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Case No: CO/3632/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2020

Before:

MR. JUSTICE SWIFT

- -

Between:

THE QUEEN

on the application of

(1) GEANINA MIRELA FRATILA **(2) RAZVAN TANASE**	**Claimants**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Defendant**
and	
THE ADVICE ON INDIVIDUAL RIGHTS IN EUROPE (AIRE) CENTRE	**Intervener**

- -

Thomas de la Mare QC and Tom Royston (instructed by **Child Poverty Action Group**) for the **Claimant**
Sir James Eadie QC, Julie Anderson and George Molyneaux (instructed by **Government Legal Department**) for the **Defendant**
Charles Banner QC and Yaaser Vanderman (instructed by **Herbert Smith Freehills LLP**) for the **Intervener**

Hearing dates: 18th and 19th February 2020

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Judgment approved by the court

Covid-19 Protocol: This judgment was handed down remotely to be circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on the 27th April 2020.

MR JUSTICE SWIFT

A. Introduction

1. This claim concerns the legality of social security rules made to govern whether persons holding pre-settled status under the Immigration Rules may qualify to claim various social welfare benefits. Pre-settled status is one of two statuses permitting residence in the United Kingdom, established by the Home Secretary under the Immigration Rules. Each is intended to protect the position of foreign EU nationals living in the United Kingdom, following the United Kingdom's departure from the European Union. The relevant social security rules were introduced by the Social Security (Income-related Benefits) (Updating and Amendment) (EU exit) Regulations 2019 ("the 2019 Social Security Regulations"), which were laid by the Secretary of State for Work and Pensions. These Regulations have the effect of preventing reliance on pre-settled status to meet the residence tests which are a condition of entitlement to a range of social welfare benefits. In some, but not all of the welfare benefit schemes that test is put in terms of whether the claimant is "in Great Britain". The 2019 Social Security Regulations amend a number of different sets of rules: the Income Support (General) Regulations 1987; the Jobseeker's Allowance Regulations 1996; the State Pension Credit Regulations 2002; the Housing Benefit Regulations 2006; the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006; the Employment and Support Allowance Regulations 2008; and the Universal Credit Regulations 2013. The case raised by the Claimants is that the change introduced by the 2019 Social Security Regulations which prevents reliance on pre-settled status, comprises unlawful discrimination on grounds of nationality, contrary to EU law.

(1) The 2019 Social Security Regulations, and Universal Credit

2. Although the 2019 Social Security Regulations amend each of the seven sets of Regulations listed above, the argument in this case has focussed on the amendment to regulation 9 of the Universal Credit Regulations 2013 ("the Universal Credit Regulations"). As amended, regulation 9 is as follows.

> **"9. — Persons treated as not being in Great Britain**
>
> (1) For the purposes of determining whether a person meets the basic condition to be in Great Britain, except where a person falls within paragraph (4), a person is to be treated as not being in Great Britain if the person is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.
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> (2) A person must not be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless the person has a right to reside in one of those places.

(3) For the purposes of paragraph (2), a right to reside does not include a right which exists by virtue of, or in accordance with—

(a) regulation 13 of the EEA Regulations or Article 6 of Council Directive No. 2004/38/EC;

(aa) regulation 14 of the EEA Regulations, but only in cases where the right exists under that regulation because the person is–

(i) a qualified person for the purposes of regulation 6(1) of those Regulations as a jobseeker; or

(ii) a family member (within the meaning of regulation 7 of those Regulations) of such a jobseeker;

(b) regulation 16 of the EEA Regulations, but only in cases where the right exists under that regulation because the person satisfies the criteria in regulation 16(5) of those Regulations or article 20 of the Treaty on the Functioning of the European Union (in a case where the right to reside arises because a British citizen would otherwise be deprived of the genuine enjoyment of their rights as a European citizen); or

(c) a person having been granted limited leave to enter, or remain in, the United Kingdom under the Immigration Act 1971 by virtue of—

(i) Appendix EU to the immigration rules made under section 3(2) of that Act; or

(ii) being a person with a Zambrano right to reside as defined in Annex 1 of Appendix EU to the immigration rules made under section 3(2) of that Act.

(4) A person falls within this paragraph if the person is—

(a) a qualified person for the purposes of regulation 6 of the EEA Regulations as a worker or a self-employed person;
(b) a family member of a person referred to in sub-paragraph (a) within the meaning of regulation 7(1)(a), (b), or (c) of the EEA Regulations;

(c) a person who has a right to reside permanently in the United Kingdom by virtue of regulation 15(1)(c), (d) or (e) of the EEA Regulations;

(d) a refugee within the definition in Article 1 of the Convention relating to the Status of Refugees done at Geneva on 28th July 1951, as extended by Article 1(2) of the Protocol relating to the Status of Refugees done at New York on 31st January 1967;

(e) a person who has been granted, or who is deemed to have been granted, leave outside the rules made under section 3(2) of the Immigration Act 1971 where that leave is—

> (i) discretionary leave to enter or remain in the United Kingdom,
> (ii) leave to remain under the Destitution Domestic Violence concession, or
> (iii) leave deemed to have been granted by virtue of regulation 3 of the Displaced Persons (Temporary Protection) Regulations 2005;
>
> (f) a person who has humanitarian protection granted under those rules; or
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> (g) a person who is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999 and who is in the United Kingdom as a result of their deportation, expulsion or other removal by compulsion of law from another country to the United Kingdom."
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> [emphasis added]

The material amendment for the purposes of the Claimants' case is the new regulation 9(3)(c)(i), added by the 2019 Social Security Regulations, and underlined above.

3. The significance of this amendment is as follows. By section 3 of the Welfare Reform Act 2012 ("the 2012 Act"), claimants are entitled to Universal Credit if they meet both the "basic conditions" and the relevant "financial conditions". Section 4(1) of the 2012 Act lists the "basic conditions'; the list includes a condition that the claimant must be "in Great Britain". Section 4(5) of the 2012 Act provides that regulations may be made in order (among other matters) to "… specify circumstances in which a person is to be treated as being or not being in Great Britain". Regulation 9 of the Universal Credit Regulations is that provision. By reason of regulation 9 (as now amended), a person will not meet the conditions for entitlement to Universal Credit unless she is actually present in the United Kingdom. However, unless the person falls into any of the categories listed in regulation 9(4), she will not be able to meet the conditions for entitlement to Universal Credit unless she is habitually resident in (any of) the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland (regulation 9(1)). A condition of establishing habitual residence is that the person must have the right to reside in (at least) one of the listed parts of the British Isles, or the Republic of Ireland (regulation 9(2)). Regulation 9(3) then provides that rights to reside under specified provisions do not count for the purposes of regulation 9(2), and that one such is the limited leave to enter or remain in the United Kingdom arising under Appendix EU to the Immigration Rules (regulation 9(3)(c)(i)).

4. Adding a little more detail, it is important to note two matters. The *first* is that the classes of person who, by reason of regulation 9(4), are able to meet the condition to be "in Great Britain" without needing to show habitual residence in the United Kingdom, include those who by reason of being workers or self-employed persons are "qualified persons" for the purposes of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"), the family members of those persons (as defined by regulation 7 of the EEA Regulations), and retired workers and self-

employed persons and their family members. The *second* is that prior to the amendments made to regulation 9 of the Universal Credit Regulations by the 2019 Social Security Regulations, the types of rights of residence that did not count for the purposes of establishing habitual residence included the initial 3 month right of residence available to EU nationals under regulation 13 of the EEA Regulations and also, if the person was a jobseeker or family member of a jobseeker as defined in the EEA Regulations, the extended right of residence under regulation 14 of the EEA Regulations (i.e. the right of residence available to EU nationals who did not meet the conditions for the permanent right of residence under regulation 15 of the EEA Regulations, which is available to, among others, those who have 5 years' continuous residence in the United Kingdom as referred to in those Regulations).

(2) Appendix EU to the Immigration Rules

5. The context for the amendments made by the 2019 Social Security Regulations to regulation 9 of the Universal Credit Regulations is Appendix EU to the Immigration Rules ("Appendix EU"). In a witness statement made for these proceedings David Malcolm, a civil servant in the Department for Work and Pensions, explains that Appendix EU was introduced by the Home Secretary as "a limited pilot" scheme from August 2018, and "went fully live" on 30 March 2019, in accordance with the provision made in articles 1 and 7 of the Immigration (European Economic Area Nationals) (EU Exit) Order 2019. The 2019 Social Security Regulations were made on 16 April 2019 and came into force on 7 May 2019.

6. Appendix EU sets out the settlement scheme devised by the Home Secretary pursuant to her powers under the Immigration Act 1971, for EEA nationals (other than British nationals) who are present in the United Kingdom as at the date the United Kingdom withdraws from the EU. Under Appendix EU such EEA nationals may apply either for permanent leave to remain (so-called "settled status") or limited leave to remain ("pre-settled status"). For present purposes it is sufficient to state that settled status is available to "relevant EEA citizens". "Relevant EEA citizens" is defined in Annex 1 to Appendix EU to mean any EEA citizen resident in the United Kingdom "for a continuous qualifying period", which began before the "specified date". The definition of "specified date" is detailed, but for present purposes may be taken to be 11pm on 31 December 2020, the end of the transition period following the United Kingdom's departure from the EU. The definition of "continuous qualifying period" is also (understandably) detailed, but so far as is relevant to the matters in issue in these proceedings can be taken to be a period of residence in the United Kingdom which began before 11pm on 31 December 2020. Put very shortly, settled status is available to relevant EEA citizens and their family members once they have been resident for a continuous period of 5 years (the full conditions are set out at paragraphs EU11 to EU13 of Appendix EU).

7. Entitlement to pre-settled status is set by paragraph EU14 of Appendix EU.

> "EU14. The applicant meets the eligibility requirements for limited leave to enter or remain where the Secretary of State is satisfied, including (where applicable) by the required evidence of family

relationship, that, at the date of application, condition 1 or 2 set out in the following table is met:

Condition.	**Is met where**
1.	a) The applicant is: (i) a relevant EEA citizen; or (ii) a family member of a relevant EEA citizen; or (iii) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; or (iv) a person with a derivative right to reside; or (v) a person with a Zambrano right to reside; and (b) The applicant is not eligible for indefinite leave to enter or remain under this Appendix solely because they have completed a continuous qualifying period of less than five years
2.	(a) The applicant is: (i) a family member of a qualifying British citizen; or (ii) a family member who has retained the right of residence by virtue of a relationship with a qualifying British citizen; and (b) The applicant was, for any period in which they were present in the UK as a family member of a qualifying British citizen relied upon under sub-paragraph (c), lawfully resident by virtue of regulation 9(1) to (6) of the EEA Regulations (regardless of whether in the UK the qualifying British citizen was a qualified person under regulation 6 of the EEA Regulations); and

> (c) The applicant is not eligible for indefinite leave to enter or remain under this Part of this Appendix solely because they have completed a continuous qualifying period in the UK of less than five years."

In this way, paragraph EU14 provides a limited right to remain in the United Kingdom to EU nationals who, before the end of the transition period, have begun to live in the United Kingdom. This limited right to remain enables such persons to remain until such time as they have 5 years' continuous residence, enabling them to apply for settled status.

8. Until such time as the transition period ends and the EEA Regulations are repealed, the rights of residence available under Appendix EU will exist side by side with the rights of residence under the EEA Regulations (i.e., under regulations 13 – 16 of those Regulations). However, and this is an important part of the Claimants' argument, the scope of pre-settled status under paragraph EU14 covers a significantly wider class of person to the right of residence available under regulation 14 (the so-called "extended right of residence" which is afforded to EEA nationals with less than 5 years' residence). This is the consequence of the definition in Appendix EU of "relevant EEA citizen" which contains no restriction equivalent to the "qualified person" requirement which is part of the regulation 14 right of residence (see the definition of "qualified person" at regulation 6 of the EEA Regulations).

(3) The Claimants

9. The First Claimant, Geanina Fratila, is a Romanian national who came to the United Kingdom on 9 June 2014. She worked here from November 2014 until September 2015 when her employer sold the business that she worked in. She has not worked since. Having made an application under paragraph EU14 of Appendix EU, on 6 June 2019 she was granted pre-settled status. By 9 June 2019 Miss Fratila had been in the United Kingdom for 5 years. She made a further application under Appendix EU. On 25 June 2019 she was granted settled status. On 13 June 2019, after her application for settled status had been made but before she had been notified of its outcome, Miss Fratila made a claim for Universal Credit. On 17 June 2019 that claim was refused on the basis that she was a jobseeker and as such did not pass the habitual residence test (i.e., by reason of regulation 9(3)(aa) of the Universal Credit Regulations). On 3 July 2019 the Department for Work and Pensions wrote again to Miss Fratila, apparently in response to a further claim by her for Universal Credit following notification that she had settled status. This second letter informed Miss Fratila that the Department was satisfied that she had a right to reside in the United Kingdom and on that basis, was "in Great Britain" for the purposes of her claim for Universal Credit.

10. The Second Claimant, Razvan Tanase is also a Romanian national. He is confined to a wheelchair, having suffered from polio in childhood. He is in receipt of various payments from the Romanian government: a disability pension; a basic retirement

pension; and an allowance in respect of the cost of the care he requires. Mr Tanase and Miss Fratila have been friends since they were children. On 30 January 2019 Mr Tanase moved to the United Kingdom and moved-in to live with Miss Fratila. Miss Fratila provides care for him. Mr Tanase made an application under paragraph EU14 of Appendix EU, and on 30 May 2019 was granted pre-settled status for 5 years until 31 May 2024. The letter from the Home Office explains that if Mr Tanase wishes to apply for settled status under Appendix EU he may do so as soon as he meets the qualifying criteria. In June 2019, Mr Tanase made a claim for Universal Credit. By letter dated 13 June 2019 the Department for Work and Pensions informed him that his claim had been refused because he did not have a right to reside that qualified for the purposes of the habitual residence test.

11. In my view, the only relevant claimant for the purposes of this claim is the Second Claimant, Mr Tanase. Miss Fratila now has settled status; she is not now affected by regulation 9(3)(c)(i) of the Universal Credit Regulations (the material provision added to those Regulations by the 2019 Social Security Regulations). Further, although Miss Fratila had pre-settled status between 6 June 2019 and 25 June 2019, the letter from the Department of Work and Pensions dated 17 June 2019 that set out its initial refusal of her claim for Universal Credit did so not on the basis of regulation 9(3)(c)(i), but instead on the basis of regulation 9(3)(aa) of the Universal Credit Regulations. As such, even prior to 25 June 2019, Miss Fratila was not subject to any adverse decision taken on the basis of her pre-settled status, or the amendment to the Universal Credit Regulations made by the 2019 Social Security Regulations.

B. Decision

(1) The Claimants' case

12. The Claimants' case can be summarised as follows. Pre-settled status available under paragraph EU14 of Appendix EU is a new form of right of residence available under English law; it has been generally available to applicants from 30 March 2019. Until 7 May 2019 when the 2019 Social Security Regulations came into force, pre-settled status was a right of residence which could render a person habitually resident in the United Kingdom for the purposes of regulation 9 of the Universal Credit Regulations and therefore "in Great Britain" for the purposes of section 3 of the 2013 Act and a claim for Universal Credit. The new regulation 9(3)(c)(i) which excludes pre-settled status as a right of residence that counts for the purposes of the habitual residence test is discrimination on grounds of nationality. This is contrary to Article 18 TFEU which prevents discrimination on grounds of nationality "within the scope of application of the Treaties and without prejudice to any special provisions contained therein".

13. In support of their submission that the new regulation 9(3)(c)(i) gives rise to discrimination on grounds of nationality the Claimants rely on a number of decisions of the CJEU: *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies Louvain La Neuve* [2002] 1 CMLR 19; *Trojani v Centre Public d'Aide Sociale de Bruxelles* [2004] 3 CMLR 38; *Pensionsversicherungsanstalt v Brey* [2014] 1 WLR 1080; *Dano v Jobcenter Leipzig* [2015] 1 WLR 2519; and *Jobcenter Berlin Neukolln v Alimanovic* [2016] QB 308. The proposition that the Claimants say arises from this case law is that if an EU national is lawfully resident in another EU member state on the basis of a

right of residence arising under that state's domestic law, she may not be subject to discrimination on grounds of nationality. Thus, since pre-settled status is a right of residence arising under English law, available only to nationals of other EU member states, discounting that right of residence for the purposes of the habitual residence test is discrimination on grounds of nationality, and unlawful.

14. The Claimants' submission falls into three parts: first, premised on the case law referred to above, that regulation 9(3)(c)(i) of the Universal Credit Regulations gives rise to a case of discrimination on grounds of nationality; second that the discrimination arising is direct discrimination, not indirect discrimination; and third even if the effect of regulation 9(3)(c)(i) is indirect discrimination, it remains unlawful because it is not justified.

15. The Claimants accept that the legal basis for their claim (i.e. their ability to rely on Article 18 TFEU) will disappear with effect from the end of the implementation period provided by section 1A of the European Union (Withdrawal) Act 2018. As matters presently stand, the implementation period will end at 11pm on 31 December 2020 (see section 39 of the European Union (Withdrawal Agreement) Act 2020). Thus, what is in issue in this claim is Mr Tanase's entitlement to Universal Credit from the date of his application to the Department for Work and Pensions in June 2019 until 31 December 2020. If this claim succeeds it will be open to all other EU nationals entitled to pre-settled status to rely on that status for the purposes of the habitual residence requirement for Universal Credit, and for the purposes of the materially identical requirements in each of the other six welfare benefits affected by the same amendment made by the 2019 Social Security Regulations (as listed above, at paragraph 1).

(2) A case of discrimination on grounds of nationality?

16. The Secretary of State's response to the Claimants' case is that there is simply no room for free-standing reliance on Article 18 TFEU because all relevant rights arising under EU law relating to rights of residence have been codified in Directive 2004/38/EC (the "Citizens' Rights Directive" – implemented into English law by the EEA Regulations). Thus, the only relevant non-discrimination provision is article 24 of the Citizens' Rights Directive, which provides as follows

> "**Equal treatment**
>
> 1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.
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> 2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer

> period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families."

On this analysis the Claimants' case fails both because direct reliance on Article 18 TFEU is not possible, and because any claim of discrimination on grounds of nationality based on article 24 of the Citizens' Rights Directive would fail because of the derogation in article 24(2). The Secretary of State submits that the Claimants' inability to found a claim directly on Article 18 TFEU is supported by the judgments of the CJEU in *Dano* and in *Alimanovic*. She submits that it is to be inferred from the reasoning in those cases that the reasoning of the CJEU in *Grzelczyk* and *Trojani* is no longer good law. Since both parties have made detailed submissions by reference to this run of CJEU case law, I will consider each case in a little detail.

17. In *Grzelczyk*, the claimant was a French national studying at university in Belgium. He applied to the Belgian authorities for payment of the *"minimex"*, a minimum subsistence payment. His application was allowed by the local public assistance centre ("the CPAS") which made payment to him. However, the Belgian government then refused to reimburse the CPAS the amount it had paid to Mr Grzelczyk on the ground that he did not meet the nationality requirement for the *minimex*. Under Belgian law the *minimex* could be claimed by any Belgian "actually resident in Belgium" and by those who were nationals of other EU member states if they fell within the scope of EC Regulation 1612/68 on the freedom of movement of workers (the predecessor of the Citizens' Rights Directive). The question referred to the Court was whether limiting entitlement to the *minimex* to non-Belgian EU nationals who were present in Belgium in accordance with the provisions of Regulation 1612/68, amounted to unlawful discrimination on grounds of nationality. The Court concluded that any EU national lawfully present in the territory of another member state could assert reliance on Article 6 of the EC Treaty (now Article 18 TFEU) "in all situations which fall within the scope *ratione materiae* of Community law" (judgment at §32), and that for that reason the limitation on availability of the *minimex* to EU nationals did amount to unlawful discrimination on grounds of nationality. It is apparent that the key to the Court's conclusion was that Mr Grzelczyk was lawfully present in Belgium quite apart from any need to rely on the provisions of Regulation 1612/68.

18. *Trojani* involved a factual situation comparable to the one in *Grzelczyk*. Mr Trojani was a French national living in Belgium. He lived in a Salvation Army hostel doing odd jobs in return for board, lodging and some pocket money. He made a claim to a CPAS to receive the *minimex*; the application was refused. Two questions were referred to the CJEU: first whether a person in Mr Trojani's circumstances could claim a right of residence under Regulation 1612/68; and second, if not, whether he could rely directly on what was then Article 12 EC (which had been Article 6 of the EC Treaty at the time the circumstances of Mr Grzelczyk's claim arose, and is now Article 18 TFEU). In answer to the first question, the CJEU concluded that it was for the national court to assess whether the paid activity undertaken by Mr Trojani was qualitatively sufficient ("real and genuine") for him to count as a worker. The Court's answer to the second question followed the reasoning that had been applied in

Grzelczyk. The Court's premise was that Mr Trojani was lawfully resident in Belgium by reason of a residence permit issued by the Brussels municipal authority. The Court then stated this

> "39. In the context of the present case, it should be examined more particularly whether, despite the conclusion in para. [36] above, a citizen of the Union in a situation such as that of the claimant in the main proceedings may rely on Art.12 EC, under which, within the scope of application of the Treaty and without prejudice to any special provisions contained therein, all discrimination on grounds of nationality is prohibited.
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> 40. In the present case, it must be stated that, while the Member States may make residence of a citizen of the Union who is not economically active, conditional on his having sufficient resources, that does not mean that such a person cannot, during his lawful residence in the host Member State, benefit from the fundamental principle of equal treatment as laid down in Art.12 EC.
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> 41. In that connection three points should be made.
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> 42. First, as the Court has held, a social assistance benefit such as the *minimex* falls within the scope of the Treaty.
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> 43. Secondly, with regard to such benefits, a citizen of the Union who is not economically active may rely on Art.12 EC where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit.
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> 44. Thirdly, national legislation such as that at issue in the main proceedings, in so far as it does not grant the social assistance benefit to citizens of the European Union, non-nationals of the Member State, who reside there lawfully even though they satisfy the conditions required of nationals of that Member State, constitutes discrimination on grounds of nationality prohibited by Art.12 EC."

Thus, since Mr Trojani was lawfully resident in Belgium, he could rely on Article 12 EC to assert that refusal to pay him the *minimex* was unlawful when that benefit would be paid to a Belgian national in the same circumstances.

19. *Dano* is the third of the cases in issue. The claimants were Romanian nationals (mother and son) who had lived in Germany for more than 3 months but less than 5 years. Mrs Dano applied for welfare benefits which under German law were payable to jobseekers. Her application failed because even though she was ordinarily resident in Germany she was a foreign national whose right of residence – arising under the German Law of Free Movement (which appears to be the German implementation of the Citizens' Rights Directive) – arose only because she was a jobseeker. It appears that by the time Mrs Dano made her application for welfare benefits she had been

issued a residence permit by the City of Leipzig. Three questions were referred to the Court. The second and third questions were summarised as follows at paragraph 56 of the judgment

> "56. By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether article 18FEU, article 20(2)FEU, article 24(2) of Directive 2004/38 and article 4 of Regulation No 883/2004 must be interpreted as precluding legislation of a member state under which nationals of other member states who are not economically active are excluded, in full or in part, from entitlement to certain "special non-contributory cash benefits" within the meaning of Regulation No 883/2004 although those benefits are granted to nationals of the member state concerned who are in the same situation."

It is clear from paragraphs 60 – 62 of the judgment that the Court approached this case on the basis that Mrs Dano was exercising rights under the Citizens' Rights Directive and for that reason, considered the case by reference to article 24 of that Directive rather than Article 18 TFEU

> "60. In this connection, it is to be noted that article 18(1) FEU prohibits any discrimination on grounds of nationality "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein". The second sub-paragraph of article 20(2) FEU expressly states that the rights conferred on Union citizens by that article are to be exercised "in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder". Furthermore, under article 21(1) FEU too, the right of Union citizens to move and reside freely within the territory of the member states is subject to compliance with the "limitations and conditions laid down in the Treaties and by the measures adopted to give them effect": *Pensionsversicherungsanstalt v Brey* (Case C-140/12) [2014] 1 WLR 1080, para 46 and the case law cited.
>
> 61. Thus, the principle of non-discrimination, laid down generally in article 18FEU, is given more specific expression in article 24 of Directive 2004/38 in relation to Union citizens who, like the applicants in the main proceedings, exercise their right to move and reside within the territory of the member states. That principle is also given more specific expression in article 4 of Regulation No 883/2004 in relation to Union citizens, such as the applicants in the main proceedings, who invoke in the host member state the benefits referred to in article 70(2) of the Regulation.
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> 62. Accordingly, the court should interpret article 24 of Directive 2004/38 and article 4 of Regulation No 883/2004."

The Court's conclusion (at paragraphs 80 – 81) was that because on the facts Mrs Dano did not qualify for a right of residence under the Citizens' Rights Directive, she could not invoke the non-discrimination provision at article 24 of that Directive.

20. The final case to consider is *Jobcenter Berlin Neukolln v Alimanovic* [2016] QB 308. Here, the claimants were four Swedish nationals (a mother and three children) living in Germany. Mrs Alimanovic had lived in Germany between 1994 and 1999; her children were all born during that time. She returned to Germany in June 2010, and in July 2010 was issued with a residence permit under the German Law on Freedom of Movement. From December 2011 to May 2012 she was in receipt of social assistance payments, but they were withdrawn on the ground that under the Law on Freedom of Movement she had lost the right to reside in Germany as a worker. The Court considered Mrs Alimanovic's position only by reference to whether she had a right of residence under the Citizens' Rights Directive and only by reference to the non-discrimination requirements of article 24 of that Directive. The Court concluded that Mrs Alimanovic's circumstances brought her case within article 24(2) of the Directive and the derogation from entitlement to social assistance payments which is permitted where residence is based on article 14(4)(b) of the Directive.

21. A point that is striking both about this judgment and the judgment in *Dano* is that in neither did the Court consider the possibility that, if lawfully present in Germany other than under the terms of the Citizens' Rights Directive, either Mrs Dano or Mrs Alimanovic might have been able to rely directly on Article 18 TFEU in the same way and to the same effect as Mr Grzelczyk and Mr Trojani in the earlier cases. The Secretary of State relies on this and submits that I should infer from the absence of any reasoning based on Article 18 TFEU in *Dano* and *Alimanovic* that the CJEU has stepped back from the reasoning relied on in *Grzelczyk* and *Trojani*, and that these latter authorities are no longer good law. On this basis, it is said, the Claimants in this case can place no free-standing reliance on Article 18 TFEU.

22. I do not accept the submission that the reasoning in *Grzelczyk* and *Trojani* is no longer good law. I accept that when the CJEU decides to reverse away from reasoning it has deployed or conclusions reached in earlier cases it does not always say that is what it is doing. However, I do not consider this is one of those occasions. Occam's razor applies. The more likely explanation of the lack of reference to claims based on Article 18 TFEU in either *Dano's* case or *Alimanovic's* case is that neither case was argued on the basis that either claimant had a right of residence other than a right arising under the Citizen's Rights Directive (or more specifically, the German Law on Freedom of Movement which implemented that Directive). Following the hearing of this case the Secretary of State has provided me with copies of the Written Observations made to the CJEU (a) by the Government of the Federal Republic of Germany in *Dano's* case; and (b) by the Belgian Government and by Mr Trojani in the *Trojani* litigation. I am reluctant to place any significant reliance on these documents – it is no part of my role to mark the work of the CJEU. However, certain basic matters do emerge from these documents. First, that in *Dano's* case the German Government submitted that the certificate issued by the City of Leipzig (referred to at paragraph 36 of the Court's judgment) was not a document that gave Mrs Dano a right of residence in Germany. Yet this does not take the Secretary of State's submission in this case any further because it only serves to explain why on the facts of that case, there was no scope for any free-standing Article 18 TFEU argument. The second point

is that in *Trojani*, the Belgian Government disputed that the certificate issued by the Brussels authorities was any form of residence permit. However, the Belgian Government went on to accept that the referring court had – in the proceedings to date – concluded that Mr Trojani was lawfully resident in Belgium. I do not see how these matters advance the Secretary of State's submission in the present case. All they suggest is that when considering the reference, the CJEU proceeded on the basis of the premises stated by the referring court. More importantly, no part of this process of excavation of the proceedings before the CJEU detracts from the actual reasons stated by the Court in *Grzelczyk* or *Trojani*. In each case the reasoning proceeded from the starting point that if an EU national was lawfully resident in another EU member state other than on a basis arising out of what is now the Citizens' Rights Directive, she could rely on (what is now) Article 18 TFEU to challenge discrimination on grounds of nationality.

23. Turning to the present case, the pre-settled status available under the provisions of Appendix EU is a right of residence that exists apart from anything available under the Citizens' Rights Directive (as transposed into English law by the EEA Regulations). It has a distinct legal basis (rules made under the Immigration Act 1971), and for that matter also, is apt to cover a wider class of persons than the "extended right of residence" available under regulation 14 of the EEA Regulations because of the scope of the definition of "relevant EEA citizen" in Appendix EU when set against the notion of "qualified person", defined in regulation 6 and then applied in regulation 14 of the EEA Regulations. Although, for the reasons I have already explained (above at paragraph 11), on the facts Miss Fratila is not a suitable claimant to challenge the legality of regulation 9(3)(c)(i) of the Universal Credit Regulations (the material part added by the 2019 Social Security Regulations), the same does not apply to Mr Tanase. His claim for Universal Credit was refused because the right to reside he could rely on was the pre-settled status right. Applying the reasoning in *Grzelczyk* and *Trojani* to the facts of his case, he is able to assert a claim of discrimination on grounds of nationality on the basis of Article 18 TFEU.

(3) Direct or indirect discrimination?

24. The Secretary of State, relying on the judgment of the Supreme Court in *Patmalniece v Secretary of State for Work and Pensions* [2011] 1 WLR 783, submits that if the exclusion from entitlement to Universal Credit of those who have pre-settled status gives rise to discrimination on grounds of nationality, it is indirect rather than direct discrimination. The significance of a conclusion that the discrimination is indirect is obvious: it permits the Secretary of State the opportunity to submit that the discriminatory impact is objectively justified.

25. The leading judgment in *Patmalniece* is the judgment of Lord Hope. The judgment is not at all easy to follow, perhaps a consequence of Lord Hope's need to apply the judgment of the CJEU in *Bressol v Gouvernement de la Communaute Francaise* [2010] 3 CMLR 20, a judgment in which the key reasoning (at paragraphs 40 – 47) is relatively terse. In *Bressol* the CJEU considered a situation in which the Belgian state restricted the number of "non-resident" students who could enrol on certain higher education courses. A student was a resident student if her principal residence was in Belgium and he met any of eight specified conditions, one of which was that she had

"the right to remain permanently in Belgium". Questions were referred to the Court which, among other matters, required it to decide whether the restriction comprised direct or indirect discrimination on grounds of nationality. The Court's reasoning on the matter is at paragraphs 44 – 47 of its judgment.

> "44. Thus, the national legislation at issue in the main proceedings creates a difference in treatment between resident and non-resident students.
>
> 45. A residence condition, such as that required by that legislation, is more easily satisfied by Belgian nationals, who more often than not reside in Belgium, than by nationals of other Member States, whose residence is generally in a Member State other than Belgium (see, by analogy, *Meeusen v Hoofddirectie vad de Informatie Beheer Groep* (C-337/97) … at [23] and [24], and *Hartmann* [2007] ECR I-6303 at [31]).
>
> 46. It follows, as the Belgian Government moreover admits, that the national legislation at issue in the main proceedings affects, by its very nature, nationals of Member States other than Belgium more than Belgian nationals and that it therefore places the former at a particular disadvantage.
>
> *The justification for the unequal treatment*
>
> 47. As stated in [41] of the present judgment, a difference in treatment, such as that put in place by the decree of June 16, 2006, constitutes indirect discrimination on the ground of nationality which is prohibited, unless it is objectively justified."

The Court approached the case as one of indirect discrimination. On the facts, its conclusion was that the Belgian Government had not justified the restriction imposed.

26. In *Patmalniece*, Lord Hope interpreted this overall conclusion as meaning that the CJEU had declined to consider whether the discrimination was direct or indirect by reference to each element of the restriction imposed by the Belgian Government. He concluded that the consequence of the judgment in *Bressol* was that if a restriction comprised more than one element, whether the consequence was direct discrimination or indirect discrimination had to be determined by looking at the composite effect of the restriction rather than any single part of it: see his judgment from paragraph 30, and in particular at paragraph 34 where he said this:

> "34. The court concluded that, looked at in this way, the national legislation created a difference in treatment between resident and non-resident students. A residence condition, such as that required by this legislation, was more easily satisfied by Belgian nationals, who more often than not reside in Belgium, than by nationals of other member states, whose residence is generally in a member state other than Belgium. It followed that the national legislation

> affected nationals of member states other than Belgium more than Belgian nationals and placed them at a particular disadvantage which was indirectly discriminatory. The second cumulative condition—as to the right to remain permanently in Belgium-which the Advocate General said was necessarily linked to a characteristic indissociable from nationality and directly discriminatory, was subsumed into the first when the two conditions were treated cumulatively. The fact that the court then went on to consider whether the difference in treatment was objectively justified makes it plain beyond any doubt that it considered the case to be one of indirect, rather than direct, discrimination."

27. The specific issue before the Supreme Court in *Patmalniece* was whether conditions for payment of state pension credit set out in section 1(2)(a) of the State Pension Credit Act 2002 and regulation 2 of the State Pension Credit Regulations 2002 (one of the sets of Regulations now amended by the 2019 Social Security Regulations) comprised direct or indirect discrimination on grounds of nationality. The requirement in the 2002 Act was that the claimant be "in Great Britain"; the effect of the 2002 Act read together with the 2002 Regulations was materially similar to the effect of regulation 9 of the Universal Credit Regulations prior to the amendment made by the 2019 Social Security Regulations, namely that a claimant would be in Great Britain if habitually resident there, and that save in certain specified instances, habitual residence could only be established by persons with a right to reside in any of the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland. Lord Hope concluded that looked at on its own the "right to reside requirement' gave rise to direct discrimination because it "[set] out a test which no United Kingdom national could fail to meet" (judgment at paragraph 26). However, he went on to conclude that although all United Kingdom nationals had a right to reside, not all would be able to demonstrate habitual residence. He said the following at paragraphs 28 – 29 of his judgment

> "28. Mr Cox for the claimant submitted that the requirement to have a right to reside here discriminated directly between citizens of the United Kingdom on the one hand and citizens of other member states on the other. It was a clear case of discrimination on the basis of nationality: *Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn Kalmthout* [1985] ECR 973, para 24. That being so, article 3(1) of Regulation 1408/71 required that discrimination to be eliminated by deeming the claimant to be a British citizen for the purposes of entitlement to state pension credit. I do not think that it is as simple as that when regulation 2 of the 2002 Regulations is read as a whole. The requirement which everyone must satisfy is that they are "in Great Britain". The test which regulation 2 lays down is a composite one. Some United Kingdom citizens will be able to say that they are in Great Britain. Some will not. That is true also of nationals of other member states. No doubt it will be more difficult in practice for nationals of other member states to meet the test. But not all United Kingdom nationals will be able to meet the test either.

> 29. In *James v Eastleigh Borough Council* [1990] 2 AC 751 a rule that those who were not of pensionable age had to pay for admission to a public swimming pool was held to directly discriminate between men and women because their pensionable ages were different. In that case there was an exact match between the difference in pensionable ages and the rule, as the right to free admission depended upon a single criterion – an exact coincidence, as Baroness Hale of Richmond JSC puts it: see para 91, below. The statutory pensionable age alone determined whether the person had to pay or not. As Lord Ackner put it, at p 769, if you were a male you had, vis-à-vis a female, a five-year handicap. This was true of every male, not just some or even most of them. That is not so in the present case. There is no such exact match. The composite test is one that some UK nationals may fail to meet too because, although they have a right of residence, they are not habitually resident here. Furthermore, we are not required in this case to say whether this amounts to direct discrimination in domestic law. The question for us is whether it amounts to direct discrimination for the purposes of article 3(1) of Regulation 1480/71."

His conclusion (at paragraph 35 of his judgment) was that because the composite test was "more likely to be satisfied by a United Kingdom national than by a national of another member state" the effect of regulation 2 of the 2002 Regulations was indirect discrimination, not direct discrimination.

28. Reading this judgment in *Patmalniece*, I cannot help but feel like the curate asked by the bishop whether his egg was good or bad. It is difficult to see how the right to reside requirement under consideration in that case could, even if considered in isolation, comprise direct discrimination. Even allowing for Lord Hope's caveat that he was not considering what was direct discrimination for the purposes of English law (i.e. under the Equality Act 2010 and its predecessors) but only under EU law, I can see no coherent basis for associating direct discrimination with a requirement that each of the non-protected group can meet (in this instance, United Kingdom nationals) and some of the protected group (nationals of other EU member states) can also meet. Logically, direct discrimination arises, and only arises, when there is an <u>exact</u> coincidence between the requirement applied (on the facts of *Patmalniece* the right to reside in the United Kingdom) and the prohibited characteristic (i.e. nationality). This was the point made by Baroness Hale in her judgment in *Patmalniece* – that for there to be direct discrimination, the rule applied would be "indissociable" from the protected characteristic (to use the shorthand at section 4 of the Equality Act 2010). There is no indissociable connection between nationality and a right to reside in the United Kingdom: although those with such a right to reside are more likely to be British nationals, foreign nationals can also obtain that right to reside. As a matter of English law, the right to reside requirement would be classified as a provision which would, if not justified, give rise to indirect discrimination. I can see nothing in the judgment in *Bressol* that requires any different conclusion as a matter of EU law. If this is correct it avoids the intellectual contortion needed to conclude that the consequences of a rule which results in direct discriminatory can be avoided if that

rule is "bundled up" with another provision which (again, looked at alone) only gives rise to indirect discrimination.

29. Be that as it may, what is the consequence of the judgment in *Patmalniece* for regulation 9 of the Universal Credit Regulations, and specifically regulation 9(3)(c)(i)? In its structure regulation 9 of the Universal Credit Regulations, as amended, is similar to regulation 2 of the 2002 Regulations considered by the Supreme Court in *Patmalniece*. Regulation 9 contains a requirement for habitual residence (albeit not applied to the classes of person specified at regulation 9(4)), and a condition that habitual residence cannot be established unless a person has a right to reside in any of the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland. The additional element in Regulation 9 is that certain rights of residence do not count for the purposes of demonstrating habitual residence. The Claimants' submission is that because regulation 9(3)(c)(i) provides a limitation on the type of right to reside that counts, it gives rise to direct discrimination. I do not accept this submission. On its own terms, the restriction imposed by regulation 9(3)(c)(i) does not give rise to direct discrimination. The question must be whether the exclusion of pre-settled status gives rise to a situation in which all non-United Kingdom EU nationals are excluded from making claims for Universal Credit. A rule that pre-settled status is a right of residence that does not count for the purpose of establishing habitual residence does not have that effect: it excludes only some members of the class of non-United Kingdom EU nationals. Other members of the class are able to satisfy the conditions to obtain Universal Credit: see for example, the effect of regulation 9(4), and the limitation on the exclusion at regulation 9(3)(aa). As such, the discrimination that arises by reason of regulation 9(3)(c)(i) is indirect discrimination, which will be unlawful only if not objectively justified.

(4) Justification

30. The judgment in *Patmalniece* means that justification too, is not an entirely straightforward matter. The point in issue is what precisely must be justified. The logical consequence of the approach in *Patmalniece* is that the presence or absence of unlawful discrimination should be assessed by looking at the cumulative effect of regulation 9 of the Universal Credit Regulations. However, this approach ought not to provide licence for anything approaching application of a broad brush. A provision such as regulation 9 comprises specific parts; any justification advanced must be capable of validating each of the parts as well as the overall effect of the provision. If the constituent parts are not themselves the subject of some form of justification there can be no means of knowing whether the prejudice caused (in the present case) by the exclusion of those with pre-settled status from the opportunity of receiving Universal Credit or any of the other welfare benefits referred to in the 2019 Social Security Regulations is proportionate to the way in which that restriction pursues a legitimate objective.

31. In the present case the Secretary of State's evidence on justification is provided in Mr Malcolm's witness statement. He refers generally to the rationale for the right to reside test present in regulation 9 prior to the amendment made by the 2019 Social Security Regulations. The overall purpose of that requirement is described in terms of protecting the social security system in the United Kingdom from persons who come

to the United Kingdom to live off benefits rather than to work. To that end, access to non-contributory benefits is restricted to persons who are variously described as "economically integrated to a sufficient extent" or as having a "particularly close connection" with the United Kingdom. The evidence also refers to a "principle" that EU nationals should contribute to the economy before receiving taxpayer support. The specific justification given for regulation 9(3)(c)(i) of the Universal Credit Regulations and the amendments made by the 2019 Social Security Regulations to the other sets of Regulations, is that each serves to maintain the status quo prior to the introduction of pre-settled status – i.e. that the exclusion of pre-settled status from the list of rights of residence that count for the purposes of the habitual residence test is in pursuit of the generic objective of protecting the social security system from claims by persons not sufficiently economically integrated into, or insufficiently closely connected with the United Kingdom.

32. I accept that the restriction now contained in regulation 9(3)(c)(i) of the Universal Credit Regulations is justified. The restriction is consistent with the overall justification for the habitual residence requirement. The grant of pre-settled status under Appendix EU does not affect such rights of residence that any applicant would otherwise have under the EEA Regulations. For so long as the transition period continues and the EEA Regulations remain in force, the rights of residence available under the EEA Regulations will continue to exist side by side with those newly available under Appendix EU. Thus, for the purpose of the operation of regulation 9 of the Universal Credit Regulations the only persons advantaged by a grant of pre-settled status are those whose position under the EEA Regulations would not permit them to meet the requirements of regulation 9 as they stood prior to the amendment made by the 2019 Social Security Regulations. In this way the amendment made by those Regulations does, as the Secretary of State submits, maintain the status quo. More significantly for the purposes of the justification argument the restriction that applies to pre-settled status serves to maintain the prior rationale for the regulation 9 habitual residence requirement, as explained in Mr Malcolm's witness statement. These reasons come to the same thing as the reasons accepted by the Supreme Court in *Patmalniece* as justifying the habitual residence test that is part of the State Pension Credit Regulations 2002. The Claimants' submission to the contrary has focussed on the fact that pre-settled status is a right of residence that is much more widely available than the right of residence available (for example) under regulation 14 of the EEA Regulations. This is correct; it is, as explained above, the consequence of the breadth of the definition of "relevant EEA citizen" set out in Appendix EU. However, that point only serves to demonstrate the rationale for the exclusion now contained in regulation 9(3)(c)(i) of the Universal Credit Regulations.

C. Conclusion

33. For these reasons the amendment made to regulation 9 of the Universal Credit Regulations by the 2019 Social Security Regulations does not give rise to unlawful discrimination on grounds of nationality contrary to Article 18 TFEU. For the same reasons, the same conclusion will apply to the same amendment made by the 2019 Social Security Regulations to each of the Income Support (General) Regulations 1987; the Jobseeker's Allowance Regulations 1996; the State Pension Credit Regulations 2002; the Housing Benefit Regulations 2006; the Housing Benefit

(Persons who have attained the qualifying age for state pension credit) Regulations 2006; and the Employment and Support Allowance Regulations 2008. Although the impact of the 2019 Social Security Regulations on each of these sets of Regulations was not the subject of detailed submissions by the parties before me, the premise of each set of submissions was that the amendments to each of these sets of Regulations would stand or fall with the outcome of the challenge to the amendment to regulation 9 of the Universal Credit Regulations, a premise I consider to be correct. The consequence is that the Claimants' application for judicial review fails.