Claim No. [redacted]

IN THE COUNTY COURT
AT [redacted]

BETWEEN:

C

Appellant

-and-

[redacted] **COUNCIL**

Respondent

-and-

THE INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS

Intervener

SKELETON ARGUMENT
ON BEHALF OF THE INTERVENER

A Preliminary matters

1. This is the skeleton argument of the Independent Monitoring Authority for the Citizens' Rights Agreements (the "**IMA**") for the hearing of the above appeal under s. 204 of the Housing Act 1996 (the "**Housing Act**").

2. The Court will be aware that the IMA had filed and served a skeleton argument in these proceedings on 27 October 2023. This skeleton argument has since been revised and updated, in particular to take account of the following developments:

   (1) The Court of Appeal's decision in *Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307 (the "***AT CA Decision***") which was handed down on 8 November 2023.

(2) The Appellant's revised skeleton argument filed and served on 11 January 2024 ("**ASkel**"). As far as the IMA is aware, the Respondent filed a skeleton argument on 17 April 2023 but has not served a further revised skeleton argument.

(3) The discontinuation of the related appeal in *VS v* [redacted] *Council* in Claim No. [redacted] which was notified to the IMA on 16 January 2024.[1]

3. In addition, and by way of update, the IMA notes that the3million and the AIRE Centre have sought (and been granted) permission to intervene. The IMA did not oppose these applications and is grateful for the input from the additional interveners on these issues.

B Introduction and Summary

4. 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 of the WA is entitled "*Citizens' Rights*" and it confers residence and related rights on EU citizens and family members residing in the UK at the end of the transition period, as well as reciprocal rights on UK citizens residing in an EU Member State at the end of the transition period. The UK was required to establish an independent authority, with powers equivalent to the European Commission, for the purposes of Part 2 of the WA under Article 159(1) of the WA. The IMA was duly established and given powers of intervening in legal proceedings in s. 15 and Sch. 2 to the European Union (Withdrawal Agreement) Act 2020 ("**EUWAA**").[2]

5. In this appeal, the Appellant (a national of [redacted] is the family member of an EU citizen and she is residing in the UK on the basis of pre-settled status ("**PSS**") under Appendix EU to the Immigration Rules. The Appellant has been refused housing assistance on the basis that she does not satisfy the qualifying residence criteria under s. 185 of the Housing Act and relevant regulations. In addition, the Respondent (the

---

[1] That appeal raised the question as to whether pre-settled status, of itself, was sufficient to bring an individual within the personal scope of the Withdrawal Agreement. The IMA considers that this issue does not arise to the same extent within the current appeal, as detailed within these submissions. If however the Court considers it would be of assistance, particularly due to the IMA's statutory role, the IMA is of course prepared to file submissions on this distinct point.

[2] The IMA has equivalent powers in relation to Part 2 of the EEA EFTA Separation Agreement ("**SA**") in the UK and Gibraltar. These submissions focus on the WA since the relevant family member in this case is an EU national. However, Part 2 of the SA is, in substance, identical to Part 2 of the WA, and the effect of Article 4(3) SA is that Part 2 of the SA has to be interpreted in conformity with Part 2 WA. The points made by the IMA may therefore be of equal application under the SA.

"**Council**") found that there was no basis in the WA to grant housing assistance to the Appellant.

6. The Grounds of Appeal concern, among other things, the proper scope and application of Part 2 of the WA. The IMA has sought to intervene to promote the adequate and effective implementation and application of Part 2 of the WA and to assist the Court in resolving the appeals by reference to the correct legal framework. To summarise the IMA's position on the key issues concerning the WA in this appeal:

   (1) First, it is necessary for the Court to establish whether the Appellant is within the personal scope of the WA under Article 10. This is a necessary precondition for the application of the WA to any individual case. In the Appellant's case, it appears that she is a "family member" of an EU worker within the meaning of Article 10(1)(e), which would be sufficient for personal scope.

   (2) Second, if the Appellant is residing on the basis of the WA, she can rely on the non-discrimination provisions in the WA. However, if she is within personal scope but does not meet the ongoing conditions of residence under the WA, she can rely on the residual protection of the Charter of Fundamental Rights of the European Union (the "**Charter**"). This follows from the proper analysis of the case law in Case C-709/20 *CG v Department for Communities in Northern Ireland* [2022] 1 CMLR 26 ("***CG***") and *Secretary of State for Work and Pensions v AT* [2022] UKUT 330; [2023] EWCA Civ 1307 ("***AT***").

   (3) Third, if the Charter applies to the Council's decision in respect of housing assistance, the Council ought to conduct an individualised assessment to assure itself that the Appellant's Charter rights (including the right to dignity under Article 1) are not at a real and immediate risk of being violated.

7. The IMA's submissions are structured as follows. The factual background is summarised briefly in Section C. The key questions on the appeal are set out in Section D. The legal framework of the WA is explained in Section E. The IMA's submissions on each of the key legal questions is set out in Section F.

C Factual background

8. The factual background in respect of this appeal is set out in the decision of the Respondent dated [redacted] 2022 under s. 202 of the Housing Act (the "**Review Decision**") and in the parties' skeleton arguments. In overview:

   (1) The Appellant is a third country national who moved to the UK in [redacted] 2019 to join [redacted] an EU citizen in work.

   (2) The Appellant was granted PSS on [redacted] 2019. The Appellant was residing in the UK before the end of the transition period (i.e., before 31 December 2020) as a family member of an EU national [redacted]

   (3) In [a date more than 3 months before the end of the transition period] [redacted] the Appellant moved in with her [redacted] also an EU citizen in work. In [redacted] 2022, the Appellant was told to leave home.

   (4) In [redacted] 2022, C applied for homelessness assistance under Part VII of the Housing Act. On [redacted] 2022, the Council made its decision under s. 184 of the Housing Act refusing C's application for housing assistance (the "**First Decision**").

   (5) The First Decision was taken under s. 185 of the Housing Act on the basis that C was ineligible for assistance because, although she had PSS, she had no other qualifying rights under the Eligibility Regulations.

   (6) On [redacted] 2022, the review officer made the Review Decision affirming the decision to refuse assistance. The officer reasoned as follows:

      (a) C was ineligible because she did not have worker status, nor was she a dependent family member because she no longer lived with or depended upon her relative (Decision Letter/pp. 15-16).

      (b) While C had a condition amounting to a disability under the Equality Act 2010, the Council did not discriminate against C because it had completed assessments under the Care Act 2014, which found that C did not have care and support needs and could live independently (Decision Letter/pp. 17-18).

      (c) Insofar as the Charter applied, the Council had already considered C's particular circumstances and concluded that C received pension credits, had

sufficient resources to provide for her own needs, had no dependent children and was living in dignified conditions through accommodation provided by [redacted] (Decision Letter/p. 18).

(d) The Council had no power to amend or disapply the Eligibility Regulations pursuant to the Charter (Decision Letter/pp. 20-21). This was purportedly due to vires, in that the Council stated it could not read down legislation which was incompatible with the Charter.

9. It will be noted that neither decision engaged in any detail with the WA or considered how it applied to the relevant regulations or to the Council's decision-making.

D The questions to be answered on the appeal

D.1 Grounds of Appeal

10. The appeal is brought under s. 204 of the Housing Act, so the Court is required to determine whether the Council committed any error of law in their decisions to refuse assistance. The Appellant has raised two grounds of appeal which the IMA summarises as follows:

(1) The Appellant is within the personal scope of the WA and therefore entitled to be treated as eligible for housing assistance under the Housing Act. The Council's failure to recognise eligibility amounts to:

(a) Discrimination under the WA ("**Ground 1(i)**"); and/or

(b) A failure to respect the Appellant's Charter rights ("**Ground 1(ii)**").

(2) The Council erred by failing to check whether refusal of homelessness assistance would amount to a breach of Charter rights ("**Ground 2**").

D.2 Questions to be answered

11. The IMA considers that resolving the appeal requires answering several distinct questions in the following order:

(1) **Question 1:** Does the Appellant have eligibility for housing assistance as a "family member" within the Eligibility Regulations?

(2) **Question 2:** If not, does the Appellant come within the personal scope of the WA?

(3) **Question 3:** If the Appellant comes within the personal scope of the WA, is she entitled to rely on non-discrimination protections in the WA and what is the consequence of that?

(4) **Question 4:** If the Appellant comes within the personal scope of the WA, is she entitled to the protections of the Charter as per *CG* and *AT*, and what are the consequences of that?

12. As noted above, the IMA is not in a position to provide submissions on factual issues which will assist in answering Question 1. The IMA is, however, well placed to assist with the proper resolution of Questions 2-4 by reference to the correct legal framework (subject to any factual determinations that need to be made). Before turning to these questions, the next sections set out the key features of the legal framework applying to the appeals.

E Legal framework

E.1 Implementation and interpretation of the WA

13. The WA is an international treaty between the UK and the member states of the EU, so the principles in the Vienna Convention on the Law of Treaties govern its interpretation.[3] This means it must be interpreted in accordance with its context and its purpose.[4] The context for the WA includes the backdrop of the UK's prior membership of the EU; its purpose includes the need to ensure a degree of continuity and preserving rights accrued by citizens within its scope after the UK's withdrawal from the EU.

14. The WA adopts and refers to a number of EU law provisions and concepts. In particular, Article 4, which is the overarching interpretative provision, sets out certain rules for construing the WA:

(1) Article 4(1) provides that the "*provisions of [the WA] and the provisions of Union law made applicable by [the WA] shall produce*" in the UK "*the same legal effects as those which they produce within the Union and its Member States*".

---

[3] This has been affirmed in a number of recent cases such as *R (IMA) v SSHD* [2022] EWHC 3274 (Admin) §§64-70; *Celik v SSHD* [2023] EWCA Civ 921 §53; *R (Ali) v SSHD* §82; *SSWP v AT* [2022] UKUT 330 (AAC) §36; *AT CA Decision* §80.

[4] Under Article 31(1) of the Vienna Convention, any international treaty has to be interpreted in its "*context and in the light of its object and purpose*".

(2) Article 4(3) requires that Union law or provisions or concepts thereof "*shall be interpreted and applied in accordance with the methods and general principles of Union law*". Article 2(a) WA defines 'Union law' to include a number of specific EU treaties, general principles, and the Charter. It is therefore clear that the Charter has a role to play in the interpretation of the WA and the provisions of Union law to which it refers.

15. In terms of the relevant domestic legislation, the WA has been implemented in domestic law in the same way that EU law was previously implemented in the UK. Thus, s.7A of the European Union (Withdrawal) Act 2018 ("**EUWA**") provides for the implementation of the WA in terms that are effectively identical to s.2(1) of the European Communities Act 1972 (now repealed). In that sense, s.7A EUWA creates a new "conduit pipe" for the WA (see *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 §60), with the result that rights, powers, liabilities and obligations which are created by the WA are automatically available in domestic law. Importantly, s.7A(3) EUWA provides that every other provision of domestic legislation, including other provisions of EUWA itself, is subject to the general implementation of the WA into domestic law.

E.2 Part 2 of the WA

16. Part 2 of the WA sets out the provisions on Citizens' Rights. While the WA brought an end to freedom of movement, it nonetheless incorporated key aspects of the EU legal framework for free movement and residence for EU citizens already residing in the UK (and UK citizens already residing in the EU). As the sixth recital to the WA records:

> "it is necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights before a date set in this agreement, and to ensure that their rights under this Agreement are enforceable and based on the principle of non-discrimination …".

17. The way in which this was achieved was to largely replicate the EU legal framework for citizens' rights in the terms of Part 2 of the WA, as specifically provided for within the WA, as described below.

Article 10: Personal scope

18. Article 10 WA governs the *ratione personae* of Part 2 of the WA. Satisfying the test for personal scope is the necessary precondition to the application of the WA in any

individual case, including the non-discrimination provisions and any residual application of the Charter. Relevantly for this appeal, Article 10(1)(a) and Article 10(1)(e) provide as follows (emphasis added):

> "1.Without prejudice to Title III, this Part shall apply to the following persons:
>
> (a) 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;
>
> …
>
> (e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:
>
> (i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter; …"

19. There are at least two important aspects to Article 10 WA.

20. The first concerns the timing of the assessment. Under Article 10(1)(a) (and equally Article 10(1)(e)(i)), the individual must be residing in the UK in accordance with Union law at the end of the transition period on 31 December 2020. While the wording is broad ("before the end"), the IMA considers that the purpose of Part 2 of the WA is to take a snapshot of the cohort of EU citizens (and their relevant family members) who, as at the end of the transition period, were residing in the UK in accordance with EU law and to continue that regime on a new footing under the WA. The IMA's reading is informed by the wording of Article 10 indicating a continuity of residence immediately before and after the end of the transition period ("continued to reside there thereafter"). It is also consistent with indications of the Court of Appeal in *Celik*, in which the IMA also intervened, that Article 10(1)(e) requires residence in compliance with EU law "*at the end of the transition period*": *Celik v SSHD* [2023] EWCA Civ 921 at §54.

21. The second concerns the nature of residence rights required before the end of the transition period. These provisions refer to residence (or exercising a right of residence) "*in accordance with Union law*" but the precise boundaries of "Union law" in this context have not been determined in the case law. The literal definition of "Union law" may be taken from Article 2(a)(i) which includes the Treaties and other implementing legislation. Article 10(1) is thus likely to include, at least, those who were residing in compliance with the substantive conditions and limitations of residence requirements under EU residence law (e.g., workers) at the end of the transition period. However, the outer limits of this provision are not yet known. The IMA returns to this question further below.

Article 12: General prohibition on non-discrimination

22. Article 12 establishes a right to non-discrimination on the grounds of nationality. It is within Title I of Part 2 which is headed "General Provisions". It states that (emphasis added):

> "Within the scope of this Part, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality within the meaning of the first subparagraph of Article 18 TFEU shall be prohibited in the host State and the State of work in respect of the persons referred to in Article 10 of this Agreement."

23. It will be noted that this is directly modelled on Article 18 of the Treaty on the Functioning of the European Union ("**TFEU**"), which was the provision considered in *CG*.

Article 13: Pre-permanent right to reside

24. Article 13 confers rights to reside in the UK for EU citizens and their family members. This article largely reflects the rights, and the limitations and conditions, that previously existed as a matter of EU law under Article 21 TFEU and Directive 2004/38/EC ("**Citizens Rights Directive**" or "**CRD**"). The CRD provided for a scheme of residence which varied according to the length of residence and activity of the citizens concerned. In broad terms, the CRD provided for the following in respect of EU citizens:

    (1) EU citizens and their family members have an unqualified right of residence on the territory of another Member State for a period of up to three months: Article 6 CRD.

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

        (a) They are workers or self-employed persons (Article 7(1)(a)). Article 7(3) sets out certain conditions in which a citizen can retain the status of worker or self-employed (for example because of illness or accident).

        (b) They have sufficient resources for themselves and their family members not to become a burden on the social assistance system and have comprehensive sickness insurance cover in the host Member State (Article 7(1)(b)).

(c) They are enrolled at a private or public establishment for a course of study and they have comprehensive sickness insurance cover and sufficient resources for themselves and their family members (Article 7(1)(c)).

(d) They are family members accompanying or joining a Union citizen who satisfies one of the conditions in Articles 7(1)(a)-(c) (Article 7(1)(d)). These rights extend to non-EU family members (Article 7(2)).

(3) Once an EU citizen has resided legally for a continuous period of five years in another Member State they have rights of permanent residence: Article 16(1) CRD. This right extends to non-EU family members: Article 16(2). Those rights are not subject to the conditions provided for in Article 7.

25. Each of the above provisions from the CRD is reflected in Article 13 WA:

> "1. Union citizens and United Kingdom nationals shall have the right to reside in the 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].
>
> 2. Family members who are either Union citizens or United Kingdom nationals shall have the right to reside in the host State as set out in Article 21 TFEU and in Article 6(1), point (d) of Article 7(1), Article 12(1) or (3), Article 13(1), Article 14, Article 16(1) or Article 17(3) and (4) of [the CRD], subject to the limitations and conditions set out in those provisions.
>
> 3. Family members who are neither Union citizens nor United Kingdom nationals shall have the right to reside in the host State under Article 21 TFEU and as set out in Article 6(2), Article 7(2), Article 12(2) or (3), Article 13(2), Article 14, Article 16(2), Article 17(3) or (4) or Article 18 of [the CRD], subject to the limitations and conditions set out in those provisions.
>
> 4. 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."

26. As can be seen from the above, Article 13(3) WA confers a right of residence for family members who are not EU citizens, subject to the relevant conditions of residence being met. The WA also continues the same definitions for "family members" as existed under the CRD: see Article 2(2) CRD and Article 9(a) WA.

27. Importantly, Article 13(1)-(3) WA each refer to Article 21 TFEU which is the foundational right of free movement and residence in the EU. While free movement is not continued by the WA, and the above EU law provisions only apply to the extent to

which the WA permits, the reference to Article 21 TFEU has important consequences as is clear from the decision in *AT* discussed below.

Article 23: Specific right to equal treatment

28. Article 23(1) confers a specific right to equal treatment for those who are "*residing on the basis of this Agreement*" (emphasis added):

> "1. In accordance with Article 24 of [the CRD], subject to the specific provisions provided for in this Title and Titles I and IV of this Part, all Union citizens or United Kingdom nationals residing on the basis of this Agreement in the territory of the host State shall enjoy equal treatment with the nationals of that State within the scope of this Part. The benefit of this right shall be extended to those family members of Union citizens or United Kingdom nationals who have the right of residence or permanent residence.
>
> 2. By way of derogation from paragraph 1, the host State shall not be obliged to confer entitlement to social assistance during periods of residence on the basis of Article 6 or point (b) of Article 14(4) of [the CRD], nor shall it be obliged, prior to a person's acquisition of the right of permanent residence in accordance with Article 15 of this Agreement, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status or to members of their family."

29. This mirrors the right that existed under Article 24(1) of the CRD which provided a specific right to equal treatment for those who are "*residing on the basis of this Directive*" including family members. As a matter of EU law, Article 24 CRD only conferred substantive equal treatment rights on those who satisfied the conditions of residence set out in the CRD: *CG* §§77, 79 and 83.

Article 18: Issuance of residence documents

30. Article 18 concerns the issuance of residence documents. It provides as follows (emphasis added):

> "1. The host State may require Union citizens or United Kingdom nationals, their respective family members and other persons, 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.
>
> 2. 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;

…

> 4. Where a host State has chosen not to require Union citizens … 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."

31. Article 18(1) permits the introduction of a "constitutive scheme" where those eligible have to apply for conferral of their WA rights. Article 18(4) provides for a "declaratory scheme" where rights are recognised by automatic operation of law. The UK and the EU Member States therefore had a choice as to which type of scheme to adopt. The UK adopted a constitutive scheme so that EU citizens and their family members had to make an application and be granted residency status in the form of either PSS (pre-permanent residence) or Settled Status (permanent residence) depending on their length of lawful residence in the UK at the point of application.

32. The application under Article 18 is, in the IMA's view and as set out in *R (IMA) v SSHD* [2022] EWHC 3274 (Admin), a gateway process for rights under Part 2 WA. In that case, Lane J observed that "*It is highly significant that Article 18(1)(a), (b), (c) and (d) make it plain the constitutive scheme established by Article 18 requires a person to make one, and only one, application for a new residence status*" (§177). Further, and as to the impact of Article 13 WA once an application has been granted under Article 18 WA, Lane J held that "*A person with Article 13 residence rights falling short of permanent residence is entitled to reside in the United Kingdom for as long as the relevant limitations and conditions in the Directive are satisfied. That is an inherent feature of the rights conferred by Article 13(1) to (3)*" (§156).

33. In practice, the UK Government took a more generous approach to granting PSS than strict compliance with the requirements of Article 13 WA. For example, the UK Government's approach required only simple residence as at the end of the transition period. This means that it is possible for a person to have PSS but not meet the conditions of the CRD as reflected in Article 13 WA and therefore not be residing on the basis of the WA but rather on domestic law alone.

Article 38: More favourable rights

34. Article 38(1) provides that nothing in Part 2 shall affect domestic laws which are more favourable to the persons concerned.

F IMA's submissions on the appeals

35. As explained above, the IMA respectfully suggests that there are four questions to be answered in order to resolve the appeal. Those questions are addressed in order below.

F.1 Does the Appellant have eligibility for housing assistance as a "family member" within the meaning of the Eligibility Regulations?

36. One of the conditions for housing assistance in domestic law is "eligibility" under s. 184(1)(a) of the Housing Act. Section 185(2) of the Housing Act 1996 provides that a person is not eligible for assistance under Part 7 if they are "*a person from abroad who is ineligible for housing assistance*". Section 185(3) permits the Secretary of State to specify categories of persons to be treated as ineligible on this basis.

37. Categories of persons ineligible for housing assistance are duly specified in Regulation 6 of the Eligibility Regulations. Regulation 6(2) sets out categories of persons that will nonetheless be eligible, such as "workers" and their family members. The definitions of these concepts are taken from EU law and have been preserved post-Brexit.[5]

38. In a nutshell, therefore, the position is that the eligibility of EU citizens for housing assistance is governed by the same rules that existed before the end of the transition period.[6] The grant of PSS alone is insufficient in domestic law to entitle an individual to housing assistance. Instead, generally speaking, an EU citizen will have to be a "worker" or "self-employed person" (or the "family member" of such an individual) at the time of their application to be eligible for housing assistance.

---

[5] Before the end of the transition period, eligibility would have been determined by the Immigration (European Economic Area) Regulations 2016 ("**EEA Regulations**"). The EEA Regulations were revoked, but they were preserved for the purposes of establishing eligibility for various forms of social assistance, including housing assistance: see the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 ("**2020 Regulations**"). See in particular paras. 2, 3(p) and 4 of Schedule 4 to the 2020 Regulations.

[6] As the Explanatory Notes to the amendments set out, "The effect of the amendments is to maintain the status quo so that where a person who is a family member of an EEA national with a right to reside of the type mentioned above (for example as the family member of an EEA jobseeker) is also granted limited leave to enter in the United Kingdom with an entry clearance that was granted under Appendix EU (Family Permit) to the Immigration Rules, this does not affect their eligibility."

39. The starting point is therefore to inquire as to whether the Council has correctly determined whether the Appellant was a qualifying "family member" (i.e., in this case, a dependent [redacted] at the time of her application. That is a factual question for the principal parties. The WA is only relevant if there is no scope for the Appellant to satisfy the domestic legislative criteria.

F.2 Does the Appellant come within the personal scope of the WA?

40. If the Court concludes that the Appellant does not satisfy the requirements of eligibility under the Eligibility Regulations, it is necessary to consider whether she can rely on the WA. In order to do so, she must come within the personal scope of Article 10 WA.

41. As noted above, the IMA's interpretation of Article 10 WA is that it is intended to cover persons who were residing in accordance with EU law at the end of the transition period and continued to reside thereafter. By way of illustration, the IMA intervened in the case of *SSWP v AT* [2022] UKUT 330 ("***AT UT Decision***"), and argued that AT was within personal scope because she had returned to the UK in October 2020 and was within her first three months of residence under Article 6 CRD as at 31 December 2020. That was why the IMA submitted that the Charter could come into play in her case. The Upper Tribunal recorded the IMA's submissions at §79: "*In this case, on the facts as understood, AT was residing in accordance with EU law at the end of the transition period (because at that time she had been in the UK for less than 3 months) and so was within Article 6 of the CRD. She was therefore within the personal scope of the WA under Article 10(1)(a)*".

42. The IMA acknowledges that the Upper Tribunal did not decide if this was the correct basis for AT being within the personal scope of the WA and did not explore the interpretation of Article 10 WA in any detail. However, the Upper Tribunal was clear that personal scope was a pre-requisite for the WA to be invoked in the first place. Since the SSWP did not take issue with AT being within the personal scope of the WA, the precise ambit of Article 10 did not have to be expressly decided (see *AT UT Decision* §§70, 79, 84, 96, 100, 102 and 106).

43. The Court of Appeal similarly did not have to address Article 10 WA in any detail in the *AT CA Decision*. The issue which was squarely before the Court of Appeal was the availability of (and the route to) Charter protection in AT's particular circumstances: *AT CA Decision* §§2, 16. The Court of Appeal decision is discussed further below.

The Appellant's position under Article 10 WA

44. The IMA notes that the Council stated in its Review Decision that "*I am satisfied that you are a family member of an EEA national who was lawfully resident in the UK prior to the 1st January 2021*" (Review Decision, p. 15, quoted in ASkel §17). Accordingly, it appears straightforward that the Appellant is in the personal scope of Article 10(1)(e) as at the end of the transition period.

45. In particular, Article 10(1)(e)(i) covers family members of EU workers so long as they resided in the UK "*in accordance with Union law before the end of the transition period and continued to reside there thereafter*". The Appellant appears to satisfy these conditions because she was a "family member" under EU law at the end of the transition period and continued to reside in the UK thereafter. On that basis, the IMA agrees with the Appellant's submissions at ASkel §§4 and 60.

46. The difficult question which remains unresolved on is whether PSS could – on its own – suffice to bring the Appellant into the personal scope of the WA. This was an issue which may have arisen in *VS v* [redacted] but does not appear to be necessary to resolve on the present appeal given the above. Given that the issue does not arise on the facts (given the finding in Review Decision, p. 15, quoted in ASkel §17), the IMA does not invite the Court to determine the point on a purely academic or hypothetical basis and would reserve its position as to this point given its significance.

47. By way of context, the interaction between the domestic grant of PSS and the meaning of the WA (in particular Articles 10, 13 and 18) is a point of significant importance and complexity which has potentially far-reaching consequences. The IMA considers that it would be best suited for resolution in a case where it can be considered carefully on the facts. In addition, the IMA notes that the Secretary of State in *AT* has sought permission to appeal in the Supreme Court and, in response, AT has indicated that a reference to the CJEU would be appropriate. Accordingly, the potential arguments as to the Charter might be reargued once again and the correct analysis as to the relevance of PSS may develop further. Nonetheless, if the IMA can be of assistance to the Court it is of course prepared to file additional submissions and/or to address this point in more detail at the hearing.

F.3 If the Appellant comes within the personal scope of the WA, is she entitled to rely on non-discrimination protections in the WA and what is the consequence of that?

48. Assuming the Appellant falls within the personal scope of the WA, then Article 12 (the general non-discrimination provision) and Article 23 (the specific equal treatment provision) are relevant. These provisions are modelled on Article 18 TFEU and Article 24 CRD respectively and therefore, given Article 4(3) WA, fall to be interpreted in line with EU law.

49. The IMA's position in respect of these non-discrimination provisions is as follows:

(1) As noted above, Article 12 WA is a general non-discrimination provision on the grounds of nationality. It states that "*without prejudice to any special provisions*", any discrimination on grounds of nationality within the meaning of Article 18 TFEU is prohibited in respect of persons under Article 10 WA. Accordingly, if the Appellant is within the personal scope of the WA, she is *prima facie* entitled to non-discrimination protection under Article 12.

(2) Having said that, it is well-established as a matter of EU law that Article 18 TFEU only applies where no other more specific anti-discrimination provision is applicable: Case C-581/18 *RB v TUV Rheinland LGA Products GmbH* [2020] 1 WLR 4849 at §§30-33; Case C-181/19 *Jobcenter Krefeld v JD* ECLI:EU:C:2020:794 at §78; Case C-333-13 *Dano v Jobcenter Leipzig* ECLI:EU:C:2014:2358 at §61.

(3) In *CG*, this led the CJEU to reframe the question for its consideration (which was put by the national court as one arising under Article 18 TFEU) as a question arising under the more specific rules of Article 24 CRD: *CG* §§66, 72. As the CJEU explained in §65 (emphasis added): "*In accordance with settled case law, the first paragraph of art.18 is intended to apply independently only to situations governed by EU law with respect to which the FEU Treaty does not lay down specific rules on non-discrimination.*"

(4) In the IMA's submission, therefore, applying the EU case law above, it follows that Article 12 must also cede to any more specific non-discrimination provisions contained elsewhere within the WA, in particular Article 23 WA.

(5) Article 23 WA confers protection on those residing "*on the basis of*" the WA. This provision incorporates and makes applicable, within the UK, Article 24 CRD

which protects individuals "*residing on the basis of this Directive*". As per Recital 20 of the CRD, this protection extends to those who classify as family members if they comply with the conditions of the CRD: "*all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals…*".

(6) It follows that if the Appellant is residing on the basis of the WA (i.e. in compliance with the conditions and limitation of the rights of residence granted by the WA) then she can take the benefit of Article 23. This follows from the way in which Article 24 CRD is usually interpreted, i.e., the substantive equal treatment provisions in Article 24 CRD are only available to those who comply with the conditions of the CRD: *CG* §75.

(7) However, if the Appellant is <u>not</u> residing on the basis of Article 13 WA, then the effect of *CG* (and *AT*) is that she only has the residual protection of the Charter. In particular, in *CG*, the CJEU made clear that if a person does not comply with the substantive residence conditions of EU law, then they can only rely on the fall-back protection of the Charter rather than the substantive equal treatment right in the CRD: *CG* §§81, 83-85.

50. The Appellant submits that she can take the benefit of the non-discrimination provisions in Articles 12 and 23 WA because she is within the personal scope of the WA and is residing on the basis of Article 13 WA: ASkel §§69-70. However, as explained above, the IMA considers that the substantive equal treatment provisions in Article 23 WA are only available to those who comply with the conditions of the WA. Hence in *CG* it was said in respect of the CRD that (emphasis added):

> "75. The Court has held that, so far as concerns access to social assistance, <u>a Union citizen can claim equal treatment</u>, by virtue of [Article 24 CRD], with nationals of the host Member State <u>only if his or her residence in the territory of that Member State complies with the conditions of [the CRD]</u> …
>
> 81. If an economically inactive Union citizen who does not have sufficient resources and resides in the host Member State without satisfying the requirements laid down in [the CRD] could rely on the principle of non-discrimination set out in Article 24(1) … <u>he or she would enjoy broader protection than he or she would have enjoyed under the provisions of that directive, under which that citizen would be refused a right of residence</u>."

51. The same analysis applies under the WA: the non-discrimination provisions in Article 23 WA are available to those who comply with the substantive conditions of residence under

the WA. In those cases, unequal treatment with UK nationals will be unlawful, even if it is contained in primary legislation, because of the primacy of the WA under s. 7A of the EUWA.

52. However, if the Appellant is not in compliance with the conditions and limitations of Article 13 WA, i.e. is not a dependent family member, but is within the personal scope of Article 10 WA, then she is not entitled to the protection of Article 23 WA. As explained below, the consequence of this is that the Appellant will have the residual protection of the Charter instead of the non-discrimination provisions in the WA. The reasoning in *CG* and *AT* does not suggest otherwise.

F.4 If the Appellant comes within the personal scope of the WA, is she entitled to the protections of the Charter as per *CG* and *AT*, and what are the consequences of that?

53. If the Appellant cannot show that she is residing on the basis of Article 13 WA, but is within the personal scope of Article 10 WA, she will have the "fall-back" protection of the Charter as was the case for CG and AT. That was the position in the case of *AT*, which led the Upper Tribunal and Court of Appeal to recognise that AT was entitled to the protection of the Charter even if she was not residing on the basis of Article 13 WA.

The IMA's position as to the Charter generally

54. For the avoidance of doubt, the IMA's position is that, although the Charter has not been "retained" generally in domestic law,[7] it has continued application in certain circumstances pursuant to the WA.[8] The WA brings with it the interpretive constraints of the Charter for two reasons:

    (1) First, under Article 4(3) "*the provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law*". Since "Union law" is in turn defined in Article 2(a) as including the Charter, this makes clear

[7] On the contrary, the effect of section 5(4) EUWA is that the Charter is generally not part of domestic law post the end of the transition period. It should be noted, however, that section 5(4) EUWA has to give way to the WA, by virtue of section 7A(3) EUWA, as reflected by section 5(7) EUWA.

[8] See *AT UT Decision* §90; *AT CA Decision* §§85, 103; see also *R (IMA) v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin) §§130-131.

that the Charter applies when interpreting the WA and the provisions of Union law to which it refers.[9] As the Upper Tribunal put in *AT* at §105:

> "Article 4(3), taken with Article 2, requires the parties to act compatibly with any Charter or fundamental rights relevant to the situation, whenever they are "applying" (as well as when "interpreting") the WA. This mirrors the effect of the Charter and fundamental rights in EU law, i.e. constraining Member State action when they are 'implementing Union law'."

(2) Second, Article 4(1) WA requires the provisions of the WA and the provisions of Union law which it makes applicable to produce "*the same legal effects*" in the UK as they produce within the Union and its Member States. In the IMA's submission, Article 4(1) is an outcome driven rule: it requires that the provisions of the WA produce the same outcome in the UK and the EU Member States. Such consistency in the application of the WA is necessary because of its reciprocal nature. As explained above, it operates as much for the protection of UK citizens residing in the EU, as for EU citizens residing in the UK. This was also confirmed in *AT UT Decision* at §§108-110 and the IMA's submissions were explicitly adopted in *AT CA Decision* §85.

The application of the Charter based on AT

55. The decisions in *AT* confirmed that the Charter has a role to play in respect of citizens with PSS who are within the personal scope of the WA. There were a number of building blocks to this conclusion:

(1) In *CG*, the CJEU had found that the Charter applied to CG's application for benefits (a form of social assistance). Even though CG was residing on the basis of PSS, and did not have rights of residence under the CRD, her historical exercise of rights of free movement under Article 21 TFEU brought her within the scope of EU law and therefore the Charter: *CG* §§83-85, 87. Importantly, Charter protection was available to her even though she did not satisfy the conditions of residence in the CRD: *CG* §83. See further the discussion of *CG* in *AT UT Decision* §§52, 54, 93-95 and *AT CA Decision* §71.

[9] It is well established that, as a matter of EU law, the Charter is a powerful interpretative tool. Indeed, 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": Case C-579/12 *RX-II Commission v Strack* EU:C:2013:570, quoted in *AT CA Decision* §88.

(2) The reasoning of *CG* "translated" to the post-implementation period under the WA. AT, like CG, had PSS which was not a form of qualifying residence under the relevant domestic rules. However, AT had a basic or "anchoring" right of residence which pre-dated but also subsisted beyond the transition period. That EU law based right became an international law right under the WA and was encapsulated into PSS, the domestic right protecting prior WA and Union law rights: *AT UT Decision* §102; *AT CA Decision* §99.

(3) The SSWP's decision as to AT's benefits involved "applying" or "interpreting" AT's modified Article 21 rights to reside and therefore had to comply with the Charter. Her Article 21 TFEU rights generated legal effects through the WA including the application of the Charter under Article 4(1), 4(3) WA. See *AT UT Decision* §§106, 108-109; *AT CA Decision* §§84-92.

(4) The Charter required the SSWP to conduct an individualised assessment to determine if there was an actual and current risk that refusal of benefits would contravene Article 1 (dignity) and/or Articles 7 and 24 (private life and children): *AT UT Decision* §§126-128; *AT CA Decision* §§144-150. This was by reference to the actual facts and reality of AT's case, not the theoretical support that might be available to her on the statute books: *AT CA Decision* §§151-157.

(5) In respect of human dignity, the threshold to be applied is that set out in EU case law such as *Haqbin*,[10] i.e. there has to be an actual and current risk that the person will find themselves in a situation of extreme material poverty incompatible with human dignity, for example lacking the most basic needs: *AT UT Decision* §§123-125, 155; *AT CA Decision* §§112, 171.

56. Thus, the Upper Tribunal and the Court of Appeal confirmed that the reasoning in *CG* did apply by analogy to the WA such as to confer on AT the benefit of Charter protection.

Consequence of Charter rights in housing cases

57. If the Appellant is within the personal scope of Article 10 WA, and the Charter applies, the IMA submits that the Charter would apply to local authorities when deciding her

[10] Case C-233/18 *Haqbin v Federaal Agentschap* EU:C:2019:956 [2020] 1 WLR 2633. In the Court of Appeal in *AT*, the judges also discussed the common law concept of the "law of humanity" as representing a similar minimum standard of dignity: *UT CA Decision* §35.

application under the Housing Act. As per *AT*, that would be a decision within the scope of the Appellant's rights which are recognised by the WA.

58. In addition, the State has chosen to allocate the housing responsibility under statute to local authorities, so the Council must bear the relevant burden when interpreting and applying relevant domestic legislation. This was made clear in the Court of Appeal in *AT* where it was noted that:

> "169. In conclusion, I accept that as an indivisible entity the state is entitled to allocate responsibility to its organs for ensuring compliance with fundamental rights. But the simple fact of allocation does not absolve the state from the continuing duty to ensure that rights, in this case conferred under the Withdrawal Agreement and accepted by the United Kingdom, remain capable of being effectively enforced."

59. By way of illustration, in *AT*, it was for the individual decision-maker on Universal Credit (with delegated powers from the SSWP) to conduct the individualised assessment. The Charter affected that decision as to AT's benefits. Similarly, here, the decision-maker is the Council who has been granted the relevant powers by Parliament. It is not possible for the Council to avoid that obligation on the basis that it is for the State to deal with it (particularly where the Secretary of State has not been joined).

60. Precisely how the local authority is supposed to give effect to the Charter is a distinct question. *AT* was a decision in the context of Universal Credit where it was found that in some cases an individualised assessment was necessary. In the housing context, it may be that a more detailed assessment as to what recourse the applicant will have to support or housing in practice will be needed before an application can be refused under s. 185 of the Housing Act. Section 7A EUWA acts as a conduit pipe to give primacy to the WA even over primary legislation. The key question will be whether or not there is a real risk of violating the applicant's right to dignity under the Charter, applying the tests in *Haqbin*: *AT UT Decision* §126; *AT CA Decision* §112.

G Conclusion

61. The IMA respectfully submits that the Council failed to engage with the WA in its decisions. The proper questions under the WA required considering whether the Appellant was within the personal scope of Article 10 WA, and the consequences of that under Articles 12 and 23 WA and the Charter as set out above.

AARUSHI SAHORE

Brick Court Chambers

7-8 Essex Street
London
WC2R 3LD

30 January 2023