IN THE COURT OF APPEAL
(CIVIL DIVISION)

Case No: CA-2024-001773

ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
[2024] EWHC 1754 (KB)
MR JUSTICE JAY

BETWEEN:

GWLADYS FERTRE

Appellant

-and-

VALE OF WHITE HORSE 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

(4) SHELTER

(5) THE AIRE CENTRE

Interveners

REPLACEMENT SKELETON ARGUMENT ON BEHALF OF THE IMA

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*References below to pages in the Core Bundle are in the form **[CB/[page number]]** and to pages in the Supplementary Bundle are in the form **[SB/[page number]]**.*

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 following the High Court judgment of Mr Justice Jay: [2024] EWHC 1754, [2024] 1 WLR 5453 **[CB/30-53]** (the "**HC Judgment**").

2. The IMA is intervening in this appeal, as it did before the High Court, pursuant to its statutory duties to monitor and promote the adequate and effective implementation and

application within the UK of Part 2 of the EU-UK Withdrawal Agreement ("**WA**") which concerns Citizens' Rights.[1] Permission to intervene was granted by Order of Lewison LJ dated 20 November 2024 **[CB/309-310]**.

3. 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. 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. The Appellant's case is that the fact of holding PSS brings her within the protection of Part 2 of the WA and in particular the right to equal treatment with nationals of the host State guaranteed by Article 23 WA.

4. 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]

5. 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. Its submissions will address Ground 1 only, which is framed as whether an EU citizen whose right to remain in the UK is solely by virtue of having PSS is residing on the basis of the WA within the meaning of Article 23(1) WA. As the IMA does not consider that the Appellant is able to rely upon Article 23 WA, it does not make submissions in relation to Ground 2 (justification).

6. The IMA has carefully considered the HC Judgment and the other judgments of the higher courts in this developing area of law, and has reviewed its position on the issues raised. It submits that the correct analysis is as follows:

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[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 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.

[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.

(1) PSS of itself is not a form of residence under the WA absent compliance with the substantive requirements of the WA. A person fulfilling the conditions in Article 13 WA would have been entitled, at the time of the application, to a grant of PSS; but a grant of PSS did not depend on those conditions being fulfilled.

(2) The Appellant may benefit from the right of residence contained in Article 13 WA by virtue of having exercised and enjoyed the rights in Article 21 TFEU, as per C-709/20 *CG v Department for Communities in Northern Ireland* [2022] 1 CMLR 26 ("***CG***"), §71.

(3) But, in order to benefit from Article 23 WA, the specific conditions of that provision would also have to be satisfied. That requires an individual to demonstrate that they comply with the conditions in Article 24 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely withing the territory of the Member States (the Citizens' Rights Directive) (the "**CRD**"), incorporated into Article 23 WA, at any particular moment.

(4) An individual who enjoys the right to reside under Article 13 WA but does not benefit from Article 23 WA is only entitled to the fall-back protection of the EU Charter of Fundamental Rights (the "**Charter**"). That requires an individualised assessment to ensure that there will be no breach of Charter rights, including the right to human dignity, before any decision to refuse assistance is made. The IMA understands that the Appellant in this case has accommodation, and that it is therefore not suggested that any breach of Charter rights arises from the decision to refuse her housing assistance.

7. 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. The issue of a reference to the CJEU is considered in Section E.

B Factual Background

8. 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:

(1) The Appellant is an EU citizen with French nationality who arrived in the UK on 4 November 2020. The Appellant appears to have several medical conditions and is a victim of domestic abuse.

(2) The Appellant's elder daughter joined her in the UK on 25 November 2020 and her younger daughter joined her in the UK on 22 June 2021. The Appellant's daughters are understood to have complex needs.

(3) The Appellant was granted PSS on 18 November 2020.

(4) The Appellant applied for homelessness assistance on 19 October 2021. The Appellant was refused as being ineligible under s. 184 of the Housing Act on the same day as her application (19 October 2021) and that decision was affirmed following a review on 21 January 2022 (the "**Review Decision**") **[CB/97-112]**.

9. 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 the proposition that PSS is a grant of a residence status under Article 18 WA. The Review Decision also concluded that the Charter did not apply and would not produce a different outcome.

10. The Appellant appealed the Review Decision on 11 March 2022. The appeal was transferred to the High Court. The High Court hearing was held in June 2024 and the judgment of Jay J delivered on 8 July 2024 **[CB/30-53]**. The Judge dismissed the appeal, finding that: (a) there was a distinction between acquiring a new residence status under and the rights conferred by that status – the former was a gateway to the potential acquisition of the latter, which were conditional; and, (b) the condition for enjoying the right in Article 23 WA was demonstrating that, at any specific moment, an individual was "residing on the basis of [the Withdrawal Agreement]". The Appellant could not do so as she did not fulfil the relevant conditions.

C The Legal Framework

11. The appeal raises a 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

12. 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.[3] This means it must be interpreted in accordance with its context and its purpose.[4] The context for the WA includes the backdrop of the UK's prior membership of the EU; its purpose includes the need to ensure a degree of continuity and preserving rights accrued by citizens within its scope after the UK's withdrawal from the EU.

13. Article 31(3)(b) of the Vienna Convention, which has not previously been addressed in the case law relating to the WA, further provides that when construing an international agreement there shall be taken into account, "*any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*".

14. 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.

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[3] This has been affirmed in a number of recent cases such as *R (IMA) v SSHD* [2022] EWHC 3274 (Admin), §§64-70; *Celik v SSHD* [2023] EWCA Civ 921, §53; *R (Ali) v SSHD* [2023] EWHC 1615 (Admin), §82; *SSWP v AT* [2022] UKUT 330 (AAC), §36; *SSWP v AT* [2024] KB 633, §80.

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

15. 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 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

16. 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

17. 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.[5] 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; …"

18. 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

[5] For the avoidance of doubt, 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.

continue that regime on a new footing under the WA. The IMA's reading is informed by the wording of Article 10 indicating a continuity of residence immediately before and after the end of the transition period ("continued to reside there thereafter"). This approach is consistent with indications in the case law and the European Commission's guidance.[6]

(2) The second concerns the nature of residence 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 free movement law (e.g., workers) at the end of the transition period. It must also include all those with PSS granted before that date, given the analysis in *SSWP v AT* [2024] KB 633 ("***AT***") as explained below.

19. 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 as at 31 December 2020, and had also been granted PSS before that date. She therefore falls within Article 10(1)(a) WA[7].

Article 12: General prohibition on non-discrimination

20. 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."

21. It will be noted that this both (i) is directly modelled on the approach of Article 18 of the Treaty on the Functioning of the European Union ("**TFEU**") and (ii) directly incorporates the wording of that provision into the WA. As was explained in *CG* §§65, 67, under EU

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[6] *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.

[7] The IMA notes that Amendment NC31 to the Border Security, Asylum and Immigration Bill, tabled by the Government on 10 March 2025, would if passed mean that EU and EEA EFTA nationals (and their family members) with EUSS status who were not residing in accordance with EU free movement law at the end of the transition period would fall to be treated as within the scope of the WA for the purposes of UK law in any event. But as already stated, there is no issue as to personal scope in this case.

law, the general non-discrimination provision gives way to the specific provision for equal treatment concerning social assistance in Article 24 CRD.[8] The same 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

22. 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)).

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[8] 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.

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

24. Article 13(4) then provides as follows:

> "The host State may not impose any limitations or conditions for obtaining, retaining or losing residence rights on the persons referred to in paragraphs 1, 2 and 3, other than those provided for in this Title. There shall be no discretion in applying the limitations and conditions provided for in this Title, other than in favour of the person concerned."

Articles 15-16: Permanent right to reside

25. 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."

26. 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."

27. 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.[9] 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

[9] 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.")

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

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

> "1. The host State may require Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this Title, to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form.
>
> 2. Applying for such a residence status shall be subject to the following conditions:
>
> (a) the purpose of the application procedure shall be to verify whether the applicant is entitled to the residence rights set out in this Title. Where that is the case, the applicant shall have a right to be granted the residence status and the document evidencing that status; …
>
> 4. Where a host State has chosen not to require Union citizens … to apply for the new residence status referred to in paragraph 1 as a condition for legal residence, those eligible for residence rights under this Title shall have the right to receive, in accordance with the conditions set out in Directive 2004/38/EC, a residence document, which may be in a digital form, that includes a statement that it has been issued in accordance with this Agreement."

29. 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.

30. 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 referred to in Article 13(1)-(3) WA.

31. The key point is that the WA provides for a residence document which establishes that a recipient qualifies for the right to be counted as a beneficiary of the WA. In that way, it

serves to distinguish those beneficiaries from those EU citizens who do not enjoy those rights. It does not however expand the scope of the rights conferred by the WA on beneficiaries, and rights of residence remain defined by Article 13 WA. Where, therefore, status is granted under the EUSS to those who would not otherwise meet the requirements of Article 10 WA, legal uncertainty is created as it is not clear from the residence document itself whether the rights provided by that status derive from the WA or are solely domestic law rights. The amendment referred to at fn7 above is, the IMA understands, intended to remove this uncertainty by providing that all those granted status under the EUSS are treated as beneficiaries under the WA (which, as already explained, does not necessarily determine the extent of their residence rights).

Article 23: Specific right to equal treatment

32. 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. It provides as follows (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 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."

33. 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, and from the opening words of Article 23

[10] Article 23(2) WA is not relevant on this appeal; the derogations therein are not relevant to the Appellant.

WA itself, which make clear that the right to equal treatment applies where the individual would have that right "in accordance with" Article 24 CRD.

34. 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).

35. 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). The analysis in *CG* was then expressly domesticated after the end of the transition period in *AT* under the WA as explained below.

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. The IMA's position is set out in the following seven points.

38. **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: see HC Judgment, §75 **[CB/46-47]**. The continuation of the meaning of underlying EU law concepts is made clear by Article 4 WA. The practical effect of the WA is therefore that all those residing in accordance with Union law, primarily the CRD, at the end of the transition period, are able to continue to do so after the end of the transition period where they continue to meet the same limitations and conditions. 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).

39. **Secondly**, 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). As Lane J stated in *R (IMA) v SSHD* [2023] 1 WLR 817 ("***R (IMA)"***):

> "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."

40. This is consistent with the HC Judgment, §69 **[CB/45]**.

41. The T3M evidence appears to show that most EU member states adopting a constitutive system have confined this to UK nationals who can show compliance with the CRD; Hungary is the only member state that appears to have taken a similar approach to the UK in extending residence rights beyond the strict requirements of the WA **[SB/659-661]**. It does not therefore appear that there is or could be any established approach to the application of the WA to those in the position of the Appellant, i.e. holding PSS but not complying with the conditions of the CRD, and Article 31(3)(b) of the Vienna Convention does not therefore have a role to play.

42. **Thirdly**, a grant of status under Article 18(1) – e.g. PSS - is not *itself* a form of residence under the WA absent compliance with the substantive requirements of the WA (i.e. Article 13).

43. Rather, 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, 160; and HC Judgment, §§72 and 74.

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

45. 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]". An individual, like the Appellant, who is granted PSS before 31 December 2020 fulfils those conditions by virtue of the fact that, in conferring greater rights than the Appellant enjoyed under the CRD, that grant was an implementation of Article 21 TFEU. In this sense, the IMA is in agreement with what is said in Shelter's Skeleton Argument, §§16 (first sentence) and 19-21 **[CB/266-267]**.[11]

46. As the Court of Appeal stated in *AT*:

> "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."

47. The Court also described the Article 21 TFEU residence right as the "anchoring right" which was "recognised" or "encapsulated" by PSS:

> "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 …."

48. What is "encapsulated" into PSS, therefore, is a limited subset of "anchoring" Article 21 TFEU residence rights, which allows those with PSS to benefit, e.g. in *AT*, from the residual protection of the Charter when a decision is made as to their eligibility for social security assistance. The same reasoning would apply to the Appellant albeit that, as

[11] Though, for the reasons set out below, the IMA disagrees with the effect Shelter says this has at the "stage 2" analysis: Skeleton Argument, §§22-25 **[CB/267-268]**.

already explained, no issue of breach of Charter rights has been raised on the facts of her case.

49. **Fourthly**, if the Appellant were correct that the grant of PSS amounted to 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 that case and *CG* about appeals as to the Charter would be entirely redundant[12]. 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 (see, further, below).

50. **Fifthly**, the fact that someone has a residence right under Article 13 WA does not mean that they, without more, benefit from all of the WA Title II rights. In relation to Article 23 WA, they would need to satisfy the conditions imposed within that provision. On this, the IMA agrees with the analysis in the HC Judgment, §76 **[CB/47]**:

> "76. This brings me to article 23(1) of the Withdrawal Agreement. The purpose of this provision was to achieve consistency between the Withdrawal Agreement and, in particular, article 24(1) of the CRD. The derogations in article 23(2) of the Withdrawal Agreement and article 24(2) of the CRD largely match. There is superficial force in the submission that "residing on the basis of this Agreement" means simply, "residing on the basis of the new residence status" issued under article 18(1) , noting that on its face it has been issued in accordance with the Withdrawal Agreement. However, I consider that is not the correct approach to this admittedly elliptical wording. The text in issue is designed to reflect its analogue in article 24(1) of the CRD—"residing on the basis of this Directive". It is necessary to examine not merely the bare fact of possession of the status but also what specific right under the CRD is being enjoyed by the person alleging discrimination at the point in time that claim is advanced. This construction continues to respect the conditional nature of the rights conferred by the "new residence status", not least because it is difficult to see how discrimination might arise in the context of a contingent right, as opposed to an actual right the conditions in respect of which have been fulfilled."

51. 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

[12] It is recognised that a ground of appeal based on Art 23 WA was stayed in *AT* and was not pursued as AT succeeded on the Charter arguments.

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.

52. 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 and meeting the conditions in the CRD. In light of the wording in Article 23 WA, and the express reference to Article 24 CRD, it is not enough simply for an individual to have been granted PSS on the basis of Article 21 TFEU. On this, it agrees with the HC Judgment, which found as follows **[CB/51]**:

> "95. At the next and final stage of the analysis, consideration must turn to my stage 2 and the nature and scope of the Title II rights conferred by PSS. We are now examining the position only after 1 January 2021. In my judgment, it is irrelevant that at stage 1 the appellant had satisfied the requirements of article 13(1) of the Withdrawal Agreement, drawing on article 21(1) of the TFEU, just as it is irrelevant that she satisfied those requirements drawing on article 6 of the CRD. That is water under the bridge. Further, I cannot accept Mr Berry's argument that at stage 2 a person, such as the appellant, who at the time of her application for state benefits failed to fulfil the limitations and conditions under a relevant article in the CRD could avail herself of article 21(1) on a distinct basis. This is because article 21(1) of the TFEU is subject to all the limitations and conditions contained in the CRD. At the time the appellant was advancing her claim for housing assistance she did not fulfil the conditions in article 7 of the CRD. The reasoning in para 83 of CG applies to her situation."

53. **Sixthly**, the IMA does not agree with the Appellant's construction of Article 13(4) WA. The Appellant's submission in reliance on Article 13(4) WA amounts to an argument that all the key conditions in the CRD 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.

54. Moreover, the IMA agrees with the analysis of Jay J where he stated the following **[CB/49]**:

> "90. On either analysis, my preferred or fall-back, article 13(4) has no application to the nature, content and ambit of the rights conferred by the grant of PSS. As a matter of principle, article 13(4) could only conceivably apply to the disapplication of the preconditions to the acquisition of the new status: that is to say, to an existing state of affairs known to the SSHD at my stage 1. It cannot operate to expand the scope of the rights as conferred under Title II, at stage 2. To say that it does collapses the conceptual distinction to which I have cleaved and achieves an additional impermissible elision to the following extent. Not merely are the rights under Title II conditional in the sense that they do not flow automatically, they are also conditional in the sense that the conditions for their fulfilment may only arise at some future date; and in the context of article 15 will by definition arise at some future date, if they arise at all. It simply does not make sense to

say that the SSHD has waived or disapplied those conditions on some anticipatory basis, regardless of an applicant's personal circumstances at the relevant time."

55. **Seventhly**, 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 required to be conferred by the WA. 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[13].

D.2 The residual application of the Charter

56. The IMA submits that the proper approach is to recognise that a person such as the Appellant – who has PSS but who cannot rely on Article 23 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

57. *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.

58. 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] …

[13] As set out above, it appears from the evidence of T3M that Hungary is the only EU member state that has adopted a similar approach to the UK in granting wider rights of residence than are required by the WA; the systems adopted in the other member states all require applicants to show exercise of free movement rights in some way.

> 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."

59. 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."

60. 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.

61. 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

62. 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.

63. 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."

64. 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."

65. 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

66. 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.

67. The IMA also does not consider there is any basis in the case law for a different approach to be taken in respect of housing law to 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 and victims of domestic violence; they have the residual protection of the Charter to be able to live in dignified conditions.

E Reference

68. T3M invites the Court to make a reference to the CJEU pursuant to Article 158(1) WA on the basis that the legal position is not *acte clair* **[CB/240]**.

69. The IMA considers that, on the basis of the analysis set out above, there is a clear answer to the issues of construction that fall to be decided on this appeal. If the Court is not minded to accept that analysis, then the IMA recognises that it may consider a reference to be necessary.

GALINA WARD KC
YAASER VANDERMAN
AARUSHI SAHORE

12 March 2025
(Replaced on 11 April 2025)