IN THE HIGH COURT OF JUSTICE **CO/ /2021**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

The Queen

on the application of

THE INDEPENDENT MONITORING AUTHORITY

FOR THE CITIZENS' RIGHTS AGREEMENTS

Claimant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

STATEMENT OF FACTS AND GROUNDS

I. INTRODUCTION

1. This is an application for judicial review of the Defendant's failure to implement its obligations to EU and EEA EFTA citizens who have retained the right of residence in the UK, contrary to 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 concluded on 19 October 2019 (the "**Withdrawal Agreement**" or "**WA**") **[E48-E587]** and the Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland concluded on 20 December 2018 (the "**EEA EFTA Separation Agreement**" or "**SA**") **[E588-E651]** (together, the "**Agreements**"). The purported implementation of citizens' rights conferred by the WA and the SA in Appendix EU of

the Immigration Rules (otherwise known as the European Union Settlement Scheme ("**EUSS**")) **[E931-E987]** is unlawful.

2. The Claimant is the Independent Monitoring Authority for the Citizens' Rights Agreements (the "**IMA**"), which was established pursuant to Article 159(1) WA and Article 64(1) SA to monitor the implementation and application in the United Kingdom of Part 2 WA and Part 2 SA.

3. Those EU and EEA EFTA citizens who resided in the United Kingdom in accordance with EU law prior to 31 December 2020 (the end of the implementation period following the UK leaving the EU) and their family members, who successfully applied to be recognised as qualifying for the continued right to reside in the UK enjoy the rights set out in Part 2 of the WA and SA.[1] Such persons are referred to as "**EU and EEA EFTA citizens**" below (which should be taken to include family members regardless of whether they are EU or EEA citizens themselves).[2]

4. The Secretary of State is responsible for the EUSS, which governs the conditions under which she will grant qualifying EU and EEA EFTA citizens leave to enter or remain in the UK. In very broad summary, it provides for the grant of indefinite leave to remain (or "**settled status**") to those individuals who had established a right of permanent residence in the UK by the time of their application under the EUSS. It also provides for the grant of five years' limited leave to enter or remain (or "**pre-settled status**") for those qualifying EU and EEA EFTA citizens who had not yet established a right of permanent residence in the UK by that time. This claim concerns only those who have been granted pre-settled status (or who may be granted such status in future).

5. The IMA is concerned that, as a result of the Defendant's failure to correctly implement the United Kingdom's obligations under the Agreements, individuals who have established that they are entitled as of right to remain in the UK under the WA or SA,

[1] The WA and SA equally benefit those UK citizens and their family members who were resident in EU and EEA EFTA countries before that date, but this claim does not directly concern those individuals given the IMA's remit as set out in footnote 2 below.

[2] Despite the name of the EEA EFTA Separation Agreement, Swiss citizens are protected under a separate Swiss Citizens' Rights Agreement ("**SCRA**"), not the SA. "EEA EFTA nationals" are defined by the SA to be citizens of Iceland, Lichtenstein or Norway alone. The IMA does not have a role in relation to the SCRA, as it makes no provision for a monitoring authority. There is no reason why Swiss citizens' substantive rights are any different for present purposes than those of EU and EEA EFTA citizens; however, given the limit on the IMA's role, no further reference is made to Swiss citizens in these grounds.

may nonetheless lose their pre-settled status (along with all the rights which accompany it) for reasons which the WA and SA simply do not permit.

6. The issue is that the Secretary of State maintains that those qualifying EU and EEA EFTA citizens who successfully applied for pre-settled status may subsequently lose it entirely if they later fail to make a *second* application. Such individuals are required to make a second application within five years of the grant of pre-settled status, either for settled status under the EUSS (once they qualify for permanent residence), or for a further period of pre-settled status. But if they fail to apply for either status, the Secretary of State will consider them to be unlawfully present in the UK by reason of that failure. The result is that they will be exposed to considerable serious consequences affecting their right to live, work and access social security support in the UK. The Claimant contends that this is incompatible with the Agreements, which do not provide for loss of status in such circumstances.

7. The total number of individuals granted pre-settled status up to 30 September 2021 is estimated to be 2.4 million. The total number of individuals liable to be affected by the consequences of being considered unlawfully present in the UK is the subset of individuals with pre-settled status who subsequently fail to make a second application (whether for settled status or for continued pre-settled status) within five years of the grant of their pre-settled status, as a result of which their five years' leave to enter or remain will have expired.

8. The earliest point at which an individual with pre-settled status would be exposed to the consequences in UK domestic law of failing to apply for settled status is 2023, i.e., 5 years from the earliest grants of pre-settled status in 2018. The IMA has initiated these proceedings at this point such that these proceedings, and any potential appeal, are resolved prior to 2023, in order to obviate the risk that individuals with a right of residence in the UK under the Agreements is unlawfully exposed to these consequences.

II. FACTUAL BACKGROUND

(1) The WA and SA and the establishment of the IMA

9. Following the UK's decision to withdraw from the EU, the UK entered into a set of agreements which established the terms of its withdrawal from the EU, and from the EEA Agreement (to which it was a contracting party as an EU member state).

10. The purpose of the entry into the Agreements was *inter alia* to provide reciprocal protection to the rights of citizens from one counterparty who had exercised a right of residence in the territory of the other counterparty (in other words, the rights of EU and EEA EFTA citizens to live in the UK, and of UK nationals to reside in the EU and EEA EFTA states). The rights of EU citizens to continue to reside in the UK (and vice versa) are set out in Part Two of the WA. The rights of EEA EFTA citizens to reside in the UK (and vice versa) are set out in Part Two of the SA.

11. Article 159(1) of the WA provides that "*the implementation and application of Part Two of the Withdrawal Agreement shall be monitored by an independent authority*" within the UK, with powers "*equivalent to those of the European Commission*" to *inter alia* receive complaints, conduct inquiries and bring legal action on behalf of EU citizens and their family members. Equivalent provisions are contained within Article 64(1) of the SA as regards to the implementation and application of Part Two of the EEA EFTA Separation Agreement.[3]

12. The IMA was established in order to satisfy these obligations by section 15 and Schedule 2 of the European Union (Withdrawal Agreement) Act 2020 ("**EU(WA)A 2020") [E912-E928]**. It is an "arms-length" body and is impartial and independent of government.

13. The IMA has two principal statutory duties, which are set out in Schedule 2 to the EU(WA)A 2020:

    a. First, the IMA must "*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 includes keeping under review "*the adequacy and effectiveness of (a) the legislative framework which implements or otherwise deals with matters arising out of, or related to, Part 2, and (b) the exercise by*

[3] As explained in footnote 2 above, there is no equivalent provision in the SCRA.

relevant public authorities of functions in relation to Part 2" (pursuant to paragraph 22 of Schedule 2 to EU(WA)A 2020).

b. Second, the IMA "*must promote the adequate and effective implementation and application of Part 2 of the Withdrawal Agreement and Part 2 of the EEA EFTA Separation Agreement*" (pursuant to paragraph 23 of the same Schedule).

14. In particular, the IMA is empowered to initiate judicial review proceedings for the purposes of promoting the adequate and effective implementation and application of those sections of the WA and SA under paragraph 30(1) of Schedule 2 of EU(WA)A 2020.

15. References to "EU citizens" below should be taken as referring to EEA EFTA citizens equally, as for all material purposes they enjoyed identical rights of residence in the UK as EU citizens prior to the UK's withdrawal from the UK, and have rights under the SA which are in all material respects identical to those enjoyed by the EU citizens under the WA. References to "EU citizens" below should also be taken to refer to their family members, and those of EEA EFTA nationals, who fall within the scope of Part 2 of the WA and Part 2 of the EEA EFTA SA.

(2) <u>The position of EU citizens prior to the UK's withdrawal from the EU and the EEA</u>

16. The principal Act which requires non-British[4] citizens to have leave to enter or remain in the UK is the Immigration Act 1971 **[E686-E727]**. In very broad summary, it provides that those who are subject to immigration control must apply for leave to enter or remain in the UK, and that in determining those applications the Secretary of State will follow the practice set out in the Immigration Rules. The Immigration Rules set out detailed requirements that must be fulfilled for an application for leave to enter or remain in various different categories (such as a visitor, a skilled worker, or a student).

17. If successful, an applicant will generally be entitled under the Rules to be granted leave to enter or remain for a limited period of time. They must then reapply for a further period of leave to remain and continue to do so until such time as they may fulfil the

[4] Certain Commonwealth citizens are taken to have a right of abode in the UK under section 2 of the Immigration Act 1971; Irish citizens do not require leave to enter or remain in the UK under section 3ZA. Where "non-British" or "EU citizen" is used in this pleading it does not refer to these cohorts.

requirements to apply for indefinite leave to remain. A failure to re-apply successfully for leave to remain will mean that an individual who overstays the period of leave originally granted will no longer be lawfully present in the country. They may in consequence have their access to free healthcare, social security support and private/social housing adversely affected, as well as their ability to work or be self-employed, and be liable to detention and removal from the UK.

18. When the UK was a Member State of the EU, and until the end of the transition period, EU citizens were not subject to this regime. Section 7(1) of the Immigration Act 1988 **[E728]** disapplied the requirement under the Immigration Act 1971 for non-British citizens to have leave to enter or remain in the UK, in respect of a person who had an enforceable EU right to do so. The Immigration Rules did not apply to such people at all. Instead, the rights of EU citizens and their family members to reside in the UK were provided for by the Immigration (European Economic Area) Regulations 2016 (as amended) (**"the 2016 Regulations**") **[E856-E905]** and its predecessors.

19. The 2016 Regulations implemented the rights of entry and residence of Union citizens and family members in the United Kingdom under the TFEU and under Directive 2004/38/EC (**"the Citizens' Rights Directive"** or **"CRD"**) **[E1-E47]**. The CRD made provision under Article 7 for rights of residence of EU citizens in a host Member State as a worker, self-employed person, self-sufficient person or student, as well as for their family members. Articles 16 to 18 CRD made provision for the right of permanent residence for EU citizens and their family members after five years' continuous qualifying residence in the host Member State (or less than five years, in the circumstances defined under Article 17 CRD).

20. In particular, the 2016 Regulations provided in regulation 14 that a qualified person "*is entitled to reside in the United Kingdom for as long as that person remains a qualified person*", and that a family member of such a person "*is entitled to remain in the United Kingdom for so long as they remain the family member of that person*". (A "*qualified person*" was an EU citizen in the United Kingdom who fulfilled one of the conditions in Article 7 CRD, namely being a worker, self-employed person, a self-sufficient person or a student, or their family member.) Further, regulation 15 provided that EU citizens or family members who had resided in the United Kingdom in accordance with the

Regulations for a continuous period of five years "*acquire the right to reside in the United Kingdom permanently*".

21. No applications were necessary to enjoy these rights. Although EU citizens and their family members could apply for registration certificates or residence cards to evidence the fact that they enjoyed those rights, they were not required to do so as a pre-condition of acquiring those rights. Nor were the rights in any way time limited, as a grant of limited leave to enter or remain would be. The right of residence continued for so long as the EU citizen or family member concerned qualified for the right (by virtue of their status as a worker etc.), and in the case of a right of permanent residence, without even that limitation.

(3) The position of EU citizens following the UK's withdrawal from the European Union and the European Economic Area

22. The UK's withdrawal from the EU has brought an end to EU citizens' continued enjoyment of those rights of residence in the UK, subject to the provisions of the Withdrawal Agreement and EEA EFTA Separation Agreement. Following the end of the transition period, both section 7 of the Immigration Act 1988 and the 2016 Regulations were repealed and revoked by Part 1 of Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, with effect from 31 December 2020 **[E929-E930]**.

23. The consequence is that all EU citizens and their family members have become subject to immigration control under the provisions of the Immigration Act 1971 and must apply for either limited leave to enter or remain or indefinite leave to remain in order to be lawfully present in the UK. Such applications will be determined in accordance with the Immigration Rules. However, qualifying EU and EEA EFTA citizens are entitled to have their applications assessed under **Appendix EU** of the Immigration Rules, which is intended to give effect to the substantive rights provided for under the Agreements, by implementing what is referred to as the EU Settlement Scheme (**"the EUSS"**).[5]

[5] Appendix EU applies to EU and EEA EFTA citizens regardless of whether they were exercising free movement rights in the UK at the end of the transition period and accordingly is broader than necessary under the WA and

24. In short, the design of the EUSS is to treat those who have not yet acquired the right of permanent residence as having "pre-settled status", and those who have acquired it as having "settled status". The latter are granted indefinite leave to remain when they make the initial application required under Article 18(1) WA and Article 17(1) SA **[E81-E88/E600-E604]**.

25. However, under the EUSS, those who are only eligible for pre-settled status are only granted limited leave to remain in the UK for a period of up to five years. If, within that time, they acquire a right of permanent residence, under the domestic legal framework they are required to make a further application for indefinite leave to remain to give effect to it: the EUSS does not have any mechanism to give automatic effect to that right once acquired. Alternatively, if they do not qualify for the right of permanent residence within that time, they must make a further application for further limited leave to remain before the expiry of the initial five-year period of limited leave to remain.

26. In either case, were they to fail to make a further application, the consequence under the domestic regime adopted by the UK Government would be that their limited leave to enter or remain would expire after five years, and they would no longer be treated as being lawfully present in the UK under the Immigration Act 1971. This would entail the consequences referred to above: such individuals would be liable to be detained and deported from the UK and would not be entitled to work or be self-employed in the UK, and also may have their access to free healthcare, social security support and private/social housing adversely affected, all of which are contingent on lawful residence in the UK.

27. The IMA considers this approach to be inconsistent with the requirements of the WA and SA and is accordingly unlawful. In particular:

    a. The right of residence conferred by the WA and the SA, once obtained, does not expire unless it is withdrawn pursuant to the terms of those Agreements. Automatic withdrawal of the right for a failure to make a *second* application

SA. This is entirely permissible under Article 13(4) WA and Article 12(4) SA which provides that provision made by host States for the implementation of the rights under the WA and SA may not be less generous than is required under the WA and SA.

within five years for a *continued* right of residence (whether pre-settled or settled) is incompatible with the WA and the SA, which make no such provision.

b. The right of permanent residence accrues automatically once the conditions for obtaining it have been fulfilled. There is no objection to the provision of an administrative procedure by which EU citizens may make an application for recognition of that right of permanent residence, supported by evidence that the relevant conditions for acquiring it have been fulfilled. However, it is unlawful for the Secretary of State to withdraw a right of continued residence beyond five years by reason of a failure to make any such application.

28. The relevant provisions of the WA and SA, and the Claimant's position as to the correct approach to be adopted in the interpretation of the Agreements are detailed below.

III. LEGAL FRAMEWORK

(1) The provisions of the WA and SA

29. Parts Two of the WA and of the SA make provision for citizens' rights. The provision in each is largely identical, save that the WA relates to Union citizens and the SA relates to EEA EFTA citizens, with attendant differences in wording.[6] This section details the relevant provisions by primary reference to the WA and by cross-reference to the SA.

30. The scope of Part Two is defined by Article 10(1) WA[7] **[E71-E73]**, which establishes that it applies to Union citizens who exercised their right to reside in the UK, or who exercised their right as frontier workers in the UK, before the end of the transition period and continue to do so thereafter (and their family members, as defined in Article 9 WA[8] **[E68-E70]**, to the extent set out in Article 10(1)(e) WA[9], whether they are Union citizens or not) in accordance with Union law.

31. The substantive rights of residence are set out in Articles 13 to 23 WA **[E76-E93]**, and Articles 12 to 22 SA **[E598-E606]**.

[6] The Defendant adopts the same approach in pre-action correspondence.
[7] Article 9 SA.
[8] Article 8 SA.
[9] Article 9(1)(e) SA.

32. Article 13(1) - (3) WA[10] provides for such Union citizens and family members to have the right to reside in the United Kingdom under the limitations and conditions set out in Articles 21, 45 or 49 TFEU[11] **[E652-E654]** (as applicable) and, importantly, under various specified provisions of the CRD. Those provisions are in essence those which confer rights of residence on EU citizens and their family members in a host member state of the EU. They include not only the principal rights of residence as a worker, self-employed person, self-sufficient person or student under Article 7 CRD, but also Articles 16 to 18 CRD which make provision for the acquisition of a right of permanent residence.

33. Article 13(4) WA[12] 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. There shall be no discretion in applying the limitations and conditions provided for in this Title, other than in favour of the person concerned." (emphasis added).

34. Article 15 WA[13] makes further provision in respect of the right of permanent residence, as follows:

> "1. Union citizens and United Kingdom nationals, and their respective family members, who have resided legally in the host State in accordance with Union law for a continuous period of 5 years or for the period specified in Article 17 of Directive 2004/38/EC, shall have the right to reside permanently in the host State under the conditions set out in Articles 16, 17 and 18 of Directive 2004/38/EC. Periods of legal residence or work in accordance with Union law before and after the end of the transition period shall be included in the calculation of the qualifying period necessary for acquisition of the right of permanent residence.
>
> 2. Continuity of residence for the purposes of acquisition of the right of permanent residence shall be determined in accordance with Article 16(3) and Article 21 of Directive 2004/38/EC.
>
> 3. Once acquired, the right of permanent residence shall be lost only through absence from the host State for a period exceeding 5 consecutive years."

[10] Article 12(1) – (4) SA.
[11] Articles 28 and 31 EEA Agreement.
[12] Article 12(4) SA.
[13] Article 14 SA.

35. Article 16 WA substantially repeats much of Article 15(1) WA, but confirms that those with less than five years' qualifying residence as at the end of the transition period can continue to accumulate periods of qualifying residence in order to acquire the right of permanent residence under Article 15 WA once they have completed the necessary periods of residence.

36. Article 18(1) WA[14] provides that the host State may require Union citizens or UK nationals and their family members who "*reside in its territory in accordance with the conditions set out in this Title, to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form.*"

37. Article 18(1) WA[15] continues:

> "Applying for such a residence status shall be subject to the following conditions:
>
> (a) the purpose of the application procedure shall be to verify whether the applicant is entitled to the residence rights set out in this Title. Where that is the case, the applicant shall have a right to be granted the residence status and the document evidencing that status;
>
> (b) the deadline for submitting the application shall not be less than 6 months from the end of the transition period, for persons residing in the host State before the end of the transition period. For persons who have the right to commence residence after the end of the transition period in the host State in accordance with this Title, the deadline for submitting the application shall be 3 months after their arrival or the expiry of the deadline referred to in the first subparagraph, whichever is later. A certificate of application for the residence status shall be issued immediately;
>
> (c) the deadline for submitting the application referred to in point (b) shall be extended automatically by 1 year where the Union has notified the United Kingdom, or the United Kingdom has notified the Union, that technical problems prevent the host State either from registering the application or from issuing the certificate of application referred to in point (b). The host State shall publish that notification and shall provide appropriate public information for the persons concerned in good time;
>
> (d) where the deadline for submitting the application referred to in point (b) is not respected by the persons concerned, the competent authorities shall

[14] Article 17(1) SA.
[15] Article 17(1) SA.

> assess all the circumstances and reasons for not respecting the deadline and shall allow those persons to submit an application within a reasonable further period of time if there are reasonable grounds for the failure to respect the deadline…"

38. The effect of Article 18(1) WA is to permit the UK and other EU Member States to require a citizen to make an application for a new residence status conferring the rights (plural) under Title II of Part Two of the Withdrawal Agreement, as a condition of the continued enjoyment of the right of residence beyond the deadline specified in Article 18(1)(b) for making the application. Where a host State does so, as the UK has done, this is known as a "constitutive" residence scheme. Alternatively, they may treat the application as being only for evidentiary purposes. Where a host State does so, this is known as a "declaratory" residence scheme. Thus, although the *purpose* of the application, as Article 18(1)(a) WA[16] makes clear, is to "*verify whether the applicant is entitled"* to the rights, the *effect* of a successful application will differ according to whether the scheme is constitutive or declaratory.

39. Article 18(4)[17] WA makes this difference explicit. It provides:

> "Where a host State has chosen not to require Union citizens or United Kingdom nationals, their family members, and other persons, residing in its territory in accordance with the conditions set out in this Title, to apply for the new residence status referred to in paragraph 1 as a condition for legal residence, those eligible for residence rights under this Title shall have the right to receive, in accordance with the conditions set out in Directive 2004/38/EC, a residence document, which may be in a digital form, that includes a statement that it has been issued in accordance with this Agreement."

40. Where the host State has adopted a constitutive scheme, Article 18(1)(b) and (d) WA[18] together make clear that the required application is to be made before a deadline of not less than 6 months after the end of the transition period (for those residing in the host State at that time), or within 3 months of their arrival (in the case of, for example, a family member joining such a person), unless extended for good reason if there has been a failure to respect that deadline in the case of any such person.

[16] Article 17(1)(a) SA.
[17] Article 17(4) SA
[18] Articles 17(1)(b) and (d) SA.

41. Finally, Article 20 WA[19] preserves various rights to restrict the right of residence that were already present in the CRD: whether personal conduct occurring before the end of the transition period should be taken as reason to restrict rights must be considered in accordance with Chapter VI of the CRD, abuse of rights or fraud may justify the refusal, termination or withdrawal of a right to reside as set out in Article 35 CRD, and such abusive/fraudulent applicants can be removed even before an appeal has been determined under the conditions set out in Articles 31 and 35 CRD.

42. Article 20(2) WA[20] adds one additional provision, to the effect that personal conduct occurring after the end of the transition period may constitute grounds for restricting residence rights "*in accordance with national legislation*", rather than the standards laid down by Chapter VI of the CRD. Further, Article 21 WA imposes the safeguards set out in Article 15 and Chapter VI of the CRD in respect of any decision to restrict residence rights.

(2) The interpretation of the WA and SA

43. The WA requires individuals' directly effective rights to be enforceable under UK domestic law:

    a. Article 4(1) WA provides that "*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."* **[E63]**

    b. Article 4(2) WA requires the United Kingdom to ensure compliance with Article 4(1) through domestic legislation, "*including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions.*" **[E63]**

[19] Article 19 SA.
[20] Article 19(2) SA.

44. Similar provision is made under Article 4 of the SA **[E592]**:

a. Article 4(1) SA requires the parties to "*undertake to ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement and to implement the rights recognised in the present Agreement into their internal legal order through domestic legislation."*

b. Article 4(2) SA provides that in the interpretation and application of domestic legislation implementing the SA, "*each Party's judicial and administrative authorities shall have due regard to this Agreement"*.

c. Article 4(3) of the SA provides that Part Two of the SA (detailing the counterparties' obligations in relation to citizens' rights) is to be "*interpreted in conformity with the provisions of Parts Two and Three of the EU-UK Withdrawal Agreement, in so far as they are identical in substance"*.

45. Effect is given to these requirements by section 7A of the European Union (Withdrawal) Act 2018 (**"EU(W)A 2018"**) **[E906-E907]**, inserted by section 5 of the European Union (Withdrawal Agreement) Act 2020 (**"EU(WA)A 2020"**). It provides that all rights created or arising by or under the WA are to be without further enactment given legal effect in the UK, to be recognised in domestic law, and that every enactment is to be read and to have effect subject to the recognition of those rights. To similar effect, section 7B of EU(W)A 2018 **[E908-E909]** gives domestic legal effect to rights arising under the SA. Accordingly, although the SA does not itself provide for its provisions to have direct effect, the UK has elected to give direct effect to its provisions in its domestic implementation.

46. Sections 7A and 7B of EU(W)A 2018 are "*relevant separation agreement law*" (section 7C(3) of EU(W)A 2018) **[E911]**.

47. *"Relevant separation agreement law*" is to be interpreted as follows (section 7C(1) of EU(W)A 2018):

> **"7C Interpretation of relevant separation agreement law**
>
> (1) Any question as to the validity, meaning or effect of any relevant separation agreement law is to be decided, so far as they are applicable—

(a) in accordance with the withdrawal agreement, the EEA EFTA separation agreement and the Swiss citizens' rights agreement, and

(b) having regard (among other things) to the desirability of ensuring that, where one of those agreements makes provision which corresponds to provision made by another of those agreements, the effect of relevant separation agreement law in relation to the matters dealt with by the corresponding provision in each agreement is consistent." (emphasis added)."

48. Accordingly, section 7A of EU(W)A 2018, which gives domestic effect to the WA and SA falls to be interpreted in accordance with the WA and SA itself. As set out above, the SA is to be interpreted in conformity with identical provisions of the WA.

49. Interpretation of the WA is dealt with in Article 4(3) of the WA, which provides that the provisions of the WA which refer to EU law or to concepts of provisions thereof are to be interpreted and applied in accordance with the methods and general principles of EU law. Accordingly, the method to be adopted in interpreting the sections of the WA which refer to EU law concepts or provisions are to be interpreted in the manner provided for in EU law, and not the domestic approach to the interpretation of treaties, insofar as those approaches differ.

50. In pre-action correspondence, the Secretary of State has placed heavy emphasis upon Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("**VCLT**") **[E666-E667]**, which provide for the approach to be adopted in the interpretation of treaties. In view of that position, the IMA makes clear that the CJEU has confirmed that Articles 31 and 32 VCLT are binding on EU institutions and form part of the EU's legal order, even though the VCLT itself does not bind the EU, inasmuch as they reflect the rules of customary international law (Case C-386/08 *Brita* [2010] ECR I-01289, §§42 – 43).

51. Article 31 VCLT ("*General rule of interpretation*") provides the primary rule of interpretation of treaties:

> "1. A treaty shall 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 the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

52. The approach of the CJEU is broadly consistent with the approach adopted by the domestic courts in the interpretation of treaties, which was summarised by Lord Reed in *Anson v Commissioners for HMRC* [2015] UKSC 44:

"56. Put shortly, the aim of interpretation of a treaty is therefore to establish, by objective and rational means, the common intention which can be ascribed to the parties. That intention is ascertained by considering the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose. Subsequent agreement as to the interpretation of the treaty, and subsequent practice which establishes agreement between the parties, are also to be taken into account, together with any relevant rules of international law which apply in the relations between the parties. Recourse may also be had to a broader range of references in order to confirm the meaning arrived at on that approach, or if that approach leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable...

…

"110. Article 31(1) of the Vienna Convention requires a treaty to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". It is accordingly the ordinary (contextual) meaning which is relevant. As Robert Walker J observed at first instance in *Memec* [1996] STC 1336, 1349, a treaty should be construed in a manner which is "international, not exclusively English"."

53. Article 32 VCLT ("*Supplementary means of interpretation*") provides for the use of supplementary means of interpretation in limited circumstances:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to

confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 :

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable."

54. However, nothing in the VCLT is capable of qualifying the express provision in Article 4(1) WA that the "*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*": to that extent, the minimum rights provided for in EU law must be provided without qualification (while recognising that it is always open to the counterparties to make more generous provision in favour of the other's citizens than is otherwise required: Article 13(4) WA).

IV. GROUND OF CHALLENGE

(1) The Defendant's interpretation of the WA and SA, as implemented in the EUSS, is wrong in law

55. The loss of rights of residence of an EU citizen, who has previously successfully applied for residence status under Article 18(1) WA but who subsequently fails to renew or upgrade their status within five years, is a breach of Articles 13 and 15 WA.[21] In providing for a loss of rights of residence in these circumstances, the EUSS is unlawful and the UK is in breach of its obligations to EU citizens under the WA. It is inconsistent with the clear language of the provisions. It is also contrary to the mutual, expressed objective of Part II of the WA to provide reciprocal protection to the citizens of each counterparty to continue to reside in the host State in which they were resident prior to the end of the transition period, subject only to the making of the initial application referred to in Article 18(1) WA (which may be required to confer the rights under Title II of Part 2 of the WA), under the same limitations and conditions as set out in the provisions of the TFEU and CRD referred to in Article 13(1)-(3) and Article 15 WA (as a minimum[22]).

[21] It is also in breach of Articles 12 and 14 SA in the case of EEA EFTA citizens. The grounds of challenge applies equally to such EEA EFTA citizens on the basis of alike breaches of the SA.
[22] It is always open to the UK to make more generous provision than required under the WA: Article 13(4) WA.

56. The interpretation of the WA implemented by the Defendant in the framing of the EUSS appears to be that the UK is entitled to require an EU citizen to make *two* applications for a relevant residence status. It requires an EU citizen to make an initial application for a continued right of residence (or "pre-settled status", in the language of the EUSS) under Article 18(1) WA,[23] and then a second application either to extend it, or to upgrade that status to a full right of permanent residence (or "settled status"), failing which, the underlying right of residence conferred by the WA is lost – with the consequence that such an individual would no longer be lawfully resident in the UK.

57. There is no provision for such an interpretation in the WA. To the contrary, Article 18(1)(a) – (d) WA[24] is clear in articulating that the deadline for an application for the right of residence in a constitutive residence scheme is limited to a single *initial* application for the new residence status (and accompanying residence documents).

58. The initial application permitted by Article 18(1) WA is to establish that the applicant is in fact entitled to the rights under Title II of Part 2 of the WA. If the application is successful those rights are conferred upon the applicant, and the applicant will be provided with a document evidencing such status. At that point, the rights conferred may be the contingent right of residence conferred under Article 13 WA, or the permanent right of residence under Article 15 WA, depending upon whether the individual applicant can evidence that they have already qualified for permanent residence. Where the host State concerned has adopted a constitutive residence scheme, the continued enjoyment of that status beyond the deadline for application is conditional upon such an initial application being made.

59. Critically, the WA does <u>not</u> provide that after making a successful application for continued residence, an individual's continued right of residence beyond five years is conditional upon making a further application at a later time (whether for further qualifying residence or for recognition of a right of permanent residence). Take the example of an individual who began their qualifying residence in 2020, who then makes a timely application for continued qualifying residence by 30 June 2021, but who only qualifies for a right of permanent residence in 2025. While that individual will be entitled

[23] Unless they already qualify for a right of permanent residence, in which case they can apply directly for settled status without the need to re-apply.
[24] Article 17(1)(b) – (d) SA.

to apply for a document evidencing that they have attained the right of permanent residence, there is nothing in Article 18(1)(b) WA, or in any other provision of the WA, making the acquisition of such a right conditional upon making an additional application by 30 June 2021 (or within 3 months of entry), or by any other date. They have complied with Article 18 by making their initial successful application for continued residence, and thereafter have the benefit of all the rights conferred under Part 2.

60. The intention and effect of the WA is that an individual who has made a successful application for continued legal residence is taken to continue to enjoy the right of residence for as long as they fulfil the conditions and subject only to the limitations set out in the provisions of the CRD referred to in Article 13(1)-(3) WA.[25] Further, if and when they fulfil the necessary condition of sufficient continuous qualifying residence to acquire the right of permanent residence, there is no additional condition precedent to acquisition of that right. In particular, there is no additional requirement to the effect that they must first apply for or possess any document evidencing that status; the status itself is acquired automatically by operation of law: Article 15(1) confers the right of permanent residence under the conditions set out in Articles 16-18 CRD, which, as set out above, have direct effect.

61. A host State is entitled to make more generous provision, going beyond those rights in an individual's favour (and the Secretary of State has stressed that the United Kingdom has done so). However, a host State is <u>not</u> entitled to impose additional limitations or conditions for obtaining, retaining or losing residence rights (including the right of permanent residence set out in Articles 16(1) and (2) CRD), other than those provided for in Title II: Article 13(4) WA. Title II does not provide that the right of permanent residence can be lost for failure to apply for this right prior to the purported expiry of the initial pre-permanent right of residence.

62. Further, the WA itself does not provide that a failure to apply for a document to evidence the right of permanent residence once acquired will lead to the loss of that right, or to the loss of any existing right of residence previously acquired under the procedure set out in Article 18(1). Although Article 18(1) WA and Article 18(4) allow the nature of the initial application to be constitutive of any right of legal residence, there is no provision

[25] Article 12(1) – (3) SA.

allowing the right of residence (or the right of permanent residence, once it has arisen) to be required to be validated by any further application after 5 years or at all.

63. To the contrary, the case law of the CJEU provides that the right of permanent residence under Article 16 CRD (conferred by Article 15(1) WA) accrues automatically after the required period of qualifying residence: see Case C-325/09 *Dias* ECLI:EU:C:2011:498:

> "57 In that regard, it must be noted that the right of permanent residence provided for in Article 16 of Directive 2004/38 could be acquired only with effect from 30 April 2006, as stated in paragraph 40 of the present judgment. Consequently, unlike periods of continuous legal residence of five years completed after that date, which confer on citizens of the Union the right of permanent residence with effect from the actual moment at which they are completed, periods completed before that date do not allow those persons to benefit from such a right of residence prior to 30 April 2006." (emphasis added).

64. Just as residence permits issued under Article 10(1) CRD were declaratory and not constitutive of the underlying right of residence (see *Dias* at [48]-[49]), the same was true of documents certifying the right of permanent residence issued under Article 19(1) CRD. As set out above, Articles 4(3) and 4(4) WA provide that the provisions of the WA referring to Union law or to concepts or provisions thereof must be interpreted and applied in accordance with the methods and general principles of Union law, and in their interpretation and application must be interpreted in accordance with the relevant case law of the CJEU handed down before the end of the transition period.

65. In those circumstances, the right of permanent residence provided for in Articles 13, 15 and 16 WA[26] must be interpreted as accruing automatically at the appropriate time (if the applicable requirement as to length of continuous qualifying residence has been fulfilled) to any person who has previously qualified for and been granted a residence document in the host State under Article 18(1) WA, without the need for a further application to be made to constitute that right. While there is no objection to the provision of an application procedure by which EU citizens can obtain a document *evidencing* that they have attained that right of permanent residence, this cannot be a mandatory pre-condition of the right, and moreover a failure to make such a further application once the conditions for a permanent right of residence have been fulfilled cannot result in the loss of that right, or indeed the loss of any right of residence at all. There is no provision in the WA for the

[26] Articles 12, 14 and 15 SA.

right of residence, once acquired, to be forfeited after five years has elapsed if no further application has been made.

66. The right of permanent residence set out in Articles 13, 15 and 16 WA is clear, precise and unconditional in its application to a person who has obtained the necessary (initial) residence document under Article 18 WA and has fulfilled the necessary period of continuous qualifying residence, and is accordingly directly effective. It follows that the directly effective right of permanent residence takes effect under UK law without further enactment, and any domestic provisions must be disapplied insofar as they are inconsistent or incompatible with the recognition of that right.

67. Similarly, a person who has obtained the necessary initial residence document under Article 18 WA but who has not yet qualified for the right of permanent residence nonetheless has a directly effective right of residence in the UK, and any domestic provisions must be disapplied insofar as they are inconsistent or incompatible with the recognition of that right in accordance with Article 4(2) WA.

68. Accordingly, the operation of the EUSS, insofar as it purports to nullify the right of an EU or EEA EFTA citizen to continue to reside in the UK where no second application is made is unlawful. The scheme does not comply with the UK's obligations under the WA, and any decision to abrogate the rights of an EU or EEA EFTA citizen on the basis of such an individual's failure to make a second application would be a breach of that individual's directly effective right to continue to reside lawfully in the UK.

(2) <u>The Defendant's interpretation of the WA</u>

69. The Defendant has set out its interpretation of the WA in pre-action correspondence with the Claimant **[D1-D13]**. In particular, the Defendant disagrees that the position as it was in Union law carries over once an initial application for residence is made, and that, to the contrary, free movement for EU citizens was ended at the end of the transition period **[D14-D28]**. It contends that "*[w]here a host state has made the choice to implement the WA via constitutive approach under Article 18, the rights of residence and concepts borrowed from EU law are varied by that approach*".

70. This is incorrect. It is clear that, regardless of whether a host State chooses to implement a declaratory or constitutive scheme, the compliance of that scheme with the host State's obligation under the Agreements is controlled by Union law, and in particular, by Article 4(1) WA which stipulates that the WA is to produce the same effects in the UK as those produced within the EU. Host States cannot escape the strictures of EU law by electing to operate a constitutive scheme.

71. The sole authority provided by the Defendant for this surprising contention is the written observations of the European Commission and the judgment of the CJEU in *CG v Department for Communities in Northern Ireland* [C-709/20] **[Supp B403-B420]**.

72. The written observations of the Commission and the CJEU judgment do not provide, nor even purport to provide, any authority for the proposition that the EUSS is consistent with the UK's obligations under the Agreements: it simply provides a brief factual description of the relevant provisions of domestic law (in the normal way). The fact that the UK considers EU citizens to lose their underlying right to reside in the UK where no second application for status is made was not at issue in that case.

73. The Defendant also relies on a wide array of materials including its own domestic policy papers and unilateral negotiating positions as well as "Q&A" documents produced by the European Commission which it suggests evidences a "*clearly accepted understanding between the European Union and the UK at the time of the Withdrawal Agreement's negotiation".* It contends that these various documents are necessary for the correct interpretation of the WA under Articles 31 and 32 VCLT.

74. The context, purpose and intent of the WA is clear from the document itself, and in particular, from its preamble, which records that the objective of the WA was *inter alia* to ensure an orderly withdrawal of the UK from the EU and to provide reciprocal protections of UK and EU citizens. It is not necessary to adduce extraneous materials in order to provide that context, nor does the Defendant provide any explanation of why unilateral negotiating positions, domestic policy papers, and unpublished drafts could ever provide useful context for the interpretation of a closely negotiated bilateral agreement.

75. Moreover, this "context" does not assist the Defendant in any event. It is clear from a survey of the materials relied on by the Defendant that none purport to establish that the right to reside is lost where no second application is made.

76. Rather, these materials, at their highest, indicate that a second application would be required under the EUSS in respect of the right of permanent residence (or settled status) in the case of those who previously had only established pre-settled status. Such an application is unobjectionable insofar as it is made available to allow those qualifying for such status to establish that the necessary conditions have been fulfilled. It does not entail that a failure to make such an application would lead to the loss of any pre-existing right of residence, contrary to the express terms of the WA.

77. The Defendant's position is entirely dependent upon the further unsupported assertion that "*[a] necessary corollary of the requirement for a second application under a constitutive system is that a failure to make that application will lead to a loss of status and therefore rights".*

78. The Defendant does not provide any justification for this assertion, and it is clearly wrong. The label of a "constitutive system" cannot be applied to introduce a requirement which is not provided for by the terms of the WA itself. Article 18(1) WA clearly allows for an initial application to be made for "*a new residence status which confers the rights under this Title*" within the six month time limit provided for by Article 18(1)(b). The necessary corollary of that requirement (in a constitutive system) is that a person who fails to make such an application with the six-month time limit does not qualify for the rights conferred under Title II at all (subject to any extension to the time limit under Article 18(1)(c) or (d)). It is not any kind of necessary corollary that acquisition of further rights conferred by Title II should be made subject to the fulfilment of additional requirements not set out in the WA, nor that existing rights should be extinguished by reason of a failure to fulfil those purported requirements. None of the materials adduced by the Defendant support this interpretation of the WA, and it is inconsistent with the language of the WA itself.

79. It is notable that a number of joint documents by the UK and the Commission in the context of negotiations indicate a common understanding and agreement that permanent residence will be acquired by beneficiaries in accordance with the terms of the WA and

Article 16 – 18 of the CRD, and can only be lost in specified circumstances (of which the failure to make a second application is not one). This is exemplified by the Joint Technical Notes on the comparison of EU-UK positions on citizens' rights, which were published between July – December 2017 **[C17-C43]** and record the evolving positions of the counterparties to the issue.

80. The final update to these notes (December 2017) indicates that the UK's position (which was, at this point in negotiation, identical to the EU's position) in relation to the acquisition and loss of permanent residence is as follows:

> "Conditions for acquiring permanent residence as per Article 16 of Directive 2004/38/EC (5 years of continuous and lawful residence as a worker/self-employed person, student, self-sufficient person (Article 7(1)(b) of Directive 2004/38/EC), or family member thereof), with periods of lawful residence prior to the specified date included in the calculation of the five year condition.
>
> …
>
> Conditions for acquiring permanent residence as per Article 17 and 18 of Directive 2004/38/EC (e.g. retired people, permanent incapacity).
>
> …
>
> Conditions for acquiring permanent residence as per Article 17 and 18 of Directive 2004/38/EC (e.g. retired people, permanent incapacity)."

81. Accordingly, far from establishing that the Defendant's interpretation of the Agreements as to the automatic loss of rights for a failure to apply was in any way considered at the time of negotiation, or implicit in those negotiations, this interpretation is conspicuously absent from the contemporaneous documents.

82. It is also fatal to the Defendant's contention that its current position was clear and uncontroversial at the time of negotiations that the European Commission has explicitly noted that it disagrees with the Defendant's interpretation of the Withdrawal Agreement as operationalised in the EUSS. This is clear from the Joint Statement by the Specialised Committee on Citizens' Rights between the European Commission and UK Government following the seventh meeting of the Specialised Committee on Citizens' Rights between the EU Commission and the UK Government, published 17 June 2021 **[C12]**:

> "The EU also expressed concerns about the fact that EU citizens lose their residence status if they do not apply in time from pre-settled to settled status and also about the lack of protection under the UK's EU Settlement Scheme of EU citizens who will not apply to the residence status by the end of the grace period until they receive their status. The EU noted that it did not share the UK's interpretation of the Withdrawal Agreement and technical discussions will continue until the end of next week, given the lack of convergence of interpretations. The EU emphasised that it will now carefully consider next steps."[27] (emphasis added).

V. CONCLUSION

83. The approach of the Defendant to the UK's obligations to EU citizens and EEA EFTA citizens is inconsistent with the terms of the WA and the SA. The result of this approach is that the Defendant's provision for the rights of residence of such individuals is wrong in law and liable to breach their directly effective rights under the Agreements and purport to render such individuals unlawfully present in the UK in circumstances in which this is not permitted under the Agreements.

84. Accordingly, the Claimant seeks:

    a. A declaration that the Defendant's interpretation of the Agreements is wrong in law and that the EUSS is unlawful insofar as it purports to abrogate such individuals' rights under the WA and SA; and

    b. Such other relief as the Court sees fit.

ROBERT PALMER QC

CLÍODHNA KELLEHER

Monckton Chambers

7 December 2021

[27] The Commission raised similar concerns in the equivalent meetings in April and September 2021.