UA-2023-001153-USTA

IN THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

BETWEEN:

[redacted]

Appellant

-and-

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

-and-

(1) THE INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS
(2) THE 3MILLION LIMITED

Interveners

SUBMISSIONS OF THE INDEPENDENT MONITORING AUTHORITY

Introduction

1. These are written submissions on behalf of the Independent Monitoring Authority for the Citizens' Rights Agreements (**"the IMA"**) in the above appeal, pursuant to the directions of UT Judge Wright dated 2 December, 24 December 2024 and 29 January 2025.

2. 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 of the EU-UK Withdrawal Agreement (**"WA"**) in the United Kingdom, which concerns Citizens' Rights.[1] The IMA is grateful for the opportunity to intervene and hopes to assist the Tribunal as an impartial and independent party as to the proper interpretation of Part 2 WA.

[1] 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"**).

3. The IMA has been invited to file written submissions in respect of Ground 2 only, which deals with the operation of the WA and related issues. These have been formulated as a list of seven questions at [37]-[44] of the case management directions issued by UT Judge Ward on 17 June 2024. The IMA's submissions address each of those questions in turn.

4. The IMA understands that the Secretary of State supports the appeal being allowed on the first part of Ground 1 (which concerns arguments over whether the Appellant accrued a right of permanent residence on the basis of self-sufficiency or retained worker status). The issues under that ground are specific to the facts of this case, and the IMA does not seek to intervene in relation to them. Further, the IMA does not take a view on whether the UT should (i) retain the appeal and determine the WA issues, or (ii) remit the case to the FtT for a factual determination of the issues under Ground 1. These submissions address the issues that arise if the UT decides to take course (i).

Background

5. The IMA defers to the principal parties as to any detailed factual disputes concerning the personal circumstances of the Appellant.[2] The essential facts for the purposes of the analysis of the WA issues, as the IMA understands them, are as follows:

   5.1. The Appellant is an EU citizen with Italian nationality, born on 2 May 1994, who arrived in the UK as a minor. The Appellant's official date of entry to the UK is recorded as 2 May 2010 (when he was 16 years old), although it appears that the Appellant's evidence is that he arrived in the UK in May 2009.[3]

   5.2. The Appellant was remanded in custody in March 2020. It appears that he has been discharged from and readmitted to the Hellingly Centre, an NHS secure mental health unit, several times since 2020. The IMA understands that the Appellant is currently serving a custodial sentence between the Hellingly Centre and prison.

[2] As the IMA has no interest in the Ground 1 arguments, it has not been considered necessary for the IMA to be provided with any wider documentation concerning the particular facts and evidence of this case.
[3] See e.g. UT Judge Ward's Order of 17 June 2024 at [23]-[24], and the Secretary of State's submissions dated 19 August 2024 at paragraph 12.

5.3. The Appellant was granted Universal Credit (**"UC"**) between May 2020 and 13 October 2020 ("the first UC application"), and from June 2021 to January 2022 ("the second UC application").

5.4. The Appellant applied under the EU Settlement Scheme (**"EUSS"**) in Appendix EU of the Immigration Rules on 22 July 2020 while in custody at the Hellingly Centre. The application was acknowledged by the Secretary of State, and the Appellant was granted a Certificate of Application (**"CoA"**). Determination of the application was paused by the Secretary of State as the Appellant was remanded in custody. The IMA understands that the Appellant's EUSS application remains undetermined.

5.5. The Appellant applied for UC on 9 June 2022 ("**the third UC application**"). The Secretary of State refused the application on 6 July 2022, and the decision was upheld following a mandatory reconsideration on 20 September 2022. The Secretary of State's decision on the third UC application is the subject of this appeal.

The legal framework

The Withdrawal Agreement

6. 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, and as such it must be interpreted in accordance with its context and purpose.[4] This includes the backdrop of the UK's prior membership of the EU, and the need to ensure a degree of continuity and preserve rights accrued by citizens within the WA's scope following the UK's withdrawal from the EU.

7. Part 1 WA includes Article 4, which contains the overarching interpretative provisions for construing the WA:

[4] As affirmed in several recent cases such as *R (IMA) 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* [2023] EWCA Civ 1307, [80]. 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"*.

7.1. 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".

7.2. 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) defines "Union law" to include a number of specific EU treaties, general principles, and the EU Charter of Fundamental Rights ("the Charter").

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

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

8. The WA has been implemented in domestic law in a similar way to how EU law was previously implemented in the UK. Sections 7A(1) and (2) of the European Union (Withdrawal) Act 2018 ("**EUWA**") creates a new "conduit pipe" for the WA so that all "rights, powers, liabilities, obligations, restrictions, remedies and procedures" arising under it are available automatically in domestic law. Section 7A(3) EUWA provides that every other provision of domestic legislation, including other provisions of the EUWA itself, are subject to the general implementation of the WA into domestic law. It follows that the WA has supremacy over the domestic legal framework.[5]

Part 2 WA

9. Part 2 WA sets out the provisions on Citizens' Rights. Article 10 defines the personal scope of the WA. Article 10(1)(a) provides:

> "1. Without prejudice to Title III, this Part shall apply to the following persons:

[5] The Retained EU Law (Revocation and Reform) Act 2023 ("REULA") made changes to the EUWA which took effect after the end of 2023, including *inter alia* amending section 5 EUWA to make it clear that the principle of the supremacy of EU law is not part of domestic law, applying to any enactment or rule of law whenever passed or made. Notably, the changes made to the EUWA by the REULA did not affect section 7A EUWA, and the latter remains in force.

(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 …"

10. Article 12 establishes a right to non-discrimination on the grounds of nationality:

> "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."

11. Article 12 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. Under EU law, the general non-discrimination provision gives way to the specific provision for equal treatment concerning social assistance in Article 24 CRD: Case C-709/20 *CG v Department for Communities in Northern Ireland* EU:C:2021:602, [65]; also Case C-333-13 *Dano v Jobcenter Leipzig* ECLI:EU:C:2014:2358, [61]. The same reasoning must apply to the WA, such that Article 12 of the WA must cede to the specific equal treatment provision within Article 23 of the WA.

12. Article 13 ("Residence rights"), cross-refers to 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:

12.1. 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.

12.2. 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:

12.2.1. 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).

12.2.2. 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 State (Article 7(1)(b)).

12.2.3. 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)).

12.2.4. 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)).

13. The above provisions from the CRD are reflected in Article 13 WA. Article 13(4) provides that the host State may not impose any limitations or conditions for obtaining, retaining or losing residence rights other than those provided for in Part 2 Title II; and that any "discretion" is to be exercised in favour of the person concerned.

14. Articles 15 and 16 concern the right to permanent residence. Article 15 provides for a permanent right of residence after five years' "continuous" lawful residence, with "periods of legal residence or work in accordance with Union law before and after the end of the transition period" being included in the calculation of the qualifying period necessary for the acquisition of a right of permanent residence under Article 15.

15. Article 16 provides:

> "Union citizens … 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."

16. The residence rights provided for in Article 7(1) CRD 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 (unless a retained right of residence accrues sooner, e.g. under Article 17). Following 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. Further, 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.

17. Article 18 concerns the issuance of residence documents. It provides as follows:

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

(q) the new residence document shall include a statement that it has been issued in accordance with this Agreement;

…

3. Pending a final decision by the competent authorities on any application referred to in paragraph 1, and pending a final judgment handed down in case of judicial redress sought against any rejection of such application by the competent administrative authorities, all rights provided for in this Part shall be deemed to apply to the applicant, including Article 21 on safeguards and right of appeal, subject to the conditions set out in Article 20(4).

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."

18. Article 23 confers a specific right of equal treatment for those who are *"residing on the basis of this Agreement"* with nationals of the host state. Article 23 WA is materially identical to the wording of Article 24 of The Citizens Rights Directive 2004/38/EC ("**CRD**").

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

The IMA's submissions

The status of a CoA

20. A preliminary issue underpinning the questions arising under Ground 2 is the status of individuals, such as the Appellant, who make a valid application under the EUSS and receive a CoA, but whose application remains undetermined.

21. The UK Government's constitutive scheme under Article 18(1) WA, as implemented domestically through the EUSS, requires individuals "to apply for a new residence status which confers the rights under this Title and a document evidencing such status". Leave granted under the EUSS may be either Settled Status ("**SS**") or Pre-Settled Status ("**PSS**"). The conditions for a grant of PSS are more generous than is required by the

WA, and extend to EU nationals (and their family members) who were residing in the UK on 31 December 2020, whether or not they fulfilled the conditions for a right of residence under the CRD.

22. Article 18(1)(a) confirms that the purpose of the application procedure is "to verify whether the applicant is entitled to the residence rights" under Part 2, and if so, the applicant will have "a right to be granted the residence status and the document evidencing that status".

23. In *R (IMA) v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin), Lane J clarified that the purpose of a constitutive residence scheme such as that under Article 18(1) was to establish a "bright line" between those who were beneficiaries under the WA and those who were not: [93], [182]-[183]. Lane J also held that the "new residence status" under Article 18(1) conferred rights which were inherently conditional, and a document issued under Article 18(1) evidenced a "qualified right of residence" subject to those conditions: [133]-[134], [151], [156], [158], [181].

24. Where a State has chosen to implement a constitutive scheme as the UK has, Article 18(1)(b) WA requires a CoA to be issued "immediately" upon application for the residence status being made, and Article 18(3) requires that "all rights provided for in this Part shall be deemed to apply to the applicant" pending a final decision on the application (see paragraph 17 above).

25. It might therefore be argued that a person who has been issued with a CoA is immediately entitled to all rights provided for in Part 2 of the WA. There is an attraction to that argument, particularly in circumstances where the UK Government has chosen to delay consideration of applications during pending criminal proceedings which may, as in this case, lead to a prolonged period between application and determination[6]. On balance, however, the IMA considers that the correct analysis is as follows.

26. Firstly, the IMA submits that the correct view of the nature of the grant of status under Article 18(1) – SS or PSS in the UK - is that it is not *itself* a form of residence under the WA absent compliance with the substantive requirements of the WA (i.e. Article

[6] It is not clear whether the Appellant's case has been reviewed following the judgment of this Tribunal in *R (Krsysztofik) v SSHD* JR-2021-LON-001727, in which the blanket imposition of a stay on such applications was held to be unlawful. But in any event it is the Secretary of State's choice to delay determination of his and other EUSS applications.

13). In other words, for an individual to enjoy a right to reside for the purposes of the WA, they must demonstrate that they fall within Article 13, or have acquired a right of permanent residence under Article 15.

27. Article 13 confers a right of residence "under the limitations and conditions as set out in Articles 21, 45 and 49 TFEU and in [various Articles of the CRD]". A grant of PSS *may*, but does not necessarily, reflect that the applicant fulfils those conditions.

28. If the grant of PSS is not, on its own, a relevant residence status for the purposes of the WA, then the same must be true for those issued with a CoA and whose EUSS applications have not yet been determined. If those persons are within the scope of the WA (as to which see further below), they are entitled to rights on an interim basis under Article 18(3). If they are not, then whilst the CoA provides for a temporary right of residence under domestic law, it does not confer any further rights.

29. This is to be expected, as otherwise even a hopeless or speculative application would result in an individual falling within the scope of Part 2 WA and benefiting from new EU law rights which they never had, purely on the basis of simple residence.

30. The language and structure of Article 18 reinforces this distinction between a CoA and the granting of residence rights. Article 18 distinguishes between (i) the *"document"* which evidences residence status under Article 18(1) on the one hand, and (ii) the CoA, which is referred to simply as a *"certificate",* on the other. Moreover, most of Article 18 relates to the provision of a residence *"document"*, whereas express reference to the CoA is limited to subparagraphs (b) and (c) of Article 18(1).

31. The IMA accordingly considers that the better interpretation is that a CoA is merely an acknowledgment of an application for beneficiary status, and in and of itself cannot bring an individual within the scope of the WA nor grant a relevant residence status.

(i) Did the FTT err in law by not treating the Appellant as being within the scope of the WA?

32. Satisfying the test for personal scope in Article 10 is the necessary precondition for the application of the WA in any individual case. Despite indications to the contrary in *Hynek v Islington* (County Court at Central London, 24 May 2024) at [62], the IMA submits that Article 10 does not itself confer any residence rights: it is simply the starting point for determining who is within personal scope of the WA.

33. Article 10(1)(a) provides that a Union citizen will fall within personal scope of the WA where they have "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".

34. In the IMA's view, subject to any findings made under Ground 1, the key question in the Appellant's case is whether a CoA alone is sufficient to satisfy the requirement for residence before the end of the transition period to be "in accordance with Union law". For the avoidance of doubt, the IMA agrees with the Appellant that the reference to "residing thereafter" does not necessarily require compliance with Union law.

35. As regards the nature of residence required before the end of the transition period, this covers those who had acquired the right a right of permanent residence or who were otherwise residing in compliance with the substantive conditions and limitations of residence requirements under Union law (e.g. workers), as well as those within their first three months of residence under Article 6 CRD.

36. The IMA, however, does not consider the provision to be broadly worded enough to capture anyone who, at any stage in the past, exercised any EU free movement residence rights. The IMA submits 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 Union law and to continue that regime on a new footing under the WA. This reading is informed by the wording of Article 10 which contemplates a continuation of residence immediately before and after the end of the transition period. This approach is also consistent with *Ali v Secretary of State for the Home Department* [2023] EWHC 1615 (Admin) [84]-[87]; and *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921, [54].

37. While the courts have not previously considered whether a CoA is sufficient to satisfy the minimum requirements of Article 10 WA, the position in respect of those with PSS, arising out of the decision in *AT v Secretary of State for Work and Pensions* [2023] EWCA Civ 1307, is instructive for present purposes.

38. In *AT*, the Court of Appeal – applying the CEJU's decision in Case C-709/20 *CG v Department for Communities in Northern Ireland* [2022] 1 CMLR 26 – described the

grant of PSS as an "implementation" of a preserved right under Article 21 TFEU from before the end of the transition period:

> "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."

39. The Court also described the Article 21 TFEU residence right as the "anchoring right" which was "recognised" or "encapsulated" by PSS at [99]:

> "99. Applying that approach to the present case AT has a basic 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 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."

40. In light of this, 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 prior to the end of the transition period, come within the personal scope of the WA for the purposes of the application of the Charter of Fundamental Rights of the European Union (**"the Charter"**). What is "encapsulated" into PSS is a limited subset of "anchoring" Article 21 TFEU residence rights, which allows those with PSS to benefit from the residual protection of the Charter when a decision is made as to their eligibility for social security assistance.

41. In the Appellant's case, however, that basic anchoring right has not been recognised in the domestic grant of PSS, as their EUSS application remains undetermined. For the reasons set out above, the Appellant cannot rely on mere possession of a CoA as having "recognised" or "encapsulated" any Article 21 TFEU rights. It follows that, subject to any findings made under Ground 1 to the effect that the Appellant had acquired the right of permanent residence or was self-sufficient, he would <u>not</u> be within scope of Article 10 WA.

(ii) Did the FTT err in law by concluding that the Appellant had the benefit of the Grace Period Regulations?

42. The IMA agrees with the Secretary of State's position as set out at paragraphs 31 to 32 of her submissions dated 19 August 2024.

43. To fall within scope of and benefit from the Grace Period Regulations there are two requirements which must be met. Firstly, a citizen must have made an application to the EUSS on or before 30 June 2021 (an 'in-time' application). Secondly, that citizen must have been residing lawfully in the UK in compliance with the requirements of EU Law under the EEA Regulations 2016.

44. On the facts of this appeal, the Appellant meets the first requirement by having made an in-time application. On the second requirement he will either need to show that he was self-sufficient at the end of the transition period; or had acquired a right of permanent residence. Whether or not the Appellant had rights under the EEA Regulations is a factual issue which the IMA is not in a position to comment on.

(iii) If the Appellant is within the scope of the WA, which provisions, if any, of the WA can assist him? Any rights under Article 13?

45. If the Appellant is found to be within scope of the WA, then he would be able to rely on Article 18(3) to access rights under Part 2 WA. A number of the rights contained in Part 2 WA, including those under Article 13, are conditional in nature and therefore the extent to which the WA could assist him would depend on his position.

46. It is important to distinguish between (i) Article 10 WA which concerns personal scope, and (ii) Article 13 WA which establishes rights of residence under the WA. Article 13 must be understood on its own terms and in accordance with EU case law and principles, and the interpretative provisions in Article 4 WA.

47. If the Appellant were to be within the scope of the WA as a result of a finding under Ground 1 that he had acquired the right of permanent residence or was self-sufficient when his CoA was issued and at the point of his application for UC, then he would be entitled to social security assistance and the appeal would be bound to succeed.

48. As stated above, the IMA does not consider that the Appellant can rely solely on possession of a CoA to fall within the scope of the WA if he is not successful on Ground 1. However, if contrary to the submissions above, the Tribunal were to find that a CoA of itself were sufficient to render his residence "in accordance with Union law" at the end of the transition period, it would follow by analogy with *AT* that the Appellant's rights under Article 21 would be preserved by Article 13.

(iv) Does Article 18 apply to a person in the Appellant's situation?

49. As Lane J recognised in *R (IMA)*, a wider cohort of persons are eligible to apply for EUSS status than is required by 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."

50. While the EUSS allowed a broader category of citizens to apply, not all applicants are able to rely on the protections provided by the WA. As explained above, Article 18(1) status reflects an individual's status as a "beneficiary" of the WA: Lane J in *R (IMA)*, [93], [182]-[183]. This is consistent with the position of the European Commission which described PSS as recognising an individual's status as a "beneficiary" of the WA, with the substantive residence rights afforded to a beneficiary depending on their personal circumstances at the time: see *R (IMA)*, [90], [60].

51. The IMA considers that Article 18(3) provides an interim protection for those with pending applications who fall within the scope of the WA. If the Appellant were eligible for and ultimately granted PSS, he would need to meet the limitations and conditions of the WA in order to benefit from the substantive rights afforded to those with beneficiary status. If he is not meeting those conditions, his right of residence derives from the generous policy of the UK and not from Article 18(3).

(v) In what way does Article 18(3) apply Article 23?

52. The IMA agrees with the Secretary of State at paragraphs 46 to 47 of her submissions.

53. It is well established in EU case law that Article 24(1) CRD, on which Article 23 WA is modelled, confers equal treatment rights in respect of social assistance on those who satisfy the substantive conditions of residence set out in the CRD. Thus in C-333-13 *Dano v Jobcenter Leipzig* ECLI:EU:C:2014:2358 ("*Dano*") the CJEU held that the provision requiring residence to be "on the basis of" the CRD meant 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]": [69]. Similarly, in *CG* the CJEU found that because CG was not residing in accordance with the conditions of Union law (her only right of residence in the UK being a grant of PSS), she was entitled only to the residual protection of the Charter rather than the full protection of Article 24 CRD: [75], [77], [79] and [83].

54. The IMA considers that the same applies under the WA: to benefit from Article 23 WA an individual must be residing on the basis of Article 13 by meeting the conditions in the CRD referred to in that Article, or Article 15 by acquiring a right of permanent residence.

55. As above, however, the IMA considers that a person who has only been issued with a CoA does not thereby acquire rights they would not otherwise be entitled to under the WA. They therefore cannot benefit from rights such as those under Article 23.

(vi) Do cases such as C-333/13 *Dano* apply to the right under Article 23?

56. In respect of Article 24 CRD (which Article 23 WA incorporates), the CJEU in *CG* applied *Dano* at [75] and [81] and found that it 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.

57. In *Hynek*, HHJ Saunders considered that PSS was a grant of rights of residence under Part 2 WA, and as a result the appellant in that case was residing on the basis of the WA and was entitled to the protections of Article 23: [56]-[57], [60]-[61]. The Judge also concluded that the case law of *Dano* and *CG* could be distinguished as they were cases concerning Article 24 CRD rather than Article 23 WA: [51], [75].

58. The IMA agrees with the Secretary of State at paragraph 51 of her submissions that the Upper Tribunal is not bound by the decision in *Hynek* and that the reasoning should not be followed insofar as it suggests that *CG* and *Dano* can be distinguished. In particular:

58.1. Article 23 is modelled on Article 24 CRD and should be interpreted in accordance with EU case law given the implied continuity and consistency of the WA with EU law, as well as the provisions in Article 4(4)-(5) WA setting out how pre- and post-transition EU case law falls to be interpreted with respect to the WA.

58.2. Further, HHJ Saunders appears to have misunderstood certain aspects of the reasoning in *R (IMA)*. Notably, HHJ Saunders considered that Lane J had found that the grant of PSS was determinative of residence rights: see *Hynek*, [65], [71]. This, however, was not the effect of Lane J's decision, which was instead that residence rights under Article 13 were *conditional* and not necessarily co-extensive with the grant of PSS: [133]-[134], [151], [156].

58.3. Lane J also recognised that concerns as to the administrative uncertainties under a constitutive residence scheme could not determine the meaning of the words used in the international treaty: [156]. *Hynek* on the other hand refers to administrative difficulties and the Windrush scandal at [63] (a submission specifically rejected by Lane J at [154]). This is a further reason for treating the decision in *Hynek* with caution.

(vii) Are there circumstances in which, depending on the outcome of the other issues raised by this appeal, the Appellant can benefit from Article 12?

59. If the Appellant is within the personal scope of the WA, he is *prima facie* entitled to non-discrimination protection under Article 12. Article 12, however, only applies where there is no specific non-discrimination provision available. It therefore must cede to more specific non-discrimination provisions contained elsewhere within the WA – in this case Article 23 WA.

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