

(1) AC/2024/BHM/000187

(2) AC/2023/BHM/000271

IN THE HIGH COURT OF JUSTICE
KING’S BENCH DIVISION
ADMINISTRATIVE COURT (BIRMINGHAM)

BETWEEN:

THE KING (on the application of BZ)

Claimant

- and -

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT

(2) SECRETARY OF STATE FOR WORK AND PENSIONS

Defendants

- and -

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

Prospective Intervener

SUBMISSIONS ON BEHALF OF THE IMA

A. Introduction

1. The Proposed Intervener, the Independent Monitoring Authority for the Citizens’ Rights Agreements (“**IMA**”), applies for permission to intervene in these proceedings.
2. The IMA understands that Mr Justice Chamberlain is considering whether to make a preliminary reference to the Court of Justice of the European Union (“**CJEU**”) under Article 158 of the EU-UK Withdrawal Agreement (“**Withdrawal Agreement**” or “**WA**”) relating to the interpretation of Article 17(2) of that Agreement. The IMA is the statutory body responsible for monitoring the implementation and application of Part 2 of the WA

in the UK and Gibraltar and, by paragraph 30(1)(b) of Schedule 2 to the European Union (Withdrawal Agreement) Act 2020, has power to intervene in proceedings if it considers it appropriate to do so in order to promote the adequate and effective implementation or application of Part 2 of the WA.

3. Whilst the IMA has had limited time in which to consider all the papers and issues in these proceedings, it hopes to assist the Court through this intervention in making submissions on the issues that arise under the WA in this case.
4. In summary, the IMA considers that two points of interpretation of the WA arise:
 - (a) Firstly, is the Claimant entitled to benefit from the protection of Article 17(2) WA in circumstances where (i) she was dependent on her son before the end of the transition period, (ii) her application for residence under the WA on the basis of that dependency was made and granted after the end of the transition period, and (iii) she subsequently ceased to be dependent upon him? The IMA agrees that this question requires a reference to the CJEU: see Section D below.
 - (b) Secondly, if that point were to be determined against the Claimant, is she entitled to an individualised assessment of her needs in order to determine whether she will be exposed to a violation of her rights under the Charter of Fundamental Rights of the European Union (“**the Charter**”) if she is not provided with support by the state? The IMA is not clear about the extent to which that question has yet been considered and determined by the Court, but does not consider it necessary for it to be referred to the CJEU in circumstances where the Second Defendant (SSWP)’s current policy would ensure that she received such an assessment in any event if she were to apply for UC now: see Section E below.

B. Factual background

5. The Claimant is a Bangladeshi national. She has a son and a daughter.
6. The Claimant resided outside the UK (in Bangladesh) at the end of the transition period (31 December 2020). The Defendants accept that the Claimant was dependent on her son at the end of the transition period.
7. On 6 April 2021, the Claimant applied for an EU Settlement Scheme (“**EUSS**”) family permit under Appendix EU (Family Permit) to the Immigration Rules.

8. On 21 October 2021, the First Defendant (“**SSHD**”) granted the Claimant’s EUSS application.
9. On 25 December 2021, the Claimant arrived in the UK. Upon her arrival, the Claimant lived with her son and his family.
10. On 22 January 2022, the Claimant applied for Pre-Settled Status (“**PSS**”) under the EUSS pursuant to Appendix EU.
11. On 28 April 2022, SSHD granted the Claimant PSS.
12. On 20 January 2023, the Claimant left her son’s house. The Claimant contends that she did so as a result of her son’s and his wife’s domestic abuse.
13. On 8 June 2023, the Claimant applied for universal credit (“**UC**”). She informed the Second Defendant (“**SSWP**”) that she was no longer receiving support from her son.
14. On 11 July 2023, SSWP refused the Claimant’s UC claim on the basis that the Claimant did not meet the habitual residence test in regulation 9 of the Universal Credit Regulations 2013 (“**UC Regs 2013**”). SSWP considered that the Claimant could not claim UC because (a) she only had limited leave to enter or remain in the UK (by virtue of her PSS status) and (b) she was not a “family member” of a “qualified person for the purposes of regulation 6” of the Immigration (European Economic Area) Regulations 2016 (“**EEA Regs 2016**”)¹ (i.e. her son), and thus could not apply for UC under regulation 9(4) of the UC Regs 2013, since she was no longer a “dependent direct relative” of her son.
15. On 7 September 2023, the Claimant sought mandatory consideration of SSWP’s decision to disallow her UC claim. She did so on the basis that she had experienced domestic abuse at the hands of her son and was vulnerable.
16. On 25 September 2023, SSWP maintained her refusal of the Claimant’s UC claim.

¹ Read with Schedule 4 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) Regulations 2020.

17. On 15 December 2023, the Claimant issued proceedings against SSWP. By that claim, the Claimant challenges regulation 9 of the UC Regs 2013 generally and SSWP's decisions to refuse the Claimant UC pursuant to regulation 9 in particular.
18. On 2 July 2024, the Claimant issued proceedings against SSHD. By that claim, the Claimant challenges SSHD's Migrant Victims of Domestic Abuse Concession ("MVDAC") and Appendix Victim of Domestic Abuse ("**Appendix VDA**").
19. A hearing listed for 10 and 11 July 2024 (to hear the claim against SSWP) was adjourned and relisted for 12 to 14 November 2024 to enable the claims to be heard together.
20. The IMA understands that, on 14 November 2024, Chamberlain J sought submissions from the parties as to the relevance and interpretation of certain provisions of the WA and directed that these be provided in writing after the hearing.
21. On 21 November 2024, the Claimant filed a note pursuant to Chamberlain J's directions. In summary, the Claimant contended that:
 - (a) When the Claimant ceased being dependent on her son, she retained her "residence rights" under Article 13 WA, and her right to equal treatment under Article 23 WA, by virtue of Article 17(2) WA. This was because Article 17(2) provides that "the rights provided for in this Title for the family members who are dependants of Union citizens or United Kingdom nationals before the end of the transition period, shall be maintained even after they cease to be dependants" (emphasis added) and the Claimant's evidence was that she was dependent on her son prior to the end of the transition period (i.e. before 31 December 2020).
 - (b) Because the Claimant retained her residence rights under Article 13 and her right to equal treatment under Article 23 when she ceased being dependent on her son, she should be entitled to UC (as she would be if she were a British citizen) and this entitlement should "take precedence over any contrary provision" in the UC Regs 2013 by virtue of section 7A of the European Union (Withdrawal) Act 2018.
22. On 28 November 2024, SSWP filed a note in reply. In summary, SSWP contended that:
 - (a) This argument was never part of the Claimant's pleaded case.

- (b) In any event, the Claimant could not rely on Article 17(2) WA because she was not dependent on her son in the UK before the end of the transition period. At the time of her claim, she was residing in the UK on the basis of retained PSS rather than any WA rights.

23. On 9 January 2025, the Claimant filed a further note.
24. On 20 January 2025, the Defendant filed a further note.
25. On 8 April 2025, Chamberlain J heard a hearing to determine whether the Court should make a reference to the CJEU, under Article 158 WA, as to the proper interpretation of Article 17(2). SSWP's position was that no reference was necessary because the meaning of Article 17(2) was clear and, in any event, the Claimant was not dependent on her son, under Article 2(2) of the Citizens Rights Directive 2004/38 ("**CRD**"), at the end of the transition period. The Claimant's position was that, whilst her interpretation of Article 17(2) was clearly correct, a reference should be made.
26. Following that hearing, further directions were made for the parties to file evidence and submissions on the issue of whether the Claimant was dependent on her son at the end of the transition period. That issue has now been conceded by the Defendants. The IMA understands that, subject to the resolution of that issue, the Court has suggested the following question for reference to the CJEU:

"Does Article 17(2) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the Withdrawal Agreement) apply to a person who, at the end of the transition period, was a "family member" of a Union Citizen as defined in point (2) of Article 2 of Directive 2004/38/EC but resided outside the host State, and who later enters the UK as a dependant, thereby falling within the personal scope provision in Article 10(1)(e)(ii) of the Withdrawal Agreement? If so, does it follow that, if such a person leaves the home of the person upon whom they were dependent as a result of domestic abuse and as a result ceases to be a dependant, they continue to fall within the personal scope of the Withdrawal Agreement, and thus entitled to rely on Article 23 thereof?"

C. Legal framework: the Withdrawal Agreement

27. 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.² This means it must be interpreted in accordance with its context and its purpose.³ 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.
28. 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:
- (a) 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”.
 - (b) 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.
 - (c) 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.
 - (d) Article 4(5) provides that UK courts “shall have due regard” to relevant CJEU case law from after the end of the transition period.
29. The WA has been implemented in domestic law in a similar manner to how EU law was previously implemented in the UK. Thus, section 7A of the European Union (Withdrawal)

² This has been affirmed in a number of recent cases such as *R (IMA) v SSHD* [2022] EWHC 3274 (Admin), §§64-70; *Celik v SSHD* [2023] EWCA Civ 921, §53; *R (Ali) v SSHD* [2023] EWHC 1615 (Admin), §82; *SSWP v AT* [2022] UKUT 330 (AAC), §36; *SSWP v AT* [2023] EWCA Civ 1307, §80.

³ 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”.

Act 2018 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. Section 7A(3) provides that every other provision of domestic legislation, including other provisions of 2018 Act itself, is subject to the general implementation of the WA into domestic law. The WA therefore has supremacy over the domestic legal framework.⁴

30. Part 2 of the WA sets out the provisions on Citizens' Rights. While the WA brought an end to freedom of movement, it nonetheless 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).
31. The way in which this was achieved was to largely replicate the EU legal framework for Citizens' Rights (i.e. the CRD) in the terms of Part 2 of the WA. This particular claim raises issues under Articles 9(a)(i), 10(1)(e)(ii), 13(3), 17(2) and 23 WA:

- (a) Article 9(a)(i) WA (Definitions) defines "family member" by adopting Article 2(2) CRD:

“(a) family members” means the following persons, irrespective of their nationality, who fall within the personal scope provided for in Article 10 of this Agreement:

- (i) family members of Union citizens or family members of United Kingdom nationals as defined in point (2) of Article 2 of [the CRD]”.

Article 2(2) CRD (Definitions) defines “family member” as including “the dependent direct relatives in the ascending line...”.

- (b) Article 10(1)(e)(ii) WA (Personal scope) provides that Part Two of the WA (Citizens' Rights) shall apply to family members who apply to join EU citizens who have exercised their right to reside in the UK in accordance with EU law before the end of the transition period and continue to reside there thereafter:

“1. ... 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;

...

⁴ *R (Ali) v SSHD* [2024] EWCA Civ 1546, §1.

(e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:

...

(ii) they were directly related to a person referred to in points (a) to (d) and resided outside the host State before the end of the transition period, provided that they fulfil the conditions set out in point (2) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph;"

As above, Article 2(2) CRD (Definitions) defines "family member" as including "the dependent direct relatives in the ascending line...". As such, a family member of an EU citizen will fall within the definition of Article 10(1)(e)(ii) (and thus fall within personal scope) if the EU citizen exercises their right to reside in the UK before the end of the transition period (and continues to reside there) and if the family member is directly related to the EU citizen and dependent on that EU citizen at the time at which the family member seeks residence.

(c) Article 13(3) WA (Residence rights) confers rights of residence on third country family members, directly adopting and implementing the different rights of residence for family members set out in the CRD:

"(3) Family members who are neither Union citizens nor United Kingdom nationals shall have the right to reside in the host State under Article 21 TFEU and as set out in Article 6(2), Article 7(2), Article 12(2) or (3), Article 13(2), Article 14, Article 16(2), Article 17(3) or (4) or Article 18 of Directive 2004/38/EC, subject to the limitations and conditions set out in those provisions."

This provision transposes a number of residence rights in the CRD. For instance, Article 7(2) CRD is the right of residence given inter alia to family members of workers for up to five years. Article 14 CRD provides that family members will have the rights of residence specified in the CRD "as long as they meet the conditions set out therein". Article 16(2) CRD provides that family members can obtain permanent residence rights after five years of continuous lawful residence.

(d) Article 17(2) WA (Status and changes) provides that if a dependent family member (who was dependent prior to the end of the transition period) ceases being dependent on the principal EU citizen, they can still retain rights under the WA. There is no express analogue to this provision in the CRD:

“(2) The rights provided for in this Title for the family members who are dependants of Union citizens or United Kingdom nationals before the end of the transition period, shall be maintained even after they cease to be dependants.”

- (e) Article 23 WA (Equal treatment) confers on those having a right of residence a consequential right, in accordance with Article 24 CRD, to equal treatment with nationals of the host state:

“1. In accordance with Article 24 of Directive 2004/38/EC, 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 Directive 2004/38/EC, 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 families.”

D. Article 17(2) WA

32. The fundamental question that arises under Article 17(2) is whether the words “The rights provided for in this Title [i.e. Title II of Part 2 of the WA] for the family members who are dependants of Union citizens or United Kingdom nationals before the end of the transition period” refer to all the rights conferred on family members who as a matter of fact are dependents before the end of the transition period, or (as the Defendants contend) only to rights that are conferred as result of dependency existing at that time and which would not exist otherwise.
33. Plainly, as a matter of language, the words are capable of bearing either meaning. On any view, two categories of dependent relative are created: those who will retain their rights under Title II if they cease to be dependent, and those who will not. The former category contains, at least, those who were dependent, and exercised their rights as such, before

the end of the transition period. The latter contains, at least, those who were not dependent at the end of the transition period but subsequently became dependent. The issue that arises is whether a person who was dependent at the end of the transition period, but only sought to exercise their rights based on that dependency after that date, falls into the former or the latter category.

34. The Defendants are right to argue (see e.g. para. 3 of the Defendants' Note dated 20 January 2025 and para. 14 of the Defendants' skeleton argument dated 1 April 2025) that a family member who seeks to exercise rights based on dependency only after the end of the transition period does not come into scope of the WA until that time pursuant to Article 10(1)(e)(ii) of the WA. Once they are in scope, however, they remain so: the qualification in Article 10(1)(e)(ii) is that they fulfil the conditions in Art 2(2) of the CRD at the time the application for residency is made.
35. Family members brought into the scope of the WA via Article 10(1)(e)(ii) have a right to reside conferred by Article 13(2) and (3) WA including as set out in the provisions of the CRD listed in those paragraphs. A person with such a right to reside also has the right under Article 23 WA to equal treatment in accordance with Article 24 of the CRD, subject to the conditions of that Article being fulfilled.
36. The Court and the parties may be aware that the question of whether the right to equal treatment under Article 23 WA extends to anyone granted PSS was the subject of argument before the Court of Appeal on 14-16 May 2025 in the case of *Fertre v Vale of White Horse DC* (CA-2024-001773). The IMA intervened in that case, taking the position that Art 23 of the WA did not confer rights on those who would not benefit under Art 24 CRD. If, contrary to the IMA's position, the appeal in *Fertre* is successful, this claim may therefore become academic.
37. On the premise however that, in order to benefit from Art 23 of the WA, the Claimant must first show that she falls within Art 17(2) WA, the IMA considers that on balance the better interpretation is that she does. The question of whether she is within scope under Article 10 is a separate question to what rights are conferred on her under Title II of the WA. There is no obvious reason to exclude a person who can show that they were dependent at the end of the transition period, and thus had a right exercisable under the

CRD at that time; their situation is more analogous to those who had exercised their rights before the end of the transition period than to those who did not have any rights at that time.

38. The IMA recognises however that the position is not *acte clair* and accordingly agrees with the provisional view of Chamberlain J that a preliminary reference to the CJEU under Article 158 WA is therefore necessary to enable this Court to determine the case.

E. Charter Protection

39. In *SSWP v AT* [2023] EWCA Civ 1307, [2024] KB 633, the Court of Appeal considered the circumstances in which the Charter applies to rights under the WA. In summary:

- (a) AT was a Romanian national who had lived in the UK as a worker between 2016-2018. She returned with her daughter and partner; and applied for and was granted PSS before the end of the transition period. Her relationship with her partner ended as a result of domestic violence and, by the time she applied for UC in February 2021, she was living with her daughter in a refuge run by a charity. Other than very limited charitable assistance, her only income was child benefit, which was being paid at the rate of £84.20 every four weeks.
- (b) AT was refused UC on the basis that she did not meet the conditions of entitlement in section 4 of the Welfare Reform Act 2012, specifically the requirement in section 4(1)(c) that the claimant must be “*in Great Britain*”, since SSHD’s grant of PSS (i.e. limited leave to remain) meant that AT could not be treated as “habitually resident” in the UK pursuant to regulation 9 of the UC Regs 2013.
- (c) The Court of Appeal applied *CG v Department for Communities in Northern Ireland* (C-709/20) [2021] 1 WLR 5919, in which the CJEU held that the Charter applied when Member States were implementing EU law and that this included the grant of PSS. The Court rejected SSWP’s submission that the *ratio* of *CG* applied only to cases during the transition period and concluded that the Charter applied to Article 13 WA (and Article 21 TFEU by cross-reference).

- (d) The Court of Appeal therefore held that SSWP was required, but failed, to carry out an individualised assessment of whether AT's rights under the Charter would be breached by the refusal of her application for UC.
40. Although the IMA does not take a position on the facts as to whether the Claimant is, or is at risk of being left in, destitution of the kind identified in *CG* and *AT*, there does appear to be a *prima facie* case that she is, based on the circumstances set out at paragraphs 15-18 of Statement of Facts and Grounds in her claim against the SSWP.
41. It is not clear whether or to what extent the Court in this case has considered the issue of whether the Claimant would be entitled to an individualised assessment applying the principle in *AT*, if she is not entitled to rely upon Article 17(2) of the WA: the question is raised, but apparently disavowed at paragraph 17 of the Claimant's Note dated 21 November 2024.
42. For the avoidance of doubt, the IMA considers that the Claimant would be so entitled as a result of the Court of Appeal's decision in *AT*. That is also the SSWP's position, as set out in guidance to caseworkers that was issued following the Supreme Court's refusal of permission to appeal in *AT*: [ADM 06/24: AT and the EU Charter of Fundamental Rights Assessment](#). That guidance sets out that EU nationals and their family members with PSS who are in scope of the WA, including family members who joined after the end of the transition period, are covered by the judgment (paragraph 12, fourth bullet point).
43. If the Claimant were to apply for UC now, therefore, she would be referred for an assessment of whether support is necessary in order to avoid a breach of Charter rights. In those circumstances, and given that she has received support to date under the terms of the interim relief granted by the Court, it does not appear necessary for the Court to resolve this issue.

F. Reference to CJEU

44. As set out at paragraph 38 above, the IMA agrees that this is a case in which a reference to the CJEU is necessary in order to resolve the question of whether the Claimant is entitled to UC because she continues to be able to rely upon Article 23 WA (and accordingly does not need to rely upon demonstrating a risk of destitution). The IMA respectfully suggests the following amendment to the question proposed by Chamberlain J, as the issue is not whether the Claimant is in scope of the WA but whether she retains her rights under Title II of Part 2:

“Does Article 17(2) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the Withdrawal Agreement) apply to a person who, at the end of the transition period, was a dependent direct relative in the ascending line of a Union citizen and accordingly a “family member” of a Union Citizen as defined in point (2) of Article 2 of Directive 2004/38/EC but resided outside the host State, and who later entered the UK as a dependant, thereby falling within the personal scope provision in Article 10(1)(e)(ii) of the Withdrawal Agreement? If so, does it follow that, if such a person leaves the home of the person upon whom they were dependent as a result of domestic abuse and as a result ceases to be a dependant, they continue to enjoy rights of residence under Article 13 in Title II of Part 2 of the Withdrawal Agreement, and are thus entitled to rely on Article 23 thereof?”

GALINA WARD KC

BARNEY MCCAY

Landmark Chambers

13 June 2025