# This is a pre-publication version of the article that appears in the *Journal of Social Welfare and Family Law* 2015, vol 37(1), pp 111-136. If you would like a copy of the final version, please contact charlotte.obrien@york.ac.uk

# The pillory, the precipice and the slippery slope: the profound effects of the UK’s legal reform programme targeting EU migrants

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# *Key words:*

# Welfare reform; Immigration (European Economic Area) Regulations 2006; Eurosceptic law making; welfare state ideology; EU migration; European Union citizenship

# *Abstract:*

# *2014 has been the year for restricting EU nationals’ access to benefits in the UK, with a series of measures being introduced since 1 January. This paper offers a combined doctrinal and socio-legal analysis, assessing each measure’s compatibility with EU law, examining the legal texts and the accompanying guidance, which may lead to infringements by administrative decision makers. The paper then analyses the cumulative programme of reforms, and identifies three societal concerns. Firstly, the programme represents a departure from EU Treaty principles. Secondly, the effects of the new measures are felt by all EU migrants, not just the ‘economically inactive’, since they are subject to extra tests and delays, face amplified xenoscepticism, and are placed in a more precarious position, with greater risks attendant upon loss of work. Thirdly, the measures represent a pure form of an individualist ideology, potentially lowering our resistance child poverty and destitution.*

EU migrants have recently been the subjects of significant welfare reforms in the UK. Wave upon wave of regulatory change has rolled in since November 2013. We have so far seen: the introduction of a three month prior residence rule for Jobseeker’s Allowance, which has been extended also to Child Benefit and Child Tax Credit; the scrapping of Housing Benefit for all EU jobseekers; the withdrawing of job centre interpretation for EU jobseekers; the introduction of a six month cut-off for Jobseeker’s Allowance, then reduced to a three month cut-off, coupled with a ‘compelling evidence of genuine prospects of work’ test; and the introduction of a ‘minimum earnings threshold to have work classified as work. This paper critiques each of these changes, examining their compatibility with EU law, and then analyses them as a package, or programme of reforms with far-reaching ramifications.

The first section of this paper contends that several of the reforms, including the three-month residence rule and the scrapping of Housing Benefit, constitute potential direct infringements of EU law. It further suggests that other reforms, such as the genuine prospects of work test, and the minimum earnings threshold appear on paper to be EU-compliant, but this is dependent upon how they are implemented in practice. When examined in light of domestic case law, the right to reside concept, government publicity and decision maker guidance, these changes aimed at influencing discretionary decision making, create the risk of infringement of EU law by administrative decision makers. These infringements are likely to have a disproportionate impact upon EU nationals who are lone parents, children and workers with disabilities – who face a greater number of welfare ‘precipices’.

The second section examines the basis of these measures, or the ‘pillory’ on which EU migrants have been placed. It suggests that the changes are counterintuitive when examining the evidence that EU migrants are net contributors to the UK economy (e.g. Dustmann, Frattini, & Halls, 2013; European Commission, 2014; and European Commission, 2013: Table 4: Non-national population by group of citizenship and foreign-born population by country of birth). The government’s own assessments show very few EU migrants claiming the benefits via the routes in question; prior to the changes, the government estimated that 1% of EU migrants were jobseekers claiming Housing Benefit (DWP, 2014c, 2). As EU migrants represent a relatively small chunk of the population,[[1]](#endnote-1) this is a small minority of a small minority, undermining the rationale for making EU migrants the subject of a public legal flogging. The fact that few people are the direct targets of the rules does not however diminish the impact of the changes. How civilised a society actually is can be judged by how it treats a vulnerable minority. And, as this paper argues, the rules have significant ramifications beyond the claimants in question.

When analysing the changes cumulatively, one possible rationale emerges. The third section examines the government’s objective to *repel* EU migrants and reduce EU immigration to tens of thousands, as expressed by in a House of Commons briefing note ‘The Government ... is taking a range of measures in order to address perceived ‘pull factors’ for migration to the UK, such as new restrictions on access to welfare benefits. The Prime Minister and Home Secretary have also spoken in favour of establishing more restrictive EU free movement provisions.’ (Gower & Hawkins, 2013). This is analysed as the implicit re-writing of EU Treaty obligations, conflicting with the objectives, and spirit, of the Union. The measures reduce obligations to EU migrants, but are combined with an expectation that *other* Member States pay benefits to UK expats, and taking a strong stance against exportation of benefits wherever possible (see below) creating an asymmetry of obligations. The new rules therefore might represent a unilateral work-around, offering an easier-to-achieve alternative to the UK government’s mooted renegotiation and reform of the EU.

Taking the cumulative analysis further, the fourth section argues that the programme of changes gives the impression that the migrants themselves are the ‘mischief’ to be tackled by this branch of law, so entrenching an administrative xenoscepticism which impacts upon all EU migrants, working or not. Each one of these changes adds more procedural complexity to an already cumbersome decision making system, making extra hoops through which all EU migrants must jump, creating a greater risk of administrative hostility, and an increasing the delay in decision making. Those in work now live on an ever more precarious cliff-edge, (see O’Brien, 2013a) since loss of work will have disastrous consequences. Xenosceptic law making is a potentially ‘slippery slope’ in terms of upholding basic principles of equality and human rights.

An accentuated welfare precipice for EU migrants has consequences for overall structure of the welfare system. The fifth section argues that the changes act as a conduit for inculcating neo-liberal welfare ideals. In the context of EU migrants, it seems these ideals can assume a perfect, untrammelled form, in which rights are vested in economic activity, potentially increasing our tolerance of child destitution, and obscuring any conception of societal responsibility, or of the kind of society in which we want to live. This affects our understanding of, and relationship with, the welfare state as a whole.

These changes re-order the UK’s relationship with other European countries and with other Europeans, contributing to the dissolution of both the national social contract and European solidarity. The classic citizen-state contract of generalised reciprocity in which individuals make contributions towards the social responsibility for the welfare of others is being replaced with an individualised, contingent contract in which claimants can only make claims if they fulfil all the right conditions – regardless of the contributions they have made. And the UK-EU membership contract is being re-written, to replace the solidarity dimension with an atomistic, competitive sort of membership, instrumentalising and de-humanising other Europeans, reaping the economic benefits of migrant work while offering more hostility and less security.

New precipices: The individual reforms

### Legal infringements

Newly arrived jobseekers, and their children, have been very much at the centre of many of the reforms. They were the subject of the first new measure to come into place, the three month residence requirement for Jobseeker’s Allowance, and have remained in the spotlight through the later extension of the three month wait to Child Benefit and Child Tax Credit, and the forthcoming reduction of total benefit entitlement to three months.

*The three-month wait for Jobseeker’s Allowance*

Amongst the first of the reforms was a new three-month residence requirement before a claimant could be tested for habitual residence for the purposes of claiming Jobseekers’ Allowance, under the Social Security (Jobseeker’s Allowance: Habitual Residence) Amendment Regulations 2013 SI 2013 No. 3196. The Social Security Advisory Committee has raised ‘serious concerns’ about the impact upon UK nationals returning from the EU (SSAC, 2014). The Secretary of State for Work and Pensions has suggested that it ‘has always been the case that UK nationals returning from abroad must satisfy the Habitual Residence Test and that this included the requirement to have been In the UK for an appreciable period time’ (DWP, 2014a). However, the Court of Justice of the European Union (CJEU) Case C-90/97 *Robin Swaddling v Adjudication Officer* [1999] ECR I-01075made clear that EU law does not allow Member States to impose a requirement of a fixed period of residence for establishing habitual residence on their own nationals returning to their home state having exercised EU free movement rights.

In *Swaddling* the CJEU stated that ‘length of residence in the Member State in which payment of the benefit at issue is sought cannot be regarded as an intrinsic element of the concept of residence’ (at para 30) for the purposes of coordinating legislation. In *Swaddling* the unlawful period introduced by the UK was 8 weeks. This was duly removed post-*Swaddling*, though has been effectively reintroduced – and lengthened - by the three month requirement creating a direct conflict with the CJEU.

The measure is not just problematic in the context of UK national returners; it goes beyond what is necessary for EU national jobseekers, who have never been expected under EU law to leap a high threshold for residence/benefit eligibility, since the alternative could constitute an obstacle to accessing the labour market (following Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-02703, para 72). While Directive 2004/38, Article 24(2) provides that ‘the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence’, benefits intended to facilitate access to the job market are a form of social security, not social assistance (according to the CJEU in Case 316/85 *Centre public d'aide sociale de Courcelles v Marie-Christine Lebon* [1987] ECR 02811, 26), and so should not be subject to an automatic three month bar. JSA was found (in *Collins*) to constitute a benefit facilitating access to the job market (so a special non-contributory benefit, not social assistance). In *Collins*, the CJEU found that it was reasonable to require migrants to demonstrate ‘a genuine link’ with the job market before allowing an unemployment benefit claim, which may be demonstrated by establishing that ‘the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question’ (para 70). However, any real link test‘cannot go beyond what is necessary’and that if the test demands a period of residence,this period ‘must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State’ (para 72).

Three months is more than is needed to demonstrate genuine jobseeking. The UK government’s Impact Assessment of the three-month rule states that ‘more than a quarter of new JSA claims end within a month and over half within three months’ (DWP, 2013c, 5). If the new rules mean that over half of potential claimants never receive unemployment benefit because they have found work during the waiting period, it seems likely that the waiting period goes beyond what is necessary.

The measure may reflect an expectation that jobseekers should initially export the equivalent of JSA from the Member State from which they have come, since Regulation 883/2004 provides for exportation of unemployment benefit for up to three months. But that logic is not watertight. Firstly, Member States may only allow *contributory* unemployment benefits to be exported, and classify non-contributory unemployment benefits as ‘special non-contributory benefits’ (SNCBs), payment of which can be limited to the territory of the Member State paying. The UK has classified income-based JSA as an SNCB, (Annex X to Regulation 883/2004) so only contribution-based JSA can be taken abroad. Those who are not entitled to a contributory unemployment benefit are unlikely to have an exportable benefit. This may be because they have not been working, or because they have been working but earning below the levels at which contributions are exacted, or have not been working for long enough to clock up the requisite contributions.[[2]](#endnote-2) Those who are entitled to a contributory unemployment benefit might find that they have not fulfilled the technical requirements to export it. For example, Regulation 883/2004 requires claimants to have been registered as a person seeking work in the exporting state, and to have been available to its employment services for at least four weeks after becoming unemployed, before attempting exportation (Art. 64(1)(a)). Circumstances may easily have prevented this from happening, especially if a claimant becomes aware shortly after leaving employment of possible job opportunities in another Member State. This requirement in itself is perhaps a little perverse, since it could discourage movement. In sum, many EU migrants seeking work will not have been able to export a benefit.

*The three-month wait for Child Benefit and Child Tax Credit*

Jobseekers (and according to the regulations anyone not the worker or family member of a worker – which might include students – see the Child Benefit (General) and Tax Credits (Residence) (Amendment) Regulations 2014, s. 3, amending Child Benefit (General) Regulations 2006, reg 23, new para 6) are also now subject to a three-month residence rule for the purposes of claiming Child Benefit and Child Tax Credit (see the new para 5 in regulation 23). In targeting migrant children, the measure echoes those put in place in the aftermath of Case C‑34/09 *Gerardo Ruiz Zambrano,v Office national de l’emploi (ONEm)* [2011] ECR I-01177 (for example, see *Harrison v. Secretary of State for the Home Department* [2012] EWCA Civ 1736, 67) as discussed in O’Brien (2013).The new three-month rule for these benefits disadvantages families and in particular low-income families for whom Child Tax Credit is especially important. The rule will impact seriously upon lone parent families; lone parents are vastly more likely to be ‘low income’ (Maplethorpe, Chanfreau, Philo & Tait, 2010) - they are nearly seven times as likely as two parent families to have a total family income in the lowest income quintile. Lone parents with young children are less likely to be in work. They are less likely to have a full time worker in the family i.e. couples are more likely to have a full time worker as either mother or father. ‘In couple families, nearly all partners in work (95 per cent) were working 30 or more hours per week’ (2010, 98, and Table 5.5, 112). So they are more susceptible to being found not to be work at all – see below on the minimum earning threshold. And they find it more difficult, so take longer to, find work (as acknowledged by the DWP, 2014c; also see Ahmad, Lance Jones, Petrie & Reith, 2010, and Citizens Advice, 2008). Lone parents seeking work are likely to have an immediate need for benefits, partly due to the difficulties of combining the search for work with the securing of childcare, which is often too inflexible to be compatible with low income, low status jobs (see Citizens Advice, 2014). Inability to access the means to provide basic subsistence for one’s child is a significant barrier to accessing a job market; the measure could have a dissuasive effect on lone parent EU nationals seeking work in the UK, and on UK national lone parents unlikely to seek work elsewhere in the EU if they face a penalty on their return. Those who exercise their free movement rights may see the welfare of their children being compromised, so while Solanke (2012) and Zelizer (2011) each ask whether EU law will treat ‘children in the same impersonal, economizing manner used for less sacred commercial products’, it seems that UK law, interacting with EU law, certainly does. In hitting lone parents the hardest, the measure may be indirectly sexually discriminatory,[[3]](#endnote-3) since most lone parents are women.[[4]](#endnote-4)

*Reducing new jobseeker benefit entitlement from six months to three*

Writing in the *Daily Telegraph* the Prime Minister announced the plan to count the first three months of a jobseeker’s residence without benefit towards the overall six months of a jobseekers’ right to reside - so halving the period of eligibility for JSA, CB and CTC to three months (Cameron, 2014). Writing about the prior six month ‘cut –off’ Cameron said ‘I can tell *Telegraph* readers today that we will be reducing that cut-off point to three months, saying very clearly: you cannot expect to come to Britain and get something for nothing.’ While, according to the *Financial Times*  ‘Downing Street insists that the new rules are compliant with EU law’, (Parker and Warrell, 2014) the rules call into question the meaning of a residence right for a jobseeker, the obligations of a state to facilitate access to the labour market, and the meaning of ‘reasonable’ period of jobseeking before being accorded unemployment benefit.

The new three-month rule was laid before parliament in October 2014 and the new regulations came into effect in November 2014.[[5]](#endnote-5) They go beyond the original proposal, by reducing the right to reside for all jobseekers – not just newly arrived ones who have previously had three months of benefit-free jobseeking – to three months. This might appear to fit with Directive 2004/38, since Article 14(4)(b) states that to have a longer period of residence than three months, a jobseeker should have a genuine chance of employment. In Case C-344/95 *Commission v Belgium*, job seekers in Belgium faced automatic expulsion after three months, but the Court found that it should be possible for the workseeker to demonstrate that she had 'genuine' chance of finding employment. This may be taken to permit some kind of ‘genuine chance’ test after three months. However, the genuine prospects of work test is likely to go beyond what would be necessary in such a scenario. Moreover, the only guidance that exists with regard to jobseekers in general – rather than new arrivals staying for longer than first three months without access to social assistance – comes from Case C-292/89 *Antonissen* [1997] ECR I-00745 – which suggests six months for jobseekers and longer if there are ‘genuine chance of being engaged’. The new rules appear to, counter-intutively, treat people who become jobseekers less favourably than newly arrived jobseekers; new arrivals have a total of six months right to reside as jobseekers, albeit with the first three unpaid; people who have had another status – family member/worker etc, but have not retained worker status and become jobseekers, face losing their right to reside after only three months of jobseeking. The rules push the *Antonissen* formula further, and possibly even hollow it out – if more than half of potential claimants cannot receive benefit-based facilitation in accessing the labour market (because they find work within the first three months).

*Disqualifying all EU jobseekers from Housing Benefit*

It is not just newly arrived (or newly returned) jobseekers (and their children) affected by new measures. All EU jobseekers who have not retained worker status[[6]](#endnote-6) and do not have permanent residence rights[[7]](#endnote-7) have been excluded since March 2014 from Housing Benefit, through the Housing Benefit (Habitual Residence) Amendment Regulations 2014, (Regulation 2 amending regulation 19(3)(b) of the Housing Benefit Regulations 2006). As a consequence, migrants who have worked for substantial periods, and may have been habitually resident for decades but not qualified for permanent residence, could face destitution and homelessness. The impact is especially serious for families. Single jobseekers on JSA with a child or children below school age are likely to be EU national women, since UK nationals in that position would qualify for Income Support, and so be passported onto Housing Benefit. EU national lone parents who do not meet the right to reside requirement for Income Support can only acquire a right to reside by registering as a jobseeker. Having so registered, they now will not be eligible for Housing Benefit, which means inability to pay rent, which leads to possession proceedings and eviction.

When it comes to lone parents, the difference in EU law between spouses/civil partners and unmarried partners of migrant workers is pertinent. The UK has obligations to both.[[8]](#endnote-8) But when they separate, those who are married are in a considerably more secure position, than those who are not, since they retain entitlement to social protection. Separated spouses can still derive a right of residence from their EU national working spouse so long as the marriage subsists – even if divorce is planned (following Case 267/83 *Aissatou Diatta v Land Berlin* [1985] ECR 00567). Therefore, if a migrant worker leaves his wife or civil partner, who is looking after their pre-school children, he can ensure they keep a roof over their heads by not divorcing. However, there are no such provisions protecting unmarried partners when they separate, so an unmarried partner of a migrant worker has no such security. In cases of domestic abuse, an unmarried partner with young children faces an unacceptable choice, between staying and keeping her children with an abuser, or taking her children, leaving and facing a total loss of social protection. This loss of a right to reside happens in spite of the fact that she herself may be a former worker, and have made contributions in the past on which she has seen no return. Moreover, if she is an accession state national, she will have been subject to the worker registration scheme. If she was not duly registered, or moved between jobs and did not get a full twelve months covered with registration certificates, then during all subsequent years of work prior to the end of transition measures she cannot be considered to be a worker. In *Zalewska v Department for Social Development* [2008] UKHL 67 it was found that workers in need of registration are not workers. She may have worked for up to a decade, but these years of work will not be counted when it comes to later claims or reliance upon permanent residence.

The welfare cliff edge faced by people who become lone parents of young children is made more startling by the disregard for the welfare and best interests of the children – unless the children are school age and can trigger a right to reside for the children and for their primary carer based on Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* [2010] ECR I-01065. This distinction is at times difficult to justify, since enrolment, or non-enrolment, in school may not be fully reflective of a family’s integration into the host society. Indeed, a pre-school child born in the UK may be more integrated into the UK than a school-age one recently arrived.

The UK government’s impact assessment of the Housing Benefit change states that there are no costs to this measure (DWP, 2014c, 1). However, the equality analysis concedes that ‘lone parents may be more likely to spend longer on JSA, with no access to HB, and so could face an increased risk of homelessness’ (DWP, 2014b, 7, 10). It also notes that nearly one in four of those affected by the new Housing Benefit measures have dependent children (2014b, 7-8). The impact assessment notes in the final paragraph that ‘the policy would increase the risk that EEA migrants could fall into difficult circumstances were they unable to find employment, particularly if they were vulnerable, such as families with children’ (DWP, 2014c, 5). The separate Equality Assessment in its turn notes that the DWP have ‘taken into account the United Nations Convention on the Rights of the Child’ (DWP, 2014b, 3, 8 and 11). Both assessments find that they would not be left without state support, because they could claim JSA(IB) for a period (DWP, 2014b, 5; DWP, 2014c, 8).

However, JSA(IB) is not likely help much, as it is not sufficient to pay rent. Shelter (2012) find that the average weekly local housing allowance (LHA - giving an indication of how much rent can be paid through benefit) in 2012 was £109 – and that included single people without children, and persons only entitled to a shared accommodation rate. As an example, the LHA in the Harrogate district for a lone parent with two different sex children, one over the age of 10, is £160 per week.[[9]](#endnote-9) The lone parent rate of JSA(IB) for a lone parent over the age of 25 is £72.40.[[10]](#endnote-10) JSA alone leaves a significant rent costs gap, and that is not accounting for having any costs at all apart from rent. The new measure is also likely to interact with the new Minimum Earnings Threshold test (see below), since part time workers are placed at a greater risk of being found to be in ‘marginal and ancillary work’, and so not to be workers at all, instead being classified as jobseekers not entitled to Housing Benefit – which is problematic for lone parents on low incomes insufficient to cover rent as well as other costs.

Both the impact assessment and the equality assessment add that families affected by the Housing Benefit withdrawal may in certain circumstances be able to apply for support from the Local Authority. This support, provided by an increasingly straitened social care sector (Hastings, Bailey & Besemer, 2013) allows for the provision of services to a child in need and their family under the Children Act 1989, (sections 17(1) and (6), and 20) and the provision of accommodation ‘in certain circumstances’ under the National Assistance Act 1948 (section 21). However, the impact assessment concludes that ‘any such costs to Local Authorities would be small and short-term’ (DWP, 2014c, 5) without explanation or projection, which suggests that few of the one in four affected households who have children will be helped in this way.

It is submitted that the measure constitutes direct discrimination on the ground of nationality, potentially contrary to Articles 18 and 45 of the Treaty on the Functioning of the European Union (TFEU) - ‘Within the scope of application of the Treaties… any discrimination on grounds of nationality shall be prohibited’. UK national jobseekers are not subject to the same exclusion, which is the same principle as was at issue in in Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193, where it was found that the ‘fact that Mr Grzelczyk is not of Belgian nationality is the only bar to [the benefit] being granted to him. It is not therefore in dispute that the case is one of discrimination solely on the ground of nationality’ (para 29). UK authorities might instead characterise it as indirect discrimination on the grounds of not having the ‘right sort’ of a right to reside, following the Supreme Court *case Patmalniece v SSWP* [2011] UKSC 11, and point to Article 24(2), according to which host Member States are not obliged to provide social assistance for the first three months of residence (or longer for a jobseeker). But that provision only applies to newly arrived migrants, whereas all EU jobseekers have been excluded from Housing Benefit. Moreover, HB might not easily be characterised as simple social assistance, and could form part of the package of benefits designed to facilitate access to the job market. The exclusion from Housing Benefit has a damaging effect on a person’s ability to seek work, since JSA(IB) levels are too low to cover rent; Housing Benefit can be characterised as part of the package of job seeking benefits, enabling a person to maintain residence in order to find work. As some other Member States provide for greater percentage of income replacement rates in unemployment benefits than does the UK, (Figari et al note that some Member States explicitly enfold housing costs into their ‘Minimum income’ schemes rather than treat them separately; Figari, Matsaganis & Sutherland, 2013; see also OECD, 2014). Housing Benefit might be a necessary unemployment benefit supplement,[[11]](#endnote-11) as evidenced by the fact that all jobseekers hitherto have been passported onto HB, and UK national jobseekers still are. Without the means to maintain a residence the ‘right to reside’ as a jobseeker might become no such thing.

While the above measures might infringe EU law, another series of measures seem on paper to be EU-compliant, but might trigger infringements of EU law by administrative decision makers: the genuine prospects of work test, the minimum earnings threshold, and the restriction of jobcentre plus interpretation services. These are explored in the next section.

Administrative infringements

*The genuine prospects of work test*

New rules place strict time limits on the right to reside of all jobseekers, including those with retained worker status. The new guidance for decision makers on retaining jobseeker status and retaining worker status is complicated and liable to confuse those reliant upon it for deciding who does and who does not get benefits.

In short, the new rules place temporal limits on the duration of EEA jobseeker benefit claims, following the logic in *Antonissen*. There, the CJEU found that a period of six months of a right to reside did ‘not appear to be insufficient’ for jobseekers to find out about job opportunities and take ‘the necessary steps in order to be engaged’. However, if after six months a jobseeker were to provide ‘evidence that he is continuing to seek employment and that he has genuine chances of being engaged’ he should not lose his jobseeker’s right of residence.

Admittedly a six-month limit may be a matter of academic rather than practical interest, since many jobseekers might struggle to survive for as long as six months without Housing Benefit. But the limit will affect migrants staying with friends or family. It will also have a significant effect on the narrative of a migrant’s history, since even a brief loss of jobseeker status can punctuate their status, and later prevent them from claiming five years of *continuous* lawful residence for the purposes of permanent residence, by restarting the clock according to the treatment of status gaps in UK case law; the government’s decision maker guidance states that ‘a break in continuity during which residence is not in accordance with the Imm (EEA) Regs will mean that the five year qualifying period has to be served afresh.’ (DWP, 2014d).

A new ‘genuine prospects of work’ test will be applied to jobseekers after six months, to establish whether they continue to have a right to reside as jobseekers, and it will also be applied to jobseekers who have retained worker status for six months, in order to establish whether they continue to have a right to reside.[[12]](#endnote-12) So what is the test, and how is it conducted? ‘Compelling evidence of genuine prospects of work’ is required. The requirement of ‘compelling evidence’ is a new, national innovation not mentioned in EU case law. It suggests a narrow range of admissible evidence – two types only, in fact, according to the decision maker guidance. The first is documentary evidence of an actual job offer, with a start date, confirmed income, hours per week and duration (DWP, 2014e, para 14(1). The second is evidence of a change of circumstances within the last two months that makes it ‘likely the claimant will receive a job offer imminently’ (2014e, 15(2) – and as a result of the change ‘they are awaiting the outcome of job interviews’ (2014e, 14(2)). The guidance is explicit that ‘*it is irrelevant whether the evidence is compelling* if the change in circumstances does not meet the “date of change” requirement’ (2014e, 15(2)). But the *Antonissen* formula does not ask for evidence of a change of circumstances, much less a time-restricted change. Nor does it require that a claimant actually have a job, or that ‘imminent employment is likely’. Instead, the *Antonissen* phrasing (‘evidence that he is *continuing to seek employment* and that he has genuine chances of being engaged’) suggests that a claimant might be still in the active ‘seeking’ part of the process, rather than sitting on a job offer, or waiting for one following an interview.

*Status gaps caused by the genuine prospects of work test*

The effects of loss of jobseeker status can be quite dramatic not just in the loss of immediate benefits, but in the re-setting of the ‘clock’ on lawful residence so that previous years of economic activity (anything below five full years) might count for nothing when permanent residence is later claimed. While it might have been possible to argue that any temporary gaps might be treated as periods of self-sufficiency, so allowing temporary benefit entitlement and not interrupting a person’s continuous lawful residence, the courts seem to have cut that route off, both through a strict approach taken to the requirement for ‘comprehensive sickness insurance’ in *Ahmad v Secretary of State for the Home Department* [2014] EWCA Civ 988 (a requirement that fits poorly with the organisation of health care in the UK), and also through a finding that Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* [2013] nyr does not apply in the UK.

In *Brey*, the CJEU ruled that EU law prohibits an automatic bar on benefit claims from those relying on a self-sufficiency based right to reside.[[13]](#endnote-13) Austrian authorities had treated any claim for social assistance benefits as disproving self-sufficiency, so disproving the right to reside, so removing any entitlement to that benefit. The ECJ called for a more discretionary approach, noting the case law recognising a ‘certain degree of financial solidarity’ between Member States,(at 72) and pointing to the provisions on ‘unreasonable burdens’ to suggest that some burdens must be reasonable. Member States should ‘assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State’s social assistance system as a whole’ (at 76-77).

Subsequently, in *VP v Secretary for Work and Pensions* (JSA) [2014] UKUT 32 (AAC), the UK’s policy of refusing social assistance benefits to the economically inactive, on the grounds they could not be self-sufficient, was challenged. Judge Ward examined *Brey* and found that, though the ECJ had not said so, it could only apply to claimants whose resources had been assessed at the point of applying for a residence card. As the UK does not issue registration cards as a matter of course, the judge concluded that it was legitimate to treat a benefit is claim as a failure of a sufficient resources assessment (at 84).

If the logic of *VP* is upheld and followed, it would never be possible to claim a social assistance benefit in the UK as a self-sufficient EU migrant, which seems at odds with the reasoning of *Brey*, which prohibits ‘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’ (*Brey*, 77)*.* As a consequence, loss of jobseeker status following the genuine prospects of work test can have perilous effects. Even those who do not claim benefits while self-sufficient cannot, following *VP,* plug their ‘status gap’ by retrospectively treating it as a period of self-sufficiency. Judge Ward stated that a person should be able to ‘point to “resources” to see them through five years’, not just the period between jobs, and could not rely on periods during which he had made no claim upon public resources ‘through a combination of luck and an unusually frugal lifestyle’. In not becoming a burden to the social assistance system, they ‘may have been fortunate, but the risk [of becoming a burden] was still there’ (*VP*, 84).

EU migrants cannot get credit for not having been a ‘burden’ – only for showing that from the outset there was no risk of them having become a burden, by showing substantial private resources (five years’ worth) from the outset. The requirement to show resources sufficient to get them through five years for any brief period of claimed self-sufficiency is disproportionate. It risks EU law infringement by administrative decision makers; many migrants wish to show that for short period between work they relied on accrued earnings and were self-sufficient, but such a claim will most likely not get past the first administrative hurdle.

The ‘genuine prospects of work’ test thus creates a significant cliff edge. It also interacts with another move likely to produce administrative infringements of EU law: the minimum earnings threshold, explored next.

*The Minimum earnings threshold*

The definition of migrant work has long been elusive and vague, (CML Rev Editorial, 2014; O’Brien, 2009) in order to be deliberately broad (Case 66/85 *Lawrie-Blum* [1986] ECR 2121, 16-17; Joined Cases C-22/08 and C-23/08 *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] ECR *-04585*, 26). There is now a new approach to assessing whether someone is a worker, which appears to comply with Union law, since it introduces a two tier test – firstly a minimum earnings threshold (equivalent to 24 hours per week at the national minimum wage) is applied, and those who pass it are automatically workers, while those come below it will have their work assessed to see whether it is ‘genuine and effective’, or ‘marginal and ancillary’, drawing upon the distinction in Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 01035, 17-18.

But in practice it is possible that earnings will be treated as basically determinative, given that it has been publicised, for example in the Prime Minister’s *Financial Times* article as a ‘new minimum earnings threshold’, rather than a new ‘genuine and effective test’ (Cameron, 2013). And the decision maker guidance provokes three causes for concern – the treatment of part time work; the treatment of students who work; and role of disability in determining the genuineness of work.

Decision makers are told that part time work is *'not necessarily always marginal and ancillary*' (DWP, 2014f, 19). Any language pertaining to probability is important in guiding decision makers, and 'not necessarily always' arguably means ‘usually’. This steer towards characterising part time work as usually marginal goes against the expansive approach in the ECJ, which has found that income is irrelevant in determining whether work is genuine and effective, emphasising instead the importance of part time work throughout the EU in *Levin*, Case 344/87 *Bettray v Staatssecretaris van Justitie* [1989] 01621, and *Lawrie-Blum*. In *Levin* the Court noted at para 15 that:

*‘part time employment, although it may provide an income lower than what is considered to be the minimum required for subsistence, constitutes for a large number of persons an effective means of improving their living conditions’ (emphasis added).*

So work is genuine and effective if it is an effective means of improving one’s living conditions. Part time work being genuine and effective for ‘a large number of persons’ seems to speak to a more generous measure than part time work being ‘not necessarily always’ marginal.

Secondly, the guidance appears to steer decision makers towards finding that students who work are not ‘workers’, by asking 'is the person exercising their rights as a worker'? Decision makers are invited to ‘look at all the circumstances, including the person’s *primary motivation in taking up employment’*. Someone who exercises free movement rights as a student and only ‘secondarily’ works to finance that study is might well fall foul of this test. If they do, decision makers do not even have to ask whether their work is genuine and effective, but must automatically find them not to be a worker. The invitation to look at someone’s motivation for working goes directly against the ECJ’s instructions that *‘*the motives which may have prompted the worker to seek employment in the Member State *concerned are of no account and must not be taken into consideration’* (*Levin*, 22)*.*

The third serious concern with the guidance is the role of disability in determining whether past work was genuine and effective. Decision makers are explicitly told to take physical capacity into account to determine with hindsight whether a person was really a worker. This is based on one judgment of a Social Security commissioner in 2007, (CSIS/467/07), that added another criterion into the definition of work: ‘it appears to me that physical capacity to perform the work is also a material feature in an employment relationship’ (DWP, 2014f, para 12). This principle has now been crystallised in the decision maker guidance and so is part of standard decision making, in the twelfth of a list of ‘factors to take into account’, [[14]](#endnote-14) and in the fifth example scenario, in which the decision maker decides ‘that the existing nature of the claimant’s condition, *the lack of physical capacity to do the work,* the short interrupted duration of the employment and the reasons for the claimants dismissal were compelling grounds for finding that the claimant had not been a worker’ (2014f, para 25).

This is deeply problematic. The criterion invites unsubstantiated and speculative retrospective guesswork about physical capacity and job performance on the part of decision makers. The guidance does not require decision makers to adduce expert evidence or review occupational health/reasonable adjustment duties as they appeared at the time of taking up employment. The guidance essentially invites ad hoc generalisations as to whether people were too disabled for the job to have been a real job, so places no weight on the responsibility of employers to put reasonable adjustments in place.[[15]](#endnote-15) The very idea that it is reasonable to dismiss someone for being too disabled, and that it is reasonable to treat disability as negating a person’s worker status rather defeats the object of the reasonable adjustment/accommodation law, and of the integration of persons with disabilities in the workplace – as required by Article 26 of the Charter of Fundamental Rights of the European Union. Given that we are dealing with a test applied to EU migrant workers, we are squarely in an area of law in which the Charter is engaged, bearing in mind the limitations of the Charter at Art. 51 that the provisions of the Charter apply to Member States ‘only when they are implementing Union law. Not only would failure to make reasonable adjustments be discrimination on the part of an employer, but in singling out persons with reduced physical capacity, and inviting extra suspicion purely on the basis of capacity, the guidance is discriminatory, contrary to the Equality Act 2010 (possibly invoking the public sector equality duty, s.149) and the UN Convention on the Rights of Persons with Disabilities. Article 28 of the convention provides for the ‘adequate standard of living and social protection’ to be promoted ‘without discrimination on the basis of disability. But this decision maker guidance rejects the social model of disability – which vests disability in social, environmental and attitudinal barriers – since it conceives of disability as an unalterable medical question of capacity.

Using a ‘too disabled’ criterion to exclude persons from the status of worker is also at odds with the current ‘activation’ climate throughout the EU (Council of Ministers, 2011; Public Employment Services Working Group, 2011) and in the UK (Daguerre & Etherington, 2014; Simmons, 2011; O’Brien, 2013b) – that is, channelling people with disabilities into the workplace through a combination of measures, including welfare withdrawal (O’Brien, forthcoming). The UK government’s recent report ‘Fulfilling Potential’ and subsequent action plan ‘Making It Happen’ make clear the emphasis on getting disabled people into work, on encouraging adjustment, on better retention, and on improving employer attitudes, (DWP, 2013b) all of which militate against a ‘too disabled’ label.

Physical capacity is misleadingly listed as the last of twelve ‘points that can be derived from EU case law’ (DWP, 2014f, para 9) – which it cannot. It is the only point on that list with no basis in EU law; only the words of one UK Commissioner. The guidance on the Minimum Earnings threshold therefore sets up administrators to infringe EU law, encouraging them to view part time work as usually marginal and ancillary, to question the motives of workers and possibly exclude students who work, and to use a discriminatory physical capacity criterion.

The Minimum Earnings Threshold also promises to interact problematically with the genuine prospects of work test. As explored above, those who wish to keep jobseeker or retained worker status beyond three months need to provide ‘compelling evidence’ of genuine prospects of work, such as an actual job offer. But this job offer must be accompanied with information on the ‘income, hours per week and duration’ in order for the decision maker to make a ‘genuine and effective’ determination. The rather perverse outcome of this is that – as example 5 in the guidance shows - even those who have a job offer and a start date, albeit for an atypical or zero hours contract may *not* have compelling evidence of a ‘genuine prospect of work’, as 'there is no compelling evidence that the work will be genuine or effective because the income, hours per week and duration cannot be confirmed' (DWP. 2014e, 15). This requirement for detailed proof of terms and conditions of employment goes beyond *Antonissen*’s requirement just to show a genuine *chance* of being employed.

As a result, benefit claimants who have reached their three-month JSA limit, and have a job offer for atypical work, but a gap before it starts, may face a welfare cliff edge. If the gap is brief enough for them to survive on their own resources, it will still likely prove an impediment to later claiming continuity of lawful residence for a permanent residence claim – even if they had clocked up more than four years’ of economic activity before going onto JSA.

EU migrants seeking work in the UK – as jobseekers or as persons with retained worker status – also face a new administrative disadvantage, potentially obstructing their ability to secure work within the three month limit: the withdrawing of routine interpretation.

*Withdrawal of routine interpretation at Jobcentre Plus*

According to the accompanying press release, this measure should encourage jobseekers to learn English, and so enhance their employability (DWP, 2014g); ministers ‘want to call time on this practice and stop subsidising unemployed migrants who do not learn English, hindering their ability to find a job and integrate into British life’ (DWP, 2014g). The DWP’s equality analysis for withdrawing interpretation (obtained through a Freedom of Information request) suggested that interpretation has an ‘adverse impact and undermine[s] community cohesion by encouraging segregation’ (DWP 2014h). It acknowledges the counter argument that removal of interpretation might be challenged as indirect discrimination on grounds of race or ethnicity, but responds that ‘removing the service as a general rule is intended to improve integration of migrant communities’. There are certain situations in which interpretation will be offered – but not simply for help in looking for work.

If a jobseeker requests interpretation, front line staff are instructed in the new ‘interpreting services policy’ (also obtained through an FOI request) to ‘discuss’ their request with them, and ‘if it becomes apparent that you can conduct business with them without the need for an interpreter, you may proceed without an interpreter’. The policy acknowledges that interpretation should be provided where it is necessary for ‘explaining to a claimant their responsibilities under the Jobseeker’s Allowance conditionality rules’ or where ‘it is clear that the person's command of English, or Welsh, is not good enough for you to deal with them properly’ (DWP, 2014l). But the implicit direction is for advisers to muddle through where they can. If advisers can get across what they feel is the headline information without interpretation, they will proceed. This approach risks a lot of things being lost in (the absence of) translation, especially with something as complex as the benefits system. The National Institute for Social and Economic Research (NIESR) has noted the increase in demand for poorly funded interpretation and translation services since the accession of the ‘A8’ states. The NIESR then went on to connect lack of English language skills with social exclusion – that those who did not speak English were less likely to use services, and more likely to rely on friends and family. In the context of public employment services, reduced access to interpretation might repel migrants from engaging with Jobcentre Plus at all. As the NIESR noted, this can reduce the pressure on services (and might reduce benefit claims) – but it ‘may also result in exploitation of migrants where they are not aware of their rights and of available support’ (Rolfe, Fic, Lalani, Roman, Prohaska & L. Doudevapage, 2013, 31).

There is no legal duty to provide such services in all cases. However, refusal to provide interpretation *on request* could result in claimants misunderstanding the conditions of the benefit, and could alienate them from further engagement – making reporting changes of circumstances difficult, which could later result in an action for fraud. The Cities for Local Integration policy network made several recommendations on the subject of EU migrant integration, finding that translation served to help integration, where there was a risk of ‘inequality of opportunity’ (2008). Job searching was one example cited. There is, in contrast, no available evidence to support the UK government’s contention that the new interpretation freeze would ‘promote equality of opportunity and help foster good relations between different groups’.

Fitting the measures together – and more change on the horizon

The programme of measures constructs an intricate series of trapdoors, so that one by one the welfare floors fall through for EU migrants, with distressing outcomes. The unmarried partner of a migrant worker leaves him because of domestic violence, and takes the children, who are not yet school age. She seeks work, so claims JSA, but finds it difficult to get a job that fits with the informal child-care available. While on JSA she loses entitlement to Housing Benefit, so accrues rent arrears and risks possession proceedings. After three months she will also face losing JSA as well – unless she has the right sort of job offer for the right sort of job, or is awaiting the outcome of interviews for the right sort of job, having undergone the right sort of change of circumstances at the right sort of time.

Someone who has reached the three-month limit for JSA but who has a zero-hours job offer may not be treated as having advance evidence of it being genuine and effective, so may lose JSA during the wait for the job to start. A claimant who actually has a part time job is also susceptible to being found to be economically inactive and so to being classified as a jobseeker, even if they could not realistically look for other work. And that would also mean no Housing Benefit.

A break in residence in the UK – to care for an elderly relative in a home state, for instance, could mean that on return an EU migrant will be treated as a new arrival – with an impact on eligibility for Child Tax Credit and Child Benefit, if the migrant is not considered a worker – which may be the case even if they are working. Being classified as economically inactive means an automatic refusal of benefits, since *Brey* is not being applied in the UK.

The reform programme is not yet complete. Further plans are being floated which could penalize some EU migrants *working* in the UK. On 4 August 2014, the Treasury launched a consultation on withdrawing the Personal Allowance – the exemption from Income tax for the first £10 000 of earnings – for ‘non-residents’. The group would include 250 000 EEA nationals in ‘temporary’ employment, who would if the allowance were removed, effectively earn less than their ‘resident’ counterparts (UK Treasury, 2014, 6.4). The consultation document notes the use in other countries of a de minimis rule to avoid taxing those with ‘very low global incomes’, but it goes on to state, ‘doing so would not be straightforward’, and would amount to an ‘administratively burdensome relief which would be available to people who might have no significant connection to the UK’. The proposal, if followed, will merit closer examination as indirect discrimination on the ground of nationality, drawing on Case C-237/94 *John O'Flynn v Adjudication Officer* [1996] ECR I-02617.

Each of the individual measures examined throughout the ‘new precipices’ sections above creates clashes with EU law. The next section questions the rationale for this programme of changes.

**Assessing the basis for the EU migrant pillory**

EU migrants have become the express targets of regulatory changes, being presented as threats to the integrity of the welfare system. In December 2013 the government announced it was ‘accelerating action to stop rogue EU benefit claims’, (DWP, 2013c) and on New Year’s Eve declared that ‘from tomorrow (1 January 2014), tough new rules come into force to ensure that migrants don’t take advantage of the British benefits system’ (DWP, 2013d). In April 2014 the government issued a press release stating that ‘the Prime Minister has made it clear that abuse and clear exploitation of the UK’s welfare system will not be tolerated’ (DWP, 2014i). The threat of benefit tourism has led Secretary of State for the DWP Iain Duncan Smith to suggest that migrants should not be entitled to claim anything for up to two years (Mills & Grimstone, 2014). But these concerns have been conspicuously unencumbered with substantiating evidence of the existence or prevalence of ‘rogue EU benefit claims’ or abuse of the system.

The impact assessment for the 3 month residence requirement for JSA was candidly devoid of figures – listing each cost as ‘n/a’, and stating in the ‘benefits’ sections that ‘a monetary value has not been estimated due to the lack of detailed data and the uncertainties regarding future migration patterns.’ The document does not provide data on how many people were claiming JSA within the first three months of residence. The absence of retrospective figures undermines the credibility of projected advantages of the changes. The impact assessment of the withdrawal of Housing Benefit from EU jobseekers is vague on the likely costs of the measures, in light of the need to rehouse families and children. There was no consultation with the Social Security Advisory Committee, which is meant to scrutinise such legislation, and nor was there consultation with local authorities.[[16]](#endnote-16) The reason for sidestepping these statutorily required consultations was ‘urgency’ (DWP, 2013a); also Housing Benefit (Habitual Residence) Amendment Regulations 2014/539, preamble). As the Prime Minister’s original announcement of the measure appeared in an article expressing concern about the lifting of transition measures for A2 immigrants, (Cameron, 2013) ‘urgency’ may imply the risk of an influx of Bulgarians and Romanians, a fear which appears to have been misplaced.[[17]](#endnote-17)

The impact upon people who have been working also goes without mention. The targets of most of the measures - for example the withdrawal of Housing Benefit from jobseekers - are the economically inactive, with the assumption that those who have been working will retain worker status and be unaffected. But it is all too easy to become unemployed without retaining worker status, through failing to comply with the procedural requirements of Article 7(3) of Directive 2004/38, which provides for the retention of worker status for those who have become involuntarily unemployed. The Upper Tribunal has made clear that those who have become involuntarily unemployed must register with Jobcentre Plus without ‘undue delay’ (*Secretary of State for Work and Pensions v MK*, CIS/2423/2009); otherwise any gap between the end of employment and the registration stops the retention of worker status and former workers can be then treated as simply ‘jobseekers’ when they do register. This has worrying consequences – as jobseekers, they will not be entitled to Housing Benefit. And they have a status gap in their records preventing the claimant from pointing to ‘continuous lawful residence’. A delay of ‘more than a very few days’ (*MK,* 69) should be analysed to see whether it is undue delay (*MK*, 72).

However, many workers on becoming involuntarily unemployed do not immediately sign on as jobseekers. This could be because they initially look for work using their own networks, and because they would rather not claim benefits while they still have some of their earnings saved up. Those with casual contracts, or zero hours contracts are at a significant disadvantage, since they might not know until some time has elapsed that they are in fact unemployed. In *VP* Judge Ward found that even where a claimant was ‘reasonably in my view, hanging on in the hope of further work from [his employer]’ (62) this nevertheless resulted in undue delay in registering for JSA (61). The period in question was of 45 days – or one and a half months. Those on zero hour contracts waiting ‘reasonably’ for further work might during that time see their accrued rights as former workers evaporate. This is concerning because of the concentration of EU migrants in atypical work (Whyman & Petrescu, 2014, table 4, 31); Jayaweera & Anderson (2008, 21) note that ‘12% of A8 nationals who were employees said they were in work that was not permanent in some way.  This compares with 6 per cent of the entire LFS sample’, while the Migration Advisory Committee (2014, 5.66) finds that in ‘both high and low-skilled jobs, workers from EU8 and EU2 and non-EU countries were more likely to be doing shift work than UK workers’. They face something of a gamble – hanging on when there is a lull, or jumping ship and claiming benefits as soon as possible. The post-economic crisis changes in the labour market, and increase in atypical working and zero hours contracts (BIS, 2014, 17; BIS, 2013, 5 and 11)[[18]](#endnote-18) means that we are likely to see increasing numbers of migrants falling through the gaps in the rules on worker status retention, and as jobseekers, their JSA will run out after three months even if they have a contract due to start soon for a zero hours contract.

The swift registration expectation created by the Administrative Appeals Chamber of the Upper Tribunal stands at odds with a rather more generous finding in the Immigration and Asylum Chamber of the Upper Tribunal. Former workers can retain worker status not only by registering as a workseeker, but also if they are made involuntarily unemployed and embark on vocational training. In *Arulmani Chengamah* Upper Tribunal (Immigration and Asylum Chamber) IA/13765/2012, Judge Conway found that ‘it cannot be argued that the EEA national is expected to embark on vocational training… immediately or otherwise be considered to no longer be exercising Treaty rights’ (24). The Judge added that ‘a reasonable period must be allowed for a suitable training course to be found. In my judgement the six months taken by the EEA national is a reasonable period’ – so that the claimant did retain worker status for six months while seeking to enrol on a course. A similar approach, if not extending as far as six months, could be adopted in allowing a gap before registering with Jobcentre Plus, given that the former worker may need time to establish that her employment has ceased, make emergency budgeting arrangements, and investigate job opportunities and vocational courses, before seeking help from the job centre.

As a consequence of the current approach, many people who have been economic actors can lose worker status without retention, so fall foul of the new benefit rules. However, there is no evidence on the work histories of those who might be affected by the measures, or on the numbers of migrants who could/should have retained worker status but for signing on quickly, so it is not possible to accurately weigh up the costs and benefits of the new measures. As Forwood (2012, 85) notes on the general topic of UK-EU relations, the push for change has been based on a ‘false and misleading prospectus’; whereas an ‘improved understanding of the realities’ might make people more likely to favour the EU – and here more specifically, tolerate EU migrants. A wealth of evidence shows that EU migrants are net contributors to the economy (see above, and Portes, 2013). A ‘fact finding analysis’ published by the European Commission (2013) tells a very different story to that underpinning these changes. Of the fifteen Member States studied, the UK had the *lowest* proportion of EU migrants in receipt of unemployment benefits (1 per cent), and was the only Member State in which a *smaller* proportion of EU migrants than own-state nationals were in receipt of unemployment benefit (4 per cent of UK nationals). This undermines the rhetoric of scroungers and of the ‘magnetic pull of Britain’s benefits system’, (Cameron, 2014) and calls the logic – and the fairness - of the campaign into question.

Taken together the changes are deeply concerning. Firstly, they challenge the fundamental principles of EU law – free movement and equal treatment; secondly they inculcate a xenosceptic legal and administrative culture, placing this cohort of the ‘precariat’ in an even riskier position; and thirdly, they import neoliberal ideals into the welfare system, reducing resistance to child destitution. The rest of this paper analyses these problems.

**The slippery slope: the social consequences of the UK’s reforms of EU migrant welfare**

The measures re-define the meaning of EU membership

It is possible that the measures are driven by the desire to dissuade EU migrants from coming to the UK. In order to achieve the government’s migration-lowering targets it would not be enough to repel ‘benefit tourists’; fewer EU migrants in general would have to come to the UK for the target to be met. The EU welfare crackdown was first announced in the Prime Minister’s article in the *Financial Times*, (Cameron, 2013) tellingly entitled ‘Free movement within Europe needs to be less free’, which suggested that migrants should not be coming to the UK to fill jobs that could be done by British people.

In a later *Daily Telegraph* article, the Prime Minister has proposed a strict cap on jobs advertised in the EU portal – so that rather than all of those advertised in Jobcentre Plus (‘more than a million’), the total advertised on the portal would be cut by ‘more than 500 000’ (Cameron, 2014). The measure ‘is quite simply about putting British residents first’. So the objective is not just to stop people being jobseekers, but to prevent EU migrants *getting jobs* in the UK. This proposal stands at odds with the idea of an integrated labour market, hampering the realisation of Article 45 TFEU, and more specifically it conflicts with the legal basis of the EU jobs portal.[[19]](#endnote-19)

The measures targeting EU nationals have been explicitly linked with the aim to reduce immigration. The government’s press release about the Minimum Earnings Threshold stated that it was being introduced ‘as part of *the government’s long-term plan to cap welfare and reduce immigration*’, (DWP, 2014i) while the three month wait for Child Tax Credit and Child Benefit, and the withdrawal of Jobcentre Plus interpretation were linked to the government’s determination ‘to cap welfare and reduce immigration as part of Britain’s long-term economic plan’ (DWP, 2014g). The desire to reduce EU migration conflicts with the European Union’s key objective of promoting free movement, as expressed in Article 3 of the Treaty on European Union and Article 45 of the Treaty on the Functioning of the European Union. These official statements could be construed as acts of declaratory discrimination on the grounds of nationality – the term used in O’Brien (2011). Indeed, following the line of reasoning in Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-05187 that the ‘most effective’ form of discrimination can be to announce a discriminatory policy, it could be that the most effective obstacle to movement could be to announce that you do not want migrants to come to your shores – making these statements actually declaratory obstacles to movement. Jansson and Kalimo discuss the role of (amateur) behaviour theory in adjudicating free movement of persons cases, and outline a persuasive case for gathering evidence on the behavioural effects of measures which might constitute obstacles (2014, 554). As the CJEU notes in the ‘Buy Irish’ case, 249/81 *Commission v Ireland* [1982] ECR 04005, (finding that the campaign to persuade people to buy Irish produce created unlawful disadvantages for producers in other Member States) ‘even measures adopted by the government of a Member State which do not have binding effect may be capable of influencing the conduct of traders and consumers in that state and thus of frustrating the aims of the Community’. Similarly, declaratory obstacles to movement – declarations from a government – are capable of influencing potential migrant workers, so frustrating the fundamental freedoms, and objectives of the Union.

The measures when combined with decision maker guidance and official publicity, constitute a re-working of EU principles, revealing a new response to EU obligations; in addition to the reactions Börzel identified as pace setting, foot dragging and fence sitting, we have a strategy of non-compliance. This has emerged in the context of the government’s calls for reform of the EU ‘to return the concept of free movement to a more sensible basis’, (Cameron, 2013 and 2014);[[20]](#endnote-20) calls that have not received much international support. Mr Steinmeyer, German foreign minister stated that whoever questions free movement ‘damages Europe and damages Germany’; Paschal Donohoe, Irish Minister for Europe has said that free movement is ‘an absolute cornerstone of the European Union,’ (Stacey and Fontanella-Khan, 2014); the article goes on to claim that ‘no European country has backed the UK’s stance on curbing free movement in the EU. Even the Netherlands, which has often been seen as the UK’s closest ally in Brussels, opposes Mr Cameron’. These changes could be the government’s work-around – a back-door, unilateral redefinition of the terms and conditions of membership, to dissuade EU migrants from coming to the UK, in light of a potentially hostile and discriminatory reception.

This is reallocation of Treaty obligations is asymmetric - UK authorities readily argue that other Member States ought in various circumstances to be responsible for UK national benefit claims, even in cases in when UK nationals have returned to seek work in the UK and are receiving JSA and UK national insurance credits. The current UK position is that such credits, jobseeking and benefit receipt do not make the UK the competent state for sickness benefits, according to *Secretary of State for Work and Pensions v PS (IB)* [2009] UKUT 226 (AAC). Where UK nationals are based in other Member States, UK authorities have resisted a responsibility to export benefits, implying that those other Member States should be competent for benefit claims. The UK opposed the exportation of Disability Living Allowance, Attendance Allowance and Carers Allowance in Case C 299/05 *Commission of the European Communities v European Parliament and Council of the European Union* [2007] ECR I-08695, and when the ECJ made clear that they are (apart from the DLA mobility component) exportable sickness benefits in Case C-537/09 *Ralph James Bartlett and Others v Secretary of State for Work and Pensions* [2011]ECR I-03417, the UK made exportability subject to very restrictive conditions, minimizing the chances of anyone actually taking them abroad. For example, the UK requires claimants to be receiving a contributory benefit from the UK (Gov.uk, 2014; DWP, 2014j, Appendix 1, para 21). This restrictive approach has been successfully challenged in the Court of Appeal of England and Wales, in *Linda Tolley (Deceased) v The Secretary of State for Work and Pensions* [2013] EWCA Civ 1471, but the Secretary of State for Work and Pensions is appealing to the Supreme Court (ICLR, 2014). The UK had also argued that a sickness benefit for young people, Employment and Support Allowance in youth should not be exportable. When the ECJ found that it was social security and therefore could be exported, in Case C-503/09 *Lucy Stewart v Secretary of State for Work and Pensions* [2011] ECR I-06497, government ministers reacted negatively, with the House of Lords welfare reform leader Lord Freud claiming that his ‘blood was chilled’[[21]](#endnote-21) on reading the judgment. The finding was used as the key reason for abolishing the benefit in its entirety.[[22]](#endnote-22)

# The reticence to export does not just affect UK nationals of course, but EU migrants who are working in the UK, who might wish to export family benefits to children in other Member States. The Prime Minister has criticised the family benefit coordination rules, stating that ‘free movement should not be about the exportation of child benefit’, and stated in a BBC interview that he thought it was not right that EU migrants working in the UK could claim child benefits for children in another Member State (BBC, 2014a). Secretary of State for Work and Pensions Iain Duncan Smith was also reported as criticising the exportation of child benefits by EU migrants working in the UK, in strong terms – asking ‘why the hell do they need our netted-out benefits?’, adding, ‘It's an absurdity’ (Mills & Grimstone, 2014). This international asymmetry of responsibility has sparked resentment – Poland’s foreign minister Radoslaw Sikorski publicly asked: ‘if Britain gets our taxpayers, shouldn't it also pay their benefits?’ (BBC, 2014b).

# In a speech in November 2014 Prime Minister David Cameron made a further speech outlining proposals which would require significant Treaty revision, including stopping in work benefits for EU migrant workers, stopping exportation of child benefits by EU migrant workers, deportation of jobseekers after six months, and restricting the family reunification rights of EU migrant workers (BBC, 2014e). These measures would be dramatic in their effects – creating a sub-class, which the UK would be allowed to tax without providing any return on their contributions. In the case of exporting child benefit, the objections offer little logic, since children whose educational and health costs are being met by another Member State represent rather good value to the public purse. In any case, this clear indication of a desire to directly discriminate against working EU migrants (and to dispense with the fig leaf of indirect discrimination provided by only refusing benefits to those without a ‘right to reside’ – O’Brien, 2008), not only requires a significant upheaval of the EU’s fundamental principles, but sends out a strong message to potential migrants – that whether or not these suggestions could ever come to pass, this is the low value we place on EU migrants, and how little we think of them as equal human beings.

The measures perpetuate a xenosceptic culture

The new measures have ramifications for all EU migrants, not just the economically inactive – one of which is heightened scrutiny and suspicion. The government’s Budget Policy costings document lays out plans for a further new measure, not documented elsewhere, to extend HMRC compliance checks to ‘all EEA migrant claims’ (HM Government, 2014, 49). Compliance checks on HMRC benefits can typically only take place where there is reason to believe that there is an error in a tax credit award.[[23]](#endnote-23) The HMRC Compliance Handbook notes that ‘some’ compliance checks are part of a randomised programme, but states that ‘the majority’ of compliance checks happen because a risk of non-compliance has been identified. Decision makers are instructed: ‘You should never start a compliance check unless there is a risk to address or the person has been selected as part of the random enquiry programme’ (HMRC, 2014). But now there is a risk that being an EU national is seen as sufficient ‘risk’ of non-compliance. This is directly discriminatory treatment, with a potentially insidious effect upon the perception of EU migrants. It breaches the EU ‘constitutional principle’ of equal treatment, as expressed in Articles 10, (since nationality discrimination has a disproportionate effect upon persons of ethnic minorities), 18, and 45(2) TFEU - automatic compliance checks by HMRC could constitute effectively a term and condition of work – workers must have a national insurance number and be registered with HMRC, and all EU national *workers* will be subject to compliance checks. It also contravenes Article 14(2) of Directive 2004/38 which states that Member States ‘may verify’ that the residence conditions are fulfilled ‘*in specific cases where there is a reasonable doubt*’. The provision then adds that ‘this verification shall not be carried out systematically’. The proposal systematises a measure that Article 14 says should not be systematic, carrying with it assumptions that EU migrants are less likely than UK nationals to comply with benefit entitlement conditions. This assumption resonates with the overall EU benefit reform package, feeding a corrosive xenoscepticism within the system. These changes are not merely ‘Eurosceptic’ – which suggests wariness of EU institutions; they target *people.*

Taken together the changes paint a picture of undeserving benefit tourists. This culture has resounding effects on *all* EU migrants. Each change entails extra administrative hurdles. Added procedural complexity impacts upon even those perceived as virtuous hard working EU migrants, and can result in substantial delay in decision making. Delay can stifle EU welfare rights, since it can amount to refusal without the right of appeal, creating hardship for a long period of time. Iain Duncan Smith has described the changes to JSA as ‘you'll have to wait three months and you'll only be able to claim for three months. Then it's bye-bye’ (Woolf & Grimstone, 2014). EU workers are placed in an even more precarious state, since a change of circumstances could see all forms of support dissolve beneath them, placing the welfare of their families at risk. This lack of security again creates a discriminatory, alienating way of life for the EU migrant worker – a life on the precipice. (On the relationships between job insecurity, welfare state regime and poor health, see Bambra 2014, 990; Bambra, Lunau, Van der Wel & Wok, 2014, 130; Benach, Vives, Amable, Vanroelen, Tarafa, & Muntaner, 2014; Bambra, 2013; Clayton, Bambra, Gosling, Povall, Misso, & Whitehead, 2011; Ferrarini, Nelson & Sjöberg, 2014).

These measures to an extent seem to respond to a prevailing atmosphere of popular xenoscepticism, as evident in the media. (Here are just a few headlines: Here are just a few headlines: ‘EU migrants snatch jobs from UK workers’ in *The Daily Express* (Dawar, 2014); ‘PM must halt EU’s migrants’ in *The Sun* (editorial 2014); ‘Four years of EU migrants coming here will fill a city the size of Manchester’ in *The Daily Mail* (Slack, 2014); ‘New immigration rules are too little, too late’ in *The Daily Telegraph* (editorial, 2013); and ‘UK has “more than 600,000 jobless EU migrants”’ in *The Times* in (Elks, 2013)). The measures similarly provide some kind of response to the electoral success of UKIP; the UK returned 24 UKIP MEPs in 2014, more than any other party (Labour 20, Conservative 19); they are members of the Europe of Freedom and Direct Democracy Group. The UK has the highest number of MEPS in that group of all Member States, and is the only Member State in which the EFDD came out ahead of other European Political Parties. (European Parliament, 2014). But these reactions have wide, penetrating effects. They generateand entrench administrative xenocepticism. As Lipsky noted, administrative decision makers (or ‘street level bureaucrats’) mould the law, (2010) and most of what most people experience as legal interaction happens mediated through them. It is at this level that key ‘frictions’ between ‘colliding legal worlds’ are played out, as described by Shaw, Miller and Fletcher in the context of UK immigration law (2013; and also Shaw & Miller, 2013). It is here submitted that in the context of EU welfare decisions, street level bureaucrats undertake this moulding through interpretation, implementation and insulation.

Decision makers mould the law through interpretation when deciding what counts as marginal work, whether someone has signed on at the job centre quickly enough to retain worker status, and whether gaps between jobs prevent a migrant having been continuously lawfully resident for five years. They mould the law through implementation when choosing the evidential burden to place on claimants, and when setting the timescale of claims. Insulating actions include keeping to the given guidance and keeping the decision making process remote from the client, or telling the client not to apply in the first place. For example, benefit decision making with an EU dimension goes to the EU decision making team (which appears to have several locations, including the far-flung outpost of Wick); clients are not given contact phone numbers, email addresses or fax numbers, and the contact postal address handles mail very slowly. While Lipsky suggested that street level bureaucrats exercised too much discretion, in each of these reforms decision makers’ discretion is curbed, through given cues to view and manage these cases through a xenosceptic lens. Those cues come in the form of governmental announcements, decision maker guidance, and the fact of a legal campaign, and they are cues as to the purpose of the legal texts, and to the ‘mischief’ to be addressed. These exhortations cramp their cognitive discretion, and encourage strategic obstructionism.

But xenoscepticism is not an end in itself. It is an instrument, a crowbar wedged in at the cracked window of society’s moral conscience – foreigners – prising it open to new, and otherwise unpalatable ways of viewing welfare, and increasing our tolerance of destitution. This infiltrates and colours how we conceive of the welfare state as a whole, and further dissolves our commitment to a social contract, a concept in which the version of society in which we want to live is paramount – the production of ‘a moral and collective body’ (Rousseau, 1998, 15).

The measures risk increasing society’s tolerance of destitution

EU migrants present a test-bed for unalloyed welfare conditionality – neoliberal ideals taken further than has hitherto been possible in the context of UK nationals. The creation of welfare segregation – legal partitioning off from the rest of society in terms of support – undermines alternative, social justice-based understandings of welfare, of human rights dimensions, or of basic universal coverage. The conditions imposed on those people compartmentalised out of welfare coverage are highly publicised. For example, the proposal to cut JSA from six months to three inspired the following stories: ‘EU migrants to Britain face further restrictions on welfare payments’ in *The Guardian* (Mason. 2014); ‘Tougher benefits rules for EU migrants: New arrivals will lose payments after just three months under new Tory plans’ in *The Independent* (Morris, 2014); ‘Jobless EU migrants to have benefits slashed’ in *The Daily Express*  (Brown, 2014); ‘Cameron outlines immigration curbs 'to put Britain first' (BBC 2014d); ‘David Cameron announces immigration benefits crackdown’ in *The Daily Telegraph* (Dominiczak, 2014); ‘David Cameron to halve time that EU migrants can claim benefits’ in *The* *Financial Times*  (Parker & Warrell, 2014); and G. Eaton ‘Why Cameron's crackdown on immigrant benefits won't help the Tories’ *The New Statesman* (Eaton, 2014). The new rules echo the objective of promoting conditionality throughout the whole system, as in Universal Credit (DWP, 2010a). As such they stand to reshape our understandings of what is acceptable; concepts of fairness and responsibility have been linguistically captured and tethered to these ideological ends. Iain Duncan Smith declared that ‘Welfare reform will restore fairness,’ (BBC News, 2010); David Cameron argued that ‘Welfare Reforms 'Put Fairness Back'’ (Sky News 2013). The government has conflated reduction of welfare with increased fairness, announcing that the ‘Government is committed to reforming the welfare system to make it fairer [and] more affordable’, and that ‘Universal Credit… will create a leaner but fairer system’ (DWP, 2010a, 6 and 5), and the government has further elided fairness with reciprocity, setting out to ‘increase fairness between benefit recipients and taxpayers’ (DWP, 2010b, 15). The concept of responsibility has been similarly appropriated; the Welfare Reform Act has a chapter entitled ‘Claimant responsibilities’, and 80 mentions of ‘claimant commitment’. (On this ideological linguistic capture, see O’Brien, 2013). So our tolerance of destitution, and of the measures by which it is created or exacerbated, is increased.

In altering what welfare means for a part of the population, we change our ideas about welfare and the objectives of a ‘civilised’ society. In basing welfare on contingent individual contracts, the idea of the social contract becomes ever further removed, so we forget to think about the kind of society we wish to buy into. The new EU welfare rules penalise those ‘virtuous’ workers (and their families) who fall out of work without retaining worker status, without recognising a degree of solidarity unless and until a five years’ permanent residence right has been acquired. This right can be circumscribed so that inability to account for brief gaps interrupts and re-starts the period, (DWP, 2014d) making it very difficult for EU migrants who move between a series of agency, casual or seasonal jobs. The changes particularly punish EU migrants who are deemed economically inactive, and are especially damaging to lone parents and their children.

In light of the figures suggesting that EU migrants are net contributors, it seems we must ask whether requiring all of the EU migrant population to be contributors nearly all of the time is realistic, economically sensible, or morally defensible. Offering some protection to the vulnerable might be considered a price worth paying in order to maintain a stable employment market and a humane society; UNICEF have described a commitment to protecting children from poverty as ‘the hallmark of a civilized society’ (UNICEF, xxx, 4, and the Archbishop of Canterbury, Justin Welby, has argued that ‘a "civilised society" had a duty to support the vulnerable’ (BBC, 2013). Alternatively, protecting the vulnerable has been viewed as an instrumental mechanism of pacification, a necessary buttress of a smoothly functioning capitalist economy (‘the democratic petty bourgeois strive for a change in social conditions by means of which existing society will be made as tolerable and comfortable as possible for them’ -Marx, 2003, 154). A humane society reaping the benefits of migrant labour should afford protection to a small minority of vulnerable EU migrants. The government estimate that 1 per cent of EU migrants with National Insurance numbers have made Housing Benefit claims as job seekers, while nearly a quarter of all those passported have children. Not providing social protection means tolerating the destitution of children, on the grounds of nationality. This is another form of slippery slope – a vision of partial and parsimonious welfare coverage, in which objectives of social justice are disregarded, since protection is only offered for those who do not need it, and such safety net as there is disappears at the point someone falls towards it. It is difficult to find a meaningful, safe status for children in the UK’s pared down economic model of EU welfare rights. One of the measures appears to actually target children – creating the prior residence rule for Child Benefit and Child Tax Credit. Child benefits play a crucial role in the UK’s poverty reduction strategy, (Bradshaw and Huby, 2014) but restricting access to EU migrant families undermines that purpose.

The notion of the ‘unreasonable burden’ did some service to the theory of EU citizenship, since it was found in *Grzelczyk* to admit the possibility of a ‘reasonable burden’. But it has been used to dehumanise EU migrants, who may only make reasonable claims upon the UK public purse as factors of production; otherwise any burden is unreasonable. This reasoning degrades our appreciation of the importance of ‘need’, so that discussion of burdens and proportionality has increasingly seeped into the general lexicon of welfare reform. The much-reviled benefit cap was touted as introducing a ‘reasonable maximum’ burden;[[24]](#endnote-24) similarly the measures time-limiting contributory invalidity benefit Employment and Support Allowance, reflects the temporal aspect of calculating unreasonable burdens.[[25]](#endnote-25)

The campaign to restrict EU welfare claims is not over. The developing benefit, Universal Credit, may further segregate EU migrant claims. The Universal Credit Regulations provide for various levels of conditionality. Sections 19 of the Welfare Reform act removes all work requirements if a claimant has limited capability for work and work-related activity, or regular and substantial caring responsibilities for a severely disabled person, or if they are the responsible carer for a child under the age of 1. Section 20 reduces work requirements to just a work focussed interview for a claimant who is the responsible carer for a child who is aged at least 1 and is ‘under a prescribed age (which may not be less than 3)’. Section 21 provides for a reduced work requirement, which may include a work focussed interview, and/or a work preparation requirement, but no more, for a claimant who does not fit into sections 19 or 20 but who has limited capability for work.

But regulation 92 of the Universal Credit Regulations 2013[[26]](#endnote-26) states that *all* EEA workseekers – including those who should have retained worker status under Article 7(b-c) of Directive 2004/38 – ‘who would otherwise fall within section 19, 20 or 21 of the [Welfare Reform] Act’ are ‘to be treated as not falling within any of those sections’ so are automatically subject to full conditionality requirements regardless of disability and caring obligations. This provision triggers a number of problems. The measure discriminates on the grounds of nationality, contrary to Article 18 TFEU, and will have a disproportionate impact upon disabled migrants, migrants associated with disabled people, and female migrants, since the care of children still falls disproportionately to women, and lone parents are more likely to be women. Conditionality requirements not imposed on their UK counterparts include a willingness to work up to one and a half hours away from home (creating up to three hours of unpaid travel during which child care would still need to be paid).[[27]](#endnote-27)

These regulations come in the context of the Welfare Reform Act which emphasises repeatedly the new ‘claimant commitment’ – eighty mentions (and fifteen mentions in the Universal Credit Regulations). The welfare segregation of EU migrants intensifies an individualistic approach to welfare – encouraging the retraction of the ‘social contract’. This is accompanied with linguistic appropriation of concepts of responsibility and fairness, coalescing around competition as the centre of gravity of society, rather than alternatives such as egalitarianism. In vesting rights in economic activity for EU nationals, this competitive vision is given rather freer reign than is yet possible in the context of UK nationals.

This dispensing of the social contract on a national scale echoes a shift on an international level - the move away from EU solidarity, to a much more atomistic membership. Free movement is to be restricted; migrants are to be dissuaded from entering the UK, or else be placed in precarious positions, afforded little security, and treated as factors of production – while other Member States should remain competent for supporting migrating UK nationals, either by denying UK competence or refusing exportation. The new measures unveil a vision for Europe in which integration is rejected, citizenship is irrelevant, and the ideas of social responsibility and social justice are neglected. It should be noted that the UK is not alone in its xenosceptic policies, but nor are such policies the European ‘norm’. A CML Rev editorial, notes 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 response of Czech, Hungarian, Polish and Slovak ministers, in December 2013, highlighting the beneficial nature of such movement for host Member State economies’ (2013). It is time to ask, before the decision is made unwittingly, what sort of society we want at a national and at a European level, and to paraphrase Michael Wilkinson, what we are willing to decide together (2013, 222) in terms of the human shape of our legal, political and social systems.

Conclusion

EU migrants have been placed on a pillory, to be viewed as a threat to the UK welfare system. This reasoning results not only in the overt targeting of EU migrants with welfare reforms, but it also has more subtle effects on our understanding of the welfare state as a collective endeavour. The isolation and exclusion of those not deemed sufficiently, consistently productive undermines a system that steps in at times of need, and recognises the greater needs of some than others. The absence of evidence to back up the notion that EU migrants are a particular threat, or that there is a ‘magnetic pull of the UK benefits system’, (Cameron, 2014) stands in contrast with available figures suggesting that EU migrants are *less* likely to be out of work and ‘in need’ than UK nationals. So the departure from a commitment to social protection has not been robustly justified.

The scaffolding of instruments does not conform to the letter of EU law. The three-month past residency rules for JSA and for ‘non-worker’ claims for Child Benefit and Child Tax Credit work against the social integration of people seeking access to the labour market, and against the welfare of the children of jobseekers. Three months goes beyond what is necessary to establish genuine work-seeking, given that half of all work-seekers find work in that time (DWP, 2013c). Moreover, the rule as it stands penalises own-state nationals for exercising their free movement rights, contrary to *Swaddling.* The subsequent reduction of jobseekers’ rights to reside plan will have the effect that jobseekers will only ever have a maximum of three months of JSA, and ‘other key welfare benefits’, (the government has not at the time of writing listed all the benefits affected, DWP 2014k; Parker & Warrell, 2014) which again minimises the degree to which the UK actually facilitates labour market access.

Excluding EU jobseekers from Housing Benefit cannot but promote homelessness and destitution amongst the small minority of EU migrants affected. Given the exclusion of non-worker EU lone parents from Income Support, by which UK nationals would be passported onto Housing Benefit, the measure could have a particularly detrimental impact upon lone parent families resulting from the separation of unmarried couples, with worrying effects in the context of domestic violence. The government has not mentioned a corresponding increase of funding to local authority social services, so it seems implausible that they will accommodate evicted families. In short, it will become impossible to actually reside and seek work in the UK for a great number of EU migrants, without risk of destitution. But restricting access to the labour market is not a side effect – it is an objective. The withdrawal of interpretation services from job centres, and plans to put a strict cap on jobs which can be advertised in the EU portal – possibly halving those advertised (Cameron, 2014) – might speak to a desire to prevent EU migrants working in the UK.

Further changes appear to invite administrative infringements, since their compatibility with EU law will depend on how they are interpreted and implemented. Decision makers have been given significant steers - through the official decision maker guidance, and through the government’s press campaign – towards potentially unlawful practices. The ‘genuine prospects of work test’ might seem a codification of the *Antonissen* principle. But decision makers are required to look for one of two very narrowly defined types of evidence of prospects of work – either an actual job offer that is specific about hours and pay, or the convoluted requirement to be waiting for the outcome of interviews following a change of circumstances in the last two months that made imminent employment likely. This significantly restricts the concept of a ‘genuine chance’ of work. The consequential loss of ‘retained’ worker or workseeker status will have concerning effects in terms of welfare entitlement, when coupled with the position in the UK that no-one can be economically inactive (‘self-sufficient’) and claim social assistance.

The two-tier Minimum Earnings Threshold/genuine and effective test might also be affected by guidance that might make the threshold basically determinative. It steers decision makers to think of part time work as ‘not necessarily always marginal and ancillary’, while the publicity around the measure places a great deal of emphasis only upon the first tier of the test – the earnings threshold. The DWP press release upon the subject states ‘if the EU national claims to be in work or to have recently been working we’ll apply a new Minimum Earnings Threshold of £153 per week to help decide whether the work can be treated as meaningful and effective’ (DWP, 2014i). It also explains that ‘*To show they are undertaking genuine and effective work* in the UK an EEA migrant will have to show that for the last 3 months they have been *earning at the level* at which employees start paying National Insurance. This is £150 a week’. In other words, the concept of genuine and effective test is not conceived as separate from (or a second tier to) the earnings threshold. The second tier of the test is also concerning, because it steers decision makers to find that students who work are not workers, and codifies a problematic Social Security Commissioner decision according to which a person’s disability or incapacity may tell against the genuineness of their past work.

Each measure stands to socially exclude vulnerable EU migrants. The campaign against EU migrant benefit claiming seems to stem in considerable part from the mainstream political parties’ desires to recapture Eurosceptic votes. Both Conservative and Labour parties have responded to UKIP’s recent high-profile by-election triumphs, (winning a seat in Clacton and coming a close second in Heywood and Middleton) – David Cameron was reported to ‘take on UKIP with promise of new measures to curb European immigration’ (Grice, 2014), and to promise ‘one last go at immigration curbs’ (BBC, 2014c), and Ed Balls was reported as announcing that ‘EU treaties on freedom of movement may have to change’ (Wintour, 2014). But those affected are not legitimate collateral damage, and nor should the measures be seen as mere rhetoric. The biggest ramifications of this campaign as a whole may not be upon just those individuals. *All* EU migrants are caught, since everyone risks being shifted onto the precipice. The loss of work could be catastrophic for migrant families – which forces them to live in a state of precarious anxiety, and puts them at greater risk of exploitation by employers (Sumption & Somerville, 2009, 28-32;. Taylor & Sturdy, 2013). Every encounter with the welfare system, even for working EU migrants, is to be characterised with a greater deal of scrutiny, extra tests and hurdles, all adding to the already significant problem of delay and consequent disadvantage, and all to be projected through an officially xenosceptic prism.

As legal expressions of a desire to curb EU migration, the changes open up the possibility of unilateral, back-door treaty tinkering, and are somewhat at odds with the aims and spirit of EU integration. A more atomistic membership is envisioned and partly achieved, through a rejection of EU solidarity. The changes also speak to an anti-solidaristic retrenchment on a national scale, directing us further away from notions of a social contract, and underscoring a commitment to individual, contingent welfare contracts. In using xenoscepticism to pierce our moral Achilles heal, these reforms lower our antipathy towards destitution – and in particular, the destitution of children. The pillory and the precipice experienced by EU migrants may lead to a slippery slope of degradation for our social conscience, exacerbating xenoscepticism and socio-economic prejudice, and shaping the current and possible future directions of our welfare state.

**Acknowledgements**

Thanks for comments on earlier drafts are owed to Helen Stalford and Michael Dougan, University of Liverpool, and Adam Tucker and Simon Halliday, York Law School. Thanks also to staff at the Child Poverty Action Group and the AIRE Centre, for inviting me to roundtable discussions regarding litigation strategies relevant to the first section of the paper. I would also like to thank participants at the University of York’s conference on ‘Questioning Austerity: Realities and alternatives’, and those who attended the research seminar in COMPAS, University of Oxford on ‘Feeding a xenosceptic culture: legal and administrative penalties for being European’, for all the comments on related papers. All errors are of course mine.

**Funding**

This research was conducted as part of an ESRC funded project ‘The EU Rights Project’ [www.eurightsproject.org.uk](http://www.eurightsproject.org.uk).

**Notes**

i. As of 1 January 2013, 3.8% of the UK population were citizens of another EU 27 Member State: European Commission, 2014b.

ii. Contribution conditions in the Jobseeker’s Allowance Regulations 1996, as amended by The Social Security (Contribution Conditions for Jobseeker’s Allowance and Employment and Support Allowance) Regulations 2010.

iii Contrary to the UK Equality Act 2010 s.11 and s. 19 applied to s.29 (provision of services and public functions), and s.149-150 (public sector equality duties) and Schedule 19 (defining public authorities); and in EU law, Directive 79/7/EEC.

iv In the UK in 2011 ‘women accounted for 92 per cent of lone parents with dependent children’ Office for National Statistics (2012).

v The Immigration (European Economic Area) (Amendment) No. 3) Regulations 2014.

vi Pursuant to Art. 7(3) of Directive 2004/38 and Regulation 5(7) of the Immigration (European Economic Area) Regulations 2006.

vii Pursuant to Art. 16 of Directive 2004/38 and Regulation 15 of the Immigration (EEA) Regulations 2006.

viii Married partners are family members Art. 2(2)(a) of Directive 2004/38; Member States must ‘facilitate entry and residence for’ partners in ‘a durable relationship, duly attested’ Art. 3(2)(b) of Directive 2004/38; they are extended family members in UK law, Regulation 8(5) of the Immigration (European Economic Area) Regulations 2006.

ix See the Local Housing Allowance rate calculator at Directgov: <http://lha-direct.voa.gov.uk/search.aspx> last accessed 16 October 2014.

x JSA rates on the UK government website: ‘Jobseeker's Allowance (JSA)’ <https://www.gov.uk/jobseekers-allowance/what-youll-get> last accessed 16 October 2014.

xi See European Commission , 2014; figure 9 shows Figure 9 shows the UK as having the lowest figures in the EU for ‘Unemployment benefit expenditures as percentage of GDP in 27 EU Member States’ 2010, and figure 5 shows the UK as having the 9th lowest unemployment assistance net replacement rate. Also note that greater reliance is placed on Housing Benefit in the UK than in other Member States as a means of poverty reduction (Bradshaw & Huby, 2014).

xii The Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2013 Schedule 1: Amending Regulation 6 (2)(b) of the Immigration (European Economic Area) Regulations 2006 and inserting Regulation 6(2)(ba).

xiii Required by the Equality Act 2010, s. 20 (or the Disability Discrimination Act 1995, s.6 at the time of the Commissioner’s decision) and the Framework Equal treatment Directive 2000/78, Article 5.

xiv Cf Cousins (2014, 95), who argues that the CJEU came to the wrong conclusion (or perhaps the right conclusion for the wrong reasons) in *Brey*.It is here submitted that the court’s ruling is congruent with the line of ‘real link’ case law; O’Brien (2008).

xv ‘A commissioner has held that a claimant’s physical incapacity to do the work she had undertaken and the fact that she had been dismissed from it after a short period were relevant to the issue of whether the work was genuine and effective’ (DWP, 2014f, para 9).

xvi As required in section 176(2)(a) of the Social Security Contributions and Benefits Act 1992.

xvii ‘there is no evidence currently available that shows an increase in EU2 migration since 1st January 2014’ – (Office of National Statistics, 2014)

xviii ‘ONS data shows the use of zero hours contracts has increased in the past 5 years, and that there are around 250,000 such contracts in use in the UK today.’ The same document, at 11, reveals that the shift-reliability for employees may have decreased, as average weekly hours on those on zero hours contracts has decreased, so ‘though the number of individuals on zero hours contracts has increased, the total employment hours worked under such contracts may not have.’

xix Articles 1(1)-(2) and 13(1)(a), Regulation (EU) No 492/2011; Commission Decision of 23 December 2002 implementing Council Regulation (EEC) No 1612/68 as regards the clearance of vacancies and applications for employment, Art. 8(2).

xx See the questions raised by a group of EU professors in response to David Cameron’s calls in January 2013 for reform: G. de Baere and P. Eeckhout et al, ‘Europe, the Prime Minister, and the facts – seven questions for David Cameron’  UK Const. L. Blog (1st March 2013) (available at [http://ukconstitutionallaw.org](http://ukconstitutionallaw.org/" \t "_blank)).

xxi HL Hansard 14 Feb 2012 Column 733.

xxii HL Hansard 11 Jan 2012 Column 144; HL Hansard 14 Feb 2012 Column 729.

xxiii The Tax Credit Act 2002 s.16 (2)(a)-3(b).

xxiv Welfare Reform Bill explanatory notes as brought from the House of Commons on 16th June 2011 [HL Bill 75] 744; Lords Hansard, 15th sitting 21 Nov, Lord Freud Column GC350.

xxv s. 51 of the Welfare Reform Act 2012, inserting s.1A into the Welfare Reform Act 2007; ss.(2)(a) limits contributory ESA to a maximum of 365 days. The temporariness of claim is a factor in Recital (16) of Directive 2004/38.

xxvi SI No 376

xxvii Regulation 97(3)(a) and (b).

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Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems OJ [2004] L166/1, Art. 64.

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