Landmark Chambers

Welcome to Landmark Chambers' EU free movement law and the EU settlement scheme webinar

The recording may be accessed here.

Your speakers today are…

Landmark Chambers

Richard Drabble QC

Chair

Matthew Fraser

Topic: Appendix EU – Where we are and issues arising in practice

Alex Shattock

Topic: Issues arising from Fratila v SSWP – Can people with pre-settled status be excluded from means tested benefits

Tim Buley QC

Topic: Extent to which EU rights preserved post-Brexit; applicability of the Charter

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EU Settlement Scheme – Current Issues

Matthew Fraser

Issues to be covered

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1. Latest statistics
2. Refusals and delays
3. The effect of the COVID-19 pandemic
4. Absences from the UK and pre-settled status
5. Grants of settled status and ongoing EEA appeals
6. Surinder Singh route
7. Suitability and criminality
8. Non-EEA family members
9. Administrative review and appeals
10. The scheme deadline
11. “Digital only” decisions

Statistics

Latest published statistics accurate up to 30 April 2020
https://www.gov.uk/government/collections/eu-settlement-scheme-statistics

- Total number of applications submitted: **3,536,000**.
- Total number of applications concluded: **3,220,100**.
- Of these, **58%** were granted settled status and **41%** were granted pre-settled status.
- Of the remaining applications, 25,800 received a withdrawn or void outcome, 10,200 were invalid and 700 were refused. Of the total refusals, 99% were refused on eligibility grounds and 1% were refused on suitability grounds.

Refusals and delays

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Home Office April 2020 statistics:

"*Many of these eligibility refusals relate to cases that had been under consideration for several months and, in most cases, subject to repeated unsuccessful attempts to obtain missing evidence or information from the applicant.*"

Delays may result from: request for further information; application being a minor not lined to an adult application; paper application; relevant criminal record; ongoing prosecution or police investigation; non-EEA national applying based on a relationship they haven't previously relied on in an application to the Home Office.

The effect of the COVID-19 pandemic

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9 April 2020, Home Office: "*applications to the EUSS continue to be processed, but during this challenging time they will take longer than usual to process*".

- Online / app applications & email support: stayed operational.
- Telephone helpline & postal route: re-opened since 22 May 2020
- Scanning service locations: still closed.

- Applications in April 2020 were 46% below March 2020
- Decisions in April 2020 were 51% below March 2020

The Home Secretary said on 29 April 2020 that "*we see no reason to extend the deadline when there's still over a year to apply*".

Absences and pre-settled status

EU citizens and family members qualify for “settled status” after completing “a continuous qualifying period of five years of residence” in the UK.

Those living in the UK for less than five years qualify instead for “pre-settled status”, and then “upgrade” to settled status after five years.

A “continuous qualifying period” = a period of residence that began before 11pm on 31 December 2020 and which has not been broken by:

1. Absence(s) from the UK exceeding a total of 6 months in any 12-month period, subject to exceptions;
2. A prison sentence;
3. A deportation, exclusion or removal decision or order.

Absences and pre-settled status

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How many days is 6 months?

"Month" not defined in Appendix EU, Immigration Rules generally, or legislation, but Home Office guidance on long residence applications for ILR: month = 30 days. To be safe, assume a total of 6 months = 180 days not 182 days.

What is a day?

A whole day. Parts of a day don't count. Leaving on 23 May, returning on 24 May, does not count as a day of absence.

Who's counting?

No need to list the exact dates of travel. Simply self-certify that absences do not exceed 6 months (although the Home Office can check border records).

Exceptions to the six-month rule

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- A single period of absence which did not exceed 12 months and was for an important reason (such as pregnancy, childbirth, serious illness, study, vocational training or an overseas posting); or

- any period of absence on compulsory military service; or

- any period of absence on a posting on Crown service or (as a spouse, civil partner, durable partner or child) any period of absence accompanying a person on a posting on Crown service; or

- any period spent working in the UK marine area (as defined in section 42 of the Marine and Coastal Access Act 2009)

Some absence issues

Consequence of exceeding the limit?

The “continuous qualifying period” needed to obtain “settled status” is broken, and the clock starts again from the date of return to the UK as long as the return is before 11pm on 31 December 2020 (and the person re-applies for pre-settled status upon return).

Coronavirus-related absences?

No provision at the moment for absences prolonged by Coronavirus, but there is word of a possible amendment coming in to deal with this.

Absences after “continuous qualifying period” achieved?

After 5-year continuous period achieved, a person can spend up to 5 years outside the UK without losing entitlement to settled status.

Grants of settled status and ongoing EEA appeals

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Ammari (EEA appeals - abandonment) Tunisia [2020] UKUT 124 (IAC) (2 March 2020)

The grant of settled status does not result in an appeal against an EEA decision under the 2016 EEA Regs being treated as abandoned (unlike the former position in relation to EEA appeals brought under section 82(1) of the NIAA 2002).

Why does this matter? A permanent residence card can have advantages over settled status when it comes to proving legality of residence in citizenship applications.

Surinder Singh

- British Citizen moves to another EU country, meets a partner or other family member there, and moves back with them to the UK. The British Citizen is treated as an EU migrant who can sponsor a family member.

- To use this route: UK citizen needs to be resident abroad exercising free movement rights before 31 December 2020, and must return to the UK before 29 March 2022 as long as their relationship began before Exit Day (31 January 2020). If the relationship began during the transition period, the deadline for return is 31 December 2020.

- Can only make paper application (form is 61 pages long).

https://www.freemovement.org.uk/new-statement-of-changes-to-the-immigration-rules-hc-120/

What criminal offences will disqualify an applicant?

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The rules distinguish between pre-Brexit and post-Brexit offending.

- Pre-Brexit offending (inc. in transition period) will be subject to existing EU law on deportation due to previous criminal convictions.

- Post-Brexit offending will be subject to current UK deportation rules.

Pre-Brexit offending

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Proportionality assessment triggered by:

- Receiving any prison sentence within the last five years
- Receiving a prison sentence of at least 12 months for a single offence at any time
- Receiving three or more convictions in the last three years, if not resident in the UK for five or more years.
- Prior involvement in serious deception such as sham marriage or assisting unlawful immigration

Where a person was previously considered for deportation but this was not pursued, they will not be re-considered for deportation.

Pre-Brexit offending

Any disqualification on criminal grounds must be **proportionate**, having regard to the individual facts of the case, e.g. length of residence, family ties, nature of the offences, degree of rehabilitation.

See *EEA decisions taken on grounds of public policy* (v. 3.0, 14 Dec 2017).

Warning: applications may be refused if false/misleading information that is material to the decision is submitted: para. EU16(a).

Post-Brexit offending

- Either settled or pre-settled status can be taken away based on post-Brexit offending, and the person can face deportation action.

- Ordinary deportation rules apply – far weaker protection than EU rules:
  - 4+ years imprisonment: deportation unless very compelling circumstances
  - 1-4 years imprisonment: deportation unless private life or family life exceptions engaged, or very compelling circumstances
  - Less than 1 year, non-persistent, no serious harm: no automatic deportation, but still may be deported if conducive to the public good.

Can non-EEA family members get status?

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- Family members of EEA nationals (known as “the sponsor”) are entitled to settled status / pre-settled status on the same basis as EEA nationals. Same deadlines and application process apply as for EEA nationals.

- Family member:
  - Close family: spouse, civil partner, under 21 child, parent, grandparent;
  - Extended family: durable partners and dependent relatives

- If relationship formed before 31 December 2020, then family member can join from abroad in the future after that date. If formed after, then normal family visa rules apply.

- In cases of death/divorce, family member can apply without sponsor.

What happens if the application is refused?

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- An application should not be refused without an opportunity to submit further evidence

- Right to re-submit new application (**if in time**) or seek **administrative review** (different person, still Home Office, refundable £80 fee, with option of submitting new evidence, 28 day time limit) if refused or granted incorrect status (unless serious offence has prompted deportation)

- Right of appeal to FTT (full merits review) if refused status.

What if you miss the deadline for applying?

- Deadline: 30 June 2021 (unless extended, e.g. due to Coronavirus …)

- Article 18(1)(d) of the Withdrawal Agreement:

"*where the deadline for submitting the application … is not respected by the persons concerned, the competent authorities shall assess all the circumstances and reasons for not respecting the deadline and shall allow those persons to submit an application within a reasonable further period of time if there are reasonable grounds for the failure to respect the deadline*"

Nothing in Appendix EU or guidance about this, but statement from Government in January 2020 that people can apply after if "good reason": https://www.bbc.co.uk/news/uk-politics-51146992.

Legal challenge to “digital-only” decisions

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A legal challenge to decisions on settled status being online only.

Grounds relied on: irrationality; failure to take into account mental health problems; breach of Article 8 ECHR.

Dismissed as unarguable by High Court of Justice of Northern Ireland: *JR96's Application for Leave to Apply for Judicial Review, Re* [2019] NIQB 97.

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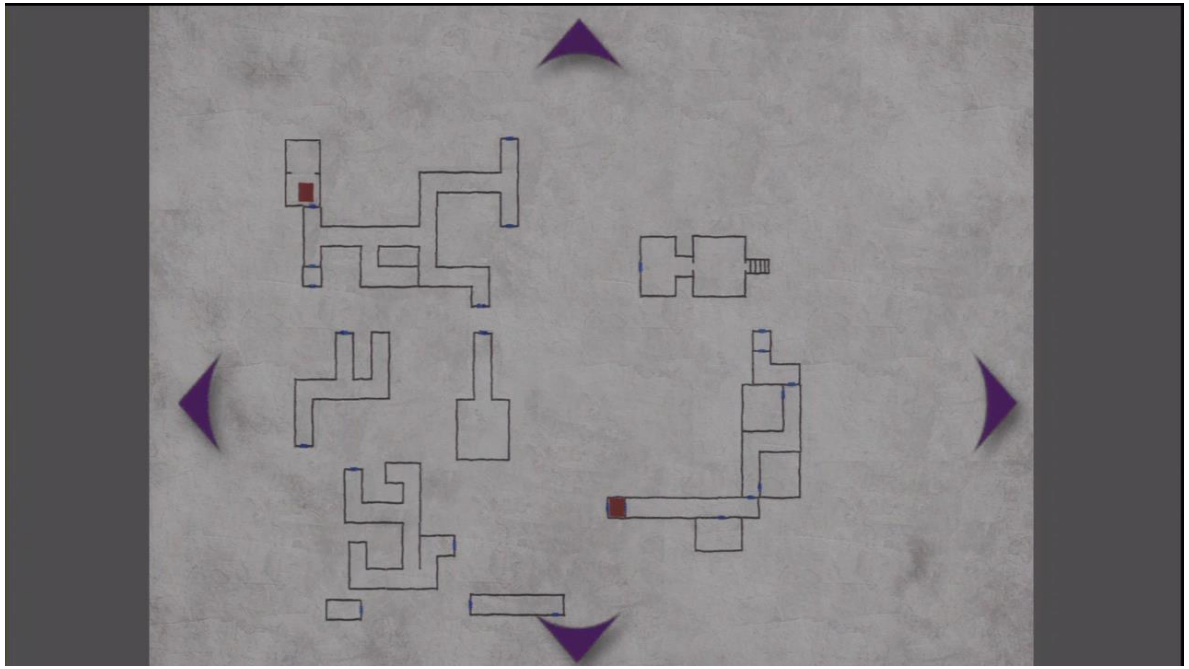
Fratila v SSWP:
Pre-settled status and benefits entitlement

Alex Shattock

EEA nationals and social security law

- *Fratila v SSWP* [2020] EWHC 998 (Admin) considered the interaction between Appendix EU and social security benefits
- Q: How does EEA national entitlement to social security benefits work?
- Social security law is a bit of a maze…



Example: Universal Credit entitlement

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- Welfare Reform Act 2012 and the Universal Credit Regulations 2013 SI 376

- S.3 of the Welfare Reform Act 2012 provides:

"3(1) A single claimant is entitled to universal credit if the claimant meets—

(a) the basic conditions, and

(b) the financial conditions for a single claimant."

Example: Universal Credit entitlement

Landmark Chambers

- Welfare Reform Act 2012 and the Universal Credit Regulations 2013 SI 376

- S.4 of the Welfare Reform Act 2012 provides:

"4 Basic conditions

(1) For the purposes of section 3, a person meets the basic conditions who—

(a) is at least 18 years old,

(b) has not reached the qualifying age for state pension credit,

(c) **is in Great Britain**,

(d) is not receiving education, and

(e) has accepted a claimant commitment."

- Seems straightforward, but…

Example: Universal Credit entitlement

Landmark Chambers

Regulation 9, Universal Credit Regulations 2013/376

9.— Persons treated as not being in Great Britain

(1) For the purposes of determining whether a person meets the basic condition to be in Great Britain, except where a person falls within paragraph (4), a person is to be treated as not being in Great Britain if the person is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.

(2) A person must not be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless the person has a right to reside in one of those places.

(3) For the purposes of paragraph (2), a right to reside does not include a right which exists by virtue of, or in accordance with—

(a) regulation 13 of the EEA Regulations or Article 6 of Council Directive No. 2004/38/EC [1] ; [...] [2]

[

(aa) regulation 14 of the EEA Regulations [4] , but only in cases where the right exists under that regulation because the person is–

(i) a qualified person for the purposes of regulation 6(1) of those Regulations as a jobseeker; or

(ii) a family member (within the meaning of regulation 7 of those Regulations) of such a jobseeker; [...] [5]

] [3]

(b) [regulation 16] [6] of the EEA Regulations [7] , but only in cases where the right exists under that regulation because [the person] [8] satisfies the criteria in [regulation 16(5)] [9] of those Regulations or article 20 of the Treaty on the Functioning of the European Union [10] (in a case where the right to reside arises because a British citizen would otherwise be deprived of the genuine enjoyment of their rights as a European citizen) [; or] [11]

Law In Force

Version 4 of 4

Version 4
To: Present
From: 7 May 2019

Version 3
To: 6 May 2019
From: 10 June 2015

Version 2
To: 9 June 2015
From: 29 October 2013

Version 1
To: 28 October 2013
From: 29 April 2013

Subjects
Social security

(c) a person having been granted limited leave to enter, or remain in, the United Kingdom under the Immigration Act 1971 by virtue of—

(i) Appendix EU to the immigration rules made under section 3(2) of that Act; or

(ii) being a person with a Zambrano right to reside as defined in Annex 1 of Appendix EU to the immigration rules made under section 3(2) of that Act.

] [12]

(4) A person falls within this paragraph if the person is—

(a) a qualified person for the purposes of regulation 6 of the EEA Regulations as a worker or a self-employed person;

(b) a family member of a person referred to in sub-paragraph (a) within the meaning of regulation 7(1)(a), (b) or (c) of the EEA Regulations;

(c) a person who has a right to reside permanently in the United Kingdom by virtue of regulation 15(1)(c), (d) or (e) of the EEA Regulations;

(d) a refugee within the definition in Article 1 of the Convention relating to the Status of Refugees done at Geneva on 28th July 1951, as extended by Article 1(2) of the Protocol relating to the Status of Refugees done at New York on 31st January 1967;

[

(e) a person who has been granted, or who is deemed to have been granted, leave outside the rules made under section 3(2) of the Immigration Act 1971 where that leave is—

(i) discretionary leave to enter or remain in the United Kingdom,

(ii) leave to remain under the Destitution Domestic Violence concession [14] , or

(iii) leave deemed to have been granted by virtue of regulation 3 of the Displaced Persons (Temporary Protection) Regulations 2005 [15] ;

] [13]

(f) a person who has humanitarian protection granted under those rules; or

(g) a person who is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999 and who is in the United Kingdom as a result of their deportation, expulsion or other removal by compulsion of law from another country to the United Kingdom.

Notes

1 OJL 158, 30.4.04, p.77.

2 Word revoked by Universal Credit (EEA Jobseekers) Amendment Regulations 2015/546 reg.2(a) (June 10, 2015: revocation has effect subject to SI 2015/546 reg.1(2))

3 Added by Universal Credit (EEA Jobseekers) Amendment Regulations 2015/546 reg.2(b) (June 10, 2015: insertion has effect subject to SI 2015/546 reg.1(2))

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5 Word revoked by Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019/872 reg.8(3)(a) (May 7, 2019)

6 Words substituted by Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019/872 reg.8(3)(b)(i) (May 7, 2019)

7 Regulation 15A was inserted by S.I. 2012/1547 and paragraph (4A) of that regulation was inserted by S.I.2012/2560.

8 Words substituted by Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019/872 reg.8(3)(b)(ii) (May 7, 2019)

9 Words substituted by Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019/872 reg.8(3)(b)(iii) (May 7, 2019)

10 OJC 83, 30.03.10 p.47.

11 Word added by Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019/872 reg.8(3)(c) (May 7, 2019)

12 Added by Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019/872 reg.8(3)(d) (May 7, 2019)

13 Substituted by Social Security (Miscellaneous Amendments) (No. 2) Regulations 2013/1508 reg.3(5) (October 29, 2013)

14 The Destitution Domestic Violence concession is published by the Home Office at: http://www.ukba.homeoffice.gov.uk/.

15 As amended by S.I. 2013/630 and other amending instruments which are not relevant for this amendment.

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Example: Universal Credit entitlement

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Regulation 9, Universal Credit Regulations 2013/376

- *In summary*: despite actually living in the UK, EEA nationals are not treated as being "in Great Britain" for the purposes of the 2012 Act *unless* they have a right of permanent residence*
- Often this will mean UC claimants not in work will need to establish permanent residence e.g. under Regulation 15 of the EEA Regs 2016

*though not an issue if they are currently a worker or jobseeker under EU law- see reg 9(4) (and other exceptions (!))

Example: Universal Credit entitlement

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- Enter the Social Security (Income-related Benefits) (Updating and Amendment) (EU exit) Regulations 2019 ("*SSIRBUAEUER 2019*"-?)
- These regs added a new qualification to Reg 9 UC Regs…

Example: Universal Credit entitlement

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(ii) being a person with a Zambrano* right to reside as defined in Annex 1 of Appendix EU to the immigration rules made under section 3(2) of that Act.

**Zambrano* carers being persons with special derivative rights to remain as their residence is required for a British Citizen, often a child, to remain in the UK

In a nutshell

- So basically: pre-settled status= not residing in Britain= no UC
- Other regs amended by the 2019 Social Security Regs in a similar fashion:

Employment and Support Allowance Regulations 2008

Income Support (General) Regulations 1987

Jobseeker's Allowance Regulations 1996

Housing Benefit Regulations 2006

State Pension Credit Regulations 2002

Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006

In a nutshell

- The 2019 Social Security Regulations amended all these schemes to prevent reliance on pre-settled status to meet the residence tests which are a condition of entitlement.

Aside: Appendix EU

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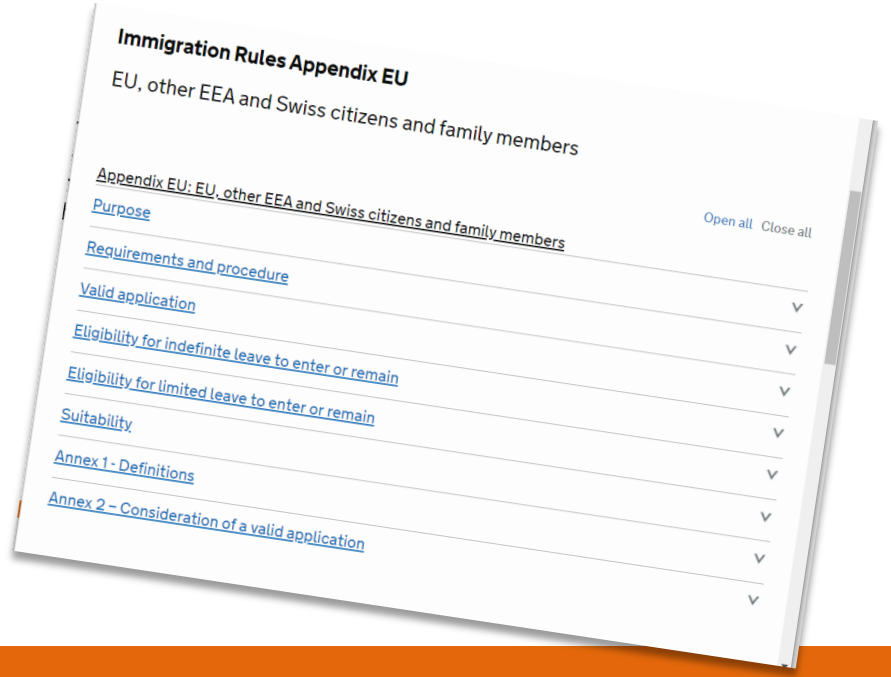
- Appendix EU introduced by the Home Secretary as “a limited pilot” scheme from August 2018, and “went fully live” on 30 March 2019- in accordance with the provision made in articles 1 and 7 of the Immigration (European Economic Area Nationals) (EU Exit) Order 2019.
- The 2019 Social Security Regulations were made on 16 April 2019 and came into force on 7 May 2019.
- Appendix EU sets out the settlement scheme pursuant to SSHD’s powers under the Immigration Act 1971, for EEA nationals (other than British nationals) who are present in the United Kingdom as at the date the United Kingdom withdraws from the EU. Under Appendix EU such EEA nationals may apply either for (1) permanent leave to remain (so-called “settled status”) or (2) limited leave to remain (“pre-settled status”).

Aside: Appendix EU

- Pre-settled status provides a limited right to remain in the United Kingdom to EU nationals who, before the end of the transition period, have begun to live in the United Kingdom. This limited right to remain enables such persons to remain until such time as they have 5 years' continuous residence, enabling them to apply for settled status.



Fratila v SSWP

- *Fratila* challenged all of those amendments, on the basis that they led to unlawful discrimination on grounds of nationality, contrary to EU law.
- Claimant's key point: EU case law states if an EU national is lawfully resident in another EU member state on the basis of a right of residence arising under that state's domestic law, she may not be subject to discrimination on grounds of nationality (Article 18 TFEU).
- SSWP's key point: You can't rely directly on Article 18 TFEU as all relevant rights arising under EU law relating to rights of residence have been codified in Directive 2004/38/EC ("the Citizens' Rights Directive"-see Article 24- allowing social security derogations)
- Other questions- direct or indirect discrimination- if indirect, is the discrimination justified?

Fratila v SSWP

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- Swift J: recent EU case law does lend some support to SSWP's analysis re: Citizens' Rights Directive as there was no direct reliance on Article 18 TFEU- (*Dano v Jobcenter Leipzig* [2015] 1 WLR 2519; *Jobcenter Berlin Neukolln v Alimanovic* [2016] QB 308)- however in these cases CJEU didn't rule it out, it just appears to have not considered direct reliance on Article 18 TFEU ([21])
- Lack of reasoning on the part of CJEU is not exactly unusual, and Swift J held that there was no basis to depart from earlier EU case law: i.e. that a claimant could rely on Article 18 TFEU directly
- In this case, the right does not derive from the Citizens' Rights Directive, and in fact is wider in scope than the EEA Regs- and so Article 18 TFEU can be relied on [23]

Fratila v SSWP

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- Swift J accepted SSWP's assertion that if there was discrimination, it was indirect discrimination following *Patmalniece v Secretary of State for Work and Pensions* [2011] 1 WLR 783
- He suggests at [28] it could not arguably be direct discrimination:
- *"There is no indissociable connection between nationality and a right to reside in the United Kingdom: although those with such a right to reside are more likely to be British nationals, foreign nationals can also obtain that right to reside."*
- The judge accepted it was however indirect discrimination [29].

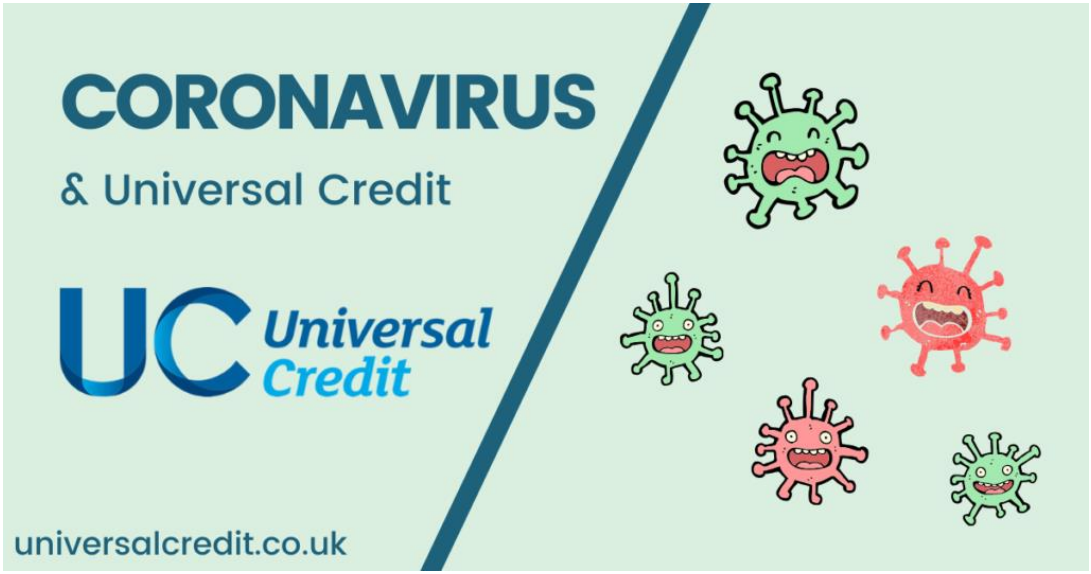
Fratila v SSWP

Landmark Chambers

- However- Swift J considered the indirect discrimination was justified [32].
- Interestingly he said a justification must be capable of validating each specific part of a provision under challenge [30]
- He accepted the purpose of the requirement was *"protecting the social security system in the United Kingdom from persons who come to the United Kingdom to live off benefits rather than to work."*
- He also accepted there was a "principle" that EU nationals should contribute to the economy before receiving taxpayer support (arguably contrary to the underlying philosophy of the welfare state- universality)
- Key point: Appendix EU rights of residence **supplement** existing rights of residence- so if the latter are justified, Appendix EU doesn't take anything away from EEA nationals. **Status quo maintained** [32]

Implications

- Pre-settled status does not grant EEA claimants an entitlement to social security benefits. This is very worrying as many EEA nationals in the UK will lose their jobs as a result of the Covid-19 pandemic and the resulting global recession



Actual graphic from UC official website

Implications

- Divergence between EA 2010 discrimination law and Article 18 TFEU discrimination?
- Justification applies to each constituent part of a scheme
- Courts do not want to get involved in political debates: and so are more likely to accepted ideological justifications at face value, without intensive legal scrutiny
- “Status quo” arguments very powerful in challenges to new Brexit measures
- Proportionality assessment somewhat sidelined: cursory analysis at [30] of *Fratila*. Does a proportionality assessment need to apply to each constituent part of a measure under challenge? How does it tie in with the overall justification assessment- and how intensive must the proportionality assessment be?

What next?

- The Court of Appeal granted permission to appeal on 29 May 2020.
- The Claimants' application for the case to be expedited and heard prior to 31 July 2020 was not granted.
- CPAG: *"The Claimants will argue that although the Court of Justice has not considered whether discrimination of this sort is direct (which would render it incapable of justification) or indirect (which would mean it could be lawful if justified) it has been clear that such discrimination is prohibited and the Claimants say that is the correct answer to their claim."*

Landmark Chambers

PRESERVATION OF EU IMMIGRATION RIGHTS POST-BREXIT AND THE EU CHARTER

TIM BULEY QC

OVERVIEW AND RESOURCES

Landmark Chambers

- This talk is concerned with EU immigration law *after* the end of transition or "implementation", currently scheduled for the end of 31 December 2020

- Two critical pieces of primary legislation:
  - European Union (Withdrawal) **Act** 2018 ("2018 Act")
  - Immigration and Social Security Co-ordination (EU Withdrawal) **Bill** 2019-20

- NB also the Immigration, Nationality and Asylum (EU Exit) Regulations 2019, made under the 2018 Act

THE EUROPEAN WITHDRAWAL ACT 2018 (1): A NEW CONSTITUTIONAL STATUTE

Landmark Chambers

- The EU (Withdrawal) Act 2018 makes detailed provision about the retention, status, and amendment of EU law following Brexit.

- The 2018 Act is a constitutional statute, whose meaning and effect are likely to be the subject of argument for many years or even decades after Brexit.

- Many uncertainties and unanswered questions about its application.

THE EUROPEAN WITHDRAWAL ACT 2018 (2): REPEAL OF THE ECA 1972

Landmark Chambers

- Section 1 of the 2018 Act:

  The European Communities Act 1972 is repealed on exit day.

- Exit day was 31 January 2020. But this is all deferred as a result of section 1A, which defers all this until “IP completion day”, currently 31 December 2020. so section 1 contains a half-truth at best!

- Note that some of the references in the 2018 Act to “exit day” have been amended to “IP Completion day” but in some cases the amendments have not yet come into effect.

- EU Law is largely given effect in UK law by ECA 1972, so effect will be that, subject to exceptions in 2018 Act, EU Law ceases to have effect.

THE EUROPEAN WITHDRAWAL ACT 2018 (3): PRESERVATION OF EU LAW

Landmark Chambers

- Sections 2-7 provide for major exceptions to repeal of EU, so as to preserve most EU law in force on Exit Day.

- Three categories of retained EU law:
  - Section 2, Saving for EU-derived domestic legislation
  - Section 3, Incorporation of Direct EU legislation
  - Section 4, Saving for rights under section 2(1) ECA 1972

- Each of these is in turn subject to general exceptions in section 5 and Schedule 1

SECTION 2: SAVING FOR EU-DERIVED DOMESTIC LEGISLATION

Landmark Chambers

- Section covers “any enactment” either (a) made under, or (b) made for a purpose mentioned in section 2 of the ECA 1972. It also covers “any enactment” otherwise relating to EU law. Note that definition of “EU-derived domestic legislation” now moved to section 1B, but unaltered in substance

- Basic effect is to preserve legal status quo at exit day, subject to sections 8 and 9.

- This covers both primary and secondary legislation, <u>whether or not made under ECA 1972</u>

SECTION 3: DIRECT EU LEGISLATION

Landmark Chambers

- Section 3 is aimed at “direct EU legislation” i.e. EU legislation which has direct effect in UK law without, and without need for, implementing UK legislation. Primary examples:
  - EU Regulations, decisions, tertiary legislation
  - Annexes and protocols to the EEA agreement

- House of Lords Constitution Committee observes that relationship with section 2 may be “complex”, because potentially directly effective EU legislation may nevertheless be implemented by UK legislation so that section 2 applies, but:

  25. … It is possible … to envisage circumstances in which only part of a relevant EU instrument is reflected in domestic legislation. … Thus, post-exit, certain EU instruments may persist in domestic law through the combined effect of [sections] *2 and 3, such as some provisions of the Equality Act.*

SECTION 4: RIGHTS ETC

Landmark Chambers

- Section 4 provides for retention of “any rights, powers, liabilities, obligations, restrictions remedies and procedures” that are recognised before exit day “by virtue of section 2(1) of the ECA 1972.

- Importantly, this is means by which directly effective rights under EU Directives are preserved, subject to section 4(2)(b):

  (b) arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before exit day (whether or not as an essential part of the decision in the case).

EXCEPTION 1: SUPREMACY OF EU LAW

Landmark Chambers

- Section 5(1) provides that the principle of the supremacy of EU law does not apply to any enactment made on or after exit day. Section 5(2) provides that "accordingly", the principle continues to apply "to the interpretation, disapplication or quashing of any enactment or rule of law" made before exit day.

- Supremacy principles (see para Chapter 5 of HL CC Report for detailed discussion), not defined in Act, but is the principle that EU law has supremacy over all forms of domestic law.

- Basic effect is that the legal and legal effect of domestic legal acts made before exit day can still be judged against compatibility with EU law. Those made after, cannot be so judged.

EXCEPTION 2: CHARTER OF FUNDAMENTAL RIGHTS (1)

Landmark Chambers

- Section 5(4) provides that the Charter of Fundamental Rights is not part of UK law after exit
- Section 5(5) says that this does not affect the operation of EU law "fundamental rights or principles which exist irrespective of the Charter"
- Paradox. The explanatory notes to the 2018 Act says:

  The Charter did not create new rights, but rather codified rights and principles which already existed in EU law. … Given that the Charter did not create any new rights, subsection (5) makes clear that, whilst the Charter will not form part of domestic law after exit, this does not remove any underlying fundamental rights …

- This reflects judgments of CJEU which will remain binding e.g. *NS (Afghanistan) v SSHD* [2012] 3 WLR 1374. Indeed, pre-exit, Charter is only effective in UK law because of legal reality or fiction that Charter does no more than restate existing principles.

EXCEPTION 2: CHARTER OF FUNDAMENTAL RIGHTS (2)

Landmark Chambers

- So there is a strong argument that the exclusion of the Charter has no legal consequences. But the position is unclear, and not clearly settled by the Act

- House of Lords Constitution Committee observes:

  119. The primary purpose of this Bill is to maintain legal continuity and promote legal certainty by retaining existing EU law as part of our law, while conferring powers on ministers to amend the retained EU law. If, as the government suggests, the Charter of Fundamental Rights adds nothing to the content of EU law which is being retained, we do not understand why any exception needs to be made for it. If, however, the Charter does add value, then legal continuity suggests that the Bill should not make substantive changes to the law which applies immediately after exit day.

EXCEPTION 2: CHARTER OF FUNDAMENTAL RIGHTS (3)

Landmark Chambers

- Charter *only* applies for now when UK is acting within the "material scope" of EU law: see Article 51 of the Charter, and see e.g. *Zagorksi* [2011] HRLR 6

- So not possible to simply rely on the Charter in all cases in the way one can with ECHR.

- Relatively straightforward where a question arises as to *interpretation* of retained EU law that UK will be acting within Scope (and difficult to see how in any case one could ignore Charter on a question of interpretation, given continuing relevance of EU case law)

- Much more tricky in relation to exercise of *discretion* within existing EU law framework

SECTION 6: INTERPRETATION OF RETAINED LAW STATUS OF CJEU JUDGMENTS POST-EXIT

Landmark Chambers

- Section 6 is concerned with status of CJEU case law post-exit.

- Section 6(1) provides that a UK court “is not bound by” CJEU decisions made on or after IP completion day. Section 6(2) however provides that a court may “have regard” to such judgments
  - So courts will have to develop case law (analogous to section 2 HRA 1998 case law) on extent to which they will have regard to such case law

- Courts are however bound by EU case law decided before exit day, where it touches the meaning and effect of EU law provisions (section 6(4).
  - There is an exception to that for the Supreme Court, which may depart from a CJEU judgment which would otherwise be binding under section 6(5) applying the same test as it applies to departing from its own decisions

SECTION 6: INTERPRETATION OF RETAINED LAW STATUS OF CJEU JUDGMENTS POST-EXIT (2)

Landmark Chambers

- Now subject to new power (section 26 2020 Act, inserting section 6(5A) into 2018 Act) for Ministers to make secondary legislation designating other courts as courts which *may* depart from EU case law decided before exit day

- Highly controversial power, for good summary see joint PLP and Clientearth briefing note:

  https://publiclawproject.org.uk/wp-content/uploads/2020/01/PLP-and-ClientEarth-joint-briefing-on-clause-26-of-WAB_.pdf

SECTION 8: SECONDARY LEGISLATION

Landmark Chambers

- Section 8 provides power to amend primary and secondary legislation to deal with “deficiencies arising from withdrawal”, namely “to prevent, remedy or mitigate”:

  (a) any failure of retained EU law to operate effectively, or

  (b) any other deficiency in retained EU law

  arising from withdrawal of the United Kingdom from the EU.

- Deficiencies are listed non-exhaustively in section 8.

- General idea is that this is not a power to make substantive changes on controversial issues, but to deal with consequential problems arising from withdrawal

- The 2019 Regs are made pursuant to this power. Should not generally make *substantive* changes to immigration law other than where EU law is not effective post-exit. Example of important matter which is revoked is Dublin III Regulation relating to returns of asylum seekers to EU countries that they passed through – cannot be operated post-exit.

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHRAWAL) BILL (1)

Landmark Chambers

- Bill broadly makes provision about two matters:
  - End of Free Movement rights
  - Make provision relating to social security co-ordination
- Takes very different approach to these two topics, with very different consequences for continuing relevance of EU rights

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHRAWAL) BILL (2): FREE MOVEMENT

Landmark Chambers

- Section 1 gives effect to Schedule 1, which it says "makes provision":

  (a) end rights to free movement of persons under retained EU law, including by repealing the main provisions of retained EU law relating to free movement, and

  (b) end other EU-derived rights, and repeal other retained EU law, relating to immigration

- Schedule 1 then lists the rights which are repealed, including:
  - Part 1, section 7 IA 1988, section 108 NIA 2002 and the Immigration (EEA) Regs 2016
  - Part 3, rights etc which would be retained under section 4 of the 2018 Act. NB Drafting seems very unclear, read literally would relate to all EU rights regardless of whether relating to immigration and free movement. Explanatory notes do clarify that it is only provisions relating to Free Movement

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHRAWAL) BILL (3): FREE MOVEMENT PRESERVED RIGHTS?

Landmark Chambers

- Basic effect of Bill, if passed, will be to remove all Free Movement Rights so that EU migrants revert to “domestic law / non-EU” immigration rights, subject to and in accordance with Appendix EU and immigration rules more generally

- Little or no scope to argue for preserved EU rights going forward in relation to *free movement.* 2020 Bill expressly revokes all retained EU law

- Likewise for EU Charter, once these measures are repealed little or no scope to argue that EU is acting with scope of EU law in relation to immigration matters.

- But query in relation to Appendix EU, which pre-dates coming into force of Bill

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHRAWAL) BILL (4): OTHER IMMIGRATION PRESERVED RIGHTS?

Landmark Chambers

- Bill does not revoke all EU law relating to immigration, and in particular does not revoke:
  - In relation to asylum, Qualification Directive and Procedures Directive will, subject to further legislation before 2021, become part of retained EU law
  - Trafficking Directive will become part of retained EU law
- In relation to these, EU rights are fully preserved subject to further legislation. That also means that:
  - EU case law decided before exit remains binding, subject to the Supreme Court, High Court of Justiciary and regs under section 6(5A) of the 2018 Act
  - EU case law decided after exit remains relevant
  - Charter remains potentially applicable in this sphere
  - Query status of directly effective rights recognised *after* exit day (NB section 4(2)(b) above)

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHRAWAL) BILL (5): OTHER IMMIGRATION PRESERVED RIGHTS?

Landmark Chambers

- Bill does not revoke all EU law relating to immigration, and in particular does not revoke:
  - In relation to asylum, Qualification Directive and Procedures Directive will, subject to further legislation before 2021, become part of retained EU law
  - Trafficking Directive will become part of retained EU law
- NB for now, no *power* to revoke these provisions, subject to future primary legislation
- In relation to these, EU rights are fully preserved subject to further legislation. That also means that:
  - EU case law decided before exit remains binding, subject to the Supreme Court, High Court of Justiciary and regs under section 6(5A) of the 2018 Act
  - EU case law decided after exit remains relevant
  - Charter remains potentially applicable in this sphere
  - Query status of directly effective rights recognised *after* exit day (NB section 4(2)(b) above)

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHRAWAL) BILL (6): SOCIAL SECURITY

Landmark Chambers

- Unlike free movement provisions, clause 5 of the Bill does not *revoke* measures relating to social security co-ordination but merely gives power to modify them in future
- For time being, such measures continue as part of retained EU law, subject to future modifications
- Most important measure here is EU Reg 883/2004, whose effect includes:
  - Enabling EU nationals living in the UK to access social security benefits if they are working or have worked here or have become "insured" in other ways (e.g. *Ruas* [2010] PTSR 1757)
  - Enabling UK nationals, and others who have lived and worked here, to claim UK benefits in certain circumstances whilst living in EU member states (e.g. *Tolley* [2017] 1 WLR 1261, and see *Konevod,* in Court of Appeal, forthcoming)

- For time being, EU rights are preserved, and Charter remains potentially applicable

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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