Michaelmas Term

[2021] UKSC 53

On appeal from: [2020] EWCA Civ 1741

JUDGMENT

Fratila and another (Respondents) v Secretary of State for Work and Pensions (Appellant)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Sales
Lord Hamblen

JUDGMENT GIVEN ON
1 December 2021

Appellant
Sir James Eadie QC
Tim Ward QC
Julia Smyth
George Molyneaux
(Instructed by The Government Legal Department)

Respondents
Richard Drabble QC
Thomas de la Mare QC
Tom Royston
Gayatri Sarathy
(Instructed by Child Poverty Action Group)

1st Intervener (The AIRE Centre)
Charles Banner QC
Yaaser Vanderman
(Instructed by Herbert Smith Freehills LLP (London))

2nd Intervener (Independent Monitoring Authority for the Citizens' Rights Agreements)
Marie Demetriou QC
Emma Mockford
(Instructed by Independent Monitoring Authority Legal Department)

LORD LLOYD-JONES: (with whom Lord Reed, Lord Hodge, Lord Sales and Lord Hamblen agree)

1.
This appeal is concerned solely with EU law as it applied in the United Kingdom while the United Kingdom was a Member State and during the transition period following the withdrawal of the United Kingdom from the European Union.

2.
The appeal concerns the compatibility with EU law of statutory provisions governing eligibility for various non-contributory benefits which were inserted into existing Regulations by the Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019 ("the 2019 Regulations"). In broad terms, the 2019 Regulations prevent leave to remain in the United Kingdom arising from pre-settled status granted under the EU Settlement Scheme ("EUSS") from constituting a qualifying right of residence for the purposes of eligibility for the relevant benefits. The case has been argued by reference to the amendment which the 2019 Regulations made to the Universal Credit Regulations 2013, which govern eligibility for universal credit. The 2019 Regulations also made analogous amendments to six other sets of Regulations, which relate to other benefits.

3.
The appellant, the Secretary of State for Work and Pensions, submits that article 18 TFEU, which prohibits, within the scope of application of the EU Treaties, any discrimination on grounds of nationality, is inapplicable and that in any event there is no breach of the provision. The appellant's case, in broad summary, is that a person with no EU law right of residence in the United Kingdom is not entitled to rely on article 18 TFEU to claim equal treatment in respect of the relevant benefits and, in any event, that any nationality discrimination to which the 2019 Regulations give rise is indirect and justified.

4.
The respondents are both Romanian nationals who are present in the United Kingdom and who made applications for Universal Credit which were refused. At the time of the relevant applications the respective right of each of them to reside in the United Kingdom arose solely from their pre-settled status. They submit that once an EU citizen is lawfully resident in a member state, whether by virtue of an EU law right of residence or, as in the present case, a purely domestic law right of residence, they are within the scope of article 18 TFEU and any refusal of social assistance to them by reference to an eligibility criterion not applied to a UK national is discrimination prohibited by article 18 TFEU.

5.
The respondents challenged by way of judicial review the refusals of their applications for universal credit, contending that the 2019 Regulations should be quashed as contrary to the prohibition on nationality discrimination in article 18 TFEU. On 27 April 2020 Swift J dismissed the claim ([2020] EWHC 998 (Admin); [2020] PTSR 1424). He held that the respondents were entitled to rely on article 18 to assert a claim of discrimination on the grounds of EU nationality, but he further held that the 2019 Regulations did not breach article 18 because:

(i)
they gave rise only to indirect, not direct, discrimination (applying the decision of the Supreme Court in Patmalniece v Secretary of State for Work and Pensions (AIRE Centre intervening) [2011] UKSC 11; [2011] 1 WLR 783, itself applying the decision of the Court of Justice of the European Union ("CJEU")

in Bressol v Gouvernement de la Communauté française (Case C-73/08) [2010] ECR I-2735; [2010] 3 CMLR 20, paras 24-29; and

(ii)
the indirect discrimination in question was justified, since the 2019 Regulations served to maintain the status quo prior to the introduction of pre-settled status and protected the social security system from claims by persons who were not sufficiently economically integrated into, or insufficiently closely connected with the United Kingdom (at paras 31-32).

6.
On appeal, the Court of Appeal ([2020] EWCA Civ 1741; [2021] PTSR 764) (McCombe, Moylan and Dingemans LJJ) allowed the appeal (Dingemans LJ dissenting). The Court of Appeal concluded, unanimously, that the respondents were entitled to rely on article 18 TFEU for the reasons given by Swift J. McCombe LJ, with whom Moylan LJ concurred, concluded that on the application of CJEU case law discrimination of this type was prohibited by EU law and the question of justification did not arise. He rejected the Secretary of State's submission that any nationality discrimination to which the 2019 Regulations gave rise was indirect and in principle capable of justification. Dingemans LJ, dissenting on this issue, concluded that the 2019 Regulations gave rise only to indirect discrimination which it was open to the Secretary of State to justify. The Court of Appeal refused permission to appeal but granted a stay of execution until 26 February 2021.

7.
On 22 February 2021 the Supreme Court granted permission to appeal and continued the stay of execution until the determination of the appeal. The hearing of the appeal was listed for 18 and 19 May 2021. The principal issues which arise on this appeal are:

(i)
Whether the respondents are entitled to rely on article 18 TFEU by virtue of being granted a domestic law right of residence, namely pre-settled status.

(ii)
If so, whether or not the 2019 Regulations breach article 18 TFEU; in particular,

(a)
whether the discrimination is prohibited or direct, such that it is not capable of justification; or

(b)
if not and the discrimination is indirect, whether it is justified.

8.
On 21 December 2020, a Social Security Tribunal in Northern Ireland had made a preliminary reference to the CJEU in a case, CG v Department for Communities in Northern Ireland, which concerned the compatibility with article 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, which are materially similar to the Universal Credit Regulations 2013, as amended by the 2019 Regulations, with which this appeal is concerned. The CJEU ordered expedition and listed an oral hearing in the matter of CG for 4 May 2021. The parties to the present appeal agree that by virtue of articles 86(2) and 89(1) of the Withdrawal Agreement, which has domestic effect by virtue of section 7A of the European Union

(Withdrawal) Act 2018, the judgment of the CJEU in CG will have binding force in its entirety on and in the United Kingdom.

9.
In these circumstances, on 11 May 2021 Lord Reed directed that the hearing date of the appeal to the Supreme Court should be vacated pending the decision of the CJEU in CG.

10.
The CJEU delivered its judgment in CG on 15 July 2021 (Case C-709/20) [2021] WLR 5919. It observed that every EU citizen may rely on the prohibition of discrimination on grounds of nationality laid down in article 18 TFEU (at para 63). However, the first paragraph of article 18 TFEU is intended to apply independently only to situations governed by EU law with respect to which the TFEU does not lay down specific rules on non-discrimination (para 65). Thus the principle of non-discrimination is given specific expression in article 24 of Parliament and Council Directive 2004/38/EC ("the Directive") in relation to EU citizens who exercise their right to move and reside within the territory of the member states (para 66). An EU citizen who moves to or resides in a member state other than that of which he or she is a national falls within the scope of the Directive and is a beneficiary of the rights conferred by it (para 67). Accordingly, the question whether that EU national faces discrimination on grounds of nationality falls to be assessed by reference to article 24 of the Directive and not by the independent application of article 18 TFEU. The CJEU concluded that an EU citizen can claim equal treatment in respect of social assistance only if his or her residence in the territory of that member state complies with the conditions of the Directive (para 75, citing Dano v Jobcenter Leipzig (Case C-333/13) [2015] 1 WLR 2519, paras 68 and 69).

11.
As a result, the first issue in this appeal has been answered by the CJEU definitively in favour of the appellant and the second issue does not arise.

12.
Furthermore, it is common ground between the appellant and the respondents that the respondents did not reside in the United Kingdom in accordance with the Directive at the time of their claims for universal credit. They cannot therefore rely on the EU principle of non-discrimination to claim a right to equal treatment in respect of entitlement to universal credit.

13.
However, by letter to the court dated 23 July 2021, the respondents submit that since EU citizens who are lawfully resident in the United Kingdom on the basis of pre-settled status are within the scope of EU law, they are entitled to rely on the fundamental rights guaranteed in the Charter of Fundamental Rights of the European Union ("the Charter"). In particular, the member state of residence must ensure the protection of such an EU citizen's rights under article 1 (human dignity), article 7 (respect for private and family life) and article 24(2) (rights of the child). The respondents now seek to challenge the 2019 Regulations and the decision to refuse them universal credit on these new grounds.

14.
In other words, the respondents 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. (See the observations of Lord Reed and Lord Hodge in Test Claimants in the FII Group Litigation v Revenue and Customs Comrs (formerly Inland Revenue Comrs) [2020] UKSC 47; [2020] 3 WLR 1369 at paras 89-93 and the cases there cited.) 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.

15.
As a result, there are no further issues for this court to determine in this appeal and, for the reasons stated above, I would allow the appeal.