Response to Government Review of the Balance of Competences between the United Kingdom and the European Union

Call for Evidence: Enlargement

May 2014

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1. Samantha Currie is a lecturer in law at the University of Liverpool. Her area of research expertise is migration in the context of European Union (EU) enlargement. Her PhD thesis (2007, Liverpool) examined the socio-legal status and experiences of Polish migrants in the UK and in 2008 she published a monograph entitled *Migration, Work and Citizenship in the Enlarged European Union* (Farnham: Ashgate) which further considered the legal framework shaping the experiences of migrants from 'new' Member States in light of the 2004 and 2007 enlargements.

2. This part of the submission will focus specifically on the issue of labour migration to the UK by citizens of the newer Member States. By drawing on insights gained in the context of the 2004 ('EU8') and 2007 ('EU2') enlargements it aims to provide perspectives on key free movement issues, particularly the impact of legal rules on citizens of the new Member States, and to consider how free movement restrictions may continue to hold relevance.

3. In the lead up to the 2004 accession a decidedly negative image of potential migrants from the EU8 was portrayed by quarters of the British press. Much emphasis was placed on the 'threat' posed to the benefits system and labour market by migrants. The pressure exerted on the UK government to impose restrictive measures was heightened as the majority of other Member States announced transitional restrictions. The UK at the time, however, was in a different position to many of its EU15 counterparts, notably because the UK economy appeared to be in need of foreign labour across a number of different sectors of the employment market. David Blunkett, then Secretary of State for the Home Department, asserted on 23 February 2004:

"We currently have more than 500,000 vacancies and will benefit from the skills, flexibility and willingness to work of those new migrant workers" (Hansard, HC, vol. 48, col.23 (23 February 2004)).

4. It seems that the UK approach was the result of a balancing act; the government was keen to allow accession migrants to work in the country to help fill labour shortages but at the same time it wanted to be seen to be responding to concerns connected to the benefit system, to limit political damage. Thus in the same statement Mr Blunkett also stressed the importance of preventing abuse of the welfare system:

"Whether they are plumbers or paediatricians, they are welcome if they come here openly to work and contribute. At the same time, it is clearly not right that people should be able to come here, fail to get a job and then enjoy access to the full range of public services and social security benefits" (Hansard, HC, vol. 48, col. 24 (23 February 2004)).

5. In order to work lawfully in the UK from 2004 an EU8 citizen was required only to find work and register their employment on the Worker Registration Scheme (WRS). Because of the 'open' policy it adopted the UK is perceived as having been generous to nationals of the EU8. The requirement to register on the WRS was generally not considered to be a particularly onerous burden despite a compulsory £90 fee for registration (the registration system was out in the Accession (Immigration and Worker Registration) Regulations 2004 SI 1211). However, the 'open' labour market policy was accompanied by certain other bureaucratic rules, for example requiring re-registration in the event of a change in occupation. Restrictions were also placed on the residence entitlement of those EU8 migrants who, for whatever reason, ceased to be employed in the UK or otherwise did not comply fully with the WRS requirements. These registration and residence rules were linked to changes to the test determining entitlement to various welfare benefits (pursuant to the Social Security (Habitual Residence) Amendment Regulations 2004 SI 1232). Benefit claimants in the UK are required to be both habitually resident and 'lawfully resident' which, for EU8 nationals, meant they must either be in work and registered or have built up 12 months of continuous and registered work.

6. The UK WRS rules had a particularly harsh impact on individuals who had remained continuously in work but had not been registered throughout the whole employment period. This was the case in *Zalewska v Department for Social Development* [2008] UKHL 67 which involved a woman who had worked in Northern Ireland for over 12 months but, after changing employer mid-way through the period, was unaware of the need to re-register. Consequently, when she later experienced difficulties she was denied access to income support on the basis that not all of her work had been registered on the WRS. This is significant because the principle of non-discrimination on grounds of nationality under Union free movement law is expansive. Those exercising free movement rights under the EU treaties are entitled to access a range of social and tax advantages under the same conditions as nationals of the host Member State (Regulation 492/2011 on freedom of movement for workers within the Union OJ [2011] L141/2). Furthermore, the principle of proportionality is central to the application of Union law and, consequently, national rules implementing EU law must be proportionate to their aim.

7. In *Zalewska* the Appellate Committee of the House of Lords, by 3:2 majority, upheld the decision of the Court of Appeal in Northern Ireland and were satisfied that the UK rules were compatible with EU law and the terms of the transitional arrangements. The majority were not convinced that any aspect of the UK's "generous" and "wide open" policy could be understood as having a disproportionate impact. They utilised a limited application of proportionality that did not take into account the personal circumstances of the claimant, the actual aim of the WRS (i.e. to monitor EU8 migrants) or the legitimate scope of the transitional arrangements as set out in the accession treaties. Therefore, although EU8 citizens benefited from being able to access the UK labour market, the finer detail of the law can be seen to have left some in undesirable situations despite their continued employment. It would have been preferable to ensure that employers, who committed an offence by employing an unregistered EU8 worker, were suitably punished as opposed to the more vulnerable worker.

8. A considerable number of EU8 citizens took advantage of the WRS in the aftermath of enlargement, with numbers starting to reduce from 2008-9. For example, from March 2007-2008 there were 215,000 WRS applications; whereas, from March 2008-2009 there were 141,000. Evidence suggests that the migrants were predominantly young and contributed to the economy by taking hard-to-fill jobs, whilst placing a few demands on the welfare system (Home Office UK Border Agency, *Accession Monitoring Report May 2004-March 2009,* 2009).

9. Indeed, the rationale behind opening the labour market appears to have been justified in the light of post-accession evidence which suggested that EU8 workers plugged gaps in the UK labour market that would not otherwise be filled by nationals. One of the first instalments of the Accession Monitoring Report series, published by the Home Office, stated that:

"The vast majority of workers are young and single, and many are doing key jobs to support public services… Accession workers are continuing to go where the work is, helping to fill gaps in our labour market" (Home Office et al (2005a), Department for Work and Pensions, the Inland Revenue and the Office of the Deputy Prime Minister, *Accession Monitoring Report, May 2004-March 2005*, 26 May 2005, 2).

10. Anderson et al ((2006), *Fair Enough? Central and East European Migrants in Low-Wage Employment in the UK* (Oxford: COMPAS)), in their research on central and eastern European migrants working in the UK, reported that employers of EU8 migrants had often persistently attempted unsuccessfully to recruit UK workers prior to accession. Essentially, the authors found that many UK workers were not prepared to accept employment in the type of sectors EU8 migrants have occupied following accession, including hospitality, agriculture and food processing, which are characterised by low wages, long hours and physically-demanding work.

11. Despite the generally positive conclusions about the contribution of EU8 migration to the UK, it does also seem that there were certain localised infrastructure-related effects, such as: pressure on language schools, increased school admissions, and competition for privatised housing. These concerns, along with the altered economic circumstances following the global financial crisis, influenced the government in imposing limits on the movement entitlement of EU2 citizens from 2007.

12. EU2 citizens who wished to access the labour market were required to be granted a worker authorisation card. In essence, such cards could only be obtained by those who had been granted a work permit under the national immigration rules (Accession (Immigration and Worker Authorisation) Regulations 2006). EU2 citizens were 'tied' to the job for which the card has been granted and have no general access to the labour market. Between January 2007 and September 2007, there were 3820 applications for accession worker cards. Again, numbers reduced later on with just 570 applications being received in the first quarter of 2009 (Home Office UK Border Agency, *Bulgarian and Romanian Accession Statistics*, 2009).

13. The expiration of transitional restrictions against Romanian and Bulgarian citizens in January 2014 again triggered intense political and media speculation in the UK about the potential for vast numbers of people to move in search of work and social benefits. The inflammatory tone of much the debate in the UK was unfortunate and in May 2014 the Office for National Statistics released figures which demonstrate how, in actual fact, labour movement from these Member States has been modest, with the number of Romanian and Bulgarian citizens working in the UK falling by 4,000 since January 2014 (ONS, *Labour Market Statistics,* May 2014. Available at: http://www.ons.gov.uk/ons/dcp171778_361188.pdf).

14. Croatian citizens are currently subject to transitional free movement restrictions following accession in 2013. The pre-accession rules continue to apply so, effectively, Croatian citizens remain categorised as third-country nationals as regards access to the UK labour market (Home Office, *Statement of Intent: Accession of Croatia to the European Union: Transitional Restrictions on Labour Market Access*, October 2012).

15. A separate but linked point concerns the potential for restrictions to be placed on the rights of migrant workers even outside of the enlargement context. The debate in the UK concerning the lifting of labour market limitations on Romanian and Bulgarian citizens at the expiry of the transitional period appears to have fuelled a more general discussion about the curtailment of free movement entitlement more generally. The minimum earnings threshold (MET) which came into force on 1 March 2014 serves as an example of this trend. Essentially, this renders the status of migrant worker under EU law conditional on earning at least £150 per week over a three month period as a condition for acquiring the status of 'worker' under EU law. While the MET aims to restrict somewhat the potential for low-paid EU nationals to qualify as migrant workers, and by corollary gain entitlement to a range of social benefits, it is not unproblematic from a compatibility point of view. Under Article 45 TFEU the concept of worker has been defined by reference to an EU, not national, law standard. Furthermore, the case law of the Court of Justice of the European Union has held that the concept, and related entitlements, cannot be made conditional on an individual earning above a certain amount or working a set number of hours (e.g. Case 53/81 *Levin* [1982] ECR 1035; Case C-357/89 *Raulin* [1992] ECR I-1027).

Conclusion

16. Citizens of the accession countries have faced a variety of different legal regimes on labour market access from the old Member States. Although the scope of the rules have differed from Member State to Member State, all national rules have sought to put in place a framework that would be of optimum benefit to the Member State's labour market and economy. Across the older EU Member States, the general trend has been that citizens of the new CEE states have filled gaps in the labour market that were otherwise unfilled by nationals. Interestingly, there is some evidence that those Member States imposing the strictest transitional restrictions have actually gained substantial numbers of CEE migrants with an irregular employment status (COM (2008) 765 final). In this regard, the unavailability of lawful migration routes for EU8 and EU2 citizens may have served to divert people into the shadow economy.

17. Looking forward, there are issues with regards to the potential for limitations to be imposed on the rights of migrant workers outside the scope of enlargement and permitted transitional free movement restrictions. Certainly, under the current Treaty framework, any such limitations on the applicability of the migrant worker status and associated rights would be impermissible from an EU law perspective.