As the campaign ahead of the UK referendum on EU membership reached its endpoint, the European Court of Justice (ECJ) [declared](http://www.independent.co.uk/news/uk/politics/eu-court-backs-uks-ability-to-restrict-child-benefits-for-migrants-a7081046.html) that UK restrictions on the access that EU citizens have to child benefit and child tax credit in Britain were lawful. The European Commission had challenged the legality of the UK’s restrictions.

Given its timing, the outcome of the [Commission v UK](http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d505aa2ab11860488ea97afcb3a405e044.e34KaxiLc3eQc40LaxqMbN4OchyTe0?text=&docid=180083&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=755784) case can hardly be considered surprising. By focusing on internal EU migration, the ruling deals with issues that are undeniably at [the forefront of the Brexit debate](https://www.ipsos-mori.com/researchpublications/researcharchive/3722/Economy-and-immigration-key-issues-for-Britons-in-the-EU-referendum.aspx). But the judgment is merely an extension of a [wider sea change](http://www.ft.com/cms/s/0/5376d942-320a-11e6-bda0-04585c31b153.html#axzz4BjVHT1jc) that reflects a general acceptance by the ECJ of arguments made by some member states who want to restrict access to welfare for non-economically active EU migrants.

The ruling can be seen as a boost for the remain camp, providing evidence that a vote to stay in the EU will not be an open invitation to “benefit tourists”. Yet it also shows how it has become both [politically acceptable and desirable](http://www.cpag.org.uk/sites/default/files/CPAG-Poverty-politically-acceptable-poverty-Oct-2014_0.pdf) to be seen to be taking a tough stance on some of the most vulnerable in society.

The ECJ’s language in the new ruling arguably also suggests that it might be receptive to the UK’s restrictions on in-work benefits for EU migrants. This formed a central part of the [deal](http://www.consilium.europa.eu/en/policies/uk/2016-uk-settlement-process-timeline/)which British Prime Minister David Cameron negotiated with other EU leaders in February, and which would come into force should the UK vote to remain on June 23.

**What the ECJ ruled**

By bringing the case the European Commission had challenged UK rules that require claimants to overcome a [“right to reside” test](https://www.citizensadvice.org.uk/benefits/coming-from-abroad-and-claiming-benefits-the-habitual-residence-test/the-habitual-residence-test-an-introduction/what-is-the-habitual-residence-test/) in order to access child benefit and child tax credit. To pass this test, EU citizens must be legally resident in the UK. Under the EU’s [Citizens’ Rights Directive](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF), after three months, non-national EU citizens are legally resident in the UK if they are working, self-employed, or have sufficient resources and comprehensive sickness cover not to become an “unreasonable burden” on the social assistance system.

As a result, applications for child benefit or child tax credit by non-economically active EU citizens risk being rejected in the UK on the basis that they would not pass the “right to reside” test because they lack the sufficient resources.

The commission argued, that, by virtue of the EU’s [Coordination of Social Security Regulation](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:166:0001:0123:en:PDF), access to social security – such as child benefit and child tax credit – should be determined solely by a test of whether an individual was “habitually resident” in the UK. Such a test, it argued, determined which member state’s social security system was responsible for any given individual, ensuring that no EU citizen fell through a gap in protection. The ECJ disagreed, holding that it was up to individual member states to determine the conditions for accessing social security.

Even though the ECJ said that the UK’s “right to reside” test was indirectly discriminatory, crucially, it held that the test was justified by the UK’s need to protect its finances. The court said the European Commission had not provided evidence that the test was an inappropriate or disproportionate means of achieving this goal.

**Politically desirable poverty**

Far from being a one-off judgment, the ECJ’s ruling is the latest in a recent line of decisions permitting member states to restrict access to social benefits for non-economically active EU citizens. In recent years, the court has progressively distanced itself from its previous approach of assessing lawful residence and access to welfare [on an individual basis](http://curia.europa.eu/juris/document/document.jsf?text=&docid=46599&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=977414). Instead, it has focused on the [potential cumulative impact](http://curia.europa.eu/juris/document/document.jsf?docid=167661&doclang=EN) of claimants on a member state’s benefits system as a whole.

There is little burden on member states to demonstrate evidence of the impact benefit claimants from the EU have on the sustainability of their finances. In this recent case, the onus was on the European Commission to prove that the UK approach was unnecessary. As some experts have argued, this risks placing vulnerable EU migrants, including those in temporary need, on [welfare cliff edges](https://www.kluwerlawonline.com/document.php?id=COLA2013162&PHPSESSID=qreo19dvre8n15aifaibivlem6) and at risk of [destitution](https://www.kluwerlawonline.com/document.php?id=COLA2015002).

**Equality under threat**

The judgment arguably indicates that the ECJ might well accept the UK’s plan to [introduce a “safeguard mechanism”](https://theconversation.com/explainer-what-is-the-eu-emergency-brake-54076) that restricts access to in-work benefits for economically active EU citizens, such as [tax credits](https://theconversation.com/explainer-what-are-tax-credits-49904) for working people. This mechanism was at the heart of the EU deal Cameron agreed in February.

While many on the leave side in the EU referendum have argued that [Cameron achieved little during the renegotiations](http://www.bbc.co.uk/news/uk-politics-eu-referendum-36246009), the safeguard mechanism has been described by some academics as an “[unexpectedly good deal](https://news.liverpool.ac.uk/2016/02/03/the-liverpool-view-the-draft-deal-on-uk-membership-of-the-eu/)”. This is because the safeguard mechanism would allow Britain to discriminate against non-UK workers from the EU, which [has long been prohibited](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61978CJ0207) under EU law. Given the new ruling, the ECJ might be receptive to arguments that the safeguard mechanism can be justified in order to protect public finances.

When combined with existing [UK rules](https://www.gov.uk/government/news/minimum-earnings-threshold-for-eea-migrants-introduced) narrowing the definition of who qualifies as a “worker”, and [limiting access to social support for jobseekers](http://www.legislation.gov.uk/uksi/2013/3196/pdfs/uksi_20133196_en.pdf), it has been argued that the safeguard mechanism will have a [disproportionately negative effect on women](https://theconversation.com/why-the-eu-emergency-brake-on-migrant-benefits-is-sexist-54195), who might experience breaks in the continuity of their employment as a result of childbirth, and are more likely to be in part-time employment or to perform unpaid care-giving roles.

The safeguard mechanism on in-work benefits also arguably ignores the [reliance of the UK employment market on low-paid, zero-hours contract work](http://www.tandfonline.com/doi/pdf/10.1080/09649069.2015.1028161), that for many with and without care responsibilities, can only be performed with the support of state benefits.

So the Commission v UK ruling represents the latest in a line of judgements in which the ECJ has accepted member state restrictions on access to welfare for EU citizens. That this can be seen as a boost for those campaigning for the UK to remain part of the EU, continues a troubling trend towards a tough stance on some of the most vulnerable people in society.