**Playing Politics So the UKSC Doesn’t Have To: The CJEU ruling in Case C-709/20 *CG v Department for Communities in Northern Ireland***

**Stephanie Reynolds**

In its recent [*CG*](https://curia.europa.eu/juris/document/document.jsf?text=&docid=244198&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=30257)judgment, the EU’s Court of Justice held that it was lawful for [Universal Credit Regulations](https://www.legislation.gov.uk/nisr/2016/216/part/2/crossheading/in-northern-ireland) to stipulate that EU citizens do not, by virtue of pre-settled status, have a ‘right to reside’ in the UK for the purposes of accessing Universal Credit. Since the right to reside test is an eligibility requirement for a wide range of welfare in the UK, the case sets significant constraints on the ways in which certain EU citizens who are lawfully registered under the UK’s [EU Settlement Scheme](https://www.gov.uk/settled-status-eu-citizens-families) (EUSS) can access social assistance. Beyond the substance, the CJEU’s reasoning has clear implications for the UK and EU constitutional frameworks and for interactions between the two.

Admittedly, the right to reside test was in operation far before the EUSS was initiated. Under the Universal Credit Regulations ([GB](https://www.legislation.gov.uk/ukdsi/2013/9780111531938/part/2/crossheading/in-great-britain)/[NI](https://www.legislation.gov.uk/nisr/2016/216/part/2/crossheading/in-northern-ireland)), for instance, applicants must show that they are ‘habitually resident’ in the UK. While British nationals meet this through residence, EU citizens must show that they have a ‘right to reside’ in the UK by being a ‘qualified person’ under [Reg 6 EEA Regulations 2016](https://www.legislation.gov.uk/uksi/2016/1052/made). This Regulation in fact largely replicates Article 7 [EU Directive 2004/38](https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF) (Citizens Rights Directive/CRD) which provides that for extended residence in a host State, an EU citizen must be working, self-employed or have sufficient resources and comprehensive sickness insurance. The practical consequence of this is that even before Brexit, non-economically active EU citizens who applied for welfare were presumed not to be self-sufficient. They therefore did not pass the right to reside test and were ineligible for social assistance.

Given that such Union citizens were nevertheless residing in the UK, it had already been argued before both the [UKSC](https://www.supremecourt.uk/cases/docs/uksc-2009-0177-judgment.pdf) and the [CJEU](https://curia.europa.eu/juris/document/document.jsf?text=&docid=180083&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4652657) that the right to reside test was in breach of EU primary law, namely the rights of free movement and non-discrimination under [Articles 21 and 18 TFEU](https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF). However, while both courts accepted that the right to reside test was indirectly discriminatory – since UK nationals could more easily establish that they were habitually resident in the UK than could EU citizens – the test was justified as an appropriate means of protecting the financial security of the British welfare system.

So why is *CG* interesting at all, and how can it be said to have new constitutional implications for the UK and the EU? First, the existing right to reside case-lawand the CJEU’s wider [*Dano*](https://curia.europa.eu/juris/document/document.jsf;jsessionid=FE80C1FCA2D2C8F17B089BDCE33006F4?text=&docid=159442&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5699177)line of judgments to which it is aligned have already been [criticised](https://kluwerlawonline.com/journalarticle/Common%2BMarket%2BLaw%2BReview/52.4/COLA2015074) for prioritising the limitations located in secondary Union legislation over the primary rights enshrined in the Union Treaties. Second,in any case *CG* goes further. The *Dano* jurisprudence might be explained because all welfare applicants in those judgments derived their residence rights solely from the CRD. While Article 21 TFEU confers upon Union citizens a primary right to reside in the territories of the Member States, this is subject to the limitations and conditions laid down in the Treaties and secondary legislation. Article 24(1) CRD also acts as a ‘specific expression’ of Article 18 TFEU and dictates that equal treatment is only available where residence is ‘lawful’. For non-economically active EU citizens, this means having sufficient resources; an application for benefits would suggest this condition has not been met. Since UK rules essentially replicated the conditions for residence under the CRD, the UK right to reside test fits comfortably within this nevertheless [controversial](https://pure.york.ac.uk/portal/en/publications/the-ecj-sacrifices-eu-citizenship-in-vain-commission-v-united-kingdom%28620943d7-501b-441f-8c9a-ffcd26059887%29.html) explanation.

Ironically, Brexit changed this dynamic. First, although the Withdrawal Agreement (WA) utilises the CRD as the main route to residence rights for EU citizens living in the UK prior to the end of the transition period, the EUSS is actually more generous. As a result of domestic [political pressure](https://publications.parliament.uk/pa/bills/cbill/2016-2017/0132/amend/european_daily_cwh_0207.pdf), and probably administrative necessity, EU citizens were eligible for pre-settled status if they could evidence UK residence prior to the end of the transition period, without needing to show this was lawfulunder the CRD.

Second, the UK made EUSS registration *constitutive* of residence rights in the UK: an EU citizen who has not registered under the EUSS has no residence rights, regardless of whether they meet the terms of the Withdrawal Agreement. This approach has been [widely criticised](https://blogs.lse.ac.uk/brexit/2020/01/27/eu-settlement-scheme-the-cliff-edge-approach-puts-many-vulnerable-applicants-at-risk/) for creating a cliff-edge as regards EU nationals’ post-Brexit residence security. However, it did appear to come with one advantageous side-effect. Those who *had* registered would have a ‘right to reside’ in national law, which, under the CJEU’s [*Trojani*](https://curia.europa.eu/juris/document/document.jsf;jsessionid=866425CE6A867D096E4A47836D518D50?text=&docid=49457&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2240704)ruling, meant lawful exercise of free movement rights under Article 21 TFEU and the right to non-discrimination as regards welfare under Article 18 TFEU.

The UK, however, tried to have its cake and eat it by quickly amending its social assistance regulations so that pre-settled status did not provide a ‘right to reside’ in respect of benefits. Thus, EU citizens were required to have a right to reside under the Scheme to be allowed to stay but simultaneously treated as though they did not have one when it came to welfare. *CG* challenged this as a breach of Article 18 TFEU, which still applied during the transition period thanks to Article 12 WA, and the Northern Ireland Social Security Tribunal referred the matter to the CJEU for a preliminary ruling.

Interestingly, a similar set of circumstances – concerning the Universal Credit Regulations in [Great Britain](https://www.legislation.gov.uk/ukdsi/2013/9780111531938/part/2/crossheading/in-great-britain) – was also before the UKSC in [*Fratila*](https://www.supremecourt.uk/cases/uksc-2021-0008.html). Although expedited, that case would still not have been heard in time for the UKSC to make a reference to the CJEU before the end of the transition period. Nevertheless, since the Northern Ireland Tribunal had referred just in time, and the CJEU’s preliminary ruling would still have binding force under Article 89 WA, the UKSC adjourned its hearing originally scheduled for May 2021. Accordingly, the outcome of *CG* was to be significant in determining not just whether CG was entitled to Universal Credit but whether pre-settled status entitled EU citizens to benefits more generally.

**The CJEU’s options in *CG***

There were arguably three options open to the CJEU in *CG*. First, as outlined above, it could have distinguished the *Dano* judgments from *Trojani* on the basis that in the former set of cases, the applicants derived their residence rights *solely* from the CRD. Just as the CA did in [*Fratila*](https://www.bailii.org/ew/cases/EWCA/Civ/2020/1741.html), the CJEU could have held that as a result of the EUSS, CG’s legal residence was no longer rooted in the CRD but in a national residence permit, which gave her a right to reside under Article 21 TFEU and equal access to welfare under Article 18 TFEU. The requirement that EU citizens meet the terms of the CRD when they already have a right to reside, and when UK nationals do not have to do this, would be a step too far.

This would have given the UKSC very little wriggle room in the *Fratila* appeal other than to find against the UK government and hold that pre-settled status holders were entitled to Universal Credit. Despite the CA judgment, this could be viewed as putting the UKSC in a difficult situation politically. A decision that seemed to put non-economically active Union citizens in a better position than they would have been were the UK still a Member State might play into the hands of a still [virulent Eurosceptic press](https://www.express.co.uk/comment/expresscomment/1466885/Brexit-news-Northern-Ireland-protocol-article-16-Frexit-Italexit-Charles-Henri-Galloi) and anger a Government that [seeks to reform](https://bills.parliament.uk/bills/3035) judicial review as a direct result of the UKSC’s [Brexit](https://www.bailii.org/ew/cases/EWCA/Civ/2012/1736.html)-related [jurisprudence](https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf). Nor would it have mattered to those actors that *Trojani* actually allows for the revocation of national residence permits – and the subsequent loss of equal access to welfare – after an individualised assessment of the applicant’s resources because, in the Brexit context, revocation of pre-settled status on this basis would be politically and administratively unfeasible.

Yet, it should be remembered that the UK *chose* to make pre-settled status a constitutive residence right and to offer it using broader criteria than the WA required. Indeed the CJEU’s [Advocate General](https://curia.europa.eu/juris/document/document.jsf?text=&docid=243425&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2252856) speculated that the UK must have considered the costs of this when designing the Scheme. Eligibility would only have been expanded to a relative minority anyway: settled status and working pre-settled status holders can already access welfare and both statuses are only available to EU citizens living in the UK before the end of the transition period who registered in time.

The second option open to the CJEU was to reinterpret *Trojani* in light of the objectives of the CRD, along similar lines as the Advocate General in his [Opinion](https://curia.europa.eu/juris/document/document.jsf?text=&docid=243425&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7180681) to the Court. On various [case-law](https://curia.europa.eu/juris/document/document.jsf;jsessionid=3DA10760D5DA2AB3FA036FD0ED216F37?text=&docid=232081&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3509224) these are simultaneously to facilitate free movement but also to ensure that EU citizens do not become an unreasonable burden on their host State. Indeed, the Court has often transplanted the framework of the CRD into its wider free movement [case-law](https://curia.europa.eu/juris/document/document.jsf;jsessionid=F1D70D92C34FED17BE894136C47FE2F4?text=&docid=49231&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5334117). Thus, it might have accepted that pre-settled status holders have a ‘right to reside’ in the UK, bringing the matter within the scope of Article 18 TFEU. An assessment of an applicant’s ‘economic and social integration’ to determine habitual residence in the UK might nevertheless have followed. Such a test would be indirectly discriminatory since UK nationals could satisfy it more easily through British nationality and UK residence. EU citizens would have to show that they were economically active or that they were otherwise integrated, involving an assessment of the duration of their residence and whether their need for financial assistance was only temporary. Such discrimination would be justified in principle via the legitimate objective of protecting the public purse and justified in practice since an individualised assessment would satisfy the principle of proportionality. Admittedly, researchers such as [O’Brien](https://www.bloomsburyprofessional.com/uk/unity-in-adversity-9781849467193/) have demonstrated that such a model causes problems for accessing benefits on the ground. Nevertheless, this option would still have broadened eligibility for benefits, been in-line with well-established CJEU [jurisprudence](https://curia.europa.eu/juris/liste.jsf?num=C-184/99), and given the UKSC the diplomatic elbow room to find against the UK Government in a way which still allowed it to save face in the Brexit context.

The third option would have been to overrule *Trojani* altogether and to establish across the board that whatever the source of an EU citizen’s residence rights in the host State, their residence must meet the conditions of Article 7 CRD in order to be ‘lawful’ and trigger equal treatment. Such an outcome seemed unlikely given that the CJEU had recently held in [*Krefeld*](https://curia.europa.eu/juris/document/document.jsf?text=&docid=232081&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2267359)that residence under the [EU’s Free Movement of Workers Regulation](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32011R0492) generated equal treatment rights when it came to welfare regardless of the fact that the applicant did not meet the terms of Article 7 CRD. Indeed, this was a large motivator for the CA in finding against the UK Government in *Fratila*.

Nevertheless, the CJEU ultimately opted for option three without expressly overruling *Trojani*. It asserted that the principle of non-discrimination under Article 18 TFEU only applied where more specific rules had not been laid down. EU citizens, such as *CG*, who had moved to another Member State triggered the CRD, which had its own provision on equal treatment in Article 24. In turn, Article 24 CRD required residence to be lawful under the Directive before EU citizens were entitled to equal treatment which, for CG meant having sufficient resources. While the Court did call for an examination of CG’s financial circumstances to determine whether she had them, it concluded that CG did not and was therefore ‘likely’ to be an unreasonable burden on the UK. She was consequently not entitled to equal access to welfare. Without reference to *Trojani*, the Court made it clear that possession of pre-settled status made no difference because to find otherwise would give her broader protection under Article 24 CRD than she would have enjoyed under the residence rules of the Directive itself.

**The implications for *Fratila* and beyond**

It now seems inevitable that the UKSC will find for the UK Government in its forthcoming *Fratila* decision. On the substance, the CJEU has provided the UKSC with a ‘get out of politics free’ card but *CG* also has longer-term consequences for the position of EU law and legal method within the UK constitution.

First, a practical reality of Brexit was to [retain EU law](https://commonslibrary.parliament.uk/research-briefings/cbp-8375/) domestically for the foreseeable future. Indeed, the EEA Regs continue to keep the notion of a ‘qualified person’, linked to the CRD, alive in UK law. However, the broader rights accompanying Articles 18 and 21 TFEU are already largely irrelevant, despite the fact that the Withdrawal Agreement maintains their legal power for those living in the UK prior to the end of the transition period.

Second, though the principle of proportionality is a European concept, it is one that has become well-integrated in UK [judicial reasoning](https://www.bailii.org/ew/cases/EWCA/Civ/2009/923.html) when EU legal matters arise, providing an important safety net for EU citizens. While the Withdrawal Agreement formally sustains its significance, *CG* effectively removes any real requirement for administrative decision-makers or judges to incorporate it into their assessments.

Third, this also suggests that despite the CJEU’s assertions that EU citizenship is the [fundamental status](https://curia.europa.eu/juris/liste.jsf?num=C-184/99) of the nationals of the Member States, it has, at best, only ever partially penetrated the domestic constitutional environment. Though the special status of EU citizens in the UK created [political pressure](https://publications.parliament.uk/pa/bills/cbill/2016-2017/0132/amend/european_daily_cwh_0207.pdf) to protect their residence entitlements immediately after the Brexit vote, it has done nothing to ensure that Union citizens are not discriminated against as compared with UK nationals. Equal treatment is dependent on market activity, while non-economically active citizens are treated much like any other immigrant with temporary leave to remain.

However, all of these outcomes arise from a CJEU decision. Consequently, those same repercussions also arise within the EU constitutional landscape. At first glance, *CG* arguably shows judicial perceptiveness towards the fragile nature of UK-EU relations. Yet, this goal could have been achieved through a test of economic and social integration outlined under option two above.

Instead, the Court has taken an approach that is unnecessarily costly to the coherence of the EU’s own constitution and its foundational principles. The prioritisation of the CRD has reduced primary free movement and equal treatment rights, as well as the principle of proportionality, to almost nothing. And yet *Trojani* and *Krefeld* have not been explicitly overruled. When then does an EU citizen enjoy equal treatment rights despite not meeting the requirements of the CRD and when do they not? Does *Krefeld* stand because the applicant established lawful residence under the Free Movement of Workers Regulation, which has its own equal treatment provision and which might be seen as a separate expression of Article 18 TFEU? If so, it remains difficult to why EU citizens can circumvent the CRD by establishing a different route to equal treatment through secondary Union legislation but not via national law and primary rights enshrined in the Treaties.

Bizarrely, the CJEU held that although CG was not lawfully exercising free movement rights for the purposes of equal treatment, that same free movement brought the matter within the scope of the EU’s [Charter of Fundamental Rights](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT). This arguably shows how tainted free movement has become bearing in mind that the Court has traditionally been far more comfortable anchoring its decisions to [free movement and equal treatment](https://curia.europa.eu/juris/liste.jsf?num=C-207/78) than [fundamental rights](https://curia.europa.eu/juris/document/document.jsf?text=&docid=114222&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5600936). Crucially, [previous case-law](https://www.bailii.org/ew/cases/EWCA/Civ/2012/1736.html) suggests that fundamental rights only require a base-line of financial support far from equivalent to equal access to benefits.

The unavoidable conclusion is that EU citizenship offers a [patchwork](https://eprints.whiterose.ac.uk/82943/1/COLA_50_6_Charlotte_O_Brien_Offprints.pdf) of increasingly diminished protections, only accessible through skilled navigation of incoherent jurisprudence. EU citizenship is far from a fundamental status in the Union constitution as well.

In addition to its clear consequences for the UK and the EU’s separate constitutional settings, *CG* also indicates a hands-off approach from the CJEU as regards ongoing UK-EU dynamics. Pursuant to Article 158 WA, UK courts and tribunals can still make preliminary references on the interpretation of the Citizens’ Rights part of the WA to the CJEU for eight years from the end of the transition period. In theory, judicial dynamics in the UK might continue to be affected by the ability of lower courts to refer to a constitutional court outwith the UK. Moreover, future litigation seems [likely](https://www.eurightshub.york.ac.uk/blog/tripwiresandtimebombsmay21). For instance, Article 18(d) WA requires the UK to allow for a ‘further reasonable period’ for registration under the EUSS where an applicant has ‘reasonable grounds’ for failing to meet the deadline. Given delays in the application process, the higher risk that certain vulnerable groups will miss the deadline due to circumstances beyond their control, and the exacerbation of these issues by the Covid-19 pandemic, it is anticipated that appreciable numbers of EU citizens are now unlawfully resident in the UK. It would be open to the CJEU to provide guidance on this if asked by a UK court but given the lengths to which the CJEU went in *CG* to avoid confrontation with the UK government, this safeguard now seem worryingly precarious.

Ultimately, the CJEU appears to have washed its hands of the UK but at great cost to its own constitutional framework and to people who remain Union citizens.

Stephanie Reynolds, Senior Lecturer in Law, University of Liverpool