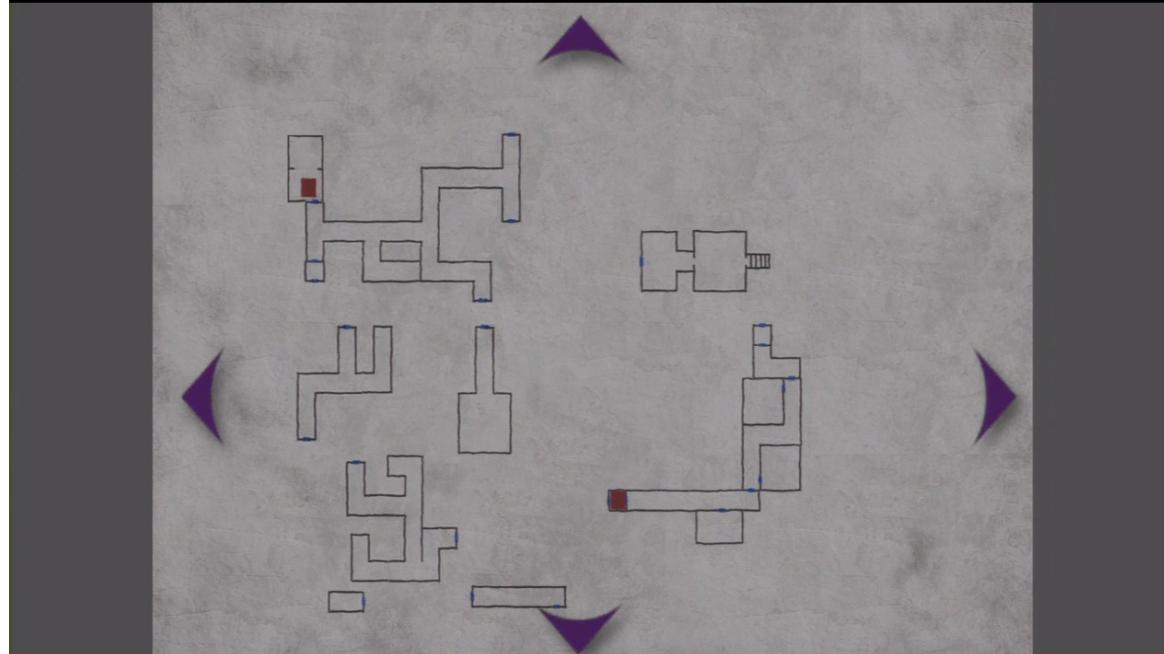


Fratila v SSWP:
Pre-settled status and benefits entitlement

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

- 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

- 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

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/EC¹; [...]²

[

(aa) regulation 14 of the EEA Regulations⁴, 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 Regulations⁷, 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 Union¹⁰ (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 concession¹⁴, or

(iii) leave deemed to have been granted by virtue of regulation 3 of the Displaced Persons (Temporary Protection) Regulations 2005¹⁵;

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(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

(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

- OJL 158, 30.4.04, p.77.
- 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))
- 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))
- Relevant amending instruments are S.I. 2012/1547 and S.I. 2013/3032
- Word revoked by Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019/872 reg.8(3)(a) (May 7, 2019)
- Words substituted by Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019/872 reg.8(3)(b)(i) (May 7, 2019)
- Regulation 15A was inserted by S.I. 2012/1547 and paragraph (4A) of that regulation was inserted by S.I.2012/2560.
- Words substituted by Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019/872 reg.8(3)(b)(ii) (May 7, 2019)
- Words substituted by Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019/872 reg.8(3)(b)(iii) (May 7, 2019)
- OJC 83, 30.03.10 p.47.
- Word added by Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019/872 reg.8(3)(c) (May 7, 2019)
- Added by Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019/872 reg.8(3)(d) (May 7, 2019)
- Substituted by Social Security (Miscellaneous Amendments) (No. 2) Regulations 2013/1508 reg.3(5) (October 29, 2013)
- The Destitution Domestic Violence concession is published by the Home Office at: <http://www.ukba.homeoffice.gov.uk/>.
- As amended by S.I. 2013/630 and other amending instruments which are not relevant for this amendment.

Example: Universal Credit entitlement

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Example: Universal Credit entitlement

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

- 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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*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

Housing Benefit Regulations
2006

Income Support
(General) Regulations
1987

State Pension Credit
Regulations 2002

Jobseeker's Allowance
Regulations 1996

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.

~~Employment and
Support Allowance
Regulations 2008~~

~~Housing Benefit Regulations
2006~~

~~Income Support
(General) Regulations
1987~~

~~State Pension Credit
Regulations 2002~~

~~Jobseeker's Allowance
Regulations 1996~~

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

Aside: Appendix EU

- 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.

Immigration Rules Appendix EU
EU, other EEA and Swiss citizens and family members

Open all Close all

[Appendix EU: EU, other EEA and Swiss citizens and family members](#)

[Purpose](#)

[Requirements and procedure](#)

[Valid application](#)

[Eligibility for indefinite leave to enter or remain](#)

[Eligibility for limited leave to enter or remain](#)

[Suitability](#)

[Annex 1 - Definitions](#)

[Annex 2 - Consideration of a valid application](#)

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

- 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

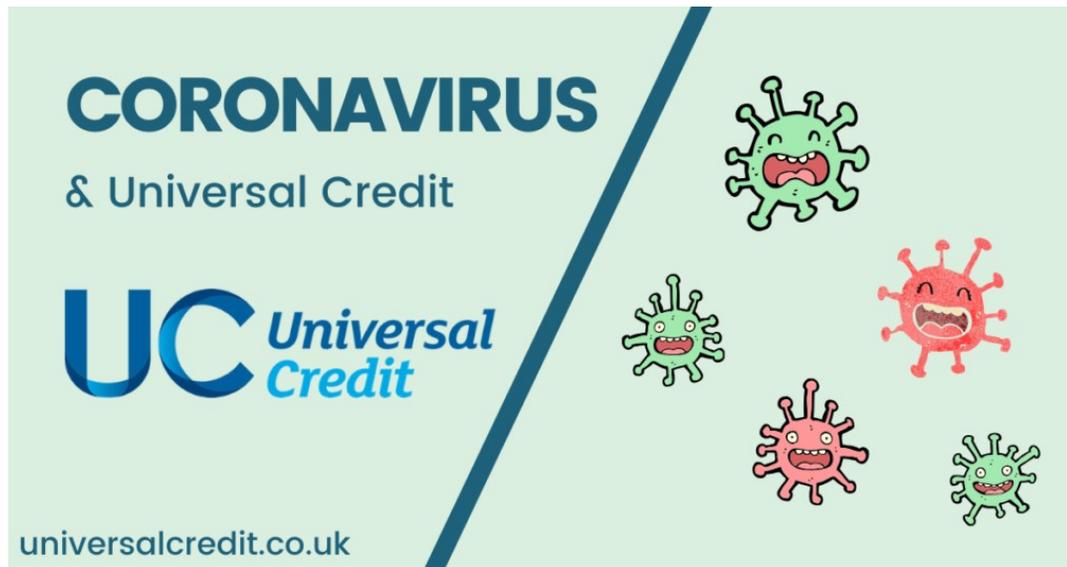
- Swift J accepted SSWP's assertion that if there was discrimination, it was indirect discrimination following *Patmalniece v Secretary of State for Work and Pensions* [2011] 1 WLR 783
- He suggests at [28] it could not arguably be direct discrimination:
- *“There is no indissociable connection between 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

- 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 accept 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.”*

Thank you for listening

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