

IN THE COUNTY COURT  
AT [REDACTED]

BETWEEN:

[REDACTED]

Appellant

-and-

[REDACTED] COUNCIL

Respondent

-and-

**THE INDEPENDENT MONITORING AUTHORITY FOR  
THE CITIZENS' RIGHTS AGREEMENTS**

Intervener

-and-

**THE AIRE CENTRE**

Intervener

-and-

**THE 3MILLION LIMITED**

Intervener

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**SUPPLEMENTARY NOTE FILED BY THE  
INDEPENDENT MONITORING AUTHORITY**

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*This note uses the same abbreviations as the IMA's skeleton argument dated 30 January 2024.*

**Whether PSS on its own suffices for Article 10 WA**

1. This supplementary note briefly addresses the issue of whether PSS, on its own, is sufficient to bring the Appellant within the personal scope of Article 10 WA (and therefore able to rely on the protection of the Charter). The IMA had previously understood that the issue did not arise as the Appellant was straightforwardly a family member of a worker at the end of the transition period. However, it appears there is a factual dispute as to the Appellant's situation at the end of the transition period. It is thus

possible that this Court will need to decide whether the Appellant can rely on her PSS as the basis for bringing her within the scope of the WA.

2. As a starting point, as far as the IMA is concerned, being able to identify who is within the personal scope of Article 10 WA (and therefore who can avail of any rights under it) is a critically important question with ramifications beyond this case. It is therefore necessary to reason from first principles and consistently with the limited guidance that is available.

3. As the Court will recall, Article 10 WA states:

“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; ...”

4. For the IMA’s part, the principal hurdle for the argument that PSS is sufficient for Article 10 is the requirement for residence before the end of the transition period to be “*in accordance with Union law*”. The requirement is contained within the explicit wording of Article 10 as set out above. For the avoidance of doubt, the IMA agrees with the 3million that the reference to “residing thereafter” does not necessarily require compliance with Union law. As to the nature of residence required before the end of the transition period, the IMA continues to consider that the provision is not broadly worded enough to capture anyone who, at any stage in the past, exercised any EU free movement or residence rights. This is because the provision appears to contemplate a continuation of residence spanning across the end of transition period. However, one important update to the IMA’s position on the question of residence “in accordance with Union law” arises out of the AT CA Decision.

### **The AT CA Decision**

5. While the Court of Appeal was not squarely confronted with this question, it appears to have reasoned in a way that implicitly supports the case that, for the purposes of obtaining

the protection of the Charter, having PSS could be sufficient to satisfy the minimum requirements of Article 10 WA.

6. By way of recap, the Court of Appeal agreed with the Upper Tribunal as to the application of the Charter, concluding in effect that the reasoning of *CG* “translated” to the WA. In the course of its reasoning, the Court of Appeal stated that (emphasis added):

“71. ... The UK authorities had granted CG a right of residence even though she lacked sufficient resources to support that residence. In so doing the authorities applied more favourable rules, than those established under the CRD. That action by the UK was not therefore an implementation of the CRD but it was still an implementation of the fundamental right of CG to move and reside freely under Article 21(1) TFEU, which provision was to be applied in accordance with the Charter.”

7. The Court of Appeal thus described the grant of PSS as an “implementation” of a preserved right under Article 21 TFEU from before the end of the transition period. The Court of Appeal also described the Article 21 TFEU residence right as the “anchoring right” which was “recognised” or “encapsulated” by PSS (emphasis added):

“99. Applying that approach to the present case AT has a basic or anchoring right of residence which pre-dated but also subsists beyond the transition period. That EU law based right became an international law right under the Withdrawal Agreement and is now encapsulated into PSS, the domestic right protecting prior Withdrawal Agreement and Union law rights. ... The failure to provide support amounts to an attack upon the basic, anchoring, right; on the analysis of the SSWP the tail eviscerates the dog.”

8. Based on these indications from the Court of Appeal in §§71 and 99, the IMA considers the correct position to be that all those who exercised Article 21 TFEU rights, so far as such rights have been recognised in the domestic grant of PSS, are entitled to the protection of the Charter when a decision is made as to their benefits (or equivalent social security provisions). The conclusion indicates that where those persons exercised Article 21 TFEU rights, that was a form of residence “in accordance with Union law” before the end of the transition period, broadly understood. That is the explanation for how persons with PSS can satisfy the terms of Article 10 WA, in that such persons come within the personal scope of the WA for the purposes of the application of the Charter.
9. The point made above does not mean that everyone who ever exercised Article 21 TFEU rights at any time in the past is within scope; they are in scope only where that anchoring right was sufficient for recognition in the form of PSS. Nor does it mean that the full gamut of Article 21 TFEU rights have been preserved by the grant of PSS. Article 21

TFEU is the historical, foundational right of free movement and, clearly, that has not been preserved in its full form under the WA because free movement has come to an end. Even as a matter of EU law, Article 21 TFEU makes clear that the right to move and reside freely is subject to the other limitations and conditions laid down in the Treaties and the measures adopted thereunder.

10. The better view is that only a limited aspect of the bundle of Article 21 TFEU rights has been preserved by PSS for the purposes of the application of the Charter. In other words, what is ‘encapsulated’ into PSS is a limited subset of Article 21 residence rights which provide an individual with the backup of Charter protection. As a result, and consistently with the Court of Appeal’s decision, all those with PSS come within the personal scope of Article 10 WA to the extent that they are able to benefit from the residual protection of the Charter.
11. Finally on this point, as far as third country family members are concerned, their position is more nuanced. Third country family members such as the Appellant never had their own freestanding Article 21 TFEU rights (as they were never EU citizens). Accordingly, the analysis must focus on the primary family member’s (e.g. the worker’s) Article 21 TFEU rights. That right is the “anchoring right” and the family member’s PSS was granted in recognition of that right. The same result follows, such that the grant of PSS brings the Appellant within personal scope of Article 10 WA (“residing in accordance with Union law”) for the purposes of Charter protection.

### **Further implications**

12. Finally, for the avoidance of doubt, it does not follow in the IMA’s view that all those with PSS are residing “on the basis of” Article 13 WA. Article 13 still falls to be understood on its own terms and in accordance with EU case law and principles as incorporated into that provision by virtue of the references to EU legislation and the interpretative provisions in Article 4 of the WA. It remains important to distinguish clearly between: (i) Article 10 WA which concerns personal scope; and (ii) Article 13 WA which establishes rights of residence under the WA. The IMA’s understanding of *CG* and *AT* is that they do not affect this basic distinction between scope and residence rights.

13. In this regard, it is important to recall that the CJEU in *CG* and the Upper Tribunal and Court of Appeal in *AT* were fundamentally concerned with identifying Article 13 as the “gateway” or “hook” for the application of the Charter (given that Article 4(3) brings the Charter into play where the WA is being “interpreted” or “applied”). They were not considering the broader questions which arise as to the operation of the WA, including the precise interaction between domestic grants of PSS and the conditions and limitations of residence rights under the terms of the WA.

AARUSHI SAHORE

Brick Court Chambers

7-8 Essex Street  
London  
WC2R 3LD

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