Memo for the House of Commons Work and Pensions Committee

Pre-settled Status and benefits: C-709/20 *CG v the Department for Communities in Northern Ireland*

*The rules at issue*

1. Prior to Brexit, EU nationals and their family members had to show they had a “right to reside” in order to be eligible for key benefits. This typically meant being a worker, or being the family member of a worker, and/or having kept that status for five years to gain permanent residence. In preparation for leaving the EU, the UK government launched the EU Settled Status scheme in March 2019, creating two new rights to reside – settled status and pre-settled status. All EU nationals resident in the UK at the end of the transition period who want(ed) to continue to live in the UK thereafter were, and still are, required to apply to the EUSS.
2. The UK government then laid new regulations, The Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019, which came into force in May 2019, to stop pre-settled status from counting as a right to reside when claiming benefits, effectively requiring an additional right to reside for benefit eligibility. In two separate high-profile cases, claimants have challenged these regulations as discriminating on the basis of nationality.

*The parallel cases*

1. The facts of *Fratila & Anor v Secretary of State for Works and Pensions & Anor* [2020] EWCA Civ 174 arose before the end of the Brexit transition period, and so EU law applied. The claimants argued that the regulations treated EU nationals with a domestic right to reside differently from UK nationals with a domestic right to reside, contrary to Article 18 TFEU, invoking the case of C-456/02 *Trojani*, in which an EU migrant who had a residence permit based on national law, was entitled to rely on EU equal treatment provisions.
2. This argument was successful before the Court of Appeal of England and Wales, which gave a ruling on the 18th December 2020 quashing the regulations at issue. SSWP was granted permission to appeal to the UK Supreme Court, but the UKSC hearing was adjourned pending the outcome of a parallel case which had, in the meantime, been referred to the CJEU.
3. A first-tier social security tribunal in Northern Ireland, hearing the case of *CG v Dept for Communities*, referred questions on the exact same points raised in *Fratila*, to the CJEU, on 30th December 2020, and requested an expedited hearing. This was granted, and the case was heard in May 2021 – Case C-709/20. The Advocate General issued an Opinion on 24th June 2021, and the CJEU handed down its judgment on 15th July 2021.

*The outcome of the CJEU case*

1. The questions referred to the CJEU were essentially – are the regulations discriminatory on the ground of nationality, contrary to Article 18 TFEU? And, if so, are they indirectly discriminatory, and are they justified? Somewhat curiously, both the Advocate General and the CJEU sidestepped discussion of Article 18 TFEU, applying instead the secondary law provision of Article 24 of Directive 2004/38, even though the claimants’ “right of residence cannot however be regarded in any way as being granted ‘on the basis of’ Directive 2004/38 within the meaning of Article 24(1) of that directive” [83].
2. Nevertheless, by ploughing on and applying the Directive, the Court found that a claimant would have to meet the conditions of the Directive – so would have to show another right to reside as well as pre-settled status. However, the Court relied on caselaw involving claimants who had no right to reside at all, and ignored the arguments raised about the *Trojani* case.
3. As such, the Court found that the claimant, CG, was not entitled to protection from discrimination on the ground of nationality. However, the Court outlined a safety net offered by EU law. People in the claimant’s situation fall within the scope of EU law (Article 21 TFEU, on the right of Union citizens to move and reside within the Union), so are entitled to protection of the Charter of Fundamental Rights of the EU. States are obliged to ensure that EU nationals “in a vulnerable situation” [89] could live in **dignity,** as required by Article 1 of the CFR. Furthermore, in line with the duty to respect **private and family life** (Art 7 CFR), and to consider **the best interests of the child** (Art 24 CFR), States are also “required to permit children, who are particularly vulnerable, to stay in dignified conditions with the parent or parents responsible for them” [91].

*What happens next with CG?*

1. This case will be sent back to the first-tier tribunal, for the judge to apply the CJEU judgment, and to ascertain whether the claimant’s fundamental rights are placed at risk by the refusal of Universal Credit. As far as this specific case is concerned, **the CJEU gave a fairly strong steer that there was a significant possibility that the claimant’s rights were at risk** [42-44; 92].

*What happens next with Fratila?*

1. There are now a number of possible outcomes; the one now seemingly impossible outcome being that the Court of Appeal’s ruling would be upheld. The claimants in *Fratila*, following the logic of the CG case, would not be entitled to protection from nationality discrimination, upon which their case depended, and on which the Court of Appeal judgment turned.
2. Instead, it is possible that the Supreme Court will decide – possibly even without a hearing – that as a result of ­*CG*, the claimants’ case fails, and regulations remain intact. The claimants may seek to mount an argument based upon their fundamental rights, under the CFR. The court may dismiss such submissions, as not having been previously raised. This is a difficulty posed when the CJEU chooses to answer different questions to the ones referred by a national court.
3. It is therefore possible that thrashing out the meaning of the fundamental rights aspects of *CG* will fall to another case – argued from the start, and then appealed up and through the court ranks.

*What happens next with other (pre-2021) cases?*

1. How the fundamental rights fall-back will play out in other cases turns on two key questions. The first is: *who* should be assessing whether or not a claimant’s fundamental rights are at risk? It is possible that the DWP will reject UC claims then signpost claimants onto local authorities, suggesting that it is up to LAs to decide whose fundamental rights are at risk. Claimants who then did not receive adequate support would be left with the option of seeking judicial review of an LA decision, which is unpalatable because of the costs, difficulty, and low likelihood of success.
2. If, however, the DWP must decide whether *refusal of UC* incurs risks of fundamental rights violations, *before* then handing cases over to the LA, that decision becomes a potential avenue for appeal through the social security tribunal route, which is more accessible and affordable.
3. The wording of the CJEU judgment appears to support the latter interpretation: “the competent national authorities may refuse an application for social assistance, such as Universal Credit, *only after* ascertaining that that refusal does not expose the citizen concerned and the children for which he or she is responsible to an actual and current risk of violation of their fundamental rights”. The fundamental rights assessment must *pre-date* the refusal of Universal Credit.
4. **This would give pre-settled EU nationals scope to appeal refusals of UC on fundamental rights grounds**, though it is possible that this ground may only become manifest once the LA has made its decision on discretionary support, or even once a claimant has attempted to live on the discretionary support and experienced destitution/loss of dignity as a result. **Appeal procedures and deadlines must reflect this possible time-lag/retrospective dimension.**
5. The second key question is: what will be required to show that someone will not be/is not/has not been able to live in dignity? **We need to know the threshold for establishing an actual or potential fundamental rights violation. The existence of *some* support should not be enough to discharge all fundamental rights obligations.** Studies have revealed serious concerns about the adequacy of last-resort local authority support. A COMPAS report[[1]](#footnote-1) on local authority provision of section 17 support (Children Act 1989), found an LA providing payments that for a family with two adults and two children “would amount to little over £1 per person per day”. In “*all cases*” payments were “well below welfare benefit rates, below Home Office s95 support for destitute asylum seekers, “and even marginally below Home Office s4 ‘hard case’ support rates”.

*What happens with post-transition cases?*

1. The cases discussed above concern facts arising before the end of the transition period, during a time in which EU law was still applicable. From 1 January 2021, EU law no longer applies in the UK, but the Withdrawal Agreement does – and this is meant to have similar direct effect in UK law (that is, individuals should be able to rely on its provisions in domestic courts), so has been incorporated into UK law through the European Union (Withdrawal Agreement) Act 2020.
2. We note that the DWP have issued misleading guidance to decision-makers on the effect of the Court of Appeal’s quashing order, stating that “the judgment itself is only relevant to claims made up to the end of the transition period” (Memo ADM 02/21 [20]). As a result, at the EU Rights & Brexit Hub, we have seen decision makers stating “the judgment only applies to applications made prior to the end of the transition period”. This is an incorrect statement of the law. The Court of Appeal did not (and, cannot) issue a time-limiting quashing order, and SSWP cannot “unquash” regulations by dint of decision maker guidance.
3. However in light of *CG*, the main issue is the continuing role of the Charter of Fundamental Rights. While the CFR is central to the pre-2021 cases, its place in the Withdrawal Agreement is vague. It is included in the definition of “Union law” (Art 2(a)(i) WA), and the provisions on residence rights cite specific Union law provisions. For example, Article 13 WA draws upon “Articles 21, 45 or 49 TFEU… Article 6(1), Article 7(1), Article 7(3), Article 14, Article 16(1) [and] Article 17(1) of Directive 2004/38/EC”. Article 15 WA states that permanent residence (settled status in the EUSS), may be acquired through accruing periods of “legal residence or work *in accordance with Union law* before *and after* the end of the transition period”.
4. Article 4(3) WA states: “*The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law*.”
5. Article 4(4) WA states: “*The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period*”.
6. It is therefore arguable that WA/EUSS residence rights should be interpreted in line with the Charter of Fundamental Rights, insofar is it forms a part of the “methods and general principles” of Union law, and also in line with Charter case law, **obliging the UK to continue to consider fundamental rights before refusing Universal Credit to people with pre-settled status**.
7. A post-transition case would also require dealing with the mismatch, and gaps, between the EUSS and WA residence provisions. Article 18 WA permits the UK to require EU citizens “to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form”.
8. The rationale of the EUSS is that the UK has exercised the option under Article 18 WA to create a constitutive scheme, requiring all EU nationals resident in the UK to apply to the scheme or else lose their rights to reside entirely and irrevocably. It is the status that confers the rights, regardless of meeting the underlying conditions, and that status is evidenced in digital form.
9. The holding of pre-settled status is not dependent upon meeting conditions relating to economic activity and/or self-sufficiency, but in contrast temporary residence rights under Article 13 WA are dependent upon meeting those conditions.
10. If pre-settled status is to be treated as equivalent to Article 13 status, then the UK should be considered to have exercised its option to adopt “more favourable provisions” under Article 38 WA, and pre-settled status is a constitutive status which *in itself* should confer the rights under that Title, including the right of equal treatment under Article 23 WA.
11. If however, pre-settled status is not treated as equivalent to Article 13 WA status, because PSS holders have not met been required to meet the conditions of Art 13 WA, this begs two questions:
	1. *On what grounds has the UK imposed a constitutive scheme, with a cut-off deadline, if it is not on the basis of Article 18 WA? On what basis can/should people eligible for pre-settled status be obliged to register for it?*
	2. *What does count as an Article 13 WA status? How do holders show that they have it? How are pre-settled EU nationals who do meet the conditions of Art 13 WA distinguished from those who do not – and what status can they apply for, and what is corresponding document, under Art 18 WA that demonstrates that status?*
12. In sum, the problem we are faced with is a regime that seeks to be *constitutive* with regard to the application deadline, enabling the UK to disentitle long-term residents from rights to stay in the UK, regardless of meeting underlying conditions, but which seeks to be *declaratory* when it comes to the rights that flow from that residence status – requiring not just the holding of a status, but the demonstration of continuing to meet a set of underlying conditions. A close reading of Article 18 WA suggests instead that there is a trade-off in adopting a constitutive regime – it allows for more draconian exclusions, but inclusion must mean full inclusion.
13. **The government needs to formally decide whether pre-settled and settled status equate to temporary and permanent residence under the WA – and if not, to lay out its plans to comply with Article 18 WA.**
14. Finally, if people with pre-settled status do not, by virtue of that status alone, fall within the scope of Article 13 WA, it will be necessary to consider the effects of the broader personal scope of Article 10 WA. This confers Part II rights upon “Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter”. It does *not* require that they “continue to reside *in accordance with Union* law”. Nor does it stipulate the exercise of a Union law right to reside “up until the end” of transition, or “immediately before” the end of transition. It could include people who exercised their Article 6 Directive 2004/38 right to reside in the UK without conditions for three months at some point before the end of transition, and continued to reside there thereafter.
15. Once within the scope of Article 10 WA it is possible to explore the effect of Article 12 WA, which reproduces the equal treatment right contained in Article 18 TFEU. In *CG*, the CJEU suggested that Article 18 TFEU was supplanted by Article 24 of Directive 2004/38 where there had been movement between states. However, given the WA *only* applies where there has been such movement, a similar dismissal of Article 12 WA would mean that **we need guidance as to when, if ever, the non-discrimination provision of Article 12 WA would apply.**

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1. https://www.compas.ox.ac.uk/wp-content/uploads/PR-2015-No\_Recourse\_Public\_Funds\_LAs.pdf [↑](#footnote-ref-1)