Department
for Work &
Pensions

Memo ADM 02/21

PRE-SETTLED STATUS – UC – EFFECT OF COURT OF APPEAL DECISION

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INTRODUCTION

1. The purpose of this memo is to

- inform DMs about a recent Court of Appeal decision[1] which deals with the issue of whether the amendments made by the Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019 to income-related benefits regulations[2] are discriminatory under EU law[3] which applied to claims up until the end of the transition period and if so, whether that discrimination was justified. The amendments in question provided that pre-settled status is not sufficient in itself to satisfy the legal part of the habitual residence test.

- instruct DMs to apply the Secretary of State's power to stay making decisions in certain lookalike cases[4], **and**

- instruct DMs how the FtT should be advised in dealing with lookalike cases where a DM's decision has already been made and an appeal is received.

1 Fratila and Tanase v SSWP & AIRE Centre [2020] EWCA Civ 1741; 2 reg. 21AA(3A)(a) IS (Gen) Regs 1987, Reg. 85A(3A)(a) JSA Regs 1996, reg. 2(3A)(a) SPC Reg 2002, reg. 10(3AA)(a) HB Regs 2006, reg. 10(4ZA)(a) HB (Persons who have attained the qualifying age for state pension credit) Regs 2006, reg. 70(3A)(a) ESA Regs 2008, reg. 9(3)(c)(i) UC Regs 2013; 3 Article 18 TFEU;4 SSA 98, s 25

THE COURT OF APPEAL DECISION

Background

2. The claimants are Romanian nationals who came to the UK in 2014 and 2019. In 2019, each was granted limited leave to remain in the UK under the EU Settlement Scheme (also known as 'pre-settled status').

3. Having obtained pre-settled status, both claimants applied for Universal Credit but were refused on the grounds that pre-settled status is not a right to reside which enables access to means-tested benefits[1].

1 UC Regs, reg 9(3)(c)(i)

4. The Claimants argued that the non-entitlement to benefits, despite having limited leave to remain in the UK with no conditions restricting recourse to public funds, was in breach of the EU right not to be discriminated against on the grounds of nationality in comparison with UK nationals, a right which has direct effect. The claimants requested that the Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019 be quashed

WHAT THE HIGH COURT DECIDED

5. The High Court (Swift J)[1] held that the claimants could rely upon Article 18 TFEU to protect themselves against unlawful discrimination on the grounds of nationality given that they were EU nationals legally residing in the UK under domestic law (due to the acquisition of pre-settled status). However, the Court held that the discriminatory treatment they had suffered was lawful because it was justified (para 32). The claimants also accepted that the legal basis for their claim fell away at the end of the transition period (para 15).

1 Fratila and Tanase v SSWP [2020] EWHC 998 (Admin)

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WHAT THE COURT OF APPEAL DECIDED

6. The Court of Appeal determined that as they had been granted a right of residence under UK law, and that EU law still applied (as it did up to the end of the transition period on 31.12.20) the claimants could rely on the EU Treaty's prohibition on discrimination, which includes that related to social assistance.

7. The Court also found that the exclusion of pre-settled status as a right to reside which enables a claimant to access means-tested benefits was prohibited as made clear in previous cases[1]. This rule was directly discriminatory on the grounds of nationality and therefore unlawful as this type of discrimination cannot be justified under EU law. The decision of the Court of Appeal was limited to the interpretation of EU Law as it applied up to the end of the transition period on 31st December 2020[2].

1 Martinez-Sala v Freistaat Bayern [1998] ECR I-0269, Grzelczyk v Centre Public d'Aide Sociale ["CPAS"] d'Ottognies Louvain la Neuve [2002] 1 CMLR 19, Trojani v CPAS de Bruxelles [2004] 3 CMLR 38, and Jobcenter Krefeld v JD C-181/19; 2 Para 26 of Fratila and Tanase v SSWP [2020] EWHC 998 (Admin)

8. If this decision were to be implemented, it would mean that those with pre-settled status, who are present in the UK, (and provided that they made a claim prior to the end of the transition period,) have a qualifying right to reside that allows access to means-tested benefits in the same way as those with settled status do. In other words, they are said to have a right to reside which is sufficient for the purposes of satisfying the legal part of the habitual residence test. They would still have to fully satisfy the requirement to be actually habitually resident (ADM C1951), in the same way as those with settled status or returning UK nationals.

9. The Secretary of State has been granted permission to appeal this decision to the Supreme Court.

Note – This judgement does not affect the amendments made in respect of pre-settled status for Zambrano carers, and such cases should continue to be assessed as they are currently. However, if such a case is appealed to the FtT, then please refer it to DMA (Leeds).

STAYING LOOKALIKE CASES

10. The DM should stay[1] making a decision on a claim to UC in respect of any case where the issue involves the refusal of benefit due to the claimant having no right to reside other than their pre-settled status (leave to remain), and the application for the benefit was made prior to the end of the transition period. If a claimant with

pre-settled status has an alternative right to reside then their application should proceed as usual.

1 SSA 98, s 25(5);

11. Equally, if a claimant applies for a revision or supersession of a disallowance decision made on an application made before 31/12/2020, on the grounds that the Court of Appeal decision means that they are entitled to benefit, the DM should stay[1] making a decision in response.

1 SSA 98, s 25(5)

12. The only exception to this is in cases of a joint application where one claimant is eligible and the other is ineligible under the current regulations. To stay such a case would have the effect of denying benefit entitlement to someone not within the *Fratila* cohort. In this type of situation, we should not stay the case, but make a decision under the regulations as they currently stand[1].

1 SSA 98, s 25(3)

13. The claimant should be notified that the DM has decided to use the staying power and so will not make a decision on the claim (or in response to the application for revision or supersession) until the determination of the Supreme Court judgment is known. Where the situation as per paragraph 12 above applies, we should inform the claimant why we have not stayed in this case, but that the claim will be revisited once the Supreme Court judgement is known.

14. Full guidance on Staying can be found in Chapter 4 of the Suspension and Termination Guide. This can be found in the list of "Our Publications" on the DMA (Leeds) intranet site or on DWP's internet site. The notification letter is DL/SUSTERM 9. Where a claimant states they will be placed into hardship if the decision on their claim is stayed, please refer the case to DMA Leeds.

15. There is no right of appeal against a decision to stay[1].

1 UC etc (D&A) Regs 2013, Sch 3 para 8

APPEALS

16. Where a lookalike case has already had a DM's decision and an appeal is received against that decision, the appeal should be referred to the FtT in the normal way, but the FtT should be advised of the lead case and that they may

wish to use their case management powers[1] to stay proceedings and defer further action pending the outcome of the appeal to the Supreme Court.

1 Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008, Rule 5(3)(j)

17. Similarly, where an appeal is pending before the FtT and the Judge raises the question of whether the Court of Appeal decision of *Fratila* applies in a case, the DM should

- advise the FtT that the Secretary of State has received permission to appeal the Court of Appeal decision in the Supreme Court **and**

- invite the FtT to use their case management powers[1] to stay proceedings and defer further action pending the outcome of the appeal to the Supreme Court.

1 Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008, Rule 5(3)(j)

18. Where an FtT has made a decision on a lookalike case, citing *Fratila*, then the statement of reason must be requested straight away and the case referred to DMA Leeds as per standard procedure.

DIFFICULT CASES

19. DMs may encounter cases where it is difficult to decide whether the case in front of them is a genuine lookalike case. Such cases can be referred to DMA (Leeds) for advice.

APPLICATIONS TO BENEFIT FROM 01/01/2021

20. Although the decision of the Court of Appeal in *Fratila* quashes the amendments made to the regulations for income-related benefits by the 2019 Regulations, this only has effect up to the end of the transition period. Therefore, the grant of a stay of execution on the quashing order means that decisions from 1 January 2021 can still be made relying on the 2019 Regulations. However, if you are unsure which cohort a claimant falls into, please do not hesitate to contact DMA Leeds for guidance.

ANNOTATIONS

The number of this Memo should be noted against the following ADM paragraphs-
C1872

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CONTACTS

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 3E zone E, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in – Memo 7/19 Requesting case guidance from DMA Leeds for all benefits.

DMA Leeds: February 2021

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ANNEX – SECRETARY OF STATE'S CERTIFICATE

In accordance with section 25(5)(a) of the Social Security Act 1998, Regulation 21(4)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 and Regulation 53 (2) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and employment and support Allowance (Decisions and Appeals) Regulations 2013, the Secretary of State for the Department for Work and Pensions hereby certifies in writing that there is an appeal pending against the following decision of the Court of Appeal (Civil Division) made on 18 December 2020 and sent to the Department on 18 December 2020.

Fratila & Anr v S of S for Work & Pensions & Anr [2020] EWCA Civ 1741

Signed on original on 26th February 2021 by

Jane Clark

On behalf of the Secretary of State for Work and Pensions

The content of the examples in this document (including use of imagery) is for illustrative purposes only