Appeal No. CA-2023-001834

IN THE COURT OF APPEAL

CIVIL DIVISION

ON APPEAL FROM:
[2023] EWHC 1615 (Admin)
Mr Justice Lane

BETWEEN:

THE KING

on the application of

FATIMA ALI

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

-and-

THE INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS

Prospective Intervener

SKELETON ARGUMENT ON BEHALF OF THE IMA

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

A Introduction and summary

1. This is the skeleton argument of the Independent Monitoring Authority for the Citizens' Rights Agreements (the "**IMA**") in respect of an appeal from the order of Mr Justice Lane following his decision in *R (Ali) v SSHD* [2023] EWHC 1615 (Admin) (the "**Judgment**"). The Judgment dismissed a judicial review challenge brought by the Appellant ("**Ms Ali**")

against a decision by the Respondent (the "**Home Office**") to refuse to grant her Pre-Settled Status ("**PSS**") under the EU Settlement Scheme ("**EUSS**").

2. The IMA has sought to intervene in this appeal pursuant to its statutory duties to monitor and promote the adequate and effective implementation and application of Part 2 within the UK of the EU-UK Withdrawal Agreement ("**WA**") which concerns Citizens' Rights.[1] The appeal raises a short but finely-balanced point of interpretation of the WA[2]: whether a third country national who came to the United Kingdom as a dependent child under 21 of an EU citizen but who, prior to the end of the transition period, took up employment and was no longer financially dependent on the EU citizen, continues to have any right to reside under the WA.

3. For the reasons set out below, the IMA's position on the appeal is as follows:

   (1) The Judgment rightly recognised that the dependent family member must reside in accordance with EU law at the end of the transition period (in this case under the EU Citizens' Rights Directive or "**CRD**") to come within the personal scope of Article 10 WA. The Judgment also rightly recognises the effect of Article 17(2) WA which is to relieve any ongoing dependency requirement after the end of the transition period for all those dependent family members who fall within the scope of Article 10 WA.

   (2) However, the antecedent question of EU law (which is relevant to personal scope under Article 10 WA), as to the right of residence of a child of an EU citizen who has taken up employment and ceased to be dependent, is more complex. The IMA's position is that the Appellant's case on this question should be preferred. While the CJEU has not squarely addressed the issue in this appeal, its judgments in Case C-423/12 *Reyes* [2014] QB 1140 ("***Reyes***") and Case C-488/21 *GV v Chief Appeals Officer* ECLI:EU:C:2023:1013 ("***GV***") are entirely consistent with the Appellant's argument. In addition, the IMA considers that, as a matter of principle and public policy, an enduring financial dependency requirement on the part of adult children

---

[1] By way of background, the UK was required to establish an independent authority, with powers equivalent to the European Commission, for the purposes of Part 2 of the WA under Article 159(1) of the WA. The IMA was duly established and given powers of intervening in legal proceedings in s. 15 and Sch. 2 to the European Union (Withdrawal Agreement) Act 2020 ("**EUWAA**").

[2] These submissions focus on the WA since the Appellant is an EU national. In general, however, identical provision is made in the EEA EFTA Separation Agreement to the WA (see Article 22 of that agreement) and the points made in these submissions are therefore of similar application in both cases.

is difficult to justify. Such a requirement would lock third country adult children into a state of financial dependency even when they are able and willing to work and have an apparent right to do so, and would be likely to inhibit the free movement of workers with children approaching adulthood.

(3) The IMA recognises that the point is finely-balanced and that the Court may consider that a preliminary reference to the CJEU under Article 158 WA is necessary.

4. This skeleton argument provides a brief summary of the Judgment in Section B and explains the key question raised by the ground of appeal in Section C. The legal principles are summarised in Section D and the IMA's submissions are set out in Section E.

B The Judgment

5. The factual background has been explained by the principal parties and is not repeated here. In summary, the Judgment dismissed Ms Ali's claim for the following key reasons:

(1) First, as regards the *Reyes* decision, Lane J distinguished it on the basis that it was not answering the question before him: Judgment §§59-60. In *Reyes*, the question was whether the third country national family member was entitled to acquire residence rights as a dependant even though they could, in principle, have worked. The CJEU did not address the specific question of whether a dependant would retain their residence rights if they took up work and thus ceased to be a dependant: Judgment §§28-29, §§58-59.

(2) Second, as regards Article 17(2) WA, he found that a family member needed to be a dependant at the end of the transition period under Article 10(1)(e)(i): Judgment §§86-87. If that preliminary condition was satisfied, then Article 17(2) WA operated as a *sui generis* relieving provision so that if the person lost dependency after the end of the transition period they would retain their residence rights: Judgment §§90-92.

6. The consequence of the Judgment is that a person such as Ms Ali, who is a third country national and adult child of an EU citizen, would need to demonstrate that she was financially dependant at the end of the transition period to come within the scope of Part 2 WA. In that case, she could benefit from the relieving provision under Article 17(2) WA if she ever ceased to be a dependant after the end of the transition period. But since her status of financial dependency was lost before the end of the transition period (as the IMA understands to be agreed by the parties and reflected in the Judgment), she was not entitled

to PSS under the domestic legal framework (the EUSS). Nor would she have residence rights under EU law (pursuant to the CRD) or under the WA.

C The Appeal

7. There is a single ground of appeal:[3]

> The Judge erred in his construction of the [WA and CRD]. Contrary to the Judge's view, the child of a Union citizen, who is aged over 21, does not lose the right to reside on account of exercising the right to work under Article 23 [CRD] and thereby ceasing to be financially dependent on the Union citizen.

8. As the Appellant points out, if there were (as the Judgment found) an enduring dependency requirement, then the right to work under Article 23 CRD (and Article 22 WA would be rendered ineffective. That is because, whenever a dependent family member exercised their right to work, they would be at risk of losing their status as a dependant; they would thus be locked into a status of dependency despite the conferral on them of a right to work. In his Judgment, Lane J rationalised the tension between dependency and the right to work by explaining that Article 23 CRD enables a dependent family member "*to take up employment or self-employment, only to the extent that doing so does not result in their no longer being dependent on that citizen*" (Judgment §65).

9. The appeal thus raises a narrow point of law which is not answered directly in the case law: as a matter of the EU law that brings a person within the scope of the WA, if a dependent family member takes up work, as is their express right, would they *ipso facto* lose their residence rights? The IMA notes that the Home Office argues that the right to work is a "red herring" because Ms Ali ceased being a dependent as a result of estrangement from her mother rather than because she exercised a right to work: RSkel/§§2.2-2.3, 8. However, whatever the facts of the present case, the right to work under Article 23 CRD is plainly relevant to the interpretation of the CRD and WA. That was indeed how the Judge below approached the Judgment, by reaching a view on this point as a matter of construction (Judgment §§64ff).

[3] Core Bundle/p. 16.

D Legal principles

D.1 Introduction to the WA

10. The WA is an international treaty between the UK and the member states of the EU. The principles in the Vienna Convention on the Law of Treaties govern its interpretation.[4] 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 preserving rights accrued by citizens within its scope after the UK's withdrawal from the EU.

11. The WA expressly adopts and refers to a number of EU law provisions and concepts. In particular, Article 4, which is the overarching interpretative provision, sets out certain rules for construing the WA:

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

    (2) Article 4(3) requires that Union law or provisions or concepts thereof "*shall be interpreted and applied in accordance with the methods and general principles of Union law*". Article 2(a) WA defines 'Union law' to include a number of specific EU treaties, general principles, and the Charter.

    (3) Article 4(4) provides that Union law or provisions or concepts thereof shall be "*interpreted in conformity with*" relevant CJEU case law from before the end of the transition period.

    (4) Article 4(5) provides that UK courts "*shall have due regard*" to relevant CJEU case law from after the end of the transition period.

12. The WA has been implemented in domestic law in a similar manner to how EU law was previously implemented in the UK. Thus, s.7A of the European Union (Withdrawal) Act 2018 ("**EUWA**") creates a new "conduit pipe" for the WA so that rights, powers, liabilities

---

[4] This has been affirmed in a number of recent cases such as *R (IMA) v SSHD* [2022] EWHC 3274 (Admin) §§64-70; *Celik v SSHD* [2023] EWCA Civ 921 §53; *R (Ali) v SSHD* [2023] EWHC 1615 (Admin) §82; *SSWP v AT* [2022] UKUT 330 (AAC) §36; *SSWP v AT* [2023] EWCA Civ 1307 §80.

[5] Under Article 31(1) of the Vienna Convention, any international treaty has to be interpreted in its "*context and in the light of its object and purpose*".

and obligations which are created by the WA are automatically available in domestic law. 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. The WA therefore has supremacy over the domestic legal framework.

D.2 Part 2 WA and the CRD

13. Part 2 of the WA sets out the provisions on Citizens' Rights. While the WA brought an end to freedom of movement, it nonetheless incorporated key aspects of the EU legal framework for free movement and residence for EU citizens already residing in the UK (and on a reciprocal basis UK citizens already 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, 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 …" **.**

14. The way in which this was achieved was to largely replicate the EU legal framework for citizens' rights (i.e. the CRD) in the terms of Part 2 of the WA. This particular appeal raises issues under Articles 9(a)(i), 10(1)(e), 13(3), 17(2) and 23 WA:

(1) Article 9(a)(i) WA defines "*family member*" by adopting Article 2(2) CRD:

> (a) "family members" means the following persons, irrespective of their nationality, who fall within the personal scope provided for in Article 10 of this Agreement:
>
> (i) family members of Union citizens or family members of United Kingdom nationals as defined in point (2) of Article 2 of [the CRD][6]

(2) Article 10(1)(e) WA sets out the personal scope of Part 2 WA as follows:

> 1. … 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; …
>
> (e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:

[6] As noted above, Article 2(2) CRD covers direct descendants of EU citizens if they are: (i) under the age of 21; or (ii) above the age of 21 and dependent on the EU citizen.

> (i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter;

Article 10 WA requires a person (including family members) to reside in accordance with EU law at the end of the transition period in order to come within the *ratione personae* of the WA. The purpose of this provision is to take a "snapshot" at the end of the transition period (11pm on 31 December 2020) of all those residing "in accordance with Union law". Thus for the Appellant (or any descendant of a Union citizen who was over the age of 21 at the end of the transition period) to take the benefit of any of the substantive rights in the WA, she needs to demonstrate that she was a dependent family member at the end of the transition period at 31 December 2020.

(3) Article 13(3) WA confers rights of residence on third country family members, directly adopting and implementing the different rights of residence for family members set out in the CRD:

> (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 Directive 2004/38/EC, subject to the limitations and conditions set out in those provisions.

This provision transposes a number of residence rights in the CRD. For instance, Article 7(2) CRD is the right of residence given *inter alia* to family members of workers for up to five years. Article 14 CRD provides that family members will have the rights of residence specified in the CRD "*as long as they meet the conditions set out therein*". Article 16(2) CRD provides that family members can obtain permanent residence rights after five years of continuous lawful residence.

(4) Article 17(2) WA provides that if a dependent family member (who was dependent prior to the end of the transition period) ceases being dependent on the principal EU citizen, they can still retain rights under the WA. There is no express analogue to this provision in EU legislation.

> The rights provided for in this Title for the family members who are dependants of Union citizens or United Kingdom nationals before the end of the transition period, **shall be maintained** even after they cease to be dependants.

(5) Article 22 WA provides family members with a right to work equivalent to that in Article 23 CRD:

> In accordance with Article 23 of Directive 2004/38/EC, irrespective of nationality, the family members of a Union citizen or United Kingdom national who have the right of residence or the right of permanent residence in the host State or the State of work shall be entitled to take up employment or self-employment there.

As with the equivalent provision in Article 23 CRD, this provision appears to require the family member to meet the definition of "family member" as well as have a "right of residence".

D.3 Dependent family members under EU law

15. Under EU law, residence rights are granted to core family members (Article 2(2) CRD) and in more limited circumstances to extended family members (Article 3(2)(a) CRD).[7] The core group, also described as the nuclear family,[8] consists of: (1) the spouse or partner (Article 2(2)(a)-(b) CRD), (2) direct descendants under the age of 21, or over the age of 21 if they are dependants (Article 2(2)(c) CRD), and (3) direct ascendants if they are dependants (Article 2(2)(d) CRD). In this context, "direct descendants" means children and grandchildren, and "direct ascendants" means parents and grandparents.[9]

16. Only certain categories, including children over the age of 21, need to meet the criteria of dependency to fall within the definition of a family member. Children under the age of 21 are presumed to be dependent,[10] whereas that status must be proven after the age of 21. This is significant for third country children who would not have any independent residence rights as students or workers under EU law.

17. The test for dependency under EU law has tended to focus on material and financial dependency as a question of fact.[11] Dependency is thus assessed by reference to whether, having regard to the family member's financial and social conditions, they require "material

---

7 Guild, Peers & Tomkin (2019), *The EU citizenship directive: a commentary*, p. 18.

8 Case C- 423/12 *Reyes* [2014] QB 1140 AG33-AG34.

9 Guild, Peers & Tomkin (2019), *The EU citizenship directive: a commentary*, p. 18.

10 "[T]he EU legislature takes the view that the children are, in any case, presumed to be dependent until the age of 21 years, as is apparent, in particular, from Article 2(2)(c) of Directive 2004/38": Cases C-401/15 to C-403/15 *Depesme v Ministre de l'Enseignement supérieur et de la Recherche* (CLI:EU:C:2016:955) §62.

11 "[T]he status of 'dependent' member of the family of a holder of a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence": Case C-200/02 *Chen* [2004] ECR I-9925 §43.

support" to meet their essential needs.[12] The evidentiary threshold is generally permissive,[13] although this is usually because the case law has focused on the question of dependence at the time of the application to join the primary citizen.[14] In that context, the CJEU has clearly concluded that it is not necessary to examine whether the family member *could* in fact take up work when permitting them to join the primary EU citizen in the host member state.[15]

18. There is however no case law directly deciding whether a third country family member can only retain residence rights under the CRD if they remain dependent, or whether they are at risk of losing those rights if they take up the right to work and thereby become financially independent. The recent judgment in *GV* establishes that, if a third country family member receives benefits from the state (and therefore is not in fact dependent on financial support from a family member who is an EU citizen worker) that does not preclude them from being treated as a dependant.[16] The Advocate General in that case also contemplated that financial dependency may not be exhaustive of the concept of dependency, noting the possibility of physical or emotional dependency.[17] But it remains the case that there is no CJEU decision specifically addressing how dependency interacts with the right to work, which is the issue on this appeal.

E The IMA's submissions

E.1 Articles 10, 17(2) and 22 WA

19. The IMA submits that the Judgment was correct to conclude that Part 2 WA applied to those dependent family members who met the definition in Article 10(1)(e)(i) WA, i.e. those who resided in the UK in accordance with Union law at the end of the transition period (Judgment §83). Consistent with this reasoning, a person who is within personal scope by virtue of Article 10 at the end of the transition period can change status, or cease to be a dependent

---

[12] See Commission Guidance (COM (2009) 313) §2.1.4, drawing on Case C-1/05 *Jia* [2007] ECR I-1 §37. The same point is made in the more recent Commission Guidance (C/2023/1392) §2.2.2.4.

[13] See e.g. Case C-1/05 *Jia* [2007] ECR I-1 §§40-43; Case C-423/12 *Reyes* [2014] QB 1140 §§26-27.

[14] See e.g. Case C- 83/11 *Rahman* (ECLI:EU:C:2012:519) §§32-34.

[15] Guild, Peers & Tomkin (2019), *The EU citizenship directive: a commentary*, pp. 45-46, citing Case C-423/12 *Reyes* [2014] QB 1140 which is discussed further below.

[16] Case C-488/21 *GV v Chief Appeals Officer* §§52-53, 69. This is the CJEU judgment handed down after the Judgment under appeal; thus Lane J did not have the benefit of this decision (though he considered in detail the Advocate General's Opinion at Judgment §§72-77).

[17] Case C-488/21 *GV v Chief Appeals Officer*, AG Opinion §§52-65.

family member, after the end of the transition period but, pursuant to Article 17 WA, will maintain their residence rights.

20. In particular, Lane J considered that references in these provisions to residing "before the end" of the transition period were references to residing "at the end" of the transition period, including because that is the point at which EU law was replaced by the WA: Judgment §§84-86. This conforms with the IMA's understanding that Part 2 WA seeks to maintain continuity and consistency in application; it therefore puts EU law on a new footing under the WA immediately after the end of the transition period, as specifically provided for by that Agreement. It follows that Article 17(2) WA only assists persons who are within the personal scope of the WA on the basis that they were residing at the end of the transition period in accordance with EU law. The same is true of Article 22 WA.

E.2 The underlying EU law issue

21. The key question on the appeal is therefore an antecedent question of EU law: having initially entered the UK as a dependent of an EU citizen, did the Appellant continue to reside in the UK in accordance with Union law at the end of the transition period despite no longer being a dependent, having taken up employment? If the Judgment was incorrect on its analysis of EU law, and there was no requirement of enduring dependency, then a different result would follow in that she would come within the personal scope of Article 10 WA, and have residence and related rights under Articles 13, 17 and 22 WA, so that to deny her PSS was in breach of those rights.

The Home Office's argument

22. The Judgment concludes that dependants can exercise the right to work to some extent, but always subject to the requirement that they are dependent on the Union citizen. This suggests that the EU legislation intended family members to be able to work but only to a limited extent. They could, for example, work part-time (RSkel/§43). On this view, the right to work is afforded to those who have residence rights in the first place, i.e. those who comply with the conditions in the CRD. At the core of this reasoning is the presumption that the secondary right to work cannot resurrect the primary right of residence.

23. The Judge's conclusion finds some support in the EU case law[18] and provisions of the CRD[19] insofar as they provide that residence rights are subject to ongoing compliance with conditions. Thus, for instance, a third country spouse can lose their residence rights in the event of a divorce; or a worker can lose their residence rights by ceasing work.[20] On this view, to the extent that third country family members are deprived of residence rights as a result of these requirements, they must then pursue residence rights in the UK under the ordinary immigration rules rather than the special provisions of EU law or WA law. These points are all relied upon by the Home Office: RSkel/§§26-30, 34-36.

Why the Appellant's approach should be preferred

24. The fundamental difficulty with the conclusion reached in the Judgment is that it potentially renders the right to work under Article 22 WA (which incorporates Article 23 CRD) ineffective because it locks the dependent family member into a state of dependency. The consequence is that the family member has in reality a very limited and uncertain right to work. Such an outcome is difficult to justify as a matter of public policy, insofar as the family member would not be seeking to rely on state benefits and would not become a burden on the state, and is not supported by any specific EU authority.

25. As far as the Home Office argues that dependent children should not be placed in a "privileged" or "unique" position as compared with spouses[21] (RSkel/§§28, 36)**,** the IMA considers that this is not necessarily a helpful analogy. Spouses do not need to demonstrate dependency so would not be impeded in exercising a right to work even if that enabled them to become financially independent. The issue is also potentially more nuanced where children are concerned. It may be justified to treat children rather differently from other categories of family members because they may have migrated with their families to the host state under the age of 21 without exercising much individual choice. They may then form connections there and have limited connections in their home state. They may well take up the right to work in the host state before or after the age of 21. They might also be in situations where they work for certain periods but then fall out of work and become

[18] E.g. Cases C-424/10 and C-425/10 *Ziolkowski* (ECLI:EU:C:2011:866) §§39-47.

[19] E.g. Recital 10, Recital 17, Article 14(2) and Article 16(2) CRD.

[20] Exceptions to these provisions are spelled out in the CRD and the WA, e.g. Article 12-13 CRD and Article 13 WA. Thus Recital 15 CRD states "Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership..."

[21] See also Judgment §§67-69.

dependent on their families again. Equally, they may fall in and out of close relationships with their parents or grandparents.

26. Furthermore, if the Judgment is correct, and there is an enduring dependency requirement for children over the age of 21, they would face considerable uncertainty from time to time as to whether they had a genuine and unimpeded right to work and (more importantly) whether their residence rights were jeopardised by exercising a purported right to work. The context here is that, at least while working, those individuals would not be a burden on the host state and would (in most cases) be enabling the continued exercise of free movement rights by the primary Union citizen.[22] Therefore, at least for certain categories of dependent family members, the Judgment appears to mandate an unattractive outcome.

27. As far as the authorities are concerned, it must be acknowledged that there is no direct case law answering the narrow question before the Court. However, in the IMA's view, the Appellant's argument should be preferred on this issue for the following reasons:

    (1) In *Reyes*, Ms Reyes (an adult child and national of Philippines) was seeking to reside in Germany on the basis that she was dependent on her mother (a German citizen). The Fourth Chamber of the CJEU found (emphasis added):

> 31. It follows that … any prospects of obtaining work in the host member state which would enable [the adult child] no longer to be dependent on that citizen once he has the right of residence are not such as to affect the interpretation of the condition of being a "dependant" referred to in article 2(2)(c) of Directive 2004/38.
>
> 32. Furthermore, as the European Commission has rightly pointed out, the opposite solution would, in practice, prohibit that descendant from looking for employment in the host member state and would accordingly infringe article 23 of that Directive, which expressly authorises such a descendant, if he has the right of residence, to take up employment or self-employment: see, by analogy, [Case 316/85 *Lebon* §20].[23]

---

[22] See by way of context Recital 5 CRD ("The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality") and Recital 10 CRD ("Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions").

[23] *Lebon* concerned a slightly different issue under the earlier Workers Regulation, which was whether the adult child could receive benefits. The CJEU stated at §20 "It must be pointed out, in the first place, that a claim for the grant of the minimax submitted by a member of a migrant worker's family who is dependent on the worker cannot affect the claimant's status as a dependent member of the worker's family. To decide otherwise would amount to accepting that the grant of the minimex could result in the claimant forfeiting the status of dependent member of the family and consequently justify either the withdrawal of the minimex itself or even the loss of the right of residence. Such a solution would in practice preclude a dependent member of a worker's family from claiming the minimex and would, for that reason, undermine the equal treatment accorded to the migrant worker. The status of dependent member of a worker's family should therefore be considered independently of the grant of the minimex."

As Lane J noted, these passages do not directly answer the question on the appeal, which is about the retention of the right of residence rather than its acquisition upon entry (Judgment §§59, 74). The passages above are each also qualified by the requirement that the individual has a "right of residence" in the first place. In addition, while the Advocate General's Opinion was clearer on this point, it carries less weight (Judgment §60). The passing reference to the right to work is also not decisive in the CJEU's analysis (Judgment §62). Nonetheless, despite those caveats, the IMA considers that here the CJEU is clearly acknowledging that a dependent family member should not necessarily be locked into a state of dependency. *Reyes* is binding authority on issues relevant to the interpretation of the WA: Art 4(4).

(2) *Reyes* is interpreted by the Commission as standing for the proposition that there is no enduring dependency requirement where the adult child takes up the right to work. Recent Commission Guidance on free movement cites *Reyes* as authority for the proposition in the first paragraph below:[24]

> Family members whose residence right is derived from their being dependent on a mobile EU citizen do not cease to be covered by the Directive when they cease to be dependent, for example by making use of their rights under Article 23 to take up employment or self-employment in the host Member State.
>
> By the same token, descendants whose residence right is derived from their being under 21 years of age remain covered by Directive 2004/38/EC when they reach the age of 21.

Again, this guidance suggests that a dependent family worker should be able to work and retain residence rights. Indeed, the Commission gives the following example immediately following the above guidance:

> Example:
>
> M. is a non-EU citizen. He had been residing and studying in a non-EU country since September 2018. His non-EU mother and his EU father reside in Member State A. They began to make monthly payments to their son to cover his study and subsistence costs in January 2020. M. moved to Member State A in October 2020, when he was 22 years of age, and applied for a residence card as a dependent direct descendant of an EU citizen (Article 2(2)(c)). He obtained his residence card in December 2020. In February 2021, he started to work in Member State A and moved away from his parents by renting a flat in Member State A. M.'s right of residence cannot be called into question by the fact that after his move to Member State A, M. is no longer dependent on his parents, due to his taking up work in accordance with Article 23 of the Directive.

[24] Commission Guidance (C/2023/1392) §2.2.2.4.

(3) Academic commentary also supports this interpretation of *Reyes*:[25]

> … there is nothing in the Directive which expressly addresses the loss of dependence of the family member concerned, either because that person takes up employment or self-employment or because that person becomes dependent upon someone else. If the family member were an EU citizen, such a change in status should not matter in most (if not all) cases, because the EU citizen would have the right to take up economic activities, or to become dependent upon someone else, in their own name. This point has been clarified by the judgment in *Reyes*, in which the Court expressly accepts that the dependent family member could cease to be dependent by exercising the right to seek work pursuant to Article 23. However, the question of becoming dependent upon someone else is still open.

And to similar effect:[26]

> This question [in *Reyes*] exposes the innate circularity of grounding residence rights in a requirement of dependency as a *precondition*: must the relevant family member remain in the relationship of dependency to sustain their right to reside, or is dependency more like a gateway condition: necessary to enter the host State but capable of being displaced by opportunities that might then arise there? In *Reyes*, the Court opted for the latter approach. Since the factual situation of material dependency must be shown to exist in the country from which the family member comes and at the time when they seek to join the Union citizen on whom they depend,
>
> > [i] t follows that . . . any prospects of obtaining work in the host Member State which would enable, if necessary, a direct descendant, who is 21 years old or older, of a Union citizen no longer to be dependent on that citizen once he has the right of residence are not such as to affect the interpretation of the condition of being a 'dependant' referred to in Article 2(2)(c). [Quoting from *Reyes* §31]
>
> Thus, where the initially required relationship of dependency ceases, the right of residence that was built upon it is not erased in consequence. That finding was underpinned with reference to Article 23 of the Directive, which confirms the entitlement of family members of a Union citizen to become economically active in a Member State in which they have a right to reside.

(4) The Commission Guidance on Part 2 WA is to the same effect:[27]

> 2.5.2. Article 17(2): A child who is no longer dependent
>
> As under Union law on free movement of EU citizens, family members of beneficiaries of the Agreement whose residence status is derived from their being dependent on the right holder do not cease to be covered by the Agreement when they cease to be dependent, for example by making use of their rights under Article 22 to take up employment or self-employment in the host State.
>
> Article 17(2) provides that such family members maintain the same rights even when they cease to be dependent, irrespective of the mode of loss of dependency.

[25] Guild, Peers & Tomkin (2019), *The EU citizenship directive: a commentary*, p. 45.

[26] Shuibne (2023), *EU Citizenship* Law, pp. 177-178.

[27] Commission Guidance (C/2020/2939).

> By the same token, family members of beneficiaries of the Agreement whose residence status is derived from their being under 21 years of age remain covered by the Agreement when they become 21 years.

It would appear that this language – which mirrors the Commission Guidance on EU law cited above – derives from *Reyes.*

(5) Consistent with the Commission Guidance above, academic commentary on Part 2 WA states:[28]

> Article 17(2) ensures that family members who were able to become Beneficiaries on account of their dependence on the Right holder do not lose their status when they grow up or cease to be dependent on the Right holder. This is in particular relevant for younger Beneficiaries who derive their residence status from another Right holder.

The footnote to this passage relies on *Reyes*, and states that:

> The EU Free Movement Directive does not lock family members into dependency. They can start a gainful activity without endangering their right of residence, see Case C-423/12, *Reyes*, ECLI:EU:C:2014:16, para. 31.

(6) In *GV v Chief Appeals Officer*, it was clearly recognised that a person must retain the status of dependency to retain residence rights under the CRD,[29] but it was also stated that the receipt of benefits would not undermine those residence rights (in that case relying on equal treatment rights in favour of the EU citizen worker).[30] The Court therefore found that, despite the fact that a person must retain the state of dependency, they did not lose their right to reside if in fact they ceased to be dependent on the EU citizen family member because they were in receipt of benefits. It is difficult to see why a working family member would be in a worse position as regards the enduring dependency requirement. Indeed, one might expect a third country worker to be in a better position because: (i) they do not become a burden on the state; and (ii) they are exercising an express right to work under Article 23 CRD. This Court must have due regard to the CJEU's decision in *GV* (Art 4(5) WA)

---

[28] Meduna et al, *The EU-UK Withdrawal Agreement* (2021) §3.55 and fn 53.

[29] Case C-488/21 *GV v Chief Appeals Officer* §§57-60.

[30] Case C-488/21 *GV v Chief Appeals Officer* §69 ("It follows that the status of 'dependent' relative in the ascending line within the meaning of Article 2(2)(d) of Directive 2004/38 cannot be affected by the grant of a social assistance benefit in the host Member State. To decide otherwise would amount to accepting that the grant of such a benefit could result in the person concerned forfeiting the status of dependent family member and, consequently, justify the withdrawal of that benefit or even the loss of his or her right of residence. Such a solution would, in practice, preclude that dependent family member from claiming that benefit and would, for that reason, undermine the equal treatment accorded to the migrant worker (see, to that effect, judgment of 18 June 1987, *Lebon*, 316/85, EU:C:1987:302, paragraph 20)").

and the WA must be interpreted so as to produce the same legal effects in the UK as in the Union and its member states (Art 4(1)).

(7) In addition, as the Advocate General recognised in her Opinion in *GV* at §§54, 57-58, financial dependency is not necessarily exhaustive of the concept of dependency under EU law. The CJEU did not express a view on this issue: *GV* §33, 37. But the IMA would agree with the Advocate General's view that, in principle, dependence on family members does not need to be limited to financial dependence. This may be of particular relevance to young adults taking their first steps into employment; it would be possible for those persons to take up the right to work without bringing an end to their emotional, physical or practical dependency on their parents or grandparents.

(8) Finally, the IMA notes Lane J's own observation at Judgment §90 (reiterated in RSkel §32) that when EU law applied in the UK "*a person who ceased to be dependent could later resume their dependency and so resume lawful EU residence*". This is potentially rather revealing because it suggests that under EU law it was possible for a dependent family member to fall into and out of work and therefore in and out of dependency. This reflects the reality that – given the exigencies of work and family life – an adult child could work and become independent temporarily but then become reliant again on their family. It would seem surprising if under EU law it was intended that these highly fact-sensitive changes in status would have decisive consequences on a lawful right of residence.

28. Accordingly, the IMA's view is that the better approach is to treat a dependent adult child as retaining their status of dependency even if they take up the right to work. The developing trend in EU case law and commentary noted above suggests that the CJEU would be likely take the view that the right to work under Article 23 CRD should not be impeded in this way. The solution adopted by the Judgment, in recognising an attenuated right to work, or in practice a right to work part-time (RSkel/§43), is unsatisfactory because it leads to considerably uncertainty and in practice resigns the adult child to a state of dependency despite their ability and willingness to work.

F Conclusion

29. Based on the analysis above, the provisions of the WA (including Article 17(2) or Article 22) cannot preserve the residence rights of someone in the position of Ms Ali unless she was complying with EU law at the end of the transition period and therefore within personal scope under Article 10 WA. In other words, the correct approach would be that Ms Ali needs to satisfy the conditions of personal scope under Article 10 WA as a precondition to relying on WA rights, including Article 17 WA or Article 22 WA.

30. But if Ms Ali is correct that there is no enduring financial dependency requirement under EU law, then the fact that she was supporting herself through employment would not preclude her from residing in the UK in accordance with EU law at the end of the transition period, and she would not be excluded her from the personal scope of the WA under Article 10 WA for that reason. On that basis, she may be entitled to the protection of Article 17(2) WA and Article 22 WA on an ongoing basis, and she is correct to argue that the implementation of the EUSS fails to recognise this. The IMA considers that the Appellant has the better side of the arguments on the narrow question before the Court. In the alternative, if this case is referred to the CJEU, the IMA submits that it would be likely to find that the Appellant is correct.

MARIE DEMETRIOU KC
Brick Court Chambers

GALINA WARD KC
Landmark Chambers

AARUSHI SAHORE
Brick Court Chambers

10 June 2024