
7BR Part-Heard

Reiss: Hello and welcome to 7BR's Part-Heard, the podcast that traverses the legal landscape, examining issues across multiple practice areas, guided by the diverse expertise of our members.

I'm Reiss Palmer, Chambers' Paralegal.

We are joined today by 7BR Member Joshua Yetman, who is joining us today to follow up with the case we discussed last July, that of *Fratila and another v Secretary of State for Work and Pensions*¹. Joshua is one of Chambers most recent tenants, having completed his pupillage in October 2020. He has a mixed practice with particular expertise in discrimination law and public law.

Josh welcome back to the podcast.

Josh: Hi Reiss.

Reiss: So, as I just said in the introduction, we're back to discuss the case that we did earlier this year, that of *Fratila*. Just as a brief round up, could you just give us an overview of the history to the matter and where we are now?

Josh: Yes, it's an appeal that this decision we're talking about today is in the Supreme Court, but unsurprisingly has gone via the High Court and then the Court of Appeal. To give an overview of the facts, the appellants in this case were Romanian Nationals, who had applied for a benefit called Universal Credit and the respondent, who was ultimately the appellant in the Supreme Court, was the Secretary of State for Work and Pensions, who administers and awards these sorts of benefits.

Now, at the time of applying, and this is the key issue in the case, both appellants had acquired something called a pre-settled status, which, post Brexit as it were, is a certain Right acquired under the EU settlement scheme, which is a form of immigration status. And so, really the question was, having acquired pre-settled status, having lived in the UK for less than five years at the time they applied, the question was whether or not they were entitled to universal credit.

Now, the main set focus for the court was a provision of the universal credit regulations that restricted the right of individuals with pre-settled status to acquire universal credit. So, the fundamental issue before the court was whether or not this was discriminatory on the basis of nationality. That is, they're Romanian nationals, lived in the UK for less than five years at the time of applying, should they be entitled to Universal Credit? And it engaged Article 18 of the Treaty of the Functioning of the European Union. So essentially, are they being discriminated against on the basis of that nationality?

Reiss: And still just going with the history to this case, could you just explain what the lower courts decided and why and what was then the primary focus of the appeal to the Supreme Court?

Josh: In the High Court of April 2020 decision, the claim brought by the respondents was ultimately challenged. And so the respondents at that stage were the ultimate claimants. So they challenged by way of judicial review, these 2019 Regulations, and they did it on the basis that they were ultimately discriminatory and contrary to Article 18, as I've already set out. So the ultimate argument was, once an EU citizen is lawfully resident, as they were, whether by

¹ [2021] UKSC 53

virtue of an EU law right or otherwise, a purely domestic law right, they fall within Article 18 and it's discriminatory if it refuses the entitlement due to their nationality under that 2019 Regulation.

Now, the High Court said the respondents so the claimants at that stage were entitled to rely on Article 18 to engage the prohibition of discrimination on the basis of nationality. But, it was found that there was not breach of that article and that was based upon the fact that there was indirect discrimination as opposed to direct discrimination. And therefore the question of justification arose, and it was found by the High Court that the measure was justified because essentially it was a maintenance of the status quo, firstly, and also it encouraged individuals to become sufficiently economically integrated into the UK. So essentially, that's the claimants who were appealing and they lost in the High Court.

So, coming to the Court of Appeal, the claimant, the Romanian nationals, appealed the High Court decision and that appeal ultimately succeeded, and the finding of the Court was that they could rely on Article 18 for the reasons given by the High Court. Now, Lord Justice McCombe and Lord Justice Moylan so the majority of the Court, decided that this discrimination was prohibited by EU law and importantly they did that on the basis that this was direct discrimination due to nationality and not indirect, so justification did not come into it.

Now, Lord Justice Dingemans did dissent from that and argued that this was indirect discrimination, but ultimately the Court allowed the appeal because the majority said it was directly discriminatory and that can never be justified. So that was the status quo before the Supreme Court decision.

Reiss: So we've now reached the Supreme Court. What was it that the appellant at this stage was arguing?

Josh: So the appellant in the Supreme Court by this stage is the Secretary of State for Work and Pensions, that being the party that lost, as it were, in the Court of Appeal. The Secretary of State argued that Article 18 of the Treaty of the Functioning of the European Union is inapplicable and therefore there's no breach.

Now, the basis of that case really was that an individual with no right of residence derived from EU law can rely on that provision. And that's an important point, this is the crux of the matter. The claimants sought to argue that a domestic right of residence that is pre-settled status derived from UK law or English and Welsh law, allows them to rely on Article 18 and the Court of Appeal agreed. The Secretary of State he was saying, no, you can't rely on Article 18 and the reason you can't is because this is a status that is derived from national law, not EU law, and that provision is designed to focus on EU law. Now, the respondents in the Supreme Court maintained unsurprisingly the argument set out in the Court of Appeal, essentially that once an EU citizen is lawfully resident, whether or not it's an EU right or a domestic right, they're within the scope of Article 18 and therefore that prohibition of discrimination applies.

Reiss: And what was the conclusion that the Supreme Court then came to?

Josh: In answering this question, The Supreme Court was with the Secretary of State, so the Secretary of State succeeded. The Court set out key questions and I'll read almost verbatim what they are, because I think it helps focus the matter.

The first question was whether the respondents, that is the claimant, the Romanian nationals, are entitled to rely on Article 18 by virtue of the domestic rights pre-settled status.

Secondly, if they can, whether or not those regulations, the 2019 Universal Credit Regulations, breach Article 18.

And then thirdly, whether that's direct or indirect, so as to address justification.

In making their decision, the Supreme Court made reference to recent Court of Justice of European Union decision that's the case of *CG v Department for Communities in Northern Ireland*². This decision essentially addressed an analogous question in the context of Northern Irish legislation, and what has happened is this has been referred by a preliminary reference from the courts in Northern Ireland to the highest arbiter of European Law there is. That decision ultimately bound, The Supreme Court found, its hand when it came to deciding this appeal.

Now, the decision in *CG* essentially said that every EU citizen can rely on the prohibition of discrimination on the grounds of nationality laid down in Article 18, but found that Article 18 is intended to apply only to situations governed by EU law in relation to which the Treaty of the Functioning of the European Union does not lay down specific rules on non-discrimination.

What does that mean? Well, essentially that's the Court saying whilst EU citizens can rely on this article, what they can't do is rely on it independently in relation to non-discrimination provisions. Now that was essentially bolstered by the finding in *CG* that the principle of non-discrimination is catered for by another article of EU law. So it's quite a complex interrelationship, essentially it was saying Article 24 of what's called the Citizens Rights Directive 2004, may be familiar to some, that caters for non-discrimination, and in fact, an EU national which faces discrimination on grounds of nationality must be assessed in relation to Article 24 of that 2004 Directive. And so therefore, if an EU citizen wants to rely on that directive, then their residence in the Member States must comply with the conditions of that directive. So the Court were essentially saying it's not Article 18. Number one, number two is Article 24 of the 2004 Citizens Rights Directive, but if you want to rely on the latter, your residence in the Member State has to comply with the conditions of that directive. And the court found actually and this is the European Court found that the claimants in that case did not comply with the conditions of that directive. That is fundamental to the Fratila appeal, because the Supreme Court then said, well, this question has been answered by the European Court, it's definitive, it's in favour of the appellant, that being the Secretary of State in the Supreme Court, and therefore, that answers the question. So they didn't even go on to address the indirect direct discrimination question because they just found, well, it's not even Article 18 of the Treaty of the Functioning European Union.

Reiss: So what does this mean going forwards then? What are the practical implications of this judgment?

Josh: Well, firstly, this is a definitive statement really, of EU law as it applied in the UK to this issue while the UK was a Member State of the European Union. So really, it's difficult to see this position changing anytime soon because, of course, the law and the applicability of the European Court's decision will alter post Brexit, but primarily, this is a definitive answer to the question of Article 18 in this context. Now what it also means is arguments raised by the claimants in the Supreme Court concerning the Charter of Fundamental Rights of the European Union also fall away. Essentially, this was something argued in the Supreme Court, and it was not addressed in the High Court or Court of Appeal, and it was thought to have been a possible backdoor insofar as well, even if Article 18 doesn't apply, could it be argued that provisions such as this would fall foul of the Charter of Fundamental Rights? The Supreme Court said, very quickly, you didn't argue this in the lower courts, essentially, so, therefore, this is not an issue before us. However, going forward, because this was addressed in the *CG* decision, this may be a slight opening that could be argued in the future even to facts that arise before the UK left the EU. That is, if it's argued from the beginning that provisions like this might breach the Charter, it may well be litigated, and there may well be a slightly different decision because that gives rise to slightly different questions.

² C-709/20.

Reiss: And just finally is there anything outstanding or anything secondary that you wanted to raise in relation to this judgment?

Josh: Well, practically speaking, it's just to say that those with pre-settled status, so those that haven't lived in the UK for five years or more before the UK left the European Union, this does unfortunately mean that the provision will stand, and that provision is essentially saying if you have pre-settled status, you cannot claim Universal Credit. So that's the unfortunate practical implication, but such claimants will have to hold on to possible future appeals raising the question of the Charter.

Reiss: Well, thanks, Josh. It's been a pleasure having you back on again.

Josh: Thank you, Reiss. Great to be here.

Reiss: Thank you to our listeners. We hope you enjoyed this week's episode and Josh's follow up and insight into the Supreme Court judgment of Fratila. If you enjoyed this week's episode, make sure to listen to his previous recording where he discusses the Court of Appeal judgment. Until next week, thank you and goodbye.

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