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Between law and political truth? Member State preferences, EU free movement rules and national immigration law

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1. Introduction

Referencing one of the foundational documents of the European Communities, the Spaak Report, the leading EU law journal the *Common Market Law Review* recently raised a pertinent question that is central to the future of the EU as an economic, political and legal integration project:

> 'So has Spaak's dream of free movement [of persons] become a nightmare – legally over-complicated, politically abused, allegedly costly and popularly misunderstood?'[2]

The dilemma is well known. The numbers of EU citizens taking advantage of EU free movement rights are now somewhat higher than before the 2004 enlargement. As the EU has now reached a population of over half a billion people[3] the numbers of 'free movers' actually sound quite large when set against the population of the smaller Member States (approx. 13.7m).[4] None the less the percentage of free movers remains small. Fewer than 3% of EU citizens are resident outside the Member State of which they hold citizenship. Yet despite this, free movement rights have gained unprecedented salience. They are now seen in a number of Member States as a problem that needs to be addressed. It is true that few Member States can

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1 School of Law / Institute for Advanced Studies in the Humanities. Contact: jo.shaw@ed.ac.uk and @joshaw. Comments on this text are very welcome. This draft paper, with its incomplete footnotes, must not be cited or quoted. Please contact me if you are interested in seeing a more polished draft of this work at a later stage. This paper builds on earlier work done with funding from the Nuffield Foundation (Grant No.OPD/36198) as well as upon the work I did jointly with Niamh Nic Shuibhne as General Rapporteurs on Union Citizenship for the XXVI FIDE Congress, Copenhagen, May 2014 (N. Nic Shuibhne and J. Shaw, 'General Report', in U. Neergaard, C. Jacqueson and N. Holst-Christensen (eds.), *Union Citizenship: Development, Impact and Challenges*, The XXVI FIDE Congress in Copenhagen, 2014, Congress Publications Vol. 2, DJØF Publishing, Copenhagen). The FIDE Congress reports system works thus: General Rapporteurs draw up a questionnaire to which national rapporteurs respond, writing reports which are published by the Congress organisers, along with a General Report and an Institutional Report prepared by someone working for the European Commission. The system provides useful and synthetic data on the application of EU law at the national level.

2 Editorial Comments, 'The free movement of persons in the European Union: Salvaging the dream while explaining the nightmare', (2014) 41 *Common Market Law Review* 729–740 at 736.

3 See the data at http://europa.eu/about-eu/facts-figures/living/index_en.htm.

4 See the data at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics.

muster the outright hostility that is to be seen emanating from the government,[5] the media[6] and some sections of the commentariat[7] in the UK, but none the less a number of other governments have been prepared to back the UK Government up on issues such as alleged 'abuses' of EU law, and the problem of 'poverty migration' as it is termed in Germany, or benefit tourism as it appears in the UK discourse.[8] The justification put forward by the objecting states would, in part, be that internal EU migration is not experienced evenly across the EU. There are around 2.5m non-national EU citizens in the UK, and over 3m in Germany, for example. That said, of course, there are also substantial numbers of UK and German citizens resident elsewhere in the EU. Indeed, free movement (i.e. mobility with transaction costs reduced[9]) is amongst the achievements of the EU most prized by EU citizens, according to Eurobarometer polls, although in the UK it seems to be simultaneously prized and feared. Accordingly, just as there are states setting out to challenge the shibboleth of free movement, so there are prominent defenders, notably governments amongst the states of Central and Eastern Europe[10] and the Nordic states.[11] At the very least, then, we can postulate that free movement is now a heavily contested issue among the governments and other stakeholders of the EU and its Member States, after decades of relative quiescence, where this field of EU law largely flew below the radar.

The primary reasons for this changed political constellation are clear, and they include the impact of the post-1989 enlargements (and the decisions taken by Member States around transitional periods) and the economic downturn experienced to a greater or less degree by all Member States in the aftermath of the financial crisis, and especially in those Member States where the financial crisis turned into a sovereign debt crisis. This, is turn, necessitated the imposition of swingeing austerity measures. These factors, combined with unemployment in states in the east and the south of the EU have resulted in EU citizens taking

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5 E.g. David Cameron, 'Free movement needs to be less free', FT, 26 November 2013, http://www.ft.com/cms/s/0/add36222-56be-11e3-ab12-00144feabdc0.html#axzz39YJSsk5W, referring to 'vast migrations'.

6 Add references…T. Horsley and S. Reynolds, 'Report on the United Kingdom', in Neergaard *et al*, above n.1. Including, for example, the *Daily Telegraph* describing the Visegrad countries in 2013 as 'EU accession countries', http://www.telegraph.co.uk/news/uknews/immigration/10484225/Eastern-European-immigrants-overwhelming-benefit-UK-economy.html.

7 E.g. David Goodhart – add references.

8 Letter to the Irish Presidency from the Ministers of the Interior of Austria, Germany, the Netherlands and the UK, April 2013 http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf.

9 Hampshire.

10 *Migrants from Central and Eastern Europe have been hugely beneficial for the British economy*, Joint Statement on the Free Movements of Persons by the Foreign Ministers of the Visegrad countries – Czech Republic, Hungary, Poland and Slovakia, November 2013, reproduced at http://proeuropa.org.uk/migrants-from-central-and-eastern-europe-have-been-hugely-beneficial-for-the-british-economy/.

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

advantage of their free movement rights to a greater extent than before, especially with east to west and south to north moves. The changes have, however, also coalesced with broader concerns amongst electorates in the Member States regarding immigration more generally (including fears about the apparent lack of integration on the part of certain migrant communities) which have led to increasing votes for anti-immigration and indeed anti-immigrant political parties and a perception that the EU's own liberalization of service sectors has opened up possibilities for exploitation of pay and conditions differentials across the Member States by transnational corporations evading host stage labour regulation requirements by 'posting' workers employed under home state conditions.[12] In that context, globalisation is a dirty word, and the EU's own single market is seen as complicit in this process of undermining the social compacts within individual Member States to the detriment of organised labour and 'ordinary working people'.

In this context, should we assume that the problems lie in the sphere of politics and economics, and that that those who hark back to the principles of EU free movement law and try to argue simply that free movement is somehow 'different' to 'ordinary' immigration as it is regulated by the treaties and relevant legislation are just hopeless romantics? Do we have to now accept that whatever EU law might say at present, the free movement project has to be regarded as politically untenable in an enlarged EU, where free movement is generally constructed in the public imagination in the same way as immigration from third states? Can the situation only be recovered – from the perspective of governments and politicians – if states can regain that elusive control over free movement that they have over most aspects of immigration from third states? In other words, is free movement just an anachronism that will disappear in a 'reformed' EU, because it is no longer acceptable to public opinion, even though it is one of the things that EU citizens report in Eurobarometer surveys that they value most about the EU? More pertinently for the UK, will we see the UK leave the EU after a referendum vote which may occur around 2017 (depending upon the 2015 election results and the outcome of reform 'negotiations') which is contested largely on the basis of public hostility to immigration?

Of course, there are arguments over whether free movement is indeed unlimited and uncontrolled in the way that it is sometimes portrayed in popular discourse and the media.[13] In fact, it is more accurate to state that it is subject to a complex set of regulations distinguishing between different categories of beneficiaries, and allowing certain exceptions for public policy and security reasons, as well as reasons related to welfare solidarity, but arguments with a sufficient degree of subtlety to capture those complexities rarely have much traction in public opinion. Nor do 'facts'[14] about the contribution of migrants to the economy and to taxation, their

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12 See P. Delivet, The Free Movement of People in the European Union: principle, stakes and challenges, Robert Schuman Foundation Policy Paper, European Issues, No. 312, May 2014.

13 FIDE report response on media.

14 Insert references.

employment rate, their relative lack of reliance upon public services, have much traction upon public opinion. As a result, as one political commentator in the UK puts it, politicians are trapped between 'absolute and political truth'.[15] One response has been to call for 'fair movement not free movement',[16] although no one really ever provides any evidence about how free movement under such conditions is actually unfair to the UK. Is it 'unfair' to reduce the transaction costs of migration, such that - as Hampshire says - free movement is actually more often circular than immigration from third states and thus may have less long term impact upon the host society?[17]

Perhaps it is now time, as Emma Carmel[18] and Regine Paul[19] in particular have argued, to end the artificial bifurcation when thinking about migration governance in the EU context between, on the one hand, free movement and, on the other hand, immigration. While there may exist only a limited set of EU competences and measures in relation to immigration from third states, and indeed there is also high levels of variation in engagement on the part of the Member States with the laws and policies that have been enacted, with Ireland and the UK having opted out of many of the relevant measures (except most of those relating to 'illegal' immigration), none the less the two sets of measures regulate in large measure the same set of societal challenges regarding mobility, labour markets and inclusion/exclusion. For Carmel, the distinction between (intra EU) mobility and (from third country) migration is a distinction without a difference. They belong together in a continuum of migration governance. She diagnoses a lack of reality around free movement at the present time, since 'Such mobility [i.e. free movement] is assumed, at Union level, to either be taking place unproblematically or, at most, to require member states' action to encourage more intra-EU mobility to generate

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15 D. Hodges, 'Britons have become scared of the wider world', *Daily Telegraph*, 5 August 2014, http://blogs.telegraph.co.uk/news/danhodges/100282452/britons-have-become-scared-of-the-wider-world/. 'It's easy to blame the mainstream party leaders for their vacillation and duplicity over immigration. They either find themselves accused of being party to a reactionary "arms race" on the subject, or of having a tin ear to a rising tide of public anger. But in reality they are trapped between absolute and political truth.
They know that migrant labour, at all levels of the economy, is vital to Britain's prosperity. They have seen the OBR [Office for Budgetary Responsibility] statistics that immigration is crucial to the recovery. And they know too that no one wants to hear it. That negative perceptions of the social, cultural and economic impact of migration are so embedded as to make any attempt to reverse them political folly.' Whether or not this is of their own making is another question which will not be further pursued in this paper – M. Goodwin, 'Why the "immigration debate" is getting us nowhere' *New Statesman*, 27 November 2013, http://www.newstatesman.com/politics/2013/11/why-immigration-debate-getting-us-nowhere.

16 Most recently Ed Balls.

17 J. Hampshire, 'Millions on the Move', *The World Today*, August 2014.

18 E. Carmel, 'Mobility, migration and rights in the European Union: critical reflections on policy and practice', (2013) 34 *Policy Studies* 238-253.

19 R. Paul, Strategic contextualisation: free movement, labour migration policies and the governance of foreign workers in Europe', (2013) 34 *Policy Studies* 122-141.

liberalising benefits for the EU economy'.[20] Thus her work, like that of Paul, offers complex typologies of rights and benefits enjoyed (or not enjoyed as the case may be) by different groups of non-citizen migrants, within a complex stratification of interests.[21]

Paul makes the point that free movement impacts upon labour market immigration policies – i.e. vis-à-vis third countries. It is not simply the case that states accept the lack of control imposed by free movement, and concentrate their regulatory efforts on immigration alone. In labour market immigration policies they respond in certain ways to the specifics of free movement, such as patterns of skilled and unskilled mobility. In fact, one could go further and suggest that EU free movement is a species of labour market immigration policy, displaying a very distinctive mix of the elements that Ruhs suggests we will find in all labour market immigration programmes, namely 'openness, skills and rights'.[22] While Paul argues that internal EU free movement and external EU immigration are connected, it is perhaps surprising that she seems to adopt an assumption that the relationship is linear and unidirectional – from (uncontrolled) free movement to (controlled) labour immigration – rather than iterative in character. The major intellectual contribution of her work is the task of figuring out exactly how that happens, which is a ideational process that she calls strategic contextualisation: 'We can therefore understand as 'strategic contextualisation' all instances in which legislation uses the policy context of free movement selectively and policy-makers link selective uses to strategic governance purposes.'[23] For sure, there is evidence of that direction of influence, especially when we look at the period under review by Paul, namely the time when there was an overlap between free movement and labour immigration policies because of choices Member States could make about whether or not to impose transitional restrictions on those states that acceded in 2004 and 2007, with some doing so and some choosing not to. The evidence seems to show that the belief did pertain in the UK for a while that EU workers could take up the slack in relation to low skill migration.[24] Of course, that is no longer an official or unofficial position, under pressure from the post 2010 General Election commitment of the UK Coalition Government (now refuted by the Liberal Democrats) to reduce net migration to less than 100k per annum. But the most interesting question to consider is the extent to which the different dimensions of migration governance are co-constitutive, in complex ways, with immigration policy impacting as much on free movement as the latter does upon the former.

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20 E. Carmel, 'With what implications? An assessment of EU migration governance between Union regulation and national diversity', (2014) 11 *Migration Letters* 137–153 at p140.

21 E. Carmel and R. Paul, 'Complex stratification: Understanding European Union governance of migrant rights', (2013) 3 *Regions and Cohesion* 56–85.

22 Martin Ruhs http://www.priceofrights.com/blog/post.php?s=2014-01-15-ten-features-of-labour-immigration-policies-in-highincome-countries#.U-ICGkjQQ70. M. Ruhs, *The Price of Rights*.

23 Paul, Strategic Contextualisation, above n.19 at p128.

24 Insert references.

This is premise against which this paper aims to explore another dimension of the socio-legal/cultural character of the encounter between the EU free movement rules and (UK) immigration law, which was the subject of earlier research.[25] I place the word 'UK' in parentheses because while the core of the earlier research focused entirely on the UK constellation of interests and actors, with very limited references to the situation in other Member States and some discussion of the EU level, the focus in this paper is a little broader, although the majority of the examples worked up below do still draw on the UK case study.[26] It should also be noted that this paper departs, as most of my work does, from the standard lawyer's script, which would generally be centred on the exposition and interpretation of legal provisions and their effects, with limited reference to wider political and economic context. But it does not depart from the law. Rather it focuses on the strategic use of legal arguments by certain privileged actors (since national executives get to decide upon most applications made by EU citizens even though they are constrained by EU law) and the responses that come both from other stakeholders within the system such as claimants and their legal advisors, and the NGO/thinktank sector and academic commentators, and also from courts (national and EU level) as the formal adjudicators upon the relationship between EU law and national law.

2. The challenge of 'free movement' in a 'Community of law'

So long as the EU subsists in its present form, ignoring or misapplying EU law in an institutionalised manner is not a realistic or longterm option for a Member State. The rule of law is deeply embedded in the Union's DNA;[27] it lies beyond the scope of this paper to explain this point in detail, but it is premise generally shared between legal scholars, political scientists and scholars of international relations. None the less, as noted earlier, the loss of control in the area of free movement is a challenge that it is hard for a Member State to manage *vis-à-vis* public opinion. Thus states often need to appear to exercise as much control as possible, now that the issue of free movement has as much salience as it presently has.[28]

What steps can a Member State take in order to achieve as many of its goals as possible in the political so that it appears to be in control of the issue of free movement? And, conversely, how do applicants, their lawyers, and relevant interest groups react to these arguments, or present counter-arguments in the context of their legal mobilisation and litigation strategies? And indeed how does the European

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25 J. Shaw, N. Miller and M. Fletcher, *Getting to Grips with EU Citizenship: Understanding the Friction Between UK Immigration Law and EU Free Movement Law*, Research Report, 2013, http://www.frictionandoverlap.ed.ac.uk/files/1693_fullreportlowres.pdf; J. Shaw and N. Miller, 'When Legal Worlds Collide: An Exploration of What Happens when EU Free Movement Law Meets UK Immigration Law', (2013) 38 *European Law Review* 137-166.

26 Note that this work will also be drawing *inter alia* on the FIDE reports.

27 Although it is under challenge in some Member States, such as Hungary – but that is another story: A. von Bogdandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: What it is, what has been done, what can be done', (2014) 51 *Common Market Law Review* 59-96.

28 That's not to say that MSs didn't fight for control before - it's arguable that the relationships have been adversarial for many years, but that's not really the point now.

Commission, in its guise as guardian of the treaty framework and of EU law, react to these arguments and responses? Finally, can we trace these arguments also into case law, and via that loop back into EU law itself via treaty change or legislative reform?[29] These are potentially huge questions, and this paper is merely a preliminary step on the path towards some answers. I will argue in what follows that there are three overlapping sets of responses to the challenges of EU law for a state that is trying to steer a course between remaining fundamentally 'rule-of-law bound' in relation to free movement law and facing adverse public opinion or electoral responses at the national level. To paraphrase the comment above about 'absolute and political truth', we could argue that these responses involve steering a path between 'law and political truth'.[30] The responses are:

- Exploiting wiggle room and competing over meaning
- The interplay of EU free movement and immigration law; and
- Changing the law

In brief, what is meant by these categories is the following: (1) concerns the scope and interpretation of EU law and the actors engaged with the task of interpretation and application; (2) relates to the location of EU free movement law within a domestic legal landscape that, in many Member States, is dominated by sovereigntist interpretations of national immigration law and control-based dimensions of immigration policy; and (3) invites us to consider the possibility that EU law might change, or be reformed in the future. The following three sections explain these points in more detail and give examples.

I would argue that this type of analysis takes further and makes more precise the arguments made by Carmel and Paul about the complexly stratified regulatory frameworks for different categories of migrant within Europe (which cut across FMOP and AFSJ measures), and it does so by focusing on how actors use arguments related to the normative character of law as well as legal institutions and structures.

3. Exploiting wiggle room, uncertainties and complexities and competing over meaning

It is trite to state that the essence of law concerns the creation of authoritative meaning in normative form. Trite, but true. An extended essay in jurisprudence is not needed in order to introduce the basic point that the contestation of authoritative meaning, along with the interpretation and application of those same legal norms, is one of the main ways in which a legal system renews itself and carves out its reference space. In this context, legal professionals possessed of 'internal

[29] This question would link this research to that done by Niamh Nic Shuibhne and Marsela Maci on the issue of justifications, CMLRev reference.

[30] See n.15 above.

legal learning'[31] hold a privileged position – courts, lawyers and advocates, other legal professionals (e.g. working for NGOs or thinktanks), and of course legal academics. That process is as lively at the EU level as it is in any other legal order, and it is even more complex than is the case in the municipal setting, because of the multi-level and plural nature of the legal system and structure of courts involving the EU and its twenty eight separate Member States. While the Court of Justice is supposed to be a 'final arbiter' and authoritative interpreter of EU law, since it is given the role under Article 19 TEU to 'ensure that in the interpretation and application of the Treaties the law is observed', in practice the relations and dialogues between the different courts within the complex juridical structure of the EU are more complicated than that. Furthermore, competing over meaning will be more intense wherever there is uncertainty.

The Treaty of Rome came into force on 1 January 1958, along with its provisions on the common market, including the free movement of workers, freedom to provide services and freedom of establishment. Even before the expiry of the twelve year transitional period in 31 December 1969, key legislative measures were adopted to facilitate the substantive and procedural aspects of free movement.[32] Since that time, numerous additional measures have been adopted, notably the so-called Citizens' Rights Directive of 2004.[33] Moreover, in 1993, the legal figure of 'citizenship of the Union' was enshrined in the EC treaties, giving a 'constitutional' timbre to principles of free movement and non-discrimination, and taking EU law away from the original focus on freedom of movement relating to factors of production only. The 'citizens' of the Union are, according to the TEU and the TFEU, the citizens of the Member States, and the citizenship concept gives rise to questions about precisely where the edges of 'free movement' lie. Does citizenship protect only completed movement, or does it include also anticipated movement? And along the way, the Court of Justice has issued judgments too numerous to list, both in response to enforcement actions brought by the European Commission against Member States for allegedly failing properly to comply with their obligations under the Treaty and in response to references for a preliminary ruling sent by national courts in all of the Member States.

And yet, fundamental uncertainties remain, as even the most sophisticated legal commentators will readily acknowledge.[34] These lie not just in the EU level measures, and in the gaps between the EU measures and national implementing measures (and the steps taken by national authorities to apply these measures), but also in the twists and turns of the case law of the Court of Justice. Uncertainties are also inevitable when legislators make use of open-textured language designed to ensure something like a level playing field across 28 Member States. Many examples

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31 M. Galanter, 'In the Winter of our Discontent: Law, Anti-Law, and Social Science', (2006) 2 *Annual Review of Law and Social Science* 1–16 at p1.

32 Directive 64/221 on limitations on free movement; Regulation 1612/68 on focusing on obstacles to free movement including the right to non-discrimination. Add references.

33 Directive 2004/38.

34 Editorial Comments, above n.2 at 733.

of uncertainties and different actors competing over the meaning of particular could be given. One could, for example, highlight the case law of the Court of Justice in relation to the free movement rights (access to the labour market, residence rights and access to social benefits, etc.) of mobile job seekers, and of those who hold part time jobs where it is not always wholly clear whether this counts as 'work' as defined in EU law. The early case law has been revised as a result both of the institution of the treaty-based concept of citizenship of the Union – which deliberately encompasses the 'free movement of persons', not just the free movement of workers – and of the adoption of the Citizens' Rights Directive.[35]

But the Citizens' Rights Directive is no panacea curing the ill of uncertainty. EU citizens who do not have a permanent right to reside must not become an 'unreasonable burden' upon the host state. If they do, they could removed – although in practice there has, hitherto, been little evidence of Member States actually removing EU citizens in large numbers. But what is 'unreasonable'? And what are – in the words of the Court of Justice – the 'genuine and effective chances of being engaged' (in employment), which prescribe the right of a person seeking employment to remain in the host state (although not necessarily to receive any out of work benefits).

Another term contained in the Directive is 'abuse of rights'. Article 35 of the Directive is the paradigm example of a provision which by definition opens up substantial and quite legitimate room for competing interpretations, and thus for 'wiggle room' for national authorities. It is worth quoting in full:

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

All the text in this provision can be the subject of conjecture and indeed has been.[36] The notable UK Upper Tribunal case of *Papajorgji*[37] closed off the 'wiggle room' of the (then) UK Borders Agency,[38] by insisting that Entry Clearance Officers examining whether to give a EEA family permit (i.e. a visa) to a third country national spouse to visit the UK with her EU citizen husband could not effectively put the burden of proof on the applicant to demonstrate their her marriage was not a marriage of convenience, or a 'sham' marriage (an example of 'reading across' – see Section 4). The UKUT re-emphasised its point – and its self-positioning within the orthodoxy of EU law as understood by the European Commission and interpreted by

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35 For further details see Editorial Comments above n.2 at pp733-736 and FIDE Report pp110-118.

36 See FIDE report for examples – give page references.

37 [2012] UKUT 00038 (IAC).

38 The UKBA was replaced in 2013 by UK Visas and Immigration, and the work was taken back 'in house' into the Home Office.

the Court of Justice – by reprinting the guidance on sham marriages issued by that body as an annex to the judgment, to assist ECOs.[39]

But some space for insisting on the importance of the scrutiny process has been subsequently reopened by the report of the Independent Chief Inspector of Borders and Immigration (the first such report by the ICI focusing directly on the 'European' casework of the Home Office) warning of a significant problem of abuse of the EU rules and their UK implementing measures as a result of sham marriages and marriages by proxy.[40] In other words, the fear is being raised that EU law and its benefits are being used to evade strict UK immigration controls (income requirements in particular) on marriage migration. The ICI reports, and this point has also been picked up by the Home Affairs Committee of the House of Commons,[41] that the problem seems to rest on *naturalised* EEA citizens marrying third country nationals, although this seems to be an inference that is drawn from the ICI's inspection of a sham marriage operation,[42] rather than a finding based on a proper body of evidence. Indeed, lazily – and without providing a reference or evidence – the ICI quotes the Home Office on sham marriages in the following terms (handily working in that other bugbear of EU free movement fame the 'benefit tourist' along the way):

> '(a sham marriage) typically occurs when a non-European national marries someone from the European Economic Area ... as a way to gain long-term residency and the right to work and claim benefits in this country.' [43]

These reports and the other materials will undoubtedly be used by the Home Office and by UK Visas and Immigration as justification for a redoubling of their scrutiny and control efforts internally and externally. It will jump on the ICI's finding that over 89% of refusals of a family permit based on a belief that there was a marriage of convenience were found to be reasonable on inspection as vindication of its current precautionary approach, which includes the introduction of new measures

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

40 See *An Inspection of the Rights of European Citizens and their Spouses to Come to the UK*, 19 June 2014, http://icinspector.independent.gov.uk/wp-content/uploads/2014/06/European-Casework-Report-Final.pdf. The office of the ICI was instituted in 2008 'to assess the efficiency and effectiveness of the UK's border and immigration functions' (http://icinspector.independent.gov.uk/about/). It is interesting to note that the first inspection report on EU citizens' rights was not issued under 2014.

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

42 ICI, *A short notice inspection of a sham marriage enforcement operation*, http://icinspector.independent.gov.uk/wp-content/uploads/2014/01/An-Inspection-of-a-Sham-Marriage-Enforcement-Operation-Web-PDF.pdf.

43 *A short notice inspection*, n.42 above para. 3.12.

penalising those who sponsor or enter into sham marriages.[44] Thus such arguments will be used in order to justify the high rate of refusals of requests for EEA family permits on the part of third country nationals married to EU citizens exercising, or wishing to exercise, their free movement rights in the UK, often in violation of EU law because, for instance, documents are required which are not permitted under the Citizens' Rights Directive.[45]

It is against the background of such a mentality of resistance that we can best review the successive announcements made by UK ministers intended to reduce the benefit entitlements of mobile EU citizens, ostensibly in order to reduce the 'pull factor' (indeed 'magnetic pull'[46]) exerted by the UK benefits system. Since the end of 2013, changes have been made to the length of time that mobile job-seeking EU citizens must wait before being able to claim jobseekers' allowance as a result of amendments to the habitual residence test that they must pass, and they have seen restrictions to their entitlement to housing benefit and to the period of time during which they may claim jobseekers' allowance, capped initially at six months and now set to be reduced to three months from November 2014 unless they can show they have genuine chances of gaining work.[47] In addition, the Government has purported to introduce a minimum income threshold for EU citizens working in the UK, before they are defined as a 'worker' in accordance with EU law and before they are able to access other 'in work' benefits in the UK.[48] Some or all of these steps taken by the UK Government may fall foul of EU law, and the European Commission may in future take enforcement steps to force the UK to reverse its policies, but as the example of

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44 http://icinspector.independent.gov.uk/wp-content/uploads/2014/06/Home-Office-Formal-Response-to-ICI-Inspection-of-European-Casework-FINAL.pdf. See the amendments to Regulation 19 and the new Regulations 20B and 21B of the EEA Regulations, reprinted at pp64-65 of *An Inspection of the Rights of European Citizens and their Spouses*, n.40 above.

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

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

47 For details of these changes, see Editorial Comment (n.2 above), M. Evans, 'Will Cameron's immigration benefit crackdown clash with EU law?', *The Justice Gap*, July 2014, http://thejusticegap.com/2014/07/will-camerons-immigration-benefit-crackdown-clash-eu-law/, and E. Sibley and R. Collins, 'Benefits for EEA migrants', (2014) 22 *Policy and Practice* 165-171. For a summary of the issue from an EU law perspective, see *Freedom of Movement and Residence of EU Citizens: Access to Social Benefits,* European Parliamentary Research Service, In Depth Analysis, June 2014, http://epthinktank.eu/2014/06/16/freedom-of-movement-and-residence-of-eu-citizens-access-to-social-benefits/.

48 https://www.gov.uk/government/news/minimum-earnings-threshold-for-eea-migrants-introduced.

the ongoing enforcement action in relation to the right to reside test shows,[49] what may be most important to the UK Government at present is that it has appeared to be 'tough' in the face of assumed floods of benefit tourists and also in the face of possible intimidation by 'Brussels'. But navigating, we noted above, between political truth and law, it has managed to avoid directly confronting the EU norm of the rule of law, by exploiting wiggle room within the existing EU regulations.

One of the practitioner interviewees in our earlier Nuffield 'Overlap' research[50] gave us a useful insight into how we should understand this type of approach to argumentation, when he was asked about arguments that had been made by various barristers acting on behalf of [what was then] the UK government in cases before both the national and European courts:

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

We can expect further confrontations of this kind in the future, regarding the situation of a category of EU citizens (and their third country national family members) who are not covered explicitly by Directive 2004/38, but who have been found, since the case of *Surinder Singh* in 1992,[51] to fall within the scope of the EU free movement rules. These are persons who, although residing in their own Member State, have or are exercising their free movement rights. One example concerns returnees, who might be dissuaded from exercising their free movement rights if, having moved to another Member State and perhaps there met and married a third country national, was unable to return to their home state accompanied by their spouse, on the grounds that the spouse was not entitled to admission to the home state under *national immigration law*. Since that time, with the increasing restrictiveness of family reunion rules under national immigration law (e.g. in Denmark, which has age restrictions,[52] or in the UK where minimum income rules require the sponsoring spouse to earn a higher than average wage[53]), *Surinder Singh* has become an established route for couples to navigate around national

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49 Social security benefits: Commission refers UK to Court for incorrect application of EU social security safeguards, IP/13/475, 30 May 2013.

50 See n.1 above. The interviews are coded with the same numbers as the Overlap report – see Shaw *et al*, above n.25.

51 Case C-370/90 *Surinder Singh* [1992] ECR I-4265.

52 Reference Denmark FIDE report.

53 Add references.

immigration law by seeking a safe harbour in EU law, which is less restrictive.[54] The issue has remained quite uncertain under both EU law and national implementing rules and case law, one question being in particular how long the parties need to reside outside the home state. The issue has recently returned to the Court of Justice in a case referred by a Dutch court.[55] Now the Court of Justice has, in effect, imposed a minimum duration for the residence outside the territory, because that residence much be 'genuine' under Article 7(1) of the Directive. In other words, it must be for more than three months.[56] In so doing, the Court acknowledged that although Directive 2004/38 does not explicitly apply to EU citizens in this situation, none the less its provisions should apply by analogy in order to protect the rights of EU citizens and their families. Any other solution might dissuade EU citizens from exercising their free movement rights. Furthermore, unlike the original *Surinder Singh* ruling, which was concerned only with *workers*, it is now plain that after *O & B* returning citizens of the EU who have been residing in another Member State *in any capacity* and who have created or strengthened their family life with a third country national in the host state, are covered by these principles. This is likely to require a further review of the UK's EEA Regulations, which implement the Citizens' Rights Directive, as currently the *Surinder Singh* route has been limited to those residing in another Member State as a worker or self-employed person.[57]

Moreover, recent changes to the EEA Regulations have made it a requirement that 'the centre of [the British citizen]'s life has transferred to the EEA State where [the British citizen] resided as a worker or self-employed person', before EU law is triggered.[58] This particular formulation finds no direct echo in the Court of Justice's approach, but the Court does offer some hope to Member States concerned about the *Surinder Singh* route driving a coach and horses through their attempts to restrict family migration (eight Member States intervened in *O & B*) in its invocation of the concept of 'abuse of rights'. According to the Court's abuse doctrine this involves, 'first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of

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54 The issue is so well known in the UK case that an ebook written by well known immigration blogger and lawyer Colin Yeo has been published called *Surinder Singh: EU free movement for British citizens*, http://www.freemovement.org.uk/downloads/surinder-singh-eu-free-movement-for-british-citizens/. In fact, even UK Government documents refer to the *Surinder Singh* route: https://www.gov.uk/government/publications/caseworker-guidance-for-applications-under-the-surinder-singh-route-from-january-2014.

55 Cases C-456/12 *O & B*, 12 March 2014.

56 See FIDE report p.140; http://europeanlawblog.eu/?p=2301 and http://eutopialaw.com/2014/03/14/rights-of-residence-of-tcn-family-members-within-a-union-citizens-home-state-comment-on-cases-c-45612-o-and-b-and-c-45712-s-and-g-judgment-of-the-court-grand-chamber-12-march-2014/.

57 E. Guild, http://www.eiln.com/page/detail/title/Surinder+Singh+Back+on+the+Table%3A+UK+EEA+Regs+in+Question+C-45612+O+%26+B+12+March+2014 and http://www.freemovement.org.uk/surinder-singh-immigration-route/.

58 For a discussion see http://blogs.kent.ac.uk/eu-rights-clinic/2013/12/08/uk-changes-rules-on-surinder-singh-route/.

those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it.'[59] But since all parties seem to acknowledge that those seeking family reunion can *deliberately* create the conditions under which the *Surinder Singh* doctrine and thus the application of EU law can be triggered, it is hard to see what is meant exactly by 'artificially creating' those conditions. Perhaps the UK authorities will seek to revive the 'centre of life' doctrine under this guise.

4. Reading across: the complex interplay of free movement and immigration law and policy

A major theme of our earlier work[60] concerned the impact of the 'mindset' of immigration law, which is a framework of narrowly drafted rules, systems of permissions and substantial scope for executive discretion premised upon national sovereignty, upon the field of free movement law, which offers a framework of general rules, principles and rights with only very limited scope for executive discretion within a structure of shared or pooled sovereignty with other Member States. We examined this phenomenon from one direction only – namely the impact of immigration law on free movement law. One interview quotation highlights the point very well. Taking the case of a third country national who is in a durable relationship with a non-national EU citizen resident in the UK, it highlights the point that the UKBA may make no proactive attempt to select the EEA/EU related cases for appropriate treatment under the EU free movement rules as opposed to the general immigration rules:

> '[The UKBA] will just turn up on the door and arrest them even although the [EU citizen] is in bed with him when they arrived. There is no issue about 'does this person have a right?' rather than 'has this person proved that they have a right?' Because of the immigration system, the whole onus is on the individual to make out their claim rather than it being for the immigration authorities to enquire to how long the couple have been living together and what the nature of their relationship is before detaining the Indian guy because obviously he might be in a durable relationship but their first reaction is 'let's detain him and if he's in a durable relationship then presumably he can make an application'." [Q20]

Further illustrations are provided by the issue of sham marriages under EU law, discussed in the previous section. One can also highlight the controversies that have burst out just as EU citizenship appeared to be shaking off its 'free movement shackles', to emerge as an autonomous constitutional concept protecting the interests of EU citizens wherever they are, within an ever widening scope of EU law.

National data collected for FIDE those cases which have arisen 'beyond the

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59 Cases C-456/12 *O & B*, para. 58.

60 See above n.25.

Directive',[61] highlight how national judiciaries have had to work hard 'to discern and to follow the twists and turns of jurisprudence-in-progress at EU level' in this field.[62]

Prima facie the only issues that fall within the scope of Directive 2004/38 are those involving *movement* where the applicant is in a *host* state. That said, it is an over-simplistic statement to suggest that 'static' EU citizens are somehow not the real EU citizens because they are not 'free movers'. Indeed, as the Court of Justice has told us on innumerable occasions, 'citizenship is intended to be the fundamental status of the nationals of the Member States'.[63] While initial thoughts turned to how this could have meaning beyond the scope of free movement, in fact the point has been well illustrated by the particular facts of the earlier case of *Rottmann*.[64] In this case, the Court of Justice was faced with the question whether EU citizenship was relevant in the following rather unusual scenario: An Austrian citizen under investigation for criminal charges moved to Germany. After residing in Germany for some time, he sought naturalisation as a German citizen, but in making his application he did not disclose the investigations that had been undertaken in Austria. In order to acquire German citizenship, he had to renounce his Austrian citizenship, pursuant to Austrian rules. Although the naturalisation decision was initially positive, once the German authorities found out about the deception (the failure to mention the criminal investigation), they sought to withdraw the naturalisation decision, which would bring about a situation where Rottmann would be stateless until he re-acquired Austrian citizenship. Such statelessness would also mean the loss of EU citizenship. Yet *prima facie* this was an instance where an EU citizen, who was now a German citizen, was trying to rely on EU law against *his own* Member State in order to resist the withdrawal of the naturalisation decision. Was this a 'purely internal situation'? Could EU citizenship escape the confines of its application hitherto only in cases of mobility.[65]

The Court of Justice noted that it is for each Member State to lay down the conditions for the acquisition and loss of nationality, but commented that they could do so only 'having due regard to Community law' (para. 39). It then went on to make a very strong statement about the 'reach' of Union citizenship and consequently the capacity of Member States to withdraw national citizenship where that results in the loss of Union citizenship:

> 'It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status

61 FIDE Report, pp138-160.

62 Nic Shuibhne and Shaw, above n.1 at p149.

63 E.g. in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177 at para 41 – but the point has been endlessly repeated since Case C-184/99 Grzelczyk [2001] ECR I-06193.

64 Case C-135/08 *Rottmann* [2010] ECR I-1449.

65 Case law from *Martínez Sala* onwards.

> conferred by Article 17 EC [i.e. Union citizenship] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law' (emphasis added; para. 42).

The Court when on to state that a state such as Germany in that case was bound by the principle of proportionality in its approach to the question of withdrawing a naturalisation decision on grounds of fraud.

While the immediate implications of *Rottmann* for issues of free movement were not clear, the subsequent case of *Ruiz Zambrano*[66] raised the controversy to another level, bringing into play EU citizenship in a context which directly engaged national immigration law.

In *Ruiz Zambrano*, a right of residence was sought by a third country national in a Member State (Belgium). Two of his minor children had the citizenship of that state and were thus EU citizens, but 'static' ones – i.e. they had never lived outside Belgium. Drawing once again on the symbolic power of the 'fundamental status' argument, the Court developed a new test for the scope of Article 20 TFEU:

> 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union' (para. 42).

Refusal to grant the right of residence, and indeed a work permit, to the third country national parents in these circumstances would mean that the children would be obliged, with their parents, to leave the territory of the Union, thus denying them the enjoyment of their rights as EU citizens (i.e. the right to reside on the territory of the Union and the capacity to exercise their free movement rights). It is interesting to note as an aside here, that arguments about the deportation of citizen children as a side effect of the deportation of non-citizen parents have often been raised by immigration lawyers as a means of resisting the deportation of a non-citizen parent lacking the legal right to remain on the territory (or leave to remain as UK immigration law would style it). Of course, the children retain the citizens' right to reside in the territory of the home state, but at national level the argument has often had to be framed – within the context of national immigration law – as an issue of family life, not of the right of residence of citizen children. Courts in many states – including Ireland and the UK – have been willing to accept the argument made by immigration authorities seeking to deport non-citizen parents who have no right to reside that family life can be enjoined in the state of the non-citizen parents, and thus there is no derivative right of residence for the parents from the citizen child.[67] The citizen child can only effectively exercise his or her right of residence on the attainment of the age of majority, bringing with it the possibility

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66 See n.63 above.

67 Reference to literature, e.g. Sawyer.

of living independently from his or her parents. EU law seemed, at first blush, to change the established constellation of interests – central to a restrictive concept built into immigration law which holds that it is the primary responsibility and prerogative of the host state to control the immigration status of the adult parents, whatever the consequences – quite dramatically. If *Ruiz Zambrano* were to have this effect, there would be consequences both for national immigration law and for the scope of EU free movement, because it had already been previously established that where an EU citizen child is resident in a different state to the one of which he or she is a citizen, the parents can seek a derivative right of residence on the basis that the child is a dependent.[68]

It is clear that these cases have become controversial precisely because the invocation of EU citizenship directly challenges national immigration law, and it is not surprising to see – in the implementation of *Ruiz Zambrano* at the national level and in subsequent cases where the Court of Justice has narrowly confined that case to its facts by requiring an immediate threat to the presence of the citizen on the territory of the Union[69] – a concern that *Ruiz Zambrano* should not be the wedge that drives open the free movement door and effectively extends this concept to many third country nationals, regardless of *intra*-EU mobility.

Others have suggested impacts in the other direction, in the sense that EU free movement's very free-ness and the inability of states to control who takes advantage of free movement may influence states' choices in relation to immigration from third countries. To put it another way, a Member State such as the UK may see the EU as the source of low-skill migration (or the migration of persons willing and able to undertake low-skill jobs), with (controlled) immigration from third states being focused on high-skill employment.[70] It is clear, therefore, that the relationship is iterative and complex, and the complexities cannot be solved simply by refusing – as advocated by Ghimis *et al* – to call mobile EU citizens 'migrants' because this blurs the picture and decreases their rights.[71]

Clearly it is problematic, as argued before, for the shadow cast by immigration law to constrain EU free movement law. It is true that the constitutional status of EU citizens resident, for example, in the UK is quite different to that of third country national immigrants. This does make a considerable difference, although it is worth noting that in practice they are each protected by broadly the same patchwork of fundamental rights that can in some circumstances limit the unalloyed application of national immigration sovereignty, in particular the right to family life guaranteed in Article 8 of the European Convention on Human Rights and Fundamental Freedoms. But there are indubitable overlaps between national immigration law

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68 *Chen.*

69 References to cases and to FIDE General Report and Institutional Report.

70 See Paul above n.19

71 A. Ghimis, A. Lazarowicz and Y. Pascouau, *Stigmatisation of EU mobile citizens: a ticking time bomb for the European project*, EPC Commentary, 24 January 2014.

and EU free movement law. In some cases, the Citizens' Rights directive even enjoins national authorities to apply national immigration law or procedures. And since immigration claimants and their legal advisors ever more frequently try to identify an EU law point that they can use to escape the strictures of national immigration law it is hardly surprising that in the national popular consciousness the two fields have become intertwined. The reality is, however, that if Member States are to be successful in identifying ways to transmit their domestic immigration law and policy concerns into the domain of EU free movement they will need something more than sympathetic interpretation. Wholesale reform may be needed. We turn now to consider whether this is a realistic option.

5. Changing the law: a realistic option?

Is it conceivable that EU free movement law could be changed in order to accommodate the concerns of states such as the UK? Is it possible to limit free movement to certain types of workers or other groups, and to exclude low-skilled workers or jobseekers (or to place a cap upon the numbers)? Can social security be better coordinated between Member States to ensure a more effective response to the challenges posed by transnational jobseekers (or persons on low incomes)? Can transitional controls on new Member State citizens be extended on an open-ended basis until those states reach a certain percentage of the average EU GDP? The range of possible options, and the implications of these in so far as they might unpick other aspects of the single market, which many regard as an interdependent whole, are canvassed in the much-delayed Balance of Competences Review Report on the Free Movement of Persons.[72] No conclusions are reached in that document, which is open ended in nature. It is clear, however, by looking at the list of evidence submitted that the overwhelming majority of those who responded to the call for evidence did so with statements that were in support of the integrity of the single market concept, and the importance of maintaining the free movement of persons as 'free'. Negative citations are overwhelmingly to the evidence submitted by Open Europe, David Goodhart, and MigrationWatch – and to them alone. The report places a good deal of weight on the 'public confidence' in the immigration system argument put forward by Goodhart in particular, but in practice Goodhart's suggestions are mere assertions, not backed up by any evidence. But the Swiss experience shows how hard it is to pick and choose across free movement. Since Switzerland wants trade with the EU, but apparently the Swiss people do not want (what they see as) uncontrolled immigration from the Member States, the Swiss Government has been left in an awkward situation.[73]

The balance of mainstream EU law opinion seems to be that it is hard to see a halfway house, in which free movement is cut away from the rest of the (constitutionalised) single market and turned into a poor relation. Organisations such as the IPPR may call for a clearer line to be drawn around free movement of

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72 HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union. Single Market: Free Movement of Persons*, Summer 2014.

73 Insert references.

persons, but it hard to see how this can be delivered, and in practice all of the reforms that IPPR suggest are non-legal in nature.[74] Of course, some or all of the legislation could be repealed, going right back to 1964, but since much of the case law of the Court of Justice is (also) phrased in terms of general principles of law (e.g. procedural protections for those threatened with deportation) and since EU citizenship is constitutionalised within the EU treaties, it is hard to see how this is going to make a difference (although it is likely to provoke legal chaos).[75]

Such a review of legislation and of competences, and the feasibility of any such negotiations on reform at the EU level, lie under the shadow of the threat of withdrawal (Brexit) now openly discussed in the UK and across the EU, and the possibility that there may be a referendum in the UK after the next election (2015) and after a period of negotiation. Withdrawal is, of course, a drastic option, although it is now provided for in the EU Treaties, and so its threat has inevitably become part of the gamut of negotiation tools that states will use. Withdrawal is not, however, a sudden or unilateral event, as Article 50 TEU provides for the negotiation of a withdrawal agreement. While we could expect withdrawal to have significant effects on the status of non-national EU citizens resident in the UK and of UK citizens resident in other Member States, presumably the withdrawal agreement would address acquired rights and – by analogy to the international law obligation of seceding states to make provision for non-citizens of a new state to become lawfully resident aliens with stability of residence – so we might expect such agreement to make provision for the transition of EU citizens into lawfully resident aliens under national immigration law.

6. Conclusion

The aim of this paper was develop a new take on the character of the encounter between the EU free movement rules and UK immigration law, building on previous research which had suggested, first, that there were two legal worlds in collision (EU free movement law and national immigration law – Overlap Report) and, second, that EU citizenship may not be in good health, just over twenty years after its inception in the treaties (FIDE Report). The lens in this paper has been turned more towards considering whether there may be political and legal worlds in collision, in circumstances where a Member State such as the UK is trying to navigate a narrow path between offering a narrow interpretation of EU free movement law in accordance with its restrictive immigration policies, whilst not openly defying the EU rule of law.

The kneejerk response of many EU lawyers to such problems has often been to call for more EU, or more EU law, or at the very least better implementation.[76] The reality is that things stand EU free movement is trapped in a vice between law and

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74 IPPR report, Impacts of Romanian and Bulgarian Migration.

75 References?

76 Delivet report includes 'strengthened European citizenship' as one of the possible responses to the problem discussed here.

political truth. The solution to slipping that vice probably does not lie within the compass of EU law.