IN THE SUPREME COURT OF THE UNITED KINGDOM **UKSC 2021/0008**
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)
Neutral citation below: [2020] EWCA Civ 1741

BETWEEN:

THE SECRETARY OF STATE FOR WORK AND PENSIONS
Defendant/ Appellant

- and -

THE QUEEN ON THE APPLICATION OF
(1) GEANINA MIRELA FRATILA
(2) RAZVAN TANASE
Claimants/ Respondents

- and -

(1) THE AIRE CENTRE
(2) THE INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS
Interveners

SUBMISSIONS OF THE INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS

I. INTRODUCTION AND SUMMARY

1. These are the written submissions of the Intervener, the Independent Monitoring Authority for the Citizens' Rights Agreements (the "**IMA**"), made in accordance with the order of 14 April 2021 granting the IMA permission to intervene in this appeal. Unless otherwise indicated, the IMA adopts the defined terms used in the Statement of Facts and Issues agreed between the parties (the "**SFI**").

The IMA and its interest in these proceedings

2. The IMA is a new statutory body created to protect the rights of EU and EEA EFTA citizens (Iceland, Liechtenstein and Norway) in the UK and Gibraltar, as guaranteed by Part Two 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 concluded on 19 October 2019 (the "**Withdrawal Agreement**" or "**WA**")

and Part Two of the Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland concluded on 20 December 2018 (the "**EEA / EFTA Separation Agreement**" or "**SA**"). The IMA's creation was required by Article 159(1) of the WA, which provides that within the UK, "*the implementation and application of Part Two [of the WA] shall be monitored by an independent authority*" with powers "*equivalent to those of the European Commission*" to, for example, conduct inquiries, receive complaints and bring legal action.[1]

3. As a matter of domestic law, the IMA has two principal statutory functions, which are set out in Schedule 2 to the European Union (Withdrawal Agreement) Act 2020 ("**EUWAA 2020**").

    a. First, it is required (pursuant to §22 of Schedule 2 EUWAA 2020) to "*monitor the implementation and application in the United Kingdom of Part 2 of the withdrawal agreement and Part 2 of the EEA EFTA separation agreement*. This includes keeping under review "*the adequacy and effectiveness of (a) the legislative framework which implements or otherwise deals with matters arising out of, or related to, Part 2, and (b) the exercise by relevant public authorities of functions in relation to Part 2*".

    b. Second, the IMA "*must promote the adequate and effective implementation and application of Part 2 of the withdrawal agreement…*" (§23 of Schedule 2).

4. Paragraph 24 of Schedule 2 EUWWA 2020 further provides that "*[i]n exercising its functions, the IMA must have regard to the importance of addressing general or systemic failings in the implementation or application of Part 2*". The IMA also has a specific statutory power to intervene in legal proceedings, if it considers it appropriate to do so in order to promote the adequate and effective implementation or application of Part 2 (see §30 of Schedule 2).

[1] Equivalent provision is made by Article 64(1) of the SA.

5. In this sense, the IMA's role is to ensure the rights conferred by Part 2 of the WA and SA can be fully enjoyed by EU and EEA EFTA citizens, and their family members, in the UK and Gibraltar.

6. This is the backdrop to the IMA's intervention in this appeal. As the Court will be aware, this appeal concerns EU law as it applied in the UK prior to the end of the Transition Period, when the WA and SA came into force. Nonetheless, it raises a number of issues of relevance to the implementation and application of the WA and SA, following the end of the Transition Period, including: (1) the proper approach, under the WA, to outstanding preliminary references and the nature of the duty of good faith that is provided for in Article 5 WA; and (2) the content of the prohibition on non-discrimination provided for in Articles 12 WA and 11 SA, which derives from Article 18 TFEU and Article 4 of the EEA Agreement respectively. The IMA is grateful to the Court for granting it permission to intervene on these points.

The structure of these submissions

7. With that introduction in mind, the remainder of these submissions are structured as follows:

   a. First, in **section II** below, the IMA explains why, in its respectful submission, the Court is required by the WA and SA to await the outcome in Case C-709/20 *The Department for Communities in Northern Ireland* before reaching a decision in this appeal.

   b. Second, in **section III** below, the IMA sets out some brief submissions on the second ground of appeal in this case – namely, the nature of the discrimination at issue.

   c. Third, in **section IV** below, the IMA sets out its submissions on the unorthodox request by the Appellant in relation to relief.

II. REFERENCE IN C-709/20 *The Department for Communities in Northern Ireland*

8. As the Court knows, a preliminary reference was made to the CJEU by a Northern Irish Social Security Tribunal on 21 December 2020 (the "***DfC***" case). *DfC* concerns the compatibility or otherwise with Article 18 TFEU of legislative provisions contained in

the Universal Credit Regulations (Northern Ireland) 2016 which are materially similar to – and have the same effect as – Reg 9(3)(c)(i) of the UC Regs.

9. The questions referred for determination by the CJEU are set out in full at SFI §30. In summary, the CJEU has been asked to determine whether the Northern Irish regulations are "*discriminatory (either directly and indirectly) pursuant to Article 18*" TFEU and, if they are indirectly discriminatory, whether they can be justified. In other words, the second ground of appeal in this case (by which the Appellant contends that the Court of Appeal was wrong to hold there was a breach of Article 18 TFEU) is squarely in issue in *DfC*. The first ground of appeal (by which the Appellant argues that the Respondents are not entitled to rely on Article 18 TFEU at all because they have no EU law right of residence) is also in issue because the claimant / applicant in *DfC* also had, at the material time, no EU law right to remain in the UK although she was granted pre-settled status in June 2020 and therefore had a domestic law right to remain. The defendant / respondent in *DfC* has argued that "*pre-settled status does not provide in itself a basis for entitlement to benefits and services under UK law*": see p. 4 of the Order for Reference. In other words, the argument advanced by the defendant / respondent in *DfC* as to the scope of Article 18 TFEU is identical to that of the Appellant in these proceedings (compare, in the present proceedings, §14 of the Appellant's written case).

10. In the circumstances, the first question which arises for this Court is what the implications are of the reference made in *DfC* for the present appeal. In the IMA's respectful submission, it is plain that this Court must await the outcome of the CJEU's decision in *DfC* before determining this appeal. That follows from the terms of the Withdrawal Agreement itself and the implementing domestic legislation. Taking them in turn:

    a. Article 86(2) WA provides that the CJEU "*shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period*". Significantly, Article 89(1) then provides that "*judgments and orders of the Court of Justice of the European Union … handed down after the end of the transition period in proceedings referred to in Article 86 … shall have binding force in their entirety*

on and in the United Kingdom".[2] Article 4(1) of the WA further provides that the "*provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States*".

b. Section 7A of the European Union (Withdrawal) Act 2018 ("***EUWA***") provides for the general implementation of the Withdrawal Agreement. Its effect is that "*all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and all such remedies and procedures from time to time provided for by or under the withdrawal agreement, as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom*" are to be "*recognised and available in domestic law, and enforced, allowed and followed accordingly*" (see ss.7A(1) and (2)). That language is in substantially the same terms as section 2 of the European Communities Act 1972.[3] In the IMA's submission, it creates a new "*conduit pipe*" by which the Withdrawal Agreement is given full effect in domestic law (see *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at §§65 and 80) including – Articles 86(2) and 89(1) WA.

11. The consequence of this is that rulings of the CJEU rendered in the context of the Article 267 TFEU preliminary reference procedure, which were sought before 31 December 2020 but handed down after that date, will continue to produce in the UK the same effects as they had before the UK's departure from the EU.

12. The further question which arises is what the position is where there is an anticipated CJEU ruling which will – once handed down – "*have binding force ... on and in the United Kingdom*" as a result of Article 89(1) WA. In the IMA's submission, the answer is clear: the Court is compelled to avoid doing anything which might result in a decision inconsistent with the CJEU's. That is because:

[2] There is no equivalent provision made in the SA, which reflects the very different approach to dispute resolution taken in the EEA Agreement of which preliminary references have never been a feature.

[3] Section 7B EUWA makes equivalent provision in respect of the SA.

a. Article 5 WA imposes an obligation of good faith on both the EU and the UK in terms which are substantially identical to the duty of sincere cooperation imposed by Article 4(3) TEU.[4] Specifically, Article 5 WA provides:

> "*The Union and the United Kingdom shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this agreement.*
>
> *They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.*
>
> *This Article is without prejudice to the application of Union law pursuant to this Agreement, in particular the principle of sincere cooperation*."[5]

b. Article 4(1) WA makes clear that "*the provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States*".

c. It is well-established that the duty of sincere cooperation imposes an overriding obligation on national courts to "*avoid any decision running counter to that of the Commission or the community courts*": see *National Grid Electricity Transmission plc v ABB Ltd* [2009] EWHC 1326 at §24 (approved in *Ryanair Holdings Plc v Competition Commission* [2012] EWCA Civ 1632 at §§5-6).

13. Consequently, in the IMA's submission, this Court must refrain from reaching a decision on this appeal, where there is a risk that its decision will be inconsistent with the CJEU's anticipated decision in *DfC*.

14. This conclusion cannot be escaped because there is a residual possibility that the CJEU's judgment will not resolve all of the issues in the appeal (see §21 of the

[4] The first two paragraphs of Article 5 WA are replicated in Article 5 SA.

[5] Article 4(3) TEU is, in all material respects, identical. It provides: "*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.*"

Appellant's written case). As explained above, both grounds of appeal which are advanced by the Appellant in this case are live issues before the CJEU in *DfC*. The CJEU's ruling can therefore be expected to provide an authoritative statement on the two questions of interpretation of Article 18 TFEU which arise in both *DfC* and this appeal: namely whether (i) Article 18 TFEU applies in circumstances where the claimants' only right of residence in the host State arises by virtue of domestic law, and (ii) Article 18 TFEU treats provisions such as those at issue in the 2019 Regulations as directly or indirectly discriminatory.

15. In the IMA's submission, therefore, whilst it is possible that the CJEU's decision in *DfC* may not resolve all issues in this appeal, it is certain to have a direct and significant bearing on the outcome. Indeed, it may well be wholly dispositive of the issues raised in this claim. In such circumstances, the IMA respectfully submits that this Court ought not to reach a decision on the issues raised in this appeal until such time as the CJEU has reached a final decision in *DfC*.[6]

16. The IMA notes that this is a matter of wider significance: according to the CJEU's website, Curia, there are currently 18 applications for preliminary references made by UK Courts prior to 31 December 2020 pending before the CJEU. Furthermore, the Court's approach to the question whether it must await the judgment of the CJEU before determining this appeal will also be determinative of the analogous duty on the English courts pending proceedings commenced by the European Commission under Article 87 WA in the period to December 2024, given that Article 89(1) WA also applies to Article 87 WA.

III. APPEAL GROUND 2: THE NATURE OF THE DISCRIMINATION IN ISSUE

17. As the IMA pointed out in its application for permission to intervene in this appeal, the prohibition on discrimination that is provided for by Article 18 TFEU also finds expression in Article 12 WA.[7] Specifically, Article 12 WA provides that:

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[6] As this Court said in *Micula & Ors v Romania* [2020] UKSC 5 at §56: "*It is only where there is* '*scarcely any risk' of a conflict between decisions of domestic and EU institutions that national authorities should proceed*" (citing Case C-234/89 *Delimitis v Henninger Brau AG* at §50 and *Emerald Supplies Ltd v British Airways plc (Nos 1 & 2)* (CA) [2016] Bus LR 145 at §70).

[7] The prohibition on non-discrimination on grounds of nationality also appears in Article 11 SA and per Article 4(3) SA "*the provisions of Parts Two and Three of [the SA] shall, in their implementation and application, be*

> "*Within the scope of this Part, and without prejudice to any specific provisions contained therein, any discrimination on grounds of nationality within the meaning 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*".

18. The effect of this is to import the same prohibition on discrimination on grounds of nationality that is found in Article 18 TFEU into Part Two of the WA. That importation is a wholesale one because (as noted above) Article 4(1) WA makes clear that "*the provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States*". Article 4(3) WA further provides that 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*".

19. Accordingly, the outcome in relation to the second ground of appeal (which goes to whether the discrimination in issue is direct or indirect) will, in the IMA's submission, have significant consequences for the implementation and application of Part 2 of the Withdrawal Agreement going forwards. It can certainly not be characterised as an issue of purely historical significance to the UK or one which arises only in relation to the law as it stood pre-31 December 2020.

20. It is for that reason that the IMA seeks, with the Court's leave, to make some brief submissions on the Appellant's second ground of appeal. The IMA's position, in a nutshell, is that the discrimination to which Reg 9(3)(c)(i) of the UC Regulations gives rise is direct in nature (or, to use the language sometimes employed by the CJEU, "overt") and therefore incapable of justification. The IMA makes two central points.

21. **First**, the IMA agrees with the Respondent (and the majority in the Court of Appeal) that this conclusion follows inexorably from the line of cases that includes Case C-85/96 *Martinez Sala* [1998] ECR I-2069 and Case C-456/02 *Trojani* [2004] 3 CMLR 38. The parties have both made detailed submissions on this line of jurisprudence so in brief:

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interpreted with the provisions of Parts Two and Three of the EU-UK Withdrawal Agreement, in so far as they are identical in substance".

a. In *Martinez Sala* the claimant was "*not in possession of a document which nationals of that same State are not required to have*" (§63). It was this which had caused the Member State to "*delay or refuse to grant to that a claimant a benefit that is provided to all persons lawfully resident in the territory of that State*" (also §63) and, in the CJEU's judgment, such "*unequal treatment ... is discrimination directly based on the appellant's nationality*" (§64).

b. Likewise, in *Trojani*, the CJEU concluded that national legislation which "*does not grant the social assistance benefit to citizens of the European Union, non-nationals of the Member State, who reside there lawfully even though they satisfy the conditions required of nationals of that Member State, constitutes discrimination on grounds of nationality prohibited by Art. 12 EC*" (at §44).

22. In the IMA's submission, it becomes evident that it is these cases which govern the instant situation rather than the *Bressol* line of case law on which the Appellant relies, once one identifies the precise provision that is giving rise to the differential treatment in issue. That this is a critical aspect of the enquiry is underlined by the *Bressol* case itself. As the CJEU said in Case C-73/08 *Bressol* [2010] 3 CMLR 20 "*the national legislation at issue in the main proceedings creates a difference in treatment between resident and non-resident students*" (§44). It was the fact that the national provision distinguished between residents and non-residents that led the CJEU in *Bressol* to analyse the issue as one of indirect discrimination on grounds of nationality: the question that had to be answered, in that case, was whether the requirement <u>for residency</u> was "*intrinsically liable to affect nationals of other Member States more than nationals of the host State*" (*Bressol*, §41).

23. Here, however, the difference in treatment which is provided for by Reg 9(3)(c)(i) of the UC Regs is not between residents and non-residents. It is between those who have a right to reside in domestic law on the basis of having been granted pre-settled status and those who have a right to reside on some other basis. Since pre-settled status is only available to those with EU / EEA EFTA nationality (or those who are the family members of such nationals – addressed further below), there is no neutral criterion which requires an assessment of whether it is "*intrinsically liable to affect nationals of other Member States more than nationals of the host State*". The criterion used is, to all intents and purposes, nationality. Consequently, the discrimination is direct.

24. **Second**, the Appellant's suggestion that the discrimination must be indirect because many non-EU citizens who are family members of EU nationals hold pre-settled status (see the Appellant's written case at §44.2) ignores that direct discrimination can arise by association.

25. The doctrine of discrimination by association has long been recognised by the CJEU: see Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27 in which the CJEU held that the parent of a disabled child could suffer direct discrimination contrary to Council Directive 2000/78/EC where he or she was treated less favourably by their employer on the basis of the disability or his or her child (see §§50-56 in particular).

26. Likewise, in Case C-83/14 *CHEZ* the CJEU held that discrimination on the grounds of nationality could arise where a person "*who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds*" (§56). The applicant in that case ran a grocer's shop in a district mainly inhabited by persons of Roma origin. Her electricity provider installed meters for all the consumers of that district at a height of between six and seven metres, whereas in the other districts the meters it installed were placed at a height of 1.70 metres, usually in the consumer's property or on the wall around the property. The CJEU concluded that such a practice, which disadvantaged the applicant insofar as she could not monitor her electricity usage as easily as she could have done had her meter been placed at an accessible height, would constitute direct discrimination if it "*proves to have been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned*" (§91).

27. Thus, it is not a requirement for direct discrimination that the person who suffers the unfavourable treatment must also possess the protected characteristic which gives rise to that unfavourable treatment. This belies the Appellant's submissions that direct discrimination cannot arise on the facts of this case because in some limited cases non-EU nationals may also obtain PSS. Furthermore, in the IMA's submission, this argument from the Appellant fails to engage with the critical point that UK nationals (i.e. nationals of the host State) are not eligible for PSS.

28. For all these reasons, the IMA contends that the discrimination in this case is direct and incapable of justification.

IV. RELIEF

29. The final issue on which the IMA seeks to address the Court is relief. The Appellant, in her written case, makes the unorthodox submission that even if the appeal is unsuccessful, the Court should set aside the quashing order which was agreed by the parties below and made by the Court of Appeal.

30. The Appellant's submission goes against the grain of well-established principle that a quashing order will be the normal consequence of a finding of unlawfulness. As Lord Hoffman said in *R (Edwards) v Environment Agency* [2008] Env LR 34 whilst the Court of course has a discretion as to remedy in judicial review cases that "*discretion must be exercised judicially and in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it*" (at §63).[8]

31. The Appellant in this case seeks to persuade the Court to depart from this orthodoxy on two bases. First, it is said that since there are a range of individuals who hold (or are entitled to hold) PSS who are not EU or EEA EFTA citizens, the quashing order goes too far in its personal scope (see the Appellant's written case at §55). It should be confined, according to the Appellant, to those individuals who are EU (or, presumably – though this is not made clear – EEA EFTA) citizens. Second, the Appellant contends that since the individual decisions in this case to refuse UC were taken prior to the end of the Transition Period, the quashing order goes further than is necessary or appropriate in terms of its temporal effects. Any relief, it is said, "*should be confined to the period prior to the end of the post-Brexit Transition Period*" (see the Appellant's written case at §59).

32. In the IMA's submission, each of these points assumes in the Appellant's favour issues of law which are controversial.

[8] See to similar effect the comments of Keene LJ in *R (C) v Secretary of State for Justice* [2009] QB 657 at §85 (a finding that delegated legislation is ultra vires "*should normally lead to the delegated legislation being quashed, and only in unusual circumstances would one expect to find a court exercising its discretion in such a way as to allow such legislation to remain in force*") as well as the other authority cited at §§106-109 of the Respondents' Written Case.

33. The first point, about the personal scope of the quashing order made by the Court of Appeal, ignores the existence of discrimination by association which arises in this case for non-EU family members of EU or EEA EFTA citizens. The IMA has explained its position on this at §§25-28 above.

34. The second point, about the temporal scope of the quashing order, is a matter of significant concern to the IMA. The position in law since the end of the Transition Period and, in particular, the compatibility of the UC Regulations with the WA is not an issue which arises in these proceedings. Nor is it an issue that has been ventilated by the parties. To the contrary, and as the Appellant points at §56 of her Written Case, the arguments were expressly put – before the Courts below – on the basis of the state of EU law as it applied in the UK during the Transition Period.

35. Furthermore, in the IMA's submission, this is not a point which can be assumed in the Appellant's favour. The IMA has already explained above how Article 12 WA imports, wholesale, Article 18 TFEU into Part Two of the WA. Further, it cannot be assumed that persons who have been granted PSS do not fall within the scope of the WA. Nor can it be assumed that persons in the position of Ms Fratila (who were once encomically active but who have ceased to be economically active) fall outside the scope of the WA. These are live questions which will no doubt at some stage receive judicial consideration. In such circumstances, if this Court were to find that the UC Regulations breach Article 18 TFEU (which is the hypothesis on which this submission as to relief proceeds), it is (at the very least) possible that the same conclusion may obtain under Article 12 WA. In other words, the lawfulness of the UC Regs post-31 December 2020 is a live issue and not one on which this Court should be drawn in this appeal.

36. For all these reasons, the IMA respectfully agrees with the Respondent that the proper course (in the event this appeal fails) is for this Court to leave undisturbed the relief ordered by the Court of Appeal.

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