IN THE HIGH COURT OF JUSTICE **CO/4193/2021**
ADMINISTRATIVE COURT

B E T W E E N:-

THE KING (on the application of THE INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS)

Claimant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

-and-

THE3MILLION LTD

EUROPEAN COMMISSION

Interveners

THE3MILLION'S REVISED WRITTEN SUBMISSIONS

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*References: **[SFG§x]** (Claimant's statement of facts and grounds, paragraph number); **[DGD§x]** (Defendant's detailed grounds of defence, paragraph number).*

INTRODUCTION

1. The3million is a not-for-profit campaigning organisation formed after the 2016 referendum to work on the specific issue of protecting the rights of European Union ('EU'), European Economic Area ('EEA') and Swiss citizens living in the United Kingdom ('UK') before it left the EU and their families (referred to in these submissions as 'EEA+ citizens and family members').

2. The organisation has a long-standing interest in the issue raised in this claim. This interest dates back to at least its February 2021 report[1] to the Claimant, in which it explained its view that the Withdrawal Agreement[2] ('WA') does not permit a loss of rights where a person with pre-settled status fails before its expiry to renew it or apply for settled status, and thus that the Defendant was adopting an unlawful position.

3. The Defendant's position, if upheld, will lead to a large cohort of EEA+ citizens, whose interests the3million was founded to represent, being left without any status on the expiry of their PSS. This is a matter of serious concern. Those individuals face grave consequences, including losing access to work, welfare benefits, healthcare and housing and the ability to leave and the re-enter the UK. The3million is concerned both to ensure that those impacts are fully understood by the Court, and that the consequences of the way in which those impacts demonstrate the difficulties of the interpretation of the WA advanced by the Defendant are taken into account when the claim is determined.

4. The3million has therefore closely followed this litigation. Once the claim was granted permission by Saini J on 24 June 2022, the3million carefully considered its position and it was concluded that the organisation was in a position to offer a unique perspective, as set out below.

5. The3million notified the Court and the parties of its intention to apply to intervene promptly on 25 July 2022. In order to ensure a well-evidenced intervention, the organisation and its legal team worked at speed over the summer, keeping the parties and the Court informed throughout.

6. The3million filed its application to intervene by way of written submissions and evidence on 15 September 2022, including a witness statement from Luke Piper, Head of Policy and Advocacy at the3million. On 16 September 2022, the Defendant was

[1] See p.29. Available at: https://the3million.org.uk/sites/default/files/documents/t3m-report-IMA-EUSSWAOverview-04Feb2021.pdf (accessed 28 October 2022). To date, the3million has provided four such reports to the Claimant, in order to assist it in carrying out its statutory functions. This was the first.

[2] That is, 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 concluded on 19 October 2019. As both the Claimant and the Defendant accept that there are no material differences between the Withdrawal Agreement and the other separation agreement with Iceland, Liechtenstein and Norway, these submissions will refer only to the Withdrawal Agreement

invited to provide her views by close of business on 20 September 2022. Following an extension, on 27 September 2022, the Defendant provided a letter in which she opposed the application. The3million provided a brief reply on 29 September 2022. The Claimant did not oppose the application.

7. On 21 October 2022, Lane J ordered that *"the3million may make written submissions but may not adduce any evidence, whether in those submissions or otherwise"* and further ordered that *"the 3million Ltd shall file and serve its written submissions in revised form, no later than 28 October 2022"*. As the3million does not wish to disturb the listed hearing date, it does not seek to renew this application orally, but would note that, if the Court hearing the claim decides that it would be beneficial to have regard to the evidence collected by the3million, it can be provided at very short notice.

8. These revised submissions are therefore filed in accordance with the order of Lane J, without reference to or reliance on the evidence previously filed. Further, in order to remain in keeping with its original application, the3million does not refer to any fresh points raised by the Defendant in her skeleton argument (filed after the3million's application), i.e. points which were not addressed in the first version of its submissions.

SCOPE OF THE INTERVENTION

9. The3million supports and adopts the Claimant's case on the interpretation of the WA. It does not intend to repeat points made by the Claimant, and so it will not deal in detail with either the wording of the WA (save where necessary) or the proper starting point for its interpretation. This is because, even if the Court adopts the Defendant's position on the proper approach to interpretation, the Court must consider the terms of the WA in the light of its *"object and purpose"* (per Article 31(1) of the Vienna Convention on the Law of Treaties 1969[3]).

10. In that vein, the purpose of this intervention is to:

    (1) identify and highlight the cohorts of individuals who are most likely to be affected by the Defendant's interpretation of the WA;

[3] *"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"* (emphasis added).

(2) explain how the consequences affecting those individuals undermine the object and purposes of the WA, namely the reciprocal protection of citizens of member states; and

(3) in so doing, explain how the Defendant's interpretation of Article 18 WA is inconsistent with the WA's wider object and purpose.

11. The3million is uniquely placed to provide this perspective. It has since its inception been very closely involved in all stages of the Brexit process. Its wide network allows it to be kept abreast of developments affecting EEA+ citizens and family members and it has drawn on this knowledge for this claim. The3million's historical perspective (being incorporated in 2017) and longstanding information gathering has a different function to the Claimant but has at the same time supported the Claimant in its work and other advocacy. It wishes to ensure through this intervention that this perspective is before the Court.

COHORTS OF INDIVIDUALS MOST LIKELY TO BE AFFECTED BY THE GOVERNMENT'S INTERPRETATION OF THE WITHDRAWAL AGREEMENT

12. Those most at risk of being adversely affected by the Defendant's interpretation of the WA are, by definition, those who are most likely to fail to apply for another status on the expiry of their pre-settled status.

13. It is a matter of public knowledge that, due to the current structure of the EUSS, individuals who qualify for settled status may fail to obtain it for a number of reasons, principally:

(1) individuals not knowing they must apply to the EUSS;

(2) individuals not being able to navigate the novel (typically digital) application system; and

(3) individuals not being easily able to demonstrate by evidence their identity and/or the length of their residence in the UK.

14. It is a further matter of public knowledge that there have been technical bugs and other barriers to accessing the EUSS that have affected EUSS applicants.

15. For the following reasons, it is logical to predict that these difficulties will be the same or worse in respect of the necessity to make a second application:

    (1) As a matter of record, there was a publicity campaign to encourage EEA+ citizens and family members to make an application to the EU Settlement Scheme before the 30 June 2021 deadline. No such campaign can exist for a set of rolling deadlines, specific to each individual, commencing from August 2023. The nature of these personal deadlines is entirely different: the length and timing of the application window within which each application must be made varies according to each individual, as some will accrue five years of 'continuous residence' in the UK and therefore qualify for settled status shortly after the grant of pre-settled status, while others will not do so until close to the end of the five-year period of pre-settled status. The Defendant's current policy creates an entirely different set of circumstances from the much simpler global cliff-edge which all EEA+ citizens and family members faced back in 2021. It cannot be managed by the mechanisms previously adopted to seek to ensure that individuals were aware of the need for, and requirements of, an application.

    (2) While it is acknowledged that support mechanisms are available to applicants to the EUSS, the Defendant cannot rely on them to ignore the serious consequences facing those who fail to make a further application prior to the expiry of their pre-settled status.

    (3) In any event, the support available was insufficient to ensure that everyone (or even nearly everyone) was able to apply to the EUSS in time. By 30 June 2022, 267,350 late EUSS applications had been received so far.[4]

    (4) Further, the support mechanisms are dwindling. Most notably, the funding the Defendant provides to civil society organisations to support vulnerable EUSS applicants has significantly decreased over time (the first tranche was

[4] See the data tables for the EUSS Quarterly Statistics for June 2022, available at: https://www.gov.uk/government/statistics/eu-settlement-scheme-quarterly-statistics-june-2022/eu-settlement-scheme-quarterly-statistics-june-2022#data-tables (accessed 28 October 2022). This figure is to be compared with an estimated figure of 5,548,440 individual applicants as at 30 June 2021, available at: https://www.gov.uk/government/statistics/eu-settlement-scheme-quarterly-statistics-june-2021/eu-settlement-scheme-quarterly-statistics-june-2021 (accessed 28 October 2022).

£9m whereas the latest tranche was £2.5m), and there has been no public announcement about the position after 30 September 2022.[5]

(5) The overwhelming majority of people will need to apply for settled status this time around, which has significantly more onerous evidential requirements (see further paragraphs 25-27 below).

16. One of the clear purposes of the WA was to ensure the protection of the rights of EEA+ citizens and their family members. This is made clear from the preamble, which states:

> *"RECOGNISING that it is necessary to provide reciprocal protection for Union citizens and for 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 […]."*

17. This protection is particularly important for vulnerable groups who are less able to take steps to protect their own rights. Indeed, it is understood that this concern was and is shared by the Defendant, resulting in the various packages of support to vulnerable groups, including the funding to civil society organisations referred to above. Yet the Defendant's interpretation self-evidently puts those groups most at risk, significantly undermining the clear and stated purpose of the WA. The3million is particularly concerned about the risk for groups such as those with physical or mental impairments or disabilities, women, Roma communities, children, older people, rough sleepers, victims of trafficking and those with other vulnerabilities.

PURPOSE OF THE ARTICLE 18 WITHDRAWAL AGREEMENT APPLICATION PROCESS

18. The3million agrees with the Claimant's construction of the WA and the observations made by the European Commission, and makes the following points in support of the Claimant's construction and in response to some of the Defendant's arguments against that construction.

19. First, the Defendant's suggestion that a *"key aim"* of the WA was to provide *"legal certainty to citizens, economic operators and public authorities"* **[DGD§4.3]** ignores that the aim was to provide legal certainty in the protection of rights (see quotation from the

[5] See: https://www.gov.uk/government/news/support-for-vulnerable-applicants-to-the-eu-settlement-scheme (accessed 28 October 2022).

Preamble above). The Defendant's interpretation leads to significant cohorts of vulnerable individuals being left without any status and the consequences they face are the opposite of protection: they amount to a denial of some of the basic services in modern society. It does this also in an entirely uncertain and disorderly fashion by creating an ongoing and rolling series of personalised deadlines and settled status application windows for individuals to make a further application: some of whom on the Defendant's analysis will have got WA rights and some of whom the Defendant would say have not got WA rights, but none of whom will have any idea which cohort they fall in from the status they are granted.

20. Secondly, and relatedly, the Defendant has suggested that if the Claimant's construction is correct, *"an individual could not be sure of the legality of their residence, and a host state would need to undertake repeated checks as to the status of any individual"* **[DGD§62.1]**. As eligibility under the EUSS is not considered by the Defendant to be entirely the same as eligibility under the WA, those who acquire pre-settled or settled status under the EUSS already do not know whether they are considered by the Defendant to have WA rights without subsequent examination by an official. This has very important practical consequences. Eligibility for universal credit and other benefits depends on the individual being able to demonstrate a right to reside (see by example reg. 9(2) of the Universal Credit Regulations 2013). However, a right to reside specifically does not include having pre-settled status under the EUSS (see reg. 9(3)(c)). Rather, the individual must demonstrate a right to reside by reference to archived implementing provisions of EU free movement law (under the Immigration (European Economic Area Regulations) 2016). In other words, there is a requirement on the state to continue to examine the circumstances of someone with pre-settled status for the purposes of ascertaining eligibility to welfare benefits. The government recently defended this position in *Fratila v Secretary of State for Work and Pensions* [2021] UKSC 53, [2022] PTSR 448, to which it has not referred in its written submissions in this claim.

21. Thirdly, while it has been common in this area of policy for all stakeholders (including, admittedly, the3million) to use the shorthand monikers of a 'declaratory' versus a 'constitutive' scheme, these concepts are not defined in either the WA or EU law. Their meaning is contested even among those who use them. It is wrong to suggest – as the Defendant does at **[DGD§4.3]** – that there is an obvious binary choice between the

two: there are many different ways of constructing a registration scheme which adopts elements of what some people might consider to be 'declaratory' and what some might consider to be 'constitutive'. In reality, the focus of the Court must be on the strict terms of the WA and whether the Defendant's implementation complies with those terms. That implementation should not be restricted by strict adherence to undefined concepts of 'declaratory' and 'constitutive'.

22. Fourthly, the Defendant's case means that the rights contained in Article 13, which are conferred by Article 18 WA, are only so conferred for the time period of the grant of that residence status. In the UK, that grant is by way of pre-settled status for five years. However, though the right contained in Article 13 WA is not unconditional, in that its existence depends on the individual establishing qualification within the provisions of EU law identified in the article (e.g. worker status, and so on, as well as not falling for restriction under Article 20 WA), it is indefinite, in that it has no temporal limitation. None of the underlying EU law rights to which it is attached contain any time-limitation. For example, the extended right of residence under Article 7 of the Citizens' Rights Directive is not lost after five years. The Defendant has not identified any provision of the WA which permits her to limit in time the conferral of status under Article 18 WA. To the contrary, Article 18 WA sets out an exhaustive list of conditions: there is no provision there which permits that residence status to be limited in time such that, if no further application is made, the rights under Article 13 WA are no longer conferred on the applicant.

23. The Defendant's case appears to rest on the assumption that a 'constitutive' scheme permitted by the framework established by Article 18 WA must necessarily entail the grant of limited leave to remain for five years within the existing parameters set by section 3 of the Immigration Act 1971, including the distinction between limited leave to remain, which may be subject to conditions, and unconditional indefinite leave to remain. That assumption is wrong: it was always open to the Defendant to introduce any necessary amendments to the domestic immigration legal framework to secure the lawful implementation of the WA.[6]

[6] Indeed, primary legislation was introduced in response to Brexit to make changes to domestic immigration law, including by amending the Immigration Act 1971 in the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020.

24. Fifthly, and relatedly, the Defendant has sought to circumvent this problem by focusing on the process of 'upgrading' from pre-settled status to settled status. However, this claim also includes the narrower issue of the loss of the rights flowing from Article 13 WA on the expiry of pre-settled status under domestic law (see e.g. Claimant's reply to the summary grounds of defence at §§12, 14). The fundamental choice created by Article 18 WA is not about the expiry and renewal of residence status under the WA; rather, it is about the obtaining of the status in the first place. Nowhere has the Defendant identified that it is a ***requirement*** for the continuity of residence rights under the WA that an individual ***must*** make a second application. One would expect, if the Government is right and that a second application stage was of vital importance, that this would be provided for on the face of the WA.

25. For clarity, the Defendant has, in her skeleton at paragraph 49, suggested that the Claimant has wrongly included in this claim a *"'pre-permanent residence' cohort: persons who, on the IMA's case, do not acquire a right of permanent residence under the WA but nonetheless continue to exercise residence rights in compliance with Article 13 of the WA"*. It appears the Defendant is referring to the places in which the Claimant makes remarks such as *"individuals are required to make a second application within five years of the grant of pre-settled status, either for settled status under the EUSS (once they qualify for permanent residence), or for a further period of pre-settled status"* (emphasis added) **[SFG§6]**.

26. The3million does not read the Claimant as saying what the Defendant has asserted. Rather, the3million understands that the Claimant is referring to the very narrow situations in which, under the *Defendant's* implementation of the EUSS, an individual would be eligible for pre-settled status but not settled status on the expiry of their initial tranche of pre-settled status. In order to provide clarity to the Court, the3million sets out those categories below, which it believes fall into three groups:

    (1) where there was a break in an individual's 'continuous residence' between the date of their original grant of pre-settled status and 31 December 2020, and so the individual applies for a fresh grant of pre-settled based on the new period of 'continuous residence' starting before 31 December 2020;

    (2) in the strictly limited situations in which a COVID-19 related absence means 'continuous residence' is 'paused', so that the individual may need to apply to

extend their pre-settled status in order to accrue the five years continuous residence necessary to qualify for settled status; and

(3) where an individual who was granted pre-settled status breaks their continuity of residence but is nonetheless eligible to (re-)apply as a joining family member on a fresh grant of pre-settled status.

27. Aside from people in these three (likely extremely small) groups, when a grant of pre-settled status expires, the individual must apply for and secure settled status or they will be left with no form of immigration status; for the overwhelming majority of pre-settled status holders, it will not be possible to apply for and secure a further grant of pre-settled status. This is significant because the evidential requirements for settled status are significantly more onerous than those for pre-settled status. Those evidential requirements are likely to mean that more people will fail to be granted settled status, instead receiving a refusal and suffering loss of their residence rights.

28. Sixthly, all of this does not mean that there is no point to the choice presented by Article 18: the first application stage remains meaningful without the Government's required second stage. The purpose of Article 18 – and of so-called 'constitutive' schemes – was to ensure that individuals were significantly incentivised to apply to the EUSS. It creates a bright line between those who have obtained WA status and protection and those who have not. Unless and until they have done so, any rights under the WA are not 'conferred'. This allowed the Government to put in place a deadline to generate public 'buy-in' via a major communications campaign. It ensured that all those individuals would then be registered and documented.

29. It did not, however, permit or necessitate an arbitrary requirement to apply for a further status after 5 years. One might ask what the point was of forcing EEA+ citizens and their family members through the EUSS application process – with the time limitations and risks involved – only for those individuals who followed the process to automatically lose their WA status entirely on grounds not at all provided for in the WA. The loss of status that follows under the EUSS if no such application is made is therefore a failure properly to implement the rights provided for in the Withdrawal Agreement.

COSTS

30. The Defendant in her letter of 27 September 2022 said "*If SSHD incurs costs responding to submissions and evidence which do not assist the Court, then she will seek her costs accordingly*". Lane J ordered on 21 October 2022 that costs be reserved and said "*The defendant does not agree that, if the 3Million Ltd is permitted to intervene, it should be on the basis that no costs are recoverable by the defendant from that company. This is not a matter that can satisfactorily addressed at this stage: hence paragraph 6 of the above Order.*"

31. The conditions for making a costs order against an intervener are set out in section 87(6) of the Criminal Justice and Courts Act 2015 and are that:

   (a) the intervener has acted, in substance, as the sole or principal applicant or defendant;

   (b) the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the Court;

   (c) a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the Court to consider in order to resolve the issues that are the subject of the stage in the proceedings; or

   (d) the intervener has behaved unreasonably.

32. Section 87(7) provides that the Court does not have to make a costs order against an intervener, even if one of those conditions is met, if there are exceptional circumstances that make it inappropriate to do so. In this case however they are not met.

33. There can be no question of the3million having acted in substance as the sole or principal applicant in this case, or of it having behaved unreasonably. Indeed, it has taken great care to keep the parties and the Court informed throughout of its intentions and to ensure that its intervention does nothing to disturb the trial timetable. The3million submits that there should be no order as to costs in respect of its intervention.

34. Whilst it is of course a question for the Court to judge the extent to which these submissions are of assistance to it, the3million has sought to ensure that they are tightly focused and clearly within the four corners of the claim, and provide a unique perspective, as set out above. The3million has approached this intervention in a

sincere and thoughtful manner and committed significant resources to using best endeavours to be of significant assistance to the Court.

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28 October 2022