Advice for people with pre-settled status following the judgment of the Court of Appeal

This note explains what advisers should do to protect the rights of claimants with pre-settled status and no other qualifying right of residence following the Court of Appeal judgment in *R(Fratila and Tanase) v SSWP* [2020] EWCA Civ 1741

What did the Court do?

The Order of the Court of Appeal "quashes" (i.e. deletes from the law) those bits of the right to reside test which provide that having a right to reside because you have "pre-settled status" (that is limited leave to remain granted under Appendix EU to the Immigration Rules) is not a sufficient right to reside to meet the test for the benefits listed above. This is because the Court of Appeal, in its judgment has held that the exclusion of those with "pre-settled status" a right to reside granted under UK immigration law is contrary to article 18 of the Treaty on the Functioning of the European Union which prohibits discrimination on the grounds of nationality against EU citizens.

Because those bits of the law have been quashed, the effect is that anyone with pre-settled status satisfies the right to reside test for access to any of the benefits listed above (including non EEA citizens such as third country national family members).

The Order also gives the Secretary of State a "stay" in implementing the judgment until 26 February 2021 to allow the Secretary of State to make an application for permission to appeal to the Supreme Court (the Court of Appeal having refused permission). This means that until then decision makers do not have to make decisions according to the law as declared by the Court. Even after that date the decision maker may be able to delay making decisions- see "*Stockpiling*" below.

Benefits affected by the judgment

The judgment applies to the right to reside requirement as it is applied in relation to:

- universal credit
- pension credit
- housing benefit
- income support
- income related employment and support allowance
- income based jobseeker's allowance

The judgment does not explicitly refer to the right to reside requirement as it applies to child benefit or child tax credit (where the same exclusion of pre-settled status from being a sufficient right to reside was made but by a different set of regulations, but it should be applied by HMRC decision makers dealing with claims and awards for those benefits and challenges to these decisions because the underlying legal principles are identical. The judgment should also, for the same reasons, apply to council tax reduction, eligibility for social housing and homelessness assistance (where again, similar exclusionary rules were introduced by two other sets of regulations – council tax reduction and homelessness (England).

Claimants with pre-settled status who have not yet made a claim

Claimants with pre-settled status who have not yet made a claim for benefit should claim benefits to which they think they are entitled as a result of the judgment as soon as possible. If they are refused benefit they should seek a mandatory reconsideration as set out above. If the decision maker attempts to delay making a decision on their claim because of a possible appeal see *"Stockpiling"* below.

Claimants with pre-settled status should not delay making a claim just because they think the decision maker will subsequently decide to delay making a decision on the claim:

- If a claim is made now and the decision on the claim is "stockpiled" then the decision maker will have to decide the claim in favour of the claimant and pay them from their date of claim should the Secretary of State be unsuccessful in her attempts to overturn the decision of the Court of Appeal.

- Additionally, as explained in the "*Stockpiling*" section there may be cases in which it would be wrong for the decision maker to "stockpile" making a decision and the claimant could get benefit now.

Claimants with pre-settled status who have made a claim but not yet had a decision

The decision maker should decide these claims in the claimant's favour if the claimant has a qualifying right to reside for the benefit claimed other than pre-settled status. The decision maker may, if they think the claimant has no such right, attempt to "stockpile" making a decision on the claim (see "*Stockpiling"* below).

If a decision is made refusing the claim then see the advice immediately below.

Claimants with pre-settled status who are now or have been within the last 13 months refused benefit

This section applies where:

- a decision refusing one of the benefits above, because they are said not to have had a sufficient right to reside, has been made; and

- at or before the date of that decision the claimant had been granted pre-settled status

A claimant to whom the above two points applies should now take the following action:

- If the decision was made within the last 13 months and was about entitlement to housing benefit (where mandatory reconsideration does not apply) or did not state that a right of appeal would only arise once a request for revision had been refused then the claimant should immediately appeal (it is better to appeal than to seek revision as the case cannot then be "stockpiled" by the decision maker). If the appeal is being made more than one month after the decision then reasons for lateness should be given- these could include that the claimant was unaware they had a case until they or their adviser became aware of this judgment.

- If the decision refusing benefit has not yet been challenged and was made within the last 13 months (or for tax credits 30 days plus 12 months), they should immediately apply for a "revision" of the decision (i.e. a "mandatory reconsideration").

    - They can do this over the phone, in writing or, if the benefit is universal credit, by posting a note on their online journal (if they have no online journal as their claim was refused and they have not reclaimed they can make a new claim and then when the new journal is created make an entry on this requesting a mandatory reconsideration of the decision refusing their previous claim.

    - Where the decision being challenged was made over 1 month ago but still within the last 13 months then the mandatory reconsideration note should explain why they could not bring the application earlier: one reason might be that it was only the result in this case which made them aware that they could do so.

    - It is important that if the claimant also has an alternative qualifying right to reside they additionally refer to this in any mandatory reconsideration request.

  Note: If the claimant asks for (or has already sought a mandatory reconsideration) against the decision and it has not yet been decided then the decision maker may be able to delay making a decision on the claim until the result of any challenge (called "stockpiling" – see below).

    - If the claimant has sought a mandatory reconsideration and it has been refused and the claimant has not yet appealed to the First-tier Tribunal then they should immediately appeal against the decision. The ground of appeal can be simply that the decision was

wrong as at the time it was made they had pre-settled status which *Fratila* shows was a sufficient right to reside for them to obtain benefit.

Note: Once the claimant appeals (or if they have already done so) then the First-tier Tribunal could decide to "stay" its consideration of the case pending the result of the Secretary of State's application for permission to appeal (and any further appeal) against the Court of Appeal decision in *Fratila.* However, provided that the stay granted to the Secretary of State is not renewed by the Supreme Court then after 26 February 2021, claimants can argue that the First-tier Tribunal should not do this as it disadvantages the claimant (if you act for a claimant where the First-tier Tribunal stays making a decision to await any Supreme Court consideration of the issue then we are able to give further advice via UTadvice@cpag.org.uk

Stockpiling

This section gives advice on what happens if the decision maker attempts to delay making a decision about a claim or a mandatory reconsideration where the claimant at the time of the claim or original decision had pre-settled status. It applies to claimants who have:

- already been refused benefit because their pre-settled status was not regarded as sufficient and they submit or are awaiting the outcome of a mandatory reconsideration; or

- now make a new claim for benefit and only have a qualifying right to reside because of their pre-settled status

In respect of such cases, the fact that the Secretary of State is seeking permission to appeal against the decision, means that decision makers do not always have to apply the judgment and accept that a person with pre-settled status automatically satisfies the right to reside test on the basis of that status alone.

Where the decision maker thinks that if the Secretary of State were to get permission and win the appeal the claim would not succeed then the decision maker is entitled to "stockpile" the claim and

not decide it until after the result of any appeal is known. This power arises under section 25 of the Social Security Act 1998.

Given the power in section 25, it is not clear that the Court of Appeal was correct to additionally grant the Secretary of State the "stay" in implementing the decision until 26 February 2021. The points below will apply once that stay has expired and provided the Supreme Court do not grant a further stay.

After the stay expires then it is important to note:

- The decision maker is only permitted to stockpile cases where the claimant has no other qualifying right to reside (for example is not a worker or possessing some other right to reside such as being the primary carer of a child in education where they have previously worked in the UK).

- The decision maker is not required to stockpile the case but has a discretion to do so. Thus if stockpiling the case might have a particularly harsh effect on a claimant (for example they might be evicted due to being unable to pay the rent) then the decision maker should take that into account when stockpiling.

It is possible that cases will arise where either (1) the decision maker inappropriately stockpiles the case of a claimant who would have another right to reside which the decision maker has overlooked or (2) the decision maker has not fully considered the claimant's situation when exercising the discretion to stockpile. In both instances, the remedy for the claimant will be via judicial review. Contact jrproject@cpag.org.uk for assistance or advice if you are advising a claimant in this situation (we are hoping to shortly have template pre-action letters available for use in either of these situations).

Even before the stay expires then decision makers should still allow claims where the claimant has an alternative qualifying right to reside.

Claimants who have not yet claimed should not delay making a claim just because their claim could be stockpiled. If the Secretary of State is unsuccessful in her attempt to overturn the Court of Appeal decision then the decision maker will be required to make decisions in all stockpiled cases on the basis

that the pre-settled right to reside is sufficient to obtain benefits and award benefit from the date of claim as appropriate.

What about after 01 January 2021?

At the time of writing then the above advice also applies after 01 January 2021. The Court of Appeal has removed those bits of the law which prevent a person from relying on pre-settled status in order to satisfy the right to reside test and even after the legal situation in the UK changes with the end of the transition period, no benefit rule allows exclusion from entitlement where a claimant's only right to reside is pre-settled status.

However, it is possible that the Secretary of State could try to introduce new legislation that has the effect of reversing the decision of the Court of Appeal from 01 January 2021.

It is very likely that if the Secretary of State attempts to do this then the new legislation will also be subject to legal challenge. Accordingly, advisers should check back on this webpage for updates on future changes and possible further litigation.

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