

## NOTES

### *The Department for Communities in Northern Ireland: The European Court of Justice Leaves Its Legacy in the United Kingdom, but Its Decision Could Impact the Rights of EU Citizens*

I. OVERVIEW .....	403
II. BACKGROUND .....	405
A. <i>Statutory Law</i> .....	405
B. <i>Case Law</i> .....	408
III. COURT’S DECISION.....	410
IV. ANALYSIS .....	412
V. CONCLUSION .....	414

#### I. OVERVIEW

CG is a Netherlands and Croatian national currently residing in Northern Ireland, a constituent country of the United Kingdom. CG moved to Northern Ireland in 2018 to follow her partner with whom she has two very young children.<sup>1</sup> While in Northern Ireland, she lived with her partner until moving into a woman’s refuge following issues of domestic violence.<sup>2</sup> She has never been employed nor carried out any economic activity in the United Kingdom and has no resources nor access to social assistance programs to provide for her or her children.<sup>3</sup>

On June 4, 2020, the Home Office of the United Kingdom granted CG pre-settled status on the basis of the EU Settlement Scheme—Immigration Rules Appendix EU (Appendix EU), which grants a temporary right of residence without requiring recipients to have sufficient resources.<sup>4</sup> On June 8, 2020, she applied to the Department for Communities in Northern Ireland (DfC) for Universal Credit, a taxpayer-funded social welfare system.<sup>5</sup> The DfC denied her request on the grounds that she did not meet the residence requirements, which require recipients to have habitual residence in Northern Ireland in accordance with the 2016 Universal Credit Regulations.<sup>6</sup> The 2019 amendment to the Universal

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1. *Id.*  
2. *Id.*  
3. *Id.*  
4. *Id.* ¶ 31.  
5. *Id.* ¶ 32.  
6. *Id.* ¶¶ 32-33.

Credit Regulations states that EU citizens with a right to reside in the United Kingdom for a fixed period under Appendix EU are not habitual residents, and thus, do not meet the conditions necessary to obtain social assistance.<sup>7</sup> Following CG's request for reconsideration, the DfC confirmed her denial on June 30, 2020.<sup>8</sup>

CG appealed this decision to the Northern Ireland Appeals Tribunal, alleging the amendment was inconsistent with the United Kingdom's obligations under the European Communities Act 1972 (ECA 1972) because it excluded EU citizens legally residing within the territory of a Member State from social assistance.<sup>9</sup> She further argued that the refusal of social assistance constituted different treatment than granted to United Kingdom nationals and was therefore discrimination based on nationality under Article 18 of the Treaty on the Functioning of the European Union (TFEU).<sup>10</sup> Relying on prior EU case law, she claimed entitlement to social assistance based on her right of residence under domestic law, arguing that it was irrelevant whether or not she had a right to reside under EU law.<sup>11</sup> On the contrary, The DfC argued that under the law of the United Kingdom, pre-settled status does not grant any right to social benefits.<sup>12</sup>

The Appeal Tribunal, deciding to stay the proceedings, referred two questions to the Court of Justice of the European Union (ECJ) for a preliminary ruling:

- (1) Is Regulation 9(3)[d](i) of the [2016 Universal Credit Regulations], which was inserted by [the 2019 Social Security Regulations], which excludes from entitlement to social security benefits [EU citizens] with a domestic right of residence (Limited Leave to Remain) [in this case "pre-settled status" under Appendix EU] unlawfully discriminatory (either directly or indirectly) pursuant to Article 18 [TFEU] and inconsistent with the [United Kingdom's] obligations under the European Communities Act 1972?<sup>13</sup>
- (2) If the answer to question 1 is in the affirmative, and Regulation 9(3)[d](i) of the [2016 Universal Credit Regulations] is held to be indirectly discriminatory, is [that provision] justified pursuant to Article 18 [of the TFEU] and

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7. *Id.* ¶¶ 33-34.

8. *Id.* ¶ 35.

9. *Id.* ¶ 36.

10. *Id.* ¶¶ 36-37.

11. *Id.* ¶ 37.

12. *Id.* ¶ 38.

13. *Id.* ¶ 39.

inconsistent with the [United Kingdom's] obligations under the European Communities Act 1972?<sup>14</sup>

The ECJ *held* that CG could not rely on the principle of non-discrimination under Article 18 of the TFEU, but that a Member State must ensure all EU citizens residing within its territory the right to dignified living conditions, in accordance with the Charter of Fundamental Rights of the European Union (CFR). Case C-709/20, Dep't for Cmtys. in N. Ir., ECLI:EU:C:2021:0000 (July 15, 2021).

## II. BACKGROUND

### A. Statutory Law

The TFEU, along with the Treaty on European Union (TEU), form the European Union's constitutional basis.<sup>15</sup> The TFEU lays out, among other provisions, the principles of EU citizenship, non-discrimination, and freedom of movement throughout the Member States.<sup>16</sup> EU citizens rely on Article 18 when exercising their right to free movement, which bars discrimination based on nationality “[w]ithin the scope of the application of the Treaties[] and without prejudice to any special provisions contained therein.”<sup>17</sup> Article 20 of the TFEU provides that every person who is a national of a Member State is also an EU citizen, and that EU citizenship is not meant to replace national citizenship.<sup>18</sup> Article 21 further grants EU citizens with the right to move and reside freely within the Member States.<sup>19</sup> However, these rights are subject to any conditions laid out in the TFEU and TEU, and by any measures adopted under the law of the Treaties.<sup>20</sup>

The ECA 1972 was an act of the United Kingdom upon its ascension to the European Union.<sup>21</sup> It implemented EU law within the domestic law of the United Kingdom, gave EU law supremacy over conflicting domestic law, and held all legal proceedings under EU treaties to be questions of law.<sup>22</sup> It further gave binding authority to judgments of the

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14. *Id.*

15. Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. (C 326) 47 [hereinafter TFEU].

16. *Id.*

17. *Id.* art. 18.

18. *Id.* art. 20.

19. *Id.* art. 21.

20. *Id.*

21. European Communities Act 1972, c. 86, sch. 1 (UK).

22. *Id.* art. 2-3.

ECJ over the courts of the United Kingdom.<sup>23</sup> The Act was repealed on January 31, 2020, upon the enactment of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement).<sup>24</sup>

The Withdrawal Agreement was approved by the Council of the European Union on January 31, 2020, with its termination date set to December 31, 2020.<sup>25</sup> Its purpose was to continue the application of EU law in the United Kingdom during its transition out of the European Union.<sup>26</sup> It further sought to protect EU citizens and their families in the exercise of free movement throughout the European Union during this period.<sup>27</sup> Under the Withdrawal Agreement, EU law included the TEU, TFEU, CFR, the Treaties of Accession, Directive 2004/38 (Citizenship Directive), general principles of EU law, and acts adopted by the EU's institutions, bodies, offices, and agencies.<sup>28</sup> EU courts continued to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom, and judgments and orders from the ECJ delivered before the end of the withdrawal period were binding within the United Kingdom.<sup>29</sup>

The Citizenship Directive provides all EU citizens and their families the right of free movement throughout the European Economic Area, the right to permanently reside in a Member State, and the right to receive equal treatment with nationals of the Member State in which they reside within areas covered by the TFEU.<sup>30</sup> However, it follows each of these rights with conditions regarding public policy, security, and health.<sup>31</sup> To be guaranteed their rights under the Citizenship Directive while residing in another Member State for more than three months, an EU citizen must have adequate sickness insurance that covers within the State, sufficient resources to provide for themselves and their families, and must not be in a position to become a burden on the state's social assistance programs.<sup>32</sup>

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23. *Id.*

24. European Union (Withdrawal) Act 2018, c. 16.

25. Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, U.K.-EU-Euratom, Jan. 24, 2020, 2019 O.J. (C 384 I) [hereinafter Withdrawal Agreement].

26. *Id.* pmb1.

27. *Id.*

28. *Id.* art. 2.

29. *Id.* art. 89.

30. Council Directive 2004/38, 2004 O.J. (L 158) 78-83 (EC).

31. *Id.* art. 1.

32. *Id.* art. 7.

Furthermore, during the initial three months of residence, a host Member State maintains the discretion of whether to grant social assistance to a national of another Member State.<sup>33</sup>

Appendix EU is a settlement scheme initiated by the United Kingdom in preparation for its withdrawal from the European Union. The scheme allows all citizens of the European Union, the European Economic Area, and Switzerland residing in the United Kingdom to seek leave to remain prior to the end of the transition period.<sup>34</sup> The system allows indefinite leave for applicants who lived continuously in the United Kingdom for five or more years.<sup>35</sup> Limited leave subject to five years is granted to all other applicants residing in the United Kingdom, allowing them to fulfill the requirements necessary to receive indefinite leave.<sup>36</sup> The United Kingdom refers to each of these residency statuses as “settled status” and “pre-settled status,” respectively.<sup>37</sup> Economically inactive EU citizens without a right of residence under EU law are eligible to receive residency under this system, allowing them to receive indefinite leave after five years of residence at which point they have uncontested access to social assistance.<sup>38</sup>

Universal Credit is a social protection scheme in the United Kingdom initiated to replace several other social credit systems such as the Jobseeker’s Allowance, Employment and Support Allowance, Income Support, and Child Tax Credit.<sup>39</sup> The system is fully funded by taxes and is subject to conditions based on the income of the recipient.<sup>40</sup> In accordance with the Welfare Reform Order of 2015, the basic condition of being in Northern Ireland is necessary to receive Universal Credit.<sup>41</sup> Under the 2016 Universal Credit Regulations, a person is regarded as not being in Northern Ireland if the person is not “habitually resident” in the United Kingdom, the Channel Islands, the Isle of Man, or the Republic of Ireland.<sup>42</sup> Such a person must not be treated as habitually resident if the

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33. *Id.* art. 24.

34. HOME OFFICE, IMMIGRATION RULES APPENDIX EU (2019) <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu>.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. DEP'T FOR WORK AND PENSIONS, CM. 7957, UNIVERSAL CREDIT: WELFARE THAT WORKS (2010) ch. 1.

40. *Id.* ch. 2.

41. The Welfare Reform (Northern Ireland) Order 2015, SI 2015/2006, art. 9.

42. The Universal Credit Regulations (Northern Ireland) 2016, SI 2016/216, art. 9.

person does not have a right to reside in one of these locations.<sup>43</sup> Further, the regulations do not include a right to reside in accordance with Article 6 of the Citizenship Directive, which covers residencies of less than three months, and Appendix EU.<sup>44</sup> A person is regarded as habitually resident if they are a worker, self-employed, or are related or in a durable relationship with an EU citizen who meets this criteria, a refugee in accordance with the Geneva and New York Conventions, maintain leave to remain under the Destitution Domestic Violence concession or Displaced Persons Regulations, or have a permanent right of residence in the United Kingdom.<sup>45</sup>

The CFR provides a basic framework for conventional rights applicable amongst all Member States.<sup>46</sup> It is comprised of fifty-four articles listed under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice.<sup>47</sup> Notably, Article 1 grants each person the right of human dignity, Article 7 the right to respect for private and family life, Article 21 the right to non-discrimination based on nationality, and Article 24 guarantees rights for children.<sup>48</sup> Under Article 24, children have an additional right to the protection and care essential for their well-being.<sup>49</sup> A child's best interests are the primary deliberation in all situations involving children, and so long as it is in the child's best interests, each child is entitled to have a personal relationship with both parents.<sup>50</sup>

### B. Case Law

The ECJ's settled case law holds that situations regarding EU citizens who exercise their right of free movement within the European Union, and legally reside in a Member State of which they are not a national, fall within the scope of EU law.<sup>51</sup> Along with the right of free movement throughout the Member States, a citizen can rely on the principle of non-discrimination under domestic law regardless of their nationality, so long as it is within the confines of the EU law and subject to conditions held

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43. *Id.*

44. *Id.*

45. *Id.*

46. Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 2.

47. *Id.*

48. *Id.* arts. 1, 7, 21, 24.

49. *Id.* art. 24.

50. *Id.*

51. Case C-454/19, ZW, EU:C:2020:947, ¶ 23 (Nov. 19, 2020).

therein.<sup>52</sup> This includes situations involving the right of free movement and the right to reside within a Member State's territory under Articles 20 and 21 of the TFEU.<sup>53</sup>

However, Article 18 of the TFEU only applies to general instances of non-discrimination where the TFEU does not grant a more specific rule.<sup>54</sup> Therefore, EU citizens residing in a Member State other than the one which they are a national rely on the more specific principle of equal treatment on the basis of nationality from the Citizenship Directive, rather than the principle of non-discrimination from Article 18 of the TFEU.<sup>55</sup> Prior to the implementation of the Citizenship Directive, the ECJ held that where an EU citizen maintains a right of residence solely under domestic law and not EU law, the EU citizen could still rely on the right to non-discrimination under Article 18 of the TFEU.<sup>56</sup> Following its implementation, the ECJ now holds that an EU citizen residing in another Member State can only profess equal treatment under the law if they meet the conditions of the Citizenship Directive.<sup>57</sup>

Thus, a Member State can refuse social assistance to a national of another Member State who risks becoming a burden on the social assistance program, in accordance with the Citizenship Directive.<sup>58</sup> The ECJ holds "social assistance" to pertain to any government-sponsored welfare system at the national, regional, or local level.<sup>59</sup> This includes a right to subsistence benefits, which are social assistance programs aimed at providing the minimum level of security necessary for a person to live a dignified lifestyle.<sup>60</sup> It should be noted, however, that just prior to the enactment of the Citizenship Directive, the ECJ held that where an EU citizen did not enjoy a right of residence in a host Member State under domestic law or any other provision of EU law, the EU citizen could still exercise a right to residency and a right to social assistance under the

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52. Case C-389/19, *Generalstaatsanwaltschaft Berlin*, EU:C:2020:1032, ¶¶ 29-30 (Dec. 17, 2020).

53. Case C-333/13, *Dano v. Jobcenter Leipzig*, ECLI:EU:C:2014:2358, ¶ 59 (Nov. 11, 2014).

54. Case C-181/19, *Jobcenter Krefeld*, ECLI:EU:C:2020:794, ¶ 78 (Oct. 6, 2020).

55. Case C-94/18, *Chenchoolia v. Minister for Justice and Equality*, ECLI:EU:C:2019:693, ¶ 54 (Sept. 10, 2019).

56. Case C-85/96, *Martínez Sala v. Bayern*, 1998 E.C.R. I-2726.

57. *Dano*, ECLI:EU:C:2014:2358, at ¶¶ 68-69.

58. *Id.* ¶¶ 63, 78.

59. *Id.* ¶ 78.

60. *Krefeld*, ECLI:EU:C:2020:794, ¶ 57.

Treaty Establishing the European Union (TEC), now the TFEU, subject to its conditions.<sup>61</sup>

### III. COURT'S DECISION

In the noted case, the ECJ looked extensively to both EU and United Kingdom statutory law including treaties, council decisions, and agreements, as well as the Court's prior case law.<sup>62</sup> The ECJ first addressed whether or not it had proper jurisdiction to hear the claim and to answer each of the questions referred by the Appeal Tribunal for Northern Ireland, finding that it did have jurisdiction to hear the claim but could only answer the first question in part.<sup>63</sup> The ECJ then addressed the interpretation of Article 18 of the TFEU and the Citizenship Directive by analyzing the documents under its relevant case law, finding that CG could not rely on Article 18 of the TFEU nor the Citizenship Directive for non-discrimination.<sup>64</sup> Finally, the ECJ found that CG and her children still maintained their fundamental rights to live in dignified conditions under the CFR.<sup>65</sup>

Regarding the issue of jurisdiction, the ECJ found that under Articles 126 and 127 of the Withdrawal Agreement, all EU law was applicable to the United Kingdom, including the judgments of EU courts, until the end of the withdrawal period on December 31, 2020.<sup>66</sup> Article 86 of the Withdrawal Agreement states that, prior to this date, the ECJ would continue to have jurisdiction to give preliminary rulings on requests from United Kingdom courts and tribunals, and that a request for a preliminary ruling from the ECJ would be dated when registered with the Court.<sup>67</sup> Following these guidelines, the ECJ found it had jurisdiction to issue a preliminary ruling since the proceedings were registered the day before the end of the withdrawal period.<sup>68</sup> However, the Court found that it did not have jurisdiction to issue a ruling for the first question with regards to the compatibility of Universal Credit Regulations with the ECA 1972, because the question "concerns neither the interpretation of EU law, nor the validity of an act of the EU institutions."<sup>69</sup>

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61. Case C-456/02, *Trojani v. CPAS*, 2004 E.C.R. I-7573, I-7612.

62. Dep't for Cmty. in N. Ir., ECLI:EU:C:2021:0000, ¶ 30.

63. *Id.* ¶¶ 45-52.

64. *Id.* ¶¶ 60-84.

65. *Id.* ¶¶ 85-93.

66. *Id.* ¶ 48.

67. *Id.* ¶ 49.

68. *Id.* ¶¶ 50-51.

69. *Id.* ¶ 52.



Next, the ECJ addressed whether Article 18 of the TFEU should be interpreted to prohibit, on the basis of non-discrimination, domestic law that excludes EU citizens with a temporary right of residence from social assistance programs.<sup>70</sup> The ECJ found that each EU citizen, within the confines of TFEU, enjoys the same treatment under the laws of every Member State, regardless of their nationality.<sup>71</sup> This includes a right to non-discrimination in situations relating to a citizen's right of movement and residency within the Member States.<sup>72</sup> However, Article 18 is meant to apply to general instances governed under EU law and not where the TFEU or a governing document within its scope state more specific rules for non-discrimination.<sup>73</sup> Furthermore, Articles 20 and 21 state that the right of EU citizenship and the right to move and reside freely within the territory of the Member States are subject to conditions and limitations defined within the Treaties, or by subsequent measures adopted within their confines.<sup>74</sup>

While Article 18 of the TFEU applies to all EU citizens who exercise their right of free movement, the Citizenship Directive applies to all citizens who reside in a different Member State than the one which they are nationals, and its principle of equal treatment is thus, a more specific measure of non-discrimination adopted within the premises of the Treaties.<sup>75</sup> Since CG is an EU citizen who resides in a Member State other than the one which she is a national, her situation falls within the scope of the Citizenship Directive.<sup>76</sup> Thus, the ECJ found that her argument for non-discrimination should be assessed under the equal treatment provision in Article 24 of the Citizenship Directive, rather than Article 18 of the TFEU.<sup>77</sup> Only EU citizens who fulfill Article 7 of the Citizenship Directive by pursuing an economic activity and maintaining sufficient resources and sickness insurance can rely on the equal treatment provision in Article 24.<sup>78</sup> The ECJ further held that the Citizenship Directive should be interpreted as to not preclude a Member State's legislation that "excludes from social assistance economically inactive [EU] citizens who do not have sufficient resources as to whom that State had granted, on the basis

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70. *Id.* ¶ 60.

71. *Id.* ¶ 62 (citing Dano, ECLI:EU:C:2014:2358, at ¶¶ 57-58).

72. *Id.* ¶ 63 (citing Dano, ECLI:EU:C:2014:2358, at ¶ 59).

73. *Id.* ¶ 65 (citing Krenfeld, ECLI:EU:C:2020:794, at ¶ 78).

74. *Id.* (citing Dano, ECLI:EU:C:2014:2358, at ¶ 60).

75. *Id.* ¶ 66.

76. *Id.* ¶ 67.

77. *Id.*

78. *Id.* ¶ 68 (citing Dano, ECLI:EU:C:2014:2358, ¶ 63).

of national law, a temporary right to reside,” effectively allowing the United Kingdom to refuse CG social assistance under this provision.<sup>79</sup> CG does not fulfill any of the requirements from Article 7, and thus, the ECJ found she would likely become an unreasonable burden on the United Kingdom’s social assistance programs and therefore, could not rely on the right of equal treatment laid out in Article 24.<sup>80</sup>

However, the ECJ held that Member States which grant EU citizens a legal right to reside under domestic law are applying Article 18 of the TFEU and are therefore, required to abide by the CFR.<sup>81</sup> Under the CFR, Member State authorities are required to find that a refusal of social assistance to a citizen exercising their right to free movement does not “expose [them] . . . and the children for which he or she is responsible, to an actual and current risk of violation of their fundamental rights.”<sup>82</sup> Based on its interpretation of the CFR, the ECJ held that each Member State must ensure that all EU citizens and their families residing in its territory live in dignified conditions by means of all forms of assistance under the State’s domestic law to which the citizen and their family are entitled.<sup>83</sup>

#### IV. ANALYSIS

Previously, the EJC ruled that even where an EU citizen received a right of residency in a Member State solely based on the State’s domestic law, the EU citizen could still rely on their general right to non-discrimination based on nationality under the TFEU.<sup>84</sup> The case at hand, building on the ECJ’s case law following the enactment of the Citizenship Directive, formally overrules this premise, with the ECJ holding that an EU citizen in this position can only rely on their right to equal treatment under the Citizenship Directive.<sup>85</sup> This could have major repercussions on the rights previously held by EU citizens when exercising their right of movement within the Member States that go beyond access to a State’s social assistance programs. A non-economically active EU citizen with a right to reside in a Member State based on domestic law is no longer entitled to equal treatment with their nation under the Citizenship Directive and TFEU.<sup>86</sup> This leaves citizens throughout the European

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79. *Id.* ¶ 72.

80. *Id.* ¶ 80.

81. *Id.* ¶¶ 85-86.

82. *Id.* ¶ 93.

83. *Id.*

84. Case C-85/96, *Martínez Sala v. Bayern*, 1998 E.C.R. I-2726.

85. Dep’t for Cmty. in N. Ir., ECLI:EU:C:2021:0000, at ¶ 67.

86. *Id.* ¶ 80.

Union in similar situations to CG, vulnerable to abuse or discrimination from their host state's government or from private enterprises.<sup>87</sup>

The ECJ also used the CFR as a means to provide a safety net for individuals, such as CG, who can no longer rely on their right to non-discrimination under the TFEU or equal treatment under the Citizenship Directive.<sup>88</sup> This signifies to Member States that while they can deny a non-economically active citizen equal treatment within the context of these documents, all Member States must still guarantee each EU citizen their fundamental rights.<sup>89</sup> The issue here is that the court's approach is much too narrow to provide protection under the law for citizens who lost their rights upon this decision.<sup>90</sup> By setting a standard, it is now up to each Member State to determine what it believes to be a dignified life for a non-economically active residing citizen under domestic law.<sup>91</sup> Not only does this leave room for incongruity between Member State courts, but citizens are now at the discretion of a host State that is not obligated to provide them with equal treatment.<sup>92</sup>

Furthermore, the decision in this case would likely have been different if the Court Registry filed the proceedings after the termination of the Withdrawal Agreement.<sup>93</sup> CG's reliance upon EU law under the Withdrawal Agreement allowed the ECJ to interpret the CFR to her benefit, ensuring that she is entitled to her fundamental rights as an EU citizen.<sup>94</sup> However, it is unclear whether other recipients of pre-settled status in the United Kingdom will be entitled to the same dignified conditions following the withdrawal period's termination.<sup>95</sup> The Court held that EU citizens residing under domestic law on the territory of a Member State are entitled to their fundamental rights as laid out in the CFR, yet made no indication that other recipients of pre-settled status in the United Kingdom would be entitled to the same rights.<sup>96</sup> The United Kingdom is no longer a Member State of the European Union, and seems

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87. *Id.*

88. *Id.* ¶¶ 85-93.

89. *Id.*

90. *Id.* ¶¶ 88-91.

91. *Id.*

92. *Id.*

93. Oliver Garner, *Case C-709/20 CG v The Department for Communities in Northern Ireland: A Post-Brexit Swansong for the Charter of Fundamental Rights*, EUR. L. BLOG (July 27, 2021), <https://europeanlawblog.eu/2021/07/27/case-c-709-20-cg-v-the-department-for-communities-in-northern-ireland-a-post-brexit-swansong-for-the-charter-of-fundamental-rights/>.

94. Dep't for Cmtys. in N. Ir., ECLI:EU:C:2021:0000, ¶¶ 85-93.

95. *Id.*

96. *Id.*

to have no obligation to ensure dignified conditions to other pre-settled status recipients.<sup>97</sup> Moreover, EU courts will no longer have jurisdiction to hear claims or issue preliminary rulings on matters relating to this issue.<sup>98</sup>

Lastly, this decision could have an impact on the way Member State governments and institutions structure their future policies if they decide to withdraw from the European Union. The ECJ held that the CFR applied to CG's case because she filed the claim within the timeframe of the Withdrawal Agreement, under which all EU law was still applicable.<sup>99</sup> However, in the case of another country's departure, the Member State might structure its withdrawal agreement to exclude EU law that could be unfavorable to its government and public institutions, such as the CFR. This decision could incentivize a Member State in this situation to forego the application of EU law, as to not be bound by ECJ judgments with one foot out the door. Similar to the uncertainty surrounding the rights of other recipients of pre-settled status in the United Kingdom following this decision, this would lead to recipients of residency status, as well as nationals of the Member State in question, in a state of limbo regarding their rights and governing authority.

## V. CONCLUSION

The ECJ's insurance of fundamental rights under the CFR to CG and her children does not make up for the rights that they, as well as EU citizens in similar situations, lost in this decision. The ECJ previously ruled that EU citizens residing in a Member State in which they are not a national could only rely on the Citizenship Directive for their right of non-discrimination rather than Article 18 of the TFEU.<sup>100</sup> However, it now seems that an EU citizen exercising this right who does not meet the conditions of the Citizenship Directive can no longer rely on any principle of non-discrimination.<sup>101</sup> While the CFR obligates each Member State to ensure that all EU citizens residing within its territory live in dignified conditions, there may be vast discrepancies in what a State might consider to be dignified conditions and what its nationals are entitled to under the law.<sup>102</sup> Moving forward, how Member State courts interpret this decision

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97. Garner, *supra* note 93.

98. Withdrawal Agreement, *supra* note 25, art. 2.

99. Dep't for Cmty. in N. Ir., ECLI:EU:C:2021:0000, ¶¶ 50-51, 85-93.

100. Dano, ECLI:EU:C:2014:2358, ¶ 59.

101. Dep't for Cmty. in N. Ir., ECLI:EU:C:2021:0000, ¶ 68.

102. Charter of Fundamental Rights of the European Union, *supra* note 46.

will define the rights of EU citizens exercising their right of free movement and residence.

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\*      © 2022 Bryan Applefeld. J.D. Candidate 2023, Tulane University Law School; B.A. 2020, The University of Texas at Austin. The author dedicates this piece to his loving sister, parents, and grandparents. He would also like to thank two inspiring teachers in his life, Mr. Andre Jones, and Dr. Michael Mosser.