IN THE COURT OF APPEAL (CIVIL DIVISION) **CA-2024-001773**
ON APPEAL FROM [2024] EWHC 1754 (KB)

BETWEEN:

GWLADYS FERTRE

Appellant

and

VALE OF WHITE HORSE DISTRICT COUNCIL

Respondent

and

(1) THE3MILLION
(2) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT
(3) INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS
(4) SHELTER
(5) THE AIRE CENTRE

Interveners

SKELETON ARGUMENT FOR THE3MILLION[1]
for hearing on 14-16 May 2025

INTRODUCTION

1. T3M submits that a Union citizen, who has been granted a residence status under Art.18(1) of the Withdrawal Agreement ('**WA**') which has not been lawfully withdrawn, is by that fact alone 'residing on the basis of' the WA for the purposes of Art.23 WA. Thus the Appellant ('**Ms Fertre**') enjoys the right of equal treatment under Art.23 WA. Ms Fertre's right does not depend on meeting the conditions which used to be applicable under Art.24 of the Citizens' Rights Directive 2004/38/EC ('**CRD**'). Jay J was wrong to reject those submissions.

[1] As the largest grassroots organisation for Union citizens in the UK, the3million Ltd. ('**T3M**') has a long-standing concern with the issues raised by this appeal. It has since March 2020 been involved in discussions with key stakeholders about the personal scope of the WA and related issues. It has raised concerns about the difficulties faced by some pre-settled status holders in accessing social assistance. It intervened to raise materially similar submissions in *C v Oldham Council* J05MA951 (HHJ Bird, 22 May 2024), and in *Hynek v Islington* K40CL206 (HHJ Saunders, 24 May 2024). T3M is a responsible and experienced litigant in test case litigation in this field. See eg. *R (IMA) v Secretary of State for the Home Department (the3million & ors intervening)* [2022] EWHC 3274 (Admin), [2023] 1 WLR 817 and *R (the3million & anor) v Secretary of State for the Home Department* [2023] EWHC 713 (Admin), [2023] WLR 3011.

2. T3M, with very considerable *pro bono* assistance from A&O Shearman and lawyers across Europe, has provided evidence of the practice in other Member States which have adopted a residence scheme under Art.18(1) WA. This shows the UK to be an outlier in the approach it has adopted, and undermines the Secretary of State's assertion that the UK's scheme's discriminatory effect is justified.[2]

3. In light of the disagreement between domestic judges,[3] and T3M's evidence about variation in approaches across Europe, T3M agrees with Jay J's assessment that the legal position is not *acte clair* (HC§17).[4] It invites this Court to request the Court of Justice of the European Union ('**CJEU**') to give a preliminary ruling pursuant to Art.158(1) WA.

4. This skeleton advances the following arguments:

> I – interpretation of the WA: the WA gives signatory states a choice about whether to require applications for a residence status under Art.18(1) WA, and a choice about whether to make the grant and/or continuation of that status subject to various conditions; a person enjoys entitlement to equal treatment where they have been conferred with the status unconditionally;
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> II – WA implementation in the UK: the UK has chosen to require an application for a residence status under Art.18(1), and has chosen not to make the grant and/or continuation of that status subject to any relevant conditions;
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> III – practice in other WA signatory states: international comparisons show the UK to be anomalous in refusing equal treatment to people with an Art.18(1) residence status;
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> IV – need for a reference: this Court should make a CJEU reference because the answer to the point at issue is unclear, determinative of this case, and important to all WA signatory states and their citizens.

[2] T3M adopts the submissions of Ms Fertre that discriminatorily unequal treatment under Art.23(1) WA is not capable of justification (see her skeleton §§87-119). If contrary to that primary position the Court finds that the discrimination is capable of justification, then T3M submits that its evidence of other states' practices is relevant to showing that a scheme like the UK's is unnecessary and disproportionate.

[3] This case and *C v Oldham* decided the point in the Government's favour; *Hynek v Islington* decided it the other way.

[4] All references in form 'HC§x' are to para x of the judgment of Jay J below.

I. INTERPRETATION OF THE WA

5. T3M's position is:

   (a) states can choose between (i) an Art.18(1) scheme where individuals must apply for a new residence status, and (ii) an Art.18(4) scheme without that new residence status;

   (b) states operating an Art.18(1) scheme accept various legal obligations pursuant to the WA, and one of those is to recognise that people holding an extant Art.18(1) residence status are, for the purposes of Art.23 WA, residing on the basis of the WA;

   (c) states operating an Art.18(1) scheme may waive limitations and conditions available to them about who may be granted the residence status, and/or limitations and conditions available to them about retention of that status;

   (d) while states can choose to make the retention of status (and therefore the continued enjoyment of rights) subject to continued compliance with conditions, a grant of Art.18(1) status does not automatically confer only conditional rights;

   (e) the enjoyment of the right under Art.23 WA does not necessarily depend on meeting the conditions of Art.24 CRD.

(a) States can choose between (i) an Art.18(1) scheme where individuals must apply for a new residence status, and (ii) an Art.18(4) scheme without that new residence status

6. Art.18 WA gave the UK choices about what residence scheme it implemented for people within the personal scope of Part II.[5] It has been common to describe the choice as between a 'constitutive' scheme under Art.18(1) or a 'declaratory' scheme under Art.18(4),[6] as explained by Lane J in *R (IMA) v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin), [2023] 1 WLR 817:

> [45] I have mentioned that Article 18 of the WA confers a power on the host state to require Union citizens and UK nationals and their family members to apply for a new residence status conferring the rights under Title II of Part Two. This power enables the United Kingdom and Member States to give effect to the citizens' rights contained in Part Two by means of a 'constitutive scheme', whereby the rights in

[5] All parties agree Ms Fertre is within the personal scope of Part II because she meets the definition in Art.10(1).
[6] Although, as Jay J noted at HC§44, these terms have 'the tendency to conceal as much as to elucidate'.

> question must be conferred by the grant of residence status. This contrasts with a 'declaratory scheme', under which the rights under Title II arise automatically upon the fulfilment of the conditions necessary for their existence…

7. Art.18 is described in M Meduna & ors, '*The Withdrawal Agreement, Part Two*' in T Liefländer & ors, *The UK– EU Withdrawal Agreement* (OUP 2021):

> [3.65] Article 18 governs the new special residence status for the Beneficiaries. It creates a new residence scheme that is constitutive and permission-based, in addition to maintaining the current declaratory and rights-based residence scheme based on the current grand-fathered Union law. This is the single biggest departure from Union law on free movement of EU citizens in the Withdrawal Agreement. Given this, it is not surprising that Article 18 is a very comprehensive provision of almost 2,000 words, making it the second longest article of the Withdrawal Agreement.

(b) States operating an Art.18(1) scheme accept various legal obligations pursuant to the WA, and one of those is to recognise that people holding an extant Art.18(1) residence status are residing on the basis of Art.23 WA

8. Art. 18(1) grants a power to States to 'require Union citizens ... 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*' (emphasis added).

9. It would be an ultra vires exercise of that power to require Union citizens to apply for a new residence status which did *not* confer the rights under Title II.

10. The key question in this appeal is whether a state which operates such a scheme is, when granting Art.18(1) status, merely recording that a person would in principle in future be able to enjoy the right of residence under the WA, should suitable conditions be met; or whether it is conferring the right of residence under the WA for the future.

11. T3M's answer is that the status is *conferring* the right. Treating pre-settled status ('**PSS**') as being merely a 'gateway' to residence rights ignores the textual, structural and contextual features of Art.18 WA and the ways in which an Art.18(1)(a) scheme is distinguished from an Art.18(4) 'declaratory' scheme [emphasis added]:

> (1)(a) … **the purpose of the application procedure shall be to verify whether the applicant is entitled to the residence rights set out in this Title**. Where that is the case, the applicant shall have a right to be granted the **residence status** and **the document evidencing that status**;
>
> (4) Where a host State has chosen not to require Union citizens 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…

Art.18(4) is the 'gateway' scheme; Art.18(1) has different wording

12. There is a difference between a 'residence status' and 'the document evidencing that status' under Art.18(1)(a). There is a further difference between those things and a 'residence document' under Art.18(4). This is complemented by Art. 19(1), which distinguishes between a 'residence status or residence document as referred to in Article 18(1) and (4)'.

13. So in an Art.18(4) scheme, citizens merely receive an attestation that they are in principle 'eligible for' residence rights (effectively an assessment that they are within the personal scope of Part II). But in an Art.18(1) scheme the application process must 'verify' whether the applicant is actually 'entitled to' (Art.18(1)(a)) the specific residence rights, and it produces a 'residence status' which 'confers' *both* the rights under Title II *and* a document evidencing that status.

No power to operate an Art.18(1) scheme which does not confer the rights under Title II

14. There is no power under the WA to operate a process requiring applications under an Art.18(1) scheme for a lesser status which does not actually 'confer' the WA rights (indeed, which on the Secretary of State's case does not even follow investigation of whether a person has ever been entitled to the rights), but merely serves the domestic law purpose of preventing a person being prosecuted as an illegal immigrant or removed from the UK, and otherwise continues the pre-Brexit declaratory approach to individual verification of rights. See Art.13(4),[7] and *R (IMA),* §150 ('whilst the WA permits the use of a constitutive scheme, that scheme must deliver the rights of residence in Title II of Part Two. Neither the United Kingdom nor a member state can employ a constitutive scheme which fails to do this').

15. It is thus in breach of the WA to use a domestic law power (in the UK, s.3 Immigration Act 1971) to purport to issue an Art.18(1) status without conferring binding recognition of *all* the Title II rights.

[7] 'The host State may not impose any limitations or conditions for obtaining, retaining or losing residence rights… other than those provided for in this Title.'

16. The conferral of the rights is the *quid pro quo* for a state being permitted to operate an Art.18(1) scheme. A state would be in breach of the WA by failing to *confer* the rights in Part II, as it is obliged to do under Art.18(1).

17. This is further confirmed by the protections at Art.18(1)(a)-(r), which apply to the applications for an Art.18(1) 'residence status' but not to applications for an Art.18(4) 'residence document'. In an Art.18(1) scheme, the application for the 'residence status' has greater importance because of the finality and practical significance of the decision. It is *the* route to securing status to ensure residence. These safeguards would be otiose if that residence status did not actually confer the rights under Title II.

The ambiguity of having two Art.18(1) cohorts

18. If a purported Art.18(1) status did not actually *confer* all the Title II rights on *some* of its recipients, this would create ambiguity undermining the conferral of Title II rights on *all* Art.18(1) recipients. Holders would have to demonstrate which category of the status they fell into in order to enjoy many of the rights, as in an Art.18(4) scheme.

19. As such, the Secretary of State's Respondent's Notice point must be wrong. If grants of PSS to people who could lawfully be refused a new residence status under Art.18(1) were operating under Art.38 not Art.13(4), recipients would not be able to rely on the grant for any WA purpose at all. A PSS holder (or, indeed a settled status ('**SS**') holder) could be perpetually required, throughout the lifetime of their residence in the UK, to evidence that they are *in fact* entitled to rely on WA rights. So to the extent conditions are waived, this must be under Art.13(4).

Conferral of Title II rights means all Title II rights, including the right to equal treatment where residence is not conditional

20. Finally, one of the 'rights' related to residence in Title II is the right to equal treatment: Art.23. Art.23 applies to those who are 'residing on the basis of' the WA with certain specified exceptions. In a state that has opted to implement a constitutive scheme under Art.18(1) (such as the UK), those 'residing on the basis of' the WA include anyone who has successfully applied for a 'new residence status'. In the UK, this is anyone who has been granted PSS or SS. In circumstances where PSS holders

are told their status is being granted to them in accordance with the WA, it follows that they are, for the purposes of Art.23, residing on the basis of the WA.[8] There is no other sensible alternative for describing what they are residing 'on the basis of'.

(c) States operating an Art.18(1) scheme may waive limitations and conditions available to them about who may be granted the residence status, and/or limitations and conditions available to them about retention of that status

21. T3M agrees with Jay J's distinction between the 'preconditions for the acquisition of the new status' under Art.18(1) ('stage 1' in Jay J's language) and the 'nature and content of the rights which flow, or may flow, from the grant of that status' ('stage 2'): HC§70. The former is about how you obtain the status; the latter includes how you might lose the status.

22. Under Art.18(1) and Art.13(4), a state may:

    (a) choose what limitations and conditions it imposes for the purposes of issuing the Art.18(1) residence status (i.e. at stage 1); and/or

    (b) choose what limitations and conditions it imposes on recipients during the lifetime of that status (i.e. stage 2).

23. In respect of stage 1, a failure to meet the chosen limitations and conditions would mean the State could lawfully refuse the grant of residence status. In respect of stage 2, the failure to meet those conditions would allow a State to provide for the 'loss' of the status: Art.13(4) and Art.39.

24. The UK has provided for conditions relating to criminality to be applied at stage 2 as well as stage 1, so a person with PSS, who then engaged in criminality, could lose PSS.[9] It has also provided that PSS holders may lose their status if they cease to meet the requirements of Appendix EU (e.g. if continuity of residence is broken).[10]

[8] The letters sent by the UK Government to EU citizens granted PSS make an express assertion about the legal basis of PSS: ' *Legal basis of status: This status has been granted to you in accordance with the EU exit separation agreements. For EU citizens, and those applying as the family members of EU citizens, this is the Withdrawal Agreement…*'

[9] See Annex 3 to Appendix EU of the Immigration Rules ('Cancellation, curtailment and revocation of leave to enter or remain').

[10] Paragraph A3.3 of Appendix EU.

25. Hungary does not appear to have enforced conditions from 2004/38/EC on the enjoyment of Art.13 WA rights either at stage 1 or stage 2.[11] Romania appears to have provided for 2004/38/EC conditions relating to exercise of Art.13 WA rights to be applied strictly at stage 1, but does not require UK nationals to evidence that they have continued to exercise 2004/38/EC conditions for the purposes of acquiring permanent residence rights, with five years continuous residence *simpliciter* being accepted.[12] Austria and Belgium appear to have required compliance with 2004/38/EC conditions at stage 1 and stage 2, so a person could be refused, or lose, their Art.18(1) status due to a failure to comply with the prescribed conditions.[13] There are many other ways in which limitations and conditions could be implemented in practice. But unless such a condition *is actually imposed on the grant of the status, and as a result of breach of that condition the status is removed*, it is irrelevant whether at some later point an individual with that status does or does not appear to meet all of the criteria for a person to be required to have residence rights recognised under Art.13(1) WA (for example, whether they do or do not appear to satisfy all the conditions for being recognised as a worker, or a self-sufficient person).[14]

26. By granting the new status, the State has not merely declared that a person appeared to have rights at one point in time. Still less has the State merely declared that a person is entitled to be assessed at some future point to see whether they might have the rights. It has *conferred* the rights.[15] Residence rights created by Art.13 are not the same as 'free movement rights' under the CRD: *R (IMA)*, §133. As Lane J put it, this is so '*notwithstanding that the rights described in article 13 contain limitations and conditions set out in the Directive*': ibid.

27. It would not be permitted for a State to waive a condition at stage 1 only to immediately re-impose it at stage 2. That would be contrary to the purpose of the

[11] AOR WS, Annex §65 and §70.
[12] AOR WS, Annex §§112-114.
[13] AOR WS, Annex §§8-9 and §§24-26.
[14] At least in the absence of abuse of rights or fraud sufficient to justify a termination or withdrawal of the status in accordance with Art.20 WA.
[15] In the UK context, see *R (IMA)*, §100 where the Secretary of State is recorded as having positively argued that '*the declaratory system…. would give rise to inherent uncertainty about whether a person enjoys a right to reside in the United Kingdom. It would always be necessary to perform a fact-sensitive analysis of their circumstances on any given date, in order to decide whether they enjoy such a right. The position of the United Kingdom government, from the outset, is said to have been that an applications-based scheme, such as the EUSS, provides secure evidence of status and is a better way of protecting people, including vulnerable individuals, compared with the declaratory system*'.

conferral of the right under Art.18(1), and would render otiose the consequences of Art.13(4) for the conferral of that right. It would be illogical: someone's status could be taken away *immediately* after they had been granted it. It would be to give with one hand and straight away take back with the other. It would be in breach of the requirements of legal certainty, disproportionate to any legitimate aim, and a breach of a legitimate expectation as a revocation of an administrative decision.

(d) While states can choose to make the retention of status (and therefore the continued enjoyment of rights) subject to continued compliance with conditions, a grant of Art.18(1) status does not automatically confer only conditional rights

28. Central to Jay J's judgment is the notion that rights granted under Art.18(1) are always *conditional* rights which are only the '*laissez-passer* to the claiming or invoking of rights at some future date': HC§§58-59 and §§72-74. This cannot be a correct interpretation of the WA.

29. Contrary to Jay J's judgment, that was not the ratio of the *IMA* decision. Issue 1 of the *IMA* judgment was concerned only with whether it is permissible to impose a time limitation on the conferral of residence rights. The Court held this was not a permissible limitation within the terms of Art.13(4). At §156 of the *IMA* judgment, Lane J was not saying that this was *because* the residence right is subject to the 'relevant limitations and conditions in the [CRD]'. He was instead making the point that this was not one of those limitations or conditions.

30. T3M accepts that the conferral of the rights under Title II via Art.18(1) status could be made conditional on continuing to meet the requirements of e.g. the CRD, such that a state could terminate the status of a person who had ceased to meet them. That would be a permissible condition under Art.13(4). But as noted above, if such conditions are not actually imposed on the grant of status (or if conditions are imposed but action is not taken to terminate the status following suspected breach), rights are enjoyed unconditionally.

(e) The enjoyment of the right under Art.23 WA does not necessarily depend on meeting the conditions of Art.24 CRD

31. The opening words of Art.23 WA, *'In accordance with Article 24 of Directive 2004/38/EC…'* do not restrict the beneficiaries of Art.23 to people who would have had, or could have had, a right of residence under the CRD. They do not require ongoing compliance with the CRD. That is the ordinary meaning of the words of the provision read in their context.

32. The contrary reading of 'In accordance with' contended for does not sit easily within the structure of the provision and is ungrammatical. In essence, it would be to replace the words 'In accordance with' with '*Where the criteria in Article 24 [etc] are met...*'. Or it would say something like '*Where the Union citizen is residing in accordance with...*'.

33. The purpose of the reference to 2004/38/EC is, rather, to confirm that the *substance* of the equal treatment right is the same as between the WA and the CRD.

34. The Art.23 opening words do not govern *who* has that equal treatment right, a matter which is dealt with under Art.10 and the particular provisions addressing the WA rights of residence. The reason that they do not govern the personal scope is that Art.23 refers expressly to rights of residence under the WA as its precondition, which are necessarily broader than those existing under the CRD: the residence rights in Art.13 WA include those under the TFEU, not just the CRD.

35. The UK has chosen to confer a residence right under the WA which, as Lane J recognised in *R (IMA)*, §133, does not have a direct parallel in the CRD. Art.23 WA is expressly applicable to people residing on the basis of that right.

36. Consequently, decisions about the CRD, e.g. C-709/20 *CG v Department for Communities in Northern Ireland* [2022] 1 CMLR 26, *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1, [2016] 1 WLR 481, C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2016] 2 WLR 208 and C-33/13 *Dano v Jobcenter Leipzig* [2015] 1 WLR 2519, do not address *who* benefits from Art.23 WA: none of them interpreted that provision.

37. The WA was mentioned in *CG*, but Part Two WA was not in force at the time of the events concerning CG herself.[16] Until the end of the transition period the operative rights came from the CRD, not the WA: Art.19(2) WA. As the CJEU held, where a person was not resident in accordance with the CRD, the CRD's equal treatment provisions did not apply, and CG was resident with a domestic law status only, not on the basis of the CRD: *CG*, §§56, 75 and 83. However, since 31 December 2020, PSS has not been merely a domestic law status. It is a status conferred under the WA by virtue of Art.18.

38. The UK did not *have to* create a new system whereby that status was conferred at all. It could instead have opted for a scheme under Art.18(4), or imposed conditions on the grant and continuation of PSS related to exercise of a specific EU law right. But *having designed the scheme it did*, the UK must now also recognise the holders' concomitant rights.[17] See by analogy *Sotgiu v Deutsche Bundespost* [1974] EUECJ R-152/73 (12 February 1974), §4.

II. WA IMPLEMENTATION IN THE UK

(a) UK chose a scheme under Art.18(1) WA not Art.18(4) WA, enabling its desired level of immigration control

39. Under Art.18, the UK could have chosen to continue the approach to immigration control which had operated during the UK's membership of the EU. Pre-Brexit, a Union citizen could lawfully stay in the UK without their right to reside or the basis for it being verified by government – indeed without even needing to report their presence to government. If at any stage they wished to claim some entitlement which depended on an EU law right of residence (e.g. benefits or housing assistance), the question of whether they had any such right was confronted and verified only at the point of application for that specific entitlement. A Union citizen also had the option of applying for a registration certificate, under reg.17 of the Immigration (European

[16] Art 185 WA: *'... Parts Two and Three, with the exception of Article 19, Article 34(1), Article 44, and Article 96(1), as well as Title I of Part Six and Articles 169 to 181, shall apply as from the end of the transition period…'*. Further, Art 19(2) WA provides: '... Decisions under Article 18(1) shall have no effect until after the end of the transition period'. For the timings of the relevant events concerning CG, see *CG*, §§31-32.

[17] T3M observes in passing that the existence of an equal treatment right for people with PSS is harmonious with the UK's international law obligations concerning nationals of states which are party to the European Convention on Social and Medical Assistance and/or the Revised European Social Charter (which is most Union states). Each of those treaties provides for equal access to social assistance to nationals of one party lawfully present in another party's territory: eg. ECSMA Art.1; RESC Art.13.

Economic Area) Regulations 2016 (the '**2016 Regulations**'), which implemented Art.8 CRD. A registration certificate was proof of the holder's right to reside on the date of issue, and no longer valid if they ceased to have a right to reside under the Regulations: reg.17(8).

40. Nothing in the WA would have prevented continuation of that approach. Under such a scheme there would have been no need to register to establish the right of residence based on the WA. If at any stage a Union citizen wished to claim an entitlement contingent upon establishing the right of residence, the question of whether they had such a right would have been addressed at the point of such a claim. Fourteen EU countries are recorded by the Commission as having adopted such 'declaratory' schemes under the WA.[18]

41. The UK did not make that choice, no doubt for a range of policy reasons, principally relating to the desire to significantly increase the UK's powers of immigration control over Union nationals as part of the ending of free movement.

42. The UK instead chose to require Union citizens 'to apply for a new residence status' under Art.18(1): *R (IMA),* §7.[19] A Union national is now required to have leave to enter or remain under the Immigration Act 1971, and if they have not applied for and/or been granted it – whether under Appendix EU or otherwise – they have no right to be in the UK, regardless of their activities and whether those activities would have engaged EU law rights of residence. They are unlawfully present, liable to prosecution and removal, and prohibited from working.[20]

43. Contrary to HC§75, this is not the preservation of the 'status quo'. Preservation of the status quo would have called for use of Art.18(4).[21] The use of Art.18(1) marks a

[18] European Commission, *Information about national residence schemes for each EU country* (undated), <https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement/citizens-rights/information-about-national-residence-schemes-each-eu-country_en>. See also Annex 2 to the judgment in *R (IMA)* (not produced in the WLR report but included in the official transcript).

[19] Ms Fertre states that the EUSS 'did not provide for a new form of residence in the UK under domestic law' [A skel §53]. T3M does not disagree, but it is important not to misunderstand this sentence. The grant of limited leave under the Immigration Act 1971 is the same form that has existed for decades for third country nationals, but it is granted pursuant to a *new part of the Immigration Rules* and which carries international law rights more extensive than those applying to other grants of leave. It is, unequivocally, 'a new residence status' for Union citizens for the purposes of Art.18(1) WA.

[20] *R (IMA)*, §§75.

[21] E.g. by retaining the Immigration Act 1988, section 7 insofar as it applies to those with residence rights under the WA.

radical change from the pre-Brexit position, under which Union citizens did not need permission to enter the UK (Immigration Act 1988, section 7) and were not in breach of any law by remaining, unless and until positively directed to leave: *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657, [2008] 1 WLR 254, §§8-15 and §25.

44. The pre-Brexit position was of three groups of EU nationals in the UK: those unlawfully resident (those who had been positively directed to leave and therefore did not have equal treatment rights); those with the right of residence (who did, save for express derogations, have equal treatment rights); and, as identified in *Abdirahman*, those whose residence was not by right but was merely tolerated (who did not have equal treatment rights). In many cases, the UK Government had no idea whether individual citizens fell into the second or the third category while they were living here. The use of Art.18(1) abolishes that third category of resident. People with PSS are, as a result, always exercising the right of residence.

(b) UK chose an Art.18(1) scheme which granted unconditional leave

45. As identified above, the UK could, in an Art. 18(1) scheme, have imposed conditions on residence, insofar as they are permitted by Title II – see Art.13(4). It did not: the UK's scheme grants PSS recipients a right of residence which does not impose any conditions about the basis on which they are resident.[22]

46. This was described by Jay J at HC§47 as a 'mismatch, or perhaps act of generosity, which provides the platform for the main issue in this appeal'. The UK's decision was not, however, a mere act of generosity. There were policy reasons for the UK's approach which had nothing to do with benevolence towards Union citizens. The UK wanted to end free movement, at speed. That required the processing of *millions* of applications. In order to do so lawfully, it had to construct a scheme which could be administered efficiently and expeditiously. It therefore decided to waive various requirements which it could have insisted upon but which would have been resource intensive and controversial to administer.

[22] The only *limitation* imposed is that leave is temporally finite, rather than indefinite. That limitation was the subject of the challenge in *R (IMA)*.

47. What the UK could not do is establish a scheme ostensibly under Art.18(1), but which did not actually 'confer' the WA residence right and instead leaves the existence of such a right to be assessed later. The Art.18(1) and 18(4) schemes exist as discrete and complete alternatives, not as a pick and mix.

48. PSS is not merely *'a domestic right of residence'* in respect of the period after 31 December 2020: *AT v Secretary of State for Work and Pensions* [2023] EWCA Civ 1307, [2024] KB 633, §4. The Secretary of State's position in *R (IMA)* was that PSS status *confers* the rights under the WA: §135.

49. It might have been possible for the UK to create an Art.18(1) scheme which, for example, provided that in cases where there were grounds for believing that the Art.13 rights were no longer being exercised, the right of residence could be terminated by the UK. That would have been administratively practicable: the Immigration Rules already make provision for leave to be terminated where a person ceases to meet the requirements of Appendix EU and it is proportionate to terminate their leave: see Appendix EU Annex 3 §A.3.4.c. But *that is not the scheme the UK created*, and in any case, Ms Fertre's right of residence has *not* been terminated.

50. An Art.18(4) scheme could have included the same level of 'generosity' about the range of people permitted to remain in the UK, by merely tolerating the continued presence of people lacking EU law rights, as had been the case pre-Brexit. That would not have caused such persons to be residing 'on the basis of' the WA. But the UK wanted to be able to insist on a much greater degree of immigration control, without having to make a large number of case specific decisions about rights exercise. That is the reason why a right to equal treatment now arises here.

(c) Scheme argued for by Secretary of State would create 'unknown unknowns'

51. The scheme the UK created, if Jay J were right, would be less transparent than the pre-Brexit position. A Union citizen, even though they have a residence status issued under the WA, could not now know whether the UK considered them to be present in exercise of WA residence rights.

52. Pre-Brexit, a Union citizen could apply for a registration certificate under reg.17 of the 2016 Regulations to verify their current status as economically active, etc, so they

could establish where they stood. There is no mechanism for individuals with PSS to do that. If Jay J were right, PSS holders' residence status would actually confer only a bare domestic law right to remain, and no actual rights under Title II: WA rights would remain indeterminate, like Schrödinger's cat, until (potentially years later) the state acted towards an individual in a manner inconsistent with them having had WA rights.

53. T3M would have serious concerns about this, because it would present precisely the 'Windrush' scenario which caused well publicised problems for another group of long-term UK residents. Many Union citizens would not be able to demonstrate WA rights without an extensive retrospective investigation. Evidential hurdles would make it impractical for many to show that they had been and continued to be entitled to WA rights.

54. This is precisely the problem that the UK government said it would avoid by its adoption of the EUSS scheme. Asked by the Home Affairs Committee why the Home Office was instituting an application scheme at all for EU nationals in the UK rather than declaring rights through primary law, the then Home Secretary's response was: 'In a word, Windrush'. He added:

> … the Windrush generation have always, quite correctly, had their rights. The problem was by doing it only through a declaratory system it meant that there was no documentation to prove that, which many years later became a problem….[23]

(d) Excluding people with PSS from Art.23 WA would involve domestic procedural incompatibility with WA

55. Another problem with Jay J's interpretation is that excluding people with PSS from Art.23 WA would create domestic procedural incompatibility with the WA.

56. In cases where residence rights are restricted, the WA gives Union citizens the procedural protection of an appeal on points of fact as well as law: as well as Art.18(1)(r) WA see Art.21 WA, cross-referring to Arts.15 and 31 CRD as explained in e.g. C-89/17 *Secretary of State for the Home Department v Banger* [2019] 1 CMLR 6, §43 and §51. So long as everyone with PSS enjoys a right of equal treatment, there

[23] House of Commons Home Affairs Committee, *Oral evidence: The work of the Home Secretary*, (HC 434, Wednesday 27 February 2019), Q759 and Q764.

is no problem, because appeals to the FTT are, under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, available on points of fact and law against PSS decisions.

57. However, if PSS and equal treatment rights were decoupled, that would leave county courts having to determine whether a person could lawfully be excluded from equal treatment, in potentially highly fact-sensitive scenarios (e.g. where a person claimed to be doing sufficient work to count as a 'worker'), where the Court's jurisdiction in a homelessness appeal is limited to points of *law*: s.204 HA 1996.

III. EVIDENCE OF PRACTICE IN OTHER MEMBER STATES[24]

(a) What the evidence shows

58. As noted above, 14 countries adopted an Art.18(4) declaratory scheme, and 14 countries adopted an Art.18(1) scheme. The evidence filed by T3M indicates:

(a) Sweden and the UK are probably[25] the only countries adopting an Art.18(1) scheme which require individuals to show exercise of CRD rights in order to access social assistance, rather than being able to rely on the possession of an Art.18(1) residence status;[26]

(b) in some countries (e.g. Austria [AOR WS Annex §§8-9] or Belgium [Annex §§24-26]), if an individual with an Art.18(1) status resorts to social assistance, that can subsequently lead to a review of that status, but holding that status will *pro tem* permit access to social assistance;

(c) in other countries (e.g. Hungary [Annex §65 and §70] or Romania [Annex §§112-114]), holding an Art.18(1) status will allow social assistance and resort to it will not lead to review of residence status.

[24] On the admissibility of non-expert evidence of foreign law, see *FS Cairo (Nile Plaza) LLC v Brownlie* [2021] UKSC 45, [2022] AC 995 §148 and *Soriano v Forensic News LLC* [2021] EWCA Civ 1952, [2022] QB 533, §§61-64. In determining the weight to give to this evidence, the Court is invited to have regard to: (i) the careful methodology of Ms O'Reilly's survey [WS §§13-25]; the cross-referencing to publicly available materials; the use of lawyers from the countries concerned to supply the materials and check Ms O'Reilly's understanding of them.

[25] Some doubts remain around Latvia and Slovenia.

[26] The UK is an outlier even compared to Sweden, as Sweden makes the Art.18(1) residence status subject to compliance with Art.13 conditions and limitations (but it appears to assert that it is entitled to withhold equal treatment even before termination of the status) [AOR WS, Annex §§128-131].

(b) How the evidence is relevant to the justification arguments

59. T3M adopts Ms Fertre's submissions on discrimination. T3M adds the observation that if the discrimination is in principle susceptible to justification, any such justification is undermined by the evidence of international practice.[27]

60. It is uncontroversial that the justification of discrimination requires demonstrating that the impugned measure is a proportionate means of achieving a legitimate aim.[28] In C-331/88 *R (Fedesa) v Minister of Agriculture, Fisheries and Food* [1991] 1 CMLR 507, §13 the Court of Justice explained the proportionality principle as follows:

> … that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued…[29]

61. T3M's evidence shows many states have adopted 'declaratory' systems, and that even amongst those which have not, almost all have chosen either to allow equal treatment to be enjoyed unconditionally by those holding the Art.18(1) status, or to allow it *pro tem* while treating resort to those rights as a possible trigger for reviewing whether a person's status should be terminated. Any of those options would have been open to the UK. There is no evidence from the Secretary of State to show why, if those options worked abroad, they could not work here.

IV. REFERENCE TO THE CJEU FOR A PRELIMINARY RULING

(a) WA power to refer arises under similar circumstances to Art.267 TFEU references

[27] We note in this regard that the Secretary of State relies on a witness statement of Mr Malcolm, who gave evidence in support of the Secretary of State for Work and Pensions defending the exclusion of PSS holders from accessing Universal Credit in *R (Fratila & Anor) v Secretary of State for Work and Pensions*, on the basis that the exclusion was justified so the UK could maintain 'parity with other EU Member States' (Exhibit LCF/11, §28).

[28] Indeed the proportionality requirement goes beyond justification of nationality discrimination: on proportionality as a general principle of Community law see eg Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, §§2-4.

[29] See also *Zalewska v Department for Social Development* [2008] UKHL 67, [2009] 1 WLR 2002, §31 '...that the means employed to achieve an aim recognised by Community law as legitimate correspond to the importance of that aim and are necessary for its achievement...'

62. Under Art.158(1) WA, this Court may ask the CJEU to give a preliminary ruling on a question concerning the interpretation of Part Two of the WA, where it considers that a decision on that question is necessary to enable it to give judgment in the case.

63. At the level of the Court of Appeal, this power is the same as that which existed under Art.267(3) TFEU. The provisions of Union law governing procedures brought before the CJEU in accordance with Art.267 TFEU are to apply *mutatis mutandis* to requests under Art.158: Art.161(2) WA.

64. The power may therefore be exercised where there is a 'question' concerning the interpretation of Part Two with the following features:[30]

    (a) it is not materially identical to a question that has already been the subject of a preliminary ruling in another case;

    (b) it has not been dealt with in previous decisions of the CJEU; and

    (c) it is not a question the answer to which the court is convinced is so obvious as to leave no scope for any reasonable doubt such that it is equally obvious to the courts of the other Member States and the CJEU (in other words, the question is not *acte clair*).

(b) Factors relevant to exercise of discretion to refer include importance of point, and need for uniform international interpretation

65. The principles governing whether to refer such a question were considered in *R v International Stock Exchange ex parte Else* [1993] QB 534 (CA), 545 (per Bingham MR):

> ... if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer...

66. In the Court of Appeal, as it is not a court of last resort, a reference will be most appropriate where the question is one of general importance and where the ruling is

[30] *CILFIT Srl v Ministero della Sanita (283/81)* [1983] 1 CMLR 472, §§13-16.

likely to promote the uniform application of the law throughout affected states: *Trinity Mirror Plc v Commissioners of Customs and Excise* [2001] EWCA Civ 65, [2001] 2 CMLR 33, §52. A reference will be least appropriate where there is an established body of case law which could readily be transposed to the facts of the instant case, or where the question turns on a narrow point considered in the light of a very specific set of facts and the ruling is unlikely to have any application beyond the instant case.

(c) A reference is appropriate here and now

67. The Court has a power to make a reference:

(a) First, as Jay J stated, the issue is not *acte clair*: HC§17. Within the UK, the question has been answered differently by at least three different judges, with more decisions working their way through the courts and tribunals now. Local authorities around the country, and central government decision makers, have been reaching different conclusions.

(b) Second, it is necessary to resolve the questions of interpretation of the WA in order to determine this appeal: as Jay J held, these questions are central to disposal. This is principally why the Secretary of State has effectively stood in the shoes of the Respondent.

68. The Court should exercise its discretion to make a reference:

(a) The point of law is an important one. The issue has generated interventions from five different highly experienced parties before this court.

(b) The evidence from other Member States shows a divergence of practice, indicative of international doubts about the correct application. Art.4 WA identifies that the WA must produce the same legal effects across the participating states. Art.5 requires the UK and the Union to 'take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement'. A reference will assist in ensuring uniformity in application between those party to the WA. The reference will also address the proper interpretation of Art.23 WA, on which all Member States will benefit from clarification irrespective of the scheme they have adopted.

(c) Because of the helpful judgment of Jay J, this Court has the benefit of the definition of the 'factual and legislative context' of the questions to be referred, which help "explain the factual circumstances on which they are based": cf. C-458/93 *Saddik* [1995] 3 CMLR 318, §12. The Court of Appeal is in as good a place as the Supreme Court would be to make a reference, and it can save time and money by doing so.

(d) The question which should be referred

69. The question which should be referred is: *does a person within the personal scope of Art.10 WA, who holds a residence status issued pursuant to Art.18(1) WA, which has not been withdrawn, and continuation of which is not expressed to be subject to compliance with any limitations and conditions mentioned in Art.13 WA, enjoy a right to equal treatment pursuant to Art.23 WA, regardless of whether they meet the conditions of Article 24 of Directive 2004/38/EC?*

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