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Introduction

1. In *Fratila and another v SSWP*,[1] the Supreme Court determined the lawfulness of the Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019 ('the 2019 Regulations') following the judgment of the CJEU in *CG v Department for Communities in Northern Ireland*.[2]

2. In *Fratila*, the claimants – two Romanian nationals living in the UK with pre-settled status (PSS) granted under the EU Settlement Scheme – had their applications for Universal Credit (UC) refused on the basis that they did not have a qualifying right to reside. This is because the amendment the 2019 Regulations made to the Universal Credit Regulations 2013 ('the 2013 Regulations') – specifically the addition of reg 9 (3)(d)(i) – prevents leave to remain in the UK arising from PSS from constituting a qualifying right of residence for the purposes of UC applications.

3. It was the claimants' case that, once an EU citizen is lawfully resident in a Member State, whether by virtue of an EU law right of residence or a purely domestic law right of residence, they are within the scope of art 18 of the Treaty on the Functioning of the European Union (TFEU). Accordingly, any refusal of social assistance to them by reference to an eligibility criterion not applied to a UK national is discrimination prohibited by art 18.

4. The High Court found that the claimants were entitled to rely on art 18 TFEU but that the 2019 Regulations did not breach art 18 because they only gave rise to indirect discrimination which was justified. The Court of Appeal agreed that the claimants were entitled to rely on art 18 TFEU but disagreed that the 2019 Regulations gave rise to only indirect discrimination and instead found that they were directly discriminatory and therefore unlawful. The Secretary of State appealed.

The decision in *CG*

5. Approximately one month after the Court of Appeal hearing, on 21 December 2020, a Social Security Tribunal in Northern Ireland made a preliminary reference to the CJEU in *CG v Department for Communities in Northern Ireland*, which concerned the

[1][2021] UKSC 53.
[2]Case C-709/20 EU:C:2021:602, [2021] 1 WLR 5919.

compatibility with art 18 TFEU 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. These provisions are materially similar to the Universal Credit Regulations 2013, as amended by the 2019 Regulations, with which *Fratila* was concerned.

6. That case concerned CG, a Croatian and Netherlands national with PSS who had lived in Northern Ireland since 2018. She had no resources to support herself or her two children and so made a claim for UC, but this was refused for the same reasons as the claimants in *Fratila*, namely that PSS was not a qualifying right of residence for UC under reg 9(3)(d)(i) of the Universal Credit Regulations (Northern Ireland) 2016.

7. The appeal in *Fratila* to the Supreme Court was stayed pending the delivery of the judgment of the CJEU in *CG*.

8. The CJEU delivered its judgment in *CG* on 15 July 2021. The Court held as follows:
   (a) Article 18 TFEU applies independently only to situations governed by EU law where there are no specific rules on non-discrimination[3] (as per *Jobcenter Krefeld-Widerspruchsstelle v JD*[4]). Article 24 of Directive 2004/38/EC ('the Directive') gives specific expression to the principle of non-discrimination in relation to Union citizens who exercise their right to move and reside within the territory of the Member States.[5]
   (b) CG, as a Union citizen who resided in a Member State other than that of which she was a national, fell within the scope of the Directive and was therefore a beneficiary of the rights conferred by it[6] (*Chenchooliah v Minister for Justice and Equality*[7]). Therefore, it was in the light of art 24 of the Directive, and not of the first paragraph of art 18 TFEU, that it was necessary to assess whether CG faced discrimination on the grounds of nationality.[8]
   (c) So far as concerns access to social assistance, a Union citizen can claim equal treatment, by virtue of art 24 of the Directive, with nationals of the host Member State *only if* his or her residence in the territory of that Member State complies with the conditions of the Directive[9] (*Dano v Jobcentre Leipzig*[10]). For periods of residence longer than three months but less than five years in the territory of the host Member State, the right of residence is subject to the conditions set out in art 7(1) of the Directive, which provides (at point (b)) that economically inactive citizen must have sufficient resources for themselves and the members of their family.[11]

[3]ibid para 65.
[4]Case C-181/19 *Jobcenter Krefeld-Widerspruchsstelle v JD* EU:C:2020:794, [78]
[5]*CG* (n 2) para 66.
[6]ibid para 67.
[7]Case C-94/18 EU:C:2019:693, [2020] 1 WLR 1801, para 54.
[8]*CG* (n 2) para 67.
[9]ibid para 75.
[10]Case C-333/13 EU:C:2014:2358, [2015] 1 WLR 2519, paras 68–69.
[11]*CG* (n 2) para76.

(d) Accordingly, a Member State has the possibility, pursuant to art 7 of the Directive, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement and who do not have sufficient resources to claim a right of residence under that Directive.[12] Given CG did not have sufficient resources to support herself or her children, it was held that she was likely to become an unreasonable burden on the social assistance system and therefore could not rely on the principle of discrimination in art 24 (1) of the Directive.[13]

(e) However, the Court went on to hold that by granting CG a right of residence even though she did not have sufficient resources, the UK recognised her right to reside freely on its territory without relying on the conditions and limitations in respect of that right laid down by the Directive.[14] In doing so, the UK implemented the provisions of the TFEU on Union citizenship and they are accordingly obliged to comply with the provisions of the Charter of Fundamental Rights of the European Union ('the Charter').[15]

(f) Article 1 of the Charter requires host Member States to ensure that Union citizens who have a right of residence on their territory live in dignified conditions;[16] Article 7 of the Charter recognises the right to respect for private and family life;[17] and art 24(2) recognises the need to consider the best interests of the child.[18] Given CG was a mother of two young children, with no resources to provide for her own and her children's needs, it was held that the competent national authority could only refuse her application for UC after ascertaining that that refusal would not expose her and her children to an actual and current risk of violation of their fundamental rights under arts 1, 7 and 24 of the Charter.[19]

CG and *Fratila*

9. By virtue of arts 86(2) and 89(1) of the Withdrawal Agreement, which has domestic effect by virtue of s 7A of the European Union (Withdrawal) Act 2018, the judgment of the CJEU in *CG* is binding on the UK.

10. Therefore, in accordance with *CG*, the Supreme Court in *Fratila* held that the claimants' case failed because they did not reside in the UK in accordance with the Directive at the time of their claims for UC. The claimants were accordingly unable to rely on the EU principle of non-discrimination (whether under art 18 or 24 of the Directive)

[12]ibid para 78. See also *Dano* (n 10) para 78.
[13]*CG* (n 2) para 80.
[14]ibid para 87.
[15]ibid.
[16]ibid para 89.
[17]ibid para 90.
[18]ibid.
[19]ibid para 92.

to claim a right to equal treatment in respect of entitlement to UC. The Secretary of State's appeal was therefore allowed.

11. Crucially, the Supreme Court refused to consider the potential relevance of the Charter on the basis that it would be inappropriate to allow the claimants to rely on a new ground not previously pursued, particularly one that would raise issues of fact which had not been determined.

12. Specifically, the penultimate paragraph[20] of the judgment in *Fratila* states:

> [T]he respondents [claimants] now seek to advance an entirely new case which has never previously been raised in these proceedings. The respondents have never previously sought to argue that the Charter confers on them an entitlement to universal credit. While an appellate court will always be cautious before permitting a new point to be raised for the first time on appeal, it would clearly be inappropriate to do so where, as in the present proceedings, the new case would raise issues of fact which have not been determined.

Comment

13. In one sense, the effect of the judgments in *CG* and *Fratila* is to create clarity. They determine that reg 9(3)(c)(i) of the 2019 Regulations is not unlawfully discriminatory; they confirm the circumstances in which a Union citizen who resides in a Member State other than that of which they are a national can rely on arts 18 and 24 of the Directive; and they clarify the limits on the ability to rely on those articles in claims for social assistance.

14. However, *CG* and *Fratila* fail to provide clarity – and indeed confuse the legal position – in relation to the Charter.

15. It is important to note that no reliance was placed in the submissions of any party in either *CG* or *Fratila* upon the Charter. The reliance on arts 1, 7 and 24 of the Charter in *CG* was entirely of the CJEU's invention.

16. Further, the existence and extent of an obligation upon national authorities in Member States to consider the Charter when dealing with applications for social assistance from EU citizens as a result of *CG* is not clear.

17. It is possible to interpret the judgment in *CG* as placing a positive obligation on Member States to ensure that before refusing an application for social assistance they have first ascertained that such refusal would not expose the citizen concerned – and the children for which they are responsible – to an actual and current risk of violation of their fundamental rights under the Charter. It is also significant that the judgment in *CG* recognises that in undertaking that assessment the national

[20] *Fratila* (n 1) [14].

authority may take into account all social assistance available to the individual in the country.

18. In other words, practically speaking, it could be argued that *CG* requires national authorities to undergo a – not insubstantial – administrative task of assessing the individual circumstances of every EU citizen applying for social assistance before determining their application. The national authority would have to assess the person's current means, their personal circumstances (e.g. whether they have any dependent children), their eligibility for other benefits, and whether to refuse social assistance would violate the applicants rights under the Charter, and only then to determine the application accordingly.

19. On the other hand, it could be argued that if the court in *CG* intended to impose such a broad general duty on national authorities, it would have made this clear. Instead, the judgment focuses on the specific circumstances of CG, namely that she was an EU citizen who was unable to establish an EU law right to reside within the Citizens Rights Directive and was – crucially – in a 'vulnerable situation'. Specifically, CG was the mother of two young children and a victim of domestic violence, living in refugee accommodation with no resources.

20. Accordingly, it could be argued that there is no *general* duty to undertake an assessment of whether a decision to refuse social assistance would violate rights under the Charter. Such an assessment is only necessary in cases where an EU citizen is unable to establish an EU law right to reside within the Citizens Rights Directive and is in an obviously 'vulnerable situation'.

21. Indeed, support for the latter interpretation is found in *Fratila*, where Lord Lloyd-Jones JSC commented:[21]

> I would add that while the CJEU in *CG* drew attention to the possible relevance of the Charter to the particular circumstances of that case, it is immediately apparent from para 92 of the judgment of the CJEU that CG's situation was materially different from that of the respondents to the present appeal.

22. As per above, the primary reasons for the Court not considering the relevance of the Charter in *Fratila* was because no party had relied on the Charter in their submissions before it. However, the Court's short additional comment on the potential relevance of the Charter to the facts in *Fratila* highlights that the factual difference between *CG* and *Fratila* is material and 'immediately apparent'. This suggests that a ground relying on the Charter may not be successful on the facts of *Fratila*, and that therefore the scope of cases to which the Charter would apply is limited.

[21] ibid.

23. Ultimately it is likely that the full and practical effect of *CG* and *Fratila* will not be determined until further cases are brought before the courts that rely upon the Charter and test the scope of that reliance. Given the potential for such cases to go all the way to the Supreme Court, this may well be an issue that the courts will be examining for years to come.