IN THE [redacted]

BETWEEN:

SECRETARY OF STATE FOR WORK AND PENSIONS

Appellant

-and-

AT

Respondent

-and-

ADVICE ON INDIVIDUAL RIGHTS IN EUROPE (AIRE) CENTRE

First Intervener

-and-

THE INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS

Second Intervener

WRITTEN SUBMISSIONS OF THE INDEPENDENT MONITORING AUTHORITY FOR THE HEARING ON 15/16 NOVEMBER 2022

I. INTRODUCTION

1. These are the written submissions of the Independent Monitoring Authority for the Citizens' Rights Agreements (the "**IMA**"), filed in accordance with the directions of [redacted] dated 3 November 2022.

2. These submissions address just one issue arising in the appeal, namely the extent to which the Charter of Fundamental Rights of the European Union (the "**Charter**") is given continuing effect in domestic law through the EU-UK Withdrawal Agreement, such that Case C-709/20 *CG v Department for Communities in Northern Ireland* [2022] 1 CMLR 26 is of application in the present case. That issue is addressed at §§11-22 of AT's skeleton argument and §§4-26 of the AIRE Centre's skeleton argument.

3. For the avoidance of doubt, the IMA does not address the further issue which arises as to what the Charter (if it applies) requires in cases like AT's (which is the matter addressed at §§23-29 of AT's skeleton and §§27-33 of the AIRE Centre's skeleton).[1]

4. With that in mind, these submissions are structured as follows:

   a. In section II below, the IMA briefly explains its role and interest in this case.

   b. In section III below, the IMA sets out the legal framework relevant to the continued application of the Charter, following the withdrawal of the United Kingdom from the European Union.

   c. In section IV below, the IMA sets out its submissions, dealing first with the position in general terms and then this case.

   d. The IMA concludes in section V.

II. THE IMA

5. The IMA is the statutory body charged with monitoring the implementation and application of Part 2 of the EU-UK Withdrawal Agreement (the "**WA**") and Part 2 of the EEA EFTA Separation Agreement.[2] Part 2 WA is entitled "*Citizens' Rights*" and it confers residence and related rights on EU citizens, and their family members, who were residing in the UK in accordance with Union law at the end of the transition period, as well as reciprocal rights on UK citizens and their families, who were residing in an EU Member State.

6. Article 159 WA requires the United Kingdom to establish an independent authority, with equivalent powers to the European Commission, to monitor the implementation and application of Part 2 of the WA. To implement these provisions of international law, s.15 of the European Union (Withdrawal Agreement) Act 2020 ("**EUWAA 2020**")

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1 As it made clear in its application for permission to intervene, the IMA also considers that it may be able to assist the Tribunal in relation to the second ground on which AT resists the appeal, which concerns the extent to which AT has WA rights to equal treatment and freedom from discrimination (ground (b) from the response to appeal from Respondent [**A/7/47**]). The IMA may seek to permission to intervene again when that issue comes to be decided by the Tribunal.

2 These submissions focus on the WA since AT is an EU national and it is therefore this particular agreement that is of relevance to the present case.

established the IMA. Schedule 2 to EUWAA 2020 sets out the IMA's duties and functions. Its overarching duties, pursuant to §22-23 of Schedule 2, are to:

a. "*Monitor the implementation and application in the United Kingdom of Part 2 of the Withdrawal Agreement and Part 2 of the EEA EFTA separation agreement*". This duty includes keeping under review "*the adequacy and effectiveness of (a) the legislative framework which implements or otherwise deal with matters arising out of, or related to, Part 2, and (b) the exercise by relevant public authorities of functions in relation to Part 2*", and

b. "*Promote the adequate and effective implementation and application of Part 2 of the withdrawal agreement*". Relevant to this duty is the power of the IMA, pursuant to §30, to institute or intervene in legal proceedings.

7. Paragraph 24 provides that "in exercising its functions, the IMA must have regard to the importance *of addressing general or systemic failings in the implementation or application of Part 2*".

8. This statutory regime explains the IMA's interest in this case, which is concerned with (*inter alia*) the proper implementation and application of Part 2 WA; the legislative framework implementing Part 2 WA; the scope of protection conferred on EU and EEA EFTA citizens, and their family members, residing in the UK within scope of Part 2 WA (and, given the reciprocal nature of the Agreement) on UK citizens residing in the EU/EEA; and the exercise by relevant public authorities of functions in relation to Part 2.

III. LEGAL FRAMEWORK

9. This section sets out the legal framework relevant to the continued application of the Charter, following the withdrawal of the United Kingdom from the European Union. The IMA deals first with the domestic statutory framework and then turns to the relevant provisions of the WA.

Domestic statutory framework

10. The relevant domestic provisions are contained in the European Union (Withdrawal) Act 2018 ("**EUWA**"). Importantly, EUWA makes separate provision in relation to: (i) the role of the Charter in domestic law generally, following 31 December 2020 (which

is referred to, in the Act, as "*IP completion date*"); and (ii) the implementation of the WA.

11. Taking those in turn, s.5 EUWA makes clear that, in general, the Charter will not form part of domestic law on or after 31 December 2020. In particular, it provides as follows:

> "*(4) The Charter of Fundamental Rights is not part of domestic law on or after IP completion day.*
>
> *(5) Subsection (4) does not affect the retention in domestic law on or after IP completion day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).*
>
> *(6) Schedule 1 (which makes further provision about exceptions to savings and incorporation) has effect*."

12. It is worth recalling that EUWA, in its original form, was enacted in June 2018 at a time when negotiations between the UK and the EU regarding the terms of the UK's withdrawal were ongoing. Subsequently (in October 2019), the WA was agreed, and it was implemented by EUWAA 2020, which (*inter alia*) amended EUWA. The amendments made to EUWA (by EUWWA 2020) make clear that the removal of the Charter from domestic law is subject to the provisions of the WA.

13. The starting point is s.5(7) EUWA (which was inserted by s.25(4)(b) EUWAA) which provides that subsections (1) to (6) of s. 5 EUWA are subject to "*relevant separation agreement law*", as defined by s. 7C EUWA. "Relevant separation agreement law" is defined in that section as meaning "*anything which is domestic law by virtue of*" ss.7A, 7B, 8B or 8C EUWA (as amended).

14. Section 7A of EUWA (inserted by s.5 EUWAA 2020)) then provides for the general implementation of the WA in the following terms (emphasis added):

> "*(1) Subsection (2) applies to—*
>
> *(a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and*
>
> *(b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement,*
>
> *as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.*

(2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—

(a) recognised and available in domestic law, and

(b) enforced, allowed and followed accordingly.

(3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2)."

15. Two particular points are notable about s.7A EUWA.

16. First, the effect of s.7A(1) and (2) is to effectively reproduce, in respect of the WA, the "conduit pipe" which previously existed for EU law, by virtue of s.2(1) of the European Communities Act 1972 (the "**ECA 1972**"). Section 2(1) of the ECA 1972 was in substantially the same terms as s.7A(1) and (2) of EUWA.[3] As the majority of the Supreme Court put it in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, the effect of s.2 of the ECA 1972 was to establish a "*process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes*" (§60)[4] The same is now true for the WA, by virtue of s.7A EUWA, which makes clear that the rights, liabilities, powers, obligations and restrictions which the WA creates are automatically part of domestic law.

17. Second, the effect of s.7A(3) is that every other provision of domestic legislation, including other provisions of EUWA itself, are subject to the general implementation of the WA into domestic law. The combined effect of ss.7A(3) and 5(7) EUWA is therefore that the role of the Charter in domestic law post the end of the transition period is not exhaustively circumscribed by s.5(4) EUWA. On the contrary, if the WA requires

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[3] In particular, it provided that "*all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly*".

[4] Note also the Explanatory Notes to the EUWAA 2020 which make clear that this is the effect of the s.7A, cited at §6 of the AIRE Centre's skeleton argument.

the consideration or application of Charter rights then that must be given effect, in domestic law, by virtue of s.7A and notwithstanding s.5(4) EUWA.

18. Against that backdrop, the IMA now turns to the provisions of the WA.

The Withdrawal Agreement and the Charter

19. The WA does not expressly apply any particular provisions of the Charter. Nonetheless, the Charter may be relevant when interpreting and applying provisions of the WA.

20. That is so because of Article 4 WA, which is headed "*Methods and principles relating to the effect, the implementation and the application of this Agreement*". Article 4 is critical and is worth reproducing in full:

> "*1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.*
>
> *Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.*
>
> *2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.*
>
> *3. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.*
>
> *4. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.*
>
> *5. In the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period.*"

21. Union law is defined in Article 2(a)(i) WA to specifically include the Charter.

22. The IMA makes two points about Article 4 WA.

23. First, under Article 4(3) it is clear that the Charter may have a role to play in the interpretation of the WA and the provisions of Union law to which it refers. Article 4(3) requires that where the WA refers to "*Union law or to concepts or provisions thereof*"

those references "*shall be interpreted and applied in accordance with the methods and general principles of Union law*".

24. It is well established as a matter of EU law that the Charter is an interpretative tool. Indeed, that in itself is a general principle of EU law. As the CJEU put it in Case C-358/16 *UBS Europe and Others* [2019] Bus LR 61 (at §53) it is "*a general principle of interpretation [that] an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter*".[5] These principles are reproduced by the WA insofar as it refers to Union law. It therefore follows that any provision of Union law referred to in the WA must be interpreted in a manner which is consistent, "*as far as possible*" with the Charter (and the whole corpus of EU primary law). More generally, fundamental rights are themselves general principles of Union law: see Article 6(3) of the Treaty on European Union ("**TEU**").

25. Second, Article 4(1) provides that the "*provisions of [the WA] and the provisions of Union law made applicable by [the WA] shall produce*" in the UK "*the same legal effects as those which they produce within the Union and its Member States*". This is a mandatory requirement that the effect of: (i) any particular provision of Union law which is made applicable by the WA; and (ii) the provisions of the WA itself, must be the same in the UK as in the EU. In that sense, Article 4(1) is an outcome driven rule. This makes sense given the reciprocal nature of the WA which operates as much for the protection of UK citizens residing in the EU, as for EU citizens residing in the UK. As the recitals to the WA record, "*it is necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights before a date set in this agreement, and to ensure that their rights under this Agreement are enforceable and based on the principle of non-discrimination ...*". In other words, the WA has to be

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5 See also Case C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2009] 1 AC 1225 at §285 (emphasis added): "*It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty*" and Case C-579/12 RX-II *Commission v Strack* ECLI:EU:C:2013:570 at §40: "*It must also be borne in mind that, under a general principle of interpretation, a European Union measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter*".

interpreted and applied consistently in all the 28 countries to which it applies. That is one reason why the CJEU has a continuing role in interpreting the WA (insofar as it is possible for the UK courts to request a preliminary ruling from the CJEU under Article 158 WA if a question is raised concerning the interpretation of the citizens' rights provisions of the WA).

The EU legal framework for free movement and its incorporation into the WA

26. Although the UK's withdrawal from the EU generally meant the end of free movement law in the UK, the WA sought to incorporate the EU legal framework for free movement, specifically for Union citizens already residing in the UK (and UK citizens already resident in the Union). This section first addresses the EU legal framework and then turns to address how the WA incorporates that framework in the post-Brexit world.

27. Article 21(1) TFEU provides that "*every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give effect to them*". Article 18 TFEU provides that "*within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*".

28. Directive 2004/38/EC (often referred to as the Citizens' Rights Directive and hereafter the "**CRD**") is one of the principal legal instruments which specifies the conditions and limitations on the general right of Union citizens to move and reside that is conferred by Article 21 of the TFEU. In summary terms, it sets up a scheme whereby:

    a. Union citizens have an unqualified right of residence on the territory of another Member State for a period of up to three months: Article 6 CRD.

    b. Once three months have expired, Union citizens have the right to continue to reside in another Member State if they meet one of the four conditions in Article 7(1) CRD, as follows:

        i. They are workers or self-employed persons in the host Member State (Article 7(1)(a)).

        ii. They have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host

Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State (Article 7(1)(b)).

iii. They are enrolled at a private or public establishment, accredited or financed by the host Member State, for the principal purpose of following a course of study and they have comprehensive sickness insurance cover in the host Member State and sufficient resources for themselves and their family members not to become a burden on the social assistance system during their period of residence (Article 7(1)(c)).

iv. They are family members accompanying or joining a Union citizen who satisfies one of the conditions in Articles 7(1)(a)-(c) (Article 7(1)(d)).

c. Once a Union citizen has resided legally for a continuous period of five years in another Member State they shall have the right of permanent residence there: Article 16(1) CRD. That right is expressly not subject to the conditions provided for in Article 7.

29. Article 24(1) CRD then confers a right of equal treatment for "*all Union citizens residing on the basis of this Directive*", providing that they "*shall enjoy equal treatment with the nationals of the host Member State*". Article 24(2) contains a derogation from Article 24(1) which explains that 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)*".

30. The above scheme for the grant of residence rights and the conferral of equal treatment has been effectively replicated in the scheme of the WA. Thus, to summarise the main provisions:

a. Article 12 WA prohibits (within the scope of Part Two of the WA) discrimination on grounds of nationality "*within the meaning of the first subparagraph of Article 18 TFEU*".

b. Article 13(1) WA confers on Union citizens and UK nationals alike, the right to reside in their host State "*under the limitations and conditions as set out in Articles 21, 45 or 49 TFEU and in Article 6(1), points (a), (b) or (c) of Article 7(1), Article 7(3), Article 14, Article 16(1) or Article 17(1) of [the CRD]*".

c. Articles 13(2) and (3) WA further confer rights of residence on family members of Union citizens and UK nationals, again on the terms "*set out*" in (*inter alia*) Article 21 TFEU and Article 7 CRD.

d. Article 13(4) WA provides that "*the host State may not impose any limitations or conditions for obtaining, retaining or losing residence rights on the persons referred to in paragraphs 1, 2 and 3, other than those provided for in this Title*". It further states that "*there shall be no discretion in applying the limitations and conditions provided for in this Title, other than in favour of the person concerned*".

e. Article 23 WA then also provides for a right of equal treatment which is said to be "*in accordance with Article 24*" of the CRD. The derogation contained at Article 23(2) WA is in substantially the same terms as the derogation in Article 24(2) CRD.

31. It is also important to note the personal scope of the WA, which is defined in Article 10 WA. Article 10 is contained within Title 1 of Part 2 of the WA (which is entitled "general provisions") and, insofar as is relevant to this case, it provides that Part 2 shall apply to "*Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter*" (Article 10(1)(a)).

The judgment of the CJEU in *CG*

32. The judgment of the CJEU in Case C-709/20 *CG v The Department for Communities in Northern Ireland* [2022] 1 CMLR 26 was handed down on 15 July 2021 (i.e. after the end of the transition period). The Tribunal must therefore pay "*due regard*" to it in accordance with Article 4(5) WA.[6]

33. The essential factual background was as follows:

[6] The IMA notes that the request for a preliminary ruling in *CG* was made on 21 December 2020 (i.e. before the end of the transition period) and the underlying facts, with which the case was concerned, also all occurred before the end of the transition period. It follows that, under Article 89(1), the judgment was formally binding on the UK. However, given that the judgment in *CG* does not engage with, or relate to, the terms of the WA (but rather is decided purely on the basis of EU law, as a pre-transition period case), the IMA does not consider that its "binding-ness" assists when one is asking how the reasoning in *CG* applies in this case.

a. CG was a dual Croatian and Dutch national. She moved to Northern Ireland in 2018. She never carried out any economic activity in the UK. She initially lived with her partner until she later moved to a women's refuge. She had no resources to support herself or her two children: see §30 of the judgment.

b. She was granted pre-settled status ("**PSS**") under Appendix EU on 4 June 2020: §31.

c. She then applied for Universal Credit. Her application was refused on the basis that she did not meet the residence requirements to receive it: §32. That was because Regulation 9(3)(d)(i) of the 2016 Universal Credit Regulations in Northern Ireland excludes those with PSS from the category of potential beneficiaries of Universal Credit: §33.

d. CG's claim was that the refusal to grant her Universal Credit, on the ground that her PSS did not establish habitual residence in the UK, constituted a difference in treatment between Union citizens residing legally in the UK and British nationals, and therefore amounted to discrimination based on nationality contrary to Article 18 TFEU: §37.

e. The question referred by the domestic court to the CJEU was whether Regulation 9(3)(d)(i) of the 2016 Universal Credit Regulations was unlawfully discriminatory contrary to Article 18 TFEU because it excludes EU citizens with a domestic right of residence, only, from entitlement to social security benefits: §39.

34. The CJEU answered that question in the negative. However, it also held that in a case like CG's, a Member State could only refuse social assistance if it had ascertained that such a refusal would not expose the Union citizen in question (and any children for which he or she was responsible) to an actual and current risk of violation of their fundamental rights, as contained in the Charter.

35. The reasoning that led the Court to its conclusion can be summarised as follows:

a. Because CG was a Union citizen who had made use of her right to move and reside in the UK her situation fell within the scope *ratione materiae* of EU law. In principle that meant she could rely on the prohibition of discrimination on grounds of nationality contained in Article 18 TFEU: §64.

b. However, Article 18 TFEU is intended only to apply to situations governed by EU law where there are no other more specific rules on non-discrimination. In relation to Union citizens who exercise their free movement rights, there is a more specific expression of the principle of non-discrimination contained in Article 24 of the CRD: §§65-66. The CJEU therefore reformulated the question asked by the referring court to focus on Article 24 of the CRD: §72.

c. However, a Union citizen can only claim equal treatment under Article 24 CRD if his or her residence in the host Member State complies with the conditions of the CRD: §75.

d. It was common ground that CG's situation did not comply with the conditions of the CRD. She had less than 5 years' residence and insufficient resources for herself and her family: see §76. Her right to reside had been granted purely as a matter of domestic law, when the UK granted her PSS. The CJEU considered that, by granting CG PSS, the UK had exercised its right under Article 37 of the CRD to establish more favourable rules in relation to residence.

e. In light of that, the CJEU held (at §83) that CG's right of residence had not been granted "on the basis" of the CRD within the meaning of Article 24(1) CRD. The fact that the UK had decided to confer more favourable treatment on CG than it was required to do by the CRD did not mean that CG's situation somehow came within the scope of the "*system introduced by that directive*". Rather, "*it is for each Member State that has decided to adopt a system that is more favourable than that established by that directive to specify the consequences of a right of residence granted on the basis of national law alone*" (also at §83). In other words, although the Court said that it is Article 24 of the CRD which applies rather than Article 18 TFEU it went on to hold that, on the facts of CG's case, she could not avail herself of the right to equal treatment conferred by Article 24 CRD either, because she was not residing on the basis of the Directive.

f. The principal rationale for this decision was explained at §77 of the judgment. As the Court put it there: "*to accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member*

State would run counter to that objective and would risk allowing economically inactive Union citizens to use the host Member State's welfare system to fund their means of subsistence".

g. However, the CJEU went on to find that because CG had previously exercised her freedom of movement under Article 21 TFEU she fell within the scope of EU law. That meant the Charter applied because "*according to settled case-law, the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law*" (§86). The way the Court put the Article 21 point at §84 of the judgment was as follows: "*a Union citizen who, like CG, has moved to another Member State has made use of his or her fundamental freedom to move and to reside within the territory of the Member States, conferred by Article 21(1) TFEU, with the result that his or her situation falls within the scope of EU law, including where his or her right of residence derives from national law*". The Charter was therefore engaged.

h. The Court then specifically referred to Articles 1, 7 and 24(2) of the Charter and held that because of CG's particular situation, the competent national authorities could only refuse her claim for social assistance "*after ascertaining that that refusal does not expose the citizen concerned and the children for which he or she is responsible to an actual and current risk of violation of their fundamental rights, as enshrined in Articles 1, 7 and 24 of the Charter*" (§92). It was for the referring Court to determine that question.

IV. SUBMISSIONS

The WA and the role of the Charter in general

36. In general terms, and in light of the matters set out at §§8-14 above, the IMA's position is as follows:

a. The Secretary of State is right to say that the WA is not, of itself, EU law (see SSWP's grounds of appeal at §34(2) [**A/2/17**]). It is an international treaty, within the meaning of the Vienna Convention on the Law of Treaties.

b. Nonetheless, the WA draws heavily on concepts of EU law. It specifically provides for particular provisions of EU law to apply within the UK after the end of the transition period, for those within scope of the WA, and for the CJEU

to have an ongoing role in its interpretation by virtue of Article 158 WA.[7] The WA also specifically defines "Union law" (in Article 2(a)) to include the Charter.

c. On the domestic plane, the UK has chosen to implement the WA in the same way that it previously implemented EU law, including by giving it primacy over every other domestic enactment (see s.7A(3) EUWA).

d. The Charter will therefore have continued effect in domestic law following the end of the transition period, notwithstanding s.5(4) EUWA, where that is required by the WA.

e. Under the WA, the Charter may have continued relevance in a number of different ways, which will depend on the facts of the particular case. For example, it may play an interpretative role, under Article 4(3). It may form part of the rationale for a judgment of the CJEU which is either binding (if it was handed down pre-the end of the transition period) or needs to be paid due regard (if it post-dates the end of the transition period). Finally, under Article 4(1), provisions of the Charter may mandate a particular outcome if that is necessary in order to ensure that the WA and the provisions of Union law which it applies produce the same legal effects in the EU and the UK respectively.

Application in this case

37. This case raises almost identical facts to *CG*, save that AT made her application for Universal Credit after the end of the transition period.[8]

38. The IMA's understanding is that: (i) as at the end of the transition period, AT was residing in the UK in accordance with Union law; and (ii) she continued to reside in the UK thereafter.[9] If that is right, then she is within the personal scope of the WA, as defined in Article 10(1)(a) (see §28 above).

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7 Under Article 31(1) of the Vienna Convention, any international treaty has to be interpreted in its "*context and in the light of its object and purpose*". The context is here plainly includes the EU law backdrop to the WA.

8 See the chronology contained in AT's skeleton argument at §7.

9 This is principally a matter for the parties, but the IMA understands that AT moved to the UK in October 2020 (having spent more than 2 years in Romania before that) and that, as at 31 December 2020, she would

39. Against that backdrop, the question which arises for the Tribunal is whether, in the post transition period, the terms of the WA mean that AT's Charter rights are engaged, in a manner that is analogous to the way in which the Charter was held, by the CJEU, to be engaged in *CG*.

40. The IMA contends that it does. That is for the following reasons:

    a. The starting point is that, as explained above, AT previously resided in the UK (before the end of the transition period) in accordance with Union law, in particular Article 6 of the CRD. When AT resided in the UK before the end of the transition period, she was exercising her fundamental freedom to move and reside in another Member State, conferred by Article 21(1) TFEU.

    b. Accordingly, AT is within the personal scope of the WA, as defined in Article 10 WA. In principle, therefore, she has a right to reside in the UK on the basis set out in Article 13 WA. Article 13(1) WA confers on Union citizens the right to reside in the UK "*under the limitations and conditions as set out in Articles 21, 45 or 49 TFEU and in Article 6(1), points (a), (b) or (c) of Article 7(1), Article 7(3), Article 14, Article 16(1) or Article 17(1) of [the CRD]*".

    c. In doing so, Article 13(1) "*refers to Union law*" and *"concepts thereof*" and also "*makes applicable*" in the UK the principal provisions of Union law relating to free movement. Those provisions of Union law which are incorporated by Article 13 WA therefore need to produce "*the same legal effects in the UK*" as in the EU (by virtue of Article 4(1) WA) and also need to be "*interpreted and applied consistently with the methods and general principles of Union law*" (Article 4(3) WA).

    d. As in *CG*, AT's right of residence is based on domestic law, namely the grant of PSS. In particular, it appears to the IMA that, although AT may have been residing on the basis of Article 6 CRD (as at the end of the transition period and as at 14 December 2020 when she was granted PSS), that provision no longer operates to confer a right of residence on AT, since she has been in the UK for more than 3 months. Furthermore, since she is not economically active she is

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therefore have been within her first 3 months of residence to which she was entitled as a matter of EU law under Article 6 CRD.

unlikely to be able to rely on Article 7 CRD. Nor, in the IMA's submission, can Article 21 TFEU be regarded as conferring an ongoing and standalone right of residence on AT because Article 21 TFEU only confers a right of residence "*subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give effect to them*" which includes the CRD. As at today's date, therefore, AT's right of residence derives from the grant of PSS pursuant to domestic law (the UK having made more favourable provision in relation to AT than it was required to do under Part 2 WA: see Art 38 WA). This of course is what also happened in *CG*: see §82 of *CG* referring to Article 37 of the CRD.

e. That is not, however, the end of the analysis. Rather, as the CJEU made clear in *CG*, a person who has previously exercised an EU law right to move and reside and is now residing lawfully in another Member State (whether on the basis of EU law or national law) is still entitled to rely on Article 21 TFEU and derive some protection from it even if she is no longer residing on the basis of it. In particular, such an individual will benefit from the application of the Charter, in the manner described in *CG*.

f. In *CG* of course, the CJEU applied the Charter in a free-standing manner on the basis that CG was within the scope of EU law. The analysis is different under the WA but the outcome is the same. That is because Article 13 WA expressly imports the protections conferred by Article 21 TFEU which continues to apply to a person within the scope of the WA (within the meaning of Article 10 WA). By virtue of Articles 4(1) and 4(3), Article 13 WA, and the provisions of Union law which it incorporates, needs to produce "*the same legal effects*" as those which they produce within the Union and need to be "*interpreted and applied in accordance with the methods and general principles of EU law*".

g. It is relevant to note, in this regard, that the CJEU has previously held that the need to interpret provisions of Union law consistently with general principles (including fundamental rights and the Charter) is specifically true of Article 21(1) TFEU. As the CJEU put it in Case C-165/14 *Rendón Marin* [2017] 1 CMLR 29, for example, the right to reside in another Member State conferred by Article 21 TFEU and the CRD is "*subject to the limitations and conditions imposed by the FEU Treaty and by the measures adopted to give it effect. Those*

limitations and conditions must be applied *in compliance with the limits imposed by EU law and in accordance with the general principles of EU law, in particular the principle of proportionality*" (§45, emphasis added).

h. Furthermore, this interpretation is consistent with the overarching scheme of the WA which operates to preserve the rights accrued by EU and UK citizens, including under Article 21 TFEU: see in particular Articles 4 and 10. The alternative outcome, which would be a situation where an individual in an effectively identical position to CG, has fewer rights than they would have had before the end of the transition period is inconsistent with the scheme of the WA, and its incorporation of the relevant corpus of EU law in Articles 4, 10 and 13.

V. CONCLUSION

41. It follows, in the IMA's submission, that a person in the situation of AT (who has been granted a right to reside as a matter of national law and is also within the personal scope of the WA because they previously exercised their right under EU law to move and reside in the UK before the end of the transition period and has continued to reside in the UK thereafter) has the benefit of the continuing protection that Article 21 TFEU confers. That is the direct result of Article 13 WA incorporating Article 21 TFEU, and it means that the UK cannot inhibit AT's right to reside "*freely*" in the UK by refusing her Universal Credit, if doing so would amount to an interference with her rights under the Charter.

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7 November 2022