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"BENEFIT TOURISM" AND WELFARE REFORM IN THE UNITED KINGDOM

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I. INTRODUCTION

Last August, Congress passed and the President signed the Personal Responsibility & Work Opportunity Reconciliation Act of 1996 ("the Personal Responsibility Act"),1 supposedly changing welfare as we know it. In so doing, the Personal Responsibility Act also changed welfare as "they" know it; among other welfare restrictions, the Act strictly curtails the availability of entitlements to immigrants. A legal immigrant entering the United States now faces a five-year ban on federal public benefits.2 A similar provision of the Act allows the individual states to set equally strict eligibility standards for state and local benefits.3 In addition, the Act completely bars illegal immigrants from both federal and state benefits.4

The motivations behind this strict policy are clearly voiced in the introduction to Title IV of the Personal Responsibility Act, which centers on immigration and welfare: "It continues to be the immigration policy of the United States that . . . aliens within the Nation's borders not depend on public resources to meet their needs . . . and . . . the availability of public benefits not constitute an incentive for immigration to the United States."5

The preamble to Title IV articulates a basic fear that drives the new United States policy: the US does not want costly welfare programs to attract benefit-hungry immigrants. This apprehen-

2. Id. at § 403(a). Some narrowly defined exceptions follow this provision.
3. Id. at § 412(a).
4. Id. at §§ 401, 411.
5. Id. at § 400(2) (A) & (B).
sion is not the exclusive property of the United States. The United Kingdom (UK) recently reformed its welfare system in order to eliminate what it saw as an incentive for European nationals to come to Britain on a “benefit holiday.” In 1994, the UK Secretary of State for Social Security established a new policy to control the distribution of income and housing benefits. Effective in August of that year, all persons who apply for government aid must pass a test of “habitual residence” to prove their residency status in the UK.6 The test represents an aggressive effort by the British government to deter “benefit tourists:” European Union (EU)7 nationals who come to the UK seeking work, but who ultimately end up unemployed, homeless, and potential recipients of entitlements in Britain.8

Government ministers and the popular press portrayed benefit tourism as a common and well-known problem.9 The new policy has come to symbolize the latest battle in the constant struggle between “Europhiles” (those in favor of a strong European Union) and “Eurosceptics” (those of a more isolationist bent who would rather see the Union weakened or even cease to exist). At the same time, the habitual residence test marked

6. “Habitual residence” is not defined by UK government documents or legislation. However, the Department of Social Security lists five criteria for establishing habitual residence: the applicant’s “centre of interest,” employment record, length and continuity of residence elsewhere, reason for coming to the UK, and future intentions. The Habitual Residence Test: One Year on, Welfare Rights Bulletin, June 1995, at 7. For a discussion of how habitual residence determinations are made, see infra part IV.

7. Actually, the policy targets nationals of the European Economic Area (EEA), which comprises a larger set of European members than the EU. As of this writing, the EEA includes all the European Union member states (France, the United Kingdom, Germany, Austria, Italy, Spain, Portugal, Belgium, the Netherlands, Luxembourg, the Republic of Ireland, Denmark, Finland, Sweden, and Greece) as well as Iceland, Norway, and Liechtenstein. For the purposes of this analysis, no distinction will be drawn between the EEA and the EU.

In addition, it should be noted that when the Maastricht Treaty became effective in November 1993, the UK became part of the European Union (EU), previously named the European Community (EC). Most of the relevant case law still refers to the EC rather than the EU. For the sake of clarity, all references to the EC have been changed to the more appropriate EU moniker.


changes in the distribution of welfare benefits in the UK. Accompanying these changes were structural defects in the disbursement of benefits, as well as adverse consequences not only for some EU nationals, but for many UK citizens as well. The resulting legal challenges and criticism of the policy over the last three years have cast significant doubts on the viability of the habitual residence test and the effectiveness of the British government's policy against benefit tourism.

Unlike the sweeping and much deliberated welfare legislation passed by the United States Congress, the habitual residence test represents a more administrative, less consistent application of welfare reform policy. The following analysis presents an overview of the benefit tourism policy as it has been applied by the UK government since 1994. Part II provides a brief background of the UK's role in the EU. That role gives one explanation for the less consistent nature of the benefit tourism policy; namely, the UK is somewhat limited in its ability to control the flow of immigration and the disbursement of benefits due to its membership in the EU.

Part III explains some of the structural problems inherent not only in the new benefit tourism policy, but in the disbursement of entitlements in the UK generally. The system in place creates a potential for conflict among government entities on local, national, and supranational levels. This part lays the groundwork for an analysis of the benefit tourism policy as it has been applied to both housing and income support benefits in the UK.

Part IV gives a synopsis of a recent report by the National Association of Citizens Advice Bureaux (NACAB), a prominent citizens' watchdog group. The NACAB report gives a damning review of the habitual residence test and its role in the UK government's plan to stop benefit tourism. The report details how the test has been inconsistently applied, revealing structural problems in general, as well as specific instances where the habitual residence test has backfired in its application and resulted in harm to UK nationals rather than the intended "Euro-crounger"\textsuperscript{10} targets.

Part V analyzes three recent legal challenges to the habitual residence test. The test survived its first legal challenge, although a later case indicates that the habitual residence test may be short-lived. Most significantly, the test is currently under

consideration by the European Court of Justice.\textsuperscript{11} That body has not yet reached a decision on the issue, but the result likely will either obliterate or entrench the habitual residence test.

Finally, Part VI provides some suggestions for how the UK government could better implement the benefit tourism policy. This part will also briefly discuss what the United States can learn from the UK welfare system. Though the impetus behind the reform movements in the two countries may be the same, the US and UK governments have handled the perceived problem in very different ways. The shortcomings of the benefit tourism policy and the difficulties surrounding its implementation should serve as a warning to US legislators and policy-makers not to fall into the same structural and administrative quicksand that has muddled the UK welfare system for the past three years.

II. GETTING AROUND THE EU

A. Freedom of Movement

The habitual residence test has some basis in EU law. Generally, European Union citizens have the right to freedom of movement within the Member States of the EU.\textsuperscript{12} However, that right is not absolute. Article 8(a)(1) of the European Union Treaty holds the rights of EU nationals "subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect."\textsuperscript{13} United Kingdom courts have interpreted this article to mean that there is not an "unqualified right of every citizen of the European Union to reside in any Member State as and when he may wish."\textsuperscript{14}

B. Exceptions to Freedom of Movement

The United Kingdom is not the first European country to attempt the application of an habitual residence test. In \textit{Di Paulo v. Office National de l'Emploi},\textsuperscript{15} the European Court of Justice considered the validity of a Belgian law requiring all its benefit recip-

\begin{itemize}
\item \textsuperscript{11} As a member of the European Union, the United Kingdom agrees to submit to EU law, effectively making the European Court of Justice the court of last resort in the UK. For a brief discussion of the European Court of Justice and how it decides cases, see JOSHUA ROZENBERG, \textit{THE SEARCH FOR JUSTICE} 202-204 (1994).
\item \textsuperscript{12} \textit{Treaty Establishing the European Economic Community [EU Treaty]} art. 48 (as amended 1991).
\item \textsuperscript{13} EU Treaty art. 8(a)(1).
\item \textsuperscript{14} R. v. Westminster City Council ex p. Castelli & Tristan-Garcia, 28 H.L.R. 125, 1995 Queen's Bench Division (LEXIS, UK library, Allcas file). See infra part V.B.
\item \textsuperscript{15} Case 76/76, 2 C.M.L.R. 59 (1977).
\end{itemize}
ients to be habitually resident in Belgium. Silvana Di Paulo, an Italian national who was raised in Belgium, was denied unemployment benefits in Belgium after working in Britain for a year. The court explained the general rule that the country where a European national works should be the country to provide benefits. However, the court then stated that an exception exists whereby a worker may show habitual residence in a country other than where he or she was last employed. When determining habitual residence, the court suggested looking at a person’s “habitual centre of interest . . . the length and continuity of residence . . . the length and purpose of his absence, the nature of the occupation found in the other [M]ember-State and the intention of the person concerned as it appears from all the circumstances.”

Though the European Court of Justice in Di Paulo allowed an exception to the general rule, the court warned that the exception would be rare, and still held to the presumption that a worker resides in the country where he or she works. Despite its narrow holding, Di Paulo allowed other EU nations to tinker with the concept of habitual residence.

Throughout its history as a member of the European Union, the UK has developed its own exceptions to the freedom of movement doctrine. The UK Immigration Rules outline the qualifications necessary for an EU national to be “lawfully present” in the UK. The rules state that “a national of a Member State of the European Union is entitled to admission to take or seek employment, to set up in business, to become self-employed or otherwise to exercise the right of establishment or the rights relating to the provision or receipt of services as provided in [EU] law.” However, the UK gives EU nationals a limited window within which to gain employment. A person admitted under the rules may remain in the UK for a maximum of six months,
after which time that person must apply for a UK residence permit.23

A residence permit will be issued to an EU national if the person is employed, has "established himself in business" or is otherwise established financially, or if the person has a family member who is employed or otherwise established in the UK.24 The residence permit normally will be issued for a five-year term.25 The national may be forced to leave the United Kingdom "if, after six months from admission, he fails to meet [these] requirements. . . ."26 Moreover, if the national has become a "charge on public funds," a residence permit most likely will not be granted, even if the six-month limitation has not yet passed.27

Before the habitual residence test was put in place, EU nationals were allowed to claim government benefits for the first six months after their arrival in the UK.28 If an EU national was not employed within six months, or failed to show he or she was actively looking for work throughout the six-month period, the benefit authorities would notify the Home Office,29 which would send a letter requiring the EU national to leave the country.30

C. EU Acceptance of UK Limitations on Freedom of Movement

The Immigration Rules curtail the EU Treaty's avowed aim of "freedom of movement" for citizens of Member States. However, the European Court of Justice gave a qualified acceptance to the UK's six-month limit in R. v. Immigration Appeal Tribunal ex p. Antonissen.31 Dutch citizen Gustaaf Antonissen appealed to the Queen's Bench Division of the United Kingdom's High Court in an attempt to overturn his deportation by an immigration appeal tribunal. The tribunal declared that Antonissen could not lawfully reside in the United Kingdom because he had been unem-

23. Id. at para. 72.
24. Id. at para. 147.
25. Id. at para. 148. If the duration of employment is expected to be shorter than five years, the term of the permit will match the expected length of employment.
26. Id. at para. 150.
27. Id.
28. See infra part II.C.
29. See PHILIP NORTON, THE BRITISH POLITY 190 tbl. 8.6 (3d ed. 1994) (defining the Home Office as an executive agency fulfilling "domestic functions not assigned to other departments, including administration of justice, police, immigration, public safety and morals, and prisons") [hereinafter BRITISH POLITY].
30. For a more detailed discussion of the Home Office and its immigration policies, see infra part V.B.
ployed for over six months. Antonissen argued that the six-month limitation violated EU law. The High Court refused to decide the question, as there was no clear rule of law on the issue, and the case was transferred to the European Court of Justice.

The European Court admitted there was no clear rule of EU law governing time limits on the right of residence for EU nationals in a foreign Member State. However, the court quickly silenced the notion that Member States should be free to legislate their own guidelines on the right of residence. The court feared this would lead to "national laws which would thus be able to exclude at will certain categories of person from the benefit of the [EU] Treaty."

As a compromise, the court declared the UK six-month limitation "does not appear in principle to be insufficient to enable the persons concerned to apprise themselves . . . of offers of employment . . . and, therefore, does not jeopardise the effectiveness of the principle of free movement." The court qualified this statement by giving alleged "overstayers" (EU nationals who stay in the UK without a permit longer than six months) a chance to prove their continuing efforts to get a job. If such continuing efforts are shown, the UK cannot force an overstayer to leave.

The Antonissen court acknowledged the possibility of benefit tourism, which it described as "the risk of persons moving to another Member State under cover of looking—in actual fact, not very actively—for employment in order to receive the social benefits provided for under the legislation of the host State." However, the court dismissed that risk as minimal. The court reasoned that national authorities that make the proper inquiries should be able to "identify those persons who are not genuinely looking for employment. Such persons could not claim a right of residence, even if they recently arrived in the host State, or as a result abuse the social advantages accruing under national law."

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32. Statement of Changes in Immigration Rules, supra note 21, at para. 150. Normally overstayers are not deported. Antonissen was deported because he had recently been convicted of cocaine possession and was deemed a danger to the public health.
33. 2 C.M.L.R. at 390 (quoting Case 53/81, Levin v. Staatssecretaris van Justitie, 2 C.M.L.R. 454 (1982)).
34. 2 C.M.L.R. at 400.
35. Id. at 394.
The European Court placed its faith in the ability of national authorities to discover and expel benefit tourists without slighting the overriding principle of freedom of movement. However, a closer look at UK practice reveals an important difference between the Antonissen ruling and reality.

III. UK Housing Policy—A Mix of Local and National Decision-Making

The two main entitlements affected by the government’s habitual residence policy are income support benefits and housing benefits. Eligibility for income support is determined by the national Benefits Agency. The Benefits Agency receives its legal guidance from the Central Adjudication Service, also a national agency. Thus, income support benefits are determined at a national level. Housing benefits, on the other hand, are administered at a local level by the housing councils of various cities in the UK.

The controlling statute regarding homelessness in the United Kingdom is the Housing Act 1985 (“the Housing Act”). Local housing councils follow the guidelines in the Housing Act when considering an application for housing benefits. Housing authorities also rely on the Code of Guidance (“the Code”) issued to councils and updated periodically by the Department of Social Security. The Code is not binding on housing councils, though it is followed as a matter of course, primarily because housing councils may be required to justify any deviations from the Code on review. An examination of case law illustrates that local authorities control the process of granting and denying housing benefits, even when EU nationals are involved.

37. The policy also affects disbursements covering the “council tax” charged by local councils. The council tax will be ignored for the purposes of this analysis.

38. For a more detailed discussion of income support benefits and the Benefits Agency, see infra part IV.

39. Housing Act, 1985, ch. 68 (Eng.) [hereinafter Housing Act]. The Housing Act was revised last year to include, among other changes, the restrictions on non-British housing benefit applicants. However, because the benefit applicants discussed infra applied under the 1985 statute, this analysis refers to the older version of the Housing Act. See, e.g., Housing Act, 1996, ch. 52, § 185 (Eng.) (“Persons from Abroad Not Eligible for Housing Assistance”).

40. Housing Act, supra note 39, at § 71(1) & (2).

41. DeFalco, Silvestri v. Crawley Borough Council, 1 All E.R. 913, 921 (1980).

A. Intentional Homelessness—Local Control

Local councils owe no duty to an applicant determined to be intentionally homeless.43 Applicants who have deliberately done or failed to do something that has resulted in loss of accommodation are considered intentionally homeless and ineligible for benefits.44 In DeFalco, Silvestri v. Crawley Borough Council,45 a local housing council held two Italians to be intentionally homeless because they had moved to the UK from Italy without first acquiring permanent accommodation. The Italians sought appeal, claiming that the housing council had denied them access to housing because of their nationality, and that the Code and EU law made clear that their nationality should not have been an issue. They referred to Section 2.18 of the Code, which states that a housing authority should consider only the “most immediate cause” of homelessness, rather than a series of prior events.46 For DeFalco and Silvestri, this likely would have meant they would not be held intentionally homeless under the Act, because they lost their accommodation most recently in the UK due to family difficulties. In addition, they pointed to EU Council Regulation 1612/68,47 which gives EU workers the same access to housing and social security benefits to which UK nationals are entitled.48

The Court of Appeal upheld the housing authority’s decision. The leading judgment explained away the relevant Code section and held that housing authorities are not officially bound by the Code. The judgment stated that Section 2.18 “may be all very well for people coming from Yorkshire or any other part of England. But it should not . . . be applied to people coming from Italy, or any other country of the Common Market.”49 Warning against the “advancing tide”50 of EU nationals in Britain, the judgment contended that EU law actually treats EU workers more favorably than it treats UK citizens in some circumstances, because housing authorities “cannot rely on . . . the Act to throw responsibility on to the housing authority of some other area.”51

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43. Housing Act, supra note 39, at § 60 (general note following text).
44. Id. at § 60(1).
45. 1 All E.R. 913 (1980).
46. Id. at 921.
48. Id.; see 1 All E.R. at 924.
49. 1 E.R. at 921.
50. DeFalco, Silvestri v. Crawley Borough Council, 1 All E.R. 913, 917 (1980).
51. Id. at 926.
DeFalco signified the power of the local housing council to decide matters of benefit distribution, regardless of the applicant's status as an EU national. The language of the DeFalco decision may have provided a clue as to how such applications might be processed throughout the EU. The following case, decided shortly before DeFalco, better explains how cooperation among the EU nations might allow UK housing councils to rely on the Housing Act to "throw responsibility" to other areas of the EU.

B. The Local Connection Standard—Possible Broad EU Application

A housing council may require an applicant to show ties to the area in order to receive housing benefits. The Housing Act states that for an applicant to establish a local connection to a particular housing council, the applicant must either normally reside in the council's district, be employed in the district, have family in the district, or have other special circumstances that tie the applicant to that district. If a housing authority determines that the applicant has a local connection elsewhere in the UK, the application may be transferred to the authority in charge of housing in that area. Whether to apply the local connection inquiry is wholly at the discretion of the housing council.

In R. v. Bristol City Council ex p. Browne, responsibility for housing an Irish applicant was transferred from England to the Republic of Ireland because the applicant had no local connection in the UK. The Bristol housing authorities contacted the relevant housing council in Ireland and received assurance that the applicant would receive housing upon her return to Ireland. Though the applicant did not wish to return to Ireland, the Bristol authorities decided they had no further duty to the applicant under the Housing Act. In a strictly limited holding, the trial court upheld the housing authority's decision to effectively transfer the housing application out of the UK.

An expansive reading of the Browne decision implies that housing applications from EU nationals in the UK might be transferred to the applicant's home country under an EU-wide "local connection" standard. No judicial body has yet considered what relationship, if any, exists between the local connection standard and the habitual residence test. The Browne case does

52. Housing Act, supra note 39, at § 61.
53. Id. at § 62(2); ENCYCLOPEDIA OF HOUSING; LAW AND PRACTICE § 14-115 (Andrew Arden & Martin Partington eds., Supp. June 1995).
54. 3 All E.R. 344 (1979).
55. Id. at 348-49.
56. Id.
57. Id. at 350-51.
little to aid in this context, both because it was decided several years before the benefit tourism policy came into effect, and because citizens of the Irish Republic are exempt from the habitual residence test.\textsuperscript{58} However, the ability to transfer applications to other EU countries under the Browne standard might eliminate the need for the current policy; true "Euroscroungers" could be sent home to receive their benefits.

\textbf{C. Local Authorities and Immigration—Tower Hamlets}

As seen in \textit{Browne} and \textit{DeFalco}, local housing councils are free to inquire about an applicant's qualifications for benefits. Housing councils may also ask about the immigration status of an applicant who may have overstayed or gained illegal entry to the UK. When councils process an application, they are told "to inquire into the immigration status of the applicant, and indeed it would seem that where it comes to the attention of the authority that an applicant may be an illegal immigrant they are under a duty to inform the immigration authorities of this fact."\textsuperscript{59} The fact that this power, officially reserved for the national immigration authorities, is instead carried out by local authorities raises some question about whether the UK is following the spirit of the \textit{Antonissen} ruling. The following case exemplifies the UK courts' willingness to give local authorities the power to decide the immigration status of members of a supranational organization.

In \textit{R. v. Secretary of State for the Environment ex p. Tower Hamlets London Borough Council},\textsuperscript{60} the United Kingdom Court of Appeal overturned a High Court decision limiting the powers of local housing councils. In \textit{Tower Hamlets}, the Secretary of State agreed housing authorities could \textit{inquire} about the immigration status of applicants, and confirmed there was no duty under the Housing Act to house an illegal immigrant.\textsuperscript{61} But the Secretary argued

\textsuperscript{58} Though the Republic of Ireland is a member of the European Union, Irish citizens have traditionally been free from restrictions on right of entry into the UK, at least insofar as their status as EU nationals is concerned. This exemption stems from the close historical ties between the two countries. Other European countries have developed such exemptions with neighboring states. \textit{See Peter Lilley Clamps Down on Benefit Tourism}, \textit{REUTER TEXTLINE HERMES—UK GOV'T PRESS RELEASES}, July 11, 1994 (LEXIS, Intlaw library, ECNews file); R. v. Secretary of State for Soc. Sec., ex p. Sarwar & Another, Court of Appeal (Civil Division) (Oct. 24, 1996) (LEXIS, UK library, Allcas file) (discussed \textit{infra} part VA); Belgian State v. Humbel, 1 C.M.L.R. 393 (1989) (discussed \textit{infra} part V.B).


\textsuperscript{60} \textit{3 All E.R. 439} (1993).

\textsuperscript{61} \textit{Id.} at 442-43.
the Immigration and Nationality Department (IND) should be the sole body with power to officially decide the issue of whether an applicant is an illegal immigrant. The Secretary cited a portion of the Code in favor of his proposition:

4.11 Authorities cannot refuse to rehouse a family because they are immigrants. Everyone admitted to this country is entitled to equal treatment under the law; their rights under [the Housing Act] are no different from those of any other person. Authorities should remember to treat as confidential information received on an applicant’s immigration status.

4.12 Authorities should also however be aware that people in the UK with limited leave to remain may prejudice their immigration status if they have recourse to public funds. If it therefore comes to light in the course of investigations that an applicant may only have limited leave to remain in the UK the housing officer should inform the applicant that s/he may be jeopardising his/her status and advise him/her to contact the Home Office or an independent advice agency for help.

In the leading judgment, Lord Justice Stuart-Smith rejected the Secretary of State’s claim. The court held an applicant’s immigration status to be a factual matter, and stated that there was nothing to indicate that immigration officials should be the only ones qualified to rule on such status. Moreover, the Lord Justice asserted that local authorities will often be in a better position to decide questions of immigration status: “It is the housing authority rather than the immigration authority who will most probably discover that there has been deception by the immigrant since it will be to it that an application will be made. It should not be necessary for them to refer the case for decision to the immigration authorities with the consequent delay involved.”

The Tower Hamlets decision prompted a change in the Code of Guidance. Sections 4.11 and 4.12 were eliminated from the Code and were replaced with new sections which follow the Tower Hamlets ruling. The new Code sections give local housing councils the power to decide whether an applicant entered illegally or became an overstayer by residing in the United Kingdom longer

62. Id. at 443.
64. 3 All E.R. at 443-44.
65. 3 All E.R. 439, 446 (1993).
than allowed under the national immigration rules. The new Code also states that while councils are under no duty to report to IND, they should notify the department when decisions are made regarding immigration status. The holding assured that local housing council decisions would still be subject to review by UK courts.

Local authorities thus have great power over the distribution of housing benefits, as well as the responsibility of administering the habitual residence test to housing applicants. However, as will be seen in Part IV, housing benefits are but one aspect of the welfare system. The habitual residence test also applies to income benefit applications, which are governed by a separate agency and set of guidelines.

IV. **Failing the Test: The NACAB Report**

In February 1996, the National Association of Citizens Advice Bureaux (NACAB) published a report detailing the effects of the benefit tourism policy on applicants for income support benefits. The report, entitled *Failing the Test*, is based on information gathered from 201 Citizens Advice Bureaux throughout England and Wales. The report gives a scathing review of the first eighteen months of the habitual residence test used to determine eligibility for benefits. Throughout its analysis, NACAB provides a number of minor recommendations for better implementing the habitual residence test, but the primary recommendation to the government is that the test be withdrawn completely.

The NACAB report concludes that the habitual residence test provides a poor means of deterring benefit tourism. NACAB points to a Social Security Advisory Committee report from April 1994, just months before the habitual residence test became effective:

> [T]he effective application of existing powers should provide sufficient remedy for any potential abuse from [EU] nationals seeking to take advantage of benefit tourism. . . . [I]t would be unduly harsh to apply an actively seeking

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67. *Id.* at § 4.30.
68. 3 All E.R. at 446.
69. NACAB is a watchdog organization that collects data and provides information and advice regarding government programs.
71. *Id.* at 3.
72. *Id.* at § 5.1.
work test more stringently to everyone at a time of high unemployment, in order to weed out a minority of benefit tourists.  

In short, the government's own advisory committee recommended that the habitual residence test not be instituted in the first place.

A. Structural Problems

In October 1995, a social security commissioner set forth criteria for making the factual determination of habitual residence. The commissioner stated that the most important factors for making this determination should be the length, continuity and general nature of the applicant's residence in the UK, and that the intentions of the applicant should not play a pivotal role. These criteria differ somewhat from the Department of Social Security criteria used by the Benefits Agency, which specifically provide that intentions should be taken into account. These conflicting guidelines bolster NACAB's argument that no realistic working definition of habitual residence exists, which leads to a great degree of subjectivity when applying the test.

In addition to the problem of subjectivity, a structural problem lurks in the application of the benefit tourism policy. The policy was enacted to ensure that applicants for housing and income support benefits would have to prove habitual residence before receiving benefits. However, two separate agencies are responsible for distribution of these entitlements and for the administration of the habitual residence test. Local housing councils are responsible for housing benefits, and they rely on the Housing Act and the Code for guidance. The Benefits Agency is responsible for income support benefits, and receives advice from the Central Adjudication Service. With two different agencies, each of which receives direction from a separate source, it is not surprising to find that occasionally the housing councils and Benefits Agency reach different results with regard to eligibility for benefits. The NACAB report gives evidence of

74. NACAB, supra note 70, at § 3.11 (citing Case 82/95, Social Security Commissioner (1995)).
75. Id.
76. See supra note 6.
77. NACAB, supra note 70, at § 3.14.
78. Id. at § 3.18.
applicants who were declared habitually resident by the local housing authority, and not habitually resident by the Benefits Agency.  

B. Backfire

The original stated aim of the habitual residence test was to prevent EU nationals from embarking on "benefit holidays" in the UK. However, EU law prevents the government from applying the test in a sweeping fashion to all EU nationals in the UK; each Member State must give EU workers the same access to benefits that are given to its own citizens.  

To clarify its adherence to this requirement, the UK government altered the habitual residence policy in March 1995, targeting only EU work seekers. As they are not entitled to the broad rights and benefits of EU workers, work seekers are still subject to the habitual residence test. Despite the alteration of the policy in 1995, the habitual residence test still applies to UK citizens returning from abroad. This has led to the confusing result of some EU nationals escaping the test while UK citizens are forced to take it. The NACAB report decries the habitual residence test both in its application to work seekers and to UK citizens.

The NACAB report suggests the government should broaden its focus with regard to benefit access by EU work seekers. To make freedom of movement a reality for work seekers, the report recommends that the UK government "work in conjunction with other European states to ensure that the same protection of non-discrimination as regards social assistance now given to European 'workers' is extended to genuine work seekers. . . ." This goal would be better served, the report argues, by helping its own citizens abroad, rather than by cutting back the benefits received by other EU nationals in the UK.

79. Id. at §§ 3.32-3.33. NACAB evidence suggests that, in general, housing authorities apply the habitual residence test more leniently than the Benefits Agency.

80. Regulation 1612/68, 1968 O.J. (L 257) art. 7(2) ("A 'worker' in this context includes a person actually in work, including part-time work; someone who has worked in the country but is now unable to do so due to permanent illness or industrial injury; an unemployed person who has previously been employed in the country and is now involuntarily unemployed; and someone who has retired, having worked in the country for at least twelve months and who has lived in the country for more than three years.").

81. NACAB, supra note 70, at § 2.13.


83. NACAB, supra note 70, at § 2.26.

84. Id. at § 2.25.
As it stands, the habitual residence test also applies to UK citizens.\(^8^5\) In fact, about twenty percent of all applicants who failed the habitual residence test during its first year were from the UK.\(^8^6\) British citizens who have worked abroad will likely have to reestablish that they are habitually resident before becoming eligible for benefits.\(^8^7\) The Social Security Advisory Committee recommended to the UK government that British citizens returning from abroad be exempt from the test, but the government did not follow the recommendation,\(^8^8\) perhaps because EU law may have prevented such an exemption. Whether British citizens return to the UK because of unemployment, ill health, marital or family problems, or fear of persecution, the habitual residence test may bar them from receiving benefits in their home country.\(^8^9\)

British citizens who were taken abroad as children are also subject to the habitual residence test upon their return to the UK as adults. It is likely the applicant's "centre of interest," one of the factors used to determine habitual residence, will be determined by the Benefits Agency to be the same as that of the applicant's parents, and the applicant will be denied benefits.\(^9^0\) The NACAB report illustrates that a British national living abroad will likely receive less favorable treatment under the benefit tourism policy than an EU national who comes to the UK, works for a short time, then becomes involuntarily unemployed.\(^9^1\) This clearly contradicts the main objective of cutting down on EU benefit tourism; nevertheless, the government stands by this effect of the habitual residence test.\(^9^2\)

C. A Policy of Racism?

The NACAB report provides some evidence that the benefit tourism policy disproportionately affects minorities. Many British minorities have links to family or spouses abroad. The Social

\(^8^5\) See Regulation 1612/68, 1968 O.J. (L 257) art. 7(2).
\(^8^6\) NACAB, supra note 70, at § 2.3 fig. 1.
\(^8^7\) Id. at § 2.34 (citing SSAC, supra note 73, at 3).
\(^8^8\) Id.
\(^8^9\) Id. at § 2.51.
\(^9^0\) Id. at § 2.55.
\(^9^1\) Id. at § 2.60.
\(^9^2\) Id. at § 2.62 ("It is perfectly reasonable that those who have made their lives elsewhere in the world who were originally British citizens or who can claim partial citizenship should be subject to the test. Why should someone who has come over here on a backpacking holiday from Canada and who has two British grandparents have the right to top up their income on holiday with income support?") (quoting former Secretary of Social Security Peter Lilley, January 23, 1995.).
Security Advisory Committee warned that applicants who visit their families or spouses overseas might fail the habitual residence test upon their return to the UK. Although they may be "well established in the UK," the visits abroad "may well be frequent and extended and it is possible that, on return to the UK, the adjudicating authorities could decide that the habitual residence qualification had not been fulfilled."93

NACAB case studies confirm this phenomenon. The report notes that male retirees from the Asian subcontinent are most vulnerable.94 Despite the fact that one applicant had spent his entire working life in Britain, had only left the UK for a short period of time, and had been a British Army World War II veteran, he was declared not to be habitually resident.95 The NACAB report shows that British applicants with non-European backgrounds may be denied income support benefits because their "centre of interest" is not considered to be in the UK.96

When this phenomenon is compared to the relative ease with which EU workers become eligible for benefits, the NACAB accusation that the policy may have racist applications is understandable.97 While the overall effect is difficult to measure, the evidence produced by the report gives an indication that the policy affects minorities unfavorably.98 The report urges that the government begin monitoring to better track the effect of the benefit tourism policy on minorities and protect against unfair application of the habitual residence test:

"It is not only patterns of living which may mean that black and ethnic minority groups may be more likely to lose their benefit under the habitual residence test; the judgement whether a person is or is not habitually resident in the UK is a subjective one. The danger is that, in making that judgement, benefit officers and tribunals bring their own prejudices and assumptions about race and culture to bear."99

V. LEGAL CHALLENGES TO THE HABITUAL RESIDENCE TEST

Any applicant may appeal a determination that he or she is not habitually resident. The NACAB report suggests that a large

93. Id. at § 2.40; SSAC, supra note 73, at 11.
94. Id. at § 2.42.
95. Id.
96. Id. at § 2.42.
97. Id. at § 2.43.
98. See id. at §§ 3.26-3.29.
99. Id. at § 2.84.
number of appeals have been filed since the habitual residence test came into effect. The average success rate was thirty-nine percent for appeals of denial of income support in 1995. However, the report claims that the appeals process takes too long, considering the fact that many appellants are poor and without income support during the time between rejection and the appellate decision. Appeals to social security tribunals usually take between four and six months to process. The NACAB report recommends that this time period be shortened to four weeks when an appellant has no other means of support. Another option would be to provide interim payments of income support to those appellants who have no other source of income. Interim payments were provided, though rarely, to appellants until February 1996, when they were completely abolished. The NACAB report recommends that the government reinstate interim payments pending determination of appeals.

Few cases challenging the habitual residence test have reached the national court level. In fact, only one case has directly challenged the test, and UK courts upheld the new policy by finding in favor of the government both in the High Court and on appeal. However, the habitual residence test gained much greater attention shortly thereafter, when a local council in London denied housing benefits to a pair of European nationals. Again, a UK court strengthened the habitual residence test by finding against Gaudenzio Castelli and Jose Tristan-Garcia. The following year the Court of Appeal reversed the decision and found in favor of the two Europeans, dealing a severe blow to the policy. Another case, still pending in the European Court, may soon determine the fate of the habitual residence test.

A. The First Challenge: Urbanek, Sarwar, & Getachew

The habitual residence test came under attack shortly after it was put into effect. The applicants in R. v. Secretary of State ex p. Urbanek, Sarwar, & Getachew, Queen's Bench Division (April 11, 1995) (LEXIS, UK library, Allcas file).
Urbanek, Sarwar, & Getachew\textsuperscript{108} were denied benefits because they were declared not to be habitually resident. The three claims were consolidated for the judgment, but the applicants attacked the policy differently. While Sarwar claimed that the habitual residence test was outside the scope of the Secretary of State’s power, the Urbaneks (a mother and adult son) and Getachew claimed the habitual residence test violated the freedom of movement rights guaranteed to EU nationals under Union law.

1. Ultra Vires: Sarwar’s Claim

Sarwar’s claim rested primarily on the Social Security Contribution & Benefits Act (“the Benefits Act”), which states that “a person in Great Britain is entitled to income support” provided the person fulfills certain conditions of age, income, and various other qualifications.\textsuperscript{109} The conditions are set forth in income support and housing benefit regulations; all regulation schemes were amended in 1994 to include the habitual residence test. The regulations provide that a “person from abroad” is not entitled to benefits, and the amendments expand the definition of “person from abroad” to include “a claimant who is not habitually resident in the United Kingdom. . . .”\textsuperscript{110}

Sarwar claimed that the Benefits Act allows any person in the UK access to income support benefits. Sarwar argued that the habitual residence test allows the Secretary of State to place a legislative limitation on the Benefits Act, which lies outside the scope of the Secretary of State’s power. The court construed the Benefits Act as a whole, rather than in isolated sections, and denied the ultra vires claim, stating that there is “no reason why a test of habitual residence should be outside the rule-making power of the Secretary of State.”\textsuperscript{111}

2. European Union Questions: Urbanek & Getachew

The two remaining complaints focused on reconciliation of the habitual residence test with the principle of freedom of

\textsuperscript{108} R. v. Secretary of State ex p. Urbanek, Sarwar, & Getachew, Queen’s Bench Division (April 11, 1995) (LEXIS, UK library, Allcas file).

\textsuperscript{109} Social Security Contribution & Benefits Act, 1992, ch. 4, §§ 123, 124 (Eng.). Sarwar relied on a similar section of the Benefits Act with regard to housing benefits. Section 130 provides that a “person is entitled to housing benefit if . . . he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home. . . .” Id. at § 130.

\textsuperscript{110} Income-Related Benefits Schemes (Miscellaneous Amendments) (No.3) Regulations 1994, reg. 21(3) (SI 1994 No. 1807).

\textsuperscript{111} R. v. Secretary of State ex p. Urbanek, Sarwar, & Getachew, Queen’s Bench Division (April 11, 1995) (LEXIS, UK library, Allcas file).
movement in the European Union. The Urbaneks and Getachew, all three EU nationals, referred to Articles Six and Forty-Eight of the EU Treaty in their argument that the habitual residence policy violates EU law.

Article Six states that "any discrimination on grounds of nationality shall be prohibited." The judgment admitted the possibility that "to give rights to habitual residents of the UK and the Republic of Ireland, and not to persons habitually resident in other countries of the [EU], can amount to discrimination on grounds of nationality..." The court quickly qualified this statement by referring to Article Forty-Eight in the context of the case of Centre Public d'Aide Sociale de Courcelles v. Lebon. In Lebon, the European Court of Justice held that only workers, not work seekers or the unemployed, are entitled to Article Forty-Eight protection. Because the Urbaneks and Getachew were unemployed, the court denied them protection under Article Forty-Eight and held them subject to the habitual residence test.

The applicants also argued that the habitual residence test is discriminatory because it confers automatic habitual residency on citizens of the Republic of Ireland, while other EU nationals are subject to the test. The court rejected this contention as well, referring to the case of Belgian State v. Humbel. The Humbel case involved a Belgian law that exempted citizens of both Belgium and Luxembourg from a school enrollment fee, while subjecting other EU nationals to the fee. Humbel, a French citizen, complained of discrimination, but his claim was denied. The Sarwar, Urbanek, & Getachew court dismissed the applicants' claims in much the same fashion as Humbel, stating that "[t]here is nothing unusual in the concept that rights of movement and rights of residence within the [EU] do not necessarily carry with them rights to maintenance." The Court of Appeal subsequently affirmed the lower court decision with respect to all the applicants. The habitual residence test had survived its first, though certainly not its last, major challenge.

112. EU Treaty art. 6.
115. See supra note 58.
117. Id. at 402.
B. Reversal of Fortune: Castelli & Tristan-Garcia

1. Castelli

Gaudenzio Castelli, an Italian citizen, came to the United Kingdom in March 1994. By February 1995, his business plans had failed and he was no longer able to support himself. In addition, Castelli's health had deteriorated; he would later be diagnosed as HIV positive. Castelli applied for housing and income benefits from the Westminster City Council. The council granted Castelli temporary accommodation under the Housing Act. However, the council later denied Castelli's application because he had failed the habitual residence test established by the new benefit guidelines. The council claimed it owed no duty to Castelli under the Housing Act, and further stated that Castelli had no right to reside in the United Kingdom.

Castelli appealed the council’s decision to an independent social security tribunal. The tribunal found Castelli to be habitually resident in the United Kingdom and homeless under the criteria of the Housing Act. The tribunal declared that his government benefits should be reinstated. Despite the tribunal's ruling, the council did not reinstate Castelli's benefits, stating that Castelli was not a "qualified person . . . lawfully resident under [EU] law. . . ." Castelli sought relief from the High Court.

2. Tristan-Garcia

Jose Tristan-Garcia faced a similar situation. He arrived from Spain in 1993, worked in England for several months, and returned to Spain in early 1994. Tristan-Garcia returned to the United Kingdom in February of that year and was unemployed until August 1995. He drew income support and housing benefits from June 1994 until April 4, 1995, when he received the following letter from the Immigration and Nationality Department:

120. Housing Act, supra note 39, at § 63 ("Interim Duty to Accommodate in Case of Apparent Priority Need").
122. Castelli's poor health was sufficient to meet the requirement of "vulnerability" to establish priority need. Id.
123. Id.
124. Id.
125. Id.
Dear Sir,
It has come to the notice of this Department that you have claimed income support since [June 17, 1994] and that you are still continuing to claim.
I should like to explain that as [an EU] national you are free to enter and reside in the United Kingdom in order to exercise Treaty rights conferred by the [EU Treaty]. These include the right to seek or take employment, or to reside here in a non-economic capacity provided that you have enough resources to avoid being a burden on public funds. However, according to our records you are not in employment, self-employment or business, nor are you seeking work with a genuine chance of obtaining work. The Secretary of State is therefore not satisfied that you are lawfully resident here under [EU] law and you should now make arrangements to leave the United Kingdom.
I should add that if you do not leave the United Kingdom on a voluntary basis then, in the present circumstances of your case, we will not take steps to enforce your departure from the United Kingdom.127

On April 24, 1995, the council informed Tristan-Garcia that he would no longer receive benefits; in a letter to Tristan-Garcia, the council included a copy of the April 4 IND letter.128 Despite IND’s suggestion that he leave the country, Tristan-Garcia remained in England. He successfully appealed the council’s decision, and his benefits were reinstated.129 Nevertheless, Tristan-Garcia sought damages from the council for a breach of statutory duty under the Housing Act.

3. Holding of the High Court

Castelli and Tristan-Garcia agreed to let the High Court consolidate their applications. The court ruled in favor of the council and affirmed the right of local housing authorities to make decisions regarding the citizenship status of applicants.130 The Castelli court relied heavily on the Tower Hamlets decision.

Once the propriety of the council’s decision-making powers had been decided, the court then evaluated the extent to which Castelli and Tristan-Garcia had a right to receive benefits in the United Kingdom. The court ruled that Castelli and Tristan-Gar-

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127. Id. (emphasis added).
128. Id.
129. Id.
130. Id.
cia were not within the bounds of their EU freedom of movement rights at the time of their applications for housing.\textsuperscript{131}

In an attempt to distinguish \textit{Tower Hamlets} from the \textit{Castelli} case, the two applicants pointed to a concurring opinion in \textit{Tower Hamlets} by Sir Thomas Bingham, the Master of the Rolls:\textsuperscript{132}

Once the immigration authorities make clear, by words or conduct, that they do not intend to seek the removal of an immigrant whether he be an illegal entrant or not, the housing authority may no longer rely on entry by deception to refuse public housing; at that point the immigrant forms part of the country's long-term, resident population, having the same rights as any other person.\textsuperscript{133}

The applicants then pointed to the IND letter of April 4, 1995, and alleged that because the IND stated it would take no action to remove the applicants from the United Kingdom, they had become a part of the resident population as described in Sir Thomas' opinion. The court dismissed this argument, calling it a "distortion" of the IND letter.\textsuperscript{134} The court analyzed the IND letter and concluded that while there was room for argument regarding its meaning, it should not be construed as granting a right of residence: "Local housing authorities could not as a matter of common sense be expected to house those whom the immigration authorities regarded as unlawfully present and required to leave. Parliament did not so intend."\textsuperscript{135}

The court further emphasized common sense, stating that when EU nationals become a burden on a Member State, they should "head home."\textsuperscript{136} Concluding that the housing authority had ultimately made the correct decision in both cases, the court denied the applicants' claims. They sought review from the Court of Appeal.

4. Court of Appeal Reversal

With regard to Tristan-Garcia's claim, the Court of Appeal adopted the more lenient interpretation of the IND letter announcing Garcia's presence as an overstayer. The court held

\begin{thebibliography}{136}
\bibitem{131} R. v. Westminster City Council ex p. Castelli & Tristan-Garcia, 28 H.L.R. 125, 1995 Queen's Bench Division (LEXIS, UK library, Allcas file).
\bibitem{132} The Master of the Rolls is the head of the Civil Division of the Court of Appeal. For a brief discussion of recent Masters, including Sir Thomas Bingham, see \textit{Joshua Rozenberg, The Search for Justice} 40-43 (1994).
\bibitem{133} 3 All E.R. 439, 447 (1993).
\bibitem{134} R. v. Westminster City Council ex p. Castelli & Tristan-Garcia, 28 H.L.R. 125, 1995 Queen's Bench Division (LEXIS, UK library, Allcas file).
\bibitem{135} \textit{Id}.
\bibitem{136} \textit{Id}.
\end{thebibliography}
that the "somewhat elliptical communication" by the IND did not signify that Garcia was no longer lawfully present in the UK.\textsuperscript{137} Rather, the letter was more like "the reaction of a reluctant host—I would rather that you left, but I will not force you to go."\textsuperscript{138} In the eyes of the Court of Appeal, mere suggestions that an applicant leave the country were not enough to result in the status of being "not lawfully present" in the UK. The lower court holding against Tristan-Garcia was reversed.\textsuperscript{139} Because Castelli did not receive a similar letter from IND, the court performed a separate analysis for his claim. Here the UK authorities had not informed Castelli that he had exceeded his lawful stay in Britain. Officially, despite the decision of the Westminster housing council, Castelli still had all the rights and privileges of an EU national lawfully present in the UK. The court therefore held that Castelli still deserved temporary accommodation under the Housing Act because he did not belong to a prohibited category.\textsuperscript{140} The lower court holding against Castelli was also reversed.\textsuperscript{141}

5. Reconciliation or Downfall?

The leading opinion in the Court of Appeal decision asserted that Castelli did not conflict with the ruling in the Tower Hamlets case.\textsuperscript{142} While that decision allowed local housing councils to decide the immigration status of applicants, the Castelli court emphasized that such local rulings have no official authority and are merely to be conducted for the purpose of the local housing council's determination of eligibility for housing benefits.\textsuperscript{143} In other words, an EU national is only officially "not lawfully present" when the national authorities declare it so. The court stated this was preferable not only to avoid conflicts between local and national government, but also to "reduce the risk of failures, even if inadvertent, to comply with [EU] Treaty obligations."\textsuperscript{144}

The Castelli opinion seems to resolve some of the tension between the Antonissen decision and the Tower Hamlets case.
Local authorities may make determinations of immigration status, but only for local purposes. The local decisions carry no official weight on a national or supranational level. The Castelli decision should aid EU nationals in their quest to appeal a denial of benefits without fear that the local authority decision on immigration status will block the appeal. However, it raises some doubts about the efficiency of the system. Why take the time of the local authorities by requiring them to perform a task for which they have no binding decision-making power? The answer appears to come from the fact that local authorities have to make a decision quickly, especially regarding temporary accommodation, and may not have time to wait for every application to be processed by IND. Conversely, when IND is forced to make a decision on the status of a potential overstayer, it might simply rely on the earlier, non-binding decision of the local authority in the interest of efficiency. If this were the case, the non-binding status of local authorities would take on a de facto binding nature over time, depending on the number and types of cases that reach the courts on appeal.

The IND policy on overstayers raises questions as well. If IND had been certain of Tristan-Garcia’s status, it should have taken steps to remove him under the auspices of the Immigration Rules, rather than supply him with ambiguous suggestions and veiled threats. The imprecise nature of the letter gives the impression that IND may be wary of drawing EU attention to its policy regarding EU “immigrants.” Too much restriction on freedom of movement would eventually draw such attention. On the other hand, complete freedom of access to the United Kingdom would open the door to benefit tourism and fraud.

The benefit tourism policy arguably gives local authorities and the Benefits Agency an effective right to rule on the eligibility of EU applicants. If an applicant is determined to be a worker under the relevant EU regulation, the applicant will be exempt from the habitual residence test. However, if the work is considered by authorities to be marginal or ancillary the applicant’s worker status may be denied, and the applicant will be forced to comply with the test. Antonissen warned against giving national legislatures too much power to limit rights of residence; it is reasonable to suggest local authorities and the Benefits Agency would be given even less respect by the European Court of Justice. Though this may be a distinction without a difference,

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the true test of the policy will come when the European Union renders a decision on the viability of the UK habitual residence test.

Such a decision may come sooner than the UK government would like. Though the European Commission\(^\text{147}\) signaled its general approval of the habitual residence test early last year,\(^\text{148}\) a British social security commissioner recently submitted a habitual residence case to the European Court of Justice.\(^\text{149}\) The case concerns Robin Swaddling, a UK citizen who worked in France for fifteen years only to return in 1995, and find he had become ineligible for benefits.\(^\text{150}\) The commissioner reinstated Swaddling's benefits, but sent the case to the European Court to determine whether his benefits should have been denied in the first instance.\(^\text{151}\) Despite the favorable ruling from the European Commission, it is possible the European Court of Justice will find fault with the specific facts surrounding the UK habitual residence policy and rule against the government. Ironically, it would be the UK's treatment of its own citizens, rather than EU nationals, that would bring the benefit tourism policy to an end.

VI. CONCLUSION AND SUGGESTIONS

A. Suggestions for the UK

The habitual residence test causes more trouble than it is worth. The government's policy to stop benefit tourists is a haphazard and subjective approach to solving the problem of entitlements fraud by foreign nationals. In addition, the NACAB report shows that the test harms UK citizens in the process. Serious reforms are in order if the government chooses to, and is able to, continue applying the policy.

The test used to detect benefit tourists should be largely objective, rather than a subjective habitual residence test based on vague criteria. Benefits should be allowed, provided the applicant gives the proper information to show qualification as a UK citizen, EU worker, or other acceptable benefit recipient. The concept of freedom of movement in the EU would prevent the UK from moving to a strict system similar to the one set up by

\(^{147}\) The European Commission is the bureaucratic wing of the EU, composed of representatives from each Member State. See generally British Polity, supra note 29, at 250-53.


\(^{150}\) Id.

\(^{151}\) Id.
the Personal Responsibility Act in the United States. However, a passport from an EU Member State, stamped with the date of entry, would be sufficient to alert the benefit authorities to an individual's status as an overstayer (i.e., an EU applicant either will have proof of employment, will have been in the UK less than six months, or will be an overstayer). The authorities could also require proof of employment to establish that an individual qualifies as an EU worker rather than a work seeker. The vague concept of "marginal and ancillary" employment should be replaced by well-defined criteria such as number of hours worked per week.

Whatever the objective criteria used, the same criteria should apply to all benefit applicants, whether applying for housing or income benefits. A joint council composed of agents of the Central Adjudication Service and the Department of Social Security should convene to construct a uniform system of guidelines. Common, objective guidelines should remove some of the structural problems associated with control of the benefit application process by two separate agencies. Section 432 of the Personal Responsibility Act, for example, calls for the United States Attorney General to "promulgate regulations requiring verification that a person applying for a Federal public benefit . . . is a qualified alien and is eligible to receive such benefit." The regulations are to be designed in such a way that they determine eligibility in a fair and non-discriminatory manner. Responsibility should similarly fall upon the United Kingdom Secretary of State for Social Security to establish uniform, objective rules to be used by both the Benefits Agency and the local housing councils.

The UK government might also recall the Browne ruling and attempt to develop some kind of EU-wide entitlements transfer system among the EU nations. True benefit tourists would probably be unable to establish a local connection in the UK. If benefit applicants cannot show a recent connection to the UK, either through employment or residence, housing councils or the Benefits Agency should be able to transfer the application back to the applicant's home country. Through the Browne method, the UK could avoid attracting welfare seekers while still standing by the principle of freedom of movement. This could become a

152. Personal Responsibility Act, supra note 1, at § 432(a). Subsection (b) requires the several states to construct verification plans that comply with the federal regulations.
153. Id. at § 432(a)(2).
more viable option as the Member States move closer to full economic union.\footnote{154}{See Michael Elliott, \textit{Hey, Can You Spare a "Euro"?}, \textit{Newsweek}, Feb. 17, 1997, at 48 (discussing the likelihood of European monetary union, and a single "Euro" currency, by 2002).}

Whatever reforms are made, and whether or not the habitual residence test stands, the UK should realize that the benefit tourism problem stems from the UK’s voluntary involvement in the EU. Membership in this supranational organization entails some sacrifice. By ascribing to the principle of freedom of movement, the UK signals its approval of an open-door, or at least a six-month revolving door, policy on immigration where EU nationals are concerned. While there are some exceptions to this principle, the UK should look to the EU for resolution of the problem, rather than trying to work alone against the “advancing tide” of EU nationals. By taking a defensive stance against “Euroscroungers,” the UK government may alienate itself from other Member States and do more harm than good in the long run.

B. \textit{Learning from the UK}

The US would do well to observe the problems the UK has encountered with its welfare system. The structural problems with the administration of benefits should be less troublesome in the US than in the UK, as federal regulations implementing the new Personal Responsibility Act will be uniform throughout the US. State regulations may go beyond the federal guidelines, but must meet the minimum federal requirements. Differences among the welfare systems of the several states will be understandable simply because the US has a federal system, unlike the unitary government in the UK.

The US should avoid the subjective, vague criteria surrounding the habitual residence test. Future intentions and “centres of interest” can be dangerous requirements when applied on a grand scale. If the US were to employ such criteria in determining eligibility for benefits, cries of racism and bias would inevitably, and rightfully, follow. It is of vital importance that uniform documentation and other objective criteria be used at both the state and federal levels in order to avoid the denial of benefits to American citizens who, like some minorities in the UK,\footnote{155}{See text accompanying notes 93-99.} might fail a test based on indeterminate requirements.

The US is not part of a supranational organization espousing freedom of movement. It is free as a sovereign nation to con-
trol its own borders, as well as its distribution of entitlements. It need not concern itself, at least at present, with the possibility of another nation or group of nations forcing its legislature to adopt an immigration policy that may seem contrary to its best interests, as the Eurosceptics in Britain would argue the EU has done. However, US policy-makers should consider what the Personal Responsibility Act does in terms of its effect, both economically and psychologically, on the incoming legal immigrant population. By restricting their access to benefits, the US is doing more than deterring immigrants' dependence on "public resources to meet their needs," or ensuring that "public benefits not constitute an incentive for immigration to the United States." The US is also sending legal immigrants a clear message: they are not as welcome as the rest of the resident population; they do not deserve the full benefits of life in America—at least, not for the first five years. In short, the Personal Responsibility Act tells legal immigrants that they are a "them," rather than an "us." Such a policy may result in divisions along lines of ethnicity and national origin as legal immigrants are gradually assimilated into the population. Americans should ask themselves whether the cost of those divisions would outweigh the savings from this partial closure of the US "open-door" policy on immigration.

156. Personal Responsibility Act, supra note 1, at § 400(2)(A) & (B).