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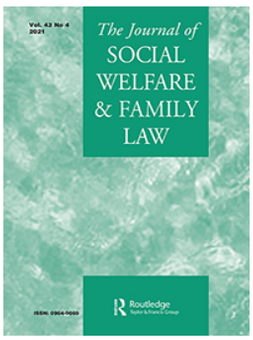

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Permission to discriminate – EU nationals, pre-settled status and access to social assistance

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EU nationals living in the UK have faced significant upheaval as a result of Brexit. To continue living in the UK, they must have made an application under the EU Settlement Scheme (EUSS) – created in the wake of the Withdrawal Agreement to register EEA nationals and their families. The EUSS creates two new domestic immigration statuses for those who can demonstrate they were resident in the UK before the end of the transition period (31 December 2020). 'Settled status' – where there is evidence of over five years residence, and "pre-settled status – where there is only evidence of less than five years. In *Fratila v Secretary of State for Work and Pensions* [2021] UKSC 53, the Supreme Court was asked whether those with pre-settled status should be entitled to equal treatment under EU law in relation to accessing social assistance. With the help of an unduly restrictive decision at the Court of Justice of the European Union (CJEU) (Case C-709/20 *CG v The Department for Communities in Northern Ireland* EU:C:2021:602), in a short judgment, the Court decided the answer was no: – the UK could withhold social assistance from those who cannot demonstrate an additional qualifying right to reside under EU law.

Fratila concerned two EEA nationals with pre-settled status who had applied for, and been refused, Universal Credit on the grounds that they did not have a qualifying right to reside. While pre-settled status would have sufficed when it was introduced, the UK government subsequently made new regulations in 2019 (the Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019) to specifically exclude pre-settled status from being a qualifying right to reside. In practice, this required anyone with pre-settled status to establish an *additional* qualifying right of residence under Directive 2004/38 – as reflected in the Immigration (European Economic Area) Regulations 2016/1052 – which is typically established through relying on work activity in the UK. These regulations were challenged on the basis that they discriminated on the basis of nationality and were contrary to the CJEU's ruling in C-456/02 *Trojani* EU:C:2004:488 that an EU citizen with an established right of residence should receive equal treatment rights under Article 18 TFEU. The Court of Appeal agreed with this and quashed the regulations, finding them to be directly discriminatory (*Fratila v SSWP* [2020] EWCA Civ 1741). The Secretary of State was granted permission to appeal to the UK Supreme Court. Meanwhile, a first-tier social security tribunal in Northern Ireland

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made a preliminary reference to the Court of Justice of the European Union (CJEU) asking the same questions that were being considered in *Fratila*, albeit about the essentially identical NI regulations. The Supreme Court appeal hearing was adjourned until the binding CJEU's judgement was handed down in July 2021.

The Supreme Court's judgment is very short, barely making six pages. Lord Lloyd-Jones (with all 4 other judges in agreement) finds that the CJEU's ruling in *CG* decisively answers the issues in question and overturns the decision of the Court of Appeal to quash the regulations. This comment therefore focuses on two remaining issues: (1) the impact on the rights of those with pre-settled status in the UK and (2) future arguments relying on the EU Charter or Withdrawal Agreement.

First, the judgment recounts the findings in *CG* where the CJEU determined that Article 24 Directive 2004/38 is the *specific* expression of Article 18 TFEU (protection from discrimination) for instances where EU citizens move to another Member State (para 10). EU citizens may only claim equal treatment rights in respect of access to social assistance if they meet the conditions of the Directive (Case C-333/13 *Dano* EU: C:2014:2358). These conditions include having a qualifying right of residence, as is required by the UK's 2019 regulations. The CJEU had not considered any arguments stemming from the judgment in *Trojani* covering equal treatment rights for EU citizens with a right of residence provided under domestic law. Instead, a sweeping adoption of the limitations of *Dano* are applied, muddling the circumstances of the claimants as analogous to those in *Dano*, where they possessed only a declaratory residence status, and ignoring pre-settled status as a constitutive right of residence in domestic law which is only provided to applicants who meet specific conditions (see O'Brien 2021). Adopting this approach, the Supreme Court states that the first issue – whether those with pre-settled status could rely on the equal treatment rights in Article 18 TFEU – is answered 'definitively' as no (para 11). As a result, the second issue, concerning whether the 2019 regulations were discriminatory, was found not to arise.

Once Article 18 TFEU falls away, the only protection for those with pre-settled status, according to the CJEU, is found in the EU Charter of Fundamental Rights. In *CG*, the EU Court identified an obligation on the UK to ensure that EU citizens can live in dignified conditions (Article 1), with respect for private and family life (Article 7) and taking into account the best interests of the child (Article 24). However, it is yet to be seen how the UK Courts will interpret this obligation. In *Fratila*, Lord Lloyd-Jones very swiftly dispenses with any arguments raised by the claimant in relation to rights under the Charter as it had not been raised in previous proceedings (paras 13–14). It is therefore still unclear what a protection from a violation of Charter rights will mean in practice for those with pre-settled status. It is possible that, rather than access to Universal Credit, the UK government may argue that their fundamental rights obligations are discharged through the availability of other discretionary support, such as under s.17 of the Children Act 1989. Although this support can fall far short of what is required for minimum subsistence (see Price and Spencer 2015) it has previously been deemed as sufficient to cover this risk for Zambranocarers in HC [2017] UKSC 73.

Pre-settled status therefore provides the right to stay in the UK, but not necessarily the right to access social assistance, unless an additional right to reside can be demonstrated. But there are significant gaps in what is deemed to meet the right to reside test. Previous research into the practice of this test in the UK has shown that it can often

lead to the exclusion of workers (especially when in part-time, temporary or casual work), long-term residents and those in vulnerable circumstances such as those fleeing domestic abuse, exploitation or trafficking (see O'Brien 2017). It can also have a discriminatory impact on disabled EU nationals and women whose work history is more likely to be disrupted by informal care. It was argued by the Secretary of State that requiring those with pre-settled status to establish a right of residence under the EEA Regulations 2016 merely maintained the pre-existing status quo. But this interpretation fails to appreciate the heightened risk associated with Brexit. Before, EU citizens who could not access welfare benefits could, at least technically, return to their Member State of nationality to receive social assistance and then travel back to the UK in the future if desired within the free movement rules. However, the end of free movement means that this is now not necessarily the case. No access to social assistance could force those with pre-settled status to leave and, if absent for long enough, be pushed into the UK's new immigration system and potentially lose their ability to return to the UK. The consequences of not having a qualifying right of residence are potentially much more severe for those with pre-settled status than EU citizens living in another EU Member State.

The ruling in *Fratila*, while disappointing, was not a surprise after the CJEU's bizarre judgment in *CG* gave permission for the UK to discriminate against the 2.5 million EEA nationals and their family members with pre-settled status. The effects of the scraps offered by the CJEU in the protection of rights under the EU Charter remain uncertain, both in the extent of support that may be deemed to meet the UK's obligation and how it would operate in practice. Future challenges will likely focus on the rights contained in the Withdrawal Agreement. These will have to identify whether those with pre-settled status fall into the personal scope of the Withdrawal Agreement and its equal treatment rights. The contention here concerns the disparity between the conditions to be granted a right to remain in the UK under Article 13 of the Withdrawal Agreement, which permitted the UK to apply the same right to reside criteria as part of the EUSS, and the less arduous 'actual residence' approach taken to granting pre-settled status. Should pre-settled status not be treated as equivalent to the right to reside in Article 13 of the Withdrawal Agreement, what would? And would the UK have failed to meet its obligations by not offering a separate status which matches that in Article 13? On the other hand, should pre-settled status be deemed equivalent to the rights in the Withdrawal Agreement, the courts can then return to the question of whether the 2019 regulations are discriminatory. As it stands however, until – and if – those 2.5 million holders of pre-settled status can upgrade to settled status, access to welfare benefits and housing support will remain largely contingent on demonstrating sufficient economic activity to meet the right to reside criteria.

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