The Great EU Citizenship Illusion Exposed: equal treatment rights evaporate for the vulnerable

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**Abstract**

EU nationals in the UK are going through an unprecedented shift of status. In order to retain their right to reside, they have had to apply to the UK’s EU Settled Status Scheme, to obtain either settled or pre-settled status – reflecting the distinction between permanent and temporary residence rights under the EU/UK Withdrawal Agreement. But the UK government has decided that pre-settled status does not entail equal treatment rights when it comes to accessing social assistance. In a dramatic turn of litigation events, this decision has been challenged in twin, parallel cases. In the first, *Fratila*,[[1]](#footnote-1) the Court of Appeal of England and Wales quashed the regulations, as contrary to the landmark *Trojani[[2]](#footnote-2)* ruling that an EU citizen with a right to reside is entitled to benefit from equal treatment rights *as an EU citizen*. But that reasoning has been – rather startlingly – upended in this case. The CJEU ignore *Trojani* completely, drawing from *Dano[[3]](#footnote-3)* a sweeping exclusion from equal treatment rights for those not in work and without sufficient resources. The only effect of having a domestic right to reside, according to the Court, is the opportunity to invoke the Charter of Fundamental Rights as a last resort. This judgment will have ramifications for EU migrants in the whole of the EU, casting aside the primary law right to non-discrimination and exposing EU citizenship’s great illusion of social solidarity.

**Factual and legal background**

Some of the most vulnerable EU citizens caught up in the Brexit maelstrom in the UK have been waiting on this CJEU decision – and they have been sadly let down. And while this case developed as a quirk of Brexit, the judgment has consequences for the construction of equal EU citizenship rights and equal treatment throughout the whole of the EU.

The case concerns the rights of holders of “pre-settled status” in the UK to access welfare benefits on equal terms with UK nationals. Before the introduction of special measures to deal with the departure from the EU, EU/EEA nationals claiming key means-tested benefits in the UK had to demonstrate a ‘right to reside’ under Directive 2004/38,[[4]](#footnote-4) as reflected in the Immigration (European Economic Area) Regulations 2016.[[5]](#footnote-5) There are a number of ways to show a right to reside, but because of restrictions placed on the ‘self-sufficient’, on students, and on work seekers, this typically means claimants must have worker status, be the family member of a worker, or have held either of those statuses continuously for five years on order to rely on permanent residence.[[6]](#footnote-6)

In amending the Immigration Rules to prepare for Brexit, the UK created two new rights to reside – settled and pre-settled status under the EU Settled Status scheme (EUSS).[[7]](#footnote-7) Neither status required meeting any conditions as to economic activity, or relating to rights to reside under the 2016 regulations or Directive 2004/38. Broadly speaking, those with five or more years’ of continuous residence[[8]](#footnote-8) in the UK could get settled status, while those resident for a shorter period at the point application would be entitled to pre-settled status. All EU nationals resident in the UK at the end of the transition period who wanted to continue to live in the UK thereafter were required to apply to the EUSS. Those who did not apply by the 30th June 2021 have an opportunity to apply late, provided they can supply reasonable grounds for missing the deadline.[[9]](#footnote-9) This scheme is taken to discharge the UK’s obligations in the UK/EU Withdrawal Agreement,[[10]](#footnote-10) which is given effect in the European Union (Withdrawal Agreement) Act 2020.

After having opened up the EUSS scheme in March 2019, the UK government then laid new regulations[[11]](#footnote-11) 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 challenged these regulations as discriminating on the basis of nationality. In *Fratila*, the Court of Appeal of England and Wales heard arguments in October 2020, then handed down a judgment on the 18th December 2020, finding in favour of the claimants – drawing upon *Trojani* to find that once a right to reside was granted to an EU national by a State subject to EU law, that State could not discriminate against them on the grounds of nationality. The regulations at issue in *Fratila* discriminate against EU nationals with a domestic right to reside, as compared to UK nationals with a domestic right to reside. That the UK government wished to preserve the pre-existing rules on benefit entitlement was not enough – the fact of holding pre-settled status had legal consequences.

The Secretary of State for Work and Pensions applied for, and was granted, permission to appeal to the UK Supreme Court. In the meantime, however, a first tier social security tribunal in Northern Ireland, also hearing an appeal from a claimant relying on her pre-settled status to claim benefits, made a preliminary reference to the CJEU, which was recorded on the 30th December 2020. The UK Supreme Court case was later adjourned, pending the CJEU judgment – *CG*[[12]](#footnote-12) – the subject of this case note.

CG, an EU citizen with dual Croatian and Netherlands nationality, had moved to the UK (Northern Ireland) in 2018, and had lived with her partner. She applied to the EUSS scheme, and was granted pre-settled status in June 2020. She later applied for Universal Credit. At that point, she was a single parent with two very young children, living in a refuge having fled her partner due to domestic violence, with ‘no resources and… no access to any social security benefits at all to provide for her and her two children’s needs’.[[13]](#footnote-13) Her UC application was refused because the regulations at issue required her to show another right to reside before she could be eligible for UC. The claimant’s appeal countered that the regulations infringed Article 18 TFEU, and constituted discrimination on the grounds of nationality. The tribunal stayed proceedings and referred two questions to the CJEU – essentially, whether the regulations were (directly or indirectly) discriminatory contrary to Article 18 TFEU, and if they were indirectly discriminatory, whether they were justified.

**Opinion of the Advocate General**

Advocate General de la Tour’s Opinion contains some surprising turns of reasoning, following a different route to the Court of Appeal in England and Wales, but reaching the conclusion that the exclusion, as it stands, is unlawful. The Advocate General found that because the benefit at issue was a form of social assistance, which is addressed in Article 24(2) of the Directive, and because that same provision addresses the principle of non-discrimination regarding “the right of Union citizens to reside on the territory of another Member State”, the claimant’s case must fall within the scope of the Directive, and primary law can be put to one side.[[14]](#footnote-14) The ensuing analysis was thus framed by Directive 2004/38.

Noting that the EUSS scheme did not require compliance with economic conditions in order to acquire pre-settled status, the Advocate General found that the UK had exercised its prerogative, under Article 37 of Directive 2004/38, to adopt more favourable measures. This led to the question as to whether, in adopting a more favourable measure, a State had full discretion as to its consequences; in *Ziolkowski and Szeja*[[15]](#footnote-15) the CJEU had stated that Member States could decide “the legal consequences of a right of residence granted on the basis of national law alone”.  However, as that case was about permanent residence the AG considered that its ratio “cannot be usefully transposed in a matter concerning equal treatment… [and] social assistance”. Article 16 of the Directive *created* the right of permanent residence, so the relevance of periods of residence under domestic law was a matter for domestic law. In contrast, Article 24 “merely constitutes the *implementation*, in relation to the right of residence of Union citizens, of the principle of non-discrimination between Union citizens laid down in Article 18 TFEU” – it does not create it. Those lawfully resident on the territory of another Member State must be able to benefit from non-discrimination rights.[[16]](#footnote-16)

Having outlined these points, he acknowledged that a logical conclusion could be that pre-settled status holders enjoy “unrestricted access to the social assistance enjoyed by nationals of the host State”. But he then swerved to suggest that such an outcome of “automatic application” would “go beyond the balance sought by the EU legislature in Directive 2004/38”, given that the right of residence “was granted to the Union citizen without conditions as to resources or social insurance”. He drew attention to the Commission’s argument that awarding a right of residence with no conditions attached “must not have the effect of obliging Member States to refrain from carrying out any check as regards entitlement to social benefits”.[[17]](#footnote-17) In other words, a conclusion based on the law as outlined would go too far, according to the EU Commission, and so the conclusion must be based upon an intuited right of States to not pay benefits to non-working EU nationals framed as unreasonable burdens.[[18]](#footnote-18)

In noting that “in certain circumstances” economically active Union citizens with pre-settled status were entitled to Universal Credit, and that on the other hand “certain United Kingdom nationals” had to prove their residence to be eligible, the Advocate General concluded that direct discrimination could be “discounted”, but that there was likely indirect discrimination.[[19]](#footnote-19) He then found that the systematic refusal of benefits provided for in the regulations likely went beyond what was necessary, so failed the proportionality test for justification.[[20]](#footnote-20) Instead, claimants should be subject to an individualised assessment, and a proportionality assessment which should take account of a claimant’s “definite degree of integration”,[[21]](#footnote-21) and whether the claim for benefit was likely to be temporary.[[22]](#footnote-22) Drawing creatively upon *Chavez Vilchez,*[[23]](#footnote-23)the Advocate General suggested that the proportionality assessment should be conducted through the prism of fundamental rights – in particular, the rights to dignity, under Article 1 of the Charter of Fundamental Rights of the EU (CFR); to private and family life, under Article 7 CFR, and the best interests of the child (Article 24 CFR).[[24]](#footnote-24) Those principles, applied in *Chavez Vilchez* when determining the residence rights of a third country national parent, could be “transposed *a fortiori*, in matters relating to social assistance”.[[25]](#footnote-25)

In light of this analysis, the Advocate General concluded that by not requiring competent authorities to assess “all of the individual circumstances that characterise the situation of extreme poverty of the person concerned” and of the effects of refusing benefits, considering “the right to respect for family life and of the best interests of the child”, the regulations were disproportionate.[[26]](#footnote-26) As such, they created unjustified indirect discrimination.

**Judgment**

The Court noted the request for an expedited procedure, and explained that, as the referring court had confirmed that “CG had no financial resources, did not currently have access to State benefits and was living in a women’s refuge and… that the fundamental rights of her children risked being violated”,[[27]](#footnote-27) the CJEU had expedited the case.

On the substantive questions referred, the Court adopted a similar starting point to that of the Advocate General – sidestepping the application of Article 18 TFEU. After noting that as a Union citizen who had moved to reside in another Member State, CG could “in principle” rely on Article 18 TFEU, the Court then added that this provision could only apply independently where EU law did “not lay down specific rules on non-discrimination”. As the principle of non-discrimination was “given specific expression in Article 24 of Directive 2004/38 in relation to Union citizens who exercise their right to move and reside within the territory of the Member States” this explicitly supplanted Article 18 TFEU and became the focus of the judgment; the question of discrimination had to be assessed “in the light of Article 24 of Directive 2004/38, and not of the first paragraph of Article 18 TFEU”.[[28]](#footnote-28)

The Court then noted that Universal Credit, the benefit at issue, could be classified as social assistance, and added that none of the derogations from the principle of equal treatment, outlined in Article 24(2), applied to the claimant’s situation.[[29]](#footnote-29) However, the Court divined from its own case law, in particular *Dano*, a right to restrict benefits wherever a claimant posed an “unreasonable burden on the social assistance system”.[[30]](#footnote-30) The Court did not wish to “risk allowing economically inactive Union citizens to use the host Member State’s welfare system to fund their means of subsistence.”[[31]](#footnote-31) This translated into a general right for Member States to refuse social benefits to the ‘economically inactive’ without sufficient resources.[[32]](#footnote-32) As CG was without resources, she was “likely to become an unreasonable burden on the social assistance system” and was not entitled to protection from discrimination under Article 24(1) of Directive 2004/38.[[33]](#footnote-33) Departing from the approach taken by the Advocate General, there was no discussion of proportionality, or consideration of non-economic factors in ruling out a right to equal treatment. The existence of a domestic, economically unconditional right to reside in the form of pre-settled status did not alter that conclusion.[[34]](#footnote-34) The UK scheme was an example of a Member State exercising its right to adopt “more favourable provisions” under Article 37 of Directive 2004/38, and following *Ziolkowski and Szeja*, the UK could specify the consequences of a right to reside based on domestic law.[[35]](#footnote-35)

This was not, however, the end of the matter. In deciding whether to grant benefits to someone in CG’s situation, the UK was implementing EU law,[[36]](#footnote-36) and so had to comply with the Charter of Fundamental Rights of the EU.[[37]](#footnote-37) In circumstances such as CG’s, “a mother of two young children, with no resources… who is isolated on account of having fled a violent partner”, national authorities could only refuse social assistance “after ascertaining that that refusal does not expose the citizen concerned and [her] children… to an actual and current risk of violation of their fundamental rights”, especially Articles 1, 7 and 24 of the Charter. Such an assessment could take account of other means of assistance from which the family “may actually and currently benefit”.[[38]](#footnote-38)

**Analysis**

The most striking aspect of this judgment is that the CJEU has taken a much more restrictive approach to protecting the rights of EU nationals in the UK, and has shown considerably less fidelity to the ratio of *Trojani*, than has a UK national court. The Court of Appeal of England and Wales in *Fratila* found fairly straightforwardly, albeit in a majority judgment,[[39]](#footnote-39) that *Trojani* precluded the adoption of legislation that subjected EU migrants with a clear right to reside in a Member State, to nationality discrimination. The CJEU ruling in *CG* now makes it impossible for the UK Supreme Court to follow the Court of Appeal. However, in so doing, it relies upon shaky, and sometimes incoherent reasoning. This case note will focus on three key, problematic arguments put by the Court in the *CG* judgment – that Article 18 TFEU has no application here; that *Dano* endorses a general right to refuse benefits on grounds of “unreasonable burden”, regardless of a pre-existing right to reside; and that fundamental rights provide an appropriate safety net for claimants such as *CG*. Finally, the analysis moves on to discuss the possible application of *CG*, in *Fratila*, in other pre-2021 cases, and in 2021-onward cases governed by the citizens’ rights provisions of the Withdrawal Agreement.

*Article 18 TFEU – where did the primary law go?*

In arguing that pre-settled status, as a right to reside, should trigger an entitlement to equal treatment, the claimant had largely relied upon Article 18 TFEU – a primary law basis for equal treatment on the ground of nationality. This has been significant partly because of the CJEU’s tendency over the past decade to treat secondary law, in particular the Citizens’ Residence Directive 2004/38 (“the Directive”), as imposing conditions precedent to the primary law right. Following this approach a right to reside, or to equal treatment, just does not materialise until those conditions are met – see for instance, the transposition of the limitations in the Directive over to Regulation 883/2004 in *Commission v UK*.[[40]](#footnote-40)

Prior to *CG*, primary law made a brief come-back in a recent Opinion delivered by Advocate General Saugmandsgaard Øe in the case of *A*.[[41]](#footnote-41) The Advocate General referred specifically to the rights laid down in Article 21 TFEU, while finding that citizenship of the Union, once “destined” to be the fundamental status of EU nationals,[[42]](#footnote-42) “has become the fundamental status of nationals of Member States”.[[43]](#footnote-43) Similarly, in *Krefeld*,[[44]](#footnote-44) the CJEU found that the derogations within the Directive from Article 18 TFEU and the right to equal treatment must be “interpreted strictly, and in accordance with the provisions of the Treaty, including those relating to Union citizenship and freedom of movement for workers”[[45]](#footnote-45) – and did not apply to a right to reside which arose outside of the Directive; in that case from Regulation 492/2011.[[46]](#footnote-46) Ristuccia argues that the Court has thus “spelt out that Directive 2004/38 does not set overarching principles exportable to the whole area of free movement of persons”.[[47]](#footnote-47)

So, it seemed as though we might be emerging from the Tyranny of the Directive; the conditions it contains are not all-encompassing. Which makes the reliance in *CG* on Article 18 TFEU quite natural, given it turns on the consequences of a Member State (or rather, a quasi-Member State as was the UK during transition), awarding a domestic right to reside, not based on the Directive, to people who do not claim to fall within the categories of the Directive.

However, it was not to be. The CJEU has reasserted the supremacy of the Directive in both *CG*, and *A*,[[48]](#footnote-48) handing down both judgments on the same day. In *A*, the Court declined Advocate General Saugmandsgaard Øe’s invitations to apply primary law, or to engage with the fundamental status of EU citizenship, while in *CG* the Court adopted some tricksy intellectual footwork in order to sidestep consideration of Article 18 TFEU. The finding that a right to reside which arose outside of the Directive should be governed by the sovereign conditions of that Directive contrasts sharply with the *Krefeld* judgment, and curiously, the difference seems related to a difference in rhetorical emphasis. In *CG*, Article 18 “is given specific expression” in Article 24(1) – an emphasis suggesting that the duties of Article 18 are fully discharged in Article 24. In contrast, in *Krefeld*, Article 24(1) is “merely a specific expression” of Article 18 TFEU. The use of an indefinite article, combined with the word “merely”, suggests at once that *other* specific expressions exist, and moreover, that they are less significant than the *general* rule.

The “given specific expression” formulation in *CG* allows the court to treat Article 18 TFEU as supplanted and dismissed – notwithstanding that the Court *itself* acknowledges later in the judgment that the claimant’s situation *does not fall within Article 24(1)*. Article 24(1) provides for equal treatment for “all Union citizens *residing on the basis of this Directive* in the territory of the host Member State”. The Court notes that pre-settled status, as held by CG “cannot however be regarded in any way as being granted ‘on the basis of’ Directive 2004/38 within the meaning of Article 24(1)”.[[49]](#footnote-49) So how on earth is an equal treatment right specifically articulated for people residing on the basis of the Directive, the appropriate ‘specific expression’ of Article 18 TFEU, for people with a right to reside *which is in no way based on the Directive*? Rather, it is an expression, as the Court itself notes,[[50]](#footnote-50) of Article 21 TFEU – the primary law right to move and reside conferred upon Union citizens. It is hard to imagine a scenario better suited to an explicit analysis of Article 18 TFEU rights.

And here we must return to *Trojani*. The claimants’ arguments centred on the finding in *Trojani* that while Member States could make a right to reside conditional on meeting certain economic conditions, once a Member State granted an EU migrant a right to reside, that migrant was entitled to rely on a primary law-based right to equal treatment on the ground of nationality. The Court of Appeal of England and Wales decided in the claimants’ favour in *Fratila*, on the basis of *Trojani* (mentioning it thirty times)*.*[[51]](#footnote-51) That judgment turned on whether *Trojani* is still good law, and the Court of Appeal found that it was: “Far from *Trojani* no longer remaining good law, the CJEU has again [in *Krefeld*] expressly adopted the same reasoning, leading to the same outcome”.[[52]](#footnote-52) The UK had granted EU nationals a right to reside, in the form of pre-settled status, which was not conditional upon economic activity or sufficient resources, which was analogous to the situation in *Trojani*, opening up a right to non-discrimination based on Article 18 TFEU. But this core argument was not so much dismissed as ignored within the CJEU. In outlining the background of the case, the Court note *once* that the claimant relies upon *Trojani*,[[53]](#footnote-53) and then… never mentions it again. It is also astonishing that the Court does not mention even once the high level, high-profile and simultaneous case of *Fratila*. By the time of the hearing in May 2021, the Court of Appeal had long-since handed down its judgment on exactly the same questions, and permission to appeal to the Supreme Court had been granted. The judgment was included in the materials before the CJEU, and the claimant’s case made substantial references to it.

So *CG* sheds no light upon the *Trojani* analogy with pre-settled status. It is not clear – given the Court does the judicial equivalent of putting its hands over its ears and singing ‘la la la’ – whether this judgment should be taken as overturning *Trojani*. On the face of it, it seems to do so, by endorsing a general derogation from equal treatment obligations when it comes to ‘economically inactive’ EU migrants, regardless of other rights to reside. This derogation is sweeping; there is no space to discuss integration or real links, or other mitigating factors, because there is no space to discuss proportionality. There is no space to discuss proportionality, because there is no space to examine justification. There is no space to examine justification, because there is no protection from discrimination. So, as in *Dano*, we see a departure from the standard procedure of treating benefit restrictions as a form of indirect discrimination, which could be readily justified (with minimal – and in some cases no – proportionality review).[[54]](#footnote-54) Rather, the Court has simply found that people who do not meet the specific residence conditions of the Directive are *ex ante* simply not entitled to equal treatment.

However, even now the Court shies away from ringing a clear death knell to *Trojani* and citizenship-based claims to equal treatment. The discrimination-dodge relies upon the incoherent (and inappropriate) shunting of the analysis away from primary law to Directive 2004/38, which leaves open the question of whether *Trojani* might apply, should the Court accept that a case fell within the remit of Article 18 TFEU. The problem with keeping that option open, is that, following *CG* it is hard to see exactly when the Court would accept that Article 24(1) is not the applicable provision, given that it considers Article 24 to displace Article 18 TFEU wherever Union citizens “exercise their right to move and reside within the territory of the Member States”. This judgment appears to significantly diminish what otherwise appeared to be a broad and important right – even a fundamental one, intertwined with EU citizenship itself – to something with almost no autonomous force, and does so without acknowledging[[55]](#footnote-55) that just a few months earlier, in *Krefeld*, the Court found that the limitations within the Directive could not be imposed where a claimant had a right to reside independent of the Directive. This is a worrying result, with potentially damaging consequences for the understanding and application of Article 18 TFEU throughout the EU; undermining claims that non-discrimination on the grounds of nationality is both a fundamental right of EU law, and also a “general principle” of EU law.

The rationale for shielding *Krefeld* claimants from the conditions contained in Directive 2004/38, where their right to reside is based on Article 10 of Regulation 492/2011, but not if their right to reside is based on domestic legislation is not explained. They are both rights independent of the Directive. And it is this distinguishing feature which makes the application of *Dano* baffling.

*The generic Dano-based right to refuse benefits*

In contrast with the single passing reference in the background section that the claimants had cited *Trojani*, the Court draws upon *Dano*, in its “substance” section nine times. The list includes a suggestion that following the *Dano* judgment, Member States have a right to impose the Directive’s conditions upon EU nationals.[[56]](#footnote-56) The trouble with the heavy reliance upon *Dano*, is that CG did not claim equal treatment by virtue of Article 24(1), because she was not residing on the basis of the Directive. In *Dano*, and its associated line of cases, (*Alimanovic; Garcia Nieto*[[57]](#footnote-57)*; Commission v UK*) the claimants had no alternative right to reside, and so had to rely upon Directive 2004/38. The residence certificate in *Dano* was a declaratory document confirming the exercise of rights under Directive 2004/38, so did not confer a right in itself.[[58]](#footnote-58) As such, the Court found that their rights to reside must comply with the Directive’s conditions.

But the claimant in *GC* argued that possession of another right to reside, awarded as a result of domestic law took the case out of the scope of the Directive. She did not seek to rely on, nor did she fall within the scope of, Article 24(1) CRD. The claimant’s invocation of Article 18 TFEU was based on having a right to reside that did not fit the framework of that directive. However, the Court summarily dismissed the relevance of another right to reside; the finding that she posed an unreasonable burden on the UK’s social assistance system “cannot be called into question by the fact that CG has a right of temporary residence, under national law, which was granted without conditions as to resources”.[[59]](#footnote-59) The Court suggested that it would be illogical to allow a claimant to rely on a non-discrimination provision in the same Directive under which she would be refused a right of residence. But – again – the claimant was not seeking equal treatment under the Directive. The Court may well have felt a reactionary impulse to avoid a generic right to equal treatment displacing the conditions placed on a more specific, albeit different, right. But such an impulse is not exactly sound legal authority. The fact of a right to reside arising outside of the Directive necessarily required examining the rights provided for outside of the Directive, and the *Krefeld* analogy warranted much greater (indeed, just some) analysis. Put simply, the creation of pre-settled status has legal consequences, whether they are intended or not, and whether the UK (or the CJEU) likes them or not, and it is disingenuous in the extreme to pretend that it simply “cannot call [a claimant’s lack of rights] into question”.

Pre-settled status is expressly and deliberately not declaratory. The whole EUSS scheme has posed a number of threats to the rights of vulnerable EU/EEA nationals and their family members – the foremost being the UK’s choice to adopt a constitutive system.[[60]](#footnote-60) Actually having applied for and having been awarded the status is necessary for the right to reside to exist, making the deadline for application a hard deadline. Would-be applicants who cannot demonstrate a reasonable ground for a later application, or who apply very late and so lose the benefit of the doubt,[[61]](#footnote-61) may topple over a cliff-edge, losing all rights of residence, and becoming subject to hostile environment policies, regardless of whether or not they actually met the underlying conditions for EUSS status.[[62]](#footnote-62) That is the nature of a constitutive, rather than declaratory scheme.

While the constitutive approach permits a draconian approach to the missed deadline, the trade-off is that once you have the status, you have the rights that flow from it. In shaping its post-Brexit regime for conferring a residence status on EU nationals covered by the Withdrawal Agreement, the UK did have the option to keep the same conditions that Directive 2004/38 attaches to residence rights. It could have continued with a declaratory scheme (the Withdrawal Agreement permitted, but did not oblige, the UK to require registration for a status by a given date). But the UK chose not to do this – a choice with legal consequences. The Court treated the creation of pre-settled status as an exercise of Article 37 Directive 2004/38 – the provision allowing Member States to adopt provisions that would be more favourable to persons covered by the Directive. It then went on to note that this could not “in any way” be regarded as granted on the basis of the Directive, and that where Member States adopt more favourable residence provisions, it is up to them “to specify the consequences of a right of residence granted on the basis of national law alone”, citing *Ziolkowski and Szeja*.[[63]](#footnote-63)

There are two key problems relying on *Ziolkowski and Szeja* in this way. First, as the Advocate General noted, the rights claimed are starkly different. *Ziolkowski and Szeja* concerned the right to permanent residence, a specific right to reside created and conferred by Directive 2004/38. It was relatively unsurprising that the Court found that in order to assert a right that is (in EU law) only located in Directive 2004/38, one had to comply with the conditions of that Directive. But in *CG*, we are dealing with equal treatment – a right which has a basis elsewhere. The second problem is a misrepresentation of the lee-way actually granted to Member States. They simply cannot and do not have free rein over the legal consequences of a national right to reside. Yes, they can adopt a series of random consequences if they wish – the right might entail free juggling lessons, or a top hat, or a letter from the Queen. But such consequences must not be awarded in a discriminatory fashion; they must abide by EU law and respect the general principles of EU law. And equal treatment or non-discrimination “is one of the general principles of Community law”, as the Court has repeatedly emphasised.[[64]](#footnote-64)

Moreover, the Court has previously stressed the need to interpret a Union measure “in such a way as not to affect its validity and in conformity with primary law as a whole… including with the principle of equal treatment”.[[65]](#footnote-65) Article 37 of Directive 2004/38 should thus be interpreted as not giving a Member State a license to discriminate against EU nationals to whom it has awarded a residence right. It is here worth contrasting the approach in *CG* with that in *Sotgiu*,[[66]](#footnote-66) where the Court found that permitted derogations from Article 48(4) EEC (now Article 45 TFEU) only applied to the admission of foreign nationals to certain jobs in the public sector – it did not justify discrimination (in matters of, e.g. remuneration) once a Member State had chosen to admit a foreign national to that role. Member States could control EU nationals’ access to those posts, but once they granted access, they were bound by equal treatment obligations. In the context of *CG*, the UK chose not to exercise its opportunity to restrict access to residence rights, but then sought to discriminate against those to whom it had awarded those rights. And the CJEU has, more or less, given its blessing.

By denying that there is any protection from discrimination, the Court found there was no need for justification, and so no proportionality analysis was required.[[67]](#footnote-67) But this rather ducks its own earlier findings that *derogations* from equal treatment (not just justifications for unequal treatment) “must comply with the principle of proportionality”. Proportionality “is one of the general principles of Community law”, even where an EU measure permitting a derogation “does not expressly provide that the [measure] be proportionate”.[[68]](#footnote-68) If a specific derogation from equal treatment which is expressly provided for in EU legislation must be interpreted narrowly and still subject to a proportionality assessment, it is unclear why a general waiver of equal treatment duties derived from the Court’s intuition, should not be subject to equivalent restrictions. A brief consideration of the proportionality of the UK measures would have to take account of four key features: the seriousness of the disadvantages created; the fact that the rules cannot have any effect on purported “benefit tourism”; the reducing number of people affected; and the time limit on pre-settled status. First, while not being able to access to social assistance could drive people into destitution, there is the added disadvantage that the normal rules of free movement do not apply. If the would-be claimant returns to their home state to secure temporary support, then they may find that they have interrupted the continuity of residence needed in the UK to secure settled status at a later date. If their right to return and reside permanently is jeopardised, this creates a significant extra detriment. Secondly, no “new” arrivals – those arriving from 1 January 2021 onwards (unless specific family member rules apply) can apply for pre-settled status, so the rules cannot have any supposed deterrent effect with regard to that mythical cohort, benefit tourists.[[69]](#footnote-69) Third, we are talking about claims from a minority of a minority of a minority; EU citizens resident in the UK before the end of transition, who only qualify for pre-settled but not yet settled status; who cannot demonstrate another right to reside; and who need to claim benefits. And as this finite number of people obtain settled status, the numbers with pre-settled status can only go down. And finally, as pre-settled status only lasts for a maximum five years, before which holders should become entitled to settled status, we are only talking about a finite period of time. Regardless of whether these points speak to whether the rules are proportionate in aggregate, if we consider individual claims it is arguable that outright refusals of benefit would be disproportionate in certain circumstances. For example, there is a proportionality argument to be made where someone with pre-settled status has been resident for four and a half years, has a record of work and contributions, but who at this point in time happens to be in need and without another right to reside, and who will within six months have gained settled status (and expects to be back in work then too). But the Court in *CG* seems to find any claim from anyone without sufficient resources amounts to an unreasonable burden,[[70]](#footnote-70) without placing any onus at all upon the UK to produce “objective, detailed analysis, supported by figures” which is “capable of demonstrating, with solid and consistent data, that there are genuine risks to the balance of the social security system”, as required in *Commission v Cyprus*.[[71]](#footnote-71)

In avoiding a proportionality assessment the Court declined the opportunity to expand upon the Advocate General’s innovative and constructive suggestion that proportionality assessments should be informed by fundamental rights.[[72]](#footnote-72) Rather than using the Charter as an interpretative prism for an established and general principle of Union law, the Court relegates fundamental rights to a rather weak, sweeping-up function.

*The problematic reliance on the Charter*

Having dismissed the possibility of a discrimination claim, the Court acknowledged that the claimant comes within the scope of EU law thanks to Article 21 TFEU and EU citizenship, (but bizarrely, not by the same token, Article 18 TFEU), so that in granting a right of domestic residence the UK was implementing EU law. It therefore had to do so in a way that complied with the Charter of Fundamental Rights of the EU, in particular, the right to live in the host Member State in “dignified conditions” under Article 1 of the Charter. Moreover, in light of Article 7 on the right to private and family life, and Article 24, which provides that public authorities should make the best interests of the child a primary consideration in all actions relating to children, the host Member State “is required to permit children, who are particularly vulnerable, to stay in dignified conditions with the parent or parents responsible for them”. In situations such as the instant case, the national authorities refusing social assistance must ascertain that such refusal does not put the claimants’ fundamental rights at risk “as enshrined in Articles 1, 7 and 24 of the Charter”. However, in deciding whether or not there is such a risk, the authorities “may take into account all means of assistance provided for by national law, from which the citizen concerned and his or her children may actually and currently benefit”.

The Charter thus helps with extreme cases that would otherwise fall through the cracks of EU law protections, and it is this novel lifeline which causes Wollenschläger to describe the *CG* judgment as “ambivalent”.[[73]](#footnote-73) But it is a curious approach – why were there no extant Charter obligations in *Dano*, and why was the Charter not mentioned in *Alimanovic*, or *Commission v UK*? The answer is, essentially, a finding that Member States in *Dano* were not implementing EU law, but that in *CG* the UK was doing so, in granting pre-settled status. The UK had thereby recognised “the right of a national of a Member State to reside freely on its territory conferred on EU citizens by Article 21(1) TFEU, without relying on the conditions and limitations in respect of that right laid down by Directive 2004/38”.

But this distinction is laboured and not entirely logical. Why does the recognition of Article 21 hinge on the existence of pre-settled status? Why are Member States that permit EU migrants to reside in their territories without sufficient resources, without granting access to social assistance,[[74]](#footnote-74) not also in effect recognising those migrants’ Article 21 TFEU rights? Or does the duty only extend to Member States who create constitutive, economically unconditional rights to reside – and if so, why? The question of when the duty kicks in is further muddied by reference to “such a situation” of the claimant in *CG*. Can national authorities refuse benefits to EU nationals, even those with a right to reside, without considering fundamental rights, if there is no evidence of domestic abuse? Or if they are not similarly isolated? Or do not have young children? Or have some meagre resources? Should other vulnerabilities be taken into account – long term illnesses, or being disabled, for instance?

It is not just the *why* or the *when* of it that is not clear – but also the *what*. The rationale may simply be that this was the best way that the Court could conceive to give pre-settled status (or its equivalent) some legal effect. But then why does discrimination not get another look-in via Article 21(2) CFR? Within the confines of Articles 1, 7 and 24 CFR, it is not entirely clear *what* would be considered an appropriate threshold for a Charter violation, and there is no guidance on this, beyond a suggestion that having ‘no resources’ is a contender. The reference to taking account of “all means of assistance provided for by national law” suggests that Member States may avoid falling foul of the Charter by pointing to last-resort forms of support. In the UK, for example, the Supreme Court found in *HC**[[75]](#footnote-75)* (surprisingly without making a preliminary reference to the CJEU)[[76]](#footnote-76) that the only material support to which *Zambrano* families were entitled, was whatever was necessary to avoid forcing the children to leave the EU. And that duty, in *HC*, was discharged just through the existence (in theory) of support under section 17 of the Children Act. This is a back-stop form of support, that in reality, many struggle to access,[[77]](#footnote-77) and those who do get it are often awarded derisory sums. A COMPAS report on local authority provision of section 17 support, found that one local authority provided 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”.[[78]](#footnote-78) Subjecting claimants to a discretionary system is itself inferior treatment compared to recognising a right to benefits, but subjecting them to a discretionary system that disburses such low sums relegates claimants to a distinct underclass.

And we still do not know *how* claimants should seek to rely upon the Charter in this way when challenging domestic decisions, given that the Charter does not exactly have autonomous force – it cannot create new rights or obligations that do not otherwise already exist.[[79]](#footnote-79) Many claimants will face a brick wall if they try to invoke the Charter when dealing with front-line decision makers, or first tier tribunals. And the duty may seem even weaker in a UK context for three key reasons. First, the UK has been a prominent Charter-sceptic, insisting, with Poland, on adding Protocol 30 to the TFEU,[[80]](#footnote-80) confirming that nothing in the Charter extends the rights of judges to find “laws, regulations or administrative provisions, practices or actions” of the UK inconsistent with fundamental rights. Second, UK Courts are fundamental rights-sceptics; the UK Supreme Court only recently found that the duty to make the best interests of the child a primary consideration, under the United Nations Convention on the Rights of the Child,[[81]](#footnote-81) could not affect the legitimacy of a UK law, because the CRPD is an unincorporated treaty.[[82]](#footnote-82) It seems unlikely to say the least, that UK Courts will give more weight to the best interests of EU national children, as a result of the Charter, than it is willing to give own-national children. And third, the UK parliament opted not to include the Charter in retained EU law.[[83]](#footnote-83) While the relevant legislation for people with pre-settled status is more likely the Withdrawal Agreement than the body of retained EU law, it is hard to see how this exclusion would not diminish the salience of the Charter elsewhere in the minds of decision makers and judges. In short, the Court made an eccentric choice of safety net if it genuinely wishes to protect the rights of EU nationals in the UK. The combination of disregarding primary law and earlier citizenship case law, along with a potentially narrow application of the Charter, all suggests that the Court wanted *this* claimant to be helped (after all, the explanation for expedition indicates the Court’s position that there was a risk to her fundamental rights),[[84]](#footnote-84) but not many others. Which is not a decision of legal principle, but rather a discretionary, political choice.

*Applying the judgment*

For many EU nationals, their family members, and advice workers, the pressing three questions are “what does this mean for (i) *Fratila;* (ii) other pre-2021 cases; (iii) post-transition cases?” But interpreting and applying this ruling is not straightforward. First, as regards *Fratila*, we face the effects of an awkward relationship between domestic litigation and CJEU preliminary references. It seemed possible that *CG* would provide a definitive answer one way or the other, effectively delivering the Supreme Court’s judgment in *Fratila* for them. But that has not happened. The one outcome that now seems quite ruled out is the Supreme Court upholding the Court of Appeal’s judgment – if CG is not entitled to protection from discrimination then neither are the claimants in *Fratila*. However, the effects of the Court’s invocation of the Charter are not clear, given that it has not previously featured as part of the arguments before the domestic courts. The Supreme Court would not normally countenance new grounds not previously raised, and moreover, those grounds would in themselves require findings of fact, and the Supreme Court is not a fact-finding court. This difficulty is created essentially because the CJEU chose to reformulate the questions before it – that is, they answered questions that had not been asked.

It is possible that the judges will adjust their normal procedures to accommodate new arguments in *Fratila*, in light of *CG*, but it is also possible that, having received a fairly unequivocal overruling of the Court of Appeal, the Supreme Court will simply hold that the claimant’s case, as argued so far, must fail, and the regulations remain in tact. They may even decide this without a hearing. If this happens, the full meaning of *CG*, and the Charter-based residual rights, can only be thrashed out through another case – ideally one in which the Charter arguments can be made from the outset.

Applying CG to other pre-2021 cases

There is likely to be considerable dispute as to what the fundamental rights duty outlined in *CG* looks like in practice. In particular, there are two likely fights on the horizon – first, *whose* decision as to fundamental rights risks is the material decision; and second, what level of resources is necessary to maintain a life of dignity. The first question is important, because it will determine the form of redress available to claimants. The Department for Work and Pensions (DWP) may be minded to divert the issue to local authorities – to suggest that so long as there are discretionary forms of support under the Children Act 1989 and the Care Act 2014, refusal of benefits does not imperil fundamental rights. And then suggest that a refusal of (or provision of inadequate) support is a matter the claimant should pursue with the local authority, which would only be possible through judicial review. This would be costly, risky and legally complicated. However, if it is the *DWP’s decision* to pass a claimant to the local authority, that is the material decision, then claimants would have an avenue to appeal to a social security tribunal. This would be more accessible and affordable.

The Court’s wording 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. So, even if it is a cursory assessment, to pass someone onto another authority, it is the DWP’s decision, for which the DWP should be accountable. However, appealing a decision to not award a benefit, on the ground that fundamental rights were not respected in practice at a later date, is likely to prove complicated. The violation of rights which forms the challenge against the original decision may not become immediately manifest. It may only be clear once a claimant has been refused discretionary support, or even once they have attempted to live in dignified conditions, while in receipt of discretionary support. Appeal procedures may need to accommodate this time-lag, and matters arising after the original decision.

It is important that the appropriate threshold of resources for determining whether someone can live in dignity is not set too low. Basic survival is not enough – the UK needs to ensure that people with pre-settled status can live in dignified conditions. This requires a different approach to that taken in *Harrison*,[[85]](#footnote-85) *Sanneh,[[86]](#footnote-86)* and *HC*,[[87]](#footnote-87) in which UK courts, having determined that *Zambrano[[88]](#footnote-88)* carers claiming benefits did not fall within the scope of the Charter of Fundamental Rights, found that the *Zambrano* right was “not a right to any particular quality of life or to any particular standard of living”. A right to live in dignified conditions, taking into account the best interests of the child, must, if it is to mean anything, entail a right to a certain standard of living. The difficulty is ascertaining what that standard is, though national benefit levels should provide a reference point. Given that the CJEU found earlier in the judgment that Universal Credit is a “subsistence benefit” which is “intended to ensure that their recipients have the minimum means of subsistence necessary to lead a life in keeping with human dignity”,[[89]](#footnote-89) it is hard to see how any means below the *necessary minimum* can also ensure a life in keeping with human dignity – let alone means which are radically below that minimum.

The traction of the Charter post-transition

The role of the Charter for EU nationals in post-Brexit UK is unclear. Although excluded from the category of ‘retained EU law’, it reappears in the Withdrawal Agreement (WA), included in the definition of “Union law” (Art 2(a)(i) WA). It is also bundled into WA references to specific provisions of Union law; Article 4(3) requires “provisions of this Agreement referring to Union law or to concepts or provisions thereof” to be “interpreted and applied in accordance with the methods and general principles of Union law”. And Article 4(4) requires those same Agreement provisions to be implemented and applied “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”. As the Charter – a piece of primary EU law – forms part of the “methods and general principles of EU law”, and also informs the relevant case law, it would seem to percolate back into UK law through the Withdrawal Agreement.

The residence and citizens’ rights Articles are prime examples of parts of the Agreement that refer to concepts or provisions of Union law. 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”. These provisions are, moreover, intended to have direct effect in the UK,[[90]](#footnote-90) allowing individuals to rely on them in domestic courts, as acknowledged in the European Union (Withdrawal Agreement) Act 2020.[[91]](#footnote-91) All of this would suggest that the ruling in *CG* is not time-limited in the UK, at least as far as EU nationals who fall within the scope of the Withdrawal Agreement are concerned – bearing in mind that the WA provides them with “life-long protection”,[[92]](#footnote-92) obliging the UK to continue to consider fundamental rights before refusing Universal Credit to people with pre-settled status.

However, there is a potential mismatch of personal scope between the Withdrawal Agreement and the UK’s EUSS scheme. While pre-settled status and settled status are in essence the UK’s equivalents to temporary and permanent residence rights under the WA, it is not clear that they will be treated as equivalent without individuals fulfilling the conditions of Articles 13 and 15 WA. In particular, will or should having pre-settled status entitle the holder to be treated as though they have a right to reside under Article 13 WA?

In obliging EU nationals to register for the EUSS, the UK has chosen to exercise the option under Article 18 of the Withdrawal Agreement, of requiring EU citizens “to apply for a new residence status *which confers the rights under this Title*”. So it is the status itself that confers the rights under Title II of the WA – which would suggest that pre-settled status should confer those rights. If, however, pre-settled status is not considered enough in itself to bring someone within the scope of the Withdrawal Agreement, then it is not a status that confers the rights in the WA, so is not awarded under Article 18 WA. This would throw into question the legal basis for obliging EU nationals to register for the EUSS, on pain of loss of rights, if the basis is not Article 18 WA. And there is an equal and opposite question – if pre-settled status does not confer the rights flowing from Article 13 WA – then what does? This nudges an avalanche of questions: how is the UK discharging its obligations under Article 13 WA if not through the EUSS? How does the UK distinguish between pre-settled citizens who are covered by Article 13 from those who are not? What are the routes to appeal the classification? And how can EU citizens demonstrate their Article 13 WA status – is there a corresponding document under Article 18 WA to which they are entitled?

The root of the problem seems to be that the UK government wants to have at its disposal the draconian effects of a constitutive status when it comes to the deadline, to allow it full freedom of action – including deportation – when dealing with future unregistered criminals, but wants to act as though it has established a declaratory system when it comes to rights that flow from EUSS status. Either having the status is decisive or it is not; but the UK has adopted a rather cynical pick-and-mix approach.

If pre-settled status is not sufficient to bring someone within the scope of Article 13 WA then our attention must turn to the personal scope of Article 10. This is more widely drawn than Article 13 WA, conferring 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 residence in accordance with Union law was continuous or up until the end of transition, or immediately before transition; rather it could be residence in accordance with Union law *at some point* before the end of transition – which would include people who have exercised their Article 6 Directive 2004/38 right to reside in the UK without conditions for the first three months, and then continued to reside thereafter. Nor does it stipulate that residence post-transition needs to be in accordance with Union law.

If we treat Article 10 WA as having an apparently broad personal scope then people with pre-settled status must come within it, and so have access to the Article 12 WA right to non-discrimination, which falls within the same Title. However, if *CG* blocks Article 18 TFEU claims before the end of transition, would it also block Article 12 WA claims after transition? Not necessarily. The different context of the WA means that the Court’s (flawed) logic could come unstuck. In *CG*, the CJEU suggested that Article 18 TFEU was supplanted by Article 24 of Directive 2004/38 because there had been movement between states. This reasoning cannot be applied to Article 12 WA, because the citizens’ rights of the WA *only* apply where there has been such movement. So we would need to know when, if ever, the non-discrimination provision of Article 12 WA would apply outside of the scope of Article 23 WA (which replicates Art 24 of the CRD) – indeed, we would need to know why the non-discrimination provision of Article 12 WA exists at all.

**Conclusion**

This is a disappointing judgment on several levels. It is remarkable that the CJEU *and the EU Commission* have less appetite than the Court of Appeal of England and Wales for protecting the rights of EU nationals cast adrift in the UK. In many cases, those with pre-settled status, who cannot persuade the authorities that they have another right to reside, and who need social assistance, will be among the most vulnerable EU citizens dragged into the slipstream of Brexit. It is hard to understand the motivation for contorting the law to avoid protecting them.

And that contortion may have widespread consequences – certainly for the rights of millions of EU nationals in the UK, but also for EU migrants across the EU. The Court has dismissed and marginalised primary non-discrimination rights, significantly diluting down the force of Article 18 TFEU, by announcing it is subordinate to, and displaced by, conditions attached to secondary law, even in situations outside the scope of the secondary law in question. And in doing so it has completely ignored its own ruling in *Trojani*, creating more zig-zags in an already haphazard area of judicial intervention. The decision seems tailored to allow this claimant access to benefits (the Court seemed persuaded by the compelling facts of the case)[[93]](#footnote-93) but as few others as the UK wishes. This suggest a decision that is not guided by sound legal principle, so much as a political intuition. The framing of this choice risks eviscerating the right to non-discrimination on the ground of nationality of any autonomous content, weakening further the value of EU citizenship, and disregarding the supposedly general principle of proportionality. All to stop a few vulnerable people, with a right to reside, from temporarily accessing support. The Court has used a sledgehammer where a sticking plaster was needed.

Finally, it is discouraging to see the Court depart from its usual mode of careful, lucid and methodical analysis,[[94]](#footnote-94) retreating into disjointed reasoning fraught with contradictions and circularity. The application and disapplication of Article 18 TFEU; the reliance on Article 24 of Directive 2004/38, which simultaneously does and does not apply; the nod to case law finding that legislative restrictions should be drawn narrowly, while finding that implicit restrictions distilled from its own case law should cast so wide they eclipse all other provisions; the duck and weave with *Trojani* and *Krefeld*, in order to rely instead on *Dano*, dismissing the material differences with no more than a turn of phrase; and the perfunctory invocation of the Charter to supposedly tie up loose ends, without guidance as to when it applies, who it helps and how, or as to what is required to uphold that mercurial value of dignity;[[95]](#footnote-95) all of these choices undermine coherence and mangle the law at hand. The Charter seems to be thrown in as a means of deflection; future cases will now turn on fleshing out what it means; future claimants will be told not to bother searching for coherence or consistency in the law on EU citizenship-based non-discrimination. Ultimately we have to ask, what is the point of Article 24 CRD if in reality States can just refuse benefits when they feel like it because someone seems burdensome? This is an area that cries out for clarity, with a host of intertwined cases that could be helpfully unravelled. But what we have here is more confusion; more surreptitious emptying of EU citizenship of autonomous content; and more resolute refusal to engage with proportionality as a means to recognise compelling equal treatment claims. Irrational, muddled, and damaging, it is truly a judgment for our Brexit times.[[96]](#footnote-96)

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   *Fratila & Anor v Secretary of State for Works and Pensions & Anor* [2020] EWCA Civ 1741. [↑](#footnote-ref-1)
2. Case C-456/02 *Trojani* EU:C:2004:488. [↑](#footnote-ref-2)
3. Case C-333/13 *Dano* EU:C:2014:2358. [↑](#footnote-ref-3)
4. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77. [↑](#footnote-ref-4)
5. SI [2016] 1052. [↑](#footnote-ref-5)
6. C. O’Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, (Oxford: Hart, 2017). [↑](#footnote-ref-6)
7. Under Appendix EU to the Immigration Rules. [↑](#footnote-ref-7)
8. With shorter periods required in certain cases of retirement, bereavement, industrial injury or illness, etc. [↑](#footnote-ref-8)
9. Home Office, “EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members”, Version 13, 20 July 2021, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/1004627/main-euss-guidance-v13.0ext.pdf> pp. 31-48. [↑](#footnote-ref-9)
10. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, [2019] OJ C 3841. [↑](#footnote-ref-10)
11. The Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019; The Child Benefit and Child Tax Credit (Amendment) (EU Exit) Regulations 2019*;* The Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) (EU Exit) Regulations 2019. [↑](#footnote-ref-11)
12. Case C-709/20 *CG v The Department for Communities in Northern Ireland*, EU:C:2021:602. [↑](#footnote-ref-12)
13. Opinion of Advocate General Richard de la Tour delivered on 24 June 2021, EU:C:2021:515, para 28. [↑](#footnote-ref-13)
14. Ibid, 45-49. [↑](#footnote-ref-14)
15. Cases C‑424/10 and C‑425/10, *Ziolkowski and Szeja*, EU:C:2011:866, 49-50. [↑](#footnote-ref-15)
16. *CG,* AG Opinion, 71-72. [↑](#footnote-ref-16)
17. Ibid, 86. [↑](#footnote-ref-17)
18. Ibid, 89. [↑](#footnote-ref-18)
19. Ibid, 92. [↑](#footnote-ref-19)
20. Ibid, 97. [↑](#footnote-ref-20)
21. Ibid, 100. [↑](#footnote-ref-21)
22. Ibid. [↑](#footnote-ref-22)
23. Case C‑133/15, *Chavez-Vilchez and Others*, EU:C:2017:354. [↑](#footnote-ref-23)
24. Ibid, 108. [↑](#footnote-ref-24)
25. Ibid, 109. [↑](#footnote-ref-25)
26. Ibid, 110. [↑](#footnote-ref-26)
27. *CG* judgment, 43. [↑](#footnote-ref-27)
28. Ibid, 67. [↑](#footnote-ref-28)
29. Ibid, 73. [↑](#footnote-ref-29)
30. *CG* judgment, 76, 80. [↑](#footnote-ref-30)
31. Ibid, 77. [↑](#footnote-ref-31)
32. Ibid, 78. [↑](#footnote-ref-32)
33. Ibid, 80. [↑](#footnote-ref-33)
34. Ibid, 81. [↑](#footnote-ref-34)
35. Ibid, 83. [↑](#footnote-ref-35)
36. Ibid, 84. [↑](#footnote-ref-36)
37. Ibid, 88. [↑](#footnote-ref-37)
38. Ibid, 92. [↑](#footnote-ref-38)
39. 2:1. [↑](#footnote-ref-39)
40. Case C-308/14 *Commission v United Kingdom* EU:C:2016:436; see C. O’Brien, “The ECJ Sacrifices EU Citizenship in Vain: *Commission v United Kingdom”* (2017) 54 CML Rev1, 209. [↑](#footnote-ref-40)
41. Case C-535/19 *A*, AG Opinion delivered 11 February 2021, EU:C:2021:114. [↑](#footnote-ref-41)
42. C-184/99, Grzelczyk, EU:C:2001:458, 31. [↑](#footnote-ref-42)
43. Case C-535/19 *A*, AG Opinion, 150. [↑](#footnote-ref-43)
44. Case C-181/19 *Krefeld* EU:C:2020:794. [↑](#footnote-ref-44)
45. Ibid, 60. [↑](#footnote-ref-45)
46. Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (codification) OJ [2011] L 141/1. [↑](#footnote-ref-46)
47. F. Ristuccia, “The right to social assistance of children in education and their primary carers: *Jobcenter Krefeld*”, (2021) 58 CML Rev, 877, 902. [↑](#footnote-ref-47)
48. Case C-535/19 *A,* judgment, EU:C:2021:595. [↑](#footnote-ref-48)
49. *CG* judgment, 83. [↑](#footnote-ref-49)
50. Ibid, 87. [↑](#footnote-ref-50)
51. Not counting repetitions of the case name in the same mention, which takes it to 43 times. [↑](#footnote-ref-51)
52. *Fratila*, above, n1, 72. [↑](#footnote-ref-52)
53. *CG* judgment, 37. [↑](#footnote-ref-53)
54. As in Case C-67/14 *Alimanovic* EU:C:2015:597. [↑](#footnote-ref-54)
55. Indeed, *Krefeld* gets two mentions, but only to support the contentions that Article 18 TFEU only applies if no more specific rules apply, (65) and that universal credit is a form of social assistance (69). [↑](#footnote-ref-55)
56. CG, judgment, 75. [↑](#footnote-ref-56)
57. Case C-299/14 *García-Nieto* EU:C:2016:114. [↑](#footnote-ref-57)
58. Note the German Government’s evidence in the High Court *Fratila* judgment: *Fratila & Anor, R (on the application of)* v*. Secretary of State for Work and Pensions & Anor* [2020] EWHC 998 (Admin) (27 April 2020), 22. [↑](#footnote-ref-58)
59. *CG*, judgment, 81. [↑](#footnote-ref-59)
60. C. O’Brien, “Between the Devil and the Deep Blue Sea: Vulnerable EU Citizens Cast Adrift in the UK Post-Brexit”, (2021) 58(2) CML Rev, 431. See also: Sumption and Fernández-Reino “Unsettled Status – 2020: Which EU Citizens are at

    risk of failing to secure their rights after Brexit?” The Migration Observatory, Report 24 Sept. 2020, available at <migrationobservatory.ox.ac.uk/wp-content/uploads/2020/09/Report-Unse ttled-Status-2020.pdf>; Corum Children’s Legal Centre, “Uncertain futures: The EU settlement scheme and children and young people’s right to remain in the UK”, Report March 2019, available at <www.childrenslegalcentre.com/wp-content/uploads/2019/03/EUSS-brief ing\_Mar2019\_FINAL .pdf>. [↑](#footnote-ref-60)
61. Home Office (2021) above, n.9, 32: “For the time being, you will give applicants the benefit of any doubt in considering whether… there are reasonable grounds for their failure to meet the deadline” and “In general, the more time which has elapsed since the deadline applicable to the person under the scheme, the harder it will be for them to satisfy you that… there are reasonable grounds for their failure to meet that deadline”. [↑](#footnote-ref-61)
62. On the nature of the UK’s hostile environment towards, and criminalisation of, irregular migrants, see M. Wu, “‘A Hostile Environment’: examining the rights and remedies afforded to exploited irregular migrant workers in the United Kingdom”, (2021), 35(2), J.I.A.N.L.,108. [↑](#footnote-ref-62)
63. *CG,* judgment, 83. [↑](#footnote-ref-63)
64. Case C-300/04 *Eman & Sevinger* EU:C:2006:545, para 57; Case C-307/05 *Alonso* EU:C:2007:509, para 27; Cases C-444/09 & C-456/09 *Gavieiro* and *Iglesias Torres* EU:C:2010:819, para 41; Case C-457/17 *Maniero* EU:C:2018:912, para 36; Case C-620/18 *Hungary v European Parliament and Council of the European Union* EU:C:2020:1001, para 109; Case C-391/09 *Runevič-Vardyn and Wardyn* EU:C:2011:291, para 43. [↑](#footnote-ref-64)
65. Case C-149/10 *Zoi Chatzi* EU:C:2010:534, para 43. [↑](#footnote-ref-65)
66. Case 152/73 *Sotgiu* EU:C:1974:13. [↑](#footnote-ref-66)
67. *CG* judgment, 94. [↑](#footnote-ref-67)
68. Case C-414/16 *Vera Egenberger* EU:C:2018:257, discussing Article 4(2) of Directive 2000/78, para 68. [↑](#footnote-ref-68)
69. K. von Papp “‘Benefit tourism’ post-Brexit: tackling the ghost by more EU social engagement”, (2018), 69(3), *Northern Ireland Legal Quarterly*, 271. [↑](#footnote-ref-69)
70. *CG* judgment, 80. [↑](#footnote-ref-70)
71. Case C-515/14, *European Commission v Cyprus*, EU:C:2016:30, 54. [↑](#footnote-ref-71)
72. See also Chapter 9 in *Unity in Adversity*, above, n6. [↑](#footnote-ref-72)
73. F. Wollenschläger, “Ein Unionsgrundrecht auf Sicherung des Existenzminimums im Aufnah-

    memitgliedstaat? Ambivalentes zur Freizügigkeit nicht erwerbstätiger Unionsbürgerinnen und Unionsbürger post Dano”, (2021) 18, *Zur Rechtsprechung*, 795. [↑](#footnote-ref-73)
74. In Germany and Austria “increasingly, EU migrants are being tolerated as residents with precarious status without access to minimum subsistence benefits” A. Heindlmaier & M. Blauberger, “Enter at your own risk: free movement of EU citizens in practice”, (2017), 40(6), West European Politics, 1198. [↑](#footnote-ref-74)
75. *HC* v. *SSWP* [2017] UKSC 73. [↑](#footnote-ref-75)
76. C. O’Brien, “*Acte cryptique*? *Zambrano*, welfare rights, and underclass citizenship in the tale of the missing preliminary reference”, (2019), 56(6), 1697. [↑](#footnote-ref-76)
77. “Parents’ experiences of the assessment process were often negative, even where the decision was to put s17 services in place. They reported being told to return to abusive partners, to go back to their ‘own country’ and that they feared they would be separated from their children.” J. Price & S. Spencer, “Safeguarding Children from Destitution: Local Authority Responses to Families with ‘No Recourse to Public funds’”, COMPAS Report, (Oxford, June 2015), 39. <https://www.compas.ox.ac.uk/wp-content/uploads/PR-2015-No\_Recourse\_Public\_Funds\_LAs.pdf>. [↑](#footnote-ref-77)
78. Ibid, 44. [↑](#footnote-ref-78)
79. Art 51(2) CFR. [↑](#footnote-ref-79)
80. Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom OJ [2016] C 202/312. [↑](#footnote-ref-80)
81. Art 3 UNCRC. [↑](#footnote-ref-81)
82. *SC, CB and 8 children, R. (on the application of) v Secretary of State for Work and Pensions & Ors* [2021] UKSC 26, 84. [↑](#footnote-ref-82)
83. European Union (Withdrawal) Act 2018, s.5(4). [↑](#footnote-ref-83)
84. *CG* judgment, 42-44. [↑](#footnote-ref-84)
85. *Harrison (Jamaica)* v. *Secretary of State for the Home Department* [2012] EWCA Civ 1736, 67. [↑](#footnote-ref-85)
86. *Sanneh & Ors v Secretary of State for Work and Pensions* [2015] EWCA Civ 49, 171. [↑](#footnote-ref-86)
87. Above, n.75, 15. [↑](#footnote-ref-87)
88. Case C-34/09 *Zambrano* EU:C:2011:124. [↑](#footnote-ref-88)
89. *CG*, judgment, 69. [↑](#footnote-ref-89)
90. Art 4(1) WA. [↑](#footnote-ref-90)
91. S. 5, inserting s 7A into the European Union (Withdrawal) Act 2018. [↑](#footnote-ref-91)
92. Art 39 WA. [↑](#footnote-ref-92)
93. *CG* judgment, 42-44; 92. [↑](#footnote-ref-93)
94. With the odd notable exception: Case C-308/14 *Commission v UK.* [↑](#footnote-ref-94)
95. It can mean any number of things; Clements notes a “Delphic” tendency of judgments that fail to define indignity: L. Clements, ‘Disability, Dignity and the Cri de Coeur’ (2011) 6 *European Human Rights Law Review* 675. [↑](#footnote-ref-95)
96. On the Brexit legal landscape, see M. Dougan “The UK's Withdrawal from the EU: A Legal Analysis”, (Oxford: OUP, 2021). [↑](#footnote-ref-96)