

**IN THE COURT OF APPEAL**  
**CIVIL DIVISION**

**CA-2024-002573-B**

**ON APPEAL FROM THE UPPER TRIBUNAL  
(DOVE J AND UT JUDGE HANSON)**

**BETWEEN:**

**KATARINA VARGOVA**

**Appellant**

**-and-**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**-and-**

**THE INDEPENDENT MONITORING AUTHORITY  
FOR THE CITIZENS' RIGHTS AGREEMENT  
(the "IMA")**

**Intervenor**

**CA-2025-000384-B**

**AND ON APPEAL FROM THE UPPER TRIBUNAL  
(UTJ HOFFMAN)**

**TOMAS MOLNAR**

**Appellant**

**-and-**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**-and-**

**THE INDEPENDENT MONITORING AUTHORITY  
FOR THE CITIZENS' RIGHTS AGREEMENT  
(the "IMA")**

**Intervenor**

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**WRITTEN SUBMISSIONS ON BEHALF OF THE IMA**

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## **Introduction and Summary**

1. The IMA was established by the UK Government to implement Article 159(1) of the Withdrawal Agreement (the “WA”). The legislative provisions establishing and governing the IMA are contained within Schedule 2 to the European Union (Withdrawal Agreement) Act 2020 (“the 2020 Act”). The IMA is required to monitor and promote the adequate and effective implementation and application of the rights of EU and EEA EFTA citizens (and their family members) in the UK and Gibraltar as provided for by Part 2 of the WA (and of the EEA EFTA Separation Agreement).<sup>1</sup> It also has power to intervene in any legal proceedings, subject to the IMA being satisfied that it is appropriate to do so in order to promote the adequate and effective implementation or application of Part 2 of the Agreements.<sup>2</sup>
  
2. In *Vargova*, the UT held that the reference to the “*safeguards set out in Article 15 and Chapter VI of [the Citizens’ Rights Directive (2004/38/EC)]*” (the “CRD”)” in Article 21 WA did not incorporate any requirement that the principle of proportionality should be applied by the decision-maker (in accordance with Article 27(2) CRD) and on appeal (in accordance with Article 31(3) CRD). It arrived at that conclusion in view of the terms of Article 20(2) WA, which provides that “*The conduct of Union citizens or United Kingdom nationals, their family members, and other persons, who exercise rights under this Title, where that conduct occurred after the end of the transition period, may constitute grounds for restricting the right of residence by the host State or the right of entry in the State of work in accordance with national legislation.*” It held that this left no room for the application of (what it called) “the EU law proportionality principle”, which it said no longer formed any part of domestic law.
  
3. The IMA has applied to intervene in the present appeals because it considers that the Upper Tribunal’s judgment in *Vargova*, which was followed in *Molnar*, is based upon an incorrect analysis of the effect of the WA. In summary, it considers that the UT:
  - 3.1 failed to distinguish between the provision made by Article 20(2) of the WA as to the “*grounds*” upon which a decision to restrict residence rights under the WA may

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<sup>1</sup> European Union (Withdrawal Agreement) Act 2020, Schedule 2, at paragraphs 22-23

<sup>2</sup> European Union (Withdrawal Agreement) Act 2020, Schedule 2, at paragraph 30(1)

be made (in accordance with national law) and the “*safeguards*” which must be applied pursuant to Article 21 WA;

- 3.2 wrongly restricted the safeguards applicable pursuant to Article 21 of the WA to its own conception of “*procedural*” safeguards which did not include any assessment of proportionality, in conflict with the terms of Article 31(3) of Directive 2004/38/EC and general principles of EU law, whose application in the United Kingdom was preserved by the terms of the WA and sections 5(7), 7A and 7C of the EU (Withdrawal) Act 2018 (as amended) (“**the 2018 Act**”);
  - 3.3 wrongly concluded that sections 32 and 33 of the UK Borders Act 2007 were not incompatible with the WA, insofar as they applied the automatic deportation regime for “foreign criminals” in respect of EU citizens (or their family member) falling within the scope of Part 2 of the WA, where the conduct giving rise to their criminal conviction occurred after the end of the transition period; and
  - 3.4 misunderstood the force that the WA has in domestic law by virtue of section 7A and 7C of the 2018 Act, including in respect of the disapplication of any primary legislation which is incompatible with the Withdrawal Agreement.
4. For those reasons, the IMA supports the appeals, insofar as they concern the interpretation and application of the WA. It limits its submissions to the points set out above, and takes no position at all as to how the relevant provisions of the WA, properly interpreted, should ultimately be applied in either case.
  5. The IMA sets out below:
    - 5.1 First, the relevant provisions and effect of EU law on the removal or deportation of an EU citizen (and family members<sup>3</sup>) from the UK, which applied while the UK was a Member State and until the end of the transition period. Particular reference is made to the extent to which those provisions set out the “*grounds*” upon which an EU citizen could be expelled (i.e. deported) from the host Member State, and

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<sup>3</sup> For ease of exposition, the IMA does not refer further to the position of family members since they do not appear to be in issue in the present case, but concentrates on the primary rights of EU citizens.

the extent to which they provided “*safeguards*” controlling the exercise of the power to expel an EU citizen on those grounds.

- 5.2 Secondly, the relevant provisions and effect of the WA, to explain how the pre-existing position changed with effect from the end of the transition period for relevant EU citizens (and family members). (“**Relevant EU citizens**” for this purpose means those who fall within the personal scope of Article 10 WA, and hence who are the beneficiaries of Part 2 of the WA.)
- 5.3 Thirdly, the relevant provisions of domestic law which implement the WA, and their effect on other provisions of domestic law relating to the deportation of “foreign criminals”.
- 5.4 Fourthly, its submissions as to why the analysis in the UT judgment fails to grapple with the true effect of the above provisions, and why its conclusion is wrong.

**(1) The relevant provisions and effect of EU law**

6. Although the UK has left the EU, it is important to start with an appreciation of EU law as it applied in the UK while it was a Member State (and until the end of the transition period). That is because the terms of the WA are best understood by reference to the law as it existed at the time it was agreed, so as to understand how matters were intended to differ after the end of the transition period. For this purpose, it suffices to recall the relevant terms of the CRD, which provided for the terms upon which the rights of freedom of movement and residence in other EU Member States could be exercised by EU citizens and their family members.
7. In summary, the relevant rights of residence for EU citizens were:
  - 7.1 A right of residence for up to three months without any conditions or formalities other than the requirement to hold a valid identity card or passport: Article 6(1) CRD. This right was enjoyed by citizens for so long as they did not become an unreasonable burden on the social assistance system of the host Member State (up to 3 months): Article 14(1) CRD.
  - 7.2 A right of residence for a period of longer than three months if they were qualified as workers, self-employed persons, self-sufficient persons, or students: Article 7(1)

CRD. This right of residence was enjoyed by EU citizens for so long as they continued to meet one of those conditions: Article 14(2) CRD.

- 7.3 A right of permanent residence once the EU citizen has resided legally (i.e. in accordance with the relevant condition) for a continuous period of five years in the host Member State. Once this right is acquired, the EU citizen no longer has to fulfil any of the conditions set out in Article 7(1) CRD in order to enjoy the continued right of residence: Article 16(1) CRD. This right could only be lost if the EU citizen was absent from the host Member State for a period exceeding two consecutive years by virtue of Article 16(4) CRD (following which the EU citizen would return to enjoying only the rights under Article 6(1) and 7(1) CRD).
8. There were two principal sets of circumstances in which an EU citizen who has exercised their right of residence might find themselves being lawfully required to leave the host Member State.
  - 8.1 The first was if they were no longer fulfilling the conditions attaching to their right of residence under Article 6(1) or 7(1) CRD (such as when an economically inactive EU citizen becomes an unreasonable burden to the social assistance scheme of the host Member State). In those circumstances, they would no longer have any relevant right of residence at all. Article 15 CRD provided for “Procedural safeguards” in respect of any action taken to remove a person on the grounds that they no longer fulfilled the conditions for the right of residence. Cases of removal in these circumstances are referred to below as “**Article 15 cases**”.
  - 8.2 The second was if their right of residence could be lawfully restricted on grounds of public policy, public security or public health. In such circumstances, EU citizens could be the subject of an expulsion order from the host Member State. The provisions of the CRD governing the basis upon which such action could be taken are all set out in Chapter VI of the CRD. Cases of removal in these circumstances are referred to below as “**Chapter VI cases**”.
9. When considering the terms of both Article 15 and Chapter VI, it is possible to distinguish in principle between:

- 9.1 The grounds of any decision by the Member State to restrict an EU citizen's right of residence; and
  - 9.2 The safeguards which protect the individual against a decision taken on such grounds but which may amount to an unjustified interference with an otherwise existing right of residence.
10. The line between the two as used in the CRD is not sharply drawn. In Chapter VI in particular, they are intertwined to a significant extent. That is because there was no particular necessity under EU law to draw such a distinction. The only reason to seek to make the distinction now is because Article 20(2) WA and Article 21 WA distinguishes between the “*grounds*” for restricting the right of residence (which may be constituted by the conduct of Union citizens occurring after the end of the transition period “*in accordance with national legislation*”) and the “*safeguards*” set out in Article 15 and Chapter VI of the CRD, which “*shall apply in respect of any decision by the host State that restricts residence rights*” of relevant EU citizens. It therefore follows that it is necessary to identify what “*safeguards*” are set out in in Article 15 and Chapter VI of the CRD, and which of those provisions concern only the “*grounds*” upon which rights may be restricted in the first place.

- *Chapter VI cases*

11. It is convenient to deal with Chapter VI cases first. It is well established that where an EU citizen has a right of residence (which they continue to qualify to enjoy, and is not the product of fraud or abuse of rights), the only grounds upon which a host Member State may restrict that right are those which are set out in Chapter VI (see e.g. Case C-127/08 *Metock*, EU:C:2008:449 at [95]).
12. Article 27 CRD is headed “General principles”.
- 12.1 Article 27(1) sets out the grounds – public policy, public security or public health.
  - 12.2 In relation to the first two of those grounds, Article 27(2) CRD provides that measures taken on those grounds “*shall be based exclusively on the personal conduct of the individual concerned*”, and that “*Previous criminal convictions shall not in themselves constitute grounds for taking such measures.*” It further provides

that “*The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.*”<sup>4</sup> These provisions are bound up as one with the definition of the “*grounds*” upon which rights may be restricted at all.

12.3 However, Article 27(2) also provides in the same sentence as the first of those limitations that such measures “*shall comply with the principle of proportionality*”. The mere fact that such words appear in the same sentence as provision defining and limiting the “*grounds*” of expulsion does not in itself mean that it is incapable of being viewed as any kind of “*safeguard*”. As observed above at paragraph 10, it was not necessary for the purposes of EU law for the CRD to make any kind of formal distinction or separation of the two. The appropriate characterisation of the proportionality requirement is addressed further below.

13. Article 28 CRD is headed “Protection against expulsion”.

13.1 Articles 28(2) and 28(3) define the (more limited) grounds upon which an EU citizen’s right of residence may be restricted in certain cases: in the case of a person with a right of permanent residence, there must be “*serious grounds of public policy or public security*”, and in the case of those who have resided for the previous ten years, and minors, there must be “*imperative grounds of public security*”. The fact that the grounds for expulsion become increasingly restrictive as the amount of time over which rights of residence have been exercised was explained by the CJEU in Case C-400/12 *SSHD v MG*, ECLI:EU:C:2014:9 at [30]. The gradual restriction of the grounds for expulsion over time is premised upon the fact that the length of residence will give rise to a greater degree of integration into the host Member State, and that weight must be given to that integration in view of the fact that it results from the exercise of rights and freedoms conferred upon the EU citizen by the TFEU.

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<sup>4</sup> This is further reinforced by Article 33(1) CRD, which provides that “Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29.”

- 13.2 Article 28(1) does not set out any “ground” upon which expulsion measures may be taken. Instead, it provides a “safeguard”: it provides that “*Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.*” None of these individual factors form any part of the justification or grounds for expulsion: rather they relate directly to the matters which must form part of the application of the principle of proportionality (as provided for in Article 27(2)). Notably, it reflects (among other things) the need to take into account the length of residence and extent of social and cultural integration.
14. Article 29 CRD is concerned with public health, and neither has any link with a person’s “conduct” nor applies in any event to diseases occurring after the initial three month period of residence. It is not necessary to consider it further.
15. Article 30 CRD is entitled “Notification of decisions”. It provides for notification of the EU citizen of any decision in writing, a right to be informed “precisely and in full” of the “public policy, public security or public health grounds” on which the decision is based, and notification of the relevant appeal rights and time allowed to leave the territory (not to be less than one month). These are all plainly safeguards. Article 30 CRD is addressed in more detail in the context of Article 15 cases below.
16. Article 31 CRD is headed “Procedural safeguards”.
- 16.1 It provides for a right of appeal or judicial review (Article 31(1)), protection against removal while any application for interim relief is made, subject to certain exceptions (Article 31(2)), and the right to appear in person at an appeal even if excluded, again subject to certain exceptions (Article 31(4)). These are also plainly safeguards. They are addressed in more detail in the context of Article 15 cases below.
- 16.2 Article 31(3) provides that the redress procedure (whether by way of appeal or judicial review) “*shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based.*”

*They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.*” This provision is intended to ensure (among other things) not only an examination of whether the grounds for expulsion are made out, but also that the application of the proportionality principle as required by Article 27(2) and Article 28(1) CRD is subject to the safeguard of being reviewed upon appeal/judicial review.

- *Article 15 cases*

17. Article 15 is to be found in Chapter III of the CRD, which is concerned with the (ordinary) right of residence (not the right of permanent residence, which is the subject of Chapter IV). The grounds upon which a free movement of Union citizens may be restricted under Chapter III are not set out explicitly in Chapter III: that is because the conditions applying to Union citizens’ entitlement to those rights are already set out in Articles 6(1) and 7(1) respectively. It is apparent that where a person fails to meet any of the relevant conditions for the exercise of the right, they may be treated as not qualifying for that right to reside (either because they never fulfilled the relevant conditions, or because they no longer do so). However, these are still “*procedural safeguards*”, as set out in the heading to Article 15 CRD, which apply in precisely such a circumstance: Case C-94/18 *Chenchooliah*, ECLI:EU:C:2019:693 (Grand Chamber of the CJEU), at [73]-[74].
18. Article 15(1) CRD provides that “*the procedures provided for by Article 30 and 31*” apply “*by analogy*” to all decisions restricting free movement of EU citizens “*on grounds other than public policy, public security or public health*” (i.e. on grounds that the relevant conditions for acquiring or retaining the right of residence under Part III have not been met, or are no longer met). Its phrasing is again consistent with a contrast between the “*grounds*” upon which the Member State has decided to act, and the “*procedures*” or “*procedural safeguards*” which control or limit such action.
19. The extent to which Article 30 and 31 CRD do apply “*by analogy*” in an Article 15 case was considered by the CJEU in *Chenchooliah* at [81]-[87]. The effect of that ruling was that, in Article 15 cases, an EU citizen enjoyed the following rights against removal from the UK under Chapter III of the CRD, prior to end of the transition period:

- 19.1 Article 30(1) CRD, which provided for notification of the decision in such a way as the persons who are the subject of the decision are able to comprehend its content and implications for them. (The words in Article 30(1) referring to any decision “*taken under Article 27(1)*” are to be disregarded, given that this provision applies by analogy to decisions taken under Article 15.)
- 19.2 Article 30(3) which required that they must be informed of their rights of appeal, and of the time allowed for departure from the territory (which must not be less than one month, save in duly substantiated cases of urgency).
- 19.3 Article 31(1), which required that the person concerned must have access to judicial redress procedures to appeal or seek review of any decision taken against them (the words “*on the grounds of public policy, public security or public health*” being disregarded for the purposes of their application by analogy).
- 19.4 Article 31(2), which required that there be a right to apply for an interim order to suspend removal, and that the person concerned not be removed until any such interim application has been decided (except in certain specified circumstances, only the last of which did not apply “*by analogy*”, since it concerns an expulsion on grounds of imperative public security under Article 28(3)).
- 19.5 Article 31(3), which required that “*the redress procedures*” must allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based, and which requires that the redress procedures “*shall ensure that the decision is not disproportionate*” (the words *particularly in view of the requirements laid down in Article 28*” being disregarded for the purpose of the analogy).
20. On the other hand, the following safeguards did not apply in an Article 15 case.
- 20.1 Article 30(2), which in a Chapter VI case requires that the person concerned should be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case was based.
- 20.2 Article 31(4), which required that where a Member State excludes an individual from their territory pending the redress procedure, they may not prevent the person

from submitting their defence in person, except where that would cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

21. In addition to the Article 30 and 31 safeguards applied by Article 15(1), further “*Procedural Safeguards*” are provided in Articles 15(2) and 15(3). It may be observed that they do not have much of the character of the “*procedural*” about them in any narrow or restricted sense:

21.1 It is to be recalled that Article 6(1) CRD provides that the sole condition for a right of residence of up to three months is “*the requirement to hold a valid identity card or passport*” (that also being a condition for the right of entry under Article 5(1) CRD). Article 15(2) CRD makes clear that the fact that the passport or identity card subsequently expires “*shall not constitute a ground for expulsion from the host Member State*”. It is notable that it is presented as a “*safeguard*”, on the basis that it limits the grounds upon which a person may be said to have lost their right of residence, rather than providing the positive grounds upon which an EU citizen’s freedom of movement can be restricted.

21.2 Article 15(3) CRD provides that the host Member State may not impose a ban on entry in the context of an expulsion decision under Part III. This is consistent with the fact that expulsion pursuant to an individual’s inability to fulfil the conditions required for a continuing right of residence under Article 7 CRD *at that time* in no way implied that that person would not be able to fulfil the conditions for residence at some point in the future. By contrast, a Part VI expulsion or exclusion decision made on the basis of a risk to public policy or public security necessarily entailed that that person should continue to be excluded thereafter (albeit that the continuing justification for exclusion must be subject to periodic review). Again, this is presented as a “*safeguard*” as it limits the basis upon which the Member State can act, rather than provide a positive basis for action.

22. It may further be observed that although there is reference to “*Procedural Safeguards*” in both Article 15 and in Article 31, there is no sharp distinction between those safeguards which might best be described as “*procedural*” in a narrow sense and those which might

be said to be more substantive in nature: Articles 15(2) and (3) in particular do not fit easily into an English law view of what amounts to a procedural safeguard.

## **(2) The relevant provisions and effect of the WA**

### *(i) The relevant provisions of the WA*

23. The Withdrawal Agreement entered into force upon the UK's exit from the EU, at 11pm GMT on 31 January 2020. It is an international treaty, to be interpreted in accordance with the interpretative principles set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969: *SSWP v AT* [2023] EWCA Civ 1307 at [80]. Lord Reed summarised the effect of those principles in *Revenue and Customs Commissioners v Anson* [2015] UKSC 44 at [56].
24. Article 126 WA provided that there would be a transition or implementation period, which would start on the date of entry into force of the WA and end on 31 December 2020. Article 127 provided that unless otherwise provided in the WA, Union law would be applicable to and in the UK during the transition period.
25. Part One of the WA makes some Common Provisions.
  - 25.1 Article 2(a) WA defines "Union law" as including the TFEU, the general principles of the Union's law, and the acts adopted by the Union's institutions
  - 25.2 Article 4(1)-(4) WA provide as follows:
    - "1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.  
Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
    2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.
    3. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.

4. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.”

- 25.3 Of particular significance for present purposes is Article 4(1)-(2) WA, which together require the UK’s judicial authorities to disapply domestic provisions which are incompatible with the provisions of the WA “*and the provisions of Union law made applicable by this Agreement*”. It is equally significant that, according to Article 4(3) WA the “*concepts or provisions*” of Union law referred to in the WA are to be interpreted and applied in accordance with the methods and general principles of Union law. All of these provisions are designed to ensure, as Article 4(1) WA provides, that the provisions of the WA and provisions of Union law made applicable by the WA “*shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.*”
26. Part Two of the WA provides for citizens’ rights: it applies to both UK citizens and EU citizens (and their family members) who have exercised their rights of residence under EU law in the EU or the UK respectively, before the end of the transition period and who continue to reside there thereafter: Article 10(1). It is not necessary to set out the detail of those rights for present purposes other than to note that:
- 26.1 Article 13(1) WA provides for relevant EU citizens to have the right to reside in the UK under the same limitations as are set out in Articles 6(1) and 7(1) CRD;
- 26.2 Article 13(4) WA provides that “*The host State may not impose any limitations or conditions for obtaining, retaining or losing residence rights on the persons referred to ... other than those provided for in this Title. There shall be no discretion in applying the limitations and conditions provided for in this Title, other than in favour of the person concerned.*”
- 26.3 Article 15(1) WA provides for a right of permanent residence to be acquired in accordance with the relevant provisions of the CRD; and
- 26.4 Article 18(1) WA permits the UK to require relevant EU citizens to apply for a new residence status which confers the rights under Article 13 and 15.

27. Article 20 WA is headed “Restrictions of the rights of residence and entry”.
- 27.1 Article 20(1) WA provides: “*The conduct of Union citizens or United Kingdom nationals, their family members, and other persons, who exercise rights under this Title, where that conduct occurred before the end of the transition period, shall be considered in accordance with Chapter VI of Directive 2004/38/EC.*”
- 27.2 Article 20(2) WA provides: “*The conduct of Union citizens or United Kingdom nationals, their family members, and other persons, who exercise rights under this Title, where that conduct occurred after the end of the transition period, may constitute grounds for restricting the right of residence by the host State or the right of entry in the State of work in accordance with national legislation.*”
28. Article 21 WA is headed “*Safeguards and right of appeal*”. It provides: “*The safeguards set out in Article 15 and Chapter VI of Directive 2004/38/EC shall apply in respect of any decision by the host State that restricts residence rights of the persons referred to in Article 10 of this Agreement.*”
- (ii) *The effect of the WA*
29. Under the terms of the WA, it is possible for the UK to restrict relevant EU citizens’ rights in three different circumstances after the end of the transition period.
30. **First**, where a relevant EU citizen ceased to qualify for the continued exercise of the right of residence under (Article 13(1) WA), they could be removed from the UK for that reason subject to the safeguards set out in Article 15 CRD (as provided for by Article 21 WA):
- 30.1 This reflects precisely the position as under the CRD, in that both Article 13(1) WA and Article 7(1) CRD require continued fulfilment of the qualifying conditions for the right of residence to be retained (see also Article 14(2) CRD): see the discussion of “Article 15 cases” above.
- 30.2 Since the “*safeguards set out in Article 15 and Chapter VI*” CRD apply to any decision by the host State that restricts residence rights, it is apparent that the safeguards which would be applicable in this context are those safeguards set out in Article 15(1), (2) and (3), and thus also, by virtue of Article 15(1) CRD, Articles

30 and 31 CRD (which are to be found within Chapter VI): these apply “by analogy” in this context, which means to the extent identified in *Chenchooliah* at [81]-[87]. (This case was handed down before the end of the transition period, and Article 15(1) CRD must be interpreted in conformity with it: Article 4(4) WA.)

30.3 This explicitly includes the requirement that “*the redress procedures must not only allow for an examination of the legality of the decision concerned, as well as of the facts and circumstances on which it is based, but also ensure that the decision in question is not disproportionate*”: see *Chenchooliah* at [85].

30.4 Articles 27(2) and 28(1) CRD (insofar as providing the requirements for proportionality and for the relevant circumstances to be taken into account) are not directly applied by Article 15 CRD, and are phrased in each case as relating to decisions taken on grounds of public policy or public security, which would not include Article 15 cases. It is nonetheless implicit in the requirement in Article 31(3) CRD, as confirmed by *Chenchooliah*, that the decision must not be disproportionate. That is also explained by the fact that proportionality is in any event a general principle of EU law, and so applies to a Member State when their action entails a restriction of freedom of movement. Article 4(3) WA applies such a principle in the present context, given the reference in Article 13(1) WA to the “*limitations and conditions*” as set out in (inter alia) Article 7(1) CRD: the interpretation and application of those provisions must be in accordance with the methods and general principles of Union law.

30.5 The remainder of Chapter VI is not engaged in this context, because as explained at paragraphs 12-14 above, it does not otherwise provide for safeguards in relation to the restriction of residence rights.

30.6 For completeness, the IMA notes that the above provisions will not in practice be engaged in the UK, as in its implementation of the WA the UK has decided to waive the requirement for any of the conditions set out in Article 7(1) CRD (as referred to in Article 13(1) WA) to continue to be fulfilled prior to the acquisition of the right of permanent residence: under the EU Settlement Scheme<sup>5</sup>, it is

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<sup>5</sup> Appendix EU of the Immigration Rules set out the provisions for the grant of leave to enter or remain to beneficiaries of Part 2 of the WA (as well as the Separation Agreement and the Swiss Citizens Rights Agreement). These rules constitute the “EU Settlement Scheme” or EUSS.

sufficient that the relevant EU citizen continues to reside in the UK. (This is further reflected in clause 42 of the Border Security, Asylum and Immigration Bill currently before Parliament, which will provide, in broad terms, that a EU citizen who was granted EUSS status under the Immigration Rules but did not fall within the personal scope of the WA (for example if they did meet the conditions in Article 7(1) CRD at the end of the transition period) is to be treated as if they did have rights under the WA.) However, none of this sheds any light on the interpretation of the WA itself: see *R (IMA) v SSHD* [2022] EWHC 3274 (Admin); [2023] 1 WLR 817 at [14] and [134].

31. **Secondly**, as made clear by Article 20(1) WA, a relevant EU citizen may be expelled following consideration of an EU citizen’s conduct occurring before the end of the transition period “*in accordance with Chapter VI*” of the CRD.

31.1 It follows that a relevant EU citizen could only be expelled from the UK on the basis of conduct committed before the end of the transitional period if they could also have been expelled on the same grounds and subject to the same safeguards as Chapter VI required under EU law applying before the end of the transition period.

31.2 This plainly entails an assessment of proportionality by the decision-maker in accordance with Article 27(2) and 28(1) CRD, and for the redress procedures to ensure that the decision is not disproportionate in accordance with Article 31(3) CRD.

31.3 All of the above apply following the end of the transition period (in relation to conduct occurring before it) by virtue of Article 20(1) WA. For this purpose, Article 21 WA adds nothing: the safeguards under Chapter VI are already required to be followed in any event given that Article 20(1) provides that any such expulsion decision must be considered “*in accordance with Chapter VI*”.

32. **Thirdly**, in the case of conduct occurring after the end of the transition period:

32.1 Article 20(2) WA provides that the conduct of relevant EU citizens “*may constitute grounds for restricting the right of residence by the host State ... in accordance with national legislation.*” This provision plainly has the effect of expanding the grounds upon which such action may be taken to beyond that provided for by

Articles 27(1), 28(2) and 28(3) CRD. Instead, the grounds may be set out in national legislation. Thus, it would be permissible under the WA for the national legislature to provide that previous criminal convictions could in themselves constitute grounds for taking such measures (contrary to the position under Article 27(2) CRD, which provides that under EU law such measures cannot be taken upon the basis of previous criminal convictions without more). The WA places no limits on what the grounds may be, provided that they are in accordance with national legislation.

32.2 However, separately, Article 21 WA nonetheless provides for safeguards to apply in respect of any decision by the host State that restricts residence rights of EU citizens. Those safeguards are those “set out in Article 15 and Chapter VI” CRD.

32.3 In a context where the restriction results from a person’s conduct, it is the safeguards set out in Chapter VI CRD that must apply, rather than those set out in Article 15 (those being applicable in the cases identified at paragraph 30 above): since they stem from a person’s “conduct”, the circumstances would remain ones of public policy or public security, with the result that, for example, Article 15(3) does not apply in this context: that is, it would be consistent with the WA for a deportation order made on the basis of a person’s criminal convictions to be accompanied by a ban on entry.

32.4 By the same token, however, the requirements of proportionality and consideration of circumstances under Article 27(2) and 28(1) CRD must be taken to apply, once they are recognised to be safeguards under Chapter VI. Further and in any event, the requirement under Article 31(3) CRD for the redress procedure to ensure that the decision is not disproportionate must apply here, just as it applies (by analogy) in the Article 15 cases (as made clear in *Chenchooliah*). It is difficult to see any basis for excluding that requirement under Article 31(3) in a conduct case in circumstances where it has been held to apply even in an Article 15 case, where no issue of public policy or public security is engaged at all.

33. The conclusions in paragraphs 32.4 above are further strengthened by reference to Article 4(3), which provides that “The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the

methods and general principles of Union law.” Article 21 WA is a provision of the WA that refers to Union law, as well as to concepts or provisions thereof. It must therefore be interpreted and applied in accordance with the methods and general principles of Union law (as accepted by the SSWP in *AT*, as recorded by Green LJ at [87]). Those principles include the principle of proportionality. (Indeed, it is difficult to think of a more firmly entrenched principle of Union law than that any restriction or limitation of rights must be proportionate, as reflected by Article 52 of the EU Charter of Fundamental Rights.) That principle has at all times been preserved in domestic law for this purpose: see paragraph 39 below.

34. The IMA accordingly submits that the correct interpretation of the WA is clear: in each of the three circumstances in which residence rights of relevant EU citizens may be restricted, there is a requirement that the decision in question must not be disproportionate, and a duty on any appeal court charged with providing the redress procedure to ensure that that is so.

### **(3) Domestic law**

#### *(i) Implementation of the WA in domestic law*

35. The WA was implemented in domestic law by section 7A of the 2018 Act, as amended by the 2020 Act. As Lord Reed succinctly explained in *SkyKick UK Ltd v Sky Ltd* [2024] UKSC 36 at [479]-[481]:

“479. Section 7A(1) and (2) are modelled on section 2(1) of the European Communities Act 1972 ("the 1972 Act"). Like that provision, they give effect in domestic law to the EU principles of direct applicability and direct effect. Crucially, they do so in relation to (among other things) "such remedies and procedures ... provided for by or under the withdrawal agreement, as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom" (section 7A(1)(b)).

480. Section 7A(3) of the 2018 Act is also important. It is modelled on section 2(4) of the 1972 Act. Its purpose and effect is to give primacy to the directly applicable and directly effective rights, remedies, procedures and so forth referred to in section 7A(1) over incompatible domestic legislation, by requiring such legislation to be read and to have effect subject to those rights, remedies, procedures and so forth.

481. It follows that remedies and procedures which are provided for by or under the Withdrawal Agreement, and which are in accordance with the Withdrawal

Agreement to be given legal effect or used in the United Kingdom without further enactment, are to be recognised and available in domestic law notwithstanding any contrary enactment.”

36. Lord Reed further confirmed at [487] that section 7A(3) of the 2018 Act implemented the UK’s obligation under Article 4(2) WA that “*The United Kingdom shall ensure compliance with [Article 4(1)], including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation*”.
37. The effect of section 7A was also summarised by Green LJ in *R (Ali) v SSHD* [2024] EWCA Civ 1546 at [31]. As Green LJ pointed out, the Explanatory Notes to section 7A made the position explicit:

"31. The approach in the Act is intended to give effect to Withdrawal Agreement law in a similar way to the manner in which EU Treaties and secondary legislation were given effect through section 2 of the ECA. Although the ECA gives effect to EU Treaties and secondary legislation, it is not the originating source of that law but merely the 'conduit pipe' by which it is introduced into UK domestic law. Further, section 2 of the ECA can only apply to those rights and remedies etc that are capable of being 'given legal effect or used' or 'enjoyed'.

32. The approach in the Act to give effect to Article 4 is to mimic this 'conduit pipe' so that the provisions of the Withdrawal Agreement will flow into domestic law through this Act, in accordance with the UK's obligations under Article 4. The approach also provides for the disapplication of inconsistent or incompatible domestic legislation where it conflicts with the Withdrawal Agreement. This ensures that all rights and remedies etc arising under the Withdrawal Agreement are available in domestic law."

38. Section 7C(1)(a) provides that any question as to the validity, meaning or effect of any “relevant separation agreement law” is to be decided, so far as they are applicable, in accordance with the WA, the EEA EFTA separation agreement and the Swiss citizens’ rights agreement. In that context, section 7C(2) expressly directs attention to Article 4 WA. Section 7C(3) defines “relevant separation agreement law” to mean (among other things), section 7A, anything which is domestic law by virtue of section 7A, Part 3 of the 2020 Act, and anything else so far as it is domestic law for the purposes of, or otherwise within the scope of the WA (other than Part 4 of the WA [which is concerned with IP rights]).

39. As to general principles of EU law:

39.1 Section 5(A4) of the 2018 Act provides that “No general principle of EU law is part of domestic law after the end of 2023.” This provision was inserted by section 4(2) of the Retained EU Law (Revocation and Reform) Act 2023 (“**the 2023 Act**”).

39.2 Paragraphs 2 and 3 of Schedule 1 of the 2018 Act (to which the UT referred at [54]) was repealed by the 2023 Act, with effect from 1 January 2024. Prior to that date:

39.2.1 Paragraph 2 had provided: “No general principle of EU law is part of domestic law on or after IP completion day if it was not recognised as a general principle of EU law by the European Court in a case decided before IP completion day (whether or not as an essential part of the decision in the case).”<sup>6</sup>

39.2.2 The Explanatory Notes to the 2018 Act explained at paragraph 166: “Paragraph 2 provides that only the EU general principles which have been recognised in CJEU cases decided before exit, will form part of domestic law after exit. These include, for example, some fundamental rights, non-retroactivity, and proportionality.”

39.2.3 Paragraph 3 had provided:<sup>7</sup>

“(1) There is no right of action in domestic law on or after IP completion day based on a failure to comply with any of the general principles of EU law.

(2) No court or tribunal or other public authority may, on or after IP completion day —

(a) disapply or quash any enactment or other rule of law, or

(b) quash any conduct or otherwise decide that it is unlawful,

because it is incompatible with any of the general principles of EU law.”

39.2.4 The Explanatory Notes at paragraph 167 explained: “Paragraph 3 provides that there is no right of action in domestic law post-exit based on failure

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<sup>6</sup> In its original form, paragraph 2 referred to “exit day” rather than “IP completion day”, but was amended by the 2020 Act with effect from IP completion day, being 31 December 2020.

<sup>7</sup> Likewise, in its original form, paragraph 3 referred to “exit day” rather than “IP completion day”, but was amended by the 2020 Act with effect from IP completion day.

to comply with the EU general principles. Courts cannot disapply domestic laws post-exit on the basis that they are incompatible with the EU general principles. Further, domestic courts will not be able to rule that a particular act was unlawful or quash any action taken on the basis that it was not compatible with the general principles.”

39.3 However, importantly, section 5(7) of the 2018 Act – which was inserted by the 2020 Act (and amended by the 2023 Act) – provides that each of the above provisions were subject to relevant separation agreement law (as defined in section 7C). That includes Article 4(3) WA. It follows that Articles 20(2) and 21 WA must still be interpreted and applied domestically in accordance with the methods and general principles of Union law: see paragraph 33 above.

(ii) *Domestic law as to deportation*

40. Section 3(5)(a) of the Immigration Act 1971 provides that a person who is not a British citizen is liable to deportation from the UK if the Secretary of State deems his deportation to be conducive to the public good.
41. Section 3(5A) of the Immigration Act 1971 provides that the Secretary of State may not deem a relevant person’s deportation to be conducive to the public good under section 3(5) if the person’s deportation would be in breach of the UK’s obligations under Article 20 WA.
42. Section 5(1) of the Immigration Act 1971 provides that where a person is liable to deportation under section 3(5), then the Secretary of State may make a deportation order against him (subject to the following provisions of that Act).
43. Section 32(4) of the UK Borders Act 2007 (“**UKBA 2007**”) has the effect that the deportation of a person who is not a British citizen but who has been convicted in the UK of an offence and sentenced to a period of imprisonment of at least 12 months (a “**foreign criminal**”) is conducive to the public good.
44. Section 32(5) UKBA 2007 provides that the Secretary of State must make a deportation order in respect of a foreign criminal.

45. Both section 32(4) and 32(5) UKBA 2007 are subject to the application of any relevant exception in section 33. Those exceptions include Exception 7, which is where the foreign citizen is (inter alia) a relevant EU citizen, and the offence for which the foreign criminal was convicted consisted of or included conduct that took place before the end of the transition period. There is no such exception where the conduct occurred after the end of the transition period.
46. Section 3(5A) and Exception 7 were both introduced by way of amendment to the 1971 Act, pursuant to section 10 of the 2020 Act. That section falls within Part 3 of that Act, and hence within the scope of section 7C(3) of the 2018 Act (see paragraph 38 above).

*(iii) Submissions*

47. The existence of Exception 7 in relation to Article 20(1) WA cases recognises that the acknowledged requirement for a proportionality assessment is inconsistent with a mandatory duty to automatically deport a foreign criminal (as defined).
48. If the IMA is correct in its analysis above of the effect of Article 20(2) WA, and in particular that such decisions relating to conduct occurring after the end of the transition period must still be proportionate to the restriction of the EU citizen's preserved rights of residence under the WA, section 32(4) is incompatible with the WA.
49. Section 32(4) and (5) must therefore be disapplied in accordance with Article 4(1) and 4(2) WA, insofar as they relate to an Article 20(2) WA case. One way to achieve that it to disapply section 33(6B)(b), which provides for Exception 7 to apply only in a case where the relevant conduct took place before the end of the transition period. Disapplying it would have the effect of extending the protection of Exception 7 to all relevant EU citizens. The effect would be to allow for a proportionality assessment to take place before any decision was taken to either deem a person's deportation to be conducive to the public good under section 3(5)(a) of the 1971 Act, or to make a deportation order in respect of the foreign criminal concerned under section 5(1) of the 1971 Act. In either case, that would ensure that any such action would not infringe the UK's obligations under Article 20 or 21 WA.

**(4) The UT's decision**

50. It is submitted that the UT was wrong to conclude that no proportionality assessment was required. Its reasoning failed to recognise the true effect of Article 21 WA, which for the reasons set out above required the proportionality of the restriction of a relevant EU citizen’s residence rights under the WA to be assessed (including on appeal), that being one of the “safeguards” set out in Article 15 and Chapter VI of the CRD.
51. First, the UT started its analysis from the wrong place at [43]-[45]: it began by rejecting the submission that the UK Borders Act should be disapplied insofar as it fails to create an exception, stating that there was no indication in any text to the effect that the lack of such an exception “*is as a result of Parliament not understanding the terms of the [WA] in relation to this issue, or is other than the will of Parliament.*” That ignores the effect of sections 7A and 7C of EU(W)A 2018. The starting point ought to have been the effect of the WA.
52. Secondly, that failure is compounded at [54], where the UT stated that the 2018 Act made provision to prohibit further recognition of general principles of EU law in cases decided after the UK had left the EU, by reference to paragraphs 2-3 of Schedule 1 of the 2018 Act.<sup>8</sup> That observation entirely ignores the express preservation of those principles in the context of Part Two of the WA, where engaged in accordance with Art 4(3) WA. Notably, the UT makes no mention of section 5(7), 7A or 7C of the 2018 Act, which together made the disapplication of general principles of EU law subject to relevant separation agreement law. Although the UT referred to Article 4(3) WA at [59], it introduced it by asserting that “*It is a settled principle that it is not possible to invoke principles of EU law in interpreting the Withdrawal Agreement, save insofar as that Agreement provides.*” The UT then appears to have accepted the Secretary of State’s submission (also recorded at [57]) that the WA does not “*specifically provide*” for consideration of “*the EU law concept of proportionality, when considering deportation of an EU national who has committed a criminal offence after the specified date*”, and that the proportionality principle “*ceased to be applicable*” after that date [63]. That is a manifestly inaccurate précis of the effect of Article 4(3) WA and sections 5(7), 7A and 7C of the 2018 Act.

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<sup>8</sup> By the time of the UT’s decision, those provisions had been repealed by section 4 of the 2023 Act. However, they were in force at the time of the SSHD’s decision and the FTT appeal, and section 22(5) of the 2023 Act provides that section 4 does not apply in relation to anything occurring before the end of 2023.

53. Thirdly, at [55] the Tribunal refers to UK statutes which make provision as to deportation, to which EU citizens are now said to be subject. That is true in respect of EU citizens who do not have retained residence rights under Part Two of the WA. However, as made clear by section 7A of the 2018 Act, they may be disapplied to the extent required to give effect to the WA – a point to which again the UT fails to advert.
54. Fourthly, at [61]-[62] the UT correctly notes that the WA treats conduct occurring before and after the end of the transition period in different ways, as per Articles 20(1) and 20(2) WA. That is obviously correct. But from that starting point, the UT makes two dramatic and unjustified leaps:
- 54.1 First, at [62(1)], it asserts that Article 20(1) WA “*creates an exception to the general proposition that following the end of the transition period and in accordance with the [WA] EU law has no application.*” That sweeping statement ignores the effect of Article 4 WA in respect of the rights of residence provided for by the WA, to which effect is also given by section 7A of the 2018 Act.
- 54.2 Secondly, at [63] it asserts that in Article 20(2) WA cases, “*the intention of the [WA] is clear in that the substantive protection provisions found in EU law, including the application of the EU law proportionality principle, ceased to be applicable.*” This conclusion is entirely unreasoned, and fails to engage with the distinction between the provision made by Article 20(2) as to the “grounds” which may be relied upon to restrict residence rights in accordance with national law, and the provision made by Article 21 WA as to the continued application of the “safeguards” under Article 15 and Chapter VI of the CRD. There is no support for this approach in the Commission’s guidance note which it cites at [64].
55. Fifthly, at [65]-[72] the UT turns to consider Article 21 WA, having already found the above propositions to be established on the basis of Article 20 WA alone.
- 55.1 It starts by misquoting Article 21 WA at [65].
- 55.2 At [66]-[67] and [69], it concludes that Article 21 must only be referring to “*procedural protections*”, which are said to be “*commonly understood*” to be the rights to be notified of a decision and how to appeal it, the right to an effective remedy, and the right to a fair hearing. It is not clear how it derives this conclusion

from the terms of Article 21 WA, but it appears to be based on the fact that Article 15 CRD – whose place in the scheme of the Directive it does not consider – applies Articles 30 and 31 CRD by analogy. The UT then focuses on the procedural nature of the protections offered by Article 30 CRD, while deferring consideration of Article 31 CRD until later. It again asserts that no “*substantive safeguards such as a requirement to apply the EU law concept of proportionality*” are imported into domestic law in Article 20(2) cases, as this would import “*the need to consider European law as provided for in Article 20(1) into cases specifically covered by Article 20(2).*” This said to make the “*clear bright line*” between the two “*irrelevant*”.

55.3 All of this is arrived at without any consideration of the text of Article 21 WA, without identifying any source for the distinction between “*procedural*” and “*substantive*” safeguards which is said to be made by Article 21 WA, and without advertent at all to the distinction made between “*grounds*” and “*safeguards*” in Articles 20 and 21 WA. Unfathomably, the UT concludes at the end of [67] that “*the only right*” an individual has after the end of the transition period is “*for any action being taken as a result of their offending after the specified date to be considered in accordance with domestic law*”. That could only be sustained as a proposition if Article 21 WA and its cross-reference to Article 15 and Chapter VI CRD did not exist at all.

55.4 Similarly, [68] fails to recognise that the concept of restriction of residence rights – which had been gained pursuant to EU law originally and which were to be preserved pursuant to the WA – can in itself engage principles of EU law pursuant to Article 4(3) WA.

55.5 At [70]-[72], the UT seeks to address Article 31 CRD for the first time, and Article 31(3) in particular. It notes that the latter refers to Article 28 CRD – but then discounts it on the sole basis that (it asserted) it had not “*been referred to any requirement in domestic law which places a legal obligation upon a decision-maker to apply Chapter VI of the Directive, which includes Articles 27 and 28.*” This is, again, baffling in light of the express provisions of sections 7A and 7C of the 2018 Act and Article 21 WA. The UT then repeats its earlier conclusion that the effect of Article 20(2) WA was to exclude any question of a proportionality

analysis based upon EU law, without providing any additional reasoning in support of that assertion.

56. The flaw is again a failure to distinguish between the “*grounds*” referred to in Article 20(2) WA and the “*safeguards*” referred to in Article 21 WA: it thus appears that the UT was proceeding under the misapprehension that the only alternative to its conclusion was the wholesale importation of the whole of Chapter VI into domestic law, which would provide no difference between Article 20(1) cases and Article 20(2) cases; see also *Molnar* at [14] in this regard. The UT was clearly right that there is a real difference between the two, but wrong to assume that the result had to be an either all or nothing approach to the continued application of the provisions of Chapter VI CRD. Its attempt to carve out a special category of purely “procedural” safeguards, on its own narrow definition of that term, is unsupported either by the terms of Article 21 WA or by the breadth and effect of the provisions which are described under the headings of “Procedural Safeguards” under Articles 15 and 31 CRD, which go well beyond the UT’s narrow conception.
57. Sixthly, the UT’s conclusion at [83] that exception 7 in section 33 UKBA 2007 was not incompatible with the WA is premised upon its erroneous analysis.

### **Conclusion**

58. The UT erred in its analysis of the WA and its effect in domestic law. In the IMA’s submission, the error is clear and does not require a reference to the CJEU to be resolved. The United Kingdom is presently in breach of its obligations under the WA, insofar as it fails to give full effect to the protection of Article 21 WA. The Court is invited to bring an end to that position by allowing these appeals.

**ROBERT PALMER KC**

**Monckton Chambers**

**24 June 2025**