[redacted]

Claim No. [redacted]

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

BETWEEN:

[redacted]

Appellant

-and-

[redacted]**DISTRICT COUNCIL**

Respondent

-and-

(1) THE3MILLION LTD

(2) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

(3) INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS

Interveners

SKELETON ARGUMENT ON BEHALF OF THE IMA

A Introduction and summary

1. This is the skeleton argument of the Independent Monitoring Authority for the Citizens' Rights Agreements (the "**IMA**") for the hearing of the above appeal under s. 204 of the Housing Act 1996 (the "**Housing Act**"). The IMA is intervening in this appeal pursuant to its statutory duties to monitor and promote the adequate and effective implementation and application of Part 2 within the UK of the EU-UK Withdrawal Agreement ("**WA**") which concerns Citizens' Rights.[1]

[1] By way of background, 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

2. The appeal concerns the decision of the Respondent (the "**Council**") to refuse the Appellant homelessness assistance on the basis that she does not satisfy the qualifying residence criteria under s. 185 of the Housing Act and relevant regulations. As the IMA understands it, the Council refused assistance because, while the Appellant held pre-settled status ("**PSS**") under the EU Settlement Scheme ("**EUSS**"), this was not sufficient for the purposes of eligibility for homelessness assistance. As such, the appeal raises potentially important issues under Part 2 WA because the Appellant is an EU citizen who may have rights under the WA which the Council has failed to take into account in refusing homelessness assistance.[2]

3. For the reasons set out below, the IMA's position on the appeal is as follows:

   (1) PSS of itself is not a form of residence under the WA absent compliance with the substantive requirements of the WA. The residence rights conferred by the WA (like those under the predecessor rules in EU law) are inherently conditional and require ongoing compliance to be maintained. As such, the Appellant is not entitled to the protection of Article 23 WA because she is not residing "on the basis of" the WA by merely having PSS.

   (2) The UK Government's constitutive scheme under Article 18(1) WA (as implemented domestically through the EUSS) does not provide for unconditional rights but rather establishes a scheme enabling EU citizens to be documented and to "be counted" in principle as a beneficiary of the WA. Thus PSS may provide a one-time check of that status, but ongoing compliance with the underlying WA conditions is needed to retain residence rights under the WA and to accumulate lawful residence on the pathway to permanent residence under the WA.

   (3) As a result of the fact that PSS and residence rights under the WA are not necessarily co-extensive, pursuant to the cases of 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***"), a person such as the Appellant – who does not hold any other

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] These submissions focus on the WA since the Appellant here is an EU national. In general, however, identical provision is made in the EEA EFTA Separation Agreement to the WA (see Article 22 of that agreement) and the points made in these submissions are therefore of similar application in both cases.

entitlement to residence save for their PSS – is only entitled to the fall-back protection of the EU Charter of Fundamental Rights (the "**Charter**"). That in turn requires an individualised assessment to ensure that the Appellant and her children can live in dignified conditions before any decision to refuse assistance is made.

4. The IMA is grateful for the opportunity to intervene and hopes to assist the Court as a neutral and independent party as to the proper interpretation of Part 2 WA. The IMA has previously intervened in similar proceedings which raise similar issues, namely the application of the non-discrimination provisions in the WA as well as the application of the Charter to homelessness assistance under the Housing Act.[3]

5. These submissions are structured as follows. The factual background is summarised in Section B. The legal framework of the WA is explained in Section C. The IMA's submissions on each of the key legal questions is set out in Section D.

B Background

B.1 Factual background

6. The IMA defers to the principal parties as to any detailed factual disputes concerning the personal circumstances of the Appellant. The essential facts for the purposes of the analysis under the WA as the IMA understands them are as follows:[4]

   (1) The Appellant is an EU citizen with [redacted] nationality who arrived in the UK on [redacted] November 2020. The Appellant appears to have several medical conditions [redacted].

   (2) The Appellant's elder daughter joined her in the UK on [redacted] 2020 and her younger daughter joined her in the UK on [redacted] 2021. The Appellant's daughters appear to have complex needs.

   (3) The Appellant was granted PSS on [redacted] 2020.

   (4) The Appellant applied for homelessness assistance on [redacted] 2021. The Appellant was refused as being ineligible under s. 184 of the Housing Act on the

[3] For instance *C v Oldham* [2024] EWCC 1 and two appeals that were settled in the Court of Appeal before hearing: CA-2022-000752 and CA-2022-001012.

[4] See the Review Decision Letter dated 21 January 2022 §§2.1-2.24 **[Bundle/pp.7-9]** and ASkel §§23-30. The background is also contained in the judgment dismissing the Council's strike out application in [2024] EWHC 1234 (KB).

same day as her application [redacted] 2021) and that decision was affirmed following a review on [redacted] 2022 (the "**Review Decision**").

7. The Review Decision proceeded on the basis that the Appellant was not eligible by virtue of having PSS for homelessness assistance under s. 185 of the Housing Act, rejecting arguments as to equal treatment which relied on PSS is a grant of a residence status under Article 18 WA.[5] The Review Decision also concluded that the Charter did not apply and would not produce a different outcome.[6]

8. The Appellant appealed the Review Decision on [redacted] 2022.[7] The appeal has taken some time to reach a hearing because of interlocutory issues concerning the correct identity of the Respondent ([2024] EWHC 112 (KB)) and a strike out application which was refused ([2024] EWHC 1234 (KB)) ("**Strike Out Judgment**"). In addition, following the Review Decision, the Appellant made further homelessness applications to the Council which have since been withdrawn because she is, at least temporarily, in housing.[8] However, given the wider public interest in the issues raised, the Appellant has been given permission to continue her appeal in respect of the Review Decision.[9]

B.2 The Appeal: Article 23 WA

9. The Appellant challenges the Review Decision principally on the basis of Article 23 WA. Article 23(1) WA confers a specific right to equal treatment for those who are "*residing on the basis of this Agreement*" (emphasis added):[10]

> "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

[5] Review Decision Letter §§4.33-4.38 **[Bundle/p. 17]**.

[6] Review Decision §§4.45-4.61 **[Bundle/pp. 18-19]**.

[7] The amended Appellant's Notice is at **[Bundle/p. 22]**.

[8] Strike Out Judgment §11.

[9] Strike Out Judgment §41.

[10] As far as the IMA understands the factual context, Article 23(2) WA is not relevant on this appeal; the derogations therein are not relevant to the Appellant.

> 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."

10. Article 23 WA is modelled nearly verbatim on Article 24 of the Citizens' Rights Directive ("**CRD**") and therefore falls to be interpreted in line with EU case law as a result of the implied continuity and consistency of the WA with EU law. It also flows from the provisions in Article 4(4)-(5) WA which set out how pre- and post-transition case law is to be used in interpreting the WA.

11. As a matter of EU case law, Article 24(1) CRD confers equal treatment rights in respect of social assistance on those who satisfy the substantive conditions of residence set out in the CRD. This is clear from the CJEU's decision in Case C-333-13 *Dano v Jobcenter Leipzig* ECLI:EU:C:2014:2358 ("***Dano***") where in respect of Article 24(1) CRD it was found that "*a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of* [the CRD]" (at §69). This flowed from the fact that the provision requires residence "*on the basis of*" the CRD (at §68).

12. After *Dano*, the CJEU handed down its decision in *CG* and found that, because CG was not residing in accordance with the conditions of EU law, she was entitled only to the fall-back protection of the Charter rather than the full protection of Article 24 CRD (see *CG* §§75, 77, 79 and 83). Like the Appellant in this case, CG's only right of residence in the UK was her PSS. The analysis in *CG* was then expressly domesticated after the end of the transition period in *AT* under the WA as explained below.

13. The Appellant argues that, notwithstanding the approach taken in *CG* and *AT*, she is entitled to the equal treatment protections under Article 23 WA. This is because the grant of PSS is pursuant to the UK Government's constitutive scheme under Article 18(1) WA and therefore is a form of residence "*on the basis of*" the WA: ASkel §§89-90, 113. It is submitted by the Appellant that the grant was unconditional by the choice of the UK Government: ASkel §§101-102. Thus, the grant of residence under Article 18 WA is free-standing and independent of the conditions of residence under Article 13(1)-(3) WA: ASkel §104.

14. This submission – in respect of Article 18 WA – has been raised in recent housing appeals in the County Court with opposing outcomes:

    (1) In *C v Oldham* [2024] EWCC 1, HHJ Bird accepted the IMA's submissions that Article 23 WA requires substantive compliance with the residence conditions in Part 2 WA and that PSS on its own is not sufficient for residence on the basis of the WA (see §§38, 51-52). As will be explained below, the IMA's position is that PSS is a gateway to the rights under the WA, and a basis for Charter protection, but not itself a form of unconditional residence granted by the WA. Thus the correct analysis is that because the Appellant holds PSS, and so is in scope of the WA for the purposes of Charter protection, the Council ought to have conducted an individualised assessment to ensure that the Appellant's (and her children's) Charter rights were not violated by the decision to refuse assistance.

    (2) On the other hand, in *Hynek v Islington*, in which the IMA did not intervene, HHJ Saunders took a different approach. The Judge agreed with the Appellant in that case that PSS was a grant of rights of residence under Part 2 WA. Therefore the Appellant was residing on the basis of the WA and was entitled to the protections of Article 23 WA: §§56-57, 60-61. The Judge also concluded that the case law of *Dano* and *CG* which was applying Article 24 CRD could be distinguished as they were not cases concerning Article 23 WA: §§51, 75.

15. The IMA's position is the same as it was in *C v Oldham* and the IMA will invite the Court to endorse the approach of HHJ Bird for the reasons explained in more detail below.

C The Legal Framework

16. The appeal raises a difficult question of construction under the WA. It is therefore necessary to sets out how Part 2 WA operates in practice, including how it adopts, and puts on a new footing, longstanding concepts of EU law.

C.1 Introduction to the WA

17. The WA is an international treaty between the UK and the member states of the EU. The principles in the Vienna Convention on the Law of Treaties govern its interpretation.[11] This means it must be interpreted in accordance with its context and its purpose.[12] 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.

18. The WA expressly 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*".

    (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.

    (3) Article 4(4) provides that Union law or provisions or concepts thereof shall be "*interpreted in conformity with*" relevant CJEU case law from before the end of the transition period.

    (4) Article 4(5) provides that UK courts "*shall have due regard*" to relevant CJEU case law from after the end of the transition period.

19. The WA has been implemented in domestic law in a similar manner to how EU law was previously implemented in the UK. Thus, s.7A of the European Union (Withdrawal) Act 2018 ("**EUWA**") creates a new "conduit pipe" for the WA so 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

[11] 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* [2023] EWHC 1615 (Admin) §82; *SSWP v AT* [2022] UKUT 330 (AAC) §36; *SSWP v AT* [2023] EWCA Civ 1307 §80.

[12] 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*".

domestic legislation, including other provisions of EUWA itself, is subject to the general implementation of the WA into domestic law. The WA therefore has supremacy over the domestic legal framework.

C.2 Part 2 of the WA

20. Part 2 of the WA sets out the provisions on Citizens' Rights. At the end of the transition period (11pm on 31 December 2020), EU free movement law came to an end. However, the WA incorporated key aspects of the EU legal framework for free movement and residence for EU citizens already residing in the UK (and on a reciprocal basis UK citizens already residing in the EU). In doing so, it was intended that there would be consistency in the effect of the WA in Member States and in the UK (see Recital 6 and Article 4(1) WA). These provisions now constitute a new body of law under the WA.

Article 10: Personal scope

21. 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.[13] Article 10(1)(a) provides as follows:

> "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; …"

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

(1) The first concerns timing. The IMA's position is that the purpose of Part 2 of the WA is to take a snapshot of the cohort of EU citizens who, 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

[13] For the avoidance of doubt, despite the indications in *Hynek v Islington* §62, the IMA submits that Article 10 WA does not itself confer any residence rights; it is simply the starting point for determining who is within the personal scope of the WA.

there thereafter"). This approach is consistent with indications in the case law and the European Commission's guidance.[14]

(2) The second concerns the nature of residence rights required before the end of the transition period. Article 10(1) WA refers to residence (or exercising a right of residence) "*in accordance with Union law*". This is 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. At least for the purposes of engaging the Charter, it must also include all those with PSS, given the analysis in *AT*.[15]

23. In this case, there is no difficulty as to personal scope because the Appellant arrived in the UK in November 2020 so was within her first three months of residence under Article 6 CRD and therefore residing in accordance with Union law as at 31 December 2020. She therefore falls within Article 10(1)(a) WA.

Article 12: General prohibition on non-discrimination

24. Article 12 establishes a right to non-discrimination on the grounds of nationality. It is within Part 2 Title I which is headed "General Provisions":

> "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.*"*

25. It will be noted that this is both directly modelled on the approach of Article 18 of the Treaty on the Functioning of the European Union ("**TFEU**") as well as directly incorporating the wording of that provision into the WA. As was explained in *CG* §§65, 67, under EU law, the general non-discrimination provision gives way to the specific provision for equal treatment concerning social assistance in Article 24 CRD.[16] The same

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[14] *Ali v SSHD* [2023] EWHC 1615 (Admin) §§84-87; *Celik v SSHD* [2023] EWCA Civ 921 §54; Commission Guidance dated 1 July 2022 at §2.1, available online.

[15] The issue is not in dispute in this case but the IMA's interpretation of the decisions in *AT* is that the grant of PSS recognises or encapsulates the previous Article 21 TFEU right and therefore could be treated as residence "*in accordance with Union law*" at the end of the transition period for the purposes of engaging the Charter (see the Court of Appeal's decision at §§71, 99). This does not answer the question on this appeal under Article 23 WA, however, which requires residence "*on the basis of*" the WA.

[16] For the avoidance of doubt, 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-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.

reasoning must apply to the WA. The general non-discrimination provision within Article 12 WA must therefore cede to the specific equal treatment provision within Article 23 WA. Hence this appeal is concerned with Article 23 WA rather than Article 12 WA.

Article 13: Pre-permanent right to reside

26. 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 the CRD. The CRD provided for a scheme of residence which varied according to the length of residence and activity of the citizens concerned:

    (1) EU citizens and their family members have an unqualified right of residence in other member states 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 conditions in Article 7(1) CRD:

        (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)).

27. Each of the above provisions from the CRD is reflected in Article 13 WA. In addition, Article 13(4) WA provides that the host state cannot impose any other conditions or limitations on residence rights other than those provided for in Part 2 Title II; any "*discretion*" is to be exercised in favour of the person concerned.

Articles 15-16: Permanent right to reside

28. Article 15 WA provides for a permanent right of residence after five years' lawful residence:

> "1. Union citizens … 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 [the CRD] shall have the right to reside permanently in the host State under the conditions set out in Articles 16, 17 and 18 of [the CRD]. 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."

29. Article 16 WA permits a person to accumulate lawful residence spanning before and after the end of the transition period:

> "Union citizens … and their respective family members, who before the end of the transition period resided legally in the host State in accordance with the conditions of Article 7 of [the CRD] for a period of less than 5 years, shall have the right to acquire the right to reside permanently under the conditions set out in Article 15 [WA] once they have completed the necessary periods of residence. 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."

30. Under the CRD, pre-permanent residence rights are inherently conditional. They become unconditional only once the person has resided lawfully, i.e. in compliance with the conditions of being a worker or student or similar, for five years under Article 16 CRD.[17] After that point, residence rights are not subject to the conditions of being a worker, being self-sufficient, or similar as set out in Article 7 CRD. The same position pertains under Article 15 WA. In addition, Article 16 WA permits those who have accumulated lawful residence falling short of five years to acquire the right to reside permanently if they continue that lawful residence after the end of the transition period.

Article 18: Issuance of residence documents

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

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[17] Cases C-424/10 and C-425/10 *Ziolkowski* (ECLI:EU:C:2011:866) §§39-47 ("the right of residence is subject to the conditions set out in art 7(1) of Directive 2004/38 and, under art 14(2), that right is retained only if the Union citizen and his family members satisfy those conditions. It is apparent from recital (10) in the preamble to the directive in particular that those conditions are intended, inter alia, to prevent such persons becoming an unreasonable burden on the social assistance system of the host member state.")

> "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."

32. Article 18(1) WA 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.

33. The grant of a residence document under Article 18 WA is, in the IMA's view, a gateway for residence rights under Part 2 WA. Each beneficiary is conferred rights under Title II to Part 2 WA by being issued a residence document: Article 18(1) WA. This includes the right under Article 13 WA, which is a right to reside under the limitations and conditions as provided in the provisions of EU law referenced in Article 13(1)-(3) WA. Similarly, just as in EU law it was necessary to comply with the substantive conditions of residence (e.g. being a worker) to retain residence rights and to accrue permanent residence rights, an individual needs to keep complying with the conditions of Article 13 WA to retain residence rights and in order to acquire permanent residence under Article 15 WA. This is because the rights conferred on the individual under Article 13 WA are inherently conditional.

34. This will be explained in more detail below, but the key point is that the residence document clearly establishes that the recipient qualifies for the right to be counted as a

beneficiary of the WA. It serves to distinguish those beneficiaries from those EU citizens who do not enjoy those rights.

Article 23: Specific right to equal treatment

35. Article 23(1) WA confers a specific right to equal treatment for those who are "*residing on the basis of this Agreement*" and is the key provision in this appeal.

Article 38: More favourable rights

36. Article 38(1) WA provides that nothing in Part 2 WA will affect domestic laws which are more favourable to the persons concerned. This provision is materially identical to Article 37 CRD.

D The IMA's Submissions

D.1 The nature of the grant of PSS under Article 18 WA

37. At the core of the argument advanced by the Appellant is a submission that the WA mandates a different result from cases such as *CG* and *AT* because the UK Government has chosen to make a grant of residence under Article 18(1) WA which "confers" residence rights under Part 2 WA.

38. The IMA submits that this is not the correct approach to the interpretation of the WA. The establishment of a constitutive scheme under Article 18(1) WA does not have the result that PSS is granted on an unconditional basis for five years, waiving the requirement to continue to comply with the substantive conditions in Article 13 WA, and thereby sidestepping *CG*. Rather, the same analysis applies as applied under EU law due to the express terms of the WA. The fact that PSS is granted pursuant to Article 18 WA does not obviate the need for compliance with Article 13 WA. This approach is supported by the following matters.

39. ***First***, the starting point is that Part 2 WA was intended to <u>continue</u>, in the interests of certainty and consistency, significant aspects of the EU law framework as provided for by that agreement. The continuation of the meaning of underlying EU law concepts is made clear by Article 4 WA. In practice, the WA permits all those residing in accordance with Union law at the end of the transition period to continue to do so on the same limitations and conditions in the CRD after the end of the transition period. It also enables

those who have not yet acquired 5 years' lawful residence to do so after the end of the transition period and thereby acquire permanent residence rights (see Article 16 WA).

40. ***Second***, it is important to distinguish at the outset between the operation of the domestic scheme (the EUSS) and the meaning of the WA (at the level of international law). Under Article 38 WA, it is clearly permissible for the UK or a Member State to adopt more favourable provisions in their domestic law. But these do not necessary "*read back*" into the WA. This is entirely sensible to ensure the WA operates consistently across the UK and different Member States. This is also clear from *CG* where it was said that the more favourable grant under Article 37 CRD (on which Article 38 WA is based) "*does not in any way mean that such provisions must be incorporated into the system introduced by that directive*" (at §83).

41. ***Third***, to explain the nature of the conditional residence rights under the WA, it is necessary to understand the judicial review claim commenced by the IMA in *R (Independent Monitoring Authority) v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin) ("***R (IMA) v SSHD***"). In that case:

    (1) Lane J found that a person only needed to make a single application under the EUSS so that, once their five years of lawful residence (in compliance with Article 13 WA) were accrued, they would be able to obtain permanent residence under Article 15 WA without a further application (§192). They would not lose their conditional right to reside under Article 13 WA at the end of the five years in the absence of such an application (§151). This reflects what the IMA submits is the orthodox view that Article 13 WA confers conditional rights of residence which are not co-extensive with the grant of PSS.

    (2) Lane J also considered the operation of Article 18 WA. He found that the grant of PSS reflected the individual's compliance at a point-in-time; the document issued under Article 18(1) WA therefore evidences a "*qualified right of residence*" which is subject to the conditions in Article 13 WA (§181). The Secretary of State had argued that this approach to Article 18(1) WA would undermine the utility of the constitutive scheme, in that it would not be determinative of what rights a person has at any point in time (see §182). In this case, the Appellant makes a similar argument to the effect that the new residence status is a "dead letter" if it does not actually confer rights of residence under the WA (ASkel §103). As to this, Lane

J clarified that the purpose of a constitutive residence scheme as permitted under A18 WA was to establish a "bright line" between those who were beneficiaries of the WA and those who were not (§§93, 182-183). In addition, Lane J observed at §156 that:[18]

> "[T]he pursuit of certainty under a constitutive residence scheme cannot affect the nature of the rights of residence conferred by the WA. 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)".

Thus, the Court acknowledged that the grant of PSS did not change the fact that residence rights under Article 13 WA are conditional. It is also important to recognise that concerns as to the administrative uncertainties attendant in such a domestic system could not determine the meaning of the words used in the international treaty. This is why *Hynek v Islington* should be treated with caution insofar as it refers to administrative difficulties and the Windrush scandal at §63 (a submission specifically rejected by Lane J at §§154, 182-184).

(3) As regards the purpose of the EUSS, and what PSS represents, Lane J acknowledged in *R (IMA) v SSHD* that a wider cohort of persons have PSS than would have residence rights under the WA:

> "134. … the defendant, in framing the EUSS, has adopted a policy which is more generous than what is required by the WA, in that leave may be granted under the EUSS by reference to "mere" residence in the United Kingdom at the relevant point in time, rather than residence in accordance with EU free movement rights. This policy, however, sheds no light on the interpretative task for this court."

By way of context, the EU Commission had described the application for PSS as an application to "stand up and be counted" (§90); and had referred to PSS as recognising the individual's status as a "beneficiary" of the WA (§160). Indeed, the Secretary of State for the Home Department had also submitted that the grant of PSS represented a "snapshot" at the point in time of the application (§156). On this view, the substantive residence rights afforded to a beneficiary depend on their personal situation at the time (§160) (such as their status as a worker). However, the EUSS was not, on any party's submissions in that case, a method of jettisoning the conditions of pre-permanent residence altogether. All parties

[18] [2022] EWHC 3274 (Admin) §156.

accepted that there were conditions which needed to be met for the Article 13 WA right to be made out and to subsist.

42. ***Fourth***, in *C v Oldham*, HHJ Bird considered *R (IMA) v SSHD* in detail and rejected the argument that the grant of PSS alone meant that the appellant in that case was residing on the basis of the WA. HHJ Bird relied on Lane J's decision above and concluded that:

> "52. … The rights granted under Art.18 are no greater than those granted in Title 2. See Lane J in Citizens' *Rights* case. If (at this stage of the analysis) any of the conditions attaching to the right of residence under Art.13 are not met, then the Art.13 right must lapse. That was the conclusion of Lane J.
>
> 53. It follows that I accept the IMA's submission and reject those of the Appellant and T3M and the Aire Centre. In short, the Art.18(1) grant does not mean that the Appellant should be treated as residing in accordance with Art.13 forever."

43. To that end, the IMA respectfully submits that, in *Hynek v Islington*, HHJ Saunders may have misunderstood certain aspects of the reasoning of *R (IMA) v SSHD*. HHJ Saunders considered that Lane J had found that the grant of PSS was determinative of residence rights (see *Hynek v Islington* §§65, 71). That was not the effect of Lane J's decision; Lane J throughout considered residence rights under Article 13 WA were conditional and not necessarily co-extensive with the grant of PSS (see e.g. §§133-134, 151, 156, 158).

44. ***Fifth***, and more generally, the terms and structure of Part 2 WA clearly requires compliance with residence conditions to obtain permanent residence rights. Otherwise there would be no meaningful difference between pre-permanent residence rights (which are conditional) and permanent residence rights after five years (which are unconditional). The complexity arises in this case because the UK Government took a more generous approach to granting PSS than strict compliance with the requirements of Article 13 WA (as required by A18(1) WA). This means that it is possible for a person to have PSS but not meet the conditions of the CRD as directly incorporated into Article 13 WA and therefore not be residing on the basis of the WA but rather on the basis of domestic law alone (see *R (IMA) v SSHD* §§134, 183).

45. The Appellant contends that this means the UK Government has exercised its "*discretion*" under Article 13(4) WA not to apply certain limitations and conditions to her grant of PSS. It is true that the UK or a Member State can exercise a discretion when applying one or more conditions in favour of a person under Article 13(4) WA. But the Appellant's submission in reliance on Article 13(4) WA (at §§102, 107) amounts to an argument that all the key conditions in the CRD (as incorporated in Articles 13(1)-(3)

WA) have been entirely waived through the grant of PSS for five years. This is a difficult argument. The discretion in Article 13(4) WA is unlikely to be broad enough to collapse the distinction between pre-permanent residence rights and permanent residence rights in this way.

46. ***Sixth***, taking a step back and considering how the WA operates in the EU Member States for the benefit of UK citizens residing there, it is likely that the different schemes (whether constitutive or declaratory) were not intended to create disparate approaches to residence rights. These were administrative mechanisms left to the domestic system but were not intended to enable fundamentally different approaches to pre-permanent rights of residence. It is to be recalled in this context that Article 4(1)-(5) WA clearly suggest a continuation of a consistent approach across the EU and the UK for residence rights. Applying Article 4(1) WA, it is clear that the rights themselves are to have reciprocal effect as between the UK and the EU – but the gateway to those rights are able to differ – as per Article 18(1) WA.

47. Drawing those threads together, it follows that the grant of PSS alone, while it is a grant of a status under Article 18(1) WA, is not itself a form of residence under the WA which in turn attracts the protection of Article 23 WA. More is needed to show that the Appellant is residing on the basis of the WA, i.e. in compliance with the conditions and limitations of the rights of residence granted by Article 13 WA, both at the time of grant of PSS but also at the point where they seek to access social assistance.

D.2 The residual application of the Charter

48. The IMA submits that the proper approach is to recognise that a person such as the Appellant – who has PSS but not substantive rights of residence under the WA – is entitled to rely on the residual protection of the Charter.

CG: The application of the Charter as a fall-back to Article 24 CRD

49. *CG* was a case concerning entitlement to Universal Credit on the part of an EU citizen residing in the UK with PSS. The decision applied EU law as it concerned facts arising during the transition period. CG argued that she was entitled to non-discrimination protection under Article 18 TFEU (the general non-discrimination provision): §60. However, the Court reframed the question as being under Article 24 CRD (the more specific non-discrimination provision applicable to social assistance): §66-67.

50. In respect of Article 24 CRD, *CG* applied *Dano* and concluded that:

> "75. The Court has held that, so far as concerns access to social assistance, a Union citizen can claim equal treatment, by virtue of [Article 24 CRD], with nationals of the host Member State only if his or her residence in the territory of that Member State complies with the conditions of [the CRD] …
>
> 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) … 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."

51. In other words, Article 24 CRD (which Article 23 WA incorporates) can only be invoked if the individual complies with the conditions for residence in the CRD. The CJEU also noted that just because there was a more generous grant of residence under UK law in the form of PSS, that would not "read back" into the CRD:

> "83. Such a right of residence [i.e. PSS] cannot however be regarded in any way as being granted "on the basis of" [the CRD] within the meaning of article 24(1) of that Directive. The court has held that the fact that national provisions concerning the right of residence of Union citizens, that are more favourable than those laid down in [the CRD], are not to be affected does not in any way mean that such provisions must be incorporated into the system introduced by that Directive."

52. It was precisely because of this limitation in Article 24 CRD that the CJEU invoked the Charter as a fall-back protection, relying on the fact that CG had in the past exercised a fundamental right of free movement under Article 21 TFEU:

> 84. That said, as pointed out in para 57 above, a Union citizen who, like CG, has moved to another member state, has made use of his or her fundamental freedom to move and to reside within the territory of the member states, conferred by article 21(1) [TFEU], with the result that his or her situation falls within the scope of EU law, including where his or her right of residence derives from national law.

53. Thus the key development in *CG*, after *Dano*, was to establish that the EU citizen would nonetheless have the residual protection of the Charter (including the right to dignity under Article 1 of the Charter) because their application for benefits came within the scope of EU law. The EU citizen's prior exercise of Article 21 TFEU rights of free movement brought the matter within the scope of EU law and therefore subject to the protections of the Charter. As a result, Articles 1, 7 and 24 of the Charter applied to ensure that CG could live in dignified conditions: *CG* §§89-93.

AT: The application of the Charter as a fall-back to Article 23 WA

54. Like CG, AT was a single mother and victim of domestic violence who was residing in the UK with PSS. On this occasion, the facts concerned the law from after the end of the transition period, i.e. Part 2 WA. The decisions in *AT* make clear that the reasoning of *CG* applies under the WA after the end of the transition period, and that the Charter can apply to protect a person with PSS from a decision as to Universal Credit which could violate their right to dignity.

55. In explaining how *CG* "translates" to the WA, the Upper Tribunal concluded that:

> 102. … What AT retained, after the end of the transition period, was that part of her bundle of Article 21 TFEU rights which entitled her to continue to reside in the UK. CG shows that that right continues to generate legal effects even when the residence does not comply with the conditions in the CRD, at least for those who have a right of residence granted under national law. …
>
> 106. CG establishes that the UK was "implementing" (or acting "in the scope of") Article 21 TFEU when granting CG a domestic law right of residence on terms more favourable than required by the CRD; the same is true in relation to AT."

56. The Court of Appeal endorsed the Upper Tribunal decision in *AT* and expressed the point as follows when explaining that in *CG* the CJEU was rejecting the application of Article 24 CRD and instead applying the Charter as a minimum or "floor" right to support:

> "68. The Court [in *CG*] then considered whether, and if so how, the rule on non-discrimination applied. As to this the Court did not resile from earlier case law demonstrating a marked reluctance to apply the principle of non-discrimination to free movement in the case of non self-sustaining migrants. This was because, by Article 21 TFEU, the right to move and reside had been decoupled from the right to work or seek work (which almost by definition involved persons not seeking to live on state support), and had given rise to the real possibility that the "economically inactive" (to use the terminology of the Court – paragraphs [76] and [77]) would seek to move to themselves of more generous social security benefits found elsewhere and they would be able to do this simply because they were "Union citizens" not workers. Application of the principle of non-discrimination in such a case risked placing "an unreasonable burden on the social assistance system of the host Member State" (paragraph [76]). The Court endorsed its earlier case law to this effect for instance in [*Dano* §71] and the case-law cited thereat.
>
> 69. Having dismissed principles of non-discrimination [under the CRD] the Court turned to the application of the Charter. Certain rights available under the Charter will be less generous than a right to equality and would not place an "economically inactive" citizen on the same footing as a national (a form of levelling up) but instead might provide only a minimum or floor right to support."

57. The Court applied the same approach under the WA insofar as it concluded that the Charter would apply to protect AT by imposing a minimum level of protection: §§91-92.

The anchoring right of Article 21 TFEU generates the Charter effects under the WA: §97. While the Court did not expressly address Article 23 WA in detail, the entire premise of its reasoning was in line with the approach in *CG*.

The same result flows under the WA as it did under EU law

58. The IMA submits that Article 4(1) and (3) WA strongly compel a similar result under the WA as pertained under EU law. As explained above, the purpose of Part 2 WA was largely to continue aspects of the EU regime on a new footing and ensure consistency across the EU and UK in respect of residence rights and other rights consequent on the same. Article 23 WA is clearly modelled on Article 24 CRD; and Articles 13 and 15 WA are modelled on Articles 7 and 16 CRD.

59. Again, the IMA respectfully suggests that the decision of *Hynek v Islington* and reasoning therein should not be followed insofar as it suggests that Article 23 WA is entirely distinct from Article 24 CRD such that *CG* and earlier cases such as *Dano* can be distinguished (e.g. §75). The logic of those cases quite clearly translates across under the WA, as confirmed in *AT*. For compelling reasons of principle, *CG* and *AT* imply that the grant of PSS does not read back into the conditions of residence in the CRD or the WA.

60. It is understood that the Appellant relies fundamentally on Article 18 WA as the key point of difference between the CRD and the WA. That point has already been addressed above and the IMA's position is that Article 18(1) WA cannot bear the weight of the Appellant's submissions. In addition, over-reliance on Article 18 WA also creates irreconcilable inconsistencies with the reasoning in *CG* and *AT*. This is because, if the Appellant is correct as to the grant of PSS being a form of residence on the basis of the WA, then someone such as AT would straightforwardly have had the full protection of Article 23 WA and the extensive discussion in those appeals as to the Charter would be entirely redundant. Put another way, *CG* and *AT* show that the grant of PSS and residence rights under the WA are not co-extensive, but the solution the law provides to vulnerable persons with PSS is to confer on them the residual protection of the Charter. This is based on the fact that PSS encapsulates and recognises the prior EU law rights of free movement that persons such as AT, CG and the Appellant have exercised.

61. Finally, the IMA does not consider there is any basis in the case law for a different approach to be taken in respect of housing law as that which pertains in monetary social assistance as far as the Charter is concerned. In other words, *CG* and *AT* can apply in the

housing context such that the end result under the Housing Act will be the same as it was in respect of Universal Credit. The Council is thus required to undertake an individualised assessment which ensures that the Appellant's Charter rights (including the right to dignity (Article 1) and the rights of her children (Article 7 and 24)) are not at risk of being violated by a decision to refuse homelessness assistance. Like the Appellant, CG and AT were single mothers [redacted] they have the residual protection of the Charter to be able to live in dignified conditions.

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