



Case No: CA-2024-001773

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**Mr Justice Jay**  
**[2024] EWHC 1754 (KB)**

Neutral Citation Number: [2025] EWCA Civ 1057

Date: 31 July 2025

Before :

**LORD JUSTICE UNDERHILL**  
**(Vice-President of the Court of Appeal (Civil Division))**  
**LORD JUSTICE NEWAY**  
and  
**LADY JUSTICE WHIPPLE**

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Between:

**GWLADYS FERTRÉ**

- and -

**Appellant**

**VALE OF WHITE HORSE DISTRICT COUNCIL**

-and-

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

**Respondent**

**Interveners**

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**Simon Cox and Hannah Smith** (instructed by **Turpin Miller LLP**) for the Appellant  
**Catherine Rowlands** (instructed by **Legal Services on behalf of the Vale of White Horse  
District Council**) for the Respondent  
**Tom Royston and Charles Bishop** (instructed by **Public Law Project**) for the Intervener (1)  
**Julia Smyth KC, James Cornwell and Zoe Gannon** (instructed by **Government Legal  
Department**) for the Intervener (2)  
**Galina Ward KC and Yaaser Vanderman** (instructed by **Independent Monitoring  
Authority for the Citizens' Rights Agreements**) for the Intervener (3)  
**Adrian Berry KC and Desmond Rutledge** (instructed by **Freshfields LLP**)  
for the Intervener (4)  
**Jamie Burton KC and Clíodhna Kelleher** (instructed by **Allen Overy Shearman Sterling  
LLP**) for the Intervener (5)

Hearing dates: 14, 15 and 16 May 2025

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## **Approved Judgment**

This judgment was handed down remotely at 10.30am on [31 July 2025] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Lady Justice Whipple:****INTRODUCTION**

1. The issue in this case is whether an EU national, who is living in the UK with pre-settled status (“PSS”) conferred on her pursuant to Article 18 of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the “Withdrawal Agreement” or “WA”), was the subject of unlawful discrimination when her claim to homelessness support under the Housing Act 1996 was refused on grounds that she was a person from abroad who was not entitled to such state support.
2. The decision refusing homelessness support was made by the Appellant’s local authority, Vale of White Horse District Council, the Respondent to this appeal. The Appellant requested a review which the Respondent determined against her. The Appellant lodged an appeal in the County Court which was transferred to the High Court where it was eventually heard by Mr Justice Jay who dismissed it. This is the Appellant’s appeal against the decision of Jay J.
3. The Appellant argues that the judge was wrong on three grounds: (i) first, in concluding that the Appellant was not residing in the UK on the basis of the Withdrawal Agreement when she says she is so residing and is protected by the equal treatment provisions of the Withdrawal Agreement; (ii) secondly, on the assumption that she was residing in the UK on the basis of the Withdrawal Agreement, in concluding that the discrimination she suffered was indirect as opposed to direct; and (iii) thirdly, and on the alternative hypothesis that the discrimination was indirect, in concluding that the discrimination was theoretically capable of objective justification (the judge thought there was insufficient evidence before him in relation to justification and reached no final view).
4. The response to this appeal is led by the second intervener, the Secretary of State for Housing, Communities and Local Government (previously known as the Department for Levelling Up, Housing and Communities) (the “Secretary of State”), whose submissions are supported by the Respondent. The Secretary of State submits that Jay J was right to dismiss the Appellant’s appeal, that there is no merit to the Appellant’s first ground, and that if the second or third grounds of appeal arise for determination at all, the judge correctly dismissed those grounds too. The Secretary of State relies on a Respondent’s Notice by which she challenges the judge’s conclusion that the grant of PSS involved the application of Article 13(4) of the Withdrawal Agreement; rather, she argues, the grant of PSS flowed from domestic law and Articles 18(1) and 38 of the Withdrawal Agreement not Article 13(4). She argues that the Appellant is not residing in the UK on the basis of the Withdrawal Agreement.
5. The Independent Monitoring Authority for the Citizens’ Rights Agreements (“IMA”) is the third intervener. The IMA aligns with the Secretary of State in submitting that the appeal should be dismissed, subject to one point of dispute which is not material to the outcome of this appeal. The IMA was established by Article 159(1) of the Withdrawal Agreement to monitor the implementation of Part Two of the Withdrawal Agreement (relating to residence and related rights of EU citizens and their families residing in the UK in accordance with EU law at the end of the transition period). The

IMA was given power to intervene in legal proceedings by section 15 of and Schedule 2 to the European Union (Withdrawal Agreement) Act 2020.

6. There are three more interveners. The3million Ltd (“T3M”) is a not-for-profit organisation formed after the UK decided, by referendum in 2016, to leave the EU. Its focus is the protection of the rights of EU citizens living in the United Kingdom and their families. T3M broadly supports the Appellant’s case that she has a right of residence in the UK under the Withdrawal Agreement. With the Appellant, T3M suggests that the point is not *acte claire* and invites a reference to the Court of Justice of the European Union (“CJEU”). Shelter is a charity providing support, legal advice and representation to people with housing and homelessness issues. It too broadly supports the Appellant’s case that she has a right of residence under the Withdrawal Agreement, although it argues that the right has a different source from that relied on by the Appellant. The AIRE Centre (whose full name is Advice on Individual Rights in Europe) is a specialist legal charity working in the provision of advice, litigation support and policy to individuals such as the Appellant. It has permission to intervene in support of the Appellant’s case on discrimination, arguing that the discrimination is direct and in any event not capable of justification.
7. It is important that I record at the outset that the Appellant is not currently homeless. She has been provided with accommodation by Oxfordshire County Council, which is not a party to this appeal, in circumstances I shall explain. However, Lewison LJ decided that because the Appellant might yet become homeless whilst only holding PSS, the appeal was not academic and should be determined substantively.
8. In this judgment, I shall set out the background matters of fact and law which are not in dispute, before coming to the disputed question of the interpretation and meaning of the Withdrawal Agreement as it applies to the Appellant, which is the subject of Ground 1, before dealing briefly with Ground 2. The Court did not hear submissions on Ground 3 (justification in the event of indirect discrimination) because it was of the view that the issue would, if it was live, have to be remitted anyway for consideration of further evidence now admitted. I shall therefore not address Ground 3 at all.
9. I have come to the conclusion that the Appellant cannot succeed on Ground 1, because she does not reside in the UK on the basis of the Withdrawal Agreement. That being so, it is unnecessary to decide Ground 2, and as already indicated, I will not be looking at Ground 3. Jay J was right to dismiss the appeal and this further appeal must also be dismissed, for reasons set out below.

## **BACKGROUND**

### **Facts**

10. I take the following summary from the judgment of Jay J at paras 6-17, with some editing.
11. The Appellant came to the UK on 4 November 2020. She is a French national. She suffers from Ehlers-Danlos Syndrome. She has two children, aged 14 and 7 (at the time of the appeal before Jay J). The elder child has a number of medical conditions, including Autism Spectrum Disorder. That child joined the Appellant in the UK on 25 November 2020. The Appellant’s younger child also has Ehlers-Danlos Syndrome and

Autism Spectrum Disorder. That child came to the UK on 22 June 2021. Both children are the subject of an anonymity order originally made in the High Court and continued by Lewison LJ on 23 October 2024.

12. On 18 November 2020 the Secretary of State for the Home Department (“the SSHD”) granted the Appellant PSS expiring on 18 November 2025. The letter notifying her of the grant of PSS stated that: (1) the letter itself was not proof of status because that could be viewed online; (2) the PSS gave her the right to stay in the UK under UK immigration law; (3) PSS had been granted to the Appellant “in accordance with the Withdrawal Agreement”; and (4) PSS did not itself provide a basis for entitlement to benefits and services under UK law because that depended on the relevant eligibility requirements for the specific benefit or service in question.
13. The Appellant obtained a job as a teaching assistant in London shortly after she arrived here but did not end up taking up the position because she could not provide the necessary references. Since then, in the light, amongst other things, of her caring responsibilities for her children, she has not been economically active.
14. The Appellant initially resided in private rented accommodation in London, but she had exhausted her savings by March 2021. She then moved to Wantage. On 19 October 2021 the Appellant applied to the Respondent for local authority housing under Part 7 of the Housing Act 1996 which the Respondent refused because she was not working and her visa stated she had no recourse to public funds. The Respondent refused that application on the same date.
15. The Appellant sought a statutory review of the decision under section 202 of the Housing Act 1996 but the Respondent upheld its earlier decision in a letter dated 21 January 2022. It is this decision that is the subject of this appeal.
16. The Appellant appealed to the County Court under section 204 of the Housing Act 1996. That appeal was transferred to the High Court where it was received on 20 June 2022.
17. On 1 December 2023, the Appellant was detained under section 3 of the Mental Health Act 1983. On 24 January 2024, she was discharged from secure psychiatric care and in consequence was owed after-care duties pursuant to section 117 of the Mental Health Act 1983.
18. Whilst residing in “step-down” accommodation, on 6 March 2024 the Appellant made a fresh application for housing assistance. The Respondent again determined that she was not eligible for housing assistance. On 19 March 2024 she was granted Universal Credit by the Secretary of State for Work and Pensions. On 21 March 2024 the Appellant sought a section 202 review of the Respondent’s refusal of housing assistance but that application for review was withdrawn on 30 April 2024 following the grant of an assured shorthold tenancy by Oxfordshire County Council and by agreement, a decision that she was not homeless was substituted. The Appellant accepts that she is no longer homeless or threatened with homelessness.

**Brexit**

19. On 23 June 2016, the UK decided by referendum to leave the EU. In October 2019, the European Commission and the Member States of the EU signed the Withdrawal Agreement as the means by which the United Kingdom would effect that exit from the EU. The Withdrawal Agreement came into effect at 11pm on 31 January 2020, which was the day on which the UK formally left the EU. The Withdrawal Agreement provided for a transition period (sometimes called the implementation period) which lasted from 11pm on 31 January 2020 to 11pm on 31 December 2020. EU law continued to apply in the transition period. Article 18 of the Withdrawal Agreement, which is central to this appeal, came into effect at 11pm on 31 December 2020.
20. In preparatory documents laid before Parliament, the government of the day explained its approach to safeguarding EU law rights held by EU citizens living in the UK and British citizens living in other Member States of the EU. The Court was taken to a number of those documents. The following are two examples. The first is an extract from a document presented to Parliament by the SSHD in June 2017:

“3. EU Citizens who came to the UK before the EU Referendum, and before the formal Article 50 process for exiting the EU was triggered, came on the basis that they would be able to settle permanently, if they were able to build a life here. We recognise the need to honour that expectation.

6. The Government undertakes to treat EU citizens in the UK according to the principles below, in the expectation that the EU will offer reciprocal treatment for UK nationals resident in its member states:

- after we leave the EU, we will create new rights in UK law for qualifying EU citizens resident here before our exit. Those rights will be enforceable in the UK legal system and will provide legal guarantees for these EU citizens. Furthermore, we are also ready to make commitments in the Withdrawal Agreement which will have the status of international law. The Court of Justice of the European Union (CJEU) will not have jurisdiction in the UK;
- qualifying EU citizens will have to apply for their residence status. The administrative procedures which they will need to comply with in order to obtain these new rights will be modernised and kept as smooth and simple as possible;
- the application process will be a separate legal scheme, in UK law, rather than the current one for certifying the exercise of rights under EU law. Accordingly we will tailor the eligibility criteria so that, for example, we will no longer require evidence that economically inactive EU citizens have previously held “comprehensive

sickness insurance” in order to be considered continuously resident;”

21. In relation to benefits, that document said that:

“EU citizens arriving before the specified date who do not have five years’ residence at the time of the UK’s exit but who remain legally in the UK on a pathway to settled status will continue to be able to access the same benefits that they can access now – (broadly, equal access for workers/ the self-employed and limited access for those not working). If these individuals go on to acquire settled status, they will then be able to access benefits on the same terms as comparable UK residents.”

22. The second is a document entitled “EU Settlement Scheme: Statement of Intent” published by the Home Office on 21 June 2018 which explained who could apply under the EUSS. It said this:

“2.3 Otherwise, those applying under the EU Settlement Scheme will not be required to show that they meet all the requirements of current free movement rules, such as any requirement to have held comprehensive sickness insurance or generally to detail the exercise of specific rights (e.g. the right to work) under EU law. The UK has decided, as a matter of domestic policy, that the main requirement for eligibility under the settlement scheme will be continuous residence in the UK.”

It went on to say this:

“7.1. The status granted to EU citizens and their family members under the EU Settlement Scheme – settled status (indefinite leave to remain) or pre-settled status (limited leave to remain), granted under Appendix EU to the Immigration Rules – will enable them to continue their lives in the UK as much as before, with the **same entitlements as now** to work (subject, in light of the Withdrawal Agreement, to any relevant occupational requirements), study and access public services and benefits, according to the same rules as now.”

### **The EU Settlement Scheme**

23. PSS, which is the status held by the Appellant, was conferred as part of the EU Settlement Scheme (“EUSS”). There is no dispute about the origin and content of that scheme, which I summarise from the witness statement of Lorna Fraser (Head of the Homelessness Strategy and Policy Team at the Ministry of Housing, Communities and Local Government, dated 15 January 2025). That statement was admitted as evidence for this appeal by a consent order dated 18 December 2024 approved by Lewison LJ. It was not before the judge below.

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24. After several test phases beginning in August 2018, the EUSS was formally introduced on 30 March 2019. It was contained in Appendix EU of the Immigration Rules. The EUSS permitted all EU citizens resident in the UK by 11pm on 31 December 2020 and their families to apply for leave to remain in the UK. There was no application fee and an application was made via an on-line application form. Where an application met the suitability and eligibility requirements, the applicant was granted PSS (or settled status if they had been continuously resident in the UK for at least 5 years and met other conditions). PSS conferred a limited right to remain in the UK for 5 years. A right of appeal against a refusal of PSS (or settled status, as relevant) existed under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (SI 2020/61). The EUSS was open from 30 March 2019. The deadline for applying to the EUSS for those resident in the UK before the end of the transition period was 30 June 2021.
25. PSS was therefore a permission to EU citizens resident in the UK at the end of the transition period with fewer than 5 years' continuous residence to remain in the UK. The conditions for acquiring PSS were straightforward, requiring proof of nationality and identity. Applicants did not have to prove that they had rights of residence under EU law. Once PSS was granted, it endured until it lapsed or the SSHD chose to revoke it, which she could do only in very limited circumstances (not including lack of economic activity).
26. PSS is a route to settlement because an EU citizen with 5 years' continuous residence in the UK, can, subject to meeting other conditions, obtain settled status which confers indefinite leave to remain.

**Housing Assistance**

27. The decision under appeal is the Respondent's decision pursuant to section 184 of the Housing Act 1996 that the Appellant is not eligible for homelessness assistance. It is not necessary to recite every twist and turn in the legislation, especially as the domestic regime is not the subject of the Appellant's attack. I will summarise the position, drawing again on the explanation contained in the witness statement of Lorna Fraser to which I have already referred. The Appellant applied unsuccessfully before Jay J to amend her grounds of appeal to raise a point on the domestic law relating to housing assistance (an application which is recited at paragraph 30 of the judgment below), which application was opposed by the Respondent and not supported by either the Secretary of State or Shelter, and was in the event rejected by the judge (for reasons set out in the Judgment below at paragraph 31). What follows, therefore, is the position as the Secretary of State and Respondent understand it to be, which is not in dispute for the purposes of this appeal.
28. Eligibility for housing assistance is determined by section 185 of the Housing Act 1996. By section 185(1) of that Act, a person is not eligible for assistance under Part 7 if they are a "person from abroad" who is ineligible for housing assistance. By section 185(2) a person who is subject to immigration control ("PSIC") within the meaning of the Asylum and Immigration Act 1996 is not eligible for housing assistance unless they are of a class prescribed by regulations made by the Secretary of State. A PSIC is defined (by section 13(2) of the Asylum and Immigration Act 1996) as a "person who under the [Immigration Act 1971] requires leave to enter or remain in the United Kingdom (whether or not such leave has been given)". Section 185(3) of the 1996 Act provides that the Secretary of State may make provision by regulations for other descriptions of



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persons who are to be treated, for the purposes of Part 7, as persons from abroad who are ineligible for housing assistance.

29. Prior to 31 January 2020 and during the transition period, section 7(1) of the Immigration Act 1988 (“IA 1988”) provided that an EU citizen residing in the UK pursuant to an enforceable EU residence right did not require leave to enter or remain. Such a person was not therefore a PSIC and that person would be eligible for housing assistance unless they fell within a description of persons who were treated as ineligible pursuant to regulations under section 185(3). An EU citizen residing in the UK but not exercising any enforceable EU right to do so would be a PSIC and would be ineligible for housing assistance, unless they fell within a class prescribed as eligible by the Secretary of State in regulation: see section 185(2).
30. The relevant regulations under sections 185(3) and 185(2) are the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 (SI 2006/1294) (the “Eligibility Regulations”). Regulation 6(1A) of the Eligibility Regulations (as they were amended by the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) (EU Exit) Regulations 2019 (SI 2019/861)) provided that PSS was to be disregarded for the purposes of determining eligibility for housing assistance during the transition period. The consequence was that, during the transition period, a person with PSS but with no enforceable EU right to reside was a PSIC, was not within a prescribed class, and therefore remained ineligible for housing assistance.
31. At the expiry of the transition period and as part of the package of legislative measures to effect withdrawal from the EU, section 7(1) of the Immigration Act 1988 was repealed with the effect that from that date an EU citizen did require leave to enter or remain, and such a person was therefore a PSIC for the purposes of the Asylum and Immigration Act 1996. Saving provisions were contained in Schedule 4 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (SI 2020/1309, the “2020 Regulations”). Paragraph 1(b) of Schedule 4 to the 2020 Regulations defined the “post-transition period group” to include persons like the Appellant who had limited leave to enter, or remain in, the United Kingdom by virtue of “residence scheme immigration rules”. Section 17(1)(a) of the European Union (Withdrawal Agreement) Act 2020 provided that: “In this Part, ‘residence scheme immigration rules’ means ... Appendix EU to the immigration rules ...”.
32. Thus, a person with PSS (ie, limited leave to enter or remain in the UK granted under Appendix EU) was and is a member of the post-transition period group for the purposes of Schedule 4 to the 2020 Regulations.
33. The combined effect of paragraphs 2, 5 and 6 of Schedule 4 is that a member of the post-transition period group is deemed not to be a PSIC for the purposes of section 185 of the Housing Act 1996, and therefore (subject to any regulations made under section 185(3)) is not ineligible for homelessness assistance, provided that at the time of their application for assistance they would have satisfied the condition under section 7(1) of the IA 1988, ie, they would have had an enforceable EU residence right. But a person who would not have had an enforceable EU residence right is not covered by the saving in Schedule 4 and is a PSIC for the purposes of the Asylum and Immigration Act 1996.

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34. By operation of section 185(2) of the Housing Act 1996, the Appellant would not have had an enforceable EU residence right at the time of her claim for housing assistance and, applying the above analysis, she was ineligible for housing assistance on the basis of domestic law.

**LEGAL FRAMEWORK**

35. I turn next to the parts of EU and domestic law which frame the particular issues raised in this appeal. I shall consider first the EU law position before the Withdrawal Agreement came into effect before looking at the Withdrawal Agreement and its effect. The Appellant's case is that her right to housing assistance comes from the Withdrawal Agreement.

**Rights of Residence under EU law**

36. EU law was capable of having direct effect in the UK prior to 1 January 2021. Rights of residence under EU law derive from the Treaty on the Functioning of the European Union ("TFEU") and more particularly from the Citizens' Rights Directive, 2004/38/EC of 29 April 2004 (the "CRD"). To explain the nature and extent of the rights of EU citizens to reside in another Member State under EU law, it is necessary to consider four key authorities of the CJEU from which a number of propositions can be drawn.

*(1) TFEU*

37. Article 18 of the TFEU prohibits discrimination on grounds of nationality. Article 21 provides for the right of free movement in the following terms:

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

38. Article 45 explains the right of free movement as entailing the right subject to limitations to move freely within the territory of Member States, to accept offers of employment and to stay in a Member State for the purpose of employment in accordance with provisions governing the employment of nationals of that State.

*(2) Citizens' Rights Directive*

39. The CRD was a consolidating directive which was intended to codify and review the existing provisions relating to the right of free movement and residence (recital 3); union citizens should have the right of residence not exceeding three months without being subject to any conditions or formalities (recital 9), but persons exercising their right of residence should not become an unreasonable burden on the social assistance system of the host Member State and the right of residence for EU citizens and their family members in excess of three months should be subject to conditions (recital 10) and it is for the State to decide whether to grant social assistance during the first three months of residence (recital 21). The Charter of Fundamental Rights of the EU was respected and observed by the CRD (recital 31).

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40. The object of the CRD was to lay down the conditions governing the right of free movement and residence, including the limits placed on that right on grounds of public policy, public security and public health (Article 1). Member States were required to grant leave to enter their territory to EU citizens and family members (Article 5).
41. Article 6 conferred the right of residence for up to three months:
  - “1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.
  2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.”
42. Article 7 dealt with residence for more than three months. This was subject to conditions that broadly required the person to be economically active, a student with insurance or former workers who retain that status on various grounds, or family member of such a person, to have a right to reside. This is the full text of Article 7:
  - “1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
    - (a) are workers or self-employed persons in the host Member State; or
    - (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
    - (c)
      - are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
      - have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months.

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.”

43. Article 8 permitted the host state to require EU citizens to register with the relevant authorities for periods of residence longer than three months.

44. Article 14 defined the right of residence, in the following terms:

“1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not

become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.”

45. Article 16 established the general rule that EU citizens would have a right of permanent residence in a Member State after residing in that State for a continuous period of 5 years.

46. Article 24 contained the right of equal treatment, including a derogation from that right in relation to a Member State’s provision of social assistance and maintenance aid for studies:

“1. Subject to such specific provisions as are expressly provided for in the [TFEU] and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence ... nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.”

47. Article 37 permitted Member States to retain laws, regulations or administrative provisions which were more favourable to persons covered by the Directive.

(3) *Key Authorities on the CRD*

48. The Court was taken to four cases where the CJEU has considered the meaning and scope of these instruments. The first was Cases C-424/10 and C-425/10 *Ziolkowski v Land Berlin* [2013] 3 CMLR 37. That case involved Polish nationals who had lived in Germany since the late 1980s (at a time when Poland was not a member of the EU). They had been granted humanitarian protection in Germany. In 2005, a year after Poland acceded to the EU, they applied for an extension of their right of residence, alternatively a right of permanent residence under EU law on the basis of continuous residence exceeding five years (relying on Article 16 of the CRD). That application was refused by the German authorities on grounds that the applicants were not economically active and were unable to support themselves. Following a series of appeals, the German court referred a question to the CJEU. That Court held that the concept of legal residence in Article 16 of the CRD meant a period of residence which complied with the conditions of Article 7 of the CRD (para 46). The existence of national provisions which were more favourable to the applicants by allowing them to reside in Germany even though they were not economically active was permitted by Article 37 of the CRD but did not form part of the system introduced by the CRD (paras 49-50). The conclusion (at para 51) was:

“In the light of the foregoing, the answer ... is that art.16(1) of [the CRD] must be interpreted as meaning that a Union citizen who has been resident for more than five years in the territory of the host Member State on the sole basis of the national law of that Member State cannot be regarded as having acquired the right of permanent residence under that provision if, during that period of residence, he did not satisfy the conditions laid down in art.7(1) of the [CRD].”

49. The second case was Case C-333/13 *Dano v Jobcentre Leipzig* [2015] 1 CMLR 48. In that case, a Romanian national applied for basic jobseekers' provision in Germany. There was no evidence that she had worked in Germany or Romania or ever sought a job in Germany. The authorities refused her application and the applicant appealed. The Leipzig court referred a question to the CJEU as to whether the refusal of benefits to this applicant was discriminatory by reference to Article 18 TFEU or Article 24 of the CRD, because such benefits would have been payable to German nationals in a similar situation. The Court noted that the principle of non-discrimination laid down generally in Article 18 TFEU was given “more specific expression” in Article 24 of the CRD (para 61), and that Article 24 was subject to a derogation in Article 24(2) (para 64). It followed that an EU citizen could claim equal treatment with nationals of a host Member State “only if his residence in the territory of the host Member State complies with the conditions of the [CRD]” (para 69). There was no obligation on a host Member State to confer entitlement to social benefits to a national of another Member State during the first three months of residence under Article 6 of the CRD (para 70), nor was there any obligation to confer entitlement to such a person who resided for longer than three months if they were not during that time complying with the conditions of Article

7 CRD (paras 71, 73). The CRD distinguishes between those who are working and those who are not (para 75). It was therefore permissible for Germany to refuse social benefits to economically inactive EU citizens who had exercised their right of free movement but who lacked sufficient resources to claim a right of residence (para 78). The unequal treatment between such EU citizens and nationals of the host Member State was recognised by (and was the “inevitable consequence of”) the CRD (para 77):

“As the Advocate General has observed ... any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regard to the grant of social benefits is an inevitable consequence of [the CRD]. Such potential unequal treatment is founded on the link established by the Union legislature in art.7 of the Directive between the requirement to have sufficient resources as a condition for residence and the concern not to create a burden on the social assistance systems of the Member States”

The Court’s conclusion was that Germany was entitled to refuse social benefits to this applicant, who was economically inactive (para 82).

50. The third case is Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2016] 2 WLR 208. That case concerned Swedish nationals who came to Germany. They originally found work but that lasted for less than a year. They continued looking for work and were paid benefits by the German state. Those benefits were withdrawn after they had been unemployed for more than six months. The applicants successfully appealed but on further appeal by the German state authorities, a question was referred to the CJEU. The Court recognised that an EU citizen could only claim equal treatment with nationals of the host Member State under Article 24 of the CRD if their residence in the territory of the host Member State complied with the conditions of the CRD (para 49). That limitation on the rights of EU citizens was consistent with the objective that EU citizens who are nationals of another Member State should not become an unreasonable burden on the social assistance system of the host Member State (paras 50 and 62). Germany was entitled to refuse social assistance to the applicant and others in her position, consistently with the derogation in Article 24(2) (para 63).
51. The fourth case is Case C-709/20 *CG v Department for Communities in Northern Ireland* [2021] 1 WLR 5919. The applicant had dual Croatian and Netherlands nationality. She moved to Northern Ireland. On 4 June 2020 she obtained PSS. She never carried out any economic activity in the UK and lived with her partner in Northern Ireland until she moved to a women’s refuge. She had no resources to support herself or her children. On 8 June 2020, she applied for Universal Credit but her application was refused on the basis of regulation 9(3)(d)(i) of the Universal Credit (Northern Ireland) Regulations 2016 which treated those who had limited leave to remain in the EU by virtue of Appendix EU as persons who did not have a right to reside in and were not habitually resident in the UK. She appealed to the tribunal. She relied on Article 18 TFEU to contend that reg 9(3)(d)(i) was discriminatory. The tribunal referred a question to the CJEU. The reference was made on 30 December 2020, during the transition period when the CJEU retained jurisdiction (see the Court’s analysis at paras 45-52 and 59).

52. The Court held that the applicant, an EU citizen, was resident in the UK on the basis of national law (para 56). She had moved to the UK in exercise of her right of free movement (para 57) and was “within the scope” of EU law (para 58) and was entitled to rely on Article 21 of the TFEU (right of free movement) (para 58). She was also entitled “in principle” to rely on Article 18 TFEU (non-discrimination) (para 64), but the principle of non-discrimination was given specific expression in Article 24 of the CRD in relation to EU citizens who exercise their right to move and reside within the territory of other Member States (para 66) and the question of discrimination in her case had to be addressed by reference to Article 24 of the CRD (paras 67 and 72). Universal Credit was to be categorised as “social assistance” within the meaning of Article 24(2) of the CRD (para 71). Because the applicant had been resident in the UK for more than three months, was economically inactive and lacked sufficient resources to support herself, she did not meet the conditions laid down in Article 7 of the CRD (para 76). It followed that the UK was entitled to refuse to grant her social benefits (para 78) and she was not entitled to rely on the principle of non-discrimination in Article 24(1) of the CRD (para 80). Further, the applicant’s right of temporary residence was granted under national law and without conditions as to resources; given that this was a matter of national law, she could not invoke the principle of non-discrimination in EU law (para 81); the domestic provisions were more generous than was required under EU law, which was permitted by Article 37 of the CRD (para 82), but that more generous grant was not “on the basis of” the CRD and those rights were not incorporated into the scheme of the Directive (para 83).

53. Given the importance of *CG* to the arguments advanced in this appeal, I cite paragraphs 81 - 83 in full:

“81. ... *CG* has a right of temporary residence, under national law, which was granted without conditions as to resources. If an economically inactive Union citizen who does not have sufficient resources and resides in the host member state without satisfying the requirements laid down in [the CRD] could rely on the principle of non-discrimination set out in article 24(1) of that Directive, he or she would enjoy broader protection than he or she would have enjoyed under the provisions of that Directive, under which that citizen would be refused a right of residence.

82. In addition, it must indeed be noted that national provisions which, like the provisions at issue in the dispute in the main proceedings, grant a right of residence to a Union citizen, even where all the requirements laid down by [the CRD] for that purpose have not been met, fall within the scenario referred to in article 37 of that Directive, to the effect that that Directive does not preclude the law of the member states from establishing more favourable rules than those laid down by the provisions of that Directive.

83. Such a right of residence cannot however be regarded in any way as being granted “on the basis of” [the CRD] within the meaning of article 24(1) of that Directive. The court has held that the fact that national provisions concerning the right of residence of Union citizens, that are more favourable than those laid down



in Directive 2004/38, are not to be affected does not in any way mean that such provisions must be incorporated into the system introduced by that Directive and it has concluded, in particular, that it is for each member state that has decided to adopt a system that is more favourable than that established by that Directive to specify the consequences of a right of residence granted on the basis of national law alone (*Ziolkowski v Land Berlin* (Joined Cases C-424/10 and C-425/10) [2011] ECR I-14035; [2014] All ER (EC) 314, paras 49 and 50).”

54. In maintaining more favourable rules, the Member State was not implementing the CRD but was recognising the right of an EU national to reside pursuant to Article 21 of the TFEU (the right of free movement) (para 87). That was an implementation of rights under the TFEU which meant that Member States were obliged to comply with the provisions of the Charter of Fundamental Rights of the EU (2000 C 384/01, the “Charter”) (para 88). The national authorities were therefore required to check that a refusal to grant benefits to an EU citizen who was legally residing on the basis of national law in that State did not violate that person’s fundamental rights as enshrined in the Charter (para 93).

*(4) Propositions drawn from the cases*

55. I draw the following propositions, relevant to this appeal, from those cases:
- i) An EU citizen can claim equal treatment in respect of social assistance only if his or her residence in the host Member State complies with the terms of the CRD; the principle of non-discrimination in the TFEU is given more specific expression in Article 24 of the CRD (*Dano, CG*).
  - ii) A distinction is to be drawn between national rules and EU law rules of residence (*Ziolkowski, Dano, CG*).
  - iii) National rules can be more generous than the EU law system, but if a Member State introduces a national rule that is more generous, that rule remains a rule of domestic law and is not imported into EU law (*Ziolkowski, CG*).
  - iv) PSS is a more generous rule than the CRD requires, because the grant of PSS is not dependent on the applicant having sufficient resources to support themselves; PSS is a domestic law rule; the grant of PSS is not “on the basis of” the CRD (*CG*).
  - v) Member States are entitled to refuse social benefits to economically inactive EU citizens who have exercised their right of free movement to live in that Member State, but who do not have a right of residence under Article 7 of the CRD because they are not complying with its conditions (*Dano, CG*).
  - vi) Such a refusal is not prohibited in EU law, even though the treatment is not equal as between EU citizens and nationals of the Member State in a similar situation (*Dano, Alimanovic, CG*).

- vii) Where a Member State has implemented a more generous rule, it is obliged to respect the Charter, ensuring that the fundamental rights of those who benefit from the more generous rule are not violated by the refusal of social benefits (CG).

## The Withdrawal Agreement

### *(1) Overview*

- 56. The Withdrawal Agreement came into effect on 1 February 2020. The preamble records, amongst other things: the necessity of providing reciprocal protection for EU citizens and UK nationals and their family members where they had exercised free movement rights before the UK left the EU; the objective of ensuring an orderly withdrawal of the UK from the EU aiming to prevent disruption and provide legal certainty to citizens and economic operators; and the balance of benefits, rights and obligations for the EU and the UK which was the foundation for the Agreement.
- 57. The Withdrawal Agreement is divided into six parts, each of which has a number of different title headings, beneath which lie chapters and individual articles.

### *(2) Part One: Common Provisions*

- 58. Part One is headed “Common Provisions”. Within that Part, Article 4 provides that the provisions of the Withdrawal Agreement have direct effect and can be relied on by legal or natural persons. Interpretation of provisions in the Withdrawal Agreement referring to EU law or to concepts or provisions of EU law is to be in accordance with EU law and with the case law of the CJEU handed down before the end of the transition period. Article 6 provides that references to Union law (subject to exceptions which are not relevant here) are to the law applicable on the last day of the transition period.

### *(3) Part Two: Citizens’ Rights*

- 59. Part Two is headed “Citizens’ Rights”. It contains four titles. The first title relates to “General Provisions”. Article 10 is within that title and provides:

#### **“Article 10 Personal scope**

- 1. Without prejudice to Title III, this Part shall apply to the following persons:

- (a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter; ...”

- 60. Article 12 is also within that title and prohibits any discrimination on grounds of nationality within the meaning of the first subparagraph of Article 18 TFEU in respect of persons referred to in Article 10. Article 12 is without prejudice to any special provisions contained in the Withdrawal Agreement.
- 61. The second title is headed “Rights and Obligations” and contains three chapters. The first chapter is “Rights Related to Residence, Residence Documents” and comprises Articles 13 to 23; that chapter is the focus of this appeal. Article 13 provides as follows:

**“Article 13 Residence rights**

1. Union citizens and United Kingdom nationals shall have the right to reside in the host State under the limitations and conditions as set out in Articles 21, 45 or 49 TFEU and in Article 6(1), points (a), (b) or (c) of Article 7(1), Article 7(3), Article 14, Article 16(1) or Article 17(1) of [the CRD].

2. Family members who are either Union citizens or United Kingdom nationals shall have the right to reside in the host State as set out in Article 21 TFEU and in Article 6(1), point (d) of Article 7(1), Article 12(1) or (3), Article 13(1), Article 14, Article 16(1) or Article 17(3) and (4) of [the CRD], subject to the limitations and conditions set out in those provisions.

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

4. The host State may not impose any limitations or conditions for obtaining, retaining or losing residence rights on the persons referred to in paragraphs 1, 2 and 3, other than those provided for in this Title. There shall be no discretion in applying the limitations and conditions provided for in this Title, other than in favour of the person concerned.”

62. Article 15 provides for the right of permanent residence in the following terms:

**“Article 15 Right of permanent residence**

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 [the CRD], shall have the right to reside permanently in the host State under the conditions set out in Articles 16, 17 and 18 of [the CRD]. 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 [the CRD].

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.”

63. Article 18 provides for the issuance of residence documents. The following are relevant extracts:

**“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.

Applying for such a residence status shall be subject to the following conditions:

(a) the purpose of the application procedure shall be to verify whether the applicant is entitled to the residence rights set out in this Title. Where that is the case, the applicant shall have a right to be granted the residence status and the document evidencing that status;

...

(k) the host State may only require Union citizens and United Kingdom nationals to present, in addition to the identity documents referred to in point (i) of this paragraph, the following supporting documents as referred to in Article 8(3) of [the CRD]:

(i) where they reside in the host State in accordance with point (a) of Article 7(1) of [the CRD] as workers or self-employed, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed;

(ii) where they reside in the host State in accordance with point (b) of Article 7(1) of [the CRD] as economically inactive persons, evidence that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host State during their period of residence and that they have comprehensive sickness insurance cover in the host State; or

(iii) where they reside in the host State in accordance with point (c) of Article 7(1) of [the CRD] as students, proof of enrolment at an establishment accredited or financed by the host State on the basis of its legislation or administrative practice, proof of comprehensive sickness insurance cover, and a declaration or equivalent means of proof, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the

host State during their period of residence. The host State may not require such declarations to refer to any specific amount of resources.

With regard to the condition of sufficient resources, Article 8(4) of Directive [the CRD] shall apply;

...

(q) the new residence document shall include a statement that it has been issued in accordance with this Agreement.

...

3. Pending a final decision by the competent authorities on any application referred to in paragraph 1, and pending a final judgment handed down in case of judicial redress sought against any rejection of such application by the competent administrative authorities, all rights provided for in this Part shall be deemed to apply to the applicant, including Article 21 on safeguards and right of appeal, subject to the conditions set out in Article 20(4).

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 [the CRD], a residence document, which may be in a digital form, that includes a statement that it has been issued in accordance with this Agreement.”

64. By Article 19, a host State can allow applications for a residence status or residence document under Article 18 to be made voluntarily from the date of entry into force of the Withdrawal Agreement. Decisions to accept or refuse such applications must be taken in accordance with Article 18(1) and (4) but, under Article 19(2): “Decisions under Article 18(1) shall have no effect until the end of the transition period”.

65. Article 23 deals with equal treatment. It provides:

**“Article 23 Equal treatment**

1. In accordance with Article 24 of [the CRD], subject to the specific provisions provided for in this Title and Titles I and IV of this Part, all Union citizens or United Kingdom nationals residing on the basis of this Agreement in the territory of the host State shall enjoy equal treatment with the nationals of that State within the scope of this Part. The benefit of this right shall be extended to those family members of Union citizens or United

Kingdom nationals who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host State shall not be obliged to confer entitlement to social assistance during periods of residence on the basis of Article 6 or point (b) of Article 14(4) of [the CRD], nor shall it be obliged, prior to a person's acquisition of the right of permanent residence in accordance with Article 15 of this Agreement, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status or to members of their families.”

66. The third title relates to coordination of social security systems and is not in issue in this appeal. The fourth title is headed “Other Provisions” and includes Articles 38 and 39. Article 38 permits Member States to maintain laws, regulations or administrative provisions which are more favourable to the person concerned (except that Article 38 does not apply to Title III, concerning social security systems, where Member States are required to maintain coordination and parity).
67. Article 39 provides that persons covered by this Part (ie, the Part on Citizens’ Rights) shall enjoy the rights provided for in the Titles to this Part for their lifetime, unless they “cease to meet the conditions set out in those Titles”.

*(4) Transition and Final Provisions*

68. Article 126 defines the transition period as starting from the date of entry into force of the Withdrawal Agreement and ending on 31 December 2020.
69. Article 158 permits a court or tribunal of the United Kingdom to refer a question of interpretation in relation to Part Two of the Withdrawal Agreement to the CJEU where necessary and where the case commenced at first instance on or before 31 December 2028.

*(5) Domestic Implementation*

70. The Withdrawal Agreement is given legal effect in the United Kingdom as a result of section 7A of the European Union (Withdrawal) Act 2018 which was inserted by section 5 of the European Union (Withdrawal Agreement) Act 2020. Section 7A provides that all rights created or arising by or under the Withdrawal Agreement are without further enactment to be given legal effect in the United Kingdom and to be recognised in domestic law; and that every enactment is to be read and have effect subject to recognition of those principles.

**THE JUDGMENT BELOW**

71. In a laudably concise judgment, Jay J dismissed the appeal, holding that it was necessary to approach the Appellant’s case in two stages, first by interpreting the

Withdrawal Agreement to establish the preconditions for the acquisition of the new immigration status, and secondly by asking whether PSS in the form in which it was granted to the Appellant conferred on her the unconditional rights she claimed which included a right to housing assistance (paras 69 and 70). It was common ground that the Appellant fulfilled the conditions of Article 6 of the CRD at the time that she applied under the EUSS; she therefore had rights which fell within Article 13(1) of the Withdrawal Agreement at that stage (para 71). However, the rights she thereby obtained were conditional and not absolute, and the grant of PSS was simply a gateway or passport to the potential acquisition of a particular right at the relevant time (para 72). In terms of its content, PSS was “no more than a laissez-passer” to the claiming or invoking of rights in the future (para 74). Article 18(1) did not bring about a sea-change but simply sought to maintain the *status quo ante* taking into account the interests of immigration control, simplicity, good administration and the protection of the accrued rights of EU or EEA nationals; it did not put EU nationals in a better position than they were in previously (para 75). The purpose of Article 23(1) of the Withdrawal Agreement was to achieve consistency between the Withdrawal Agreement and Article 24 of the CRD (para 76). It was not enough simply to possess the new status; the specific right under the CRD which the person was enjoying had to be identified (para 76). The preferred analysis was that as a matter of language, there was a clear and direct pathway from Article 13(4) to Article 13(1) and Article 18, each provision referring to conditions (para 81). Provided that it continued to be seen as a “one-off” passageway, Article 18(1) was silent as to the mechanism by which a host State might choose to confer residence status; the grant of immigration leave of 5 years was within the permissible ambit of Article 18(1) (para 88). But the fall-back analysis was that if PSS was more generous than Article 18(1) of the Withdrawal Agreement, then that more generous right was enjoyed by virtue of domestic law permitted by Article 37 of the CRD or Article 38 of the Withdrawal Agreement (para 89). The Secretary of State must be treated as having applied Article 13(4) to the Appellant’s situation, by not requiring proof of a relevant EU law right at the point that the Appellant applied for PSS in November 2020 (para 92). She had no free-standing right to residence under Article 21(1) TFEU noting that at the time of her claim for housing assistance, the Appellant did not fulfil the conditions in Article 7 of the CRD (paras 94-95). For those reasons, she lost on the main issue because she did not have rights under the Withdrawal Agreement which were protected by Article 23 of that Agreement (para 96). That determined the case against her but if, contrary to that conclusion, there was discrimination, it was indirect because not all UK nationals qualify for housing assistance (because not all are habitually resident) and not all those with PSS (assuming against himself on the main issue) would not qualify for housing assistance; the overall impact of these provisions is only to make it substantially more difficult for PSS holders to succeed, which is a classic case of indirect discrimination (para 105). There was insufficient evidence before the Court to determine whether that indirect discrimination was objectively justified (para 107).

72. The issues and arguments have developed since Jay J heard the case. In the interests of brevity, I will address the arguments as they are now put and I will do so in my own words and in my own sequence. I have already indicated that I am in agreement with the outcome determined by Jay J. I also agree, in the main, with his reasons.

## THE ISSUES

73. It is appropriate at this point to frame the issues for determination in this appeal. On 1 February 2020, the transition period began. During this period, EU law continued to apply in the UK save to the extent that the Withdrawal Agreement provided otherwise. On 4 November 2020, during the transition period, the Appellant came to the UK. She was entitled to travel to the UK at that time and in doing so was exercising her right of free movement in EU law – see Article 21(1) of the TFEU. She had an enforceable EU law right to reside in the UK, even though she was not economically active, for a period of three months under Article 6 of the CRD (implemented into domestic law by regulation 13 of the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) (the “Immigration Regulations”).
74. On 18 November 2020, still during the transition period, the Appellant obtained PSS. PSS is a domestic law right of residence and is not granted on the basis of the CRD – see *CG*.
75. The transition period ended on 31 December 2020. On that date, EU law ceased to have effect in the UK, subject to certain savings provisions (contained in the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (SI 2020/1309)) and save to the extent that provisions of EU law were given effect by the Withdrawal Agreement.
76. As at that date, the Appellant was still within the first three months of her arrival, and still had what would have been an EU law right of residence under Article 6 of the CRD, preserved in Article 13(1) of the Withdrawal Agreement. In addition, as a person with PSS, she had leave to remain as a matter of domestic law for 5 years.
77. The Appellant has remained economically inactive throughout her residence in the UK. That means that, at the end of the initial three month period (expiring on 4 February 2021) the Appellant no longer had what would, under EU law, have been an enforceable EU law right to reside in the UK. Her initial right to reside under Article 6 CRD had expired, and she was not complying with the conditions of Article 7 CRD.
78. In summary, it is the Appellant’s case that Article 18 of the Withdrawal Agreement, which came into effect on 1 January 2021, conferred on the Appellant a right to reside in the UK, recognised by Article 13 of the Withdrawal Agreement and protected by Article 23 of the Withdrawal Agreement. When her claim for housing assistance was refused, she was discriminated against by being treated less favourably than a comparable UK national. Ground 1 of her appeal challenges Jay J’s conclusion that she has no right of residence protected by Article 23 of the Withdrawal Agreement. The remainder of the appeal depends on the Appellant succeeding on Ground 1. If she does, by Ground 2 she says that the discrimination was on grounds of nationality, because it was targeted at EU nationals, and was direct; as such, it was for that reason, and without more, unlawful. Alternatively, if the discrimination was indirect, by Ground 3 she argues that the discrimination is incapable of objective justification. Different aspects of the Appellant’s case are supported in different ways by T3M, Shelter and the AIRE Centre.



79. It is the Secretary of State's case, in alignment with the Respondent and the IMA (albeit that IMA's case was limited to Ground 1), that Jay J was right to conclude that the Appellant had no right of residence under the Withdrawal Agreement. They submit that the Appellant was ineligible for housing assistance before Article 18 of the Withdrawal Agreement came into effect and remained so after it came into effect, both during the remainder of her three month residence under Article 6 CRD and after that, when she was residing in the UK by reason of her PSS. They say that if the Appellant is right, the effect of the Withdrawal Agreement is to widen the class of people entitled to rely on the prohibition against discrimination to include all those with PSS, which would mark a major shift away from the EU law *status quo ante*, because the Appellant would not have been entitled to housing assistance during the transition period or at any earlier time when the UK was a member of the EU. There is no discrimination, either direct or indirect; but any indirect discrimination would anyway be objectively justified. All three grounds are therefore resisted.
80. Ancillary issues arise as to whether (i) the Appellant's PSS is properly described as a domestic law right or an EU law right (this is the subject of the Secretary of State's Respondent's Notice, and relates to Ground 1); (ii) the scope and content of the EU law rights under Article 21 TFEU which are preserved by the Withdrawal Agreement (this is the subject of Shelter's intervention, and it is to an extent supported by the IMA; this too relates to Ground 1); and (iii) whether this Court should refer a question to the CJEU (this is the main focus of submissions from T3M, and this too relates to Ground 1 in the main).
81. I am indebted to all Counsel and their supporting teams for the assistance they have given the Court. Between the parties and interveners, a large number of arguments have been put before the Court, some of which conflicted with arguments advanced by others "on the same side" and all of which were rebutted by others in Court in one or various ways. It is not necessary for me to deal with each and every one of the arguments advanced. In my view, it is better to concentrate on the handful of key points which are in the end determinative of the appeal.

## GROUND 1

### Approach to Interpretation of the Withdrawal Agreement

82. The Withdrawal Agreement is an international treaty to which Articles 31 and 32 of the Vienna Convention apply. Those articles and the Supreme Court's commentary on them is set out in this passage from *Revenue and Customs Commissioners v Anson* [2015] UKSC 44, [2015] 4 All ER 288 per Lord Reed:

"55. Articles 31 and 32 of the Vienna Convention are in the following terms:

#### 'Article 31

##### General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

## **Article 32**

### **Supplementary means of interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.'

56. Put shortly, the aim of interpretation of a treaty is therefore to establish, by objective and rational means, the common intention which can be ascribed to the parties. That intention is ascertained by considering the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose. Subsequent agreement as to the interpretation of the treaty, and subsequent practice which establishes agreement

between the parties, are also to be taken into account, together with any relevant rules of international law which apply in the relations between the parties. Recourse may also be had to a broader range of references in order to confirm the meaning arrived at on that approach, or if that approach leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.”

83. I make two points consequent on that passage from *Anson*. First, at issue in this appeal are provisions of the Withdrawal Agreement dealing with citizens’ rights. Those provisions reflect the position as it was agreed by the UK, the EU and the Member States to apply reciprocally to EU citizens resident in the UK and British citizens resident in EU Member States. Further or additional measures implemented by the UK relating to EU citizens resident in the UK could not be “read into” the Withdrawal Agreement, because the treaty reflects the common intention of the parties which cannot be altered by one party acting alone. Secondly, I have already referred to two contemporaneous documents published by the UK government outlining the Government’s intentions in relation to EU nationals resident in the UK once the UK left the EU (see paragraphs 20-22 above). Those documents are amongst the “broader range of references” (cf *Anson* paragraph 56) to which this Court could potentially have regard to confirm the meaning of the Withdrawal Agreement or to resolve ambiguity, obscurity, absurdity or unreasonableness.

### **Purpose of the Withdrawal Agreement**

84. I shall consider the detail of the Appellant’s arguments below, but it is worth making three points at the outset, related to the overarching issue of the common intention of the signatories. The first is that the object and purpose of the Withdrawal Agreement is explained in the recitals, and the key message to be drawn from the recitals is that the Withdrawal Agreement is intended to secure an orderly withdrawal of the UK from the EU, whilst at the same time protecting EU and UK nationals who had exercised their right of free movement under EU law before 31 December 2020. There is no suggestion in the recitals that the UK intended to broaden eligibility to social benefits for EU nationals. The second point builds on the first. Given the context of the Withdrawal Agreement, which put into effect the UK’s decision to leave the EU, it is inherently unlikely that the UK would have intended to broaden the cohort of EU nationals entitled to claim UK social benefits when it left the EU. Yet the effect of the Appellant’s argument is to confer on EU nationals living in the UK who are not economically active a right to claim social benefits (including housing assistance) even though they had not previously possessed that right in EU or domestic law. That leads to the third observation: any change of the sort for which the Appellant argues would need to be very clearly expressed in the Withdrawal Agreement. It would mark a significant departure from the position as it existed before Brexit and it would involve a costly expansion of the welfare state in favour of EU citizens.
85. I turn then to consider the parts of the Withdrawal Agreement on which the Appellant’s arguments are centred.

**Article 13**

86. The Appellant accepts that the Withdrawal Agreement does not confer a right to reside on every person who comes within Article 10, and that States are permitted to limit that right to those who meet the conditions of Article 13(1). The Appellant further accepts that she does not come within the terms of Article 13(1) on an ordinary reading. However, the Appellant relies on Article 13(4) to submit that the UK has conferred an unconditional right of residence on those who qualify under the EUSS, including those with PSS, without distinguishing between those who meet the conditions specified within Article 13(1) and those who do not. To recap, Article 13(4) states, with emphasis on the key words:

“4. The host State may not impose any limitations or conditions for obtaining, retaining or losing residence rights on the persons referred to in paragraphs 1, 2 and 3, other than those provided for in this Title. There shall be no discretion in applying the limitations and conditions provided for in this Title, *other than in favour of the person concerned.*”

87. The Appellant, by Mr Cox, says that Article 13(4) gives the signatories to the Withdrawal Agreement a power to grant residence rights under the agreement. He argues that the language of this provision is open and unlimited. He relies on the earlier judgment of this Court in *Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307, [2024] KB 633 where the asymmetrical effect of Article 13(4) was recognised. As a matter of context, he submits that the signatories to the Withdrawal Agreement intended to retain flexibility to provide more generously than the agreement itself provided for, and in particular to recognise within Article 13(1) all those EU citizens who were within Article 10 - which would include the Appellant. If Article 13 was intended to be limited only to those who met the conditions under the CRD, Article 13(1) could have said so; but the reference to the TFEU, alongside the Article 13(4) discretion, reveals an intention to permit a wider group to be included, which would extend to anyone falling within Article 10. Article 13(1) was thus the irreducible minimum protected by the Withdrawal Agreement but was subject to Article 13(4) which provided a discretion to extend rights of residence under the Withdrawal Agreement to people like the Appellant. *CG* was a case decided during the transition period, at which point the status of PSS existed in domestic law alone. Once the transition period ended, the Withdrawal Agreement promoted those domestic law rights to the plane of international law. That analysis was strongly supported by *AT*, a case which examined a person’s rights of residence after the end of the transition period, and where the Court recognised that a person with PSS who did not meet the conditions of the CRD nonetheless had rights under Article 13 of the Withdrawal Agreement. Further, as a matter of interpretation, Article 13 falls to be interpreted in the same way as Article 21 TFEU (of which Article 13 is the analogue). A signatory to the Withdrawal Agreement can grant a right of residence under the Withdrawal Agreement, regardless of whether the conditions in the CRD have been satisfied; an analogy in the context of the TFEU would be with the “*Ibrahim and Teixeira* right of residence” which was fashioned by the CJEU out of Article 21 TFEU (see Cases C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim* and C-480/08 *Maria Teixeira v London Borough of Lambeth* [2010] ICR 1118) to enable the primary carer of a child of an EEA citizen former worker, which child remained in education, to remain with that child in a host EU Member State even though the carer did not meet the conditions under the

CRD. By reference to broader considerations of purpose, for the Withdrawal Agreement to recognise the Appellant as having residence rights under Article 13 ensured continuity with the *status quo ante* and was consistent with its recitals; by contrast, the Secretary of State’s position represented a “radical break” with the EU law position which previously prevailed because there would no longer be a power to waive the requirements for a right of residence. Further, uncertainty flowed from the Secretary of State’s case because the grant of PSS was not, after all, determinative of a person’s rights, and employers and others would have to look behind that status. Yet further, he suggests that the Withdrawal Agreement contained a degree of flexibility to avoid the system becoming overly complex and bureaucratic, which flexibility should not be overridden by the Court.

88. I address first of all Mr Cox’s reliance on *AT*. I am not persuaded *AT* helps him. *AT* was a Romanian national living in the UK with PSS; she left her home taking her daughter with her to escape domestic abuse by *AT*’s partner; *AT*’s claim to Universal Credit was refused by the Secretary of State for Work and Pensions on grounds that, as a person with PSS, she was not entitled to social support. The Court of Appeal upheld *AT*’s successful appeal against that decision. Green LJ, with whom King and Dingemans LJJ agreed, held that Article 13 of the Withdrawal Agreement did not create a “standalone” right but rather one that incorporated Article 21 TFEU by reference (para 94); Article 21 was the “umbrella” or “anchoring” right (para 94) and it was also a continuing right which triggered the obligation on the State to ensure that Charter rights were protected (paras 94 and 97). It was on the basis that *AT*’s *Charter rights* were in jeopardy by the refusal of benefits that *AT*’s appeal was upheld, because those Charter rights were protected by the Withdrawal Agreement and remained continuous (paras 99 and 150).
89. The reasoning in *AT* is closely dependent on *CG*, a case I have already considered. *CG* is not helpful to the Appellant’s case because in *CG* the CJEU categorised PSS as a domestic law right and differentiated it from EU law rights of residence contained in the CRD. *AT* is further confirmation of that proposition. Further, *AT* is not concerned with rights of residence under the CRD at all, only with rights under the Charter, and this appeal is not concerned with Charter rights. For those reasons, *AT* does not assist the Appellant.
90. I turn to Mr Cox’s other arguments. On an ordinary reading, Article 13(1) sets out the rule that EU citizens retain the right to reside in the host State under the limitations and conditions set out in the TFEU (relevant parts) and CRD (relevant parts). There is no surprise in that general rule, which is consistent with established EU law on rights of residence (see paragraph 55 above) and with the recitals in the Withdrawal Agreement which suggest that continuity was intended. In short, the general rule reflects the *status quo ante*.
91. Although I follow the Appellant’s arguments on Article 13(4) as a matter of language – because Article 13(4) plainly does contain a discretion to disapply the limitations and conditions provided for elsewhere as long as that discretion is exercised in favour of the individual – I am not attracted by the Appellant’s arguments about the scope and exercise of that discretion. There are a number of reasons for that.
92. First, the Appellant’s construction leads to an outcome which is inconsistent with, even contradictory of, the general rule in Article 13(1). It is difficult to understand why the

Withdrawal Agreement would lay down that general rule only to permit it to be subverted a few sentences later. The Appellant's case involves a subversion of the general rule on a grand scale – not just permitting an administrative discretion at the margins in difficult cases, but widening Article 13(1) to include *all* EU citizens who come within Article 10, regardless of whether they meet the CRD conditions.

93. Secondly, there are no clear words to express such an outcome, which puts in doubt that such an outcome was ever the common intention of the parties to the Withdrawal Agreement.
94. Thirdly, and contrary to the Appellant's arguments, that outcome plainly does disrupt the *status quo ante* in a significant and systematic way. A person in the Appellant's position had no right to benefits before the end of the transition period; yet the Appellant's case is that she does have such rights afterwards. I have not been shown any convincing evidence that this was the intended effect of the Withdrawal Agreement.
95. Fourth, and more fundamentally, the Appellant's arguments fail to respect the distinction identified in *CG* and repeated in *AT* between EU law residence rights on the one hand (specified in the CRD) and domestic law rights on the other (of which PSS stands as an exemplar); rather, under the Appellant's argument the two are conflated under the umbrella heading of "rights of residence for Article 13(1) purposes".
96. Fifth, this outcome offends the principle that domestic law rights cannot be imported into the EU legal order by one State acting unilaterally (see *CG*) which itself is a reflection of the wider international law rule that one signatory cannot unilaterally vary the terms of a Treaty (see *Anson*). The effect of the Appellant's argument is to elevate a domestic law right, PSS, into a right of residence protected under the Withdrawal Agreement. Even if that was what the UK had wanted to do (as to which, as I have said, there is no convincing evidence), the UK could not vary the terms of a multi-lateral international agreement in that way.
97. Sixth, in the context of an agreement intended to be of reciprocal effect, the Appellant's construction would or might lead to the UK carrying a greater obligation to EU citizens than a comparable UK citizen (who had exercised their right of free movement) could claim from an EU host State; that is, unless that EU host State had used the discretion in Article 13(4) to expand the meaning of Article 13(1) to similar effect which seems unlikely (and is not established by available evidence about practice in other signatory States).
98. I find the Secretary of State's submissions on Article 13(1) and (4), supported by the IMA, much more compelling, both as a matter of language, and by reference to the context and purpose of the Withdrawal Agreement. The Secretary of State argues that Article 13(1) sets the rule and the final words of Article 13(4) provide an administrative discretion to enable signatory States to deal with borderline cases. On that analysis, the general rule in Article 13(1) is not subverted. Rather, the signatory States retain an administrative discretion to avoid unnecessary complexity or unfairness in individual cases at the margins. As a matter of language, it means that the discretion – contained in just a few words tucked up at the end of Article 13(4) – is given a limited purpose, which better reflects its position and framing. It also explains the asymmetrical nature of the discretion, to be exercised in favour of the "person concerned". That analysis is

consistent with the stated objectives reflected in the recitals, because it preserves the *status quo ante* and achieves reciprocity.

99. That conclusion is, in one sense, sufficient to dispose of the appeal because Mr Cox’s case depends on extending Article 13(1) (by means of Article 13(4)) to encompass PSS holders like the Appellant. But it is preferable to consider all aspects of Mr Cox’s case on the interpretation of the Withdrawal Agreement before reaching a conclusion on Ground 1. I turn next to Article 18.

## Article 18

100. Mr Cox began his submissions by taking the Court to the letter sent to the Appellant on 18 November 2020 which granted her application under the EUSS and referring to the Appellant’s digital confirmation of PSS which stated that her leave had been issued “in accordance with ... the Withdrawal Agreement”. I understand why he goes to these documents and I see the point he makes based on them, but the meaning of an international treaty cannot be determined by the language used in correspondence between the authorities of one signatory State and individuals living in their territory. In any event, the words are not, it seems to me, inconsistent with the Secretary of State’s case, which recognises that Article 18 is the origin of the new residence status of which PSS forms part. The dispute centres on the content and effect of that new residence status.
101. Mr Cox argues that the effect of Article 18 is to elevate PSS, which had previously operated on the plane of domestic law (see *CG*), into an international law right of residence protected by the Withdrawal Agreement. Article 19(2) states in terms that decisions under Article 18 shall have no effect until the end of the transition period, which supports the argument that the status of such decisions changed on 1 January 2021 (and explains their elevation to the international law plane on that date). He says that the UK made a deliberate choice to adopt a system whereby all those who applied successfully under the EUSS would be treated in the same way. Further, he argues that it is not possible, having made an unconditional grant under the EUSS, for the UK to narrow the rights which are conferred by the new residence status to include only existing rights under Article 13(1) (absent the Article 13(4) expansion which I have addressed above). As a matter of language and context, the new residence status applies to, and benefits, all those with PSS. He says that the Secretary of State is wrong to argue that Article 18 is merely a gateway to other rights because it confers rights – something to be drawn from its plain words. Article 18 forms part of Title II which is about rights and obligations; it contains multiple references to conferring or granting rights, describing those rights as rights of residence (see, as examples, the introductory words of Article 18(1), Article 18(1)(a) and (n), Article 18(3) and Article 18(4)). Article 18(1)(q) states in terms that the new residence document (to which a person is entitled) shall include a statement that it has been issued “in accordance with this Agreement” which confirms the Appellant’s interpretation.
102. By way of recap, Article 18 is headed “Issuance of Residence Documents” and Article 18(1) provides, with emphasis on the key words, as follows:
- “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.”*

103. I see the Appellant’s arguments based on the language of Article 18(1), but here too I think the Appellant faces a number of hurdles. First, the title of Article 18 indicates that the provision is about the issuance of documents – which suggests that it is an administrative or operational provision rather than a provision concerned with the grant of rights. Its placement in Title II is not at odds with that characterisation, because the documents in question, and the new residence status they evidence, are indeed connected with a person’s rights which are the subject of Title II.
104. Secondly, the content of Article 18 supports the conclusion that it is an administrative or operational provision. It contains a number of administrative processes for recognising rights. Article 18(1) permits a host State to require EU citizens or UK nationals to apply for the new residence status; the various conditions then listed within Article 18(1) are centred on the process of applying and the evidence required to support such an application, rather than the content of the rights conferred. The implementation of this new residence status is not compulsory, so the UK could have done nothing at all, in which case it would only be obliged to provide a residence document on request to those who are “eligible for residence rights under this Title” (see Article 18(4)). Article 18 therefore permits two options and they must be of parallel effect; the second option, under Article 18(4), quite clearly only avails those who are eligible for residence rights under Title II, which would exclude the Appellant. It is reasonable to infer that the Article 18(1) process is not intended to be of wider effect.
105. Thirdly, Article 18(4) refers to the new residence status (in Article 18(1)) as a “condition for legal residence” in the host State, which supports the proposition that the new residence status is the pre-cursor to legal residence rather than itself constituting that right of residence.
106. Fourth, the references to rights in Article 18 are invariably described as “rights *under this Title*”. That must, on any sensible linguistic or purposive analysis, require regard to be had to the other provisions of this title, namely Title II of Part Two, to establish what rights are in issue. Title II includes Article 13(1), which refers to the “limitations and conditions” attaching to the rights under the TFEU or the CRD there listed; it also includes Article 15, the right of permanent residence, which is subject to the condition of continuous residence for 5 years. It is common ground that the Appellant does not have any rights of residence under the TFEU or the CRD, to which Article 13(1) refers (absent, of course, a read-in by means of Article 13(4) – addressed above), nor does she have a right of permanent residence under the conditions listed in Article 15. Yet those are the obvious places to look for the “rights under this Title”. Title II does not include Article 10, which contains a reference to “Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside thereafter” – a description which the Appellant does meet.
107. Fifth, Article 18 could have referred to Article 10 in terms if it was intended that Article 18 should encompass all those within Article 10. The absence of such cross-referencing (to Article 10) or some other language to denote the wider scope for which the Appellant argues is significant. These are all points made by the Secretary of State and the IMA and I agree with them.



108. Quite apart from those points based on the language and purpose of Article 18, I agree with the Secretary of State that the Appellant's case is not supported by previous case law, specifically the *IMA* case (*R (Independent Monitoring Authority) v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin), [2013] 1 WLR 817). In *IMA*, Lane J considered the content and meaning of Article 18 in the context of a judicial review brought by the IMA, which, supported by the EU Commission as intervener, succeeded in challenging the government's position (as it then stood) that a person with PSS should be required to make a further application either to extend their leave period or to upgrade it to indefinite leave to remain, failing which that person's underlying right of residence in the UK would be lost. The Court held that the UK's approach involved an impermissible limitation on an EU citizen's right to reside (citing the prohibition on any host State imposing new or different limitations or conditions on rights of residence contained in the first sentence of Article 13(4)) because as a matter of EU law the right of permanent residence was acquired automatically on satisfaction of the relevant conditions and could not be lost through inaction. The case is important in the context of this appeal for two main reasons. First, it contains a valuable explanation of the nature and purpose of the EUSS (paras 45-54). Lane J recognises that the EUSS was implemented by the UK pursuant to the permission at Article 18(1) of the Withdrawal Agreement. EUSS was a "constitutive scheme", the first option permitted to signatory States under Article 18(1). By a constitutive scheme, rights were conferred by the grant of the new residence status, for which eligible persons had to apply. The second option is a "declaratory scheme", permitted by Article 18(4), whereby rights arise automatically without any need for registration or conferred status, so that a person can demand recognition of those rights but does not need to stand up and be counted.
109. Secondly, it contains an analysis of what is meant by the "new residence status" referred to in Article 18. The Commission had advanced the following arguments, predicated on the status being that of "WA beneficiary":

"88. As for the effects of the United Kingdom's decision to adopt a constitutive scheme, the Commission considers that what are conferred by the new residence status in article 18(1) are all the rights granted in Title II of Part Two; namely, the rights provided for in articles 13 to 29 of the WA, which include the right of non-permanent residence and that of permanent residence. There is, therefore, only one new residence status under the WA that of WA beneficiary, to which all the relevant rights are attached. Different rights will be relevant at different times, depending on the personal situation of the beneficiary. Although every eligible person who successful goes through the application process will be granted WA beneficiary status, the Commission considers that one beneficiary may have a non-permanent right of residence at the moment of conferral, whilst another may have already acquired the right of permanent residence. One beneficiary may have a residence right as a student, another as a worker, and yet another as a non-economically active person. Their status under the WA, however, is the same.

89. Accordingly, the Commission considers that the difference between the declaratory and constitutive residence schemes lies merely in how access is given to WA beneficiary status. Once such status has been

obtained, the rights attached to it operate in the same way, under both schemes.”

110. The Commission argued that where a Member State had implemented a constitutive scheme there was an obligation on an individual to “stand up and be counted”, but that was all they had to do and they could not be required to make a new application once that new residence status had been conferred (para 90). This was in opposition to the case advanced by the SSHD to the effect that “the constitutive scheme gives rise to rights under the WA, as opposed to those rights arising automatically on fulfilment of the relevant conditions” (para 98). Lane J held that the United Kingdom was in breach of the prohibition contained in the first sentence of Article 13(4) of the Withdrawal Agreement by requiring a person with PSS to make a fresh application at the point they wished to have settled status conferred on them (paras 138, 145). There was one, and only one, application required for the new residence status (paras 177 and 179). He held that the application process was still meaningful:

“182. ... Its purpose was to ensure that individuals were significantly incentivised to apply under the EUSS. The constitutive scheme created a “bright line” between those who obtained status under the WA and those who did not. Unless and until individuals obtained such status, rights under the WA were not conferred. This allowed the government to put in place a deadline, in order to generate public “buy-in” via a major communications campaign. It ensured that all who responded would then be registered and documented.”

111. Lane J accepted the arguments advanced by the IMA and the Commission (para 192). The case does not therefore support the Appellant’s arguments that Article 18 confers rights; it is strongly supportive of the Secretary of State’s opposing argument that Article 18 is an administrative measure only, providing an immigration status (or gateway) to which other rights are attached.
112. Ms Smyth KC, who represents the Secretary of State in this appeal, confirmed on instructions that the Government now considers *IMA* to have been correctly decided. Thus, the case represents the agreed position of the UK Government, the Commission and the IMA. To my mind the case carries considerable weight in this Court. It is, as Ms Smyth submitted, evidence of subsequent agreement by the parties to the Withdrawal Agreement as to its interpretation, which this Court can take into account applying *Anson* (see paras 82-83 above). Lane J’s analysis in *IMA* echoes the description of the EUSS contained in the materials referred to at paras 20-22 above, which materials can also be relied on as confirming the Secretary of State’s case on Article 18(1).
113. In my judgment, in agreement with the Secretary of State (supported by the IMA), the new residence status in Article 18 is merely a gateway to other rights. It was described as a “laissez-passer” by the judge below. In argument in this Court, Ms Smyth described it as a “badge of entitlement”. These sorts of descriptions are helpful without being definitive. They show that the new residence status in Article 18 is a means by which a person can access rights which they already hold or might come to hold under the Withdrawal Agreement and preserved from EU law; it does not itself confer those rights.

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114. I reject the Appellant’s argument that domestic law rights under PSS were automatically elevated by operation of Article 18 into rights under the Withdrawal Agreement on 1 January 2021. The function of Article 18 is much more limited. It brings into existence the new residence status as a gateway to other rights under the Withdrawal Agreement. That new residence status was embodied in the EUSS and was a means of ensuring that EU citizens resident in the UK would “stand up and be counted”.
115. It follows, as a matter of logic, that some individuals with PSS on 1 January 2021 would have come into possession of a right of residence, previously held as a matter of EU law and now preserved by the Withdrawal Agreement. Such rights would correctly be categorised as held “on the basis of the Withdrawal Agreement” for Article 23 purposes. Typically, these would be EU citizens who had exercised their right to free movement to come to the UK and were either still within their first three months (Article 6 CRD) or remained economically active or retained sufficient resources to be self-sufficient (Article 7 CRD) (preserved by Article 13(1) of the Withdrawal Agreement). Indeed, if I have my dates right, the Appellant was within this group for a brief time because she arrived in the UK in November 2020. However, there was another group, into which the Appellant moved from February 2021 onwards, which comprised members with no EU right of residence and in consequence no right to reside on the basis of the Withdrawal Agreement; members of the latter group only have a domestic law right to remain in the UK. Thus it can be said that PSS is a single immigration status, conferring limited leave to remain in the UK, but that those with PSS will have differing rights of residence, depending on personal circumstances, and their entitlements and protections under the Withdrawal Agreement differ accordingly.
116. I conclude that the “new residence status which *confers the rights under this Title*” in Article 18(1) means only that it is a status (or badge) which confers (in the sense of giving access to or providing a gateway to) such rights as may have accrued, or yet accrue, under Title II of Part Two. At the time of the decision under appeal, the Appellant had no rights of residence under Title II of Part Two. She did have rights under the Charter, but those are not in issue in this appeal.
117. This is to accept the submissions of the Secretary of State, supported by the IMA and the Respondent, on the scope and meaning of Article 18.

**Article 23**

118. Finally, I come to Article 23. The Appellant’s case is that the reference to residing “on the basis of this Agreement” includes those residing on the basis of PSS. The Appellant submits that the judge was wrong to conclude that Article 23 was intended to mirror Article 24 of the CRD and that Article 23 is broader because the protection against discrimination extends to all those EU citizens residing on the basis of rights and permissions in the Withdrawal Agreement, including those with PSS. The opening words of Article 23, which refer in terms to Article 24 of the CRD, import only the general principles of non-discrimination. On facing questioning from the Court about the purpose and scope of the derogation at Article 23(2), Mr Cox submitted that the UK had chosen to grant a blanket level of protection to all those with PSS, pursuant to Article 23(1) properly interpreted in light of Articles 13 and 18, and the UK had not implemented any measures pursuant to the derogation at Article 23(2).

119. To recap, Article 23(1) provides in material part (with emphasis added):

“In accordance with Article 24 of [the CRD], subject to the specific provisions provided for in this Title and Titles I and IV of this Part, all Union citizens or United Kingdom nationals *residing on the basis of this Agreement* in the territory of the host State *shall enjoy equal treatment with the nationals of that State within the scope of this Part. ...*”

120. Much of the ground in answer to Mr Cox’s arguments has already been covered in my discussion of Articles 13 and 18. But there are a number of additional points which emerge from Article 23 to undermine the Appellant’s case further. The first is that Article 23(1) of the Withdrawal Agreement mirrors, almost word for word, Article 24(1) of the CRD. Like the judge below, I am sure the match is deliberate. A similar point could be made by comparing Article 23(2) of the Withdrawal Agreement with Article 24(2) of the CRD – again, very similar. It is reasonable to infer that these matched provisions are performing the same function in each instrument. Given that it is established as a matter of EU law that the right of equal treatment extends only to rights specifically provided for in the CRD, the natural reading of the Withdrawal Agreement must be to similar effect.
121. That point, about the symmetry between Article 24 CRD and Article 23 of the Withdrawal Agreement, finds further support in the introductory words of Article 23(1): “In accordance with Article 24 of [the CRD]...”. These words import into Article 23(1) not just parts of, but the whole of, the EU *acquis* – comprising the TFEU, relevant directives, regulations and the case law of the CJEU – as it touches on Article 24 of the CRD. Thus, the propositions summarised at paragraph 55 above are drawn in and are applicable. Those cases are unhelpful to the Appellant’s case: they confirm that the equal treatment right is limited to rights *within the CRD*. The reason, surely, for importing those propositions and the material which informs them into Article 23(1) is to ensure that the scope of the equal treatment protection in Article 23(1) remains similarly limited.
122. The Appellant relies on the words “on the basis of” the Withdrawal Agreement to press her case. But those words echo Article 24(1) of the CRD. They import the same body of law: in *CG*, the CJEU emphasised those words in the context of distinguishing between EU rights of residence (which were granted “on the basis of” the CRD) and the more generous domestic law rights granted by way of PSS which were not (see proposition (iv) at paragraph 55 above). Thus the words “on the basis of” have a specific meaning in the case law of the CJEU, pointing to rights recognised in (and subject to conditions and limitations under) the CRD, and now retained by the Withdrawal Agreement, but going no wider.
123. If the Appellant is correct, it is difficult to understand how the derogation at Article 23(2) is meant to work. That derogation removes the obligation to pay social benefits and student grants to certain groups who do have residence rights, including those who are resident during the first three months (cf Article 6) or job-seekers (Article 14(4) of the CRD) or their family members. The Appellant’s analysis effectively overrides this derogation, rendering it meaningless, because on the Appellant’s case such benefits *would* be payable to all those who have PSS, regardless of their particular status under the CRD. The derogation at Article 23(2) lives much more comfortably alongside the Secretary of State’s case, as a permitted derogation from equal treatment for certain

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individuals with EU law residence rights preserved by the Withdrawal Agreement. This would ensure that Article 23(2) operated in a manner analogous to Article 24(2) of the CRD, on which it is undoubtedly based.

124. There is no difficulty in understanding Article 23 on the Secretary of State's case, because on her case it is a direct analogue of Article 24 of the CRD, it is in line with the case law of the CJEU, the derogation in Article 23(2) is consistent in scope with that set out at Article 24(2) of the CRD, and it fits with the recitals of the Withdrawal Agreement aimed at securing an orderly exit and preserving the *status quo ante*. I accept the Secretary of State's case on Article 23.
125. I have rejected the Appellant's case on Articles 13, 18 and 23. But before coming to any final conclusions on the appeal, it is appropriate to address a number of other points on interpretation raised by other parties.

### **Ancillary Points on Ground 1**

#### *The Respondent's Notice*

126. The Secretary of State challenges the judge's reasoning on one point, relating to Article 13(4). At paragraphs 78 to 84 of his judgment, Jay J rejected the Secretary of State's submissions (then put by Mr Cornwell) that the status of PSS was conferred solely by domestic law (permitted by Article 38 of the Withdrawal Agreement) concluding instead, as his preferred analysis, that PSS was the result of the United Kingdom disapplying the strict rule of Article 7 CRD, by means of Article 13(4), with the consequence that PSS was a right to residence under the Withdrawal Agreement. His alternative analysis (at para 89) was that PSS was a purely domestic law right, which was permitted by Article 38 of the Withdrawal Agreement.
127. I agree with the Secretary of State (and the IMA) that the judge's alternative analysis is the right one. PSS is a domestic law rule which is not part of the EU legal order (or, I infer, the international law order established by the Withdrawal Agreement): see *CG* and the propositions of law drawn from it summarised at paragraph 55 above. The cohort of EU citizens entitled to PSS includes those with EU law residence rights (complying with the CRD) but it also includes others who have no such rights (not meeting the conditions of the CRD). PSS is more generous than the scheme of EU rights of residence; such generosity is permitted by Article 38 of the Withdrawal Agreement (Article 37 of the CRD during the transition period). It does not result in an expansion of Article 13(1) or any other provision of the Withdrawal Agreement. It follows that the UK was not relying on Article 13(4) in implementing the EUSS. The power to devise a scheme such as the EUSS comes from Article 18(1). To the extent that the scheme benefited individuals who did not have EU law rights of residence (which became rights protected under the Withdrawal Agreement after 1 January 2021), it was offering more generous terms as it was entitled to do under Article 37 of the CRD or Article 38 of the Withdrawal Agreement.

#### *The outstanding issue between the Secretary of State and the IMA/Shelter*

128. Shelter argues that a person with PSS has an EU right to residence under Article 21 of the TFEU, which right (they say) is within Article 13(1). This argument is not supported by the Appellant (who recognises that she has no right under Article 13(1) -

absent the argument about exercise of discretion under Article 13(4) which I have already addressed).

129. The IMA argues in partial support of Shelter on this point, suggesting that there might, in another case, be a right of residence derived directly from Article 21 TFEU which is preserved by the Withdrawal Agreement (by analogy with the preservation of Charter rights as in *CG* and *AT*).
130. The argument is resisted by the Secretary of State who notes that the CRD is *lex specialis*. Ms Smyth submits that the Court should have regard only to the CRD in determining the Appellant's residence rights in EU law as those rights have been preserved by the Withdrawal Agreement. She acknowledges that there are rights of residence which fall outside the CRD - the *Ibrahim* and *Teixeira* right is an example - but there is no suggestion that there are any such rights in issue in this case and Article 21 of the TFEU does not provide the Appellant with any alternative basis for claiming a residence right in EU law.
131. In my judgment, Shelter is wrong to suggest (if I understand their submissions correctly) that this Appellant has a "free-standing" right of residence arising out of Article 21 TFEU; it is quite clear from the case law summarised at paragraph 55 above that the general rights in Article 21 give way to the specific implementation of those rights contained in the CRD. For reasons discussed above, this Appellant has no rights of residence under the CRD.
132. In answer to the IMA's point, I would leave open for determination in another case where it might make a difference to outcome the possibility that there might be an EU law right of residence which falls or fell outside the CRD but is still preserved by the Withdrawal Agreement and as such benefits from equal treatment protection under Article 23. There is no argument for the existence of any such right in this case.

### Conclusion on Ground 1

133. I am persuaded, by a healthy margin, that the Secretary of State offers the better arguments in response to Ground 1. The Withdrawal Agreement was intended only to preserve existing EU law rights. That the UK granted PSS to EU nationals, regardless of whether they were complying with the limitations and conditions of the CRD, was more generous than required by EU law; to the extent that it resulted in rights and permissions to remain in the UK which existed independently of rights and permission in EU law, those were rights and permissions in domestic law only. The Appellant has no EU law right (as preserved by the Withdrawal Agreement) to reside in the UK. She may yet come into an EU law right, depending on her personal circumstances. As matters stand, her right of residence is not protected by the Withdrawal Agreement. She is not completely without EU law protection because she has Charter protection (see *CG* and *AT*). But this appeal does not rest on the Appellant's Charter rights and there is no suggestion in this case that her Charter rights are being or might be infringed.
134. That result is consistent with the context of the Withdrawal Agreement, by which the UK agreed the terms of its departure from the EU. It is also consistent with the purpose of the Withdrawal Agreement which was to preserve rights and to ensure reciprocity of treatment as between UK nationals living in other EU Member States and EU citizens living in the UK. The parties to the Withdrawal Agreement did not intend to alter the

*status quo ante* under which EU citizens exercising their right of free movement to come to the UK but lacking any EU law right under the CRD were not permitted to claim housing assistance or other benefits. The Appellant's Ground 1 therefore fails.

## Reference to CJEU

135. The Appellant, with support from T3M in particular, urges a reference to the CJEU to resolve the question raised by Ground 1. Under Article 158(1) of the Withdrawal Agreement, this Court may ask the CJEU to give a preliminary ruling on a question concerning Part Two of the Withdrawal Agreement. We remain well within the 8 year period (from the end of the transition period) for such a reference to be made. It is said that the issue at the heart of this appeal (the subject of ground 1) is not *acte claire*, a phrase that has been defined to mean that the application of EU law is “so obvious as to leave no scope for reasonable doubt” (Case 283/81 *CILFIT Srl v Ministero Della Sanita* [1983] 1 CMLR 472 at para 16). T3M suggests, in addition, that there is great uncertainty about any individual's rights if the Secretary of State is correct. The point about uncertainty was answered, in my view correctly, in *IMA* where Lane J held that “the pursuit of certainty under a constitutive residence scheme cannot affect the nature of the rights of residence conferred”; that a person with Article 13 residence rights falling short of permanent residence was entitled to reside in the UK, as a matter of EU law, only for as long as the relevant limitations and conditions in the CRD were satisfied; and that was “an inherent feature of the rights conferred by Article 13(1) to (3)” (paragraph 156).
136. The Secretary of State, the IMA and the Respondent resist a reference. They submit that there is a clear answer to the issues of construction of the Withdrawal Agreement and that the opinion of the CJEU is not required.
137. Jay J was of the view that the issue at the heart of this appeal was not *acte claire* but still he declined to make a reference. We have had the benefit of more refined arguments from the parties and a number of interveners. We have also had the significant benefit of Jay J's judgment. The points are now well rehearsed.
138. I agree with the Secretary of State and the IMA. I am not left in any real doubt about the answer to this appeal. I am sure that the equal treatment protection in Article 23(1) does not extend to this Appellant. I accept that the Secretary of State's analysis, which I have endorsed, results in a mixed cohort of PSS holders: some with EU law rights of residence, and others without. But that is how the new residence status designed by the UK and permitted by Article 18(1) is meant to work. In the end, it is simply not possible to accept that the signatories to the Withdrawal Agreement intended those with purely domestic law rights (by means of PSS, like the Appellant) to benefit from equal treatment protection under the Withdrawal Agreement; that would mark a significant shift away from the *status quo ante* and would need to be clearly signalled. That leads me to conclude that the answer is *acte claire* and for that reason I would not refer a question to the CJEU.

## GROUND 2

139. Ground 2 only arises in the event that the Appellant succeeds on Ground 1. She has not succeeded and there is no need for me to address Ground 2. I have considered whether I should, in any event, offer a view on the merits of Ground 2, but I consider it

preferable to leave Ground 2 unresolved without expressing a view on it either way. That is for the following reasons. First, the time devoted at the hearing to argument on Ground 2 was very compressed and the point was taken at considerable speed. Even with the assistance of the parties' written arguments on Ground 2, the issue has not in my view been explored thoroughly. Secondly, the issue is not straightforward. The parties advanced starkly differing submissions, arising out of a number of authorities. The leading cases are Case C-73/08 *Bressol v Gouvernement de la Communauté Française* [2010] 3 CMLR 20, *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, [2011] 1 WLR 783 and *R (Fratila) v Secretary of State for Work and Pensions (AIRE Centre intervening)* [2020] EWHC 998 (Admin), [2020] PTSR 1424 (High Court), [2020] EWCA Civ 1741, [2021] 3 All ER 1043 (Court of Appeal) and [2021] UKSC 53, [2022] 3 All ER 1045 (Supreme Court). Ground 2 requires careful analysis of these cases and others in the same line. The cases themselves show that views on the correct approach to and definition of direct discrimination differ, with the Court in *Bressol* rejecting the opinion of the Advocate General, and the Court of Appeal in *Fratila* being split on the point with the majority differing from the first instance judge. Third, it follows that any view expressed by this Court would be of only modest value. It would be *obiter dicta* in light of the conclusion reached on Ground 1 and would be subordinate to the conclusions already reached by superior Courts. Fourthly, Jay J expressed the view, on a provisional basis, that any discrimination suffered by the Appellant, if he was wrong on Ground 1, was indirect. The Appellant knows the case she has to meet if the point was to be the subject of a further appeal beyond this Court, on the hypothesis that I am wrong in my conclusions on Ground 1.

## CONCLUSION

140. I would dismiss this appeal on Ground 1. The Appellant is not residing in the UK on the basis of the Withdrawal Agreement and is not entitled to protection by Article 23. Ground 2 does not arise for determination in light of my conclusion on Ground 1.

### Lord Justice Newey:

141. I agree.

### Lord Justice Underhill:

142. I agree that this appeal should be dismissed for the reasons given by Whipple LJ. In my view it is quite clear that the Appellant was not entitled under the Withdrawal Agreement to the rights which she claims, and I do not believe that a reference to the CJEU is necessary.