Neutral Citation Number: **[2024] EWHC 1754 (KB)**

Case No: QA-2022-000089

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 July 2024

Before:

MR JUSTICE JAY

- -

Between:

GWLADYS FERTRÉ

Appellant

- and –

VALE OF WHITE HORSE DISTRICT COUNCIL

Respondent

- and –

(1) THE3MILLION LIMITED
(2) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(3) INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS
(4) SHELTER, THE NATIONAL CAMPAIGN FOR HOMELESS PEOPLE LIMITED

Interveners

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Simon Cox and **Hannah Smith** (instructed by **Turpin Miller LLP**) for the **Appellan**t
Catherine Rowlands (instructed by **Vivien Williams, Head of Legal and Democratic & Monitoring Officer (Interim) for the Vale of White Horse District Council Legal Department**) for the **Respondent**
Tom Royston and **Charles Bishop** (instructed by **Public Law Project**) for the **First Intervener**
James Cornwell (instructed by the **Government Legal Department**) for the **Second Intervener**
Aarushi Sahore (instructed by **the IMA**) for the **Third Intervener**

Adrian Berry and **Desmond Rutledge** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Fourth Intervener**

Hearing dates: 11th and 12 June 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 8 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE JAY

MR JUSTICE JAY:

THE ISSUE IN THIS APPEAL

1. Ms Gwladys Fertré ("the Appellant"), a French citizen, came to this country during the transition period 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 (2019/C 384 I/01) (the "Withdrawal Agreement"). She applied for, and obtained, pre-settled status ("PSS") under the relevant immigration rules. Later, when her personal circumstances changed, she applied to the Vale of White Horse District Council ("the Respondent") for housing assistance under Part 7 of the Housing Act 1996 but her application was refused on the ground that she, as a "person from abroad" with no more than PSS, was not entitled to it. Eventually her appeal against the Respondent's decision has reached this Court for determination.

2. The issue in this appeal is whether Article 23(1) of the Withdrawal Agreement, which has direct effect by virtue of the operation of section 7A of the European Union (Withdrawal) Act 2018 ("the Withdrawal Act 2018")[1] prohibits or disapplies a domestic rule requiring those who have a "new residence status" under Article 18(1) of the Withdrawal Agreement to fulfil requirements for eligibility to social assistance to which a British citizen with habitual residence is not subject.

3. This issue is no longer of much practical interest to the Appellant because the Respondent and the county council have made subsequent decisions which render its first refusal largely academic. However, the point is one of general public importance and for that reason Constable J permitted the appeal to proceed.

4. The issue raised in the Ground of Appeal neatly sub-divides into two discrete matters. The first question, and I will henceforth be calling this the "main issue", is whether in the circumstances that have arisen the Appellant at the time she made her application for housing assistance was residing on the basis of the Withdrawal Agreement given the "new residence status" I have mentioned. If she was not, that is the end of the case. If she was, then the second question which arises is whether the discrimination that has arisen in this case is direct or indirect; and, if the latter, whether it can be justified.

5. It makes sense for me to address the main issue first of all before saying anything about the issue of discrimination. Not merely will this course make my judgment easier to follow, I should state at the outset that I am resolving the main issue against the Appellant. That has the effect of rendering the second issue less important, although I will address it to the extent I think necessary.

THE FACTS

6. The Appellant came to the UK on 4 November 2020. She suffers from Ehlers Danlos Syndrome. She has two children, aged 14 and 7, the elder of whom has a number of medical conditions, including Autism Spectrum Disorder. She came to the UK to live with her mother later in November 2020. The Appellant's younger child, who has

[1] Inserted by section 5 of the European Union (Withdrawal Agreement) Act 2020.

Ehlers-Danlos Syndrome and Autistic Spectrum Disorder, came to the UK in June 2021. It should be stressed that both children have the benefit of anonymity in these proceedings.

7. On 18 November 2020 the Secretary of State for the Home Department ("the SSHD") granted the Appellant PSS expiring on 18 November 2025. The letter notifying her of the grant of PSS stated that:

   (1) The letter itself was not proof of status: that could be viewed online.

   (2) The PSS gave her the right to stay in the UK under UK immigration law.

   (3) PSS had been granted to the Appellant in accordance with the Withdrawal Agreement.

   (4) PSS did not itself provide a basis for entitlement to benefits and services under UK law because that depended on the relevant eligibility requirements for the specific benefit or service in question.

8. The Appellant obtained a job as a teaching assistant in London shortly after she arrived here, but did not end up taking the position because she could not provide the necessary references. Since then, in the light amongst other things of her caring responsibilities for her children, she has not been economically active.

9. The Appellant initially resided in private rented accommodation in London, but she had exhausted her savings by March 2021. She then moved to Wantage. On 19 October 2021 the Appellant applied to the Respondent for local authority housing under section 184 of the Housing Act 1996.

10. On the same day the Respondent concluded that the Appellant was not eligible for assistance on the following basis: she had PSS; she was not working; she had been refused universal credit; and her visa stated that she had no recourse to public funds.

11. The Appellant sought a statutory review of the decision under section 202 of the Housing Act 1996 on 19 October 2021, making submissions in support of the requested review on 2 November 2021. The Respondent upheld the decision of 19 October 2021 in a letter dated 21 January 2022. It is this decision that is the subject of this Appeal.

12. The Respondent's reasons for refusing the Appellant's application do not merit close scrutiny because the appeal to this Court is on a pure point of law. All that need to be said is that the Appellant's solicitors did not contend on her behalf that she was entitled to housing assistance simply under domestic law. The argument being advanced was essentially the same argument that Mr Simon Cox put forward before me. In short, although the Respondent's reasons are not always easy to follow, what was being said was that the Appellant as an economically inactive person was not someone residing in the UK on the basis of the Withdrawal Agreement.

13. The Appellant's appeal to the County Court under section 204 of the Housing Act 1996, lodged on 11 February 2022, erroneously named South Oxfordshire District Council as Respondent.

14. On 8 April 2022 HH Patrick Moloney QC gave the Appellant permission to amend her appeal, *inter alia* by substituting the Vale of White Horse District Council for South Oxfordshire District Council as Respondent. This Appeal was also transferred to the High Court where it was received on 20 June 2022.

15. The Appellant was detained under section 3 of the Mental Health Act 1983 on 1 December 2023. On 24 January 2024, she was discharged from secure psychiatric care and is now owed section 117 after-care duties by Oxfordshire County Council. On 25 January Ellenbogen J dismissed the Respondent's appeal to this Court against the County Court's Order substituting the name of the Respondent ([2024] EWHC 112 (KB)). Whilst residing in "step-down" accommodation, on 6 March the Appellant made a fresh application. Although the Respondent accepted the application it again determined that she was not eligible for assistance. On 19 March she was granted universal credit by the Secretary of State for Work and Pensions. On 21 March the Appellant sought a section 202 review of the Respondent's refusal but that was withdrawn on 30 April following the grant of an assured shorthold tenancy. The Appellant accepts that she is no longer homeless or threatened with homelessness.

16. On 22 May Constable J dismissed the Respondent's application to strike out this appeal as academic: ([2024] EWHC 1234 (KB)). He also granted permission for the Secretary of State for Levelling Up, Housing and Communities ("SoSLUHC"), the Independent Monitoring Authority for the Citizens' Rights Agreements ("the IMA") and The3Million Ltd ("3million") to intervene in the substantive appeal. On 5 June 2024 Soole J granted Shelter permission to intervene.

17. I am grateful to all counsel for their written and oral arguments. The point of principle at the heart of this appeal (what I am calling the main issue) is not entirely straightforward, and although I have come to a clear conclusion as to the outcome I am satisfied that the issue is not *acte clair*. All parties are agreed that in no circumstances should I be referring either issue to the CJEU under Article 158 of the Withdrawal Agreement, and I concur with that assessment.

THE PRE-BREXIT POSITION UNDER EU LAW

18. The parties have provided me with a detailed analysis of what may be described as the pre-Brexit position. I propose to provide a simpler version.

19. Under Article 18 of the Treaty on the Functioning of the European Union (Consolidated Version, 2016) ("the TFEU"), any discrimination on the basis of nationality is prohibited. However, that prohibition does not avail the Appellant in the light of specific provisions elsewhere: see *CG v Department for Communities in Northern Ireland* (Case C-709/20); [2021] 1 WLR 5919, para 65.

20. Under Article 21(1) of the TFEU:

> "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

In other words, in the context of the present case, the impact of Article 21(1) is subordinated to any limitations and conditions located in a relevant directive.

21. 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 within the territory of the Member States ("the CRD") lays down the limitations and conditions for freedom of movement referred to under *inter alia* Article 21(1) of the TFEU. I note, but need not expressly refer to, recitals 10 and 21. Under Article 6, there is a right of residence in the territory of another Member State for a period of up to three months "without any conditions or any formalities" beyond holding a relevant identity document, although it is clear from recital 21 that any right to claim social assistance during that period is left to individual Members States to determine as they see fit. Further, under Article 14 such persons must not become an unreasonable burden on the social assistance system of the host member State. Under Article 7 of the CRD, beyond the three month initial period specified in Article 6 all Union citizens shall have the right of residence in the territory of another Member State if, and here I oversimplify the position, they are either economically active or otherwise self-sufficient in resources. Under Article 16, Union citizens who have resided legally in the host Member State for a continuous period of five years are entitled to permanent residence.

22. Article 24 of the CRD is of particular relevance:

> "**Equal treatment**
> 1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens *residing on the basis of this Directive* in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. …
>
> 2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, 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 and members of their families." (emphasis supplied)

23. For the purposes of Article 24(1), persons physically present in another Member State beyond the initial three month period, but are economically inactive, are not residing *on the basis of this Directive*. Whilst it was a Member State of the EU, the UK did not in fact normally remove economically inactive persons from its territory, but that is nothing to the point. For the purposes of Article 24(1) of the CRD, (1) the express wording (as highlighted above) is entirely clear, and (2) on authority, such persons were not residing in the UK on the basis of the CRD: see *CG*, at paras 74-77, and *Dano v Jobcentre Leipzig* (C-333/13); [2015] 1 WLR 2519, paras 74-78.

24. At the time the Appellant applied for PSS she was within the initial three month period provided for by Article 6 of the CRD. Accordingly, she had rights under the CRD when her application was made and granted, although as we will soon see the existence of

such a right has not been made a precondition for entitlement to PSS. Had the Appellant arrived here, say in June 2020 and applied for PSS in November 2020, on that later date she would have been someone without any rights under the CRD. The same applies to other individuals, not before the Court, who obtained PSS beyond the three month point who were economically inactive at the time of application. Such individuals would still have been granted PSS.

25. I should add that under Article 37 of the CRD it was open to a Member State to implement a rule of domestic law that was more favourable to an individual. However, the effect of implementing such a rule would mean that the individual in question does not enjoy a right that was granted *on the basis of* the CRD. Rather, the normative source of the right was the rule of domestic law alone: see *CG*, at paras 82-83 and 87. Here, I highlight "on the basis of" in the same way as I did when setting out the terms of Article 24(1). The reasoning of the CJEU in para 82 of *CG* is that a person granted the right of residence in a host State, in circumstances where not all the limitations or conditions set out in the CRD have been met, falls within the scenario referred to in Article 37 of the CRD. Para 83 of *CG* makes it clear that it was insufficient for the purposes of her claim for State benefits that she was a person exercising freedom of movement rights under Article 21(1) of the TFEU.

26. Given that *CG* was concerned solely with her rights during the transition period and not thereafter, the normative status of the Withdrawal Agreement was irrelevant to her claim. It follows that *CG* is not an authority on Articles 13 and 18 of the Withdrawal Agreement, including Article 13(4).

DOMESTIC LAW

27. The pre-Brexit position under domestic law was governed by the Immigration (European Economic Area) Regulations 2016 (2016 SI No 1052) ("the 2016 Regulations"). These implemented the CRD. In broad outline, therefore, an individual such as the Appellant had a right to reside in the UK for a period not exceeding three months provided that she did not place an unreasonable burden on the social security system (regulation 13). The Appellant was exercising that right when she came to the UK in November 2020, and at that point she was placing no burden on the social security system. Not that it mattered for the Appellant's purposes, an individual falling under regulation 13 would not be entitled to claim housing assistance: see regulation 6(1)(b)(ii) of the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 (2006 SI No 1294) ("the 2006 Regulations"). Individuals who had been here for more than three months were not "qualified persons" under the 2016 Regulations if they were economically inactive (regulation 6). Such persons were not entitled to housing assistance under Part 7 of the Housing Act 1996 as such persons required leave to enter or leave to remain and were therefore persons subject to immigration control and ineligible for housing assistance under section 185(2) Housing Act.

28. Turning now to the post-Brexit position, I will examine the relevant provisions of the Withdrawal Agreement in due course but for present purposes I will address the pure domestic law position during the transition period, which started on 1 February 2020 and ended at 11pm on 31 December 2020. That position is not free from complexity, but – as before – I will endeavour to simplify.

29. The settlement scheme for EEA nationals residing in the UK at the date the UK withdrew from the EU ("the EUSS") is set out in Appendix EU to the Immigration Rules. As the SoSLUHC's skeleton argument helpfully puts it, "very broadly, the EUSS permits EU citizens resident in the UK by the end of the transition period under the Withdrawal Agreement (and their family members) with fewer than five years' continuous residence and who meet certain conditions, to obtain five years' limited leave to enter or remain, or PSS". The conditions for acquiring PSS are fairly straightforward and are in the main limited to proof of identity and nationality. Applicants did not have to prove that they were qualified persons for the purposes of the 2016 Regulations or that they had rights of residence under the CRD. Once PSS is granted it endures until either it lapses under Article 13(4) of the Immigration (Leave to Enter and Remain) Order 2000 (2000 SI No 1161) or the SSHD chooses to revoke it in very limited circumstances under Annex 3 to Appendix EU. The SSHD has no revocation power on the basis of economic inactivity.

30. Why this Appellant was not entitled to housing assistance at the time she made her application under relevant provisions of domestic law would require an intricate answer if the matter had properly been put in issue by the Appellant. In my judgment, it has not been. The original application for a statutory review back in 2021 did not assert any enforceable right under domestic law, and the Appellant's skeleton argument expressly conceded that she enjoyed no such right. The SoSLUHC's skeleton argument stated that the concession was incorrect on the basis on which it was made but correct for another reason. At the start of the hearing Mr Cox applied to amend his Grounds of Appeal to contend that the SoSLUHC's other reason was wrong, and that the Appellant in fact enjoyed an enforceable right under domestic law. Ms Catherine Rowlands for the Respondent strongly opposed that application, although Mr James Cornwell for the SoSLUHC and Mr Adrian Berry for Shelter were more relaxed about it.

31. I refused the application because (1) it was made far too late and the case as advanced to the Respondent had never relied on domestic law, (2) it is incumbent on an Appellant to analyse the law correctly rather than be responsive to the SoSLUHC skeleton argument, (3) the latter's position had been clearly set out in statutory guidance, (4) my provisional assessment was that Mr Cox's new analysis was almost certainly incorrect (both the SoSLUHC and Shelter were largely *ad idem* on this issue, and the terms of the Appellant's PSS letter made it clear that she was not automatically entitled to benefits), and (5) given the time estimate for the hearing, I was concerned that any new point might cause unnecessary strain (as it happens, we sat until 4:50pm on the first day and until 4:45pm on the second, having started at 10am).

32. The position under domestic law is that a person with only PSS and who, accordingly, would not have had any other enforceable EU right of residence for the purposes of section 7(1) of the Immigration Act 1988 will not be covered by the saving in paragraph 5 of Schedule 4 to the Immigration and Social Security Co-Ordination Regulations (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (2020 SI No 1309) ("the 2020 Regulations"), and is therefore a person subject to immigration control ("PSIC") for the purposes of section 13(2) of the Asylum and Immigration Act 1996. Such a person is ineligible for housing assistance pursuant to section 185(2) of the Housing Act 1996.

THE WITHDRAWAL AGREEMENT

33. The Withdrawal Agreement as an international treaty falls to be construed in line with well-established interpretative principles.

34. Under the sixth recital:

> "Recognising that it is necessary to provide reciprocal protection for Union citizens and United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights before a date set in this Agreement, and to ensure that their rights under this Agreement are enforceable and based on the principle of non-discrimination, recognising also that rights deriving from periods of social security insurance should be protected."

The "date set in this agreement" is the date the transition period ends: see Article 126. It follows that the person's free movement rights must be exercised before then. The purpose of the "reciprocal protection" is to ensure that free movement rights exercised before 31 December 2020 are enforceable; it is not to create an enhanced level of protection.

35. Under Article 4(1), the rights conferred by and under the Withdrawal Agreement shall have direct effect under both UK and EU law. We have already seen that, in terms of UK primary legislation, that result has been achieved by section 7A of the Withdrawal Act 2018. Under other provisions in Article 4, the general principles of EU law apply to the application and interpretation of concepts and provisions in the Withdrawal Agreement which refer to EU law. Under Article 127, EU law continued to apply to the UK during the transition period, at least for the purposes of the instant case.

36. It is clear that the Appellant falls within the personal scope of the Withdrawal Agreement: see Article 10. This is because she exercised her right to reside in the UK in accordance with EU law before the end of the transition period. She did so under Article 6 of the CRD.

37. I was referred to the non-discrimination provision in Article 12 but it is common ground in this case that it is the specific provisions of Article 23 which are germane. The general succumbs to the particular.

38. I set out the entirety of Article 13:

> **"Article 13 Residence rights**
>
> 1.
>
> Union citizens and United Kingdom nationals shall have the right to reside in the host State under the limitations and conditions as set out in Articles 21, 45 or 49 TFEU and in Article 6(1), points (a), (b) or (c) of Article 7(1), Article 7(3), Article 14, Article 16(1) or Article 17(1) of Directive 2004/38/EC.
>
> 2.
>
> Family members who are either Union citizens or United Kingdom nationals shall have the right to reside in the host State as set out in Article 21 TFEU and in Article 6(1), point (d) of Article 7(1), Article 12(1) or

> (3), Article 13(1), Article 14, Article 16(1) or Article 17(3) and (4) of Directive 2004/38/EC, subject to the limitations and conditions set out in those provisions.
>
> 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.
>
> 4.
>
> 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."

39. Article 15 confers a right of permanent residence for those who have resided continuously in the relevant host State, here the UK, for a period of five years. It may be seen that Article 15 mirrors the rights conferred by the CRD.

40. The "chapeau" of Article 18(1) provides:

> **"Article 18 Issuance of residence documents**
>
> 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."

41. It is clear that Article 18(1) gives a host State the option to insist on this requirement. The UK has exercised that option, and has done so through the implementation of the EUSS conferring PSS. This, in the UK at least, is the "new residence status" mentioned in the "chapeau".

42. Article 18(1) falls to be contrasted with Article 18(4). That provides:

> "4.
>
> Where a host State has chosen not to require Union citizens or United Kingdom nationals, their family members, and other persons, residing in its territory in accordance with the conditions set out in this Title, 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."

43. In contradistinction with Article 18(1), there is no requirement in Article 18(4) for the individual in question to apply for anything. All that she need do is continue to rely on "residence rights under this Title", which means the rights conferred by the CRD. This is because Article 13 of the Withdrawal Agreement, and indeed Article 18, both fall under Title II. If, on the other hand, she wishes to apply for a residence document, that does no more than state that the individual possesses a relevant residence right. It is well-established that a residence document of this type is simply declaratory of a pre-existing right: see *Secretary of State for Work and Pensions v Dias* (Case C-325-09); [2011] 3 CMLR 40.

44. I was told that 14 EU Member states have opted for Article 18(4) schemes, which have been described as "declaratory". A scheme under Article 18(1) has been called "constitutive" but that epithet has the tendency to conceal as much as to elucidate. I would prefer to say that if a host State opts for an Article 18(1) scheme then, unless an individual applies under its terms by the due date, she will lose all the EU-derived rights she ever had.

45. Subject to her last-minute reliance on Article 21(1) of the TFEU, it is a key plank of the Appellant's case that there is a fundamental difference between schemes made under Article 18(1) on the one hand and Article 18(4) on the other. It is implicit in the Appellant's case that if the outcome were driven by the provisions of Article 18(4) she should lose this appeal. This is because on this counterfactual at the time she applied for housing assistance she did not possess any right of residence under the CRD.

46. Light on the true construction of Article 18(1) is thrown by other provisions within it. I select just a few:

> "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;
>
> …
>
> (k) the host State may only require Union citizens and United Kingdom nationals to present, in addition to the identity documents referred to in point (i) of this paragraph, the following supporting documents as referred to in Article 8(3) of Directive 2004/38/EC:
>
> (i) where they reside in the host State in accordance with point (a) of Article 7(1) of Directive 2004/38/EC as workers or self-employed, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed;
>
> …

> (n) for cases other than those set out in points (k), (l) and (m), the host State shall not require applicants to present supporting documents that go beyond what is strictly necessary and proportionate to provide evidence that the conditions relating to the right of residence under this Title have been fulfilled;
>
> …
>
> (q) the new residence document shall include a statement that it has been issued in accordance with this Agreement."

47. In my judgment, these provisions make it crystal-clear that the idea behind an Article 18(1) scheme is that the applicant must prove her entitlement to a residence right under the CRD as a precondition for acquiring the "new residence status". By "prove her entitlement", I mean – "prove that any condition or limitation connected to the residence right in question has been fulfilled". To my mind, that was already clear enough from the wording of the "chapeau" – "Union citizens … who reside in [the host State] in accordance with the conditions set out in this Title". Those are the conditions set out in the CRD. The effect of these further provisions is to put the matter beyond any reasonable doubt.

48. Of course, the EUSS devised and implemented by the UK did not follow this model. The UK did not require proof of an extant CRD right: as a general rule, "bare" presence would suffice. It is this mismatch, or perhaps act of generosity, which provides the platform for the main issue in this appeal.

49. The cut-off date for applying for PSS was 30 June 2021. Applicants had to prove that they were physically present in the UK before 1 January 2021. Under Article 19 of the Withdrawal Agreement, a host State was permitted to grant applications for a residence status or residence document before the end of the transition period in accordance with Article 18(1) and (4), as the case may be. Such decisions had no effect until after the end of that period. The correct application of Article 19 is not straightforward, and I address it under §§91-92 below.

50. Under Article 23:

> **"Article 23 Equal treatment**
>
> 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." (emphasis supplied)

51. By way of first impression, Article 23 of the Withdrawal Agreement is very similar in terminology and structure to Article 24 of the CRD. We see the same highlighted phrase, *on the basis of this Agreement*. Further, it is hardly surprising that an individual residing in a host State for less than three months has no right to social assistance by way of derogation in Article 23(2) from Article 23(1), because such an individual enjoyed no such right in light of the derogation in Article 24(2) of the CRD.

52. Article 38(1) provides:

> "**Article 38 More favourable provisions**
>
> 1.
>
> This Part shall not affect any laws, regulations or administrative provisions applicable in a host State or a State of work which would be more favourable to the persons concerned. This paragraph shall not apply to Title III."

53. If, but only if, the host State exercises power under Article 38 would it follow that the (more favourable) rule of domestic law should not be regarded as having been made on the basis of the Withdrawal Agreement.

R (IMA) v SECRETARY OF STATE FOR THE HOME DEPARTMENT [2023] 1 WLR 817

54. The parties rightly devoted considerable attention to this authority. I have already referenced or summarised all the other cases that I consider relevant to the determination of the main issue on this appeal, recognising as I do that no authority supplies a conclusive answer.

55. The IMA's claim for judicial review, which was in the nature of a generic or systemic challenge to the SSHD's policy in relation to the grant of PSS, raised two issues. At the time *IMA* was decided the SSHD was requiring holders of PSS to make a fresh application for indefinite leave to remain, or settled status, before their five years' limited leave expired, because if they did not their residence rights would be lost. That was said by the IMA to amount to an unlawful constraint on the right of residence conferred by or under the Withdrawal Agreement (the first issue). The IMA further contended that the right of permanent residence under Article 15 of the Withdrawal Agreement accrued automatically, and therefore a person asserting such a right should not have to make a second application (the second issue).

56. Lane J found in favour of the IMA on both issues. His essential reasoning was that Article 18(1) of the Withdrawal Agreement permitted the UK to implement a constitutive scheme but such a scheme was required to deliver the rights of residence set out in Title II, including the right of permanent residence under Article 15. Accordingly, the SSHD could not lawfully require an applicant to make a further application for settled status at or before the relevant date since that requirement ran the obvious risk that a cohort of individuals would lose their entitlements under the Withdrawal Agreement. Furthermore, the "new residence status" under Article 18(1) was a single entity comprising all the rights under Title II, including the rights under Articles 15 and 16.

57. It may be understood that Lane J did not decide the issue which arises for determination on this appeal. However, I agree with Mr Cornwell and Ms Sahore that there are dicta in his judgment that support their argument. In particular, it was central to Lane J's reasoning that the "new residence status" confers rights which are inherently conditional: see paras 151 and 156 of his judgment. The grant of limited leave under the EUSS represents no more than a "snapshot" of an applicant's position at the time the decision on her application is made. In the language of the final two sentences of para 156:

> "A person with article 13 residence rights falling short of permanent residence is entitled to reside in the United Kingdom for as long as the relevant limitations and conditions in the Directive [i.e. the CRD] are satisfied."

58. Mr Cox submitted that this paragraph is concerned only with the position under EU law, i.e. the CRD, and not that under the EUSS where an individual is granted a right to reside in the UK for five years on an unconditional basis. I think that Lane J was making a different and slightly subtler point. If one reads back through para 156, it is clear that what Lane J was saying was that the rights conferred by or under the EUSS cannot affect the rights conferred by the Withdrawal Agreement. The passage I have cited addresses the latter and not the former, but its premise is that the nature and scope of PSS as a matter of domestic law cannot logically impinge on the nature and scope of the relevant status under the Withdrawal Agreement.

59. The conditional nature of the right or rights conferred by PSS is a matter which will require some further elaboration. For the time being, I observe that Lane J's conclusion that PSS could and should be granted once and only once is another powerful factor in favour of the rights at issue being inherently conditional.

60. *IMA* is not a case which assists me with the application of Article 13(4) of the Withdrawal Agreement.

61. The parties drew my attention to other jurisprudence on the main issue but I have not found that to be helpful.

THE CASES OF THE APPELLANT, THE RESPONDENT AND THE INTERVENERS IN OUTLINE

62. I propose to encapsulate the respective positions of the parties and the intervenors rather than set out their submissions in full. The helpful submissions I received, which I can

assure everyone concerned I have studied with considerable care, are reflected in the section of this judgment that follows.

63. The final iteration of the Appellant's case (supported by 3million and Shelter), follows this pathway of reasoning:

(1) the Appellant was granted a "new residence status" under Article 18(1) of the Withdrawal Agreement, in the form of PSS. The grant of this status represents a radical departure from the status quo.

(2) PSS amounts to the grant of limited leave to remain for five years without further conditions.

(3) Article 13(4) of the Withdrawal Agreement is wide enough to enable the host State to disapply or remove any relevant limitation or condition under Article 13(1).

(4) Where the host State chooses to grant a new residence status under Article 18(1) which is unconditionally valid for a period beyond that in respect of which the EU citizen is residing in accordance with the limitations and conditions in Article 13(1) or 15, the host State is using article 13(4) to issue that document. That is because an unconditional "new residence status" confers residence rights in respect of a period when the holder may not meet the limitations and conditions in Article 13(1) or 15. For those reasons, while the Appellant did not need Article 13(4) to be issued with a document under Article 18(1), she did need Article 13(4) to be issued with the document which the SSHD chose to issue her under Article 18(1).

(5) It also follows that the Appellant falls full-square within Article 23(1) of the Withdrawal Agreement because in the circumstances that have arisen, or perhaps in any event, she is "residing on the basis of the agreement" (which, after all, is what the PSS document says, meeting the requirements of Article 18(1)(q)).

(6) As a distinct and alternative argument, predicated on the Appellant's primary argument being incorrect, reliance is placed on Article 21(1) of the TFEU. At the time she applied for housing assistance, the rights conferred by PSS on the Appellant under Title II to the Withdrawal Agreement included a right under Article 21(1) which did not depend on the fulfilment of any limitations or conditions in the CRD. In Mr Berry's formulation, the prior grant of PSS/limited leave would mean that the Appellant is within the material scope of Article 13(1) of the Withdrawal Agreement at the time the matter falls for consideration.

64. I have described the foregoing as the final iteration of the Appellant's case because this was not the way in which Mr Cox advanced it in his skeleton argument. It may be seen that the Appellant now places particular emphasis on Article 13(4). I will, however, be addressing earlier versions of the Appellant's core argument if for no other reason than to demonstrate that Article 13(4) cannot bear the weight that is now being placed on it. I should also point out that what I am calling the distinct and alternative argument was not advanced with anything approaching sufficient clarity and force until very late in the day.

65. The Respondent's case (ably supported by the SoSLUHC and IMA), runs along these lines:

(1) The grant of PSS on a one-off basis confers rights which are inherently conditional. Whether a relevant condition has been fulfilled must require examination of an applicant's circumstances at the appropriate time. That moment will arise only if an applicant seeks state assistance or applies for permanent residence.

(2) Thus, the clause, "new residence status which confers the rights under this Title" cannot be read as meaning that as soon as PSS is granted the holder of it must be deemed to have fulfilled all the conditions pertinent to the right in question: here, the residence right conferred by Article 13(1) of the Withdrawal Agreement read in conjunction with Article 7 of the CRD.

(3) It also follows from the foregoing that for the purposes of Article 23(1) of the Withdrawal Agreement an individual such as the Appellant who at the time her application for housing assistance was made did not fulfil the limitations and conditions in Article 13 of the Withdrawal Agreement, read in conjunction with Article 7 of the CRD, is not residing on the basis of the Withdrawal Agreement.

(4) To the extent that PSS is more generous than the Withdrawal Agreement, Article 38 applies and not Article 13(4). The latter provision is not relevant to the Appellant's case because (a) she fulfilled the conditions of Title II when she applied for PSS, and (b) it is not capable of extending or enhancing the rights conferred by the grant of the new status.

66. After the hearing, I invited clarification from counsel on two matters. Essentially, these touched on whether Article 13(4) could have any application to the Appellant's case on her particular facts. I am grateful to counsel for their illuminating responses.

DISCUSSION AND CONCLUSIONS

67. The parties are in agreement that the Appellant's rights must be assessed as at the date of the decision on her application for housing assistance.

68. The correct point of departure for an accurate analysis of this regime is Article 18 of the Withdrawal Agreement and not Article 23(1) or Article 13. Article 13 feeds into Article 18 when attention is directed to the phrase, "in accordance with the conditions set out in this Title". Article 23 becomes relevant if, and only if, the Appellant is correct about Article 18.

69. The focus of the final iteration of the Appellant's case is the terms of the PSS granted to the Appellant by the SSHD. In my opinion, that is not the correct starting point. The right approach is to consider the scheme of the Withdrawal Agreement and the meaning of "new residence status" without reference to the SSHD's policy and practice. At the next stage of the analysis one must ask whether the PSS in the form in which it was granted to the Appellant conferred on her the unconditional rights asserted by Mr Cox.

70. At the first stage of the analysis, it is important to bear in mind at all material times the conceptual distinction between the "in accordance with conditions set out in this Title" (stage 1) and the "new residence status which confers the rights under this Title" (stage 2). The former are about the preconditions for the acquisition of the new status; the latter are about the nature and content of the rights which flow, or may flow, from the

grant of that status. There must be no attempt at elision between the two, contrary to the Appellant's approach.

71. At stage 1, in November 2020 the Appellant fulfilled the conditions of Article 6 of the CRD. This provision applied to her case by virtue of Article 13(1) of the Withdrawal Agreement. It is common ground between the parties that she would not have needed Article 13(4) in order to have found herself in that position.

72. At stage 2 the examination must be of the nature and content of the rights conferred by or under the "new residence status". In my judgment, Lane J was correct to hold that these rights are in the nature of being conditional and not absolute, and (putting the matter in my language and not his) that the grant of the status is no more than the gateway or passport to the potential acquisition of a particular right at the relevant time. I also consider that Lane J was correct to hold as a connected issue that the "new residence status" is a single and one-off grant of status rather than something that could be applied for and acquired on second or further occasions, in the event of loss or lapse. In my opinion, it would be odd indeed if a person who has achieved "new residence status" on one basis, e.g. less than three months presence in the UK, has somehow acquired by force of law the full panoply of rights under Title II, including those under Article 13(1) if not Article 15, regardless of personal circumstances at some future date. The "rights conferred under Title II" depend on what a person's circumstances might happen to be at the relevant point in time.

73. I accept that there is a degree of tension inherent in Article 18(1) which causes a modicum of head-scratching. On the one hand, putting to one side what the UK has done in practice, the "new residence status" is a one-off grant which depends on the fulfilment of certain conditions at the time of grant. However, there is nothing to suggest that the status itself could or should be lost if the preconditions for acquisition are no longer met. Continued residence in a host State therefore appears to be blessed by the Withdrawal Agreement. On the other hand, and as Lane J has pointed out, the right of residence under the Withdrawal Agreement for someone who does not have permanent residence is dependent on the Article 13 conditions continuing to be satisfied.

74. In my judgment, the framers of Article 18(1) have created an entity whose fundamental characteristics, like the quantum particle, does not allow itself easily to be pinned down. Even so, the stumbling block for the Appellant's argument is that the "new residence status" is not a "once-and-for-all"[2] or blanket conferment of rights, both current and future. It is and can be no more than the *laissez-passer* to the claiming or invoking of rights at some future date (which date may never in fact materialise); and in that particular sense alone *confers* these rights.

75. Mr Cox's argument has to be that Lane J's reasoning is wrong, not that it may be distinguished. I also accept Ms Sahore's very helpful submissions on the *IMA* case. Her analysis, with which I concur, serves to bring Article 18(1) in line with Article 18(4), and to ensure continuity with pre-existing residence rights under EU law. The only difference between the two sub-articles is that in an Article 18(1) case a person seeking

[2] The terms "one-off" and "once-and-for-all" have led to some confusion inasmuch as the parties have been using them to mean different things. For my purposes, "one-off" means that PSS can be granted only once and on the basis of the fulfilment of conditions existing at the time of grant, and not thereafter. "Once-and-for-all" means that the grantee was given access to all Title II rights unconditionally, and therefore enjoyed Article 23(1) equal treatment protection during the currency of her PSS without more.

to rely on EU residence rights must acquire this new status as the key to the door of future access. In this way, Article 18(1) has not brought about the sea-change suggested by Mr Royston but has sought to preserve the status quo, taking into account the interests of immigration control, simplicity, good administration and the protection of the accrued rights of EU (or EEA) nationals some years down the line in circumstances where documentary proof of status might be difficult. I reject the submission that the interests I have mentioned should also compel the conclusion that the UK wanted to put EU nationals in a better position than they were previously. That conclusion simply does not follow, is contrary to common sense, and would amount to the bestowing of an exceptional and uncovenanted degree of munificence.

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.

77. Thus far, I have examined the position purely by reference to Article 18 of the Withdrawal Agreement and without reference to Mr Cox's arguments under Article 13(4). It is apparent that without his Article 13(4) arguments the Appellant's case on the main issue cannot succeed. Does Article 13(4) make all the difference?

78. Article 13(4) is an entirely new provision. Its sphere of application has been hotly contested. Although it is agreed that the Appellant does not require Article 13(4) on her particular facts in connection with the fulfilment of the conditions for the grant of PSS, Mr Cornwell and Ms Sahore submitted that it could not have applied to the Appellant's case even had she needed it.

79. Mr Cornwell endeavoured to persuade me that Article 13(4) could not apply as a matter of principle to the act of granting the new status, and that the relevant provision is Article 38. In other words, if and to the extent that PSS goes further than the CRD, relevant rights have been conferred solely under domestic law. His submissions were buttressed by Ms Sahore, who recognised that the ambit of Article 13(4) raised a difficult question. Given that the Appellant's PSS was granted in November 2020 Ms Sahore, correctly in my view, focused on Article 37 of the CRD and not Article 38 of the Withdrawal Agreement, although nothing really turns on that.

80. The endeavour of Mr Cornwell and Ms Sahore was to demonstrate (not that they put the matter quite in these terms) that if Article 13(4) could not apply as a matter of principle at stage 1, it could not conceivably apply at stage 2. I agree with this logic but

I cannot agree with the premise. In my judgment, Article 13(4) could as a matter of principle apply at stage 1. My reasons are as follows.

81. In my view, the SSHD, in adopting a policy and practice which did not require strict adherence to the conditions in Article 13(1), has removed or disapplied them. As a matter of language, there is a clear and direct pathway from Article 13(4) through to Article 13(1) and then to Article 18(1), each provision referring to "conditions".

82. Mr Cornwell's further submission to the effect that Article 13(4) is only concerned with the exercise of discretions located within a relevant limitation or condition has no appeal. Article 13(4) is not concerned with how a discretion conferred in or by a particular provision in the TFEU or the CRD should be exercised. What Article 13(4) is saying that the parties to the Withdrawal Agreement have no power to apply more stringent limitations and conditions than those found in the TFEU and the CRD, but they do have power to apply less onerous conditions. That power would include the disapplication of a limitation or condition located, for example, within a relevant provision of the CRD. Ms Sahore submitted that it seems odd that a provision tucked away at the end of an article in a treaty should have such wide-ranging consequences. That submission had slightly greater appeal, but ultimately it was no more than an impressionistic point. I am guided by what the Withdrawal Agreement actually says.

83. Nor can I begin to accept the contention that by disapplying the requirements of Article 7 of the CRD the SSHD must be seen as acting under Article 38 of the Withdrawal Agreement or Article 37 of the CRD, and has therefore conferred rights solely under domestic law. Mr Cornwell modified that submission under the pressure of oral argument to suggest that the exercise of power was hybrid, that is to say both under Article 18(1) and under Article 38. In my judgment, if Article 13(4) is deployed to disapply a relevant limitation or condition, the applicant must *at that point in time* be residing in the UK in accordance with a condition set out in Title II because Article 13 of the Withdrawal Agreement incorporates Article 7 by reference, and his "new residence status"/PSS was issued on that basis. That, after all, is what the PSS says on its face, in conformity with Article 18(1)(q) of the Withdrawal Agreement.

84. In oral argument Mr Cornwell submitted that his instructions were that Her Majesty's Government were intending to deploy Article 38 of the Withdrawal Agreement to facts of this type. I do not question the integrity of his instructions, but I must ignore them entirely. It cannot possibly be said that the viewpoint of just one Treaty party constitutes *travaux préparatoires*.

85. Thus far, the discussion has been about the disapplication of the preconditions for acquisition of the new status. Mr Cox has to persuade me that Article 13(4) is also applicable to the Title II rights conferred by that status (my stage 2). But it is immediately apparent these are not the same rights. Overall, I cannot accept Mr Cox's argument persuasively though it was advanced, attractively supported as it was by Mr Royston and Mr Berry.

86. The grant of PSS was for all applicants for five years and without any further conditions. I reject Mr Cox's argument that PSS was and is "unconditional" in the sense that it, without more, accords immediate and unfettered access to all the rights set out in Title II. PSS is only "unconditional" for the purposes of UK immigration law: a PSS holder is granted five years' leave to remain without conditions. That is all it does.

Furthermore, and inconveniently for Mr Cox's purposes, the grantee is told in terms that she does not *ipso facto* qualify for state benefits.

87. What the UK could not have done was to confer a "new residence status" which lasted for only so long as the Article 13(1) conditions were met. If that had been the position, EU nationals would have to make serial applications for PSS as their personal circumstances fluctuated. Finally, it would mean that Lane J was wrong; but I do not think that he was.

88. Provided that it is continued to be seen as a "one-off" passageway, Article 18(1) is silent as to the mechanism by which a host State may choose to confer residence status. All that can be said is that the Treaty parties must have been proceeding on the basis that each of them would have to implement a legally effective act under domestic law to achieve the intended result. An immigration leave of five years is, in my view, within the permissible ambit of this provision. This means that Mr Cornwell does not need Article 38 of the Withdrawal Agreement as the *vires* (post-1 January 2021) for the form of PSS that the SSHD as a matter of policy and practice has implemented.

89. If, contrary to my preferred analysis, PSS *is* more generous than Article 18(1) of the Withdrawal Agreement because that is the effect of conferring an unconditional immigration leave, then I would hold that this more generous right is enjoyed by virtue of a rule of domestic law permitted by Article 38 (on post-1 January 2021 facts), and not on account of Article 13(4). On this premise, Article 38 would be operating post-1 January 2021 in the same way as Article 37 of the CRD worked before that date.

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.

91. I turn, for completeness, to the issue I left hanging under §49 above. At one stage in my post-hearing deliberations I was nurturing the idea that the Appellant could not recruit Article 13(4) on the facts of her case because her PSS was granted during the transition period, and that provision was not yet in force. Mr Cox submitted that the effect of Article 19 of the Withdrawal Agreement, in particular sub-article (2), is that the SSHD must be treated as having made a decision in accordance with Article 18(1) and on the premise that it was already in force, even though it had no legal effect until after the end of the transition period. That, he said, brings Article 13(4) into scope. Ms Sahore submitted that, given that PSS was a "one-off" grant, Article 13(4) cannot be regarded as having been somehow "turned on", to borrow her metaphor, for this purpose. She

repeated her submission that *CG* and Article 37 of the CRD apply to the Appellant's factual pattern.

92. In my judgment, Mr Cox's submissions on this particular issue are correct. The Appellant's rights during the transition period were regulated by the CRD and her rights thereafter by the Withdrawal Agreement. The present case is not concerned, unlike *CG*, with her rights during that period. Although the grant of PSS was "one-off", what took place in November 2020 was done in accordance with Article 18(1) of the Withdrawal Agreement, with anticipatory effect. In my view, this means that if the SSHD was not requiring proof of a relevant EU right at that point in time, he must be treated as having applied Article 13(4) to the Appellant's situation in the same way as he would have done had she made her application after 1 January 2021. It is because Article 18(1) has been "turned on" with proleptic effect that the button for Article 13(4) has also been pressed. The case therefore turns on the points of principle I have already addressed, and not on the timing point that at one stage was stimulating my interest.

93. Finally, and as I have said, the Appellant has a separate and free-standing argument grounded on Article 21(1) of the TFEU. In post-hearing submissions Mr Cox and Mr Berry placed particular emphasis on a point that Mr Cox had raised for the first time in his reply although Mr Berry, to be fair to him, had adumbrated it, albeit in less than forthright terms, in paras 41-44 of his skeleton argument. As Mr Cox was developing his point orally I confess that he completely lost me. Counsel now say that an EU national who before 1 January 2021 enjoyed a more favourable status than under the CRD was exercising free movement rights under Article 21(1) of the TFEU, and it was the existence of these rights that satisfied the precondition in Article 18(1) of the Withdrawal Agreement via Article 13(1). Further, Mr Berry argues that the suite of rights in Title II conferred by PSS include a right to freedom of movement which is not dependent on the CRD: each time the matter falls for consideration, the person (here, the Appellant) would be within the material scope of Article 13(1). Counsel rely on para 87 of *CG*, which provides:

> "In the present case, it is apparent from the order for reference that the UK authorities granted CG a right of residence even though she did not have sufficient resources. As noted in paragraph 82 of the present judgment, those authorities applied more favourable rules, in terms of the right of residence, than those established by the provisions of Directive 2004/38, with the result that that action cannot be regarded as an implementation of that directive. In so doing, those authorities by contrast recognised the right of a national of a Member State to reside freely on its territory conferred on EU citizens by Article 21(1) TFEU, without relying on the conditions and limitations in respect of that right laid down by Directive 2004/38."

94. In order to deconstruct this argument, which in my view was only clearly set out in a post-hearing submission filed by Mr Berry, one needs to proceed in stages. During the transition period the Appellant on her particular facts was enjoying rights under both Article 6 of the CRD and Article 21(1) of the TFEU. In the case of someone such as CG who did not fulfil the conditions of the CRD before 1 January 2021, para 87 of *CG* is authority for the limited proposition that she was residing here during the transition

period not under the CRD but solely in the exercise of broader free movement rights under Article 21(1). That state of affairs did not avail CG in her case before the CJEU because there was nothing to preclude a rule of domestic law which denied her access to State benefits (para 83).

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.

96. For all these reasons, I conclude that the Respondent succeeds on the main issue. This means that the Appellant's appeal must fail, but given the public importance of this case and in view of the overriding objective I have decided to move on to address the discrimination issue as best I can.

DISCRIMINATION

97. All parties will agree with me that the discrimination issue was accorded much less time and attention than the main issue. Had the discrimination issue been potentially determinative of the outcome, I would have adjourned the case for further submissions.

98. My conclusion on the discrimination issue is that, on the premise that it is sufficient for the Appellant's purposes to rely on nothing more than her PSS, the discrimination arising in this case is indirect rather than direct, and that it is capable of being justified. However, I am unable to come to a definitive conclusion on the issue of justification on the evidence and submissions presently available. That issue will have to live and fight another day.

99. Whether the discrimination in this case is direct is not answered simply by examining the terms of Article 23(1) of the Withdrawal Agreement and asking whether the relevant rule of domestic law (as summarised under §32 above) is an impediment to a potentially successful claim brought by this Appellant. The depth of inquiry must be greater.

100. In *Patmalniece v Secretary of State for Work and Pensions (AIRE Centre Intervening)* [2011] UKSC 11; [2011] 1 WLR 783, Baroness Hale of Richmond JSC deprecated what she called "the inherent complexity of the concepts developed in the pursuit of equal treatment". In *Schnorbus v Land Hessen* (Case C-79/99); [2000] ECR I-10997, Advocate General Jacobs said, at paragraph 33 of his opinion:

> "The discrimination is direct where the difference in treatment is based on a criterion which is either explicitly that of sex or necessarily linked to a characteristic indissociable from sex. It is

> indirect where some other criterion is applied but a substantially higher proportion of one sex than the other is in fact affected."

101. In *Bressol v Gouvernement de la Communauté Française* (Case C-73/08) ; [2010] 3 CMLR 559, Advocate General Sharpston said, at paragraph 56 of her opinion:

> "I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification."

102. On my understanding of what happened in the *Bressol* litigation, Advocate General Sharpston slightly broadened this test to hold that, although there was not exact congruence on the facts, there was still direct discrimination. The CJEU came to a different conclusion. That led Baroness Hale to conclude on the facts of *Patmalniece* that the discrimination at issue was indirect because the congruence was insufficiently exact.

103. In *R (oao Fratila and another) v Secretary of State for Work and Pensions (Advice on Individual Rights in Europe (AIRE) Centre Intervening)* [2020] EWCA Civ 1741; [2021] 3 All ER 1043, the Court of Appeal was concerned with the entitlement to universal credit of someone with PSS, and the impact of the non-discrimination provision in Article 18 of the TFEU. The Court of Appeal held by a majority (McCombe and Moylan LJJ, Dingemans LJ dissenting) that the claimants were entitled to rely on the TFEU, and that the discrimination which arose was direct.

104. The Supreme Court allowed the appeal of the Secretary of State for Work and Pensions from the Court of Appeal's decision ([2021] UKSC 53; [2022] 3 All ER 1045). Lord Lloyd-Jones JSC gave the sole reasoned judgment. The Supreme Court concluded, in line with *CG*, that the discrimination claim was governed by Article 24 of the CRD and not Article 18 of the TFEU. As the Respondents to the appeal were not residing in the UK on the basis of the CRD at the time of their claims for universal credit, they were unable to bring themselves within the scope of Article 24. It follows that the reasoning and decision of the Court of Appeal on the direct vs indirect discrimination issue is *obiter* only.

105. Examining the reasons given by McCombe and Moylan LJJ on the one hand and Dingemans LJ (who sided with Swift J) on the other, it may be said that the present case is arguably stronger from the Appellant's perspective than *Fratila* for the reason that Article 23(1) contains an explicit and precise anti-discrimination rule. That having been said, I have come to the conclusion that that Dingemans LJ is right for the reasons he gave. In my judgment, the key point is that not all UK nationals qualify for housing assistance (because not all are habitually resident) and not all those with PSS (assuming I am wrong on the main issue) do not. Although the relevant rule of domestic law disqualifies all those with PSS and nothing more, the overall impact of these provisions is only to make it substantially more difficult for PSS holders to succeed. It follows that this is a classic case of indirect discrimination.

106. As Swift J explained in *Fratila* and I respectfully agree:

> "Logically, direct discrimination arises, and only arises, when there is an exact coincidence between the requirement applied (on the facts of *Patmalniece* the right to reside in the United Kingdom) and the prohibited characteristic (i.e. nationality). This was the point made by Baroness Hale in her judgment in *Patmalniece* – that for there to be direct discrimination, the rule applied would be "indissociable" from the protected characteristic (to use the shorthand at section 4 of the Equality Act 2010). There is no indissociable connection between nationality and a right to reside in the United Kingdom: although those with such a right to reside are more likely to be British nationals, foreign nationals can also obtain that right to reside. As a matter of English law, the right to reside requirement would be classified as a provision which would, if not justified, give rise to indirect discrimination. I can see nothing in the judgment in *Bressol* that requires any different conclusion as a matter of EU law. If this is correct it avoids the intellectual contortion needed to conclude that the consequences of a rule which results in direct discriminatory can be avoided if that rule is "bundled up" with another provision which (again, looked at alone) only gives rise to indirect discrimination." ([2020] EWHC 998 (Admin); [2020] PTSR 1424, at 1442H – 1443C/D)

107. In my judgment, this is indirect discrimination which is capable of being justified, but I am inadequately equipped to determine this issue on a definitive basis given the limited nature of the submissions and evidence I have received and heard. Whether it will ever be necessary for this Court to reach a final conclusion on this issue will depend on what happens elsewhere.

DISPOSAL

108. This appeal must be dismissed.