CA REF: [redacted]

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
(His Honour Judge Roberts)

BETWEEN:

A

Claimant / Appellant

-and-

LONDON BOROUGH OF BARNET

Defendant / Respondent

-and-

THE INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS

First Intervener

-and-

THE ADVICE ON INDIVIDUAL RIGHTS IN EUROPE CENTRE

Second Intervener

-and-

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Third Intervener

SKELETON ARGUMENT ON BEHALF OF THE INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS*

**Updated Skeleton Argument to address the Appellant's additional ground of appeal for which permission was granted pursuant to paragraph 1 of the Order of Arnold LJ dated 13 January 2023.*

I. INTRODUCTION AND SUMMARY

1. This is the skeleton argument of the Independent Monitoring Authority for the Citizens' Rights Agreements (the "**IMA**") for the hearing of this appeal, which concerns the Appellant's entitlement to housing assistance under s.185 of the Housing Act 1996 (the "**Housing Act**").

2. The IMA is the statutory body responsible for monitoring the implementation and application of Part 2 of the EU-UK Withdrawal Agreement ("**WA**").[1] Part 2 WA is entitled "*Citizens' Rights*" and it confers residence and related rights on EU citizens and their family members who were residing in the UK in accordance with Union law at the end of the transition period, as well as reciprocal rights on UK citizens and their famiy members who were residing in an EU Member State at the end of the transition period. The UK was required to establish an independent authority in respect of Part 2, with powers equivalent to the European Commission, pursuant to Article 159(1) WA. The IMA was duly established, and given powers of intervening in legal proceedings, by s.15 and Schedule 2 to the European Union (Withdrawal Agreement) Act 2020 ("**EUWAA**").

3. The Appellant is an EU citizen residing in the UK on the basis of "pre-settled status" ("**PSS**") under Appendix EU to the Immigration Rules. The court below found that: (i) she was not eligible for housing assistance because she did not satisfy the relevant qualifying criteria as an EU national in the UK, such as being a worker or having derivative rights; and (ii) it was not necessary for the reviewing officer to consider whether the refusal of housing assistance breached her rights under the Charter of Fundamental Rights of the European Union (the "**Charter**") following the UK's exit from the European Union. In the IMA's submission, the Court erred in both respects.

4. To summarise the IMA's position on the appeal:

   a. The IMA considers that the Appellant is eligible for housing assistance as the primary carer of a child in education under the *Ibrahim/Teixeira* line of EU case

[1] The IMA has equivalent powers in relation to Part 2 of the EEA EFTA Separation Agreement ("**SA**") in the UK and Gibraltar. These submissions focus on the WA since the Appellant is an EU national. However, Part 2 of the SA is, in substance, identical to Part 2 of the WA, and the effect of Article 4(3) SA is that Part 2 of the SA has to be interpreted in conformity with Part 2 WA. The points made by the IMA are therefore of equal application under the SA.

law. *Ibrahim/Teixeira* derivative rights of residence, have been specifically preserved in domestic law for the purposes of establishing entitlement to housing assistance. See §§31-42 below.

b. The domestic preservation of *Ibrahim/Teixeira* rights of residence as a basis for eligibility for social assistance and housing assistance was required by the WA, in particular by Article 24 WA, which brings with it the principles under *Ibrahim/Teixeira* including a specific right to equal treatment with UK nationals in matters of housing. See §§43-48 below.

c. Since the Appellant is residing on the basis of the WA, it follows that she is also entitled to rely, in principle, on both:

   i. The general prohibition against discrimination on the grounds of nationality under Article 12 WA, which incorporates and applies Article 18 of the Treaty on the Functioning of the European Union ("**TFEU**"); and

   ii. The specific equal treatment protections in Article 23 WA, which incorporates and applies Article 24 of Directive 2004/38/EC (the "**Citizens' Rights Directive**" or "**CRD**"). See §§49-51 below.

d. If, contrary to the IMA's primary position, the Appellant is not residing on the basis of *Ibrahim/Teixeira* rights, she would nonetheless be able to avail herself of the residual protection of the Charter because she is within the personal scope of the WA. The Charter is a powerful interpretive tool under the WA (Articles 2 and 4 WA), which acts as a safeguard even if other non-discrimination provisions in the WA are not available. See §§54-65 below.

5. The IMA's submissions are structured as follows. The factual background and judgment under appeal are summarised in **Sections II** and **III**. The grounds of appeal and the parties' positions are summarised in **Section IV**. The WA is introduced in **Section V**. The IMA's submissions on Grounds 1 and 2 are then set out in **Sections VI** and **VII**. The Annex sets out a brief summary of the WA to assist the Court by way of background.

II. FACTUAL BACKGROUND

6. The factual background is summarised in the decision of the County Court dated 28 March 2022 (the "**Judgment**") as well as the decisions of the Respondent dated [redacted] (the "**First Decision**") and [redacted] (the "**Review Decision**"). In overview:

a. The Appellant is a [redacted] national who moved to the UK in [redacted] At that time, she had one child, D, who was born in [redacted] (Judgment §§12-13).

b. The Appellant worked in the UK until [redacted], and then moved to [redacted] from [redacted] until [redacted] while she was pregnant with her second child (Judgment §§13-17). She did not work within this period due to a pregnancy-related illness (Review Decision §8, §12, cited at Judgment §29).

c. The Appellant returned to the UK in [redacted] with D, who was then aged [redacted]. She gave birth to her second child, S, in [redacted] §20). D commenced school in the UK in [redacted] (Judgment §17).

d. The Appellant has been granted PSS.[2] The precise date of her award of PSS is not clear from the Judgment (Judgment §§12, 32) but the IMA understands from the Appellant it was granted before the end of the transition period in [redacted].

e. The Appellant became homeless as a result of domestic abuse. She applied to the Respondent for homelessness assistance under Part 7 of the Housing Act, in around [redacted]

The First Decision

7. On [redacted], the Respondent made the First Decision pursuant to s.184 of the Housing Act. That decision concluded that the Appellant was not eligible for housing assistance under s.185 of the Housing Act as well as the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 (as amended) (the "**Eligibility Regulations**"). The First Decision stated that this was because the Appellant did not meet any of the relevant qualifying criteria in the Eligibility Regulations as an EU national in the UK, such

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[2] PSS is the grant of five years' limited leave to enter or remain for those qualifying EU and EEA EFTA citizens and their family members who had not yet established a right of permanent residence in the UK by the time of their application under Appendix EU. Those who are granted PSS are then entitled to apply for 'settled status' (i.e. indefinite leave to remain) once they have acquired five years' residence.

[3] The First Decision suggests that the housing assistance interview took place on [redacted] (see p. 1, first bullet point), whilst both the Judgment and the Appellant's Appeal Skeleton Argument suggest (at §§22 and 94 respectively) that the call took place on [redacted].

as being a worker or having derivative rights. The IMA addresses the qualifying criteria in detail below.

The Review Decision

8. The Appellant then sought a review of that decision under s.202 of the Housing Act 1996. [redacted], the Respondent's reviewing officer made the Review Decision. The Review Decision confirmed the conclusion reached in the First Decision: i.e. that the Appellant was not entitled to housing assistance pursuant to the Eligibility Regulations.

9. The Review Decision concluded that, though the Appellant had PSS, she was not a worker, nor a person with derivative rights (Review Decision §6), for the following reasons:

    a. The Appellant had worker status from her work during the period between [redacted] [redacted] (at §12).

    b. The Appellant retained that worker status from January 2020 until July 2020 due to her inability to work as a result of pregnancy-related illness (at §12).

    c. The Appellant also retained worker status from [redacted] due to maternity leave, applying the principles in Case C-507/12 *Saint Prix v SSWP* [2015] 1 CMLR 5 ("***St Prix***") as well as domestic case law (at §§13, 17, 18).

    d. However, because the Appellant did not return to work after [redacted], she was not eligible for assistance (at §26).

10. The Review Decision noted, without elaboration, that the Appellant would not be eligible on the basis of derivative rights (at §§6(e), 30, 30bis, 31).

III. THE JUDGMENT BELOW

11. The Appellant appealed the Review Decision to the County Court pursuant to s.204 of the Housing Act. In a judgment and order dated 28 March 2022, Judge Roberts (the "**Judge**") dismissed the appeal. The Judge agreed with the Review Decision that the Appellant was not eligible for housing assistance.

12. The Judge's reasoning was as follows:

    a. The Appellant had PSS, but to qualify for housing assistance she needed to meet the conditions that applied to EEA nationals before January 2021, being the

provisions of the Immigration (European Economic Area) Regulations 2016 (the "**EEA Regulations**") (Judgment §§32-33).

b. The Review Decision was correct to find that the Appellant was a worker until the end of [redacted] under the principles in *St Prix*. However, the Appellant had not returned to work at the time of the Review Decision on [redacted], so had forfeited such status. Accordingly, she was not eligible for housing assistance (Judgment §§49-52).

c. The Appellant's reliance on the Charter was misplaced because the Charter did not create new rights or obligations which were enforceable by individuals when the UK was an EU Member State. In any event, no rights under Articles 1, 7 or 24 of the Charter had been preserved in domestic law after the end of the transition period (Judgment §§60-61).

13. In reaching this decision, the Judge did not directly address the question of whether the Appellant might be eligible for housing assistance on the basis of derivative residence rights under *Ibrahim/Teixeira*. As is explained below, those residence rights derive from a primary carer's responsibilities towards a child in education. In relation to the Judge's treatment of this issue in the Judgment, the IMA particularly notes that:

a. The Judge did refer to the fact that derivative residence rights were codified under Regulation 16 of the EEA Regulations before the end of the transition period. He noted that, while the EEA Regulations were repealed after the end of the transition period, Regulation 16 was "saved" for the purposes of determining eligibility under the Eligibility Regulations (Judgment §§34-37).

b. The Judge extracted Regulation 16(3) and 16(4) in particular at Judgment §37, which are the provisions which codified the rights of residence established in *Ibrahim/Teixeira*. However, these provisions were not discussed further, except insofar as reference was made to the Appellant's submissions at Judgment §44.

14. With respect to the Judge, it is rather unclear why he did not address in any detail the potential basis of eligibility under *Ibrahim/Teixeira*. The Judge's reasoning was compressed but it appears that he took the view that the question of whether the Appellant had "forfeited" her worker status overruled any potential relevance of other bases of residence. The Judge did not discuss the WA, nor were submissions made to him on that basis.

IV. THE GROUNDS OF APPEAL AND THE PARTIES' POSITIONS

15. Before this Court, the Appellant has raised three grounds of appeal:

    a. The first ground is that the Judge was wrong to decide that the Appellant was ineligible for assistance, because she was indeed eligible as the primary carer of a child in education ("**Ground 1**"): see Appeal Skeleton Argument §§11-30.

    b. The second ground is that the Judge should have found that the Respondent acted unlawfully by not considering whether the refusal to grant housing assistance would expose the Appellant and her children to the risk of violation of their fundamental rights under Articles 1, 7 and 24 of the Charter ("**Ground 2(b)**", for the reasons explained below): see Appeal Skeleton Argument §§31(b), 73-96.

    c. The third ground contends that the Respondent's refusal of housing assistance amounted to direct discrimination contrary to Articles 12 and 23 WA: see Appeal Skeleton Argument at §§31(a), 32-72. The Appellant was recently granted permission to amend her grounds of appeal to plead this ground.[4] The IMA's position, for the reasons explained below, is that the applicability of Articles 12 and 23 WA is a logically prior question to the application of the Charter, so for convenience this new ground is labelled "**Ground 2(a)**".

16. On 6 October 2022, the Respondent filed a Respondent's Notice which seeks to uphold the Judgment on two grounds. The first of these concerns an exclusion in Regulation 16(7) of the EEA Regulations, which is discussed in the context of Ground 1 below. Secondly, the Respondent denies the relevance of the Charter and claims that the outcome would have been no different even if the Charter had been considered. The IMA considers the Respondent's arguments in relation to the Charter in the context of Ground 2(b) below (although, consistent with its position as an intervener, it does not make submissions on the factual issues such as whether a different outcome would have eventuated if the Charter had been considered).

17. Finally, the IMA notes that the Secretary of State for Work and Pensions wrote to the Court and the parties on 10 January 2023, recording his agreement with the IMA's position on

[4] Paragraph 1 of the Order of Arnold LJ dated 13 January 2023. The question of whether the Appellant should have permission to argue the new ground (notwithstanding that it was not raised below) has been adjourned to the appeal hearing: see paragraph 2 of the Order.

Ground 1 (§3 of the letter). It appears the Secretary of State also accepts that Ground 2(a) is well-founded (§9 of the letter). However, as the Respondent continues to resist the appeal, ~~the~~ IMA's submissions are set out below on each of the grounds ~~below in order~~ to assist the Court.

V. THE LEGAL FRAMEWORK OF THE WA

18. Before turning to the IMA's submissions on the grounds of appeal, this section briefly introduces the WA and the way that it has been implemented in the UK. A more detailed summary of the WA is contained in the accompanying Annex to this skeleton argument, which seeks to place these provisions in context.

<u>**Part 2 of the WA: Citizens' Rights**</u>

19. The WA is an international treaty concluded between the UK and the EU.

20. While the WA brought an end to freedom of movement, Part 2 of the WA sought to preserve the rights of those citizens who had already exercised rights of free movement before the end of the transition period. It applies in the same way to both EU citizens residing in the UK and UK citizens residing in the EU. As the sixth recital to the WA records:

> "*it is necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, <u>where they have exercised free movement rights before a date set in this agreement, and to ensure that their rights under this Agreement are enforceable and based on the principle of non-discrimination</u>* …"

21. The personal scope of Part 2 is set out in Article 10 WA. In particular, Article 10(1)(a) provides that Part 2 shall apply to (*inter alia*) "*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*". The IMA's understanding is that the Appellant is within the personal scope of the WA because, as at 31 December 2020, she was residing in the UK in accordance with EU law while she retained her worker status under the *St Prix* rule (see Judgment §50). The Appellant then continued to reside in the UK after the end of the transition period.

22. Part 2 then establishes rights of residence which mirror the rights and conditions which existed in EU law for residence in another Member State. In particular, Articles 13(1)-(3) WA confer rights to reside on individuals within the personal scope of Part 2 on the same terms as EU law, in particular under Article 21 TFEU and Articles 6, 7 and 16 of the CRD.

23. The WA also separately and expressly confers rights of residence on primary carers of dependent children of workers / the self-employed who are in education under Articles 24(2) and 25(2). Thus, Article 24(2) WA provides as follows:

> "*Where a direct descendant of a worker who has ceased to reside in the host State is in education in that State, the primary carer for that descendant shall have the right to reside in that State until the descendant reaches the age of majority, and after the age of majority if that descendant continues to need the presence and care of the primary carer in order to pursue and complete his or her education.*"

24. Article 25(2) applies the right in Article 24(2) to "*direct descendants of self-employed workers*". These rights reflect and codify the line of EU case law including *Ibrahim* and *Teixeira*, discussed further below, which provides that the right for children of a worker to attend general education in a host state carries with it a right of residence for that child's primary carer.

25. In summary, therefore, Articles 13, 24 and 25 continue the application of specific EU law limitations and conditions concerning residence rights for those within the personal scope of the WA. The difference between the position before and after the end of the transition period is that the relevant residence rights now arise under the WA rather than EU law.

<u>Interpretation and implementation of the WA</u>

26. Two additional points should be noted by way of introduction to the WA.

27. First, and as noted above, the WA is an international treaty. This means it must be interpreted in accordance with its context and its purpose.[5] The context for the WA includes the backdrop of the UK's prior membership of the EU. Its purpose includes the need to ensure a degree of continuity and consistency for EU citizens within its scope after the UK's withdrawal from the EU. It is also intended (as noted above) to provide reciprocal protection to UK citizens in the EU and EU citizens in the UK.

28. Second, the WA has been implemented in domestic law in the same way that EU law was previously implemented in the UK. Thus, s.7A of the European Union (Withdrawal) Act 2018 ("**EUWA**") provides for the implementation of the WA in terms that are effectively

[5] Under Article 31(1) of the Vienna Convention on the Law of Treaties, any international treaty has to be interpreted in its "*context and in the light of its object and purpose*". See further *R (IMA) v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin) §§64-70.

identical to s.2(1) of the European Communities Act 1972 (now repealed). In that sense, s.7A EUWA creates a new "conduit pipe" for the WA (see *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 §60), with the result that rights, powers, liabilities and obligations which are created by the WA are automatically available in domestic law.

29. Importantly, s.7A(3) EUWA provides that every other provision of domestic legislation, including other provisions of EUWA itself, is subject to the general implementation of the WA into domestic law. In other words, the WA, like EU law before it, has primacy. The consequences of this are explained further below in respect of Ground 2(b).

VI. THE IMA'S SUBMISSIONS ON GROUND 1

30. Under Ground 1, the Appellant appeals against the order of the Court below on the basis that she was eligible for housing assistance as the primary carer of a dependent child in education. The IMA submits that, subject to any disputed factual issues, the Appellant's analysis is correct. When the domestic legislation is properly analysed, in light of the UK's international law obligations under the WA, it is evident that the Appellant is entitled to housing assistance on this basis. In his letter of 10 January 2023, the Secretary of State has confirmed his agreement with the IMA's analysis (§3 of the letter).

Eligibility for housing assistance

31. Housing assistance is only available for those who meet the condition of "eligibility" under s.184(1)(a) of the Housing Act.

32. Section 185(2)-(3) permits the Secretary of State to specify categories of persons to be treated as <u>in</u>eligible. Such categories have been specified by the Secretary of State in Regulations 5 and 6 of the Eligibility Regulations. This includes, among other categories, a limited subset of persons with derivative rights of residence under the EEA Regulations. In particular, Regulation 6(1)(b)(iii) of the Eligibility Regulations provides as follows (emphasis added):

> "*(1) <u>A person</u> who is not subject to immigration control <u>is to be treated as a person from abroad who is ineligible for housing assistance</u> under Part 7 of the 1996 Act if—*
> …
>
> *(b) his only right to reside in the United Kingdom— …*

> *(iii) <u>is a derivative right to reside to which he is entitled under regulation 16(1) of the EEA Regulations</u>, <u>**but only in a case**</u> where the right exists under that regulation because the applicant satisfies the criteria in <u>regulation 16(5) of those Regulations</u>; ...*"

33. The double negative in this drafting necessitates a close reading, but the upshot is that those with a derivative right to reside under Regulation 16(1) of the EEA Regulations <u>will</u> be eligible for housing assistance, unless that right arises only on the basis of Regulation 16(5).

34. Turning to Regulation 16 of the EEA Regulations: before the UK's withdrawal from the EU, the effect of Regulation 16 was to confer various derivative residence rights which previously existed in EU law (see the Judgment at §§33, 37). The EEA Regulations were generally revoked at the end of the transition period and there is no ongoing right of residence under Regulation 16.

35. However, persons with derivative rights, including those described in Regulation 16(3) and (4) of the EEA Regulations, were able to apply for PSS under Appendix EU. In addition, Regulation 16 was saved for the purposes of establishing eligibility for housing assistance under the Eligibility Regulations for those who have been granted PSS: see Regulation 83 and §§1(a)-(b), 2, 3(p) and 4(n) of Schedule 4 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020.

36. Regulation 16 relevantly states as follows (emphasis added):

> *"(1) A person has <u>a derivative right to reside</u> during any period in which the person—*
>
> > *(a) is not an exempt person; and*
> >
> > *(b) satisfies each of the criteria in one or more of <u>paragraphs (2) to (6)</u>. ...*
>
> *(3) The criteria in this paragraph are that—*
>
> > *(a) any of the person's parents ("PP") is <u>an EEA national who resides or has resided</u> in the United Kingdom;*
> >
> > *(b) both the person and PP reside or have resided in the United Kingdom <u>at the same time, and during such a period of residence, PP has been a worker</u> in the United Kingdom; and*
> >
> > *I <u>the person is in education</u> in the United Kingdom.*
>
> *(4) The criteria in this paragraph are that—*

(a) *the person is the primary carer of a person satisfying the criteria in paragraph (3)* *("PPP"); and*

(b) *PPP would be unable to continue to be educated in the United Kingdom if the person left the United Kingdom for an indefinite period. ...*

(5) The criteria in this paragraph are that—

(a) the person is the primary carer of a British citizen ("BC");

(b) BC is residing in the United Kingdom; aI(c) BC would be unable to reside in the united Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period. ...

(7) In this regulation— ...

(b) "worker" does not include a jobseeker or a person treated as a worker under regulation 6(2); …

37. Regulations 16(3) and (4) specifically codify the EU case law in *Ibrahim/Teixeira* establishing certain derivative rights of residence for carers of children in education: see *Sandwell MBC v KK* [2022] UKUT 123 (AAC) §12. Regulation 16(5) concerns *Zambrano* rights. The combined effect, therefore, of Regulation 6(1)(b)(iii) of the Eligibility Regulations and Regulation 16(5) of the EEA Regulations is that those with *Zambrano* rights to reside will not be eligible for housing assistance. It is not contended, in this case, that the Appellant has a *Zambrano* right to reside. Rather, the argument, as explained above, is that she has a right to reside as the primary carer of a child in education, such that she is within the scope of Regulation 16(4). If that is right, then under Regulation 6(1)(b)(iii) of the Eligibility Regulations, she will be eligible for housing assistance.

The Appellant's situation

38. Given its position as an intervener, the IMA does not make detailed submissions on factual matters, which are properly for the parties. *Prima facie*, however, it appears to the IMA that the Appellant is entitled to rely on the rights under Regulation 16(4) to establish eligibility for housing assistance. This is because she was a "worker" at the time that her child, D, began school in [redacted] in the UK. Her worker status at that time arose pursuant to the principles concerning maternity leave in *St Prix* §§33-47. So much was accepted in the Review Decision at §§13, 17, 18 and in the Judgment at §50. The IMA does not understand this issue to have been the subject of the Respondent's Notice. D is therefore a person within the scope of Regulation 16(3); A is the primary carer of D (Article 16(4)(a)) and D

would be unable to continue to be educated in the UK if A left the UK for an indefinite period (Article 16(4)(b)).

39. A point that was raised in the Respondent's Notice is that the Appellant is excluded from the scope of Regulation 16 of the EEA Regulations, because of Regulation 16(7). The IMA understands this to be a reference to the fact that Regulation 16(7)(b) (extracted at §36 above) provides that the meaning of "worker" does not encompass the extended definition of a worker under Regulation 6(2) of the EEA Regulations.

40. Regulation 6(2) of the EEA Regulations lists certain circumstances where a person retains their status as a worker despite, for example, illness:

> "*(1) In these Regulations— ...*
>
> *"qualified person" means a person who is an EEA national and in the United Kingdom as— ...*
>
> *(b) a worker; ...*
>
> *(2) A person who is no longer working must continue to be treated as a worker provided that the person—*
>
> *(a) is temporarily unable to work as the result of an illness or accident; ...*"

41. Again, this is a factual question that is principally for the parties. For the IMA's part, however, it does not appear that the exclusion in Regulation 16(7)(b) applies to the Appellant because her worker status, for the purposes of establishing derivative rights at the time that D began school, arises pursuant to the principles in *St Prix*.

42. By contrast, the extended definition of "worker" in Regulation 6(2) reflects the categories of retained worker in Article 7(3) CRD. As a matter of EU law, worker status for pregnant women exists independently of those categories under the CRD: *St Prix* at §38. It follows that such status is also independent of retained worker status under Regulation 6(2) of the EEA Regulations.

Derivative rights of residence (including rights to housing assistance) were specifically preserved by the WA

43. The IMA makes one further point in relation to Ground 1 which is that, in its submission, the above analysis of the domestic legislation is mandated by, and reflects the proper implementation of, the WA. Put another way, the UK does not have a discretion as to

whether or not to confer entitlement to housing assistance to individuals with *Ibrahim/Teixeira* rights. The IMA develops this submission below.

44. The starting point is that the WA has incorporated the entire corpus of EU law relating to *Ibrahim/Teixeira* derivative rights. Thus:

   a. As explained at §23 above, Article 24(2) WA confers a right to reside on the primary carer of the descendant of a worker who is in education in the UK. This reflects the line of CJEU cases beginning with Case C-413/99 *Baumbast* [2002] 3 CMLR 23 and leading to Case C-310/08 *Harrow LBC v Ibrahim* [2010] 2 CMLR 51 and Case C-480/08 *Teixeira v Lambeth LBC* [2010] 2 CMLR 50.

   b. In addition, Article 24(1) WA confers on EU workers residing in the UK after the end of the transition period (and UK workers residing in the EU after the end of the transition period) "*the rights guaranteed by Article 45 TFEU and the rights granted by Regulation (EU) No. 492/2011*" (the "**Workers Regulation**"). Two particular sub-provisions should be noted in this context.

      i. First, Article 24(1)(g) refers to "*the rights and benefits accorded to national workers in matters of housing*". This is a reference to Article 9 of the Workers Regulation which is an express non-discrimination right in relation to housing for the benefit of workers.

      ii. Second, Article 24(1)(h) refers to the "*right for their children [i.e. workers' children] to be admitted to the general educational, apprenticeship and vocational training courses under the same conditions as the nationals of the host State or the State of work*". This reflects what used to be Article 12 of Regulation 1612/88 and is now Article 10 of the Workers Regulation. It is an express non-discrimination right in relation to access to education for the benefit of the children of workers.

45. Under EU law, "derivative" rights of residence under *Ibrahim/Teixeira* are described as such because they derive from the dependent's rights to education under Article 10 of the Workers Regulation. As the CJEU put it in *Ibrahim* at §30: "*where the children enjoy, under Article 12 of Regulation 1612/88, the right to continue their education in the host Member State ... a refusal to allow those parents to remain in the host Member State during the period of their children's education might deprive those children of a right which has*

been granted to them by the legislature of the European Union". In other words, the reason why a parent is able to derive a right of residence from (what was) Article 12 of Regulation 1612/88 and (is now) Article 10 of the Workers Regulation is that such a right is necessary in order to enable the child to exercise their right to be admitted to the educational system of the host Member State.[6]

46. For the same reason, the CJEU has also held that the derivative right to reside of the carer is not conditional on the carer and child having sufficient resources and comprehensive sickness insurance cover in the host Member State (in contrast to the position under the CRD): *Ibrahim* at §§50-59; *Teixeira* at §§62-70. As the CJEU put it in *Ibrahim* at §52: "*there is no … condition [that the persons concerned must have sufficient resources and comprehensive sickness insurance] in Article 12 of Regulation 1612/68 and … as the Court has already held, that article cannot be interpreted restrictively and must not, under any circumstances, be rendered ineffective*". In other words, as a matter of EU law, an *Ibrahim/Teixeira* right to reside brings with it a right to access social assistance on the same terms as nationals of the host Member State.

47. In circumstances where Article 24(1) WA expressly confers on workers all the rights granted by the Workers Regulation, including (at Article 24(1)(h)) the dependent's right to education in Article 10 of the Workers Regulation, the IMA submits that the same outcome must follow under the WA. That follows from the combined effect of Article 24(1) WA and Article 4 WA, which requires: (i) that "*the provisions of Union law made applicable by this Agreement*" must produce "*the same legal effects as those which they produce within the Union and its Member States*" (Article 4(1)); and (ii) that references to Union law or "*concepts or provisions thereof*" must be "*interpreted in conformity with the relevant case law*" of the CJEU before the end of the transition period (Article 4(4)). That case law includes *Ibrahim* and *Teixeira*.

48. Accordingly, the WA requires that those with *Ibrahim/Teixeira* derivative rights of residence (such as the Appellant) are entitled to housing assistance. This gives effect to

[6] Under EU law, it follows that the child in question will also have an independent right of residence: see *Ibrahim* at §§35-37. That is the situation contemplated by Regulation 16(3) of the EEA Regulations.

"reciprocal protection" of citizens' rights and also ensures a degree of continuity after the end of the transition period for those within the personal scope of the WA.

VII. THE IMA'S SUBMISSIONS ON GROUND 2

49. By her second ground of appeal, the Appellant submits that the Respondent has discriminated against her contrary to the WA (Ground 2(a)) and/or infringed her rights under Articles 1, 7 and 24 of the Charter (Ground 2(b)).

Ground 2(a): Non-discrimination under the WA

50. The Appellant submits that she can take the benefit of the non-discrimination provisions contained in Articles 12 and 23 WA because she is residing on the basis of Article 13. For the reasons above, the IMA's position is that the Appellant is both within the personal scope of the WA and is residing on the basis of the WA. The IMA considers that the Appellant is residing on the basis of Article 24(2) WA (and has been since March 2021, when her child, D, started school).[7] That derivative right of residence brings with it a right of access to social assistance on the same terms as nationals of the host State (i.e. the UK).

51. A wider question arises, however, as to whether that right of residence also brings with it a more general right to non-discrimination or equal treatment. That is the focus of ground 2(a). In the IMA's submission, the fact that the Appellant is residing on the basis of the WA does indeed mean that she can take the benefit of Articles 12 and 23 WA. The Secretary of State also appears to accept this in his letter at §9.The IMA's analysis on this point is as follows:

    a. Article 12 WA is a general non-discrimination provision on the grounds of nationality. It is within Title I of Part 2 which is headed "General Provisions". It states that (emphasis added):

        > "*Within the scope of this Part*, *and* *without prejudice to any special provisions* *contained therein, any discrimination on grounds of nationality* *within the meaning of the first subparagraph of Article 18 TFEU* *shall be prohibited in the host State and the State of work* *in respect of the persons referred to in Article 10 of this Agreement*."

[7] Article 17(1) WA provides that a person's right to rely on Part 2 shall not be affected once they change status, "*for example between student, worker, self-employed person and economically inactive person*".

b. Article 12 expressly incorporates, and makes applicable in the UK, Article 18 TFEU, which was the provision in issue in the *Fratila* litigation,[8] and in Case C-709/20 *CG v Department for Communities in Northern Ireland* [2022] 1 CMLR 26 ("***CG***"), both of which concerned facts arising before the end of the transition period. As the Appellant is within the personal scope of the WA, she is *prima facie* entitled to non-discrimination protection under Article 12.

c. However, it is well-established as a matter of EU law that Article 18 TFEU only applies where no other more specific anti-discrimination provision is applicable: Case C-581/18 *RB v TUV Rheinland LGA Products GmbH* [2020] 1 WLR 4849 at §§30-33 and Case C-181/19 *Jobcenter Krefeld v JD* ECLI:EU:C:2020:794 at §78.

d. In *CG*, this led the CJEU to reframe the question for its consideration (which was put by the national court as one arising under Article 18 TFEU) as a question arising under the more specific rules of Article 24 CRD: *CG* §§66, 72. As the CJEU explained in §65 (emphasis added): "*In accordance with settled case law, the first paragraph of art.18 is intended to apply independently <u>only to situations governed by EU law with respect to which the FEU Treaty does not lay down specific rules on non-discrimination</u>.*"

e. Article 12 WA, like Article 18 TFEU, begins with the words "*without prejudice to any special provisions contained therein*". In the IMA's submission, therefore, applying the EU case law above, it follows that Article 12 must also cede to any more specific non-discrimination provisions contained elsewhere within the WA.

f. One such provision is Article 23 WA. Article 23 WA confers protection on those residing "*on the basis of*" the WA (emphasis added), in the following terms:

> "*1. <u>In accordance with Article 24 of [the CRD]</u>, 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 <u>residing on the basis of this Agreement</u> in the territory of the host State shall enjoy equal treatment with the nationals of that State <u>within the scope of this Part</u>. 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.*

[8] *Fratila v SSWP* [2020] EWCA Civ 1741 and [2021] UKSC 53.

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 family."

g. This provision incorporates and makes applicable, within the UK, Article 24 CRD. However, there is an important difference between Article 23 WA and Article 24 CRD. The latter only applies where the individual is "*residing on the basis of this Directive*" (Article 24(1) CRD). The CRD establishes different categories of residence based on how long the individual had been residing in compliance with various conditions.[9] Meeting those conditions is therefore a prerequisite to relying on the equal treatment protection in Article 24 CRD. This is why, in *CG*, it was held that residing on the basis of domestic law provisions was not sufficient to come within the scope of Article 24 CRD: *CG* §83. In contrast, Article 23 WA refers to individuals who are residing "*on the basis of this Agreement*", which in the IMA's submission would capture individuals who are residing both on the basis of Article 13 WA but also on other bases provided for under the Agreement – e.g. Article 24(2).

h. If, as the IMA submits, the Appellant is residing on the basis of Article 24(2) WA then it follows that she can take the benefit of the right to equal treatment under Article 23 WA.

i. Finally, the IMA submits that the derogation under Article 23(2) WA in respect of social assistance for certain categories of persons would not operate to preclude the Appellant from being able to claim equal treatment in matters of housing. This is because that derogation only applies to those who are residing on the basis of Article 6 CRD or point (b) of Article 14(4) CRD. It therefore does not apply to

[9] Article 6 CRD grants an unqualified right to three months' residence; Article 7 CRD grants rights of residence of between 3 months and 5 years to workers and other categories of persons who would not be a burden on the state; and Article 16 CRD grants permanent residence after 5 years. Those provisions are now reflected in Article 13 WA.

those residing on the basis of Article 24(2) WA for example. This reflects the established position under EU law, that rights in the Workers' Regulation including *Teixeira* rights are not intended to be circumscribed or superseded by Article 24(2) CRD.[10]

Ground 2(b): Rights under the Charter

52. Ground 2(b) concerns the continued relevance of the Charter and relies on the decision of the CJEU in *CG*.

53. The IMA's position as to how the Charter has continued relevance through the WA is explained below, including by reference to *CG*. Before turning to those submissions, two preliminary points should be noted.

    a. First, the IMA's primary position as set out above is that, given the Appellant has *Teixeira/Ibrahim* rights of residence under the WA, she is entitled to the benefit of the non-discrimination protections in the WA. If that is right, it is unnecessary to consider the Charter. For that reason, the submissions below proceed on the assumption that (contrary to the IMA's primary position) the Appellant does not have rights of residence based on the WA.

    b. Second, the issue of Charter protection under the WA arose recently in *AT v Secretary of State for Work and Pensions* [2022] UKUT 330 (AAC) ("***AT***"), in which the IMA was an intervener. *AT* concerned the entitlement of an EU citizen with PSS to Universal Credit after the end of the transition period. In a judgment handed down on 12 December 2022, the Upper Tribunal (Justice Chamberlain, Judge Wright and Judge Ward) found that AT was entitled to Charter protection under the WA, so the decision to refuse Universal Credit had to take into account her fundamental rights. The Secretary of State was granted permission to appeal in *AT* by the Upper Tribunal and filed his Appellant's Notice in this Court on 16 January 2023. The IMA is seeking permission to intervene in the *AT* appeal, which has been listed immediately after the hearing in *A v Barnet*.[11] The IMA's position

[10] See Case C-181/19 *Jobcenter Krefeld v JD* ECLI:EU:C:2020:794 §§56-65. The justification is that concerns about becoming a burden on the state do not, in principle, apply to workers: §§66-71.

[11] CA-2023-000085.

in both appeals is that the Charter has continued application under the WA, as recognised by the Upper Tribunal in *AT*.

The continued relevance of the Charter under the WA

54. The IMA's position is that, although the Charter has not been "saved" generally in domestic law,[12] it has continued application in certain circumstances pursuant to the WA. This was also the conclusion of the Upper Tribunal in *AT*, which found that while there has been a fundamental change in the UK's legal order after the end of the transition period, there is "*no doubt*" that the WA makes applicable certain parts of EU law: see *AT* §§90; see also *R (IMA) v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin) §§130-131. In particular, the WA brings with it the interpretive constraints of the Charter. This is for two reasons.

55. First, under Article 4(3) "*the provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law*". Since "*Union law*" is in turn defined in Article 2(a) as including the Charter, this makes clear that the Charter applies when interpreting the WA and the provisions of Union law to which it refers. As the Upper Tribunal put in *AT* at §105:

> *"Article 4(3), taken with Article 2, requires the parties to act compatibly with any Charter or fundamental rights relevant to the situation, whenever they are "applying" (as well as when "interpreting") the WA. This mirrors the effect of the Charter and fundamental rights in EU law, i.e. constraining Member State action when they are 'implementing Union law'."*

56. For the avoidance of doubt, it is well established that, as a matter of EU law, the Charter is a powerful interpretative tool. Indeed, it is "*a general principle of interpretation [that] an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of*

[12] On the contrary, the effect of s.5(4) EUWA is that the Charter is generally not part of domestic law post the end of the transition period. However, as explained at §§28-29 above, s.5(4) EUWA has to give way to the WA, by virtue of s.7A(3) EUWA.

the Charter".[13] More generally, fundamental rights are themselves general principles of Union law: see Article 6(3) of the Treaty on European Union ("**TEU**").

57. Second, Article 4(1) WA requires the provisions of the WA and the provisions of Union law which it makes applicable to produce "*the same legal effects*" in the UK as they produce within the Union and its Member States. In the IMA's submission, Article 4(1) is an outcome driven rule: it requires that the provisions of the WA produce the same outcome in the UK and the EU Member States. Such consistency in the application of the WA is necessary because of its reciprocal nature. As explained above, it operates as much for the protection of UK citizens residing in the EU, as for EU citizens residing in the UK. This was also confirmed in *AT* at §§108-110.

The decision in CG

58. As explained at §53.a above, the specific question that arises under Ground 2(b) is whether a person who is not residing on the basis of the WA (but is within its personal scope) can nonetheless derive some residual form of protection from the Charter.

59. In the IMA's submission, that is the case following the CJEU's judgment in *CG*. In that case, CG had been granted PSS and applied for Universal Credit before the end of the transition period. Under the Universal Credit Regulations (Northern Ireland) 2016, individuals residing purely on the basis of PSS were not eligible to claim Universal Credit. CG argued that excluding EU citizens with PSS from Universal Credit amounted to discrimination on the grounds of nationality contrary to Article 18 TFEU: §37.

60. The CJEU decided that:

    a. In principle, CG could rely on Article 18 TFEU as a Union citizen who had made use of her rights to move and reside in the UK and whose situation therefore fell

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[13] Case C-358/16 *UBS Europe and Others* [2019] Bus LR 61 at §53. See also Case C-402/05 P and C-415/05 *P Kadi and Al Barakaat International Foundation v Council and Commission* [2009] 1 AC 1225 at §285 (emphasis added): "*the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty*". See further Case C-579/12 RX-II *Commission v Strack* ECLI:EU:C:2013:570 at §40.

within the scope *ratione materiae* of EU law: §64. However, there was a more specific expression of the principle of non-discrimination contained in Article 24 CRD which had to be applied: §§65-66.

b. The CJEU therefore reformulated the question as being one under Article 24 CRD: §72. The difficulty this posed for CG was that she was not residing "on the basis" of the CRD within the meaning of Article 24(1) CRD. In particular, she did not meet the ongoing conditions of the CRD because she had less than 5 years' residence and insufficient resources for herself and her family: §§75-76.

c. The CJEU found that the UK had established a more favourable regime for residence (i.e. PSS under Appendix EU) and it could specify the consequences of that under national law: §§77, 83.

d. Nonetheless, the CJEU found that because CG had previously exercised her freedom of movement under Article 21 TFEU she fell within the scope of EU law: §84. That meant the Charter applied because "*according to settled case-law, the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law*" (§86).

The application of CG in the present case

61. *CG* is a decision of the CJEU within the ambit of Article 4(5) WA, and is an authority to which this Court must have due regard.[14] The question for the Court is whether and how *CG* "translates" to the post-transition world under the WA. This was precisely the question before the Upper Tribunal in *AT* as well: see *AT* §95.

62. The IMA submits that the reasoning in *CG* does translate across under the WA. The critical point in *CG* was that because CG had previously exercised her freedom of movement under Article 21 TFEU she fell within the scope of EU law. The way the Court put the point in *CG* at §84 was as follows: "*a Union citizen who, like CG, has moved to another Member State <u>has made use of his or her fundamental freedom to move and to reside</u> within the territory of the Member States, conferred by Article 21(1) TFEU, <u>with the result that his or</u>*

[14] The IMA notes that *CG* was referred to the CJEU before the end of the transition period, so it is also within the scope of Article 86 and 89 WA. But given that the judgment does not engage with, or relate to, the terms of the WA, the IMA does not consider that this assists when one is enquiring as to how the reasoning in *CG* applies in this case.

her situation falls within the scope of EU law, including where his or her right of residence derives from national law". The Charter was therefore engaged even though CG had purely domestic rights of residence and did not satisfy the conditions for residence within the CRD.

63. While that reasoning does not apply directly under the WA, the same consequences follow under the WA because of the way that Article 13 WA refers to and incorporates Article 21 TFEU: see *AT* at §106.

64. On the present appeal, even assuming that the Appellant does not have residence rights under the WA, she nonetheless comes within the personal scope of the WA pursuant to Article 10(1)(a). Like CG, she exercised her rights of free movement and residence under Article 21 TFEU before the end of the transition period.[15] A narrower form of the Article 21 TFEU right of residence is therefore conferred on the Appellant under Article 13 WA, which continues to generate legal effects and in particular brings with it the residual protection of the Charter. This is because, as noted above, Article 4(3) provides that provisions of the WA which "*refer*" to Union law or "*concepts or provisions thereof*" should be "*interpreted and applied*" in accordance with the methods and general principles of Union law: *AT* §§100-106.

65. Accordingly, while in *CG* the Charter applied in a freestanding way, the same reasoning can be applied by analogy under the WA by reference to Articles 4, 10 and 13. This does not require the Appellant to actually satisfy the conditions of residence in the WA: *AT* §102.

VIII. CONCLUSION

66. For all the above reasons, the IMA submits that the appeal should be allowed since the Appellant is entitled to housing assistance.

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[15] In addition, unlike CG, the Appellant has exercised Article 45 TFEU freedom of movement for workers. The analysis in *CG* and *AT* should apply *mutatis mutandis* to workers under Article 45 TFEU as it does for non-workers under Article 21 TFEU.

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1 February 2023