IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (AAC)
(Mr Justice Chamberlain, Judge Ward and Judge Wright)

[2022] UKUT 330 (AAC)

BETWEEN:

SECRETARY OF STATE FOR WORK AND PENSIONS

Appellant / Respondent

-and-

AT

Respondent / Appellant

-and-

THE INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS

Intervener

-and-

THE ADVICE ON INDIVIDUAL RIGHTS IN EUROPE CENTRE

Intervener

SKELETON ARGUMENT ON BEHALF OF THE INDEPENDENT MONITORING AUTHORITY FOR THE HEARING ON 8-10 MARCH 2023

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*Bundle references are in the form **[CB/Tab/Page]** for the Core Bundle and **[SB/Tab/Page]** for the Supplementary Bundle.*

I. INTRODUCTION AND SUMMARY

1. This is the skeleton argument of the Independent Monitoring Authority for the Citizens' Rights Agreements (the "**IMA**") for the hearing of this appeal.

2. The IMA is the statutory body responsible for monitoring the implementation and application of Part 2 of the EU-UK Withdrawal Agreement ("**WA**"). Part 2 WA is entitled "*Citizens' Rights*" and, as is explained further below, 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 (i.e. 11pm on 31 December 2020), as well as reciprocal rights on UK citizens and their family members who were residing in an EU Member State as at that date. The UK was required to establish an independent authority in respect of Part 2 WA, with powers equivalent to the European Commission, pursuant to Article 159(1) WA. The IMA was duly established, and given powers of intervening in legal proceedings, by s.15 of and Schedule 2 to the European Union (Withdrawal Agreement) Act 2020 ("**EUWAA**"). By §4 of its order dated 6 February 2023, the Court granted the IMA permission to intervene in these proceedings **[CB/12/170]**.

3. This appeal concerns the Appellant's (the "**SSWP's**") decision to refuse the Respondent's ("**AT's**") application for Universal Credit. AT contends, and the IMA agrees, that in making this decision the SSWP was required to take into account AT's and her child's rights under the Charter of Fundamental Rights of the European Union (the "**Charter**"), by virtue of the provisions of the WA. This was also the conclusion of the Upper Tribunal (the "**UT**"), in the judgment under appeal (the "**Judgment**") **[CB/7/108]**.

4. The SSWP, by contrast, submits that the UT erred in finding that the Charter is of any application in the present case ("**Ground 1**"). By its second, third and fourth grounds the SSWP contends that, in any event, there is no need for an individualised assessment of AT's Charter rights, of the kind contemplated by the UT.

5. The IMA's submissions, as developed in this skeleton argument, concern only Ground 1 of the appeal. The IMA's position on Ground 1 can be summarised as follows:

   a. Contrary to the impression cultivated by the SSWP's skeleton, there is in reality a substantial amount of common ground between the parties (which was recognised by the UT) as to the legal context in which this issue arises. In particular, there is no dispute that the UK's departure from the EU brought about a fundamental change

in the UK's legal order. It is also agreed that the Charter is, in general, no longer applicable in UK law. Rather, the question for the Court is a relatively narrow one: namely, given the express terms of the WA and its context and purpose, does the Charter have a continuing interpretive role for situations which fall within the scope of the WA?

b. On that central question, the UT's careful and cogent reasoning is unimpeachable. The essential conclusion which the UT reached is that the combined effect of Articles 2 and 4 WA, which expressly refer to the Charter as an aspect of "Union law", mean the Charter has a continuing role to play when the UK and EU are interpreting and applying the WA. In particular, it acts as an interpretive constraint on each of the UK and the EU whenever they are applying other provisions of EU law which are made applicable by the WA. The consequence, in this case, is that, by parity of reasoning with the decision of the CJEU in Case C-709/20 *CG v Department for Communities in Northern Ireland* [2022] 1 CMLR 26 ("***CG***") , the SSWP could only refuse AT's application for Universal Credit, if to do so was not inconsistent with her rights under the Charter.

c. The SSWP's objections to the Judgment are unconvincing. Amongst other things, the SSWP contends that: (i) if the UT's conclusions are right, the effect will be that all substantive provisions of Union law are "*back in play*", with the result that the parts of the WA which introduce bespoke citizens rights' are essentially pointless (SSWP skeleton §38 **[CB/2/28]** and see also §54 **[CB/2/32]**); and (ii) the effect of the UT's judgment is to introduce a "*radical new obligation on a host state in respect of social assistance benefits*" (SSWP skeleton §5.1 **[CB/2/19]**) and thereby destabilise the "*financial equilibrium of the Member State's social assistance systems*" which is "*well established in EU jurisprudence*" (SSWP skeleton §18 **[CB/2/22]**). Both of these points are straw men, however. In relation to the first point, the UT made very clear that it was answering a narrow question as to the circumstances in which the SSWP can refuse EU citizens who are within the personal scope of the WA Universal Credit. Its reasoning hinges on the wording of Article 13 WA which in turn applies (*inter alia*) Article 21 TFEU, and it can only apply to a limited cohort of people who are within the personal scope of Article 10 WA. As to the second point, the SSWP's objection is not properly directed to the UT's judgment but to the prior judgment of the CJEU in *CG*. In reality, the UT's

judgment does nothing more than apply *CG* so as to ensure that Union citizens residing in the UK are no worse off after the end of the transition period, than they were before.

6. The remainder of the IMA's submissions are structured as follows. In **Section II** the IMA explains the background to this appeal including the relevant legal framework and the judgment of the CJEU in *CG*. In **Section III**, the IMA summarises the Tribunal's reasoning in its Judgment. Against that backdrop, in **Section IV**, IMA explains why the Tribunal's reasoning in the Judgment is right and why the SSWP's criticisms of it are incorrect.[1]

II. BACKGROUND TO GROUND 1

7. The Judgment sets out a careful analysis of the relevant legal framework, including the international and domestic legislative provisions and the applicable case law at §§11-69 **[CB/7/111]**. The IMA does not seek to repeat that exposition here, but a number of points do bear emphasis in light of the SSWP's skeleton argument.

(a) Common ground

8. First, it is common ground between the parties, and the UT accepted, that the UK's departure from the EU has brought about a fundamental change in the UK's legal order (see e.g. Judgment §90). In particular, the IMA of course recognises that the UK's withdrawal from the EU meant the end of free movement generally in the UK.

9. It is also common ground that, in terms of its general application, the Charter has ceased to be part of domestic law since the end of the transition period. As §22 of the SSWP's skeleton **[CB/2/24]** explains, that is the effect of s.5(4) of the European Union (Withdrawal) Act 2018 ("**EUWA**"). That does not, however, answer the question which arises in this case: namely, whether the EU and UK agreed, in the WA, that the Charter would continue to play an interpretive role when either the EU or the UK are applying or interpreting provisions of Union law made applicable by the WA.

[1] The factual background is not in dispute. It is summarised in the Judgment at §§1-5 **[CB/7/109]**, as well as at §§7-10 of the SSWP's skeleton **[CB/2/20]**. Consistent with its position as an intervener, the IMA says nothing more about the facts.

10. As to that, there is further common ground (cf. §30 of the SSWP's skeleton **[CB/2/26]**) that the WA is an international treaty which falls to be interpreted by reference to Article 31 of the Vienna Convention of the Law of Treaties. As the UT recorded at Judgment §36, this means that it must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose.

11. Importantly, however, the context here includes that the WA was concluded against the backdrop of the UK's prior and longstanding membership of the EU, and that both parties to the WA wished to effect an orderly withdrawal of the UK from the EU. Its purpose includes the need to ensure a degree of continuity and consistency for EU citizens within its scope after the UK's withdrawal from the EU. That much is plain from the recitals to the WA, and it explains why, notwithstanding the UK's departure from the EU, both sides agreed that they would, in the future, continue to apply the EU legal framework on free movement for the benefit of both EU citizens already residing in the UK and UK citizens already residing in the EU. The IMA explains this in further detail below.

(b) The WA and its application of EU free movement rules for those within personal scope

12. Starting with the recitals to the WA, the IMA notes the following:

    a. First, as Judgment §33 records **[CB/7/116]**, the recitals make clear that EU law will continue to apply in the UK to the extent that is provided for by the WA. Thus, the preamble provides that: "*the law of the Union … in its entirety ceases to apply to the United Kingdom from the date of entry into force of this Agreement*" but this is said to be "*subject to the arrangements laid down in this Agreement*" (fourth paragraph).

    b. Second, the recitals record that the objective of the WA is to "*ensure an orderly withdrawal of the United Kingdom from the Union*" (preamble, fifth paragraph). In order to achieve that aim, it is necessary to "*prevent disruption and provide legal certainty to citizens and economic operators … in the Union and in the United Kingdom*" (preamble, seventh paragraph).

    c. Third, the preamble stresses the need for reciprocity: "*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" (preamble, sixth paragraph).

13. Again, therefore, the IMA agrees with the SSWP that, after the end of the transition period, provisions and principles of EU law only continue to apply to the extent that the WA specifically applies them (SSWP skeleton §31 **[CB/2/26]**), and that the focus must therefore be on the "*bespoke provisions*" that the EU and UK agreed in the WA (SSWP skeleton §36 **[CB/2/28]**). What the SSWP skates over, however, is that by way of Part 2 of the WA the EU and UK have expressly agreed to preserve the rights of citizens who had already exercised rights of free movement before the end of the transition period.

14. The personal scope of Part 2 is set out in Article 10 WA. Satisfying the test for personal scope is an important precondition to the application of the WA in any individual case (and therefore the relevance of the Charter after the end of the transition period). Of particular relevance to this appeal is Article 10(1)(a) which provides that Part 2 shall apply to (*inter alia*) "*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*". It is common ground that AT was residing in the UK "*in accordance with EU law*" because, as at 31 December 2020, she was within an initial three-month period as contemplated by Article 6 of Directive 2004/38/EC (the "**Citizens' Rights Directive**" or the "**CRD**") (see Judgment §79 **[CB/7/127]** and SSWP skeleton §16 **[CB/2/21]**). AT then "*continued to reside*" in the UK immediately after the end of the transition period.

15. For those within personal scope, Part 2 establishes rights of residence which replicate the rights and conditions which previously existed in EU law for residence in another Member State. Most relevantly for present purposes, Articles 13(1)-(3) WA confer rights to reside on individuals within the personal scope of Part 2 on the same terms as EU law, including under Article 21 TFEU and Articles 6, 7 and 16 of the CRD. In particular:

    a. Article 12 WA prohibits (within the scope of Part 2 WA) discrimination on grounds of nationality "*within the meaning of the first subparagraph of Article 18 TFEU*". This therefore applies the general non-discrimination provision in 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 specific right of equal treatment which is "*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.

16. In consequence, the only difference between residence rights before and after the end of the transition period for those within personal scope of the WA is that those rights now arise under the WA rather than EU law. In doing so, the WA has achieved its aim of providing "legal certainty" for citizens within Part 2, insofar as it has ensured a continuity of treatment and entitlements, post-transition period.

(c) Interpreting the WA by reference to the Charter

17. The SSWP suggests that there is no provision in Parts 1 or 2 WA which applies the Charter generally (see SSWP skeleton §34 **[CB/2/27]**). In one sense, that is correct in that no provision of the WA applies the Charter in a freestanding way, after the end of the transition period.

18. That is not the end of the story, however. Article 2(a)(i) (which appears in Part 1 WA ('common provisions')) defines "*Union law*" for the purposes of the WA as meaning "*the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community, as amended or supplemented, as well as the Treaties of Accession and the Charter of Fundamental Rights of the European Union*" (emphasis added). That definition of "*Union law*" is then applied in Article 4 WA, which explains how the WA should be interpreted, implemented and applied. In particular, Article 4(3) WA provides that: "*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".

19. Article 4(3) is a critical provision of the WA, which is central to the arguments in this appeal and is addressed further below. The fundamental point is that Article 4(3) provides that, where other provisions of the WA refer to Union law, those provisions fall to be interpreted by reference to the Charter. There is, in the IMA's submission, nothing radical or surprising about that; it is clear on the face of Article 4(3), combined with the definition of Union law in Article 2(a)(i).

20. The further question that arises, however, is why a Charter-compliant interpretation of Article 13 WA might mean that the SSWP cannot refuse AT Universal Credit, if that refusal would be incompatible with AT's rights under the Charter. The answer to that question lies in the CJEU's decision in *CG*.

(d) The CJEU decision in *CG*

21. The judgment of the CJEU in *CG* was handed down on 15 July 2021 (i.e. after the end of the transition period). Under Article 4(5) WA, the Court must therefore pay "*due regard*" to it.

22. The facts of *CG* and the reasoning of the Court are summarised at Judgment §§45-56 **[CB/7/119]**. In brief, CG had been granted Pre-Settled Status ("**PSS**") and applied for Universal Credit before the end of the transition period. Under the Universal Credit Regulations (Northern Ireland) 2016, individuals residing purely on the basis of PSS were not eligible to claim Universal Credit. CG argued that excluding EU citizens with PSS from Universal Credit amounted to discrimination on the grounds of nationality contrary to Article 18 TFEU: §37.

23. The CJEU rejected that argument. Consistently with its previous case law (and, in particular, its judgment in Case C-333/13 *Dano v Jobcentre Leipzig*), the Court held that the principle of non-discrimination in Article 18 TFEU had to cede to the "*more specific expression*" of that principle contained in Article 24 CRD (see *CG* at §§65-66). Since CG was not residing "on the basis of" the CRD (as she had less than 5 years' residence and insufficient resources to support herself and her family), she was unable to avail herself of the right to equal treatment contained in Article 24 CRD. 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: §84. 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).

24. 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. 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* [their] *children 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.

25. In the IMA's submission, two points are particularly important about *CG*, both of which were recognised by the UT.

26. First, *CG* represents a departure from the previously settled case law of the CJEU. In *Dano*, the CJEU had specifically and expressly considered whether the Charter required Member States to make subsistence benefits available to Union citizens; and it had answered that question in the negative. Its reasoning in *Dano* was that because the Charter applies to Member States only when they are implementing EU law, and the conditions for the entitlement to the benefit were set by domestic law rather than EU law, the Charter did not apply. In taking a different view in *CG*, the case law of the CJEU has taken "*a new turn*", as the UT put it (see Judgment §53 **[CB/7/121]**).

27. The SSWP, at §26 of his skeleton argument **[CB/2/25]**, describes the CJEU's reasoning in *CG* as "*perplexing*". In the IMA's view, that criticism is unwarranted.[2] But in any event,

[2] Arguably, the development in *CG* is an appropriate response to what could be criticised as an overly restrictive approach taken in *Dano*. In *CG* itself, for example, the Advocate General proposed to extend the circumstances in which Article 24 CRD applied so as to afford CG protection against unequal treatment on the grounds of nationality (see §§AG5, AG60-66,

the fact remains that the CJEU in *CG* has taken a deliberate and conscious choice to move beyond the reasoning in *Dano*. This is important because it belies the SSWP's repeated suggestions that the effect of the UT's Judgment is to "*significantly depart … from the well-established position in EU law recognised by both the CJEU and the Supreme Court*" (SSWP skeleton §4 **[CB/2/18]**) insofar as it introduces "*radical new obligations on a host state in respect of social assistance benefits*" (§5.1 **[CB/2/19]**) or to alter the established "*financial equilibrium of the Member States' social assistance systems*" (§18 **[CB/2/22]**). That is, in the IMA's submission, not an objection which can be properly levied at the UT; it is the CJEU that has departed from its own previous case law in *CG*. The UT, as explained further below, has correctly applied the reasoning of the CJEU in *CG*.

28. Second, as pointed out in Judgment §46 **[CB/7/119]**, there are no relevant factual differences between the situation of CG and AT, save that in CG's case the decision to refuse Universal Credit was taken before the end of the transition period and therefore at a time when, under the WA, EU law applied in its entirety to and in the UK (subject to certain limited and immaterial exceptions). It follows that if AT had made her application for Universal Credit just two months earlier than she in fact did, she would have been entitled to its receipt, applying *CG*. Against that backdrop, the question with which the UT had to grapple was whether and how the reasoning in *CG* "translates" to a post-transition world under the WA. The conclusion it reached was that when the SSWP was deciding AT's application for social assistance, he was obliged by Article 4(3) WA to act compatibly with AT's and her child's Charter rights. The reasoning that led the UT to that conclusion is explained below.

III. THE UT'S JUDGMENT

29. The UT's central reasoning is contained at Judgment §§90-110 **[CB/7/130]**. An important starting point is the scope of the question which the UT considered it was required to

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AG74, AG75-82, AG111). The CJEU did not take the course advocated by the Advocate General, reaffirming its narrow reading of Article 24(1) CRD (see §§81-83, which directly respond to the Advocate General's approach). But it did reconsider its approach to the Charter (at §84). The CJEU therefore struck a careful balance in order to ensure that even where an individual is not currently residing on the CRD, but has previously exercised their freedom of movement, they should not be exposed to conditions in which their human dignity is violated.

decide. At Judgment §91 **[CB/7/130]**, it posed the question in the following way: whether the SSWP, when deciding AT's application for Universal Credit, was obliged to act compatibly with AT's and her child's rights as recognised in Articles 1,7 and 24(1) of the Charter.

30. In the UT's view, the answer to that question was 'yes' for the following reasons:

a. While EU law no longer applies generally in the UK, the effect of the WA is to make applicable certain parts of EU law, often with modifications to its temporal, personal and/or material scope: Judgment §90 **[CB/7/130]**.

b. In particular, Article 13(1) WA "*makes applicable*" Article 21 TFEU, which is the right to free movement and residence, in a modified form: Judgment §§99-102 **[CB/7/132]**. Specifically, Article 13(1) WA confers a part of the bundle of rights making up Article 21 TFEU, being the right of residence, for those within the personal scope of the WA: Judgment §§96-98 **[CB/7/131]**. The modified Article 21 right is not an ongoing free movement right but it continues to generate certain legal effects after the end of the transition period: §102 **[CB/7/132]**.

c. Article 4(3) WA requires that provisions of the WA "*referring to Union law or to concepts or provisions thereof*" have to be "*interpreted and applied in accordance with the methods and general principles of Union law*", and Article 2 defines "*Union law*" to include the Charter. This means that the UK must comply with (relevant) Charter rights whenever it is "*applying*" or "*interpreting*" the WA: Judgment §105 **[CB/7/133]**. In addition, Article 4(1) WA provides that the provisions of Union law "*made applicable*" by the WA must "*produce the same legal effects*" in the UK as in the Member States. For Member States, the WA is part of the EU legal order, so it similarly follows that the UK must comply with the Charter when acting in the scope of the WA: Judgment §§109-110 **[CB/7/134]**.

d. *CG* provides that where an EU citizen has made use of their fundamental freedom to move and reside under Article 21 TFEU, their situation falls within the scope of EU law, even if their right of residence derives from national law. By granting a right of residence to CG even though she did not have sufficient resources, the UK recognised her right to reside freely as per Article 21 TFEU, despite non-compliance with the CRD: Judgment §§54 **[CB/7/122]**, 106 **[CB/7/133]**. In determining her application for social assistance, which is necessary to make the Article 21 right effective, the

SSWP was therefore acting within the scope of CG's Article 21 rights: Judgment §106 **[CB/7/133]**.

e. *CG* concerned a situation during the transition period, when EU law applied in its entirety under the WA. In contrast, after *CG*, EU law applies only to the extent specifically provided for in the WA: Judgment §§46 **[CB/7/119]**, 95 **[CB/7/131]**. But by parity of reasoning with *CG*, the SSWP was "*applying*" AT's modified Article 21 right to reside, conferred by Articles 10 and 13 WA, when determining her application for Universal Credit. This required him to comply with AT's and her child's Charter rights: Judgment §106 **[CB/7/133]**.

f. The UT also expressly noted that its reasoning does not mean (contrary to a submission pressed on it by the SSWP) that the WA opens a "portal" through which all Charter rights must flow: Judgment §107 **[CB/7/134]**. In particular, the UT drew a distinction between certain Charter rights which are "*inextricably linked to the status of citizenship*" (e.g. rights to vote and stand in European Parliament and municipal elections contained in Articles 39 and 40 of the Charter). Such rights, by definition, could not survive the UK's exit from the EU: see Case C-673/20 *EP v Préfet du Gers* [2023] 1 CMLR 2 §§77-83. In contrast, the rights at issue in this case are not in that category: "*they are, by their nature, capable of being enjoyed by anyone whose situation falls within the material scope of EU law (including in cases where that law is made applicable by the WA)*".

IV. THE UT REACHED THE CORRECT CONCLUSION

31. In the IMA's submission, the UT's reasoning was plainly right and should be upheld. The SSWP's criticisms of it are incorrect. The IMA makes five points in this regard.

32. First, it is clear on its face that Article 4(3) does, in general terms, require that where provisions of the WA apply or refer to concepts or provisions of EU law, those concepts or provisions of EU law, must be interpreted compatibly with the Charter. As Lane J said in *R (IMA) v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin) §§130-131, Article 4(3) means that "*the fact that the United Kingdom has left the EU does not mean EU legal concepts must be ignored; indeed, the contrary is the case*".

33. The SSWP takes issue with this insofar as he contends that the Charter is not a "*method*" of EU law and is also distinct from the "*general principles*": see SSWP skeleton §§20

[CB/2/23], 38 **[CB/2/28]**. This is inaccurate, however. It is well established that, as a matter of EU law, the Charter is a powerful 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*".[3]

34. This is as much true in the context of CRD as in other areas of EU law. That is unsurprising given that Recital 31 of the CRD expressly requires its provisions to be implemented "*in accordance with the prohibition of discrimination contained in the Charter*". By way of example, in Case C-673/16 *Coman v Inspectoratul General pentru Imigrari* [2019] 1 WLR 425, the CJEU interpreted the term "*spouse*" in Article 2(2)(a) of the CRD (now applied by Article 9(a)(i) WA) as including same-sex married couples. This followed from (*inter alia*) "*the right to respect for private and family life guaranteed by the Charter*" (see §§3, 48 and §59 of the Advocate General's opinion referring to the need for a "*contextual interpretation*" of the term given the protection for family life guaranteed by Article 7 of the Charter). Similarly, in Case C-165/14 *Rendón Marin* [2017] 1 CMLR 29, the CJEU affirmed the interpretive constraints of Articles 7 and 8 of the Charter where the Member State was applying derogations from residence rights under Article 27 CRD on grounds of public policy: §66.

35. When, therefore, Article 4(3) WA requires that other "*provisions of [the WA] referring to Union law or to concepts or provisions thereof*" are "*interpreted and applied in accordance with the methods and general principles of Union law*", it is clear, in the IMA's submission, that this does mandate an interpretation and application of those

[3] 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): "*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*". See further Case C-579/12 RX-II *Commission v Strack* ECLI:EU:C:2013:570 at §40.

provisions which is consistent with the Charter. The express inclusion of the Charter in the definition of "*Union law*" in Article 2 puts the point beyond peradventure.

36. Second, in AT's particular case, the UT was right to hold that the SSWP was "*interpreting or applying*" Article 13 WA in deciding AT's application for Universal Credit. As explained above, 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]*". In doing so, Article 13(1) "*refers to Union law*" and "*concepts thereof*" and "*makes applicable*" in the UK the principal provisions of Union law relating to free movement.

37. The reasoning of the CJEU in *CG* was that refusing subsistence benefits for an individual who had previously exercised their right to move under Article 21 TFEU was a decision within the scope of EU law, even where the citizen's current right of residence derives purely from national law. That was because the grant of domestic right of residence recognised the individual's Article 21 TFEU rights (*CG* at §87). In addition, as the UT noted in its Judgment at §106 **[CB/7/133]**, the grant of social assistance was necessary to make the Article 21 right effective.

38. By analogy, and as the UT held, when the UK decides on the eligibility of subsistence benefits for an individual who falls within the personal scope of Article 10 WA, and who has previously exercised their right to move conferred by Article 21 TFEU, the UK is "applying" and/or "interpreting" Article 13 WA. That is not the same as saying that AT has a positive right of residence under Article 13 WA; her rights of residence are still sourced in domestic law, but those domestic rights recognise her prior exercise of Article 21 TFEU rights. In addition, her Article 21 rights are recognised and applied by Article 13 and continue to generate legal effects under the WA.

39. This is the answer to the SSWP's complaint at §47 of his skeleton **[CB/2/30]** that "*basic gateway condition in Art. 4(3) WA for the application of fundamental rights is not met*" because no issue about the interpretation or application of Article 13 WA arose in AT's case. As explained above, the UK has granted AT domestic residence rights in recognition of that prior exercise of rights under Article 21 TFEU, and is acting in the scope of those rights when determining her application for benefits. In particular, the reference to Article 21 TFEU in Article 13 WA is not a dead letter. It is there because, as in EU law, it

represents the original and underlying free movement and residence right, which is then subject to the limitations and conditions in the CRD (before the end of the transition period) and in the WA (after the end of the transition period).

40. So far as the SSWP argues that the "modified" nature of Article 21 TFEU takes it outside the scope of Article 4(3) (SSWP skeleton §52 **[CB/2/31]**), that reflects too narrow a reading of Article 4(3). It is obvious that wherever EU law is applied under the WA it is in some ways "modified" – it has a different source, and it is subject to the limitations prescribed in the WA, not in EU law. The purpose of Article 4(3) is, as explained above, to ensure consistency and reciprocity. The proper understanding of how the Charter provides residual protection to those within the personal scope of the WA, and who exercised rights of free movement and residence before 31 December 2020, is also the answer to the SSWP's assertion that the EU/UK's agreement on social assistance was confined to Article 23 (SSWP skeleton §43 **[CB/2/29]**). There is no evidential or textual support for that proposition, and it overlooks Article 13 WA, which expressly adopts and applies Article 21 TFEU.

41. Third, contrary to SSWP skeleton §§49-51 **[CB/2/30]**, the reasoning in *CG* is not inextricably linked with citizenship of the Union. The CJEU's reasoning in *CG* hinges on a prior exercise of free movement rights, not Union citizenship. More generally, Union citizenship is made up of a number of distinct rights, some of which have been preserved after the end of the transition period, whilst others have not. This is apparent from the decision in *Préfet du Gers*, which the UT properly analysed at Judgment §§57-62 **[CB/7/123]**, 107 **[CB/7/134]**. *Préfet du Gers* makes clear, for example, that voting rights are not preserved by Part 2 (§63), whereas residence rights are (see §§73-75). As the UT noted at Judgment §99 **[CB/7/132]**, *Préfet du Gers* §80 suggests that Part 2 WA is indeed making Article 21 TFEU applicable. In contrast, voting rights are nowhere to be found in the WA.

42. Fourth, the SSWP is wrong to suggest that the Judgment gives rise to some kind of 'floodgates' concern whereby EU nationals residing in the UK can rely on all the rights in the Charter (SSWP skeleton §54 **[CB/2/32]**). Given the analysis above, this will be a case specific question. In each case, one would need to identify a provision of EU law that is applied by the WA, or requires interpretation and then consider how it is interpreted in EU

law. If and only if – as a matter of EU law – its interpretation requires the Charter to be applied, would the Charter then have to be applied under the WA.

43. Fifth and finally, the UT was also right in its alternative conclusion in relation to Article 4(1) WA. Article 4(1) requires that the provisions of the WA and the provisions of Union law which it makes applicable must produce "*the same legal effects*" in the UK as they produce within the Union and its Member States. The UT was therefore correct to reason by reference to what a Member State would be required to do under the WA to inform itself as to the proper ambit of Article 4(1). The WA, as an international treaty concluded by the EU, is an integral part of the EU legal order and would fall to be interpreted by a Member State in line with the Charter, entirely independently of Article 4(3) (under C-266/16 *Western Sahara* [2018] 3 CMLR 15 §46). It follows from Article 4(1) that the UK is required to do the same.

44. Even more straightforwardly, in the IMA's submission, this follows from the plain wording of Article 4(1) WA. Article 4(1) is on its face a mandatory, outcome driven rule: it requires that the provisions of the WA produce the same outcome in the UK and the EU Member States. Contrary to the SSWP's submissions (SSWP skeleton §56 **[CB/2/33]**), Article 4(1) is not simply mandating direct effect. First, the WA is intended to give reciprocal protection in the EU and the UK. This is achieved by, among other things, requiring the same legal outcomes to be generated by provisions of EU law that are applied by the WA. Second, the inclusion of the words "accordingly" and "in particular" in the second paragraph show that direct effect is only one consequence of the broader obligation in Article 4(1).

V. CONCLUSION

45. For all the above reasons, the IMA submits that the appeal should be dismissed.

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