No entitlement to Universal Credit for EU citizens with pre-settled status under the EU Settlement Scheme

Fratila and Tanase v Secretary of State for Work and Pensions; the Advice on Individual Rights in Europe (intervener) [2020] EWHC 998 (Admin); April 27, 2020

Facts

The appellants are two Romanians who reside in the UK. Their appeal raised important questions in relation to the EU Settlement Scheme (EUSS), and EU citizens who have pre-settled status (PSS) under that scheme.

PSS means EU citizens who have lived in the UK for less than 5 years are granted limited leave to remain in the UK. That is, they have a right to reside in the UK for up to 5 years only. The appellants had PSS but were refused Universal Credit (UC) because the Universal Credit Regulations 2013/376 (the Regulations), as amended, bar claimants with PSS from obtaining UC.

Specifically, Regulation 9(1) provides that claimants must be *habitually* resident in the UK. Regulation 9(2) provides that claimants will not be deemed habitually resident unless they have a right to reside in the UK. The offending provision - Regulation 9(3)(c)(i) – then states that those with a right to reside derived from PSS do not have a right to reside for the purposes of Regulation 9(2). This excludes claimants with PSS from the definition of a right to reside and so habitual residence.

The practical implications under the EUSS are stark. It means that those with settled status under the EUSS – non-UK EU nationals who have lived in the UK for 5 or more years – can establish a right to reside and thus habitual residence. That is, had the claimants been Romanian nationals who had lived in the UK for 5 years or more, they would not have fallen foul of this provision.

High Court

The appeal argued that Regulation 9(3)(c)(i) contravened Article 18 of the Treaty on the Functioning of the European Union's (TFEU) prohibition of discrimination on the basis of nationality. The appeal was dismissed. The court held the following:

Right of residence: whilst the appellants did not have a right of residence in the UK, their right of residence in Romania enabled them to rely on Article 18 TFEU for the purposes of proceedings within the UK. This was because PSS as an extension of their non-UK EU nationality created a free-standing right of

residence under domestic law. As a result, the court considered that *Trojani v Centre Public d'Aide Sociale de Bruxelles* [2004] 3 CMLR 38 was still good law [23].

Indirect discrimination: because some non-UK EU nationals may be awarded UC if they have lived in the UK for 5 years or more, whilst the provision is discriminatory, it was deemed indirectly discriminatory (thus, opening the door to justification being raised). It was premised on the basis that for direct discrimination to be evident, there must be an indissociable connection between the requirement (the right to reside) and the protected characteristic (nationality) [28]. However, in this case the requirement could be dissociated from the appellant's nationality, because other Romanian nationals could satisfy the right to reside requirement by establishing settled status under the EUSS [29].

Justification: the habitual residence requirement underpinned Regulation 9(3)(c)(i)'s exclusion and this justified that Regulation's indirectly discriminatory effect. The court noted that the rationale behind habitual residence is rooted in the desire to make non-contributory benefits such as UC available to those who come to the UK to work. It has at its focus those who are economically active and integrated within the UK; claimants who had a sufficiently close connection with the UK [31]. The SSWP also referenced the principle that non-UK EU nationals should contribute before receiving taxpayer support, as well as the fact that the provision maintained that status quo – in that PSS gave rise to the same rights of residence as the appellants would have had under the EEA Regulations. The court considered these reasons lawful justification for the discriminatory treatment.

Comment

The court's approach to a right of residence under EU law is of note. In viewing PSS as a standalone domestic right of residence derived from a right to reside in another EU state, it leaves the door open for a broad approach to the prohibition on discrimination due to nationality under EU law. That is, non-UK EU nationals without a right to reside, and who are not workers or jobseekers (as would have been required under 2004/38/EC should the SSWP's position on this matter have succeeded) can nonetheless benefit from the protection of Article 18 TFEU.

As far as the court's characterisation of indirect discrimination under EU law is concerned, the court relied heavily on Lord Hope's judgment in *Patmalniece v Secretary of State for Work and Pensions* [2011] 1 WLR 783. *Patmalniece* itself sought to apply the CJEU's decision in *Bressol v Gouvernement de la Communaute Francaise* [2010] 3 CMLR 20.

Bressol gave little by way of analysis in terms of explaining why a provision similar to that raised in *Fratila* gives rise to indirect, as opposed to direct, discrimination. Other than *Bressol,* there is little CJEU jurisprudence that addresses whether residence conditions of the sort in issue constitute direct or indirect discrimination under EU law. On that basis, *Fratila* highlights a lacuna in EU law that remains insufficiently remedied.

Practically speaking, as it stands, *Fratila* means that non-UK EU nationals with PSS will continue to be precluded from obtaining UC. However, it is important to note that the claimants in *Fratila* were granted permission to appeal to the CA and the hearing took place on October 27 and 28, 2020. We await the decision with interest.

Elaine Banton & **Joshua Yetman**
7BR Chambers