Advice for people with pre-settled status following the judgment of the Supreme Court in *Fratila* and the decision of the Court of Justice in *CG v Department for Communities*

This advice replaces previous advice given whilst the case was still pending before the Supreme Court.

1. This note explains what advisers should do to assist claimants with pre-settled status and no other qualifying right of residence following:

    a. the Supreme Court decision in *Fratila and Another (Respondents) v Secretary of State for Work and Pensions and Another* [2021] UKSC 53 ("***Fratila***") and;

    b. the decision of the Court of Justice of the European Union in C-709/20 *CG v Department for Communities (NI)* ("***CG***").

Background to the cases

2. Both *Fratila* and *CG* challenged part of the "right to reside" test: specifically they argued that it was unlawfully discriminatory under Article 18 of the Treaty on the Functioning of the European Union ("**TFEU**") to exclude an EU national who had been granted "pre-settled status" ("**PSS**") under the EUSS scheme but who had no other right to reside (e.g. was not a worker, retaining worker status, primary carer of child of former worker receiving education etc.).

CG

3. On 15 July 2021, the Court of Justice decided Case C-709/20 *CG v Department for Communities.* The Court held that the exclusion of pre-settled status as a qualifying right of residence to obtain benefits was not unlawfully discriminatory:

a. An EU citizen who is lawfully resident in the UK on the sole basis of PSS is within the scope of EU law [§§57-58, §64];

b. If an EU citizen is lawfully resident in the UK, he or she may, in principle, rely on the prohibition of discrimination on grounds of nationality contained in Article 18 TFEU. However, such a person falls within the scope of Directive 2004/38 (the "CRD"), with the result that the issue of whether there is nationality discrimination against them falls to be determined by Article 24 of the CRD, and not Article 18 TFEU [§64, §67];

c. Article 24 of the CRD does not preclude legislation which excludes from social assistance economically inactive EU citizens who do not have sufficient resources and to whom that State has granted a temporary right of residence, such as PSS. An EU citizen resident in the UK on the sole basis of PSS does not reside in the UK "on the basis of" the CRD and therefore cannot rely on the equal treatment guarantee in Article 24(1) of the CRD [§80, §83];

4. The Court did not stop its analysis at that point however. It went on to hold:

a. Since an EU citizen who is lawfully resident in the UK on the sole basis of PSS is within the scope of EU law, he or she is entitled to rely on the fundamental rights guaranteed in the EU Charter of Fundamental Rights (the "Charter") and Member States are obliged to comply with provisions of the Charter [§§84-88];

b. In particular, the Member State must ensure that the 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) of the Charter are protected [§§89-92];

c. Accordingly:

> "provided that a Union citizen resides legally, on the basis of national law, in the territory of a Member State other than that of which he or she is a national, the national authorities empowered to grant social assistance are required to check that a refusal to grant such benefits based on that legislation does not expose that citizen, and the children for which he or she is responsible, to an actual and current risk of violation of their fundamental rights, as enshrined in Articles 1, 7 and 24 of the Charter of Fundamental Rights of the European Union. Where that citizen does not have any resources to provide for his or her own needs and those of his or her children and is isolated, those authorities must ensure that, in the

> event of a refusal to grant social assistance, that citizen may nevertheless live with his or her children in dignified conditions. In the context of that examination, those authorities may take into account all means of assistance provided for by national law, from which the citizen concerned and her children are actually entitled to benefit."

Fratila

5. The Court of Appeal had decided the *Fratila* case on 18 December 2019, before *CG* was referred to the Court of Justice (on 30 December 2019). It had reached the opposite view to the Court of Justice and had ruled that (1) EU nationals lawfully resident in the UK due to a grant of PSS were within the scope of Article 18 TFEU and (2) exclusion from benefit was unlawful discrimination under that Article.
6. The Secretary of State had appealed against the Court of Appeal's decision to the Supreme Court. The parties agreed that the decision in *CG* was binding on the Supreme Court. It was suggested on behalf of the Respondents that the Court should hold a hearing to consider the implications of the second part of the judgment of the Court of Justice in *CG* but the Supreme Court declined to do so.
7. The Supreme Courts decision therefore does not make any comment on that second part of the Court of Justice's decision, save to note that the facts of the cases it was considering were different to the facts of *CG*.

Advice for claimants

8. The advice for claimants below is divided into three parts:
    a. Cases which were stayed to await *Fratila:* what should happen now?
    b. Available arguments in cases that arose on or before 31 December 2020.
    c. Available arguments in cases that arose after 31 December 2020

a. Cases which were stayed to await *Fratila*: what should happen now?

9. The DWP issued guidance to decision makers following the judgment of the Court of Appeal- *Advice for Decision Making* memo: ADM 02/21. This advised Decision Makers to "stay" (pause decision making) cases which involved entitlement to benefit in respect of a period on or

before 31 December 2020 and to take no further action until the Supreme Court case was decided. This is referred to sometimes as "stockpiling" such cases for decision. In addition, Decision Makers were advised to ask the First-tier Tribunal, for cases where there was already an appeal, to use its powers to stay such cases to await the Supreme Court decision.

10. Cases would have been stockpiled at one of the following points:

Stockpiled by Decision Maker at the stage of decision/revision on a new claim.

a. This would happen where the claimant was never awarded universal credit (UC). It could mean the case was stayed before any decision was made on a new claim made on or before 31 December 2020 or it could be such a claim was refused and then, when the claimant asked for a revision (mandatory reconsideration) of that decision, the Decision Maker stayed carrying out that revision.

b. In these cases, then the Decision Maker now needs to make a decision- either the initial decision on the claim or indeed the revision decision. Please see below on what arguments might be available.

Stockpiled by Decision Maker when deciding whether to remove an entitlement.

c. Stockpiling may also have taken place where a claimant had an award of UC and an issue arose as to whether that award was correctly made in the first place or an issue arose as to whether the claimant continued to have a qualifying right to reside. In those circumstances, the Decision Maker should have suspended payment and then stayed the question of what decision to make by way of supersession or revision. Alternatively, if a negative decision had been made bringing an end to an award and the claimant had sought a revision (mandatory reconsideration) then the Decision Maker might have stayed making that revision decision.

d. In these cases the Decision Maker again simply needs to make a decision. If benefit has been suspended and the decision is that the claimant did continue to have a right to reside or that it was unlawful to apply that condition (as in *CG*) then payment of benefit should be restored and the arrears that were withheld during the suspension paid. If the decision is that there is no entitlement then a decision should be made ending the award from whatever date that is held to be the case from (which could be the date of suspension or indeed earlier or later than that).

Stockpiled by First-tier Tribunal at appeal stage.

e. If the claimant fell within one of the first two groups and should have had the decision making by the Decision Maker stayed as set out there, but this did not happen and the claimant had then appealed then the First-tier Tribunal may have decided to stay deciding the case under its own powers to do this.

f. In these cases the FTT will need to now decide the case. It will decide whether to hold a hearing etc. in the usual manner. Advisers can contact the FTT and ask for directions which set out how the case should proceed (for example adviser could provide a submission on implication of above 2 decisions for the case and ask that Decision Maker should respond within four weeks and the case be listed for hearing as soon as possible after that).

11. Some other cases, which involve only entitlement for periods after 31 December 2020 may nonetheless have been stayed as set out at 3(a) to (c) above despite the fact the case relates to a period after 31 December 2020.

b. Arguments available in cases that arose on or before 31 December 2020

12. Advisers should always make sure that any argument that the claimant does (or did) have a qualifying right to reside at the relevant time is made. There are many cases where the Decision Maker could have stayed to await the outcome of *Fratila* despite the fact that the case did not depend on that because the claimant in fact had a right to reside (even if not a very obvious one to the Decision Maker).

13. However, in cases where the claimant had PSS and there was genuinely no other non excluded right of residence it must now be accepted that the exclusion of the PSS from being a sufficient right of residence is not unlawfully discriminatory.

14. Such claimants may however be able to rely on *CG* to assert that an exclusion from benefits left them with inadequate money to obtain basic necessities and that breached their right to dignity, right to family life or the best interests of any children. Such an argument would involve demonstrating that there was not alternative state provision (section 17 Children Act payments etc) which the claimant could access and which would have meant that there fundamental rights were not breached. It is important that such arguments are made carefully: for example the facts of the claimants in *Fratila* do not come close to demonstrating that they would have been left without basic necessities to the requisite degree to provoke a breach of fundamental rights. CPAG is happy to advise on any cases which now arise.

c. Arguments available in cases that arose after 31 December 2020

15. Again, advisers should always make sure that any normal right to reside argument is clearly put. The mere fact the case was stayed for *Fratila* does not mean that those arguments are closed off.

16. However, in cases where no other qualifying right to reside can be found then a question arises as to whether a claimant can rely upon the Charter rights referred to in *CG* in circumstances where a refusal of benefit will leave the claimant destitute. It is likely that the DWP will say that they cannot on the basis that the Charter of Fundamental Rights is not part of "retained EU law". Claimants could seek to argue that this was wrong and that they are entitled to rely on the Charter in just the same way as the claimant in *CG*. Specifically they could argue:

    a. As EU citizens with PSS they reside within the scope of the Withdrawal Agreement.

    b. The Agreement needs to be applied in accordance with general principles of EU law which includes the Charter.

    c. As such UC cannot be refused where to do so would result in a breach of fundamental rights.

    Whether such an argument would succeed is not clear. Certainly it is highly likely the DWP will argue strongly that EU nationals cannot rely on a right to live a life in keeping with human dignity post 31 December 2021.

17. Claimants may have a further argument. People with PSS, particularly if there is no human dignity route to having exclusion from benefit non applied, are the only group with limited leave to remain who could be shut out of benefit altogether in this way. Other forms of limited leave to remain are not excluded from being sufficient right to reside to satisfy that test. Instead, they typically have a condition that the bearer of the leave has "no recourse to public funds" and are thus defined as persons subject to immigration control and excluded from benefit under s.115(9) of the Immigration and Asylum Act 1999. However, the Home Office policy is that the no recourse to funds restriction should be lifted where not to do so would cause destitution. That places a destitute person with PSS in arguably a worse position than a similar person with another form of limited leave who has a potential route on to benefit. Arguably that is unlawful discrimination under the Human Rights Act 1998. Ideally the facts would need to show very clearly that the claimant would be destitute without access to

benefits, demonstrate a clear reason why the claimant was unable to work. Ideally, also the claimant would have children and have not received adequate support under s.17.

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18. Advisers assisting claimants with pre-settled status who are, or are at risk of, being destitute due to a refusal of universal credit, should contact CPAG and use “destitute EU” in the subject line (advice@cpag.org.uk).

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