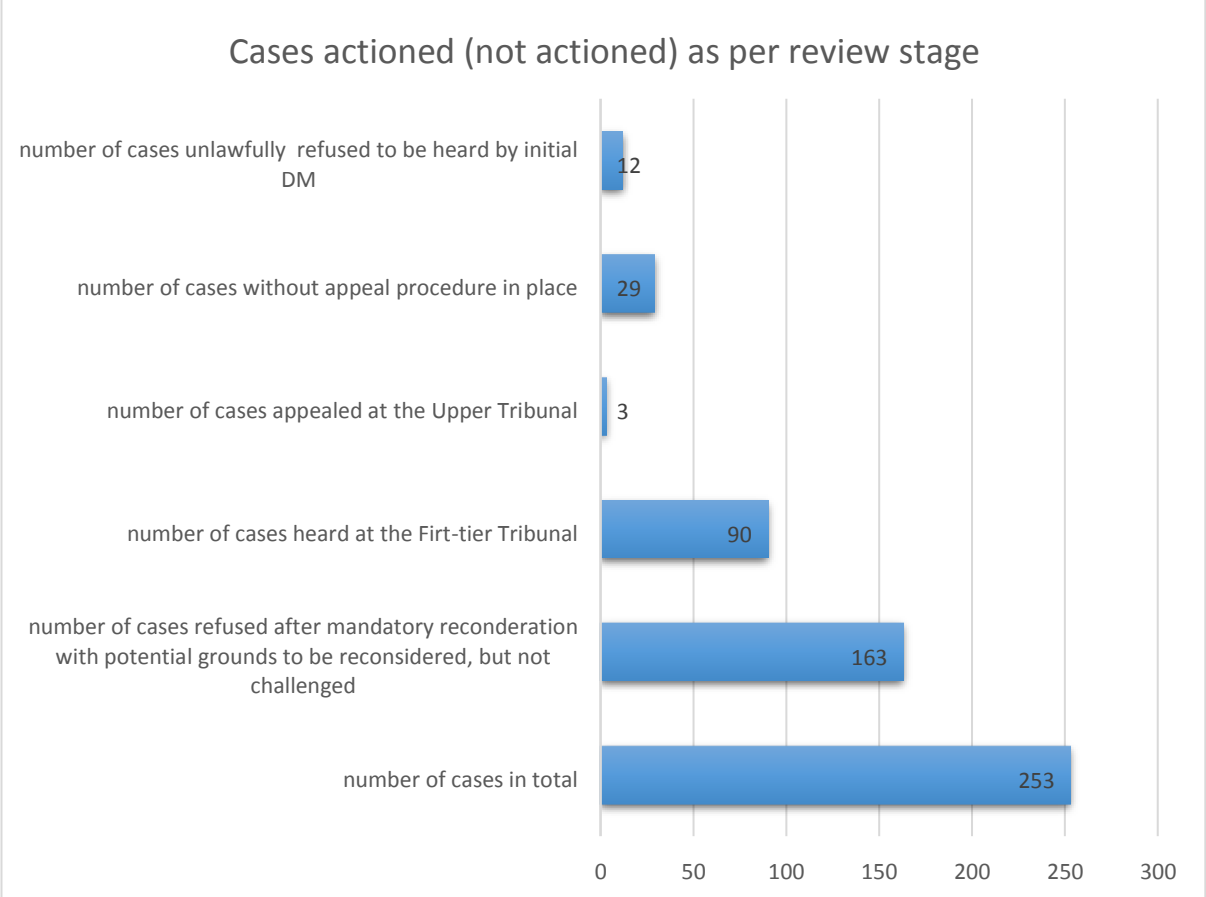
No matter how much the existing EU legal framework expresses commitment to the recognition of rights, practice at the national level often shows resistance to genuine recognition of social security rights in the context of free movement. Funding of social security for EU migrants in the UK was discussed as a great deal in the Brexit Referendum, where the area of migration was a very controversial matter during political debates. Despite the UK’s negotiations allowing Britain for

more selective allocation of social rights towards non-British EU nationals, and the outcome in the case concerning the UK's rights to reside test, which allows social payment mainly to those who are/were economically active, the UK voted to leave the EU. This leaves EU citizens with concerns about their future and also raises questions about legal certainty.

Research in the area of social security in the context of free movement is quite challenging due to frequent changes in EU and national laws.

The study thus recognises its limitations in terms of the extent it was able to provide a comprehensive debate fully examining compliance with EU social security law affecting genuine enjoyment of free movement rights. The research is limited in the number of issues it dealt with and the degree of examination of each case presented. The discrepancy between 'theoretical rights' and effective implementation of those rights in practise indicates issues that should be addressed as part of future research studies. The European Union is continuously developing due to further accessions planned, dynamic free movement of persons and changing needs of European society. Moreover, there are lots of challenges to come in the UK that has left the EU but continues to host EU citizens and to apply EU law. Thus, it needs to be suggested that evaluation of actual access to legal rights should be a focal point of future socio-legal research to ensue clarity of EU law and to enhance recognition of fundamental rights of their holders.

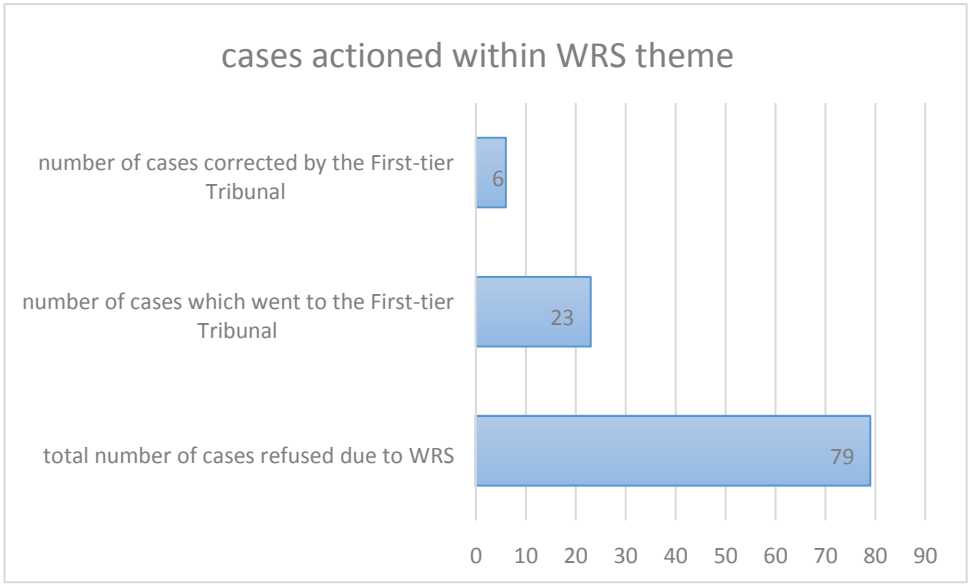
Appendix I: Quantitative data

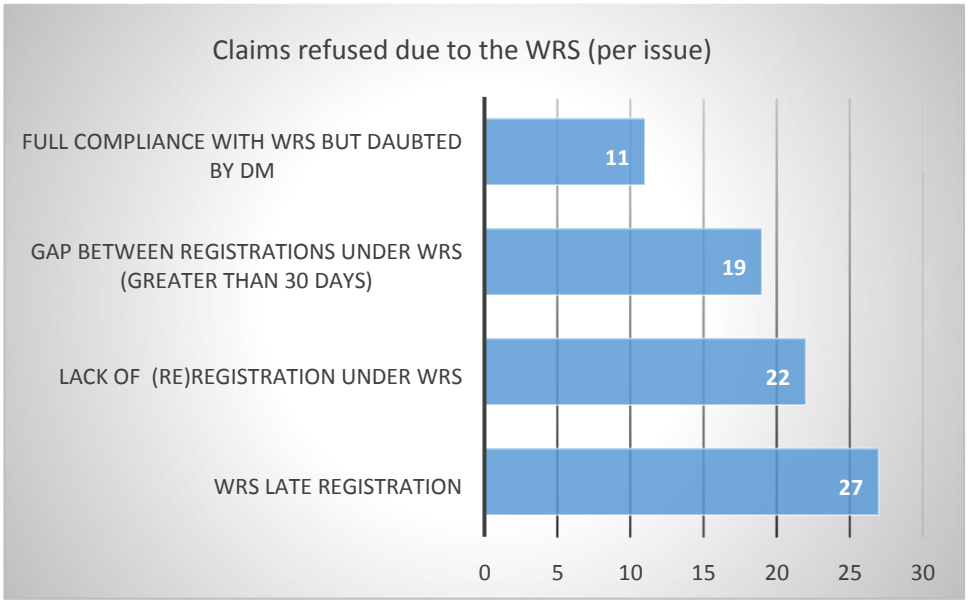


Appendix II: qualitative data

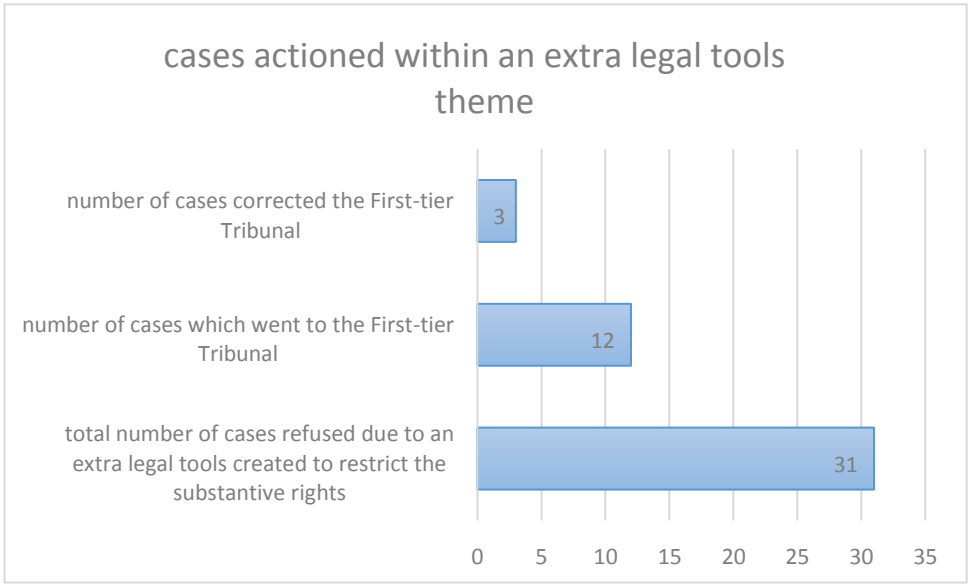
Charts on data collected over the period of 2010 to 2014 for the purpose of the thesis – transitional regime

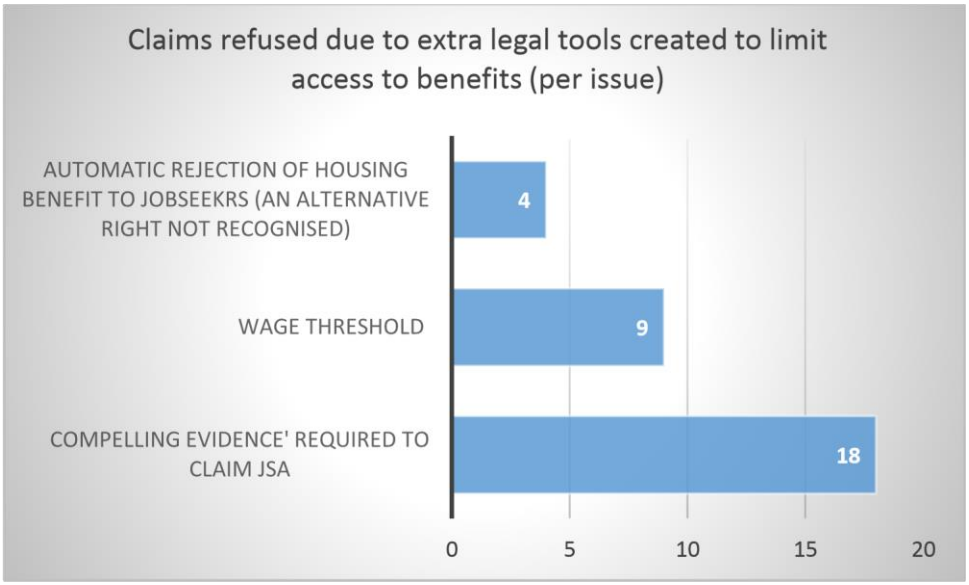
1. The transitional provisions





2. Additional legal measures





Appendix III : UK social benefits

Main categories of UK benefits

1. UK Special Non-Contributory Benefits

UK Special Non-Contributory Benefits, as per Annex X of Regulation (EC) No 883/2004[178] :

State Pension Credit (subsistence benefit for those of pension age).

Income Support (subsistence benefit for lone parents and certain others, such as ill person)[179]

Income-based Jobseeker's Allowance (subsistence benefit for those seeking work). Disability Living Allowance (mobility component).

Income-related Employment and Support Allowance (subsistence benefit for those unable to work, later added to Annex X as per below.)

2. Extract from EC COM (2010) 794

According to European Commission's Proposal to Amend Regulation 883/2004[615],

Annex X and XI to Regulation (EC) No 883/2004 are amended as follows:

(…)

(b) In section "UNITED KINGDOM"; (i) Point (c) is deleted; (ii) The following point (e) is added: "(e) Employment and Support Allowance Income-related (Welfare Reform Act 2007 and Welfare Reform Act (Northern Ireland) 2007)."*

*The rationale for a change was mainly due to the fact that the ESA (IR) is to guarantee a minimum subsistence income having regard to the economic and social situation in the UK and is available where a person's contribution record or financial situation is such that no or inadequate contributory Employment and Support Allowance is payable. ESA (IR) was considered by the Administrative Commission to be a special non-contributory cash benefit in the sense of Article 70 of Regulation (EC) No. 883/2004 and listed in Annex X to Regulation (EC) No 883/2004 from 22 May 2012, the European Parliament and Council agreed,

178 Former annex IIa of Regulation 1408/71.
179 Replaced by Employment and Support Allowance from May 2012. 615 EC COM (2010) 794.

delisting Income Support from the UK's SNCB list and incorporating income-related Employment and Support Allowance instead.[180]

The Welfare Reform Act 2012, introduced by the United Kingdom's government on 2 February 2011, is set to overhaul the nation's welfare system beginning in 2013. The central feature of the Act – the introduction of Universal Credit – replaces several of the UK's special non-contributory benefits, including income-based Jobseeker's Allowance and income-related Employment and Support Allowance, and per the current regulations, will potentially be applied in a discriminatory manner to EU migrants moving into the UK.

3. UK Social security benefits[181]

Sickness and invalidity benefits

Attendance Allowance

Disability Living Allowance care component

Carers Allowance

Contribution-based Employment and Support Allowance in the assessment phase

Statutory Sick Pay

Unemployment benefit

Contribution-based Jobseeker's Allowance

Survivor's benefit

Bereavement Payment (see EIM76171), replaced Widow's Payment from 9 April 2001

Family benefits

Child Benefit

180 Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) No 883/2004 on coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, OJ L 149, 8.6.2012, p.4-10.

181 https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim76100

Child Tax Credit

Guardian's Allowance

Benefits for accident at work and occupational disease

Constant Attendance Allowance, see industrial disablement benefit below

Exceptionally Severe Disablement Allowance

Industrial Injuries Benefit, a general term covering industrial injuries pension, reduced earnings allowance, retirement allowance, constant attendance allowance and exceptionally severe disablement allowance

Maternity benefits

Maternity Allowance, see EIM76361

Statutory Maternity Pay

Paternity benefit

Statutory Paternity Pay

Old age benefits

Additional pension

Pensioner's Christmas Bonus

Winter Fuel payment

State Pension

Graduated Retirement benefit

Appendix IV: Plain language statement and informed consent

Address:…….

E-mail: k.feddek.1@research.gla.ac.uk

March….. 2013

Dear

Re: The protection of the right to free movement of persons and social security in European law: law and practice.

I am writing to you as a social security claimant to invite you to participate in the above research project. This research is being conducted by me as part of my thesis in Law at the University of Glasgow, and is supervised by Professor Noreen Burrows of the School of Law at the University of Glasgow. This research has been reviewed and approved by the University of Glasgow, College of Social Sciences Research Ethics Committee on Day/Month/Year.

The aim of this study is to investigate and critically analyze the problems faced by migrant workers from Eastern European countries when they claim social security benefits in the UK. This research aims to involve representative social security claimants.

With your permission, I would like to access the information contained in your file at the advice centre and to use that information to explain the problems faced by claimants. I will use the information as a case study to illustrate the main obstacles faced by claimants in accessing social security benefits.

Your identity and personal details will be anonymized and kept confidential at all times and in my thesis your name will be replaced by a number. The analysed data will inform my thesis.

I should inform you that this study will not assist you personally in your claim. Moreover, your decision whether or not to take part in the research will not have any consequences for the service you receive from Money Matters.

Please be advised that your participation in this study is voluntary. Should you wish to withdraw your consent at any time, you are free to do so. In this case, any information held about you will be destroyed and not used in the study.

If you agree to my using your information in this way please sign the enclosed consent form and return it to me in the stamped envelope provided.

Once the thesis has been completed, a copy will be available via the University of Glasgow online publication database, Enlighten (http://eprints.gla.ac.uk). It is also possible that the results will be presented at academic conferences, through academic or other journal articles, or by other written means. The data resulting from this research study will be kept securely until my thesis is sustained. It will then be destroyed.

If you have any concerns about the proposed conduct of this research project, please contact the University of Glasgow College of Social Sciences Ethics Officer, Professor John McKernan at John.McKernan@glasgow.ac.uk.

If you have any queries or concerns, please do not hesitate to contact me.

Yours sincerely,

Kamila A Feddek

Appendix: Informed Consent Form

Supervisor Contact information:

Professor Noreen Burrows

School of Law

Stair Building

University of Glasgow

Glasgow G12 8QQ

United Kingdom

Phone 0141 330 7166

Noreen.Burrows@glasgow.ac.uk

University of Glasgow | College of Social Sciences

Informed Consent Form

Title of Research Project: The protection of the right to free movement of persons and social security in European law: law and practice.

Name of Researcher: Kamila A Feddek

Degree: Master (Law)

Institution: University of Glasgow School of Law

Address: School of Law, Star Building, Glasgow, G12 8QQ, UNITED KINGDOM

E-mail Address: k.feddek.1@research.gla.ac.uk

1.I confirm that I have read and I understand the information provided to me about this research.

2.I understand that my participation is voluntary and that I am free to withdraw my consent at any time, without giving any reason. I am aware that any information about myself will not be used in the study if I withdraw my consent. I understand that whether or not I take part in the research it will not have any consequences for the service I receive from Money Matters.

3.I consent to have details of my case used in this research as a case study to illustrate the main obstacles faced by claimants in accessing social security benefits. I understand that my name will not appear in relation to my case.

4.I am aware that the research will not influence my own claim.

5.I agree / do not agree (delete as applicable) to take part in the above research.

_____

_____ _____

Name of Participant Date/Month/Year Signature

_____

Researcher Date/Month/Year Signature

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