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

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

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

SKELETON ARGUMENT
ON BEHALF OF THE CLAIMANT
for hearing on 1 – 2 November 2022

References to the Core Bundle are in the form [CB/tab/page]

Time estimate for hearing: *2 days*
Time estimate for pre-reading: *1 day*
Recommended pre-reading: *See list at [CB/1/4]*

Introduction and Summary

1. This is a challenge to the Secretary of State's domestic implementation of commitments made by the UK under the UK-EU Withdrawal Agreement ("**WA**") **[CB/15/215]** and the UK-EEA EFTA Separation Agreement ("**SA**"). The commitments concern the rights of Union citizens and EEA-EFTA nationals, and their family members, who had exercised their right to reside in the UK before the end of the transition period following the UK's withdrawal from the EU. In essence, Part Two of the WA and of the SA preserves the rights of residence that those individuals enjoyed prior to that time (albeit with some

differences in the conditions and limitations to which those rights are subject). The Secretary of State has purported to implement those rights in Appendix EU of the Immigration Rules (otherwise known as the European Union Settlement Scheme ("**EUSS**")) **[CB/17/290]**. However, she has failed to do so compatibly with the WA and SA.

2. Article 159(1) WA and Article 64(1) SA required the establishment of an independent authority to monitor the implementation and application of the citizens' rights provisions of the Agreements in the UK. The Claimant (hereafter "**the IMA**") was duly established by section 15 and Schedule 2 of the European Union (Withdrawal Agreement) Act 2020 ("**EU(WA)A 2020**") to fulfil that role. It is a non-departmental public body which operates at an "arm's-length" from government and is therefore impartial and independent of government.

3. The Defendant is the Secretary of State for the Home Department, who is responsible for the EUSS, which governs the conditions under which certain EU citizens and EEA-EFTA nationals, and their family members, (including the beneficiaries of the rights conferred by the WA and SA) are granted leave to enter or remain in the UK.

4. Those EU citizens and EEA EFTA nationals who resided in the UK in accordance with EU law prior to 11pm on 31 December 2020 (the end of the transition period following the UK leaving the EU) and their family members, and who successfully applied to be recognised as qualifying for the continued right to reside in the UK, enjoy the rights set out in Part 2 of the WA and SA. For convenience:

   (1) This skeleton argument will refer to the provisions of the WA only as opposed to referring in each instance to the parallel provisions of the SA which provides for equivalent rights for EEA EFTA nationals.

   (2) References to "**EU citizens**" below should be taken as referring to EEA EFTA nationals equally, as insofar as is material for the purposes of this claim (i) they enjoyed identical rights of residence in the UK as EU citizens prior to the UK's withdrawal from the UK, and (ii) they have rights under the SA which are identical to those enjoyed by EU citizens under the WA.

   (3) References to "EU citizens" below should also be taken to refer to their family members, and those of EEA EFTA nationals, who fall within the scope of Part 2 of

the WA and Part 2 of the SA (notwithstanding that such family members need not themselves be EU citizens or EEA EFTA nationals).

5. The EUSS applies only to EU citizens who began residing in the UK before the end of the transition period (and family members joining them): other EU citizens are subject to the same Immigration Rules as any other person without the right of abode in the UK. Pursuant to Article 18(1) WA **[CB/15/248]**, the UK was entitled to require EU citizens within six months of the end of the transition period to make an application for "*a new residence status which confers the rights*" protected in the WA: this was the mechanism by which qualifying EU citizens were able to establish their entitlement to those rights (distinguishing themselves from those EU citizens who are not so entitled, because they were not resident in the UK at the applicable time).

6. In very broad summary, the Immigration Rules set out in the EUSS **[CB/17/290]** provide for the grant of indefinite leave to remain (or "**settled status**") to those qualifying EU citizens who had established a right of permanent residence in the UK by the time of their application under the EUSS. It also provides for the grant of five years' limited leave to enter or remain (or "**pre-settled status**") for those qualifying EU citizens who had not yet established a right of permanent residence in the UK by that time.

7. The claim concerns only the treatment of EU citizens who applied to the EUSS and were awarded "pre-settled status". The dispute arises because the Secretary of State claims that the making of a successful application by such EU citizens for the new residence status under Article 18(1) WA does <u>not</u> in fact secure all of those rights under the WA, but only a time-limited right. She claims that a successful applicant for pre-settled status will *lose* their right to lawfully reside in the UK under the terms of the WA, unless that applicant successfully makes a *further* application within five years of the grant of pre-settled status, either for settled status (i.e., indefinite leave to remain) once they qualify for the right of permanent residence under the WA, or for a further period of pre-settled status (i.e., a further five years' limited leave to remain). The result of the loss of such rights is that they will be exposed to considerable serious consequences affecting their right to live, work and access social security support and housing in the UK, and will be liable to detention and removal.

8. The IMA contends that the Secretary of State's position is incompatible with the WA, which does not provide for loss of status in such circumstances. In particular, the IMA contends that:

(1) The UK was entitled to require an initial application to be made under Article 18 WA. The new residence status and rights conferred by the WA, once obtained, do not expire unless they are lost or withdrawn pursuant to the terms of the WA (see Articles 15(3) and 20 **[CB/15/246, 257]**). The right of residence is not limited in time, and in particular does not expire after five years (save in the case of extended absence from the UK). Automatic withdrawal of the right for a failure to make a *further* application within five years for a *continued* right of residence is incompatible with the WA, which makes no such provision.

(2) If, at the point of the initial application, the applicant had completed five years' qualifying residence in the UK, they acquired the right to reside permanently under Art 15 WA **[CB/15/246]**. If the applicant was a qualifying resident of less than 5 years at the point of initial application, the applicant continued to enjoy a right of residence in the UK subject to the conditions and limitations referred to in Article 13(1)-(3) WA (i.e., subject to whether they are a worker etc.) **[CB/15/243]**. They also had the right to accumulate further periods of qualifying residence conferred under Art 16 WA **[CB/15/247]**, and once they have accumulated the requisite 5 years' continuous residence, the right to reside permanently under Art 15 WA. Until such point as the right of permanent residence is acquired, EU citizens continue to enjoy their right of residence under Article 13(1)-(3) WA, without having to make any further application.

(3) The right of permanent residence accrues automatically once the conditions for obtaining it have been fulfilled. There is no objection to the provision of an administrative procedure by which EU citizens may then make an application for *recognition* of that right of permanent residence, supported by evidence that the relevant conditions for acquiring it have been fulfilled. However, it is unlawful for the Secretary of State to purport to make the existence of a continued right of residence beyond five years conditional upon the making of a further application, and to withdraw it by reason of a failure to make any such application.

9. The Secretary of State accepts that if a successful applicant to the EUSS did not yet have the requisite five years residence for the right of permanent residence and hence was granted "pre-settled status" (referred to in the Defendant's Detailed Grounds of Defence, "**DGD**", §50 **[CB/6/90]** as "*the post-TP PR cohort*"), the applicant had the right to accumulate periods under Art 16 WA conferred on them. However, she contends that:

   (1) within the five year period, the applicant must make a further application – either to have the right of permanent residence under Art 15 WA conferred on them (if they have accumulated the requisite five years residence), or to extend their period of limited leave to remain for another five years; and

   (2) if the applicant does not make this further application within five years, they will have no continued right to reside in the UK at all (with all the consequences that that entails).

10. The IMA submits that the Secretary of State's approach is wrong in law, in that it fails to give full effect to the rights conferred under the WA. The Court is invited to so declare.

11. The earliest point at which the Secretary of State's interpretation of the WA will begin to have practical effect is August 2023, as this is 5 years from the earliest grants of pre-settled status (from August 2018) and so is the earliest point that an individual can be said to have failed to have made a second application for status. The IMA initiated these proceedings in December 2021 to avoid, as much as possible, the risk that individuals will begin to be subject to the Secretary of State's unlawful interpretation of the WA.

12. The skeleton argument is structured as follows:

   (1) The position of EU citizens prior to the UK's withdrawal from the EU;

   (2) The position of EU citizens following the UK's withdrawal from the EU;

   (3) The rights conferred by the WA;

   (4) The interpretation and effect of the WA;

   (5) The IMA's submissions;

   (6) The IMA's response to the Secretary of State's submissions;

   (7) The extraneous material;

   (8) Conclusion.

(1) The position of EU citizens prior to the UK's withdrawal from the EU

13. The principal Act which requires non-British[1] citizens to have leave to enter or remain in the UK is the Immigration Act 1971. In very broad summary, it provides that those who are subject to immigration control must apply for leave to enter or remain in the UK, and that in determining those applications the Secretary of State will follow the practice set out in the Immigration Rules. The Immigration Rules set out detailed requirements that must be fulfilled for an application for leave to enter or remain in various different categories (such as a visitor, a skilled worker, or a student).

14. If successful, an applicant will generally be entitled under the Rules to be granted leave to enter or remain for a limited period of time. They must then reapply for a further period of leave to remain and continue to do so until such time as they may fulfil the requirements to apply for indefinite leave to remain. A failure to re-apply successfully for leave to remain will mean that an individual who overstays the period of leave originally granted will no longer be lawfully present in the country. They may in consequence have their access to free healthcare, social security support and private/social housing adversely affected, as well as their ability to work or be self-employed, and be liable to detention and removal from the UK.

15. When the UK was a Member State of the EU, and until the end of the transition period, EU citizens were not subject to this regime. Section 7(1) of the Immigration Act 1988 disapplied the requirement under the Immigration Act 1971 for non-British citizens to have leave to enter or remain in the UK, in respect of a person who had an enforceable EU right to do so. The Immigration Rules did not apply to such people at all. Instead, the rights of EU citizens and their family members to reside in the UK were provided for by the Immigration (European Economic Area) Regulations 2016 (as amended) (**"the 2016 Regulations**") and its predecessors.

16. The 2016 Regulations implemented the rights of entry and residence of EU citizens and family members in the United Kingdom under the TFEU and under Directive 2004/38/EC (**"the Citizens' Rights Directive"** or **"CRD"**) **[CB/13/165]**. The CRD made provision under Article 7 for rights of residence of EU citizens in a host Member

[1] Certain Commonwealth citizens are taken to have a right of abode in the UK under section 2 of the Immigration Act 1971; Irish citizens do not require leave to enter or remain in the UK under section 3ZA. Where "non-British" or "EU citizen" is used in this pleading it does not refer to these cohorts.

State as a worker, self-employed person, self-sufficient person or student, as well as for their family members **[CB/13/181]**. Articles 16 to 18 CRD made provision for the right of permanent residence for EU citizens and their family members after five years' continuous qualifying residence in the host Member State (or less than five years, in the circumstances defined under Article 17 CRD) **[CB/13/193]**.

17. In particular, the 2016 Regulations provided in regulation 14 that a qualified person "*is entitled to reside in the United Kingdom for as long as that person remains a qualified person*", and that a family member of such a person "*is entitled to remain in the United Kingdom for so long as they remain the family member of that person*". A "*qualified person*" was an EU citizen in the United Kingdom who fulfilled one of the conditions in Article 7 CRD, namely being a worker, self-employed person, a self-sufficient person or a student, or their family member (henceforth, "**worker etc.**"): see regulation 6. Further, regulation 15 provided that EU citizens or family members who had resided in the United Kingdom in accordance with the Regulations for a continuous period of five years "*acquire the right to reside in the United Kingdom permanently*".

18. No applications were necessary to enjoy these rights. Although EU citizens and their family members could apply for registration certificates or residence cards to evidence the fact that they enjoyed those rights, they were not required to do so as a pre-condition of acquiring those rights. Nor were the rights in any way time limited, as a grant of limited leave to enter or remain would be. The right of residence continued for so long as the EU citizen or family member concerned qualified for the right (by virtue of their status as a worker etc.), and in the case of a right of permanent residence, without even that limitation.

(2) The position of EU citizens following the UK's withdrawal from the EU and the EEA

19. The UK's withdrawal from the EU has brought an end to EU citizens' continued enjoyment of those rights of residence in the UK, subject to the provisions of the WA. Following the end of the transition period, both section 7 of the Immigration Act 1988 and the 2016 Regulations were repealed and revoked by Part 1 of Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, with effect from 31 December 2020.

20. The consequence is that all EU citizens and their family members have become subject to immigration control under the provisions of the Immigration Act 1971 and must apply for leave to enter or remain in order to be lawfully present in the UK. Such applications will be determined in accordance with the Immigration Rules. However, qualifying EU citizens are entitled to have their applications assessed under Appendix EU of the Immigration Rules, which is intended to give effect to the substantive rights provided for under the Agreements, by implementing the EUSS.[2]

21. In short, the design of the EUSS is to treat those who have not yet acquired the right of permanent residence as having "pre-settled status" (Rules EU14 and EU14A **[CB/17/299**), and those who have acquired it (by way of five years' continuous residence) as having "settled status" (Rules EU11 and EU11A **[CB/17/293]**). The latter are granted indefinite leave to remain when they make the application required under Article 18(1) WA.

22. However, under the EUSS, those who are only eligible for pre-settled status are only granted limited leave to remain in the UK for a period of up to five years (Rules EU3 and EU3A **[CB/17/291]**). If, within that time, they acquire a right of permanent residence, under the domestic legal framework they are required to make a further application for indefinite leave to remain to give effect to it: the EUSS does not have any mechanism to give automatic effect to that right once acquired. Alternatively, if they do not qualify for the right of permanent residence within that time (because, for example, of an absence which breaks continuity of residence, as provided for under Article 15(2) WA), they must make a further application for further limited leave to remain before the expiry of the initial five-year period of limited leave to remain.[3] In the latter case, such an individual would then need to make a third application before the end of that period of limited leave to remain (and continue to do so until such time as they qualify to apply for indefinite leave to remain).

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[2] Appendix EU applies to EU citizens regardless of whether they were exercising free movement rights in the UK at the end of the transition period and accordingly is broader than necessary under the WA. This is entirely permissible under Article 13(4) WA, which provides that provision made by host States for the implementation of the rights under the WA may not be less generous than is required under the WA and SA.

[3] As concisely explained at https://www.gov.uk/settled-status-eu-citizens-families/switch-from-presettled-status-to-settled-status.

23. In either case, were they to fail to make a further application during this or any subsequent five-year period of limited leave to remain, the consequence under the domestic regime adopted by the Secretary of State would be that their limited leave to enter or remain would expire, and they would no longer be treated as being lawfully present in the UK under the Immigration Act 1971. This would entail the consequences referred to above at paragraph 7.

(3) The rights conferred by the WA

24. The scope of Part Two is defined by Article 10(1) WA, which establishes that it applies to EU citizens who exercised their right to reside in the UK or who exercised their right as frontier workers in the UK, in accordance with Union law, before the end of the transition period and continue to do so thereafter (and their family members, as defined in Article 9 WA, to the extent set out in Article 10(1)(e) WA, whether they are EU citizens or not) **[CB/15/238]**.

25. The substantive rights of residence are set out in Chapter 1 of Title II of the WA, namely Articles 13 to 23 **[CB/15/243]**.

26. Article 13(1) - (3) WA provides for such EU citizens to have the right to reside in the UK under the limitations and conditions set out in Articles 21, 45 or 49 TFEU (as applicable) **[CB/14/212]** and, importantly, under various specified provisions of the CRD. Those provisions are in essence those which confer rights of residence on EU citizens in a host member state of the EU. They include not only the principal rights of residence as a worker etc. under Article 7 CRD, but also Articles 16 to 18 CRD which make provision for the acquisition of a right of permanent residence.

27. Importantly, Article 13(4) WA **[CB/15/244]** provides that:

> "*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."* (emphasis added).

28. Article 15 WA **[CB/15/246]** provides that an EU citizen who has resided legally in the UK in accordance with Union law[4] for a continuous period of five years shall have the right to reside permanently in the UK under the conditions set out in Articles 16, 17 and 18 CRD:

> "*1. Union citizens and United Kingdom nationals, and their respective family members, who have resided legally in the host State in accordance with Union law for a continuous period of 5 years or for the period specified in Article 17 of Directive 2004/38/EC, shall have the right to reside permanently in the host State under the conditions set out in Articles 16, 17 and 18 of Directive 2004/38/EC. Periods of legal residence or work in accordance with Union law before and after the end of the transition period shall be included in the calculation of the qualifying period necessary for acquisition of the right of permanent residence.*
>
> *2. Continuity of residence for the purposes of acquisition of the right of permanent residence shall be determined in accordance with Article 16(3) and Article 21 of Directive 2004/38/EC.*
>
> *3. Once acquired, the right of permanent residence shall be lost only through absence from the host State for a period exceeding 5 consecutive years."*

29. Not all EU citizens had accumulated the requisite five years residence by the end of the transition period. In order to protect the position of these EU citizens, Article 16 WA **[CB/15/247]** provides that EU citizens with qualifying residence in the UK before the end of the transition period for a period of less than five years have the right to accumulate the period of five years' qualifying residence necessary to acquire permanent residence (i.e., until they fulfil the requirements of Article 15 WA):

> "*Article 16*
>
> *Accumulation of periods*

[4] This requirement was voluntarily disapplied by the UK in its consideration of residence applications under the WA. This clause was intended to replicate the position in EU law, as EU citizens do not have an unfettered right to move to another EU member state for longer than 3 months simply by virtue of being an EU citizen. Rather, in highly simplified terms, EU free movement rights are contingent on holding a qualifying status (e.g., being a worker, a student, an individual with sufficient income to live in another Member State without needing income support, and with comprehensive health insurance, etc.). In its implementation of the WA, the UK elected not to require applicants for residence to prove that they had been residing in accordance with EU law.

Union citizens and United Kingdom nationals, and their respective family members, who before the end of the transition period resided legally in the host State in accordance with the conditions of Article 7 of Directive 2004/38/EC for a period of less than 5 years, shall have the right to acquire the right to reside permanently under the conditions set out in Article 15 of this Agreement once they have completed the necessary periods of residence. Periods of legal residence or work in accordance with Union law before and after the end of the transition period shall be included in the calculation of the qualifying period necessary for acquisition of the right of permanent residence."

30. Article 18 WA **[CB/15/248]** allows signatories to the WA to operate what have come to be known as either a "declaratory scheme", or a "constitutive scheme" in respect of residence rights. Under a declaratory scheme, the residence rights provided for in the WA accrue automatically to those eligible for them, with no need for an application (albeit with the right to apply for a residence document to provide evidence that the holder has qualified for those rights: see Article 18(4) WA). Under a constitutive scheme, applicants are required to apply for the rights protected in the WA, and their acceptance under the scheme is constitutive of their residence rights:

"*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.*"

31. Where the host State has adopted a constitutive scheme, Article 18(1)(b) and (d) WA together make clear that the required application is to be made before a deadline of not less than 6 months after the end of the transition period (for those residing in the host State at that time), or within 3 months of their arrival (in the case of, for example, a family member joining such a person), unless extended for good reason if there has been a failure to respect that deadline in the case of any such person.

32. Article 20 WA **[CB/15/257]** preserves various rights to restrict the right of residence that were already present in the CRD: whether personal conduct occurring before the end of the transition period should be taken as reason to restrict rights must be considered in accordance with Chapter VI of the CRD, abuse of rights or fraud may justify the refusal, termination or withdrawal of a right to reside as set out in Article 35 CRD, and such

abusive/fraudulent applicants can be removed even before an appeal has been determined under the conditions set out in Articles 31 and 35 CRD.

33. Article 20(2) WA adds one additional provision, to the effect that personal conduct occurring after the end of the transition period may constitute grounds for restricting residence rights "*in accordance with national legislation*", rather than the standards laid down by Chapter VI of the CRD. Further, Article 21 WA imposes the safeguards set out in Article 15 and Chapter VI of the CRD in respect of any decision to restrict residence rights **[CB/15/258]**.

(4) The interpretation and effect of the WA

34. Article 4 WA **[CB/15/230]** requires individuals' directly effective rights to be enforceable under UK domestic law:

    (1) Article 4(1) WA provides that "*The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.*"

    (2) Article 4(2) WA requires the UK to ensure compliance with Article 4(1) through domestic legislation, "*including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions*".

35. Effect is given to these requirements by section 7A of the European Union (Withdrawal) Act 2018 (**"EU(W)A 2018"**) **[CB/16/284]**, inserted by section 5 of the EU(WA)A 2020. It provides that all rights created or arising by or under the WA are to be without further enactment given legal effect in the UK, to be recognised in domestic law, and that every enactment is to be read and to have effect subject to the recognition of those rights. (To similar effect, section 7B of EU(W)A 2018 gives domestic legal effect to rights arising under the SA) **[CB/16/286].**

36. Sections 7A and 7B of EU(W)A 2018 are "*relevant separation agreement law*" (section 7C(3) of EU(W)A 2018) **[CB/16/289]**.

37. *"Relevant separation agreement law*" is to be interpreted as follows (section 7C(1) of EU(W)A 2018) **[CB/16/288]**:

> **"*7C Interpretation of relevant separation agreement law***
>
> *(1) Any question as to the validity, meaning or effect of any relevant separation agreement law is to be decided, so far as they are applicable—*
>
> *(a) in accordance with the withdrawal agreement, the EEA EFTA separation agreement and the Swiss citizens' rights agreement, and*
>
> *(b) having regard (among other things) to the desirability of ensuring that, where one of those agreements makes provision which corresponds to provision made by another of those agreements, the effect of relevant separation agreement law in relation to the matters dealt with by the corresponding provision in each agreement is consistent."* (emphasis added).

38. Accordingly, section 7A of EU(W)A 2018, which gives domestic effect to the WA falls to be interpreted in accordance with the WA itself.

39. Interpretation of the WA is dealt with in Article 4(3) WA **[CB/15/231]**, which provides that the provisions of the WA which refer to EU law or to concepts of provisions thereof are to be interpreted and applied in accordance with the methods and general principles of EU law. Accordingly, the method to be adopted in interpreting the sections of the WA which refer to EU law concepts or provisions are to be interpreted in the manner provided for in EU law, and not the domestic approach to the interpretation of treaties, insofar as those approaches differ.

40. Notably, the Secretary of State agrees with the IMA that:

    a. The WA, given direct effect by section 7A EU(W)A, is a "*discrete body"* of law (DGD, §6.2) **[CB/6/78]**;

    b. Any reference to Union law in the WA must be applied in accordance with the definition of Union law in Article 2 WA (DGD, §8.1) **[CB/6/79]**;

    c. Provisions of the WA which refer to Union law must be interpreted and applied in accordance with the methods and general principles of Union law (DGD, §8.3) **[CB/6/79]**.

41. Further, the Secretary of State states that the WA "…*is an international treaty which falls to be interpreted by reference to the Vienna Convention, save where it specifically applies*

provisions of EU law (which provisions must be interpreted and applied in accordance with the general methods and principles of EU law)" (DGD, §10 **[CB/6/79]**).

42. The IMA agrees that Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("**VCLT**") apply to the interpretation of international treaties as part of the EU legal order in that they reflect the rules of customary international law (Case C-386/08 *Brita* [2010] ECR I-01289, §§42 – 43). The approach of the CJEU is broadly consistent with the approach adopted by the domestic courts in the interpretation of treaties, which was summarised by Lord Reed in *Anson v Commissioners for HMRC* [2015] UKSC 44 at §56 and § 110.

43. However, nothing in the VCLT is capable of qualifying the express provision in Article 4(1) WA that the "*Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States*": to that extent, the minimum rights provided for in EU law which are made applicable by the WA must be provided without qualification (while recognising that it is always open to the counterparties to make more generous provision in favour of the other's citizens than is required: Article 13(4) WA **[CB/15/244]**).

44. In the context of this dispute, the rights in question are firmly derived from, and articulated by reference to Union freedom of movement law, such that the interpretation of these provisions is controlled by relevant Union law.

(5) The IMA's submissions

45. The loss of rights of residence of an EU citizen, who has previously successfully applied for residence status under Article 18(1) WA but who subsequently fails to renew or upgrade their status within five years (or any subsequent five-year period), is a breach of Articles 13 and 15 WA. In providing for a loss of rights of residence in these circumstances, the UK is in breach of its obligations to EU citizens under the WA. It is inconsistent with the clear language of the provisions of the WA. It is also contrary to the mutual, expressed objective of Part II of the WA to provide reciprocal protection to the citizens of each counterparty to continue to reside in the host State in which they were resident prior to the end of the transition period, subject only to the making of the application referred to in Article 18(1) WA (which may be required to confer the rights under Title II of Part 2 of the WA), under the same limitations and conditions as set out

in the provisions of the TFEU and CRD referred to in Article 13(1)-(3) and Article 15 WA (as a minimum[5]).

46. The single application permitted by Article 18(1) WA is to establish that the applicant is in fact entitled to the new residence status and hence to have the rights under Title II of Part 2 of the WA conferred on them. Where the host State concerned has adopted a constitutive residence scheme, the continued enjoyment of those rights beyond the deadline for application is conditional upon such an application being made. If the application is successful those rights are conferred upon the applicant, and the applicant will be provided with a document evidencing such status. At that point, the operative right of residence may be the right of residence conferred under Article 13 WA, or the permanent right of residence under Article 15 WA, depending upon whether the individual applicant can evidence that they have already qualified for permanent residence.

47. Crucially, a failure to make such a further application after five years (whether or not the conditions for a permanent right of residence have been fulfilled) cannot result in the loss of any right of residence at all. There is no provision in the WA for the right of residence, once acquired, to be forfeited after five years has elapsed if no further application has been made. Yet under the EUSS as implemented by the Secretary of State, such a loss of rights results – in a manner directly contrary to Article 13(4) WA. That is unlawful. (While there is no objection to the provision of an application procedure by which EU citizens can obtain a document *evidencing* that they have attained that right of permanent residence, nor to the fact that this is administered by a single competent authority within the UK, this cannot be a mandatory pre-condition of obtaining or retaining the right.)

48. A host State is entitled to make more generous provision, going beyond those rights in an individual's favour (and the Secretary of State has stressed that the UK has done so in some respects, by waiving some of the conditions to be found in Articles 10 and 13 WA). However, a host State is <u>not</u> entitled to impose additional limitations or conditions for obtaining, retaining or losing residence rights (including the right of permanent residence set out in Articles 16(1) and (2) CRD), other than those provided for in Title II: Article 13(4) WA. Title II does not provide that the right of residence can be lost for failure to

[5] It is always open to the UK to make more generous provision than required under the WA: Article 13(4) WA.

re-apply prior to the purported expiry of the initial pre-permanent right of residence. There is no provision in the WA entitling the UK to require an EU citizen to make *more than a single* application for residence status, nor allowing the UK to make an individual's continued right of residence beyond five years conditional upon making a further application at a later time (whether for one or more periods of further qualifying residence or for recognition of a right of permanent residence). To the contrary, Article 18(1)(a) – (d) WA is clear in articulating that the deadline for an application for the right of residence in a constitutive residence scheme is limited to a single application for the new residence status (and accompanying residence documents) which in itself confers the rights set out in Title II of Part Two of the WA.

49. An individual who has made a successful application for continued legal residence is taken to continue to enjoy the right of residence for as long as they fulfil the conditions and subject only to the limitations set out in the provisions of the CRD referred to in Article 13(1)-(3) WA, until such point as, by operation of law, Article 15(1) confers the right of permanent residence in the circumstances set out in Articles 16-18 CRD. The case law of the CJEU further provides that the right of permanent residence under Article 16 CRD (conferred by Article 15(1) WA) accrues automatically after the required period of qualifying residence: see Case C-325/09 *Dias* ECLI:EU:C:2011:498:

> "57 In that regard, it must be noted that the right of permanent residence provided for in Article 16 of Directive 2004/38 could be acquired only with effect from 30 April 2006, as stated in paragraph 40 of the present judgment. Consequently, unlike periods of continuous legal residence of five years completed after that date, which confer on citizens of the Union the right of permanent residence with effect from the actual moment at which they are completed, periods completed before that date do not allow those persons to benefit from such a right of residence prior to 30 April 2006." (emphasis added).

50. Just as residence permits issued under Article 10(1) CRD were declaratory and not constitutive of the underlying right of residence (see *Dias* at [48]-[49]), the same was true of documents certifying the right of permanent residence issued under Article 19(1) CRD. As set out above, Articles 4(3) and 4(4) WA provide that the provisions of the WA referring to Union law or to concepts or provisions thereof must be interpreted and applied in accordance with the methods and general principles of Union law, and in their interpretation and application must be interpreted in accordance with the relevant case law of the CJEU handed down before the end of the transition period.

51. The right of permanent residence set out in Articles 13, 15 and 16 WA is clear, precise and unconditional in its application to a person who has obtained the necessary residence document under Article 18 WA and has fulfilled the necessary period of continuous qualifying residence, and is accordingly directly effective. It follows that the directly effective right of permanent residence takes effect under UK law without further enactment, and any domestic provisions must be disapplied insofar as they are inconsistent or incompatible with the recognition of that right.

52. Similarly, a person who has obtained the necessary residence document under Article 18 WA but who has not yet qualified for the right of permanent residence nonetheless has a directly effective right of residence in the UK, and any domestic provisions must be disapplied insofar as they are inconsistent or incompatible with the recognition of that right in accordance with Article 4(2) WA.

53. Accordingly, the operation of the EUSS, insofar as it purports to limit the right of an EU citizen to continue to reside in the UK to five years unless they apply before the end of that period for permanent residence or another temporary five year period, is unlawful. The scheme does not comply with the UK's obligations under the WA, and any decision to abrogate the rights of an EU citizen on the basis of such an individual's failure to make a further application would be a breach of that individual's directly effective right to continue to reside lawfully in the UK.

(6) The IMA's response to the Secretary of State's submissions

54. The Secretary of State's interpretation of the WA is contrary to both the language and the purpose of the WA.

55. The first, and most significant reason that the Secretary of State's interpretation is wrong is the language of the WA itself. Article 18(1) WA provides (in relevant part):

> *"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."*

56. Accordingly, the entitlement to operate a constitutive scheme is an entitlement to require relevant individuals to apply for a new residence status which confers "*the rights"* (plural) in "*this Title*". Parsing this:

a. The Title in question is Title II, "Rights and Obligations" within Part Two of the WA, "Citizens' Rights".

b. In total, eleven closely related rights or sets of rights are contained in Title II, namely, the right to reside, the right of exit and entry from the UK, the right of permanent residence, the right to accumulate periods towards permanent residence, the right to change status (e.g., between worker and self-employed) without other rights being affected, the right to have restrictions on residence and entry be considered in accordance with Article 20 WA, procedural safeguards and a right of appeal against relevant decisions in accordance with Article 21 WA, various rights *qua* worker or self-employed person, the right to be treated equally with nationals of the host state, and rights as to recognition of certain professional qualifications.

57. Correctly characterised, it is clear that vast swathes of the Secretary of State's response to this claim do not actually engage with the IMA's position. In particular, the following elements of the Secretary of State's position are misdirected:

a. The claim that, on the IMA's case the status issued does not confer rights (DGD, §46) **[CB/6/89]**: This is wrong. A valid application under EUSS confers the rights in Title II. The IMA has never contended otherwise: see SFG, §§38, 55, 57, and in particular, 58 **[CB/3/32, 37]**:

> "*...If the application is successful those rights are conferred upon the applicant, and the applicant will be provided with a document evidencing such status. At that point, the rights conferred may be the contingent right of residence conferred under Article 13 WA, or the permanent right of residence under Article 15, depending on whether the individual applicant can evidence that they have already qualified for permanent residence. Where the host State concerned has adopted a constitutive residence scheme, the continued enjoyment of that status beyond the deadline for application is conditional upon such an initial application being made".*

b. The claim that the IMA contends for a system that is, to all intents and purposes, the same as the one in place before the end of the transition period, and that on the IMA's case, the system reverts to a declaratory system (DGD, §3) **[CB/6/77]**. This is, likewise, wrong. The residence document issued after the (first) application is constitutive of the rights. Those rights inherently include

the right to permanent residence once the necessary five year period of qualifying residence has been completed. The system is in no sense declaratory.

c. The claim that the IMA contends for a "*confusing and largely pointless halfway house between a declaratory and a constitutive system"* (DGD, §4.3) **[CB/6/77]**; and/or that the residence document is simply a "*gateway document*" without which an EU citizen cannot enjoy residence rights under the WA but simply signifies that a person may enjoy rights: The residence document issued following a valid application is constitutive of an EU citizen's right to reside. There is no ambiguity in whether the applicant enjoys those rights. It is not pointless for the Secretary of State to have decided to adopt a constitutive system which allows EU citizens to clearly establish that they qualify for the rights set out in the WA, and to distinguish them for immigration control purposes from those EU citizens who do not enjoy those rights.

d. The claim that certain provisions are missing from the WA if the IMA is correct and the system reverts to being fundamentally declaratory following the grant of the initial application (DGD, §§54 – 55) **[CB/6/91]**: the residence document provided following the initial application is constitutive of the EU citizen's residence rights and the system does not revert to a declaratory system. The fact that (pursuant to the terms of the WA itself) the right of residence is limited to one of *qualifying* residence (as a worker etc.) up to the five-year point does not change that position.

58. The Secretary of State provides three textual arguments in support of her position.

59. The first is that the reference in Article 18 to "rights" (plural) is somehow internally disjunctive: *"… the reference is to "rights", plural*: *in other words, either the right of residence pursuant to Article 13, or the right of permanent residence pursuant to Article 15 or 16"* (DGD, §47) **[CB/6/90]**. This interpretation is contorted and arbitrary. There is no support in the WA for the idea that "*rights under this Title"* in fact only refers to two of the rights in Title II, or that it applies to them disjunctively, as alternatives. The obvious interpretation is that Article 18 means exactly what it says: it relates to the full suite of rights in Title II, and a successful application confers on an applicant all of the rights in the Title (subject to the conditions and limitations laid down in Title II).

60. Second, the Secretary of State claims that her interpretation is "*reinforced"* by reference to other provisions of Article 18 WA. She makes two closely linked arguments (DGD, §49):

    a. Article 18(1)(a) provides that the purpose of the application is to verify whether the applicant "*is entitled to the residence rights set out in this Title*" and does not say that the purpose of the application is simply to determine whether an individual is in scope of the WA (i.e., that they satisfy Article 10); and

    b. Article 18(1)(n) imposes a requirement for applicants to provide evidence that they establish the conditions under the Title.

61. The Secretary of State relies on these arguments for the proposition that they are proof that the right of permanent residence does not accrue automatically and must be evidenced in order for it to be conferred on an applicant. These arguments go nowhere:

    a. The IMA has at no point argued that it is sufficient for an individual to satisfy the "scope" conditions in Article 10 WA in order to acquire a right of permanent residence under the WA. The individual must satisfy the requirements of Article 15;

    b. The evidence referred to in Article 18(1)(n) is provided in the course of the initial application. It does not provide any support for the proposition that, in a constitutive scheme, a further application is required to continue to enjoy the rights conferred by Article 18(1) as a consequence of a successful initial application.

62. Third, the Secretary of State argues that the phrase "*the right to acquire the right to reside permanently"* in Article 16 means that an application is required to "acquire" the right, and that there is no other sensible explanation for the inclusion of this phrase or for the existence of Article 16 at all. This is clearly wrong. Article 16 provides for the right to aggregate earlier periods of qualifying residence with subsequent periods of qualifying residence, in order to acquire permanent residence. As the IMA made clear in its Reply **[CB/5/68]**, rights can be "*acquired"* otherwise than by application, including by the automatic operation of law. Here, Article 16 provides a right to acquire the right to reside permanently by fulfilling the condition of completing the necessary period of residence (provided only that a successful application under Article 18(1) was made at the outset

in order to confer continued rights of residence, as well as the right to acquire the right of permanent residence upon the fulfilment of that separate condition).

63. The Secretary of State's response to this is to argue that this was the position under the CRD, and that the language of the CRD differs from that of the WA, and had the WA been intended to replicate the position under the CRD, it would have replicated its language (DGD, §52). This is also wrong. In the case of the CRD, it proved necessary for the CJEU to have to clarify that the five years' qualifying residence to give rise to the right of permanent residence under Article 16 CRD could be accumulated by reference to periods of residence completed before the transposition date of the CRD (30 April 2006) as well as periods after that date: Case C-162/09 *Secretary of State for Work and Pensions v Lassal* [2010] ECR I-9217, EU:C:2010:592. Article 16 WA makes the corresponding principle explicit in the context of periods before and after the end of the transition period. The fact that such a provision was thought necessary is readily explicable in that context: to have used only the language of the Directive would have risked leaving open the same area of uncertainty. However, its inclusion in no way imports a wholly new requirement for a formal application to be made as a further condition of acquisition of the right, despite the fact that the new residence status referred to in Article 18(1) has already been successfully applied for.

64. Further, and fatally for the Secretary of State, it is notable that she cannot point to any provision of the WA as the source of the claimed entitlement to require a successful applicant for "pre-settled status" to reapply after five years for a further period of "pre-settled status" to avoid the loss of their existing right of residence under Article 13 (as she accepts may in principle be required under the EUSS, for example where continuity of residence has been broken: see footnote 3 above).

65. The Secretary of State further advances an argument at DGD §54 that it is significant that Article 25 CRD has no counterpart in the WA. This is a hopeless submission. Article 25 CRD reflected the fact that citizens' rights under the CRD were conferred by virtue of a person's citizenship (or that of their family member), without the need for any application at all; the status of residence documents could in those circumstances only be evidentiary of the holder's enjoyment of those rights. Under Article 18(1) WA, as the IMA has always acknowledged, a Member State may adopt a constitutive scheme requiring an application to be made to acquire the new residence status conferring the rights under

Title II of Part Two of the WA. That is in itself a complete explanation as to why there is no equivalent of Article 25 CRD in the WA. It is of much more significance that there is no provision allowing for the loss of rights for failure to follow a procedural step in the manner suggested by the Secretary of State.

66. The Secretary of State, further, advances arguments which she argues, on a purposive construction of the WA, support her interpretation of it. She advances three arguments:

    a. The IMA's construction of the WA is inconsistent with one of the fundamental aims of the WA, which is to provide legal certainty for *inter alia* individuals (DGD, §60);

    b. The IMA's construction is absurd because if it is correct, the document issued at the end of the application only indicates a potential entitlement to a residence right (DGD, §61)

    c. The IMA's construction would generate practical difficulties (DGD, §62).

67. In response:

    a. Whether the Secretary of State's preferred interpretation would give rise to greater certainty does not alter the position. The Secretary of State is entitled to give greater certainty to EU citizens and their family members by waiving any requirement to comply with those conditions and limitations. But this does not entitle her later to withdraw rights by reason of a failure to make a further application to continue to enjoy them. Whether or not it would create greater "certainty" to do so, it is not consistent with what the UK has agreed in the WA and so is unlawful. Whether or not a qualifying EU citizen enjoys rights under Article 13 WA or a right of permanent residence under Article 15 WA at any one time is no less certain than it was prior to the UK's withdrawal from the EU – and in any event may be provided (as before) by the provision (upon application) of an evidentiary document showing that the right of permanent residence has been acquired.

    b. This turns on the Secretary of State's misunderstanding of the IMA's position. As set out above, the IMA agrees that the residence document issued following the (singular) application permitted under Article 18 is constitutive of the individual's rights of residence. The fact that those rights are subject to certain conditions and

limitations is a fundamental feature of the rights conferred by the WA (under Article 13 in particular).

c. It is not for the IMA to craft a system which generates the fewest practical difficulties for the Secretary of State. The question for the Court concerns the correct interpretation of the WA. None of the "practical difficulties" identified by the Secretary of State in fact extend beyond those which were a fundamental feature of the nature of the rights conferred under the CRD, and which are in turn conferred by the WA.

(7) The extraneous materials

68. The Secretary of State spends a significant portion of her DGD (see §§27-42 **[CB/6/84]** and §§63-67 **[CB/6/95]**) rehearsing the detail of various documents extraneous to the Agreements, including early negotiation proposals by the UK, the Secretary of State's unilateral policy proposals, select email exchanges between officials at the Secretary of State's department and officials at the European Commission, which she purports:

    a. "… *made clear the UK's position that an application would need to be made for settled status"* DGD, §28); and

    b. "*...made clear that a second application for "settled status" would need to be made in due course by those who qualified only for pre-settled status…"* (DGD, §29).

69. Such documents are not a legitimate aid to the construction of the WA: the IMA's interpretation above is consistent with the approach to be taken under Article 31 VCLT, which neither leaves the meaning ambiguous or obscure, nor leads to a result which is manifestly absurd or unreasonable within the meaning of Article 32 VCLT.

70. To the extent that they are relevant at all, the IMA makes four observations about the Secretary of State's reliance on these documents.

71. First, it is clear on face that none of these documents purport to establish that the failure to make a further application would entail a loss of rights under the WA. To the extent that these documents fall to be considered at all, they simply do not establish what the Secretary of State is required to establish in this claim.

72. Second, it appears that the assumptions underlying the Secretary of State's reliance on these documents is that if a further application is required for permanent residence, (i) there must be consequences for the failure to make a further application, and (ii) the consequence is a loss of the rights under the WA. These assumptions are not justified. The fact that an EU citizen is able to seek a document evidencing their right of permanent residence after a five year period does not in any way logically entail a loss of those rights for a failure to do so.

73. Third, a number of the Secretary of State's observations rely on the alleged failure of particular officials within the Commission in email correspondence to object to the prospect of an EU citizen losing their rights as a consequence of a failure to make a second application as somehow establishing that this was an accepted fact between the counterparties to the WA, e.g., :

    a. "*... Neither version raised any issue about the need for those granted temporary status to make a further application for settled status"* (DGD, §31);

    b. "…*The Commission was invited to, and did, comment on the draft Rules in July and August 2018. It did not raise any issue about pre-settled status expiring or the need to make a further application to obtain settled status"* (DGD, §36).

74. In response:

    a. The documents and correspondence relied on by the Secretary of State do not indicate that rights will be lost as a consequence of failing to make an application. There is nothing for an official to respond to, negatively or otherwise.

    b. In any event, if the documents did in some way indicate that rights would be lost by failure to make an application, silence on the part of a particular Commission official could not possibly establish acquiescence to that state of affairs by the Commission. The absence of the negative does not prove the positive.

75. Fourth, the merits of sifting through various pre-negotiation documents aside, insofar as the Commission's understanding of the meaning of the WA is relevant to the interpretation of the WA, the Commission has stated that it does not agree with the Secretary of State's interpretation of the WA and has made this clear to the UK Government: SFG, §82 **[CB/3/44]**.

(8) Conclusion

76. For these reasons, it is submitted that the Court should grant the IMA's claim for judicial review, make a declaration that the Secretary of State's interpretation and implementation of the Agreements is wrong in law and that the EUSS is unlawful insofar as it purports to abrogate individuals' rights under the WA, and SA, and grant such other relief as it sees fit.

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CLÍODHNA KELLEHER

10 October 2022 **Monckton Chambers**