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CJEU gives with one hand but takes with the other on refusal of Universal Credit to applicant with limited leave to remain

CG v Department for Communities in Northern Ireland C-709/20; July 15, 2021

Facts

CG moved to Northern Ireland in 2018 with her then partner and children. In June 2020, she was granted an immigration status under the UK's EU Settlement Scheme (EUSS). Broadly speaking, the EUSS provides for two rights of residence for EU nationals living in the UK at the time the UK left the EU. One is known as settled status (SS) and can be acquired by those who have lived in the UK for five years or more at the time the UK seceded from the EU on December 31, 2020. Persons with SS have indefinite leave to remain. The other is known as pre-settled status (PSS), which can be acquired by those who lived in the UK for less than 5 years at the time the UK seceded from the EU. Persons with PSS have limited leave to remain and CG had been granted PSS.

CG then applied for Universal Credit (UC). She was refused an award on the basis that she did not have the requisite immigration status for the purposes of the Universal Credit Regulations (Northern Ireland) 2016, as amended by the Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations (Northern Ireland) 2019 (the 2016 Regulations). Regulation 9(3)(d)(i) of the 2016 Regulations explicitly excludes those with PSS, such as CG, from being deemed habitually resident in the UK. Without this status, CG was not entitled to UC and so this provision was referred for a preliminary ruling so as to ask the CJEU to determine whether it was unlawfully discriminatory.

Importantly, the provision in question is analogous to the equivalent that is applicable in England and Wales, which has been the subject of an appeal to the England and Wales Court of Appeal in the case of *Fratila & Anor v Secretary of State for Work and Pensions & Anor* [2020] EWCA Civ 1741; Briefing 981. For that reason, the decision in *CG* also has broader implications for those with PSS that live in the UK.

Court of Justice of the European Union

The questions referred

The CJEU initially determined procedural questions. Firstly, it found that it had jurisdiction to make preliminary rulings in relation to EU law as it applied in the UK until the end of the transition period [paras 48-49, 51]. Secondly, the court determined that it had jurisdiction to answer the questions referred because CG had exercised her right to move freely [paras 57-58]. In terms of the substantive issues, the court then outlined the justiciable questions referred to it by the Appeal Tribunal as asking:

1. whether Regulation 9(3)(d)(i) of the 2016 Regulations is directly or indirectly discriminatory contrary to Article 18 of the TFEU, and
2. if it is indirectly discriminatory, whether the provision's effect can be justified [paras 39, 52].

However, the court then went on to reformulate the first question insofar as it related to whether or not CG could avail herself of Article 18 [paras 61-66, 72]. Consequently, whilst the court observed that CG could '*in principle*' rely on Article 18's prohibition of discrimination on the basis of nationality, it went on to answer a different question entirely [para 64]. For that reason the second question went unanswered altogether.

The question answered

This reformulation led to a restatement of the fact that Article 18 has been interpreted as applying only to circumstances in which the TFEU does not provide for rules on non-discrimination [para 65, citing C181/19 *Jobcenter Krefeld*]. In short, Article 18 would not be engaged if there was another source of EU law providing for non-discrimination in relation to EU nationals exercising their rights to move and reside within another EU member state. The corollary of this was that the court determined that there *was* another applicable source in this context: Article 24(1) of Directive 2004/38 [para 66]. Consequently, UC was categorised as social assistance for the purposes of Article 24(2) of the Directive instead of applying Article 18 of the TFEU [para 71].

Crucially, whilst the Directive provides for non-discrimination of EU nationals, it is caveated with the need for EU nationals to comply with the terms of the Directive if they wish to be treated equally to nationals of the host member state [para 75]. It was here that CG's claim failed because:

a) she had lived in Northern Ireland for less than 5 years (but more than 3 months),
b) was economically inactive,
c) otherwise lacked sufficient resources, and
d) under Article 7 of the Directive, member states can withhold welfare benefits to such EU nationals[para 76].

This meant that the UK could refuse to pay CG the benefit because she would be an *'unreasonable burden on the social assistance system of the United Kingdom*'and thus could not rely on the principle of non- discrimination provided for by Article 24 [para 80].

Charter of Fundamental Rights of the European Union

Notwithstanding this, the CJEU then went on to find that Charter of Fundamental Rights of the European Union still applied to CG [para 88]. This was premised on the fact that Article 1 of the Charter required the UK to ensure CG lived in dignified conditions, which recognised that CG was an EU national in a vulnerable situation who had exercised free movement rights and had been granted a right to reside in the UK [para 89]. Article 7 of the Charter – right to respect for private and family life – was also deemed to apply, as was Article 24(2) – the need to consider the best interests of children. In practice, this analysis saw the court determine that social assistance such as UC can only be refused if the UK has ensured that this 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 as enshrined in*

Articles 1, 7 and 24 of the Charter. [para 92]

Practical implications

In determining that Directive 2004/38 applied so as to render the UC Regulations in Northern Ireland lawful, the CJEU departed from the CA's position in *Fratila.* In *Fratila,* the court found that PSS gave rise toa freestanding right of residence which is not rooted in the Directive (albeit as this pertained to the equivalent provision applicable in England and Wales). This then led the CA to address Article 18 TFEU's prohibition of discrimination, which does not have the same caveats as Article 24 of the Directive. Precluding entitlement to UC to those with PSS was found to be unlawful, and Regulation 9(3)(c)(i) of the UC Regulations 2013 was quashed insofar as it applied in England and Wales. However, that decision has been stayed because the SC granted permission for the Secretary of State for Work and Pensions to appeal. That appeal has been adjourned pending the outcome of *CG.*

Had the court adopted the approach in *Fratila,* it would have distinguished *Trojani v Centre Public d'Aide Sociale de Bruxelles* [2004] 3 CMLR 38 from *Krefeld*so as to apply the former and thus focus on residence derived from national law as opposed to EU law. This distinction would have precluded, or in the least limited, the applicability of the Directive. In turn this approach would have narrowed the arguments in favour of limiting UC to those with PSS. However, in essence the CJEU in *CG* removed the need to evaluate the source of an EU national's residence rights and focused instead on whether CG met the requirements of Article 7 of the Directive, but did so without overruling *Trojani* (indeed the CJEU's approach to this question replicated that argued by the Secretary of State for Work and Pensions in *Fratila* at first instance and on appeal).

It is easy to speculate and posit that this approach is one alive to political sensitives in a post-Brexit UK, and even a post-Brexit EU. That is not the preserve of this article. However, undoubtedly the decision is a curious and creative one. Whilst *CG* has ultimately determined that the UK's refusal to award UC to those with PSS is lawful, it has also provided for a mechanism to soften the impact of this decision. That is, by making clear that decision-makers must have regard to Articles 1,7 and 24 of the Charter before refusing UC, there is hope yet for claimants with PSS who applied before December 31, 2020.

In practice, this places the SC in an invidious position where the outstanding *Fratila* appeal is concerned. Subject to creative thinking, on any reading of *CG,* it seems that the CA's decision to quash Regulation 9(3)(c)(i) is liable to be overturned because it focused on Article 18 as opposed to the Directive; the SC remains bound by CJEU decisions that address EU law as it applied in the UK prior to December 31, 2020. However, arguments in relation to the Charter were not made in *Fratila* but clearly formed the basis of *CG's* backstop where there was a risk of violating a claimant's dignity/right to respect for family and/or interests of a claimant's children. Whether the SC will entertain arguments addressing the Charter, as they apply tothat appeal, will be crucial to claimants with PSS who claimed for UC before December 31, 2020.

It is of note that according to s5(4) of the European Union (Withdrawal) Act 2018, the Charter does not apply in the UK after December 31, 2020. For that reason, even if claimants who have applied for UC before that date can avail themselves of arguments under the Charter so as to circumvent a refusal due to PSS, those who apply after that date will not be afforded the same protection.

Joshua Yetman
7BR Chambers