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To encourage the publication of original analysis or critique of law and policy on different categories of migrants, on refugee and asylum issues and on nationality laws, at UK, comparative, European and international level; to encourage the publication of work on such topics that links the development of law to migration flows between states and regions of the world; to provide updates and news features on recent developments in UK law; to publish reviews of texts related to the concerns of practitioners and academics.

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Editorial

It is often forgotten in the rush to make policy changes in immigration law with a narrow nationalist focus on the UK that the impacts are felt much wider. The UK's membership of the EU is just one factor in the complex kaleidoscope of interacting laws that determine the ultimate shape of people's experiences. It is clearly no longer possible from a legal viewpoint to say that British jobs should be reserved for British workers and that Italians should be somehow excluded. The election campaign gave the occasion for some politicians to remind people that if this kind of rhetoric was taken too far it would impact on the status of British workers elsewhere.

The IPPR's new study on the British diaspora (see *News*) also reacts to the fact that British workers are now dispersed across the world and that Britain fails to take their importance seriously in all kinds of ways. In Turkey, for example, from where this editorial is being written, there are recently sprung-up settlements of British and other European citizens all over the Mediterranean and Aegean coasts. Research among this group of migrants already reveals that the Turkish authorities respond to changes in British immigration laws with alacrity. Many British people complain about the high fees involved for renewing their residence permits but it seems that the Turkish government, applying the rules on fees on a reciprocal basis, simply reflects the pushed-up fees for all kinds of immigration applications in the UK for Turkish citizens among other foreign migrants. This shows how policy change in Britain has unintended effects elsewhere and on British citizens.

The recently announced limits to the Points Based System have been the subject of some complaint by the Indian government (see *News*) and it may be that the large number of British people living in India could be impacted also. British immigration policy is less and less amenable to unilateral fashioning at the British end without regard to extraneous consequences.

Prakash Shah

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News

Manifesto pledges are put to the test for coalition government

The feasability of manifesto pledges made by the Conservative and Liberal Democrat parties on immigration policy and reform are being tested as the election dust settles around the UK's new coalition government.

Following the Tories' manifesto promise to impose an 'English language test for anyone coming here to get married' an announcement was made by the Home Secretary, Theresa May on 9 June 2010 that as of autumn 2010, anyone applying as the husband, wife, civil partner, unmarried partner, same-sex partner, fiance(e) or prospective civil partner of a UK citizen or a person settled in the UK would be required to pass an English test. Language testing was initially proposed by the previous Labour government in 2007 along with proposals (now implemented) to raise the visa age for spouse and other partnership visas. The new language requirements will apply to non-EU visa applicants within and outside the UK and will be in addition to the 'knowledge of life in the UK' requirement for applications for indefinite leave to remain. The tests, which will only cover speaking and listening, not reading and writing, must be taken by an approved tester and will be set at A1 level, the same as that currently required for entry to the UK under Tier 2 of the points based system. The UKBA estimates that achieving this level will require 40 to 50 hours of tuition for most learners with no background in English. The applicant will be required to pay for their own learning and test. Visa applicants from majority English speaking countries will not be required to pass the test.

In introducing the measures, Theresa May stated her belief that they would 'help promote integration, remove cultural barriers and protect public services.' She added that the government is currently looking into the possibility of imposing language requirements in other visa categories. In 2009, 38,000 people were granted spouse visas. The proposed measures have been criticised for a number of reasons including the impracticality, for some, of learning English outside the UK for health, financial, age or cultural reasons. As we go to print there is at least one outstanding judicial review of the proposed measures.

Meanwhile the flagship Tory election policy and pledge of the coalition government to cap non-EU immigration has met with more weighty controversy. Although a promise has been made to introduce permanent caps by the 1 April 2011, prominent voices of concern have been heard from within and outside government. Michael Grove, Education Secretary, David Willets, Universities Secretary, and Vince Cable, Business Secretary, have warned that a rigid cap could harm universities and businesses. Boris Johnson and business leaders have also expressed their reservations about the harmful effect that caps could have on British businesses. Anand Sharma, the Indian Industry Secretary, expressed concern of his government that the cap would affect Indian businesses which have invested in the UK, particularly in the service sector. These concerns are likely to be raised again when Prime Minister Cameron visits India in July 2010. In light of these concerns the cap will most likely not be a rigid one. Indeed a consultation has been launched by the government into the mechanics of how a cap would work and the Migration Advisory Committee has been commissioned to run its own consultation and research into what that cap should be. This consultation will run until 7 September 2010 and the results will be presented to the government at the end of that month. Ministers have suggested that they night favour a 'pool' model for Tier 1 applicants to allow the

most highly qualified to immigrate with ease, while a more rigid cap will be maintained for Tier 2 applications. Among the measures being considered by the government for implementation alongside the cap are that businesses pay for their overseas employees' private healthcare insurance and those wishing to employ non-EU workers be required to offer apprenticeships to British workers.

While the detail of the permanent cap is being designed, the government has announced interim limits on Tier 1 and Tier 2 applications from the 16 July in order to prevent what the UKBA has termed a 'closing down sale' on visa applications. These limits will be set to a level such that immigration under these categories will be lower than in 2009. The interim limit on Tier 1 applications will not include in-country applications. Nor will it include applications under the post-study work, entrepreneur or investor categories. However, from July 2010 Tier 1 migrants will also be required to gain 100 rather than 95 points (apart from in-country applications from those currently with visas in the Tier 1 (General) category, highly skilled migrants, writers, composers and artists or self employed lawyers). The interim cap will operate monthly and any applications received in any month after the limit has been reached will be considered as part of the following month's quota. It is questionable, however, whether there will, in any event, be more applications before April 2011 than there were during that period last year on account of the continuing problems being experienced in the UK labour market. The Tier 2 cap will consist of a limit of the number of certificates of sponsorship that a sponsor can issue. Sponsors will be told that they can apply for further certificates only if they can prove that they have used up their existing number and if there is a 'pressing need' for further certificates. The UKBA anticipates that these would be 'exceptional circumstances'. In-country applicants are to be included in this limit, although intra-company transfers, sports persons, and ministers of religion will not be.

The shadow cabinet has criticised the caps, inter alia, on account of the fact that, based on immigration statistics, the measures will only affect one in seven immigrants. The Home Secretary has, however, stated to Parliament that measures for cutting immigration in other categories are being considered.

The Liberal Democrat election pledge to end the detention of children for immigration purposes has also survived into the agenda of the coalition government and, on 15 May 2010, a consultation was announced on alternatives to detention. Immigration Minister Damian Green stated that '… we are determined to replace the current process with something more humane without compromising our need to remove people who have no right to be in this country.' The review which began on 1 June and lasts 6 weeks examines alternative ways of dealing with families without immigration status including an examination of the current pilot in Glasgow and good practice from other jurisdictions. The detention of children has received considerable adverse publicity in recent months, particularly in Scotland where on the 19 May it was announced that child detention would end in the Dungavel detention centre. It was stated that families would instead be moved to Yarls Wood detention centre in Bedford. Meanwhile, the plans for a new Bullingdon immigration centre in Oxfordshire which was to have capacity for 800 people have been shelved due to the cost.

UK's implementation of the Convention on Trafficking criticised

In June 2010, the UK's Anti-Trafficking Monitoring Group, made up of nine organisations including ILPA, UNICEF UK and Anti-Slavery International, published its report *Wrong kind*

of victim?: One year on: an analysis of UK measures to protect trafficked persons. The report was the product of various data protection requests, 90 interviews with individuals engaged in anti-trafficking work, and a review of 390 individual cases. It contains a strong critique of the UK's 'National Referral Mechanism' (NRM) which came into effect in April 2009 after the UK's ratification of the Council of Europe's Convention on Action Against Trafficking in Human Beings in December 2008.

Criticism fell under four heads: that the UK government had misunderstood key parts of the Convention; that it had not implemented the Convention in its entirety; that the identification system was flawed; and that safeguards for children had been neglected. Key to the critique was the observation that the NRM did not have the trafficking victim at its centre as required by the Convention. It was said that Competent Authorities tasked with making conclusive decisions on whether a referee was a victim of trafficking appeared more concerned with the bureaucratic procedure of conferring trafficking status than with providing the potential victim with support: 'The research indicates that the system fails to treat those who have been trafficked as victims of crime and places too much emphasis on judging them, rather than bringing traffickers to justice.' Focus was also put on the immigration status of the individual with the mechanism appearing as 'an extension of the UKBA's activities'. Between April 2009 and December 2009 the report stated that 527 people were referred to the NRM as potential victims of trafficking, 26.7% of whom were children. Of the 527 persons, 74% were female and 26% male. However, the report pointed to a further 130 potential victims that it was aware of who had chosen not to enter the NRM system either because they saw no benefit in doing so or because they did not want contact with the immigration authorities. The report also queried the wide discrepancies in the identification of victims of trafficking, with 76% of UK nationals referred found conclusively to be victims of trafficking, 29.2% for those from the EU and 11.9% for those from outside the EU. The report was careful not to conclude that the process was discriminatory on the basis of these figures but did argue that they should, at the very least, warrant further investigation.

Particular criticism, however, was reserved for how the cases of child trafficking victims have been dealt with since the NRM was established. Of the children referred as potential victims, 85 were girls and 58 boys, with 47 trafficked for sexual exploitation, 19 for domestic servitude and 47 for forced labour. The report questioned whether the NRM, rather than children's services, were best placed to deal with referrals of children on account of the former's lack of specific expertise. It also identified as a major issue difficulties in the identification of victims of trafficking with some victims only coming into contact with the authorities as a result of petty crime and being criminalised for their work rather than recognised as victims. Another significant issue was that of age dispute, the report expressing regret that children were not being given the benefit of the doubt, as required by UKBA policy. It was also a matter of concern that children were not assigned a guardian before being referred to the NRM.

Despite citing isolated examples of good practice in terms of cooperation between local services the Monitoring Group felt that there were significant gaps in implementation including insufficient access to victim services including accommodation. Victims were also unaware that they could be entitled to compensation and there was no independent watchdog which could be charged with oversight of the entire mechanism. The report regretted that the NRM had also not contributed significantly, as expected, to an increase in prosecution or to a wider understanding of trafficking. The Monitoring Group called for a restructuring of the NRM including the establishment of an appeal right against its decisions and a rethink of how best to meet the UK's obligations under the Trafficking Convention.

A rare glimpse into the British diaspora: The Institute of Public Policy Research surveys emigration from the UK

On 30 June 2010, the Institute for Public Policy Research (IPPR) published *Global Brit: Making the most of the British Diaspora*, an investigation into British emigrant patterns, attitudes, patriotism and integration. A follow on from their 2006 publication *Brits Abroad*, the Institute found that there are currently 5.6 million British nationals living overseas long-term with another 500,000 emigrating for part of the year. Emigration had peaked in 2007 when 200,000 nationals a year left the UK. However that number had dropped by a third to 134,000, the yearly estimate in September 2009. The largest ex-pat community of British nationals was in Australia where over one million had emigrated. Large communities also exist in Spain, the US, Canada and France, while in China and the United Arab Emirates the population has grown rapidly in recent years. There are over 100 countries in which over 1000 British nationals live. The report found that most emigrants leaving the UK are doing so for the first time and are doing so for between one and four years. It found that Britain is experiencing a 'brain drain' with many emigrants being young, highly educated and better paid than the UK average. However it also stated that the UK received £4.5 billion in remittances in 2006, 0.3 per cent of the GDP.

As well as analysing emigration statistics, the report carried out qualitative research, interviewing emigrants about their integration experiences. It was found that those who integrate successfully are those engaged in the local community, speak the local language, and work for local organisations or companies, whereas those who do not integrate have poor language skills, work for British or multi-national companies, and have few friends or family locally. Interestingly, the report found that British nationals are better integrated in Bulgaria and the US but less well integrated in, for example, Spain. It says that most emigrants keep links to the UK, travelling back frequently and keeping in touch via modern means of communication. Emigrants remain interested in British affairs and while generally proud of the BBC, are not generally interested in influencing UK politics. It was noted that electoral registration is very low in British diasporas around the world. The report ends with recommendations for the UK government on how it could utilise its diasporic population to promote itself abroad.

Helen MacIntyre

Closure of Refugee and Migrant Justice and the legal aid tenders

Refugee and Migrant Justice, formerly the Refugee Legal Centre, went into administration on 15 June 2010.[1] For a short period there were hopes that the organisation could be saved, but by 23 June 2010 it was clear that the administrators would wind up the organisation.[2]

There is likely to be lengthy discussion on the immediate causes of the closure of Refugee and Migrant Justice, but the underlying causes must be traced to the Legal Services Commission's payment scenes. Graduated fixed fees, introduced in 2007,[3] work in favour of

1 *Refugee and Migrant Justice goes into administration*, Refugee and Migrant Justice press release, 15 June 2010.
2 *Refugee and Migrant Justice administration – update*, Refugee and Migrant Justice Press release 23 June 2010.
3 See Response of the Immigration Law Practitioners' Association to the Legal Services Commission/Department of Constitutional Affairs Consultation Paper *Legal Aid: A Sustainable Future*, October 2006, available from www.ilpa.org.uk/submissions/menu/html

those who take on the least complex cases, or do the least work on them. Stage billing, which used to allow immigration and asylum cases to be billed when six months had elapsed and £500 been earned, was abolished on 1 April 2004.[4] This results in firms carrying enormous amounts of unpaid 'work in progress', including disbursements (for example payments for interpreters fees, experts reports) and profit costs (staff salaries, heating, lighting and everything else required to run an office) until the case reached a particular stage. The opportunity to submit a bill is thus governed not by the practitioner, nor by the Legal Services Commission, but by the UK Border Agency, a part of government not fêted for its alacrity in decision-making.

While Refugee and Migrant Justice, along with the Immigration Advisory Service, had benefited from transitional measures of special protection against the Government's schemes for fixed fees in asylum and immigration and payment for work in progress, this protection was an insufficient buffer, especially in the light of the special exposure of a large charity specialising in complex asylum cases that were often protracted. A charity does not have the same access to bank loans as a private firm. An organisation specialising in asylum has no scope for the 'swings and roundabouts' that are supposed to make legal aid fixed fees viable.

This is not to say that the pressures on Refugee and Migrant Justice were unique to that organisation. Private firms have increasing difficulty in securing bank loans in a difficult economic climate, and they have the added burden of being required to pay corporation tax on their work in progress; often enormous sums for larger organisations. Ministers claimed that Refugee and Migrant Justice had failed to cope where others had done so,[5] but neglected to identify that 'coping' has consisted in supplementing immigration legal aid work with private work, or with work in other areas of law, or else cutting down on the work that is done on cases or being selective about the cases that one takes on.

Refugee and Migrant Justice staff members had endeavoured throughout to protect the best interests of their clients. The shock of finding out that your organisation is in financial difficulty, then that it has gone into administration, and then having to pack up the files of clients at risk cannot be underestimated. At first staff were scarcely aware that they had lost their jobs; all that they were aware of was that they had lost their ability to protect their clients. The people who asked 'What about you – what will you do?' were their clients, as always a source of inspiration and strength.

Bhatt Murphy solicitors brought legal action on behalf of two former Refugee and Migrant Justice clients in *R (CMX et ors) v Legal Services Commission and the Secretary of State for the Home Department* (Co/6888/2010, counsel Mark Henderson and Martin Westgate QC of Doughty Street Chambers). Both the Immigration Law Practitioners' Association (represented by Bindmans LLP, Samantha Knights and Helen Mountfield QC of Matrix Chambers) and the Children's Commissioner for England and Wales (represented by Wilsons Solicitors LLP, Edward Nicholson and Manjit Gill QC of No 5 chambers) intervened in the litigation. At the outset it was a bold attempt to make the Legal Services Commission release the monies owed for work in progress and thus an attempt to save Refugee and Migrant Justice. When this failed, the pressure of the litigation can be identified as an important contributor to obtaining better transfer arrangements, which have led to the extension of leases on Refugee and Migrant Justice offices and an increased staff contingent to assist in transfer of files. The Legal Services Commission issued confusing guidance and dragged its heels on reallocating matter starts unused by Refugee and Migrant Justice to other providers. The Commission did not

4 See House of Commons Library Research paper 03/89 of 12 December 2003 citing The Law Society's *Response to the LCD (now DCA) Consultation on Changes to Publicly Funded Immigration and Asylum Work,* August 2003.

5 Hansard HC Report HC Deb, 17 June 2010, col 1023ff; HL Report 28 Jun 2010, Col 1506–1508.

supplement the total number of new matter starts to take account of those where clients were previously represented by Refugee and Migrant Justice but will now need to search for a new provider who, if they were lucky enough to find one, had to open a new matter start to take on the case. The capacity within immigration and asylum legal aid from now to October 2010 has been reduced by many thousands by these measures. This affects not only former clients of Refugee and Migrant Justice but others looking for legal advice and representation.

In *CMX et ors* an order for interim relief was sought against the UK Border Agency to prevent it taking decisions on cases of former clients of Refugee and Migrant Justice pending sufficient opportunity for a transfer. Mr Justice Mitting, while declining to the grant such an order, showed a healthy scepticism for the extent to which the UK Border Agency's guidance would translate into practice and instead adjourned the matter, with liberty to apply if (when?) the UK Border Agency failed to do as promised.

Meanwhile the results of the tender for three year contracts in immigration and asylum from 16 October 2010 have finally been announced. Under the new contracts there will be, following negotiations with Government by ILPA, the Legal Aid Practitioners' Group, the Law Centres Federation, the Mental Health Lawyers' Association and others, stage billing for disbursements but not for profit-costs.

As to the results of the tenders, after more than three years of consultation, what do we have? The difference between whether one got a tender or not, or got a viable case ('matter start') allocation or not, turns upon whether someone in the organisation had posted an application to The Law Society be a level three accredited caseworker and whether or not the firm had promised to offer a drop-in service. The way matter starts have been allocated neither militates against quality nor protects it; the tender is for the most part blind to quality and the result is that the capacity of some good providers is very much reduced.

Whither next? Will immigration and asylum advice become the sole province of small community organisations with test cases being undertaken by city firms and counsel *pro bono* and only a small amount of provision for those who need representation but are not a test case? There is little cause for optimism. The current situation recalls the days of 'green form' legal aid, when only the Refugee Legal Centre and the Immigration Advisory Service were funded to provide free representation at appeals, with demand for their services outstripping supply.

Alison Harvey

The Transformation of Border Controls in an Era of Security: UK and EU Systems Converging?

Valsamis Mitsilegas

At a glance

Recent years have witnessed the transformation of border controls in five main respects: they are now explicitly linked with security and counter-terrorism; focus on identity management via biometrics; focusing on prevention and the collection of data before travel; access to personal data by police and security agencies is maximised; and controls are premised upon continuous risk assessments of passengers. On the basis of these five strands of transformation, this article aims to demonstrate that, notwithstanding the UK's non-participation in the borders part of Schengen and its selective stance with regard to the adoption of EU immigration law, there is increasing convergence between the UK and the EU legal framework on borders.

1. Introduction

Recent years have witnessed the transformation of border controls in Europe and beyond. Led by a growing emphasis on risk assessment (and controlling borders as a means of addressing security concerns) and based on developments in technology, border controls have been transformed in five main respects:

(a) Premised upon a risk-based approach, they are now explicitly linked with security and counter-terrorism
(b) Focusing on identity management, they consist increasingly of the collection and exchange of sensitive personal data such as biometrics
(c) Focusing on prevention, they cover the generalised collection and exchange of a wide range of personal data relating to different instances of movement extending increasingly to controls outside/before the border
(d) Maximising access, the information gathered in the process of border controls is made available to a wide range of law enforcement and security agencies
(e) Evaluating the risk posed by everyone who is moving, their scope extends beyond third country nationals wishing to enter the territory to cover information on the movement of everyone, including EU citizens.

This article aims to demonstrate how this model of border control has been gradually prevailing in the law and policy in both the UK and the EU. It is argued that, notwithstanding the UK's non-participation in principle in the borders part of Schengen and its selective stance with regard to the adoption of EU immigration law, there is increasing convergence between the

UK and the EU legal frameworks on borders. On the basis of the five strands of transformation of border control mentioned above, this article will highlight the similarities between the UK and EU models of border control.

2. Security and risk

The link between border controls and security has emerged as a top Government priority in the UK, inextricably linked with broader counter-terrorism purposes. This link is evident in Gordon Brown's statement to the Commons on 'national security' in July 2007.[1] The emphasis has been on three 'lines of defence' against terrorism (before the border, at the border and in country).[2] The use of biometrics is central in all three stages. On stage one, according to the then Prime Minister,

> 'the way forward is electronic screening of all passengers as they check in and out of the country at ports and airports, so that terrorist suspects can be identified and stopped before they board planes, trains and boats to the United Kingdom. After a review of counter-terrorism screening … the Home Secretary will enhance the existing e-borders programme to incorporate all passenger information to help to track and intercept terrorists and criminals as well as, of course, illegal immigrants'.[3]

The emphasis on identification, prevention and risk assessment (the three further elements in the transformation of border controls analysed further below) is inextricably linked with the framing of border controls in the context of national security. The message here is that border controls are all about national security, and in this light the boundaries between immigration control and counter-terrorism or the fight against crime are blurred. The specific purpose of border controls as immigration control is lost in the broad, all-encompassing objective of fighting terrorism and maintaining national security. This approach will lead, as will be seen throughout this article, to the extension of the collection and exchange of personal data generated in the context of the transformed border controls in particular by allowing access to such data to law enforcement authorities.

The link between border controls and security has also been clearly articulated in EU law and policy. According to the Hague Programme (the five-year Policy Plan on EU Justice and Home Affairs adopted in 2004):

> 'the management of migration flows, including the fight against illegal immigration should be strengthened by establishing *a continuum of security measures* that effectively links visa application procedures and entry and exit procedures at external border crossings. Such measures are also of importance for the prevention and control of crime, in particular terrorism. In order to achieve this, a coherent approach and harmonised solutions in the EU on biometric identifiers and data are necessary'.[4]

1 Commons Hansard of 25 July 2007, cols 841–843.

2 Note the similarities of this approach with the Commission definition of the concept of integrated border management in the EU, which involves 'measures taken at the consulates of Member States in third countries, measures at the border itself, and measures taken within the Schengen area' – European Commission, *Communication on Preparing the Next Steps in Border Management in the European Union*, COM (2008) 69 final, Brussels, 13 February 2008, para 1.2.

3 Column 842.

4 Paragraph 1.7.2. Emphasis added.

There are clear similarities here with the UK approach described above, with controls on immigration and movement being prioritised and linked with counter-terrorism. In this manner, the wording of the Hague Programme reflects what scholars already identified in the 1990s as the so-called '(in)security continuum' which consists of linking, in law and policy discourse, the disparate and very different aims of controlling immigration on the one hand and fighting 'security threats' such as crime and terrorism on the other.[5] Intervention before entry, prevention and the collection and exchange of personal data (including biometrics) are all key in this context and have been the aim, as will be seen below, of a number of EU measures following the Hague Programme. The security continuum approach is also evident, albeit less explicitly, in the successor to the Hague Programme, the five-year Stockholm Programme adopted in 2009: although located under different sections in the Programme, there is still emphasis placed on ensuring the flow of information to the State in both chapters on internal security and border management.[6] The Commission Action Plan aiming to put flesh on the political commitments of the Stockholm Programme envisages the tabling by the Commission of legislative proposals on the establishment of a EU internal Passenger Name Records transfer system as part of the Stockholm Programme's internal security chapter, but also of legislative proposals on setting up an entry-exit system and a registered traveller programme as part of the implementation of the Stockholm chapter on border management.[7]

3. Identity management

A central element of the transformation of border controls has been the focus on mechanisms to ensure the identification of individuals aiming to reach the border. In the UK, a series of policy documents emphasise the priority on identifying individuals by the use of biometrics. The title and tone of the Home Office Action Plan on *'Borders, Immigration and Identity'* are indicative in this context: it is boldly stated that 'biometric technology now means that *we can link people to a unique identity'* and that biometrics are 'the most secure way of *fixing an individual to a unique identity*'.[8] This extraordinary use of language is repeated in the Home Office Strategy Paper entitled *'Securing the UK Border'*,[9] where identity management is flagged up as a key element of the Government's approach. As the Home Office proclaims:

> 'we want … *to fix people's identities at the earliest point practicable*, checking them *through each stage of their journey*, identifying those presenting risk and stopping them coming to the UK. By the time a passenger has been identified at the border posing a threat, it can be too late – they have achieved their goal in reaching our shores. *Off-shoring our border control is the keystone of our border defence*'.[10]

The key aim of such a system is the accumulation of *knowledge* regarding individuals who move for preventative purposes: as is explicitly stated in the same document, 'our aim is to build up

5 See in particular D Bigo *Polices en Réseaux. L'Éxperience Européenne* (Paris: Presses de Sciences Po, 1996).

6 *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, OJ C115, 4 May 2010, p 1 (chapters 4 and 5 respectively).

7 Commission Communication, *Delivering an Area of Freedom, Security and Justice for Europe's Citizens. Action Plan Implementing the Stockholm Programme*, COM (2010) 171 final.

8 Home Office, *Borders, Immigration and Identity Action Plan,* December 2006, chapter 2 (introduction and point 2.2 respectively, emphasis added).

9 March 2007.

10 Point 1.4. Emphasis added.

as rich a knowledge of the travelling public as possible'.[11] This emphasis on (i) knowledge and identification, (ii) prior to reaching the border, (iii) primarily via biometrics is repeated in a number of subsequent UK policy documents. Only in 2007 did references to 'fixing' people's identities (or, according to the latest White Paper entitled 'Security in a Global Hub', *all individuals being 'locked into a secure biometric identity'*…)[12] appear in at least 3 major policy initiatives on migration, borders and security.[13] It is noteworthy in this context that biometric identification covers not only third country nationals, but also extends to citizens. UK biometric passports were launched in 2006.[14] On the other hand, section 126 of the Nationality Immigration and Asylum Act 2002 granted power to the Home Secretary to require biometric information with applications for entry clearance or for leave to enter or remain in the UK and has now been implemented by the roll-out of both digital photographs and fingerprinting as a requirement for all applications for entry clearance at all posts.[15]

A similar emphasis on the use of biometrics in border management, covering both Union and third country nationals, can be discerned at the level of the European Union. At the 2003 Thessaloniki European Council, EU leaders called for a coherent Union approach on biometric identifiers or biometric data, which would result in 'harmonised solutions for documents for third country nationals, EU citizens' passports and information systems (VIS and SIS II).'[16] Soon thereafter, in its Declaration on combating terrorism following the Madrid bombings, the European Council linked the monitoring of the movement of people with the 'war on terror' by stressing that 'improved border controls and document security play an important role in combating terrorism' and called for measures ensuring the inclusion of biometrics in EU visas and passports to be adopted by the end of 2004.[17] Political pressure towards the insertion of biometrics into identity and travel documents in EU Member States led to the adoption, in December 2004, of a Regulation introducing biometric identifiers (in the form of facial images and fingerprints) in EU passports.[18] The legal basis of the Regulation was art 62(2)(a) EC Treaty on external border controls but, in line with domestic policy, the Regulation was deemed by Member States such as the United Kingdom to be a security measure.[19] The Regulation was finally adopted notwithstanding serious objections regarding the appropriateness of the legal basis of art 62(2)(a) (which concerned the controls of the EU external border and arguably did not extend to regulating the identity documents of EU nationals) and doubts regarding the existence of EC competence to adopt binding legislation on the content of identity documents (art 18(3) EC Treaty on EU citizenship explicitly stated that

11 Point 4.1. Emphasis added.

12 Cabinet Office, *Security in a Global Hub,* November 2007, point 3.26. Emphasis added.

13 *Securing the UK Border*; *Security in a Global Hub*; and *Managing Global Migration* (Home Office and FCO, June 2007, in particular p 24).

14 BBC News, *UK Biometric Passports Launched,* 6 March 2006, http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/uk/4776562.stm.

15 See the Immigration (Provision of Physical Data) Regulations 2006, SI 2006/1743. For an analysis of biometric requirements in the context of entry clearance see G Clayton, 'The UK and Extraterritorial Immigration Control: Entry Clearance and Juxtaposed Control' in V Mitsilegas and B Ryan (eds), *Extraterritorial Immigration Control. Legal Challenges,* Brill, 2010, pp 397–430 at pp 403–406.

16 Council doc. 11638/03, Brussels, 1 October 2003, paragraph 11.

17 Declaration on combating terrorism, 25 March 2004, at www.consilium.europa.eu.

18 Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel docs issued by Member States, [2004] OJ L 385/1, 29 December 2004.

19 See letter of 15 July 2004 by the then Home Office Minister, Caroline Flint, to Lord Grenfell, Chairman of the House of Lords EU Select Committee, stating that 'our view is that the current proposal is first and foremost a security measure.'

Community action to facilitate the exercise of citizenship rights does not apply to provisions on passports, identity cards, residence permits or any such document).[20] It is indicative of the importance of the measure for the UK that the Government requested to opt into it but the request was rejected (along with a similar request to take part in the *Frontex* Regulation) by the Council, and subsequently by the Court in Luxembourg.[21]

EU law has also introduced requirements for biometric identification of third country nationals both *before* and *after* their entry into EU territory. In the context of EU databases, both the emerging second generation Schengen Information System,[22] and the Visa Information System,[23] have the legal and technical capacity to include biometrics. Eurodac, on the other hand, is a database specifically designed to include fingerprints of asylum seekers.[24] On the other hand, the amendment to the Regulation laying down a uniform format for residence permits for third country nationals set out the security features and biometric identifiers to be used by Member States in this context.[25] The uniform format for residence permits will include a storage medium containing the facial image and two fingerprints images of the holder, both in interoperable formats.[26] The technical specifications for the capture of biometrics will be set in accordance with the requirements for the passports of EU nationals under the 2004 biometrics Regulation mentioned above.[27]

4. Prevention

A central feature in the transformation of border controls has been the trend towards maximum identification of individuals *before* they reach the border. In the UK, the centrepiece of this strategy has been the establishment of an 'e-borders' programme or, in Home Office jargon, of a 'joined-up, modernised and intelligence-led border control and security framework'.[28] The collection of information on passengers by transport companies in advance is a key element of e-borders. Primary legislation was enacted in 2006 to provide the framework enabling powers for the e-borders programme, with paras 27 and 27B of Sch 2 to the Immigration Act 1971 as

20 For an analysis, see V. Mitsilegas 'Border Security in the European Union. Towards Centralised Controls and Maximum Surveillance' in E Guild, H Toner and A Baldaccini (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Publishing, 2007) pp 359–394. It is noteworthy that the Lisbon Treaty has introduced a specific legal basis, under Title V on the 'Area of Freedom, Security and Justice' on the adoption of provisions concerning passports and identity cards – however competence is granted if Union action should prove necessary to facilitate the exercise of EU citizens to move and reside freely *within* the territory of the Member States (art 77(3) TFEU). It is questionable whether this legal basis would cover EU legislation on passports for the purposes of controlling the EU *external* border.

21 See Case C-77/05 *United Kingdom v Council* [2007] ECR I-11459 and Case C-137/05 *United Kingdom v Council* [2007] ECR I-11593. For an analysis of the UK Government's position, see House of Lords European Union Committee, *Frontex: the EU External Borders Agency*, 9th Report, session 2007–08, HL Paper 60.

22 The second generation Schengen Information System (SIS II) will contain photographs and fingerprints – see Article 20 of the Regulation and the Decision establishing SIS II (OJ L 381, 28 December 2006, p 4 and OJ L 205, 7 August 2007, p 63 respectively.

23 See part 5 below.

24 Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L316, 15 December 2000, p 1. Although the United Kingdom is outside the immigration part of the Schengen Information System and does not participate in the VIS measures, it has opted into the Eurodac Regulation.

25 Council Regulation (EC) No 380/2008, L115/1, 29 April 2008. The UK has opted into this Regulation.

26 Articles 4a and 4b.

27 Article 4b.

28 See Home Office, *Controlling our Borders: Making Migration Work for Britain. Five Year Strategy for Asylum and Immigration*, February 2005.

amended in 2006 and ss 32 to 38 of the Immigration, Asylum and Nationality Act 2006 creating powers for the UK Border Agency and the police to obtain passenger, crew and service data from carriers in advance of all movements into and out of the United Kingdom and a duty for the border agencies to share that data among themselves. These powers have been further fleshed out in five statutory instruments adopted in 2007 and 2008.[29] In particular, the Immigration and Police (Passenger, Crew and Service Information) Order 2008 specifies the travel-related data that an immigration officer or a police officer can require from ships, aircraft and trains entering and leaving the United Kingdom. The requested data are divided into two groups: mandatory data, which must be collected and supplied when requested at particular times; and additional data which must be supplied only to the extent which the carrier knows the data. Mandatory data are primarily data held in the machine readable zone of the passport or identity document (Advance Passenger Information, API). Additional data include details such as passenger name, address, telephone numbers, ticketing information and travel itinerary (Passenger Name Records-PNR data). Thus the UK legislative framework creates a legal obligation for carriers to collect and supply a wide range of personal data to immigration *and police authorities*. Immigration and security objectives are thus merged in this context. Concerns have been raised about the proportionality of these requirements for carriers and passengers, and their compatibility with EU free movement law as regards the imposition of additional controls upon EU nationals exercising free movement rights between the UK and other EU Member States.[30]

This emphasis on the collection of passenger data has also been a central feature of EU law and policy in recent years. A prime demonstration of the accommodation of this model by the EU has been the conclusion of a series of agreements between the (EC initially) EU and the US with regard to the transfer of passenger name records (PNR) to the US.[31] Notwithstanding the sustained concerns raised by the European Parliament and specialist EU data protection bodies with regard to the compatibility of the EU-US PNR Agreements with EU privacy and data protection law, the Commission tabled a proposal in 2008 for a Framework Decision for similar system of transmission of PNR data by carriers flying *into* the EU.[32] The Commission justified the proposal by referring to 'policy-learning' from existing PNR Agreements with the US and Canada, as well as the development of pilot projects in the UK. Both these developments (involving countries, in particular the US and the UK which, as seen above, have pushed forward a specific concept of 'border security' linked with technology and the fight against

29 See: the Immigration, Asylum and Nationality Act 2006 (Commencement No 7) Order 2007 (SI 2007/3138, as amended by SI 2007/3580; the Channel Tunnel (International Arrangements and Miscellaneous Provisions) (Amendment) Order 2007 (SI 2007/3579);the Immigration and Police (Passenger, Crew and Service Information) Order 2008 (statutory instrument 2008 No 5); the Immigration, Asylum and Nationality Act 2006 (Duty to Share Information and Disclosure of Information for Security Purposes) Order 2008 (SI 2008/539); and the Immigration, Asylum and Nationality Act 2006 (Data Sharing Code of Practice) Order 2008 (SI 2008/8).

30 See in this context House of Commons Home Affairs Committee, *The E-Borders Programme*, 3rd Report of session 2009–10, HC 170 and *UK Border Agency: Follow-up on Asylum Cases and E-Borders Programme*, 12th Report of session 2009–10, HC 406. On the basis of assurances provided by the UK Borders Agency (UKBA), the European Commission has deemed the UK provisions on the transfer of API data compatible with EU data protection and free movement law. It is noteworthy that UKBA has indicated to the Commission its commitment not to collect PNR data for intra-EU travel as long as no EU PNR legislation has been adopted – see letter of Jonathan Faull of 17 December 2009 to J Sedgwick, Deputy Chief Executive, Policy and Strategy Group, UK Border Agency.

31 For a background, see V Mitsilegas, 'The External Dimension of EU Action in Criminal Matters', in (2007) Vol 12 *European Foreign Affairs Review* 457–497.

32 *Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for Law Enforcement Purposes*, COM (2007) 654 final, Brussels, 6 November 2007.

terrorism) demonstrate, according to the Commission, the potential of PNR data for law enforcement purposes.[33]

However, at the time of the tabling of the 'EU PNR' proposal, the EU had already established a system requiring airlines to transmit passenger data, put forward by a Directive requiring airlines to transmit more limited advance passenger information (API data) to border authorities in advance of departure.[34] The 'API Directive' was adopted under a first pillar, Title IV legal basis with data transfer obligations being justified on grounds of border and immigration control. However, in negotiations, the United Kingdom (which has opted into the measure) attempted to, and eventually succeeded, in exporting its domestic approach to 'securitised' border controls at EU level by linking the control of movement with the control of terrorism at EC level and ensuring that access to API data was extended beyond immigration to law enforcement authorities.[35] In the light of the API Directive, one could question the necessity and added value of an essentially similar system in the third pillar. Mindful of this criticism, the Commission attempts in the Explanatory Memorandum to the PNR proposal to distinguish between the two initiatives. The Commission noted that:

> 'For the purposes of the fight against terrorism and organised crime, the information contained in the API data would be sufficient only for identifying known terrorists and criminals by using alert systems. API data are official data, as they stem from passports, and sufficiently accurate as to the identity of a person. On the other hand, PNR data contains more data elements and are available in advance of API data. Such data elements are a very important tool for carrying out risk assessments of the persons, for obtaining intelligence and for making associations between known and unknown people'.[36]

From this passage, it is clear that the Commission has adopted an intelligence-led model of border controls very similar to the 'border security' models in the US and the UK. The emphasis is on risk assessment and profiling, on the basis of the collection of a wide range of personal data at the earliest possible stage in time. From the limited categories of passport data to be transmitted prior to departure under the API Directive, we are now moving to the transfer of a wide range of information related to air passengers at a considerably earlier stage. The transfer of PNR data is viewed as necessary not only for border controls/immigration, but also for broader counter-terrorism and security purposes.[37] This approach is evident from the legal basis and content of the proposal. Following the ECJ ruling with regard to the EC-US PNR Agreement (where the Court ruled that the Agreement was wrongly adopted under the first pillar as its main purpose was security)[38], the Commission's internal PNR proposal was

33 Page 2.

34 Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data [2004] OJ L 261/24, 6 August 2004.

35 See House of Lords EU Committee, *Fighting illegal immigration: should carriers carry the burden?* 5th Report, session 2003–04, HL Paper 29. This approach has led to the extension of the period of storage of API data as well as the extension of access to data by law enforcement authorities.

36 Page 3.

37 In this context, see also the Explanatory Memorandum submitted by the Home Office with regard to the Commission PNR proposal, where it is stated that 'we need to allow the processing and exchange of PNR data for wider border security and crime-fighting purposes'. The UK Government further advocated a wider scope to the proposal than the one envisaged by the Commission – see House of Commons European Scrutiny Committee, Seventh Report, session 2007–08.

38 Joined Cases C-317/04 and C-318/04 *European Parliament v Council* [2006] ECR I-4721.

tabled as a third pillar measure on police co-operation. As regards the content, the proposal envisaged the collection of a wide range of PNR data (broadly similar to the subsequent EU-US Agreements), an extended retention period of up to 13 years, and the processing of data by law enforcement authorities in order to identify persons who are or *may be* involved in terrorism and organised crime offences and their associates, to *create and update risk indicators* for the assessment of such persons, to *provide intelligence on travel patterns* and other trends relating to terrorist offences and organised crime, and to use data in criminal investigations and prosecutions.[39] The emphasis on profiling of suspect populations, regardless of their actual involvement in criminal offences, is evident in this context.

While the 'EU PNR' proposal has been put on hold in the light of the entry into force of the Lisbon Treaty, as seen above, the tabling of a new post-Lisbon Directive on the subject is to be expected by the Commission as part of its Action Plan to implement the Stockholm Programme. It remains to be seen whether the main thrust and elements of the original proposal will be replicated in the new Directive. An internal EU PNR system may be seen as a significant political move by EU institutions aiming to ensure real reciprocity with the United States (US airlines would be subject to these standards and the adoption of EU standards in the field will trigger the application of the various reciprocity clauses in the PNR Agreement). However, what this move also means is that the EU is essentially adopting an intelligence-led, generalised surveillance based on profiling via the gathering of a wide range of everyday information on *all* passengers for 'security' purposes. It is noteworthy in this context that one of the issues discussed during negotiations of the original third pillar proposal was to extend the system to *intra-Community* flights, thus leading to the generalised surveillance of air travel also *within* the borderless Schengen area.[40] The challenges of such a model to fundamental rights – in particular privacy – as proclaimed by the EU are evident, and have been articulated in the criticism of the EU-US PNR Agreements by EU institutions and bodies. The framing of the proposal as a counter-terrorism measure not only results in the weakening of privacy protection *inside* the EU (with the third pillar privacy and data protection framework being fragmented and limited to say the least) but also sits uneasily with the proclaimed freedom of movement within the Union.

5. Maximising access

Another level of transformation of border controls has been the trend towards maximising access to the data collected for these purposes. Key to this trend has been the approach that 'it is all about security', and that the purpose of collecting information such as biometrics or passenger data is not limited merely to control of immigration and/or the border, but extends to counter-terrorism, security and the fight against crime. The UK has been at the forefront of such a catch-all approach to security and, as seen above, its domestic system aims at maximising access to personal data and exchange of such data by a wide range of authorities, including authorities competent for law enforcement and security. This policy choice has been translated legally into Section 36 of the Immigration Asylum and Nationality Act 2006 which aims to facilitate the sharing of personal data under e-Borders between a number of agencies, including

39 Article 3(5). Emphasis added.

40 See the Conclusions of the Justice and Home Affairs Council of 24 October 2008, Council doc. 14667/08 (Presse 299) p 18.

the Borders Agency, Revenue and the police.[41] The Immigration, Asylum and Nationality Act 2006 (Duty to Share Information and Disclosure of Information for Security Purposes) Order 2008 further specifies travel-related information which the border agencies must share with each other where it is likely to be of use for immigration, HM Revenue & Customs, or police purposes. The order also specifies that the border agencies may also disclose this information to the security and intelligence agencies, if the information is likely to be of use for certain security purposes.[42] Moreover, fingerprints from visa applicants are being cross-checked against the National Fingerprint Database, accessed by law enforcement authorities and it has been reported that an IT case working system sends information back daily to a central Reference System database, which is accessible to government departments involved in immigration control, law enforcement and national security.[43] In law and in practice, personal data collected for immigration/movement purposes are accessed by a wide range of agencies with powers on law enforcement and security.

The move to allow access to immigration/movement personal data to law enforcement authorities has been increasingly prevalent at EU level. While there has been resistance to opening up the immigration section of the Schengen Information System and Eurodac to the police,[44] such resistance has been weakened in the case of access by law enforcement authorities to passenger data,[45] and even more so in the case of access to law enforcement authorities to the Visa Information System. Following the adoption of the Decision forming the legal basis for the establishment of the Visa Information System (VIS),[46] negotiations began to define its purpose and functions and formulate rules on access and exchange of data. In this context, the Justice and Home Affairs Council of 24 February 2005 called for access to VIS to be given to national authorities responsible for 'internal security', when exercising their powers in investigating, preventing and detecting criminal offences, including terrorist acts or threats and invited the Commission to present a separate, third pillar proposal to this end.[47] The third pillar Decision was eventually adopted (in parallel with the first pillar Regulation on VIS) in 2008.[48] Reflecting the logic of the Conclusions of the 2005 JHA Council, the VIS Regulation expressly states that one of the purposes of the Visa Information System is to contribute to the prevention of threats to the internal security of the Member States.[49] The Regulation also contains a bridging clause to the third pillar Decision allowing access to VIS by Europol within the limits of its mandate and, when necessary, for the performance of its tasks, and by the relevant national authorities 'if there are reasonable grounds to consider that consultation of VIS data will substantially contribute' to the prevention, detection or investigation of terrorist offences and of other

41 See also the Code of Practice on the Management of Information shared by the Border and Immigration Agency, Her Majesty's Revenue and Customs and the Police, adopted under s 37 of the 2006 Act and brought into force by SI 2008/8, The Immigration, Asylum and Nationality Act 2006 (Data Sharing Code of Practice) Order 2008.

42 SI 2008/539.

43 *Database State*, A Report commissioned by the Joseph Rowntree Reform Trust Ltd. (R Anderson *et al.*) 2009, pp 23–24.

44 For an overview of the use of EU immigration databases for security purposes, see V Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009) chapter 5. The Commission has since tabled a proposal aiming to enable access by law enforcement authorities to Eurodac data – see COM(2009) 342 final, Brussels, 10 September 2009.

45 See part 4 above. Note that, unlike the case of API data, the transfer of PNR data has been labelled as a police/security measure at EU level.

46 Council Decision of 8 June 2004 establishing the Visa Information System (VIS), [2004] OJ L 213/5, 15 June 2004.

47 Document 6228.05 (Presse 28), pp.15–16.

48 Regulation (EC) No 767/2008, OJ L218, 13 August 2008, p.60; Decision 2008/633/JHA, OJ L218, 13 August 2008, p 129.

49 The Regulation also enables the recording of biometric data into VIS – see art 5(1).

serious criminal offences.[50] The terms of access of internal security authorities and Europol to the VIS are set out in detail in the third pillar Decision.[51] The national authorities with access to the VIS are 'authorities which are responsible for the prevention, detection or investigation of terrorist offences or of other serious criminal offences' designated by each Member State.[52] Access to the VIS is thus potentially extended to a wide range of national authorities with diverse tasks. It is up to the Member States to designate such authorities, and the only specification regarding their mandate is the remit of the prevention, investigation or detection of terrorism and serious crime. A wide range of agencies may be responsible for the prevention of terrorism at national level across the EU, not excluding intelligence agencies.

The security logic permeating UK border controls is thus also evident at EU level as regards access by law enforcement and security agencies to the Visa Information System, a database containing legitimate information on individuals applying for a visa to enter the Schengen area. Notwithstanding this policy convergence, the United Kingdom has not been allowed to participate in the third pillar instrument establishing access by law enforcement authorities to the VIS. The exclusion of the United Kingdom in this context (similar to its exclusion from the Regulations establishing the European Borders Agency and introducing biometrics in passports) has been justified on the grounds of the UK non-participation in the immigration part of the Schengen *acquis*. As regards the VIS Decision, this exclusion occurred notwithstanding the fact that the Decision in question has been adopted under a third pillar (and not a Title IV) legal basis. The United Kingdom has challenged its exclusion arguing that the Decision in question is not a development of visa policy (and thus a Schengen-building measure) but a police cooperation measure having the sole objective to enable the fight against crime. The case is currently pending before the Court in Luxembourg. It remains to be seen whether the Court will follow its earlier teleological/systemic approach in the Frontex/biometrics rulings, and the similarly argued Opinion of AG Mengozzi in the VIS case, and accept that the VIS Decision, although adopted in the old third pillar and containing a security objective, is still a measure building upon the Schengen *acquis* whose coherence and integrity would be jeopardised if the full participation of the UK was permitted.[53] Arguments centering on the coherence and integrity of the Schengen system are convincing in highlighting the aim towards an integrated border management system in an area without internal frontiers, as well as in reminding that the overall underlying function of this system is border control.

6. Generalised risk assessment: from citizens to suspects

The emphasis placed on identification, in particular by the use of biometrics, has been used to explore the development of extensive systems of generalised surveillance of movement. Surveillance is aiming at a continuous process of risk assessment of individuals and is based upon the construction of automated systems of entry and exit from the territory, inextricably linked with the creation of categories of passengers. In the UK, this approach has been epitomised in the creation, on the basis of biometric identification, of the concept of a 'Trusted Traveller'. Under this scheme, individuals are pre-screened and can then use fast-track access to the UK

50 Article3(1).
51 In particular arts 5–7.
52 Article 2(1)(e).
53 See Opinion of Advocate General Mengozzi, Case C-482/08, *United Kingdom v Council*, delivered on 24 June 2010.

via automated gates using iris recognition.[54] Similar ideas have been explored at EU level recently, with the Commission proposing the creation of an entry-exit system at the external borders of the European Union, coupled with facilitation of border crossings for *bona fide* travellers and the creation of an electronic travel authorisation system.[55] The entry/exit system would be a new database, applying to third country nationals admitted for a short stay; bona fide travellers would be 'low risk' third country nationals, but also EU citizens, and both would cross external borders via 'automated gates'. The Electronic Travel Authorisation System (ETA) would apply to third country nationals not subject to a visa requirement who would be required to make an electronic application in advance of travelling. Both interoperability and the use of biometrics are central to these proposals, in particular to the proposals for the establishment of a system of border crossings via automated gates. The Commission notes that:

> 'In the run-up to *full introduction of biometric passports*, the current legal framework allows for schemes based on voluntary enrolment to be deployed by Member States, under the condition that the criteria for enrolment correspond to those for minimum checks at the borders *and that the schemes are open for all persons enjoying the Community right to free movement*. Such schemes should be *interoperable* within the EU, based on common technical standards, which should be defined to support the *widespread and coherent use of automated border control systems*'.[56]

By establishing an entry-exit system[57] – remarkably similar to the UK e-borders programme – the EU introduces a system of surveillance of movement based on automaticity, interoperability, and the collection and consultation of sensitive personal data such as biometrics. Merging the logic of risk prevention with the logic of border security, this model has far-reaching consequences for the protection of fundamental rights and the relationship between the individual and the State. Movement is monitored on the basis of profiling and the establishment of individual, subjective assessments on each traveller. Both third country nationals and EU citizens can be deemed as 'suspects' under these assessments, and their freedom of movement curtailed accordingly. The introduction of the concept of 'bona fide' traveller is extremely worrying in this context. As the European Data Protection Supervisor has noted in his preliminary comments on the Commission proposals:

> 'The underlying assumption in the communications (especially in the entry/exit proposal) is worrying: all travellers are put under surveillance and are considered a priori as potential law breakers. For instance in the Registered Travellers system, only the travellers taking specific steps, through ad hoc registration and provision of detailed personal information, will be considered 'bona fide' travellers. The vast amount of travellers, who do not travel frequently enough to undergo such a registration, are thus, by implication, de facto in the 'mala fide' category of those suspected of intentions of overstay'.[58]

54 Home Office, UK Border Agency, *A Strong New Force at the Border*, August 2008, p 17.
55 Commission Communication on *Preparing the Next Steps in Border Management in the European Union*, COM (2008) 69 final, Brussels, 13 February 2008.
56 Ibid., p.7. Emphasis added.
57 According to its Action Plan implementing the Stockholm Programme, the Commission is scheduled to table legislative proposals setting up an entry-exit system and a registered traveller programme in 2011.
58 Opinion of 3 March 2008, pp 5–6.

The establishment of EU systems of surveillance of movement along these lines poses significant challenges for EU fundamental freedoms, in particular free movement and citizenship rights. It creates a 'borders paradox', whereby the abolition of internal frontiers is accompanied by the maximisation of surveillance not only of third country nationals, but also of EU citizens.[59] Citizen participation in these emerging systems is currently promoted on a voluntary basis, on the basis of convenience. The recent Council Conclusions on facilitating entry for citizens *of the European Union* at *external* borders[60] link such participation with the development of technology on biometrics and databases: the Council 'invites Member States to move *on a voluntary basis* to a more extensive use of automated border control systems *on the basis of the new passport* which would enable European Union citizens to enter or exit the external borders of the Member States of the European Union easily and quickly, regardless of the system operating in the Member State concerned, taking into account the international technical standards and the need for the systems to be interoperable' and 'encourages the Member States *and European Union citizens* to make optimum use of the new biometric passports currently in force and to take advantage of the design features which facilitate border transit, while ensuring the highest levels of security'.[61] These calls are justified on the basis of developments of similar systems in a number of Member States (presumably including the UK),[62] with the Council using a mix of considerations based on European identity and convenience to get the message across.[63] However, this approach is used to justify the adoption of systems leading to a maximisation of control, with long-established fundamental rights under Union law being contaminated by a logic of security and control. It is not by chance that the Council Conclusions refer to the 'subtle balance' between right to free movement across borders and guaranteeing the highest level of security *for European Union citizens*.[64]

7. Conclusion: Convergence, security and rights

This analysis of the transformation of border controls in the light of security considerations demonstrates a considerable convergence between the UK e-borders system and proposals and measures developing an EU system of border management. This convergence may seem paradoxical in light of the UK's proclaimed sovereignty in the field of border controls and its piecemeal approach towards participating in EU immigration law. While convergence may indicate a level of dialogue between systems and a degree of influence of the UK logic of securitised border controls on the development of the EU system, the 'pick-and-choose' approach of the UK towards EU immigration law has led to its exclusion from key EU border control measures in which the UK has expressed the wish to participate. The UK's exclusion by the EU institutions is a reminder of the need to safeguard the coherence of a system designed to control the external borders of an area without internal frontiers. While one may argue that UK non-participation is not significant in the light of de facto convergence, it should be

59 See V Mitsilegas, 'The Borders Paradox. The Surveillance of Movement in a Union without Internal Frontiers', in H Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Faultlines of the EU's Area of Freedom, Security and Justice* (Hart, 2009) pp 33–64.

60 3018th Justice and Home Affairs Council, 3 June 2010. Emphasis added.

61 Points 3 and 4 respectively.

62 Preamble, point 3.

63 Point two of the Preamble reads as follows: 'the rights of European citizenship which create *a sense of integration,* are essential in order to bring *the EU closer to its citizens*, hence the need to continue our work on making clearly visible the *benefits a*ccruing from a fast-tack system for external border crossing' – emphasis added..

64 Preamble, point 5, emphasis added.

pointed out that the EU system of border controls comes with a series of rules delineating rights and powers in border controls (such as the Schengen Borders Code) in which the United Kingdom has chosen not to take part. In the light of the increased integration of the system of control of the EU's external border, the UK Government will have to contemplate in this context the extent to which it can influence its EU counterparts in substantive policy terms in parallel with maintaining a constitutional detachment in the field of EU border controls.

The impact of the transformation of border controls along the lines analysed in this article on both legality and individual rights is potentially far-reaching. Security concerns have had a profound impact on both UK and EU immigration law. The readiness of Member States – and at times EU institutions – to accommodate these concerns within the complex Union legal framework has led to a series of legal acrobatics reflected by the adoption of measures where the boundaries of legality have been seriously blurred. The attempt to do away with purpose limitation and to merge immigration and security have led to attempts to label measures with a clear counter-terrorism objective as immigration measures (as with the passenger data example), and thus contaminating the strict guarantees of EU free movement law with the broad exceptionalism of counter-terrorism law.

In this context, the move from a system of physical border controls to a system of generalised surveillance of movement is striking. Surveillance takes place on many different levels and at many different instances of movement. A wide range of personal data is collected every time an individual wishes to travel by air from the EU to a number of third countries (with PNR Agreements now being signed with the US, Australia and Canada) and will in the future be collected for all flights into the Union (and possibly for all flights *within* the Union). The collection of biometrics is a pre-requisite for all EU citizens wishing to travel. Automaticity and perceived convenience are introduced into border controls under new entry-exit systems on the basis of the use of personal data such as biometrics, with automated gates opening if sufficient information exists for the passenger to go through.

This new system of surveillance has a profound impact on individuals. It is based upon their extensive risk assessment and profiling. A wide range of personal data is collected in a wide range of databases, which become increasingly interoperable and accessible by a wide range of authorities. This leads to what has been deemed as 'the disappearance of disappearance', a process whereby 'it is increasingly difficult for individuals to maintain their anonymity or to escape the monitoring of social institutions'.[65] It also leads to the creation of individual profiles, with surveillance taking place on the basis of concepts such as the 'trusted', or the 'suspect' individual or passenger. These profiles may apply to *all* passengers. The generalised surveillance of movement in these terms poses significant challenges for the protection of individuals under European law: challenges to the protection of privacy, with EU (and domestic) privacy law struggling to address legal and technological developments with profound implications for the concept of the Self and human dignity; challenges to equality and non-discrimination, with surveillance based on profiling; and last, but not least, challenges to freedom, with free movement within the EU being rendered increasingly illusory in the light of the generalised surveillance of movement of *everyone,* even *within* the EU territory.

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65 K D Haggerty and R V Ericson 'The Surveillant Assemblage' in (2004) 51/4 *British Journal of Sociology* p 619.

Unqualified Persons: The Lawfulness of Expelling Homeless EEA Nationals from the UK

Adam Weiss[1]

At a glance

This article proposes a theory as to why it is unlawful, as a matter of EU law, to remove EEA nationals from the UK on the basis that they are not exercising residence rights. The theory is a response to the UK Border Agency's recent pilot scheme of removing homeless EEA nationals on this basis, in accordance with reg 19(3)(a) of the Immigration (European Economic Area) Regulations 2006. The use of this power is untested in the courts and the lawfulness of these removals has been put in question at EU level by the Court of Justice and the European Commission.

Introduction

This article is written in response to the recent attempts of the UK Border Agency ('UKBA') to expel EEA[2] nationals on the basis that they are not exercising residence rights. The lawfulness of expelling of EEA nationals on this basis is essentially untested in the domestic courts and in the Court of Justice of the European Union.[3] The purpose of this article is to develop an argument as to why the practice is unlawful. While the article specifically looks at the UK context, it is also relevant to other Member States.

The next part provides some background information on the UK pilot scheme. Some aspects of the scheme, however, remain unknown. The following part looks at the ambiguity that exists at European level – within the European Commission and the case law of the Court of Justice – about the lawfulness of expelling EU citizens from other Member States on the basis that they have no right to reside. The following part then offers a theory as to why these expulsions may be unlawful in the UK as a matter of EU law.

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1 The author is the assistant director of the AIRE Centre (Advice on Individual Rights in Europe), a charity which, among other things, provides legal advice to individuals on their rights under EU free-movement law. This article is the result of discussions about the UK's pilot scheme with other AIRE Centre staff members, particularly Saadiya Chaudary and Nuala Mole, as well as various members and staff of the Immigration Law Practitioners Association, including Adrian Berry, Elspeth Guild, Alison Harvey and Alison Hunter, whose input made this article possible. Nonetheless, all errors remain the author's.

2 This article considers the interaction of the domestic legislation, which refers to 'EEA nationals' (because of the UK's free-movement obligations towards other EU citizens as well as citizens of Iceland, Lichtenstein, Norway and Switzerland), and EU legislation, which refers to 'Union citizens'. This article essentially uses the terms interchangeably, depending on which legislation is being discussed, and also uses the term 'EU migrants' for clarity and to avoid repetition.

3 This institution, formerly known as the European Court of Justice, took this name when the Lisbon Treaty came into force on 1 December 2009.

The UK Pilot Scheme

EU law[4] provides for the removal of EU migrant citizens and their family members 'on grounds of public policy, public security or public health'.[5] The standard is high: 'The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.[6] On 8 April 2009, UKBA announced that it was reducing the threshold for the deportation of EEA nationals who have committed crimes, automatically considering all of those sentenced to twelve months' imprisonment for violent and sexual offences; in the words of the Immigration Minister at the time, 'we are making it easier to kick out European criminals and stop them from returning'.[7]

At around the same time, UKBA clarified its power to remove EEA nationals on the basis that they are not exercising residence rights at all, including the right to detain such EEA nationals.[8] By showing that an EEA national is not exercising residence rights under EU law – or, in terms of domestic legislation, is not a 'qualified person'[9] or someone who has a right of permanent residence[10] – the authorities make it unnecessary to show a genuine, present and sufficiently serious threat. Unlike the deportation of EEA nationals on grounds of public policy and public security, which has been the subject of considerable litigation at European[11] and domestic[12] levels, removal on these grounds has not been tested in the courts.[13] Indeed, even within UKBA there appears to be some doubt as to its lawfulness. In its guidance on 'Conducive deportation of EEA nationals', updated in January 2010, UKBA states that 'European law (Council Directive 2004/38/EC) provides that nationals of EEA Member States may be expelled from the territory of another member State only on grounds of public policy, public security or public health'.[14]

Earlier this year, reports of homeless central and east European EEA nationals being deported under a 'pilot scheme' on the basis that they were not working began to surface.[15] As of 17 June 2010, 116 EEA nationals have been served with 'minded to remove' letters under the pilot scheme and 40 with immigration-decision notices; 13 have been 'administratively removed'.[16] UKBA has declined to make much information available about the scheme, apart from instructions to UKBA staff.[17] The scheme appears to be targeting homeless EEA nationals in certain areas, including Peterborough.[18]

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4 Directive 2004/38/EC, Chapter VI.
5 Ibid. Article 27(1). See, eg Case C-348/96 *Criminal Proceedings Against Calfa* [1999] ECR. I-11.
6 Ibid. Article 27(2), second paragraph.
7 UKBA 'Government keeps work restrictions for eastern Europeans', 8 April 2009, available at http://webarchive.nationalarchives.gov.uk/20090410145618/http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/Government-keeps-work-restrict.
8 The Immigration (European Economic Area) (Amendment) Regulations 2009.
9 Ibid. Regulation 6.
10 Ibid. Regulation 15.
11 See eg Case 30/77 *Regina v Bouchereau*.
12 See eg *LG and CC (EEA Regs: residence; imprisonment; removal) Italy* [2009] UKAIT 00024.
13 But see below, section D.
14 UKBA, 'Enforcement Instructions and Guidance', Chapter 12.3, available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/oemsectionb/chapter12?view=Binary. This contradicts other guidance found in Chapter 8, section 1, paragraph 6 of the European Casework Instructions, available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/chapter8.pdf?view=Binary.
15 See eg Daily Mail 'Homeless migrants will be ordered to leave' 7 April 2010, available at http://www.dailymail.co.uk/news/article-1263891/Homeless-migrants-living-rough-shanty-towns-told-work-sent-home.html.
16 Letter from UKBA to the author, in response to a request under the Freedom of Information Act 2000, dated 17 June 2010.
17 Further information about the scheme, including documents relating to the scheme and correspondence with other Government departments was excluded from the Freedom of Information response (see footnote 16 above) on the grounds of a public-interest exemption.
18 See footnote 15.

The legal basis for the removals is reg 19(3)(a) of the Immigration (European Economic Area) Regulations ('the 2006 Regulations'), which reads (as amended): 'Subject to paragraphs (4) and (5), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if that person does not have or ceases to have a right to reside under these Regulations.' The provision is not new; it existed in the legislation that preceded the 2006 Regulations.[19] However, in June 2009 the Government amended the provision[20] and included provisions on detaining EEA nationals subject to removal.[21]

The UK is not the first EU Member State to try to remove central and east European EU migrants without reference to principles of public policy, public security or public health. It appears that in 2009, the French authorities returned 8,000 EU citizens of Roma origin to Romania and Bulgaria.[22] The removal of large numbers of EU citizens of Roma origin from Italy has also attracted attention in recent years.[23] In these cases, though, it is not entirely clear whether the authorities were relying on the mere fact that the EU citizens removed were not exercising residence rights. In France, the returns appear (or are made to appear) to be voluntary, with returnees receiving €300 in financial assistance; it also appears that many of the returnees quickly make their way back to France, and there are accusations that the authorities return these EU citizens in order to inflate official statistics on expulsions.[2] The Italian authorities have ostensibly based expulsion of EU citizens of Roma ethnicity on public policy and public security concerns.[25]

Ambiguity under EU law

On 30 November 2009, a Member of the European Parliament sympathetic to Italy's approach to Roma EU migrants invited the European Commission to clarify 'what measures can be implemented by the Member States, under Directive 2004/38/EC, to enforce the expulsion of Community citizens who are a threat to public policy and security *or who do not meet the conditions for residing in a Member State*'.[26] The Commission responded as follows:

> 'As to Directive 2004/38/EC Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on

19 Immigration (European Economic Area) Regulations 2000, reg 21(3)(a)(i).

20 Regulation 19(3)(a) initially stated: 'Subject to paragraphs (4) and (5), a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these Regulations may be removed from the United Kingdom if he does not have or ceases to have a right to reside under these Regulations'. The change accompanies other changes in reg 19 permitting the authorities to issue exclusion orders against EU nationals on grounds of public policy, public security or public health to prevent them from entering the UK.

21 The Immigration (European Economic Area) (Amendment) Regulations 2009, amending reg 24 to allow detention '[i]f there are reasonable grounds for suspecting that a person is someone who may be removed from the United Kingdom under regulation 19(3)'.

22 See 'Exploitation des enfants roms: la France et la Roumanie se mobilisent', *Le Monde*, 15 February 2010; 'Les Roms-Tsiganes à nouveau boucs émissaires?', 25 February 2010; GISTI, 'Les Roms roumains, citoyens de l'Union européenne, ont comme tous les autres le droit de circuler et de s'installer dans tous les pays d'Europe', 23 February 2010, available at http://www.gisti.org/spip.php?article1898.

23 See eg BBC News, 'Italy starts deporting Romanians', 5 November 2007, available at http://news.bbc.co.uk/1/hi/world/europe/7078532.stm ('It is not clear whether the new Italian legislation will stand the test of European law, which allows EU citizens to travel freely across member states' borders.').

24 See footnote 22.

25 See footnote 23; see also Human Rights Watch, 'Italy: Expulsion Decree Targets Romanians', 7 November 2007, available at http://www.hrw.org/en/news/2007/11/07/italy-expulsion-decree-targets-romanians.

26 Carlo Fidanza, Written Question E-5962/09 (emphasis added).

> grounds of public policy, public security or public health. Restrictive measures may be taken only on a case-by-case basis where the personal conduct of an individual represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the host Member State. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned.'[27]

The Commission's answer can be interpreted either as ignoring the question about those who do not meet the conditions for residence, or as indicating that not meeting the conditions for residence is not a basis for expulsion.

Prior to 2004, legislation on the free movement of persons established residence rights for specific categories of EU migrants: workers,[28] the self-employed,[29] pensioners,[30] the self-sufficient[31] and students.[32] Directive 2004/38 created a comprehensive regime granting all EU citizens a right of entry into other Member States.[33] While it set down conditions on residence, it did not explicitly provide for the expulsion of EU migrants on the basis that they did not meet those conditions.[34] The Commission's response betrays some doubt about whether that is a valid ground for expelling an EU migrant under the current legislative framework.

The relevant case law of the European Court of Justice is similarly ambiguous. The *Oulane* case concerned a French citizen the Dutch authorities came across in a goods tunnel closed off to the public inside a train station.[35] (He had already been stopped by the authorities earlier on suspicion of illegal residence, but he had on that occasion presented a national identity card as proof of his EU citizenship.[36]) Since he was unable on this occasion to prove his citizenship he was detained and, a few days later (paradoxically) expelled to France.[37]

Advocate-General Léger, in his Opinion, was of the view that 'the fact that a person from a Member State is present at a given moment in another Member State gives rise to a presumption that he is or will be a recipient of services in that State',[38] giving him a right to reside under art 49 EC Treaty (now art 56 of the Treaty on the Functioning of the European Union ('TFEU')). Such a presumption would make it extremely difficult to expel any EU migrant. The Court did not go as far as the Advocate General on the nature of that presumption,[39] although it did find that a person can prove he is exercising residence rights 'by any appropriate means'.[40] The Court also imposed a very strong reading of the non-discrimination provisions in EU law, finding it unlawful to require an EU migrant to prove his nationality by way of a national identity card if host State nationals can prove their nationality by other means.[41] Detaining Mr Oulane on the basis that he could not produce a valid identity card was therefore also unlawful.[42]

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27 Answer given by Mr Špidla on behalf of the Commission, E-5962/09 (2 February 2010).
28 Regulation 1612/68/EEC.
29 Directive 73/148/EEC.
30 Directive 90/365/EEC.
31 Directive 90/364/EC.
32 Directive 93/96/EC.
33 Article 5.
34 See below, Exercising Treaty rights: always self-sufficient?
35 Case C-215/03 *Oulane v Minister voor Vreemdelingenzaken en Integratie*, paragraph 11.
36 Ibid. Paragraph 10.
37 Ibid. Paragraphs 11–12.
38 Opinion of Advocate General Léger, Case C-215/03 (21 October 2004), paragraph 39.
39 *Oulane*, paragraphs 21, 56.
40 Ibid. Paragraph 53.
41 Ibid. Paragraph 35.
42 Ibid. Paragraph 44.

Elspeth Guild has interpreted the ECJ judgment as confirming that 'expulsion and exclusion of Union citizens exercising free movement rights are not allowed unless the state can justify the ground. As regards evidence that the individual is actually exercising a treaty right, the ECJ sets the threshold very low for individuals'.[43] Indeed, it is difficult to see when it would be lawful to expel an EU migrant on the basis that she is not exercising residence rights. The case law of the Court of Justice refers to the possibility of such an expulsion but has never actually condoned it. In the *Antonissen* case, where the UK was attempting to expel a Belgian who had committed drug offences on the basis that as a long-term workseeker who had not found work, he did not have the right to stay in the country, the Court established a favourable right to reside for jobseekers who could show they were seeking work and had 'genuine chances of being engaged'.[44] In the *Grzelzcyk* case, the Court found that a student who was no longer able to support himself was entitled to a social assistance benefit because his financial difficulties were temporary and he has already completed most of his course.[45] And in the *Trojani* case, the fact that the EU migrant concerned had received a residence permit from the Belgian authorities meant he was entitled to access subsistence benefits as long as his documentation was valid, although the Belgian authorities could, hypothetically, 'take a measure to remove him', but only 'within the limits imposed by Community law'.[46]

Those limits include, at a minimum, the requirements contained in arts 30 and 31 of the Directive, applicable, by analogy, to all decisions restricting free-movement rights.[47] These limits include notification of the decision,[48] the right to appeal,[49] the possibility of the appeal having suspensive effect,[50] and review on appeal of issues of law and fact.[51] Such expulsions would presumably have to comply with the principle of proportionality as well.[52] It appears unlikely, for example, that it would be lawful to impose an exclusion order on an EU migrant expelled because she was not exercising Treaty rights, unless this was justified by reference to public policy, public security or public health.[53] That, along with the other factors inherent in the proportionality analysis,[54] cast even more doubt on the lawfulness of expelling EU migrants merely because they are not exercising residence rights.

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43 Elspeth Guild, 'Citizens Without a Constitution, Borders Without a State: EU Free Movement of Persons', *in* Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy (2007).

44 Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex p Gustaff Desiderius Antonissen* paragraphs 3, 21.

45 Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* paragraph 44.

46 Case 456/02, *Trojani v Centre public d'aide sociale de Bruxelles* paragraph 45.

47 Directive 2004/38, art 15(1).

48 Article 30.

49 Article 31(1).

50 Article 31(2).

51 Article 31(3).

52 See Nicola Rogers and Rick Scannell, *Free Movement of Persons in the Enlarged European Union* (Sweet & Maxwell 2005) section 14–39 (page 243): 'Principles of proportionality if properly applied could have an important impact on the exercise by a Member State of the power to expel an EU national who does not meet the limitations and conditions in secondary legislation'.

53 See Case C-33/07 *Ministerul Administratiei si Internelor-Directia Generala de Patspoarte Bucuresti v Jipa* (finding it unlawful for the Romanian authorities to prevent a Romanian citizen from travelling to Belgium, without examining whether he posed a threat to public security, public policy or public health; the Romanian authorities had acted pursuant to an agreement with Belgium, on the basis that he had been expelled from Belgium prior to accession for not having a right to reside there).

54 If art 28(1) of Directive 2004/38, which covers expulsions on grounds of public policy, public security or public health, is a guide, these factors include: 'how long the individual has resided in the territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin'.

Exercising Treaty rights: always self-sufficient?

Regulation 19(3) does not transpose any explicit provision of Directive 2004/38. While Chapter VI of the Directive details the circumstances in which the host Member State can expel an EU migrant who is exercising residence rights, there is no explicit provision permitting the host State to expel a migrant on the basis that she is not exercising residence rights. There are several provisions in art 14 which make it clear when the host State *cannot* expel on this basis, implying that the power does exist but imposing restrictions on it. Article 14 reads as follows:

1 Union citizens and their family members shall have the right of residence provided for in Article 6 [first three months], as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2 Union citizens and their family members shall have the right of residence provided for in Articles 7 [residence rights as a worker, self-employed, self-sufficient person or student], 12 [certain retained rights of residence not generally applicable here] and 13 [same] as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Article 7, 12 and 13, Member States may verify if these conditions are fulfilled. This *verification shall not be carried out systematically*.

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

4 By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI [expulsions on other grounds], an expulsion may in no case be adopted against Union citizens or their family members if:

a. the Union citizens are *workers* or *self-employed persons*;

b. the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for *as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged*. (emphasis added)

If expelling EU migrants who are not exercising residence rights is permitted, then reg 19(3) does nothing more than permit expulsions up to the limits of EU law. Regulation 19(4) prevents expulsion as an automatic consequence of having recourse to the social assistance system, in line with art 14(3), and the fact that a jobseeker, worker or self-employed person is a 'qualified person' under reg 6 means that her expulsion (prohibited under art 14(4) of the Directive) would not be lawful under reg 19(3)(a). Indeed, reg 19(3)(a) appears to represent a characteristic refusal in UK legislation to introduce 'more favourable national provisions', as Spain has and as Recital 29 to the Directive indicates is allowed.[55] There can be nothing unlawful about that.

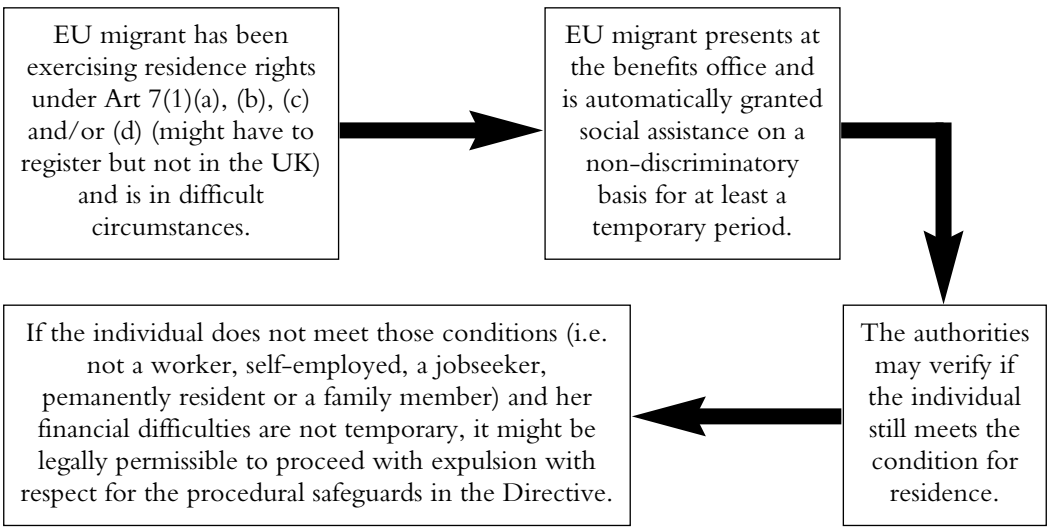
55 See eg sch 3 to the Nationality, Immigration and Asylum Act 2002, prohibiting EEA nationals from accessing certain forms of basic social assistance unless there would be a breach of the European Convention on Human Rights or 'a person's rights under the Community Treaties'. Of course reg 19(3)(a) does not require the expulsion of an EEA national not exercising residence rights, whereas this provision prohibits the provision of assistance unless EU or human rights law require it.

Paragraphs 1 and 3 of art 14 also seem to assume, however, that EU migrants will have at least temporary access to the social assistance system; it is hard to make sense of those provisions otherwise. Recital 16 of the Directive bolsters this inference:

> *'As long as beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled*. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and *the amount of aid granted* in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion.' (emphasis added)

There are in fact two linked assumptions here: that every EU migrant who has been exercising residence rights in the host State will get at least temporary access to social assistance; and that protecting the social assistance system is the only legitimate aim Member States can aim towards when expelling out-of-work migrants who are not self-sufficient.

These twin assumptions make sense in the light of art 24 of the Directive, which guarantees equal access to social assistance except in certain limited circumstances (including those who are exercising an initial, three-month right to reside),[56] as well as art 18 TFEU (the general non-discrimination provision). The system the Directive envisages seems to look like this:



56 Article 24(2) of Directive 2004/38 permits States to refrain from offering social assistance to those who are exercising a right to reside for fewer than three months, or to those who are exercising a right to reside based solely on seeking work.

The judgment of the Court of Justice in the *Trojani* case was arguably aimed at pushing Belgium back into this flow.[57] The UK system may need a similar push.

The term 'social assistance' has a specific definition under EU law; it does not include all benefits or forms of State support an individual might receive.[58] The European Court of Justice has found, for example, that 'Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting "social assistance" within the meaning of Article 24(2) of Directive 2004/38'.[59] (Article 24 prohibits discrimination in access to social assistance and other matters falling 'within the scope of the Treaty', but provides certain exceptions for receipt of social assistance.) The Court of Justice has found, in a similar context, that 'The concept of "social assistance" … must be interpreted as referring to assistance which compensates for a lack of stable, regular and sufficient resources, and not as referring to assistance which enables exceptional or unforeseen needs to be addressed'.[60] In the same judgment, the Court defined 'social assistance' in the following terms: 'In the light, in particular, of the differences existing between the Member States in the management of social assistance, that concept must be understood as referring to social assistance granted by the public authorities, whether at national, regional or local level.'[61]

Most of forms of social assistance in the UK which meet this definition appear to fall within the scope of four legislative schemes:

1. **Schedule 3 to the Immigration, Nationality and Asylum Act 2002**. This provision of primary legislation covers a certain number of social assistance provisions, such as local authority accommodation under the National Assistance Act 1948 and social services under the National Health Service Act 1977, as well as welfare powers that local authorities can exercise in relation to adults under the Children Act 1989. This is the lowest safety net the UK spreads for its most vulnerable citizens. EEA nationals are excluded unless they can show that to deprive them of these benefits would violate their human rights or their rights under the 'Community treaties'.[62]
2. **The Social Security (Persons from Abroad) (Amendment) Regulations 2006**. These regulations, which amend the regulations governing, inter alia, Council Tax Benefit, Housing Benefit, Income Support, Jobseeker's Allowance and Pension Credit

57 In that case, a French national in Belgium had been granted residence documentation as a migrant EU national. When he requested a social assistance benefit, he was refused; the authorities found that he was not exercising residence rights. The Court found that 'Mr Trojani is lawfully resident in Belgium, as is attested by the residence permit which has in the meantime been issued to him by the municipal authorities of Brussels'. As a result, he was entitled to the protection of art 12 of the EC Treaty (now art 18 TFEU) and entitled to receive the benefit. The Court noted that it remained open to the Belgians 'to take the view that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence. In such a case, the host Member State may, within the limits imposed by Community law, take a measure to remove him'. Ultimately, however, the *Trojani* judgment was based on the fact that Mr Trojani had a residence permit. The 2006 Regulations do not require EEA nationals in the UK to obtain residence documentation, and many will not.

58 See Case C-578/08 *Chakroun v Minister van Buitelnlandse Zaken* paragraph 45 ('[T]he concept of "social assistance system of the Member State" is a concept which has its own independent meaning in European Union law and cannot be defined by reference to concepts of national law.'). The case concerned the interpretation of art 7(1)(c) of Directive 2003/86/EC on family reunification for third-country nationals in the EU (a measure in which the UK does not participate). The language of the two Directives – 'recourse to the social assistance system' – is identical.

59 Case C-22/08 *Vatsouras and Koupatantze v Arbeitsgemeinschaft Nürnberg* 900, paragraph 45.

60 *Chakroun*, paragraph 49.

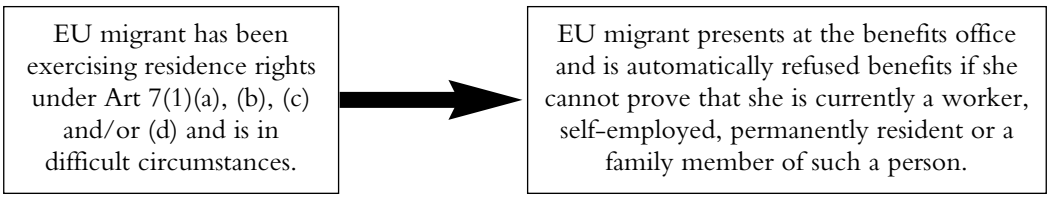
61 Ibid. Paragraph 45.

62 See footnote 56.

preclude EEA nationals from accessing these benefits unless they have a 'right to reside'.[63] The right-to-reside test is a component of the habitual residence test. Those who are exercising a right to reside solely based on being in the UK for three months or less, or solely as jobseekers, cannot access benefits.[64] Others, such as workers, are automatically treated as habitually resident.[65] Some categories, such as students and self-sufficient migrants, are not mentioned.

3. **The Tax Credit (Residence) Regulations 2004.** This imposes a simple right-to-reside test on Child Tax Credit and Working Tax Credit. Since the latter is only available to those who are working, and workers are always exercising a right to reside, there should not be an issue with access for out-of-work EEA nationals. It appears that EEA nationals can access Child Tax Credit, which is a social security benefit falling within the scope of Regulation 883/04, even if they are out of work and exercising a right to reside as self-sufficient under art 7(1)(b) of Directive 2004/38,[66] suggesting that the authorities do not view it as a social assistance benefit.
4. **The Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006**. This imposed a right-to-reside test along the lines of what the Social Security (Persons from Abroad) (Amendment) Regulations 2006 impose on access to housing and homelessness assistance in England. The Government introduced The Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) (Amendment) Order 2008 in order to extend the right-to-reside test for housing and homelessness assistance to Scotland and Northern Ireland.[67]

Under these provisions, the situation of an out-of-work EEA national in the UK seeking benefits looks something like this:



The UK legislation essentially establishes a presumption that EEA nationals are not entitled to benefits unless they can prove that they are.[68] This may be unlawful for those who have been

63 In the light of the *Vatsouras* judgment, it seems clear that Jobseeker's Allowance is not a social assistance benefit. It could be argued that other benefits covered here are also not social assistance.

64 See, eg Council Tax Benefit Regulations 2006, reg 7(4), as amended.

65 See ibid. Regulation 7(4A), as amended.

66 HM Revenue and Customs, 'Rights to Reside in the United Kingdom', available at http://www.hmrc.gov.uk/manuals/ntcmanual/eligibility_residency/ntc0350090.htm 'In these cases, the claimant would only have the right to reside in the UK if he or she has sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the UK. All the claimant's personal circumstances would be taken into account when deciding whether he or she is self-sufficient. Such factors could include the likelihood of the claimant obtaining employment and whether or not the claimant had claimed means-tested social security benefits from the Department for Work and Pensions or Department for Social Development. For example, income support, income based jobseeker's allowance or housing and council tax benefits').

67 See Explanatory Memorandum, available at http://www.opsi.gov.uk/si/si2008/em/uksiem_20081768_en.pdf, paragraph 7.8.

68 In the AIRE Centre's experience, even those with residence documentation, as in *Trojani*, are presumed not to be entitled to benefits unless they can prove that they are.

exercising residence rights under art 7(1) of Directive 2004/38, since art 14(3) seems to presuppose that such individuals will have recourse to the social assistance system.

As a result the social-assistance arrangements in the UK may be unlawful under EU law, because they prevent those who have been exercising residence rights from at least temporarily accessing benefits. Regardless of whether they are unlawful, however, those arrangements prevent the UK authorities from expelling anyone under art 19(3). There are two reasons for this.

The first, as established above, is that the Directive appears to envision expulsion of EU migrants who are not exercising residence rights only in cases where those persons have become an unreasonable burden on the social assistance system (Recital 29, art 14(3)). If an EU migrant is already precluded from accessing social assistance, expelling her achieves no permissible aim. It is as if a parent, who has rid the house of cookies, punished his child for going into the kitchen, because she might find cookies there.

The second, and related, reason, may be that an out-of-work EU migrant, as difficult as her circumstances may be, can always be said to be exercising a right to reside under art 7(1)(b) of the Directive. In order to exercise a right to reside under that provision, EU migrants must show: (i) that they 'have sufficient resources for themselves and for their family members not to become a burden on the social assistance system of the host Member State during their period of residence'; and (ii) that they 'have comprehensive sickness insurance cover in the host Member State'. The first requirement appears irrelevant: as they cannot become a burden on the social assistance system by operation of domestic law, there can be no question about whether they have sufficient resources. In relation to the second requirement, it appears that all EEA nationals in the UK are entitled to NHS care.

EU migrants, when they first arrive in the UK, if they are still 'resident' in the last EU country in which they resided as that term is used in Regulation 883/04,[69] will generally be covered for sickness under art 19 of that Regulation (the European Health Insurance Card scheme), and so have access to adequate cover.[70] Once they become 'resident' in the UK under the Regulation – and it does not appear that the definition of residence in EU social security law includes a right-to-reside test[71] – they will generally become subject to the UK's social security legislation, including its legislation on in-kind sickness benefits (ie NHS treatment).[72] As the UK operates a universal healthcare scheme for all British Citizens ordinarily resident in the UK, and art 4 of Regulation 883/04 prevents the UK from discriminating against EU migrants in the distribution of social security benefits (including in-kind sickness benefits), EU

69 The Court of Justice clarified that 'resident' (which is defined in the Regulation as being 'habitually resident', art 1(j)) has an EU-wide meaning in Case C-90/97 *Swaddling v Adjudication Officer*, paragraph 28. According to the Court (para 29): 'The phrase "the Member State in which they reside" in Article 10a of Regulation No 1408/71 refers to the State in which the persons concerned habitually reside and where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances'. The Court was dealing with Regulation 1408/71/EEC, Regulation 883/04's predecessor.

70 In Case C-413/99 *Baumbast and R v Secretary of State for the Home Department*, the Court of Justice found that comprehensive cover in another Member State was sufficient (paragraph 89).

71 See footnote 69 above. However, the *Swaddling* case involved a British Citizen returning to the UK. It is unclear whether or how the Court of Justice would incorporate the provisions of Directive 2004/38 into its analysis of residence under Regulation 883/04. See, generally, Training and Reporting on European Social Security, 'Think Tank Report 2008: The relationship and interaction between the coordination Regulations and Directive 2004/38/EC', available at http://www.tress-network.org/TRESSNEW/PUBLIC/EUROPEANREPORT/ThinkTank_Residence.pdf.

72 Regulation 883/04, art 11(3)(e).

migrants resident in the UK under Regulation 883/04 are entitled to NHS care. The European Commission has indicated that public health cover can satisfy the sickness-insurance-cover requirement.[73] It does not appear that domestic legislation prevents EEA migrants who are ordinarily resident in the UK from accessing NHS care, nor, as a matter of practice, that EU migrants are excluded from primary care or charged for hospital treatment.[74]

In brief, it seems perfectly plausible that the UKBA will come across a homeless EEA national, in the course of its pilot scheme, who is not accessing social assistance benefits yet who is receiving NHS care.[75] It seems impossible to argue that such a person does not meet the requirements of art 7(1)(b) of Directive 2004/38.

Conclusion

The UKBA's attempt to use its powers under art 19(3)(a) raises important questions about the lawfulness of the UK's legislative scheme for permitting EEA nationals to access its social assistance system. It is also submitted here that, because of the way that legislative scheme is defined, it is probably unlawful to expel an EEA national on the basis that she is not exercising a right to reside. This is a purely legal argument. There may be circumstances where psycho-social concerns suggest repatriation may be the best option. In those circumstances, however, it appears unlawful to have recourse to coercive methods of removal. If that is going to be possible, the UK will have to fundamentally rethink the provisions it has put in place to protect its social assistance system and offer some measure of temporary financial solidarity to EEA nationals in difficult circumstances who have been exercising residence rights here.

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73 COM (2009) 313, para 2.3.2: 'Any insurance cover, private or public, contracted in the host Member State or elsewhere, is acceptable in principle, as long as it provides **comprehensive coverage** and does not create a burden on the public finances of the host Member State. In protecting their public finances while assessing the comprehensiveness of sickness insurance cover, Member States must act in compliance with the limits imposed by Community law and in accordance with the principle of proportionality.'

74 It is assumed here that someone who is 'resident' in the UK under the *Swaddling* test is also 'ordinarily resident' under the National Health Service (Charges to Overseas Visitors) Regulations 1989. The only relevant case law on this point is *YA v Secretary of State for Health* [2009] EWCA Civ 225, where a failed asylum seeker was found not to be 'ordinarily resident' and therefore subject to charging for NHS hospital treatment. It is unclear if, as a matter of domestic law, that could also be applied to certain economically-inactive EU nationals. It could also be argued that a self-sufficient EEA national is ordinarily resident in the UK and therefore entitled to free NHS care (although that leads to a chicken-and-egg argument). However, applying art 4 of Regulation 883/04, as argued above, means that the ordinary-residence test must be interpreted as covering EEA nationals who meet the *Swaddling*-residence test, regardless of whether they have a right to reside at the beginning.

75 The AIRE Centre has advised a number of individuals in exactly that position.

Statelessness: The 'de facto' Statelessness Debate

Alison Harvey

At a glance

Confusion as to the boundaries of the reserved domain of the State in matters of nationality law results in confusion about who is a stateless person. The use of the term 'de facto stateless' to describe those who are not stateless, but do not enjoy the rights and protections that have come under increasing examination in the flourishing debate on citizenship, risks perpetuating confusion on all levels. In this article it is argued that the decision to use the term 'de facto stateless' to describe persons who are not stateless, rather than find some other way of describing their plight, is a decision prompted by considerations of advocacy rather than logic. The article sounds a note of caution as to some of the current usage.

Debates on statelessness bring into sharp focus debates on the reserved domain of the State in matters of nationality law. Such debates bring with them a strong temptation to avoid difficult questions by reaching for the definition '*de facto* statelessness'. This article seeks to identify what are the difficult questions and to demonstrate that to reach for the term 'de facto statelessness' rather than confront them risks runs the risk of the term being used in contexts where it has no meaning or content. The article goes on to look at the choices that must be made before this terminology is available to the writer or speaker.

The International Court of Justice held in the *Nottebohm* case:

> '… it is for every sovereign State to settle by its own legislation the rules relating to the acquisition of its nationality'[1]

The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws provides at Article 1:

> 'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom and the principles of law generally recognised with regard to nationality.'[2]

With the growth of international human rights law, the question of the boundaries of the reserved domain of States where nationality law is concerned has become more muddled. As Professor Robin White has written:

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1 (1955) ICJ Reports, 4.
2 170 LBNTS 80

> 'The point of human rights is that all humans have them. The point of nationality is that all humans do not. So nationality integrates to the extent that it compromises rights available to all human beings. Or, alternatively put, the expansion of human rights is at the expense of nationality.'[3]

The 1954 UN Convention relating to the Status of Stateless persons[4] provides at Article 1:

> '1. For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.'

It can be seen from this that confusion as to the boundaries of the reserved domain of the State in matters of nationality law results in confusion about who is a stateless person. What if a State strips persons of their nationality in apparent violation of international human rights norms? What if the nationality laws of a particular State discriminate against certain groups in apparent violation of international human rights norms? We may be reluctant to deem those affected 'stateless', for this appears to let the offending State off the hook. But such purity of approach would be of little comfort to those who find themselves not considered a national by any State under the operation of its laws and remain in limbo, without status, and often without attendant rights. Indeed, it is not the approach that has been taken in the development of international laws on statelessness, which are to a large extent predicated upon dealing with statelessness as the lack of a particular nationality rather than the lack of any nationality.

All over the world, the main ways in which persons derive the nationality they have by birth can be summarised under the headings *jus soli or jus sanguinis,* with many countries operating a mixture of the two.

Take a classic case where the statelessness of an individual is produced by a conflict of laws. A 'modern' example is that of baby born in India as a result of a surrogacy agreement where the genetic mother is a British citizen in the UK and the person who gives birth to the child an Indian national in India. India recognises the genetic mother as the mother[5] and would thus expect the child to take the nationality of the British citizen mother. But UK law recognises the woman who gives birth to the child as the mother[6] and would thus expect the child to take the nationality of the Indian mother. The result is a stateless baby. But, arguably, we can reach consensus on the range of States that might be called upon to address this baby's plight: the UK and India. The baby lacks a nationality, but we can have an intelligent conversation that is limited to a discussion about the baby lacking British or Indian nationality.

In cases where persons are stripped of their nationality, we can identify the nationality they have lost, including through the operation of laws that fall short of international standards. In succession of States cases, we can identify the range of successor States and posit that the person may be able to lay claim to the nationality of one or other of them.

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3 Professor Robin White, University of Dundee, *How does nationality integrate?* Paper submitted to the 2nd European Conference on Nationality, 8–9 October 2001.

4 Adopted 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A (XVII) of 26 April 1954 . In force 6 June 1960.

5 See *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics*, Indian Council of Medical Research (ICMR) & National Academy of Medical Sciences (NAMS) 2005 and see Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy, Law Commission of India, Report 228, August 2009.

6 Human Fertilisation and Embryology Act 1990, s 27(1).

In all these cases, we are likely to look first to the obligations of particular States under their domestic laws and binding international instruments on statelessness, and to the pressure that can be put on particular States by reference to non-binding international standards, before casting around more generally for a State to step in and afford individuals the protection of its nationality. The notion that a person can be stateless as a matter of international law and yet look to a particular State rather than the community of nations in general to rectify the problem is not merely an intuitive one; it is reflected in, for example, the 1961 UN Convention on the Reduction of Statelessness.[7] For example, art 4 of that Convention provides:

> '4. A Contracting State shall grant its nationality to a person who would otherwise be stateless and who is unable to acquire the nationality of the Contracting State in whose territory he was born because he had passed the age for lodging his application or has not fulfilled the required residence conditions, if the nationality of one of his parents at the time of the person's birth was that of the Contracting State first above mentioned….'

In other words, when *jus soli* has failed, look to the principles of *jus sanguinis*.

In cases of foundlings, the 1961 Convention introduces at art 2 presumptions that allow *jus soli* and *jus sanguinis* principles to operate:

> 'A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.'

Definitions

In its *Global Trends* report for 2008[8] UNHCR set out its estimate that there were some 12 million stateless people worldwide and recorded that it had identified some 6.6 million stateless people in 58 countries. In that report UNHCR uses the following definition:

> '**Stateless persons** are individuals not considered as nationals by any State under national laws or who formally possess a nationality but where it is ineffective. The statistics in this report on statelessness also include people with undetermined nationality. UNHCR has been called upon by the General *Assembly to contribute to* the prevention and reduction of statelessness and the protection of stateless persons' [Emphasis in original]

Thus it includes within the definition of stateless persons those 'who formally possess a nationality but where it is ineffective.' Can this be reconciled with the definition at art 1 of the 1954 UN Convention relating to the Status of Stateless persons? To do so involves positing that where a State does not render a person's nationality 'effective' we are permitted to conclude that that State does not consider the person as a national under the operation of its law whatever the State itself may say about the question. Thus we posit a definition of a 'national' over and above that generated by the domestic laws of the State concerned. It feels like trying to square a circle but there is some mileage in this approach. The question is, how much?

7 New York on 30 August 1961. In force on 13 December 1975. United Nations, *Treaty Series*, vol. 989, p 175.
8 *Global Trends 2008: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, UNHCR, 16 June 2009.

British nationality law carves out a right of abode from the concept of nationality.[9] Many British nationals other than British citizens do not have a right of abode. We can argue that such British nationals are, absent another nationality, stateless persons because the nationality that they hold does not satisfy the minimum conditions of a nationality viz. the rights of any national to enter, reside in and leave the country of nationality. The International Covenant on Civil and Political Rights, states at art 12 that:

'no one shall be arbitrarily deprived of the right to enter his own country.'

Protocol 4 to the European Convention on Human Rights (which the UK signed on 16 September 1963 but has not ratified) provides:

'3(1) No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
(2) No one shall be deprived of the right to enter the territory of the State of which he is a national.'

In this domain, questions of language are of great sensitivity. The same people who might feel comfortable speaking of 'stateless Palestinians' might feel a lot less comfortable asserting that Palestinian nationality does not satisfy the minimum conditions of a nationality.

British nationality law, and the question of Palestine are extreme cases. Can we posit a definition of a national that requires respect for a person's human rights and say that when the State does not respect such rights it does not consider the person a 'national' under operation of its law, whatever the State in question might say about the matter? To avoid such difficulties, but at the same time to avoid a head-on collision with art 1 of the 1961 Convention and also to avoid encouraging the notion that by treating a person badly enough a State can rid itself of responsibility for that person, we may prefer to abandon the language of the UNHCR Global Report 2008. Instead we may prefer to treat 'persons who formally possess a nationality but where it is ineffective' as a free-standing category, rather than a subset of the stateless.

This is not without its own problems. It leaves hanging the question of whether the person falls within the mandate or competence of UNHCR or another international agency, by reference to the remit of the agency in question and the memoranda of understanding UN agencies sign with States where they work. It also leaves hanging the question of how such persons are to be counted. Finally, there is the question of whether it will be easier or more difficult to advocate for the rights and entitlements of such persons if we no longer include them within the rubric of statelessness.

Another approach, or perhaps the same approach by a different name, is to look to the expression '*de facto* statelessness'. In April 2010 a background paper *'UNHCR and de facto statelessness'* by Hugh Massey, Senior Legal Officer in the Division of International Protection at UNHCR, was published as part of UNHCR's Legal and Protection Policy Research series.[10] As with all such papers, the views expressed are stated to be those of the author and not necessarily to reflect those of the United Nations or of UNHCR. Part I of the Paper is a masterly exposition of the appearance, if not development, of the concept of '*de facto*

9 Immigration Act 1971, s 2.
10 LPPR/2010/01.

statelessness' in nationality law debates over the years. Part two, entitled 'Shifting paradigm of *de facto* statelessness' considers the use of the term in modern parlance.

Part III, alas, posits a definition of *de facto* statelessness. Alas, because if we are to create an intermediate status and give it a legal definition it is difficult to think of a more unfortunate descriptor for a legal status than one that includes the words '*de facto*'. The working paper's proposed definition is:

> 'De facto stateless persons are persons outside the country of their nationality who are unable, or for valid reasons, are unwilling to avail themselves of the protection of that country.
>
> Persons who have more than one nationality are de facto stateless only if they are outside all the countries of their nationality and are unable, or for valid reasons, are unwilling to avail themselves of the protection of any of those countries'[11]

The definition is glossed by the explanation that persons who are *de facto* stateless cannot be inside the country of their nationality because 'by definition they must be outside that country'. But this is to confound *de facto* stateless with statelessness. It also wrecks the paper's own definition since it leaves the references to 'that country' or 'all the countries' with no referents. Thus the definition fails for internal inconsistency.

Persons with undetermined nationality

Neither references to a person 'who formally possess a nationality but where it is ineffective' nor the definition in the UNHCR working paper (even if we subtract from it the requirement to be outside the country of one's nationality) cope with cases of persons of undetermined nationality.

The UNHCR working paper states:

> 'Persons who are unable to establish their nationality or who are of undermined nationality may turn out to be de jure or de facto stateless.'[12]

Or they may 'turn out to be' nationals of a particular State. But this does not answer the question of what their status is at the time when the question is posed. If the status determination procedure is rapid this may not be too troubling, but if, as is often the case, there is no procedure on offer or the procedure is protracted, then talk only of what persons may 'turn out to be' would seem inadequate.

Dr Matthew J Gibney has argued in the context of statelessness debates[13] for a concept of '*jus domicili*' whereby a period of residence in a state could give rise to an entitlement to a nationality. Whatever its resonance in broader debates about ideal nationality laws, this concept singularly fails to deal with the 'here and now' plight of any stateless person, including a person with undetermined nationality.

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11 *Op. cit.* Part 2, para 10.

12 Part II, para 7.3.

13 See his Statelessness and the Right to Citizenship, Forced Migration Review 32, pp 50–51. Dr Gibney also gave a presentation on this topic at the Short Course on Statelessness and International Law Refugee Studies Centre, University of Oxford, 16–18 April 2010.

That this type of approach could be used to keep stateless persons in limbo rather than to resolve their status was demonstrated by correspondence during the passage of what became the UK's Borders, Citizenship and Immigration Act 2009. On 20 May 2009 the Lord Brett wrote to the Lord Avebury[14] about, *inter alia,* stateless children born overseas to British nationals other than British citizens:

> '… we distinguish those who are perpetually stateless from those who find themselves in practice to be "citizens in waiting" as a result of their ability to register as a citizen in their birth country on acquiring a particular age.'

The examples given in the debates to which this letter relates[15] were of children who would spend the whole of their childhood, and beyond, with no nationality or citizenship. That a stateless child may be redescribed as a 'citizen in waiting' reveals the grave limitations of the '*jus domicili'* approach in cases of statelessness.

The Equal Rights Trust in the UK is conducting a project *Stateless Persons in Detention*. Papers prepared as part of this project use the term 'd*e facto* stateless' for a very wide variety of persons indeed, many of whom are persons with undetermined nationality:

> 'Whilst there is a strict legal distinction between de jure and de facto stateless persons, both groups can have similar protection needs in detention or when their liberty is restricted in some way including detention whilst a state attempts to ascertain or verify their identity and obtain appropriate documents for the purposes of removal. This process can be severely delayed or may prove impossible for a number of practical, humanitarian or legal reasons. These include circumstances where:
> a) Deportation would violate the principle of refoulement or where return is not allowed on humanitarian grounds;
> b) The country of origin refuses to issue identity documents or to cooperate with deportation proceedings;
> c) There is no safe means of transportation to the country of origin.'[16]
> 'Victims of trafficking may be rendered de facto stateless owing, inter alia, to a lack of documentation, for example where traffickers destroy their identity documents.'[17]

A paper prepared by the Trust states:

> 'Perhaps attempting to find an all encompassing definition to de facto statelessness is the wrong way to go about things. A more pragmatic approach may be to identify different scenarios which amount to de facto statelessness, adding to the list with the benefit of time and experience. Such a pragmatic and dynamic approach would prevent the boxing out of persons through premature definitions which do not reflect the complexities and nuances of reality.'[18]

14 A copy of this letter is held by the Immigration Law Practitioners Association. See also ILPA briefings on the Bill available at www.ilpa.org.uk
15 *Hansard* HL 4 March 2009, col 739.
16 The Equal Rights Trust Project 'Stateless Persons in Detention' *Research Working Paper: The Protection of Stateless Persons in Detention*, January 2009, para 42.
17 Op.cit, para 49.
18 Legal Working Paper: The Protection of Stateless Persons in Detention under International Law, January 2009.

The question is then, why use the term 'statelessness' at all? The Trust's website states:

> 'The goal of this two year project which started in May 2008 is to strengthen the protection of stateless persons who are in any kind of detention or imprisonment due at least in part to their being stateless, and to ensure they can exercise their right to be free from arbitrary detention without discrimination. The focus of the sought improvement in protection is on the limits, length and conditions of detention.'[19]

But this seems to posit a prior definition of who falls within the ambit of the project and that definition is nowhere to be found.

It is perhaps easier to read the Trust's use of the word 'statelessness' where it is applied more broadly than to those '*persons who are not considered as nationals by any State under the operation of its law*,' as a matter of choice, of advocacy. So what are the advantages and disadvantages of calling on the language of statelessness for such people? Why appeal to the language of statelessness? And why not?

It is arguable that the word statelessness is of particular appeal when a person is in a country which is not the country in which they were born and to which they have no links by virtue of their parents' nationality. In such cases, where there is no possibility of the person being able to return to countries to which they have such ties, as a matter of history if not of law, the primary desire of advocates is likely to be to persuade the State in which they are found to take responsibility for them and not to leave them in limbo (in the cases being studied by the Equal Rights Trust, in limbo, in detention).

In cases where the focus of advocacy is a State to which a person has ties, as a matter of history if not of law, by virtue of having been born there or because their parents hold its nationality, the use of the term statelessness might serve to underline the gravity of that State's treatment of them. Expulsions, deprivations of nationality, stripping people of the protection and entitlements attendant on nationality, are examples. The force of international condemnation is expressed if the language of statelessness is used. However, there could be other, less desirable effects. A State which strips persons of its nationality and expels them might be only too pleased to see them cut loose and left to float free as stateless, especially if this entailed obligations upon other States to take them in and absorb them. The work of a State that has denied a group within its borders entitlements given to other nationals might be facilitated if everyone accepts that the persons in question are not nationals, and charges of discrimination averted.

Are there any by-ways along which we could usefully wander while the quest for a definition continues, or gets bogged down? Would it be useful to review how many of those currently being counted by UNHCR as stateless are inside a country to which they have ties as a matter of history if not of law, by virtue of having been born there or having parents who have a nationality there, and how many are outside? We could then look at the situations of particular groups and what advocacy strategies have led, or show signs of leading, to progress. Would it be useful to look at agreed standards for evidence and the burden of proof? Would it be useful to contemplate some minimum standards for the treatment of persons of indeterminate nationality? To look at what steps could be taken to agree timescales within which, if it had proved impossible to resolve their status, they could benefit from recognition

19 http://www.equalrightstrust.org/stateless%20persons/index.htm, 12 June 2010.

as stateless persons, including where appropriate a consequent grant of nationality, albeit that this might fall to be reviewed at a later date when other entitlements because clearer? Or is it time to bite the bullet and review the whole question of the State's reserved domain in questions of nationality law?

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* The views in this paper are those of the author and not of the Immigration Law Practitioners' Association. The author is grateful to Laurie Fransman QC for his comments on an earlier draft of this article; to all those who gave presentations at, and participated in, the Short Course on Statelessness and International Law organised by Dr Alice Edwards at the Refugee Studies Centre, University of Oxford, from 16–18 April 2010; to the Lord Avebury, Adrian Berry and to colleagues from the Open Society Institute working on the Citizenship in Africa project. They were the inspirations for this article, but the views and any mistakes herein are all my own.

Practice Notes

The run of major Supreme Court judgments on immigration issues has continued with a vengeance with the case of *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31. Arguably the case represents a new paradigm for protection, giving belated full effect to the Refugee Convention. The previous pragmatic approach to future behaviour established by *Iftikar Ahmed* [2000] INLR 1 boiled down to assessing whether the asylum claimant really would, despite the dangers they would face, behave in future in such a way that they would attract persecution. Lawyers and decision makers until now tended to focus more on whether historic activities would cause the asylum claimant to suffer persecution as retribution. Now, the question is whether the person would in future *want* to act in such a way that would attract persecution but would only refrain from doing so because of the risk of persecution.

Other major case law news came with *Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719, in which a broad-based challenge to the Points Based System succeeded. The Court of Appeal held that the guidance documents setting out much of the detail of the scheme do not have the legal force ascribed to them by the Home Office and by the tribunal in the case of *NA and Others* [2009] UKAIT 00025. This is because only the Immigration Rules themselves comply with the requirements of s 3(2) of the Immigration Act 1971 such that they are quasi-statutory in nature. The guidance documents references by the Immigration Rules are just that: guidance documents, which must accordingly be applied sensibly and flexibly in line with the underlying policy purpose. The Immigration Rules cannot delegate statutory force to the guidance documents, as the Home Office had seemed to hope. In practical terms, this means that it is only the requirements specifically set out in the Immigration Rules themselves which have binding force. Any additional requirements set out in the policy guidance are to be seen as suggestions rather than requirements.

On a related note, a challenge by a coalition of language schools to the increase in the minimum level of English required as a prerequisite for studying English as a foreign student also succeeded. In *R (on the application of English UK Ltd) v Secretary of State for the Home Department* [2010] EWHC 1726 (Admin) Mr Justice Foskett in the Administrative Court held that the way in which the change had been implemented was unlawful.

The Home Office has elected not to appeal either decision, instead introducing new Immigration Rules in order to incorporate the specific requirements in question (the three month maintenance rule and the minimum English requirement) directly through Statement of Changes HC 382. At least this makes the requirements slightly easier to access and comprehend.

In one of the first higher court judgments on the mandatory refusal Immigration Rules introduced in 2008, the Court of Appeal in *AA (Nigeria) v Secretary of State for the Home Department* [2010] EWCA Civ 773 addressed the meaning of 'false representations'. The Court held that in the Immigration Rules a 'false representation' is one that is deliberately deceitful rather than merely accidentally incorrect. Immigration Judges must therefore assess whether any false representation cited by the Home Office was made deliberately to mislead or was made accidentally. This case concerned non-disclosure of criminal convictions. Notably, the outcome is entirely opposite to that in *FW (Paragraph 322: untruthful answer) Kenya* [2010] UKUT 165 (IAC), where the same issue was considered by the tribunal.

Lastly on the case law front, case law watchers will be interested to note that Lord Justice Sedley has undertaken a tour of duty in the Upper Tribunal and contributed to a number of recently reported decisions.

The coalition Government announced on 9 June 2010 that it would introduce a minimum English language requirement for foreign spouses in the Autumn. The details of how this will be assessed are yet to be announced, but a list of majority English speaking countries has been announced whose nationals will be exempt from the requirement. As with the increase in the minimum age requirement for spouses, some may suspect that the change is aimed primarily at British Asians marrying Indian, Pakistani and Bangladeshi spouses.

The Government has also announced that it is considering more transparent means of limiting immigration. Skilled migration routes and foreign students are being looked at (so, the Points Based System, basically) and a consultation has been opened on the means by which limits might be achieved. The voice of the business lobby has had some impact, and it seems likely that intra-company transfers will not be affected. An interim cap was introduced as of 19 July 2010 in order to prevent a last minute rush. See Statement of Changes HC 96.

On 26 July 2010 UKBA announced that Certificates of Appeal will be scrapped in late 2010 or early 2011.

Several reports have been released by John Vine, the Chief Inspector of UKBA, which had been caught up in the pre-election purdah. More reports are due in the near future. Both the reports on family removals and the visa operation in Pakistan make interesting and somewhat depressing reading (see http://icinspector.independent.gov.uk).

Lastly, as covered elsewhere in this issue (see *News*), all in the sector will be distressed by the demise of Refugee and Migrant Justice, formerly the Refugee Legal Centre. The author, in common with so many barristers and solicitors in the sector, and a good number of immigration judges, used to work at RLC and found the experience seminal. One wonders from where the immigration lawyers and judges of the future will come.

Colin Yeo
Renaissance Chambers

Case Notes and Comments

R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant)

[2010] UKSC 15

All experienced asylum practitioners will have come across cases where an asylum seeker has arguably been guilty of persecuting others. When an oppressive regime is overthrown those who were responsible for the oppression may themselves become at risk of persecution. Similarly, where illegal organisations pursue political ends by means including armed force or terrorist acts, measures taken against members of the organisation may amount to persecution thereby generating asylum claims.

The principle that not all refugees are deserving of protection is enshrined in the Refugee Convention by way of art 1F which excludes certain refugees from the benefits of the Convention: This provides:

> 'F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes…'

Applying art 1F raises difficult but important questions of fact and law. One reason for this is that those who are members of an organisation that is responsible for war crimes or terrorism may not have been personally involved in the offending acts: not all members will be involved in actually pulling the trigger or making or planting the bomb; issues can arise as to the degree to which their conduct has assisted such acts; the extent of their knowledge of wrongdoing may also be debatable. When will the person's conduct as a member of an organisation be such as to make him guilty of war crimes or crimes against humanity committed by that organisation?

In the case of *R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant)* the Supreme Court had to consider the scope of art 1F. The Home Office had refused asylum to a Sri Lankan asylum seeker by invoking art 1F(a). The Home Office's justification for the decision was that that JS had been a voluntary member, with command responsibilities, of the LTTE, an organisation it described as 'responsible for widespread and systemic war crimes and crimes against humanity'. Accordingly the Home Office case was that his involvement in the LTTE was such as to amount to complicity in war crimes, thereby disqualifying him from protection. Reliance was placed on the case of *Gurung* [2003] Imm AR 115 where the Tribunal had approved of UNHCR Guidelines to the effect that where a person was a member of an extremist international terrorist organisation 'voluntary membership could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity in the crimes in question.'

There was no right of appeal against this decision but the applicant sought judicial review of the refusal of asylum. The Court of Appeal allowed the application, quashing the decision (see [2009] EWCA Civ 364; [2010] 2 WLR 17). The Home Office appealed to the Supreme

Court. There was agreement amongst the parties that mere membership of an organisation responsible for war crimes was not enough of itself to justify a finding that an applicant had committed such crimes; the difficult issue confronting the Court was: what more is needed?

The leading judgment was given by Lord Brown with whom the other four judges agreed (with Lord Hope and Lord Kerr adding reasons of their own). On the narrow issue of whether the Court of Appeal had been right to quash the Home Office decision his Lordship found that the reasoning of the Secretary of State in the decision letter was clearly insupportable. This was because it could not be said that the LTTE was an organisation that was 'predominantly terrorist in character' or an 'extremist international group'; accordingly there could be no question of presuming, as the Home Office had done, that JS's voluntary membership of the LTTE amounted to complicity in war crimes (para 27).

His Lordship then turned to two issues of more general importance. The first concerned the correctness of the way the Asylum and Immigration Tribunal had approached the issue of complicity in war crimes in *Gurung* [2003] Imm AR 115. In that case the Tribunal had sought to sub-divide illegal organisations in such a way that membership of certain terrorist groups (those 'whose aims, methods and activities are predominantly terrorist in character') would result in a presumption that the member was liable for their crimes. Lord Brown found this approach unhelpful. Instead the focus should be on what would normally be the determining factors:

> '(i) the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum-seeker was himself most directly concerned, (ii) whether and, if so, by whom the organisation was proscribed, (iii) how the asylum-seeker came to be recruited, (iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it, (v) his position, rank, standing and influence in the organisation, (vi) his knowledge of the organisation's war crimes activities, and (vii) his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes.' (para 31)

In his Lordship's opinion, looking for a presumption of individual liability from membership of an organisation was likely to result in error: the nature of the organisation was one of a number of factors to be considered. The same point was made by Lord Hope in this way: 'It diverts attention from a close examination of the facts and the need for a carefully reasoned decision as to precisely why the person concerned is excluded from protection under the Convention.' Lord Kerr observed that Lord Brown's list of factors was not exhaustive and that each of the factors need not be significant in all cases. The need was 'to concentrate on the actual role played by the particular person, taking all material aspects of that role into account so as to decide whether the required degree of participation is established.'

A further criticism of *Gurung* was the way in which the Tribunal had taken into account the aims of an organisation, which was a factor irrelevant to whether a person's conduct came within art 1F. This was because:

> 'War crimes are war crimes however benevolent and estimable may be the long-term aims of those concerned. And actions which would not otherwise constitute war crimes do not become so merely because they are taken pursuant to policies abhorrent to western liberal democracies.' (para 32)

The second issue of general importance addressed by Lord Brown concerned the proper approach to the issue of how art 1F applies to those who have not personally committed crimes, but who

have arguably contributed to their commission. The Court looked at relevant provisions of the Statute of the International Criminal Court, the Statute of the International Criminal Tribunal for the former Yugoslavia, the EU Qualifications Directive and other international materials. The language of these provisions was such that liability for crimes under art 1F was wider than liability under domestic law for participation in a joint enterprise. Instead art 1F exclusion would attach to anyone who makes a substantial contribution to commission of a crime, knowing their acts or omissions would facilitate it. This would include, to use the language of art 7(1) of the ICTY Statute anyone who 'planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution' of the relevant crime. His Lordship agreed with the view expressed by UNHCR that also caught by art 1F would be anyone 'in control of the funds' of an organisation known to be 'dedicated to achieving its aims through such violent crimes', and anyone contributing to the commission of such crimes 'by substantially assisting the organisation to continue to function effectively in pursuance of its aims'.

What about the mental element? Lord Brown makes it clear that criminal liability such as to bring art 1F into play will only attach to those who have the necessary *mens rea*, though he notes that if a person is aware that in the ordinary course of events a particular consequence will follow from his actions, he is taken to have acted with both knowledge and intent (para 36). Knowledge of a specific crime will not always be required: when a person is participating in a common plan or purpose to further the organisation's aims by commission of war crimes generally then no more need be shown than that the person had personal knowledge of such aims and intended to contribute to their commission.

Lord Brown summed up the position in this way:

> 'Put simply, I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose.' (para 38)

The decision of the Supreme Court is a welcome exposition of a provision of the refugee Convention that is likely to continue to grow in importance. It is now clear that the Home Office cannot simply point to the evils of a particular group or organisation and thereby create a presumption that anyone who is a voluntary member is accordingly guilty of any crimes committed by the organisation. A careful evaluation is required of the relevant factors to see if what the person actually did reached a threshold sufficient to justify exclusion under art 1F.

Consideration of the nature of a particular organisation will presumably still be of some practical importance, even though no presumption of guilt is created by voluntary membership. In the case of a terrorist organisation whose very purpose is terror, mayhem, death and destruction, it will be relatively easy to show that any activities conducted by the applicant for the organisation were in knowing furtherance of those aims so that the requisite level of personal responsibility is reached, thereby engaging art 1F. However decision-makers will have to take care to avoid any automatic assumption that this is the case.

Applying the principles set out by the Supreme Court will involve particularly difficult factual evaluations where the asylum-seeker was a member of an organisation that is not wholly terrorist in character. As in all cases where the applicant for asylum has not personally carried out the relevant crime the focus will have to be on what role he or she actually played and the degree of his or her personal responsibility for any crimes perpetrated by the organisation.

Jim Gillespie

Commission v Netherlands

CJEU, 29 April 2010, C-92/07

Work permit rules in force in August 1980 – application to Turkish nationals seeking to come to a Member State to work

The Netherlands has had a hard few months before the Court of Justice of the European Union (CJEU) over Turkish workers. First there was the *Sahin*[1] judgment where the CJEU held that the very high fees which it was applying to Turkish nationals and their family members coming to or renewing their residence permits in the Netherlands constituted a restriction prohibited by legislation subsidiary to the EC Turkey Association Agreement, in particular Decision 1/80. Now the CJEU has gone even farther in a case brought by the Commission against the Netherlands, once again on high fees. The CJEU's ruling in this judgment has much wider implications for other Member States than the one in *Sahin* as the ruling covers wider ground and makes the UK's PBS scheme inapplicable to Turkish nationals as they are entitled to the more advantageous system in force in 1980. Besides the Netherlands, the ruling is of relevance to every other country which was already a Member State by 1980.

The finding

The CJEU held 'that, by introducing and maintaining a system for the issue of residence permits providing for charges which are disproportionate in relation to those imposed on nationals of Member States for the issue of similar documents, and by applying that system to Turkish nationals who have a right of residence in the Netherlands on the basis of:

- the Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey, on the one hand, and by the Member States of the EEC and the Community, on the other hand, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963;
- the Additional Protocol, signed on 23 November 1970 at Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972; and of
- Decision No 1/80, adopted on 19 September 1980 by the Association Council, set up by the Association Agreement and consisting, on the one hand, of members of the Governments of the Member States, of the Council of the European Union and of the Commission of the European Communities and, on the other hand, of members of the Turkish Government,

the Kingdom of the Netherlands has failed to fulfil its obligations under Article 9 of that Association Agreement, Article 41 of that Additional Protocol and Articles 10(1) and 13 of Decision No 1/80.'

1 C-242/06, 17 September 2009.

The importance of the case

The right of Turkish workers to renewal of their residence permits after one year, to change employers after three years and to free access to the labour market after four years working in a Member State is provided by art 6(1) of Decision 1/80 – the secondary legislation of the EC Turkey Association Agreement. That Decision also includes at art 13 a standstill provision which states 'The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.' The CJEU has held that this provision has direct effect. Further it has held that it means:

> '48. The Court ruled that, as the standstill clause in Article 13 of Decision No 1/80 is of the same kind as that contained in Article 41(1) of the Additional Protocol, and as the objective pursued by those two clauses is identical, the interpretation of Article 41(1) must be equally valid as regards the standstill obligation which is the basis of Article 13 in relation to freedom of movement for workers (*Sahin*, para 65).
>
> 49. It follows that Article 13 of Decision No 1/80 precludes the introduction into Netherlands legislation, as from the date on which Decision No 1/80 entered into force in the Netherlands, of any new restrictions on the exercise of the free movement of workers, including those relating to the substantive and/or procedural conditions governing the first admission to the territory of that Member State of Turkish nationals intending to exercise that freedom.
>
> 50. Consequently, the standstill rules laid down in Article 41(1) of the Additional Protocol and in Article 13 of Decision No 1/80 are applicable, from the entry into force of those provisions, to all of the charges imposed on Turkish nationals for the issue of residence permits concerning a first admission to the territory of the Kingdom of the Netherlands or for the extension of such a permit.'

What this means is that the Points Based System rules in the UK cannot be applied to Turkish nationals, not only for an extension of work but also for first issue and for any visa or entry clearance required. Instead, the work permit rules which applied in August 1980 must be applied to them if they are coming for work. If the Turkish national is coming for self employment or service provision or receipt the standstill provision at Article 41 Additional Protocol EC Turkey Association Agreement applies and the 1973 immigration rules must be applied.[2]

The CJEU also confirms that differential fees from those charged to EU nationals cannot be imposed on Turkish nationals or members of their family. If the Turkish national is a worker or prospective worker the restriction arises from Article 10 of Decision 1/80. If the Turkish national is self employed or a service provider or recipient the prohibition arises from art 9 of the EC Turkey Association Agreement itself.

Elspeth Guild

2 C-16/05 *Tum & Dari* [2007] ECR I-7415; C-171/01 *Wählergruppe Gemeinsam* [2003] ECR I-4301; C-228/06 *Soysal* [2009] ECR I-1031.

Book Reviews

Nations of Immigrants: Australia and the USA Compared
John Higley and John Nieuwenhuysen with Stine Neerup (eds)
Cheltenham, UK: Edward Elgar, 2009
ISBN: 978 1 84844 636 6
206 pp
£59.95

This is a collection of papers, originally composed for a two-day workshop at Monash University's Centre at Prato, Italy, and subsequently revised in light of the workshop discussions. As acknowledged in the preface, it was conceived as an updating exercise and a companion to a previous study published in 1992, on the same broad theme, to take stock of the changes that have occurred since. And it can hardly be denied that the whole migration scene affecting the two continental areas covered in the title has undergone a radical transformation during the two decades in between.

The volume begins with an introduction by the editors outlining the scheme and thrust of the papers, by 14 leading Australian and American academics, focusing on recent immigration trends, policy convergences and structural differences between the US and Australia, the impact on their respective labour markets, issues relating to integration of new migrants, and the dynamics of ethnicity and multi-culturalism in the two countries.

We learn that in Australia it is possible for those admitted on temporary visas (eg. as students) 'to apply onshore for visa extensions or permanent residence' and that the earlier strict US prohibition against onshore changes of resident status has been relaxed, though many in temporary resident categories must still return home before applying for permanent status. One major consequence of the 9/11 terrorist attacks on US targets in 2001 was a tightening up of the student visa regime. As a result the number of students declined, but rose again 'so that by 2008 the total number of enrolled international students was 6 per cent above its pre-9/11 level' though there is no clearly demarcated route that they can follow to gain permanent resident status in the US.

Students are just one, albeit important, component of the shift, in both the US and Australia, towards skilled migrants, with a large element of 'cherry picking'. In Australia, this is achieved through its much prized 'points' system, while in the US there has been 'a large increase in the number of temporary residence visas issued to persons with needed skills'. This has had a particularly adverse impact on the island economies of the Caribbean and the Pacific in the immediate vicinity of the US and Australia. The individual papers address a spectrum of issues and concerns from a wider perspective and each of them needs a short mention here.

In Chapter 2, Graeme Hugo examines the flows of immigrants to Australia from 1993 to 2008, with detailed charts, diagrams and statistical tables. While traditionally Australian policy had been geared towards permanent settlers, in recent years 'it has been recognized that in the context of globalised labour markets it is essential to have mechanisms to allow non-permanent entry of workers in certain groups'. After a closely argued and referenced analysis of the evidence, he found that '(w)hereas in 1993, 67 per cent of Australians considered that "the number of migrants has gone much too far", by 2004 (this) proportion … had fallen to 29.7 per cent, although by 2007 it had increased again'. He concludes that the Australian government needs to undertake a comprehensive policy review of the country's 'international migration, its drivers and impacts' as there have been 'massive changes' since the last review in 1988.

The next chapter is on trends in US immigration by Susan K Brown, James Bachmeier and Frank D Bean. It mirrors the previous one, but with an emphasis on and a detailed examination of the historical background – going back to the first wave of colonial pioneers, then the second wave of slaves, and on to the third wave of agrarian settlers, the fourth wave of industrial labourers, and the fifth wave of reunited families and refugees – leaping forward into the present day. In this last part they look at unauthorized migrants, non-immigrant entrants and temporary legal workers, and end with a discussion of the new era of exclusion of permanent settlers through reliance on temporary and unauthorized guest workers.

The fourth chapter, by Gary P Freeman, is rather tellingly entitled 'From disordered expansion to disordered stalemate: immigration policies in the United States'. It opens with a reminder of the rationale and impact of the 1990 Immigration Act which, conceived 'in the spirit of liberal immigration policy' had 'increased (both) the overall legal admissions for permanent residency by one-third and sought to increase the ethnic diversity of immigrant flows to the US via a new class of visas'. He considers that what has changed since 1992 is 'the end of the expansionist consensus', ('Revolt and Stalemate, Phase One'), illustrated with a table of *Restrictive immigration proposals in the US Congress that died, were defeated or were weakened by amendment* during 1995–2001, together with a summary of the main provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The 'Revolt and Stalemate, Phase 2' that followed covered the entire two terms of George W Bush's presidency from 2001 to 2008, involving many battles with Congress on his proposals for reform that would have included a guest worker system and a path to legalisation for the large undocumented population of the US, mostly from Mexico and other Latin American countries. These, alas, were to remain unresolved, leaving Freeman to conclude that 'the decisive victory of Democrats in the November 2008 election could put the country back on the road to immigration expansion'!

In Chapter 5, Bob Birrell gives an overview of immigration policy in Australia, with a short historical outline focusing on 'The Australian Experience', in the light of what he describes as 'a dramatic expansion' of immigration levels in the first decade of this century on account of globalization and 'the recent economic boom', which resulted in opening up the Skilled Migration Programme. He concludes with a brief look at 'Immigration Policy under the Rudd Labor Government' and 'Domestic Political Constraints in the Twenty-first Century' and informs us that at the time of writing 'the Rudd government was already in retreat from its 2008–09 programme objectives'. The measure it announced on 17 December 2008 'would give priority to migrants sponsored by employers and those with occupations on a limited critical skills list … focused on medical and key IT professionals, engineers and constructions trades'. This represented a significant change in policy, since it considerably narrowed the pool of those eligible for permanent residence. It was of course this Australian style points-based model that was adopted by our government for its radical reforms of the immigration system during the last Parliament.

Immigration and the labour market is the focus of papers by Santina Bertone looking at Australia, and by Brian Duncan and Stephen J Trejo dealing with the US. Both consider the need and scope for skilled migration, the status of immigrants compared to the rest of the working population, their integration into the labour market, the impact on native workers and so on. Duncan and Trejo give a comparative critique of the two jurisdictions with this astute observation: 'Unlike Australia, the US makes little or no effort to regulate either the volume or the skill content of immigration flows to fit with current labour market needs', and further that 'a large share of US immigration is illegal and

the government appears to have almost no control over this predominantly unskilled flow'! This appears to be borne out by the other studies in this collection.

The subject of Chapter 8 by Andrew Jakubowicz is 'New groups and social cohesion in Australia'. By 'new groups' he means 'communities created in Australia after the break-up of the Soviet Union, composed of immigrants or refugees from countries that had hitherto had a small or non-existent presence', in the main coming 'from Africa, parts of the Middle East and … of the Pacific'. To put the matter in perspective, he retraces the prior history of migration to Australia and the changes that occurred in the 1980s following 'the end of the "White Australia policy" in the mid-1970s' and the unexpected arrival of thousands of Indochinese refugees. He also suggests that the Australian 'resurgence of an interest in social cohesion' came from the experience of the European Community which too had grappled with issues of national identities of member states, of economic disparities among them and of social marginalization of immigrant groups from Eastern Europe as well as from outside Europe altogether. The picture that emerges is of an increasingly multi-racial and multi-cultural post-White Australia population, and the problems associated with absorbing the new arrivals into the mainstream, through to the post-9/11 phenomenon of Muslim anger, alienation and asymmetry 'driven by its own anti-Semitic, anti-American and anti-Australian/White racism'. At the end of his meticulous analysis of the causes and tentacles of the undercurrents of discontent and disharmony within the Australian polity, Jakubowicz poses a number of questions which underline his doubts about the Rudd government's declared policy of 'social inclusion. '

Chapter 9, by David L Leal, is a parallel study of social cohesion in the United States, with a particular emphasis on Latinos. Again, starting with a history of Latino migration into the country, we are treated to an examination of such topics as 'The treatment of Latinos', 'Race and Immigration in the United States', 'Markers of Latino Integration', 'Religious Conflict and Social Division', 'Latino Immigration after 9/11' and 'Comparisons with Australia'. He notes that 'Latinos are the fastest growing major demographic group in the US', and that while it is sometimes claimed that 'Mexican nationals living legally in the US have a low rate of naturalization' because 'they are disinclined for cultural or political reasons to become Americans', this overlooks 'that Canadians living in the US have comparatively low naturalization rates' too, which suggests that it is 'geographic proximity to one's home country' rather than 'the more abstract explanations [that] is the underlying cause'. His conclusion is that '(f)rom the deep South to the rural Midwest, Latino communities are putting down roots across the US [and] (w)hile this creates some tensions between Latinos, Anglos, and African Americans in the short run, in the longer term Latinos will increasingly be part of everyday American life and society'. This may be too optimistic; only time will tell.

The penultimate paper is on 'Immigrant settlement, ethnic relations and multi-culturalism in Australia' by James Jupp. He makes a valid but often undervalued point that '(u)nfortunately American experience often colours and even corrupts public debate in Australia, especially around the concepts of multiculturalism, assimilation and integration'. While '(a)t the popular level … [both] the US and Britain were frequently held up as horrible examples of what might happen in Australia if strict control over immigration were to be relaxed' this ignored the historical basis of their respective ethnographical landscapes, since 'American race relations were not dominated by immigration but by a slave population numbering a majority in several southern states … and Britain freely allowed subjects of the British Empire to settle without restriction until the 1960s', whereas in 'White Australia … strict physical criteria and total exclusion had been applied since 1901'.

He goes on to illustrate the fundamental differences between the US and Australia on a number of levels, such as the existence of deeply ingrained racial divisions in American society – in terms of lynching, Jim Crow laws, rioting leading to deaths, denial of the franchise and the KKK etc – which 'were not part of the Australian scene'. However, he does acknowledge the inferior position of the Aboriginals (even admitting to elements in their history 'that certainly justify the term "genocide"') and that rioting against Chinese miners did take place between 1850 and 1890, 'though few deaths occurred and the army and police were called in to restore order with considerable success'. And while the presence of Catholics and Jews in both Australia and the US for many generations had tended to modify prejudice, it was the influx in the twentieth century of 'new and different ethnicities, which aroused new prejudices with each wave'. Both countries for decades, if not centuries, 'adopted policies favouring people like themselves … British and Irish', even if 'strained by Protestant/Catholic tensions'. In Australia however there was always a distinctly British flavour and orientation as far as maintaining a steady supply of new migrants was concerned, with 'assisted passages' and 'Bring out a Briton' schemes stretching right into the latter half of the twentieth century.

Jupp puts all these and other facets of the demographical picture of Australian society under a minute examination, through concepts of 'Immigration and the Nation State', 'Managing the "problem" of Ethnic Diversity', 'The arrival of newcomers', 'From Assimilation to Multiculturalism' and finally 'Multiculturalism' under different headings, with constant references to the British and American parallels. The trend, as he sees it, is to stress 'the need to accept liberal democratic values, equality of the sexes, peaceful resolution of disputes, dominance of the English language and mutual tolerance'. These were incorporated into 'a citizenship test that required undertakings on and understandings of these issues' by the Howard Liberal government which at the time of writing were being revised by the present Rudd Labour government. According to Jupp, this shows an undercurrent of assimilation that may not be welcome to the Muslim communities, numbering less than 2 per cent of the population.

In a sense, all the nuanced discussion of the preceding papers is encapsulated by Cara Wong in the title of her paper, 'Who belongs? Assimilation, integration and multiculturalism in the United States'. She sets out the broad parameters of her study thus: 'Membership of a society can be defined in many different ways, and I present five definitions that pertain to immigrants in the US'. These are not as clear cut as claimed and do overlap to some extent, but 'the most straightforward and simple definition equates membership with citizenship'. Turning to the fundamentals and technicalities of citizenship as membership, in terms of the formal qualifications and processes involved, Wong observes that these are 'assimilationist in nature', with the guiding motto that 'Americans are united not by bloodlines but by shared beliefs about "life, liberty and the pursuit of happiness"'.

Superimposed on the legal concept of citizenship is the public perception of it for, as she says, '(t)he American people have a unique view of who is "truly American" [that] does not necessarily coincide with governmental definitions or practice', while equally 'the views of immigrants themselves' also have a bearing on whether 'they consider themselves members of the US national community and whether this includes or excludes their membership of other national communities'. Another criterion is behaviour as an indicator of membership, ie. whether or to what extent do immigrants 'behave in ways that are largely indistinguishable from the behaviours of native-born Americans?'.

Wong takes us through this minefield of social constructs and concludes that '(c)oncerns about whether immigrants can become full members of American society

date back to the country's founding', and though '(n)aturalization requirements … have changed very little over time' there have been shifts in the underlying philosophy of what we would call the 'one-nation' society. According to Wong (rather surprisingly), 'even though a majority of Americans support the idea of making English the official language and believe that ethnic organizations promote separatism, a majority also support bilingual ballots, bilingual education, oppose requiring that only English be used in public and do not believe that ethnic histories receive too much attention in schools', but 'even among those who support the maintenance of distinct cultures, very few believe that the government should help groups manifesting these cultures; instead .. that such matters should be left to the groups themselves, thus marking a line between public and private spheres'.

These papers capture the pluralist phenomenon of two of the largest immigrant-receiving countries of all time. Within this 200+ page volume, then, is to be found a truly informative mass of data (complete with graphs, tables and statistics) and learned analyses pertaining to the twin-focus of its title which will serve as a valuable tool of reference and reflection by all who have an interest in the subject.

Ramnik Shah

Blacks out
Vladimiro Polchi
Bari, Italy: Editori Laterza, 2010
ISBN: 9788842091899
144 pp
€15.00

It is the twentieth of March and there is general chaos all over the country. All the immigrants who live and work in Italy had decided to go on strike. All the factories, the world of carers, babysitters and domestic workers have ceased to function. Fruit and vegetables are rotting in fields. Moreover, restaurants, bars and caterers have lowered their shutters and even football, volleyball and basketball are suspended; parishes are without priests. It sounds like a description of the aftermath of a disaster, but it is actually what would happen if all the immigrants who live and work in Italy, regular or irregular, decided at some point to stop working, even just for a day.

This is the argument in the book by Vladimiro Polchi, about which he says: 'I wrote a novel where all the characters and all the numbers are real'. Polchi is a journalist, expert on the Italian immigration and the racism situation.

More than anything, the numbers are shocking. Starting with some statistics: 105,000 Philippinos are working as regular house keepers in Italy. First to come are women, followed by their husbands and family. They rely primarily on the community network to find a suitable job and modest accommodation. They work hard all week long for no more than 1.000 Euros per month and 300 Euros are sent back home every month. The majority of the businesses are owned by foreigners. In Prato, a small town in Tuscany, there are 2,783 Chinese fabric workers. In total, over the country, more than 250,000 workers speak another language. They produce 9.7% of the PIL (GDP Gross Domestic Product), that converts to approximately 122 billion Euros.

To continue with the condition of the caregivers: according to the CENSI's data the number of caregivers is around 774,000, and 700,000 of them are foreigners. They are paid 9 billion and 352 million Euros per year and 1 out of 10 families is 'caregiver-dependent'. Moreover, 1 out of 4 has an irregular status and more than 57% are working in the black market. Polchi also underlines a very common practice nowadays called 'grey market': declaring fewer hours than are really

worked. The grey market is mostly women; 48% of them work in the north, 35% in the centre, 17% in the south. The majority arrive from Eastern Europe. From 2002 to 2008 the Ukrainian community grew exponentially from 12,000 to 155,000 and the Moldovan community from 7,000 to 100,000.

In the agricultural sector, there are 133,000 farm hands. They belong to 155 different nationalities, including Romanian, Polish, Albanian and Moroccan. They are indispensable for collecting strawberries in Verona, apples in Trentino, fruits in Campania and Emilia Romagna, grapes in Piemonte, tobacco in Umbria and Tuscany, melons in Mantova and tomatoes in Puglia. Every nationality now specialises in something: Slovenians and Africans specialise in collecting in the fields, Romanians and Hungarians are experts in distribution and women workers are used for washing and stocking the products. In short, without them the agricultural sector would stop.

If they are so irreplaceable what do these agricultural workers receive in return? According to Doctors without Borders in 2008, they are overworked and do not receive any kind of medical assistance. 88% of them do not have a contract and they receive less than 10 Euros for a day's work. Caritas Italiana stated that in total they are 4 million, 7% of the total population and 10% of the work force. Since 2001 the numbers are growing rapidly and there are around 400,000 new arrivals every year. A quarter of them have a diploma or a bachelors degree.

Most of these have a regular status, so what about all the irregulars? Polchi gives us an even more catastrophic picture. There are more than 650,000 immigrants without a visa according to Ismu, an organisation involved in the study and research of ethnicity, migration and multiethnic ties in Italy. The majority of them arrive by sea but the overstayer phenomenon is now also very widespread (30%). They live and work in the territory but they are invisible before the law. To make them visible and regular the Italian Government is now using amnesties and regularisation through the so called 'flow ordinance'. More specifically, the Government provides a so called 'quota' of non-EEA citizens who can come into the Italian territory for work reasons. This is the law but in practice it works differently. An 'irregular' already present into the territory submits their job application, hoping that they will be part of the quota, then they get out of the country with a clearance certificate and come back with the entry visa. It is a so called 'sliding doors system' – you get out irregular and you come back regularised.

In conclusion Polchi is presenting, between fiction and reality, a very depressing portrait of how Italy treats its immigrants and, in the end, its work force. This book is also part of a project called: 'journalists against racism and xenophobia' which aims to remove from documents and official media including letters words such as 'clandestine', 'gypsy', 'extracomunitario' and finally 'vù comprà'.

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Tribunal Practice and Procedure
Edward Jacobs
London: LAG, 2009
ISBN: 978 1 903307 73 1
lxxxii, 900 pp
£40

This is not a book for reading (not from cover to cover anyway, as your reviewer tried). It is a book for dipping into, if you want to know anything at all about what tribunals do. It is compendious, comprehensive and exhaustive (not to say exhausting, if you try to take in too much at once). In his foreword, Lord Justice Carnwath looks forward to 'using the work as a ready handbook and guide to the new tribunals world.' One need look for no other.

The author, Edward Jacobs, was a deputy Child Support and Social Security Commissioner, and now sits in the Administrative Appeals Chamber of the Upper Tribunal. Hence many of the reported decisions which he cites are those of the Social Security and Child Support Commissioners, but many decisions by other sorts of Commissioner are cited, and there is a wealth of case law from the ordinary courts. When Commissioner Jacobs completed his book in July 2009 the AIT still lay outside the two-tier structure, but its admission the following February was anticipated, and the book is not a whit less useful to judges and practitioners in the asylum and immigration jurisdiction because of its date of publication and the absence of any decisions by the IAT and the AIT.

The scope of the book ranges from the philosophically general to the pragmatically particular. In the former category comes an overview of what tribunals are for, and how they differ from the ordinary courts. Thus, an 'enabling' attitude is promoted, providing assistance and encouragement to unrepresented appellants. Accessibility for users is facilitated by a preference for the inquisitorial rather than the adversarial approach, and cross-examination of witnesses is frowned on. Co-operation between the parties, and between the parties and the court, is a *desideratum*, as indeed was adumbrated by Carnwath LJ himself in *E & R* [2004] EWCA Civ 49, when he referred to '*those statutory contexts where the parties share an interest in co-operating to achieve the correct result*.' His Lordship included asylum appeals among those contexts.

These ideals may not reflect the experience of practitioners, judges or appellants as far as immigration and asylum are concerned, and some formal differences still remain now that this jurisdiction has been integrated into the Tribunals Service. It is only in this jurisdiction that there is any restriction on who can represent appellants (in Part V of the 1999 Act), while Immigration and Asylum is the only chamber in the Upper Tribunal which has no power to strike out proceedings or to make a wasted costs order. Service of Tribunal decisions by the respondent on the appellant remains, of course, another exception.

Mr Jacobs has a knack for classification and definition. As examples of the latter, he distinguishes between 'practice' and 'procedure' (as in the title of the book), 'applicant' and 'appellant', 'leave' and 'permission' and – one that had not occurred to me – 'refusal' and 'rejection'. Contrary to my previous view that 'paper hearing' was an oxymoron, I learned that a hearing may be an oral hearing or a paper hearing, and that the word 'hearing' is appropriate for both procedures. A 'specialist' tribunal is distinguished from an 'expert' tribunal, an example of the latter being the Medical Appeal Tribunal, which can decide whether an appellant is swinging the lead or is genuinely ill. The superior courts used to refer approvingly to the AIT as a 'specialist' tribunal, thus earning the disapproval of Zahir Chowdhury in his article *The Doctrine of Deference to Tribunal Expertise and the Parameters of Judicial Restraint* (Immigration Law Digest vol. 15 no. 3). But the courts also seem to use these terms interchangeably. Thus Baroness Hale in *AH (Sudan)* [2008] AC 678 describes the AIT as '*an expert tribunal charged with administering a complex area of law in challenging circumstances*.' The Tribunals, Courts and Enforcement Act itself requires the Senior President, at s 2(3)(c), to have regard to '*the need for members of tribunals to be experts in the subject-matter of, or the law to be applied in, cases in which they decide matters*.'

Mr Jacobs' classificatory bent is displayed in his treatment of 'jurisdiction', which has already been used in one of its various senses above. It is divided into 'general' and 'particular' jurisdiction, the former being subdivided into the 'narrow' (or constitutive) and 'wider' (or adjudicative) senses, and the latter being subdivided into the questions whether the proceedings were properly brought and whether the tribunal itself was properly constituted. A taxonomy is also provided for the term 'discretion', which

can have a 'narrow' and a 'wide' meaning, and differs too in whether it is 'unfettered' or 'structured'. Quite heavy-duty discussion of legal terms of art, such as issue estoppel and its relation to legitimate expectation, is not shirked either.

One insight which the book gave this reader was that things which he thought were peculiar to immigration and asylum crop up in other parts of the Tribunals Service too. Thus, regulation 13(2)(a) of the Education (Prohibition from Teaching or Working with Children) Regulations 2003 provides that on appeal a tribunal may not take account of information that was not before the Secretary of State. So the notorious section 85A of the Nationality, Immigration and Asylum Act 2002, not yet in force, which confines the tribunal on appeal to considering only the evidence which was submitted in support of an application under the Points Based System, is not unique.

The answers to all sorts of questions, some commonplace, some rare, can be found between the pages of this book. To take one example, can a concession be withdrawn? The answer is, '*It may be withdrawn on appeal, if that can be done without prejudice to the other parties*.' The authority given for that is *Davoodipanah* [2004] EWCA Civ 106, a case which escaped the vigilance of the Brown Books. (The case of *Carcabuk & Bla* (00/TH/01426), reported in Immigration Law Update vol. 6 no. 15, only says that an adjudicator must not go behind a concession made by the respondent.)

In short, Mr Jacobs' book contains all you ever wanted to know about tribunals, but were afraid to ask, and probably most of what you will ever want to know. For a book of its size, there are remarkably few typographical errors, although Lord Hoffmann, as in many other tomes, regularly appears shorn of his final 'n'. Your reviewer was, he must confess, a little disappointed to read, in the section on writing reasoned decisions, '*Humour is seldom appropriate, if ever.*' True it is, though, that the business of the tribunals and the courts is serious business, and the reader will certainly find this book, in Sir Robert Carnwath's words, '*a ready handbook and guide to the new tribunals world*.'

Richard McKee
Judge of the Upper Tribunal (Immigration and Asylum Chamber).

ILPA

About ILPA

ILPA is a professional association established in 1984 by leading UK practitioners in immigration, asylum and nationality law. It exists to promote excellence in the provision of advice and representation in this field and to contribute to a just and equitable system of immigration, refugee and nationality law practice that does not discriminate against individuals on the grounds of race, gender or otherwise.

Have you visited ILPA's website recently?

ILPA posts briefings and submissions on its website, www.ilpa.org.uk, on a weekly (and sometimes more than weekly) basis. These contain legal and policy analysis as well as evidence of the experiences of members and their clients and are a rich source of information for academics and researchers.

Our members

ILPA's membership of over 900 individuals and organisations includes lawyers, advice workers, academics and others with a substantial interest in the law, in the UK and beyond. Our members include not only immigration lawyers, but also lawyers whose work touches on immigration, immigration advisors and others with an interest in immigration, asylum and nationality law. Leading practitioners in this field deliver training for ILPA, represent the association and speak on its behalf, and contribute to the work of its sub-committees, its lobbying, responses to enquiries and consultations and specialist research and publications. Membership of ILPA provides an opportunity to get information unavailable elsewhere and to be involved in this work. If you are working on immigration, asylum or nationality law and you are not a member of ILPA then you are missing out.

Why join ILPA?

Joining ILPA is your chance to get involved, alongside leading practitioners, in improving the quality of immigration advice and representation and in influencing the development of the law. ILPA works across all areas of immigration, asylum and nationality law and its work is widely recognised.

As a member, you will benefit from:

- reduced rates for all ILPA training, which is provided by experts and accredited for continuing professional development (CPD) points by the Bar Council, the Solicitors' Regulation Authority, the OISC and the Institute of Legal Executives
- listing in ILPA's online and hard copy Directory of Members
- ILPA's monthly mailing updating you on new developments and providing you with information not available elsewhere
- email alerts on developments of importance
- opportunities to participate in specialist members-only sub-committees, through e-groups and meetings
- free copies of ILPA publications including best practice guides
- opportunities to become involved in the work of the Association, working alongside leading practitioners in the field including on responding to consultations, representing ILPA at official meetings and in work with parliamentarians
- access to ILPA's library by appointment
- a say in how ILPA is run

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Work with ILPA

Twenty-five years on, ILPA remains your best option for contributing to raising standards of advice and representation and to a just and equitable immigration, asylum and nationality law practice. By maintaining and renewing your membership, training for ILPA, hosting training sessions or attending them, attending the subcommittees, sharing information with members and writing for the mailing or for the Journal of Immigration, Asylum and Nationality Law you help to support practitioners and through them, their clients.

Help to

- Promote and improve the advising and representation of immigrants
- Share information on domestic and European immigration, refugee and nationality law
- Work to secure a non-racist, non-sexist, just and equitable system of immigration, refugee and nationality law practice.

By

… strengthening our membership
Maintain or renew your membership and see if you can recruit a practitioner who would benefit from ILPA's support and contribute to ILPA's work.

… supporting our training
Come on training courses, publicise them to others, train for ILPA, suggest or host courses. Increasingly lawyers in all areas of practice find themselves confronting matters of immigration law and ILPA is always interested in reaching out to train those practitioners, as well as immigration, asylum and nationality law practitioners.

… sharing information with others
When you come across something that other immigration practitioners need to know – pass it to ILPA so that we can disseminate it to members. Share information received and write casenotes and memoranda for the ILPA mailing; and/or write articles for the Journal of Immigration, Asylum and Nationality Law

… working to influence the development of law and practice in this area
Get involved in ILPA's subcommittees and members' meetings; represent ILPA at meetings; help with responses to consultations and parliamentary briefings. ILPA is represented on 'stakeholder' and advisory/user groups run by the UK Border Agency, the Administrative Court and tribunals, and on advisory and other groups convened by public bodies and NGOs. Since it was founded, ILPA has provided advice to members of the UK parliament and House of Lords on legislation, and has excellent links with institutions and organisations working at European level. Our comments on proposed legislation and our responses to consultations influence law and policy in the UK and beyond.

CR* – Concessionary rate for ILPA members who are full time students, pupil barristers or trainee solicitors, or employees of Law Centres and smaller voluntary organizations.

CPD – Solicitors, barristers, OISC regulated advisors and legal executives can all sign for Continuing Professional Development hours.

This is a selection of the training sessions offered by ILPA. The full training programme is available on the ILPA website: www.ilpa.org.uk

Training

Some examples of ILPA training recent and forthcoming appear below. Please see ILPA's website www.ilpa.org.uk for the full programme which is updated regularly. Academics and researchers, members of ILPA and others, who attend ILPA training sessions have an unparalleled opportunity to learn of experiences of practitioners and thus have access to information not available elsewhere.

October 2010

Update: recent developments in immigration law
Thursday 14 October 2010, 4–7.15pm
Speakers

- David Chirico, 1 Pump Court Chambers
- Sonali Naik, Garden Court Chambers

CPD 3 hours
Fee ILPA members £120, CR*£60, Non members £240
Code DT 1229
David Chirico and Sonali Naik return with this comprehensive course covering recent cases and related developments to ensure that you are fully up to speed. The most efficient way to get up to speed on all recent developments in

immigration caselaw and practice, with an opportunity to reflect on their implications for your clients. Feedback on training from this popular team has included 'the best ILPA course I have been to', 'very interesting and well presented course, knowledgeable speakers – very good!'

Significant others: applications for partners

Friday 15 October 2010, 10am–5pm

Speakers

- Tim Barnden and Barry O'Leary, Wesley Gryk Solicitors

CPD 5.5 hours

Fee ILPA members £220, CR* £110, Non members £440

Code DT 1236

Its back! This course, covering all aspects of applications for spouses, civil, unmarried and same sex partners is back again by popular demand. 'The best course I have ever attended, brilliant', 'outstanding' , 'informative, lively and important' says the feedback. Characterised as 'Tim Barnden and Barry O'Leary are described as particularly helpful tutors', with one participant commenting 'I would be happy to attend any sessions conducted by Tim and Barry'. They both specialise in applications for partners at Wesley Gryk solicitors, described in Chambers UK as having a 'fantastic reputation' and as 'developing knowledge, testing the boundaries and pushing the agenda'. According to previous participants this 'great, very informative, interesting' session 'full of practical tips', 'very useful material, good insights, well-presented and to the point' will give you an 'excellent opportunity to discuss and clarify the topics', including on developments on the general grounds for refusal and changes to minimum age for partners and spouses. Previous attendees record 'no dull moments'. Come along and re-ignite your enthusiasm, while honing your knowledge and skills.

Home office policy, concessions and the exercise of discretion outside the immigration rules

Friday 22 October 2010, 2–5.15pm Birmingham or Wednesday 10 November 2010, 4–7.15pm London

Speakers

- Trevor Wornham, Wornham and Co
- David Jones, Garden Court Chambers
- Vanessa Ganguin, Laura Devine Solicitors
- Alison Stanley, Bindman and Partners LLP

CPD 3 hours

Fee ILPA members £150, CR* £90, non members £300

Code DT 1260 (Birmingham) or DT 1261 (London)

This special rate for members will include a copy of HJT and ILPA's Home Office Policy Manuals http://www.hjt-training.co.uk/products/1228-9260/hjt-ilpa-s-home-office-policy-manual.php which will be supplemented by ILPA's training materials and notes.

It's back – the long-awaited ILPA training on Home Office policies and concessions outside the immigration rules in immigration and nationality (not asylum) cases – where to find them, what they cover, pitfalls and how to use them in your clients' cases. The experienced trainers will guide you through policy and practice, the principles upon which discretion is exercised both within and outside the rules; the major areas of Home Office discretion in areas including family settlement, commercial immigration categories, British nationality and enforcement of immigration controls and how the exercise of discretion is currently operating. All participants will receive a copy of the ILPA/HJT Compilation of Immigration and Asylum Policy Instructions of the Home Office (normal price £62) as well as a training pack providing notes and new materials. An essential update from a practitioners' perspective.

Discrimination and immigration

Tuesday 19 October 2010, 4–7.15pm

Speakers

- Declan O'Dempsey, Cloisters Chambers
- Jawaid Luqmani, Luqmani Thompson and Partners

CPD 3 hours

Fee ILPA members £120, CR★£60, Non members £240
Code DT 1234
Are you confident in invoking discrimination law in pleading your clients cases, or taking discrimination claims for them? This course uses lecture notes and case studies to look at the availability of domestic and European remedies for discrimination, including cases before the immigration tribunals and litigation in the county court relating to discrimination by the immigration authorities arising out of immigration detention, or other processing of clients' claims. It will also look at how to use the public sector equality duty. Declan O'Dempsey is a discrimination law specialist who has represented both claimants and defendants in a variety of domestic courts and is regularly instructed by interveners such as the Equality and Human Rights Commission and has written widely on the subject. He is part of the team of four writing the statutory code on public functions, goods and services and writing the public sector equality duty code for the Equalities and Human Rights Commission. Jawaid Luqmani undertakes both immigration and asylum work with discrimination litigation in the context of race claims and disability discrimination within the Upper Tribunal.

Nationality law is fun
Thursday 28 October 2010, 10am to 5.15pm
Speakers
- Alison Harvey, ILPA General Secretary
- Mahmud Quayum, Camden Community Law Centre

CPD 5.5 CPD hours
Fee ILPA members £220, CR★£110, non members £440
Code DT 1247
Particpants of a previous session told us '(the speakers) enjoy nationality law and that was infectious', 'case studies very helpful … very interesting and well presented', 'This was one of the most informative and useful sessions I have attended' … 'fascinating'.
The session is aimed at practitioners who want to develop their understanding of nationality law and who are interested not only in naturalisation, but also in the acquisition of British Citizenship by birth and registration. The session will assume general knowledge in the fields of immigration and asylum law and that participants have some general knowledge of current naturalisation procedures. It will not assume prior experience of having dealt with tracing or knowledge of the provisions on naturalisation set out in the Borders, Citizenship and Immigration Act 2009. The course will look at forms of British nationality other than British Citizenship only insofar as these are relevant to understanding the development of British nationality law and also insofar as these are relevant to eligibility for British citizenship. There will be opportunities to explore participants' questions and concerns. The session will incorporate elements of ILPA's Nationality by Birth course and those who have been on this course will find that some things will be repeated.

November 2010

Visitors' Rules
Monday 8 November 2010, 4–7.15pm
Speakers
- Mahmud Quayum, Camden Community Law Centre
- Natasha Chell, Laura Devine Solicitors

CPD 3 hours
Fee ILPA members £120, CR★ £60, non members £240
Code DT 1263
Participants on the session ILPA ran on this topic in June 2009 described it as 'excellent', 'very useful and very relevant' with useful 'questions and answers based on practical experience' we are pleased to be repeating it. General visitors, business visitors, child visitors, student visitors, special visitors – for all the talk of simplification the rules on visitors have become increasingly complex. This course provides a chance to take stock of the new rules as a whole. With the prospect of re-entry bans and other penalties and disadvantages for breaches of the rules, it is vital that representatives are able to advise their clients on what they can and cannot do in the different

categories. The course will allow you to ensure that you are confident across the whole range of the visitor categories and cognisant of the pitfalls that await the unwary.

Challenging immigration detention, an update
Tuesday 23 November 2010, 4–7.15pm
Speakers
- James Elliot, Wilson Solicitors LLP
- Graham Denholm, 1 Pump Court Chambers

CPD 3 hours
Fee ILPA members £120, CR*£60, Non members £240
Code DT 1264
The law on immigration detention is developing rapidly. This seminar brings practitioners up to speed with recent changes. James Elliott and Graham Denholm have represented many detained clients in cases in the Administrative court and in civil cases brought by those detained under immigration act powers. Together they cover guidance on tactical and procedural considerations when advising on potential challenges to ongoing or past detention, tactics in bail cases, recent developments in the caselaw on the lawfulness of detention, judicial review, and damages claims in the civil courts, including questions of quantum. With the increasing use of immigration detention, this course is a must for all immigration practitioners, and also useful for criminal and prison lawyers whose clients are detained under immigration powers.

Asylum & immigration in the Court of Session: a St. Andrew's Day review
Tuesday 30 November 2010, 2–5.15pm.
Speakers
- Joe Bryce, Advocate and Jamie Kerr, Drummond Miller Solicitors

CPD 3 hours
Fee ILPA members £120, CR*£60, Non members £240
Code DT 1248
A comprehensive review of 25 years of reported decisions from north of the border. The Court of Session is divided into an Outer and an Inner House. Outer House decisions are of equal ranking to the Administrative Court, and Inner House decisions rank with the Court of Appeal. Court of Session decisions cannot bind south of the border but ought to be persuasive and the Courts are very often examining exactly the same provisions of immigation law. Many practitioners are not drawing on this rich resource, so give yourself the edge by coming to this course, which will equip you with knowledge of helpful caselaw. Jamie Kerr is solicitor in charge of the Glasgow office of Drummond Miller, and has appeared in every kind of immigration and asylum appeal in Scotland, and extensive experience of instructing Scottish counsel to appear in the Court of Session. He is a member of the Law Society of Scotland's Human Rights Law Sub Committee. Joe Bryce is an Advocate (Scots barrister) with 16 years' experience in asylum and immigration as counsel and as instructing solicitor. A very special way to celebrate St Andrew's Day.

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