Note on the Withdrawal Agreement:

Personal Scope (Article 10) and Equal Treatment (Article 23)

As relied upon in submissions in the case of C v Oldham (Case J05MA951) - a section 204 Housing Act 1996 appeal heard by the Manchester County Court on 8-9 February 2024. As at the date of writing, judgment is awaited.

the3million intervened in a section 204 Housing Act 1996 appeal (C v Oldham) against a refusal of homelessness support which was heard in the Manchester County Court on 8-9 February 2024. the3million was represented by Tom Royston (Garden Court North) and Charles Bishop (Landmark Chambers), instructed by Aoife O'Reilly at Public Law Project. We are grateful for their expert insight and advice, and succinct legal submissions.

This note sets out the legal position and arguments relied on by the3million in that appeal, and is taken largely from the skeleton argument drafted by Counsel in that case, who were assisted by the EU Rights and Brexit Hub. It is intended to set out the view of the3million and may be of interest to advisers who are assisting individuals with pre-settled status who do not have a qualifying right to reside for the purpose of accessing many state supports, including homelessness support and welfare benefits such as Universal Credit.

In C v Oldham, there were two main arguments run by our legal team, which were set out in the following way:

a. *A Union citizen is within the personal scope of the Withdrawal Agreement (WA) if they came to the UK before 11pm on 31 December 2020 ('IP Completion Day') and remained here thereafter[1];*

b. *a Union citizen who has been granted pre-settled status under Appendix EU is 'residing on the basis of' the WA, and is consequently entitled to equal treatment under Art.23 WA.*

The first submission was relevant in that appeal because there was thought to be a dispute about whether the Appellant is within the personal scope of the WA.

The second submission was relevant because if the Appellant enjoys an equal treatment right under the WA, she cannot lawfully be excluded from eligibility for housing assistance which a UK national would enjoy, regardless of the terms of domestic regulations: s.7A European Union (Withdrawal) Act 2018.

the3million would be interested to hear about cases where these arguments are being made at all stages, whether at the initial application stage, on review/mandatory reconsideration and in any appeals.

[1] Unless expressly stated otherwise, all references to 'Union citizens' should be read as applying also to family members of Union citizens within the scope of the WA, and to relevant EEA, EFTA and Swiss nationals.

(a). A Union citizen is within the personal scope of the Withdrawal Agreement if they came to the UK before 11pm on 31 December 2020 ('IP Completion Day') and remained here thereafter

1. Art.10(1) places within the personal scope of the WA 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'.

2. Every Union citizen entering the UK before 31 December 2020 was entitled to rely on Art.21(1) of the Treaty on the Functioning of the European Union ('TFEU'),[2] and will have exercised a three month right of initial residence under Art.6 of Directive 2004/38/EC. That initial period of residence under Art.6 uncontroversially involved the exercise of a 'right to reside in the United Kingdom in accordance with Union law'..

3. the3million considers that any form of residence following that initial period of Art 6. residence is sufficient because:

   (i) it is the ordinary textual meaning;

   (ii) it is consistent with relevant case law about the meaning of 'residence', when used without qualifying adjective, in EU law;

   (iii) it avoids absurd policy outcomes.

(i) Ordinary meaning

4. In *AT* the Court summarised the correct approach to the interpretation of the WA at §80. Of particular relevance are the following principles:

   a. the ordinary meaning must be given to its terms in their context and in the light of their object and purpose taking into account only relevant and admissible secondary sources;

   b. the WA must be construed in good faith; and

   c. a court will take into account any special rules of construction and implementation the parties have agreed upon and included in the instrument in question.

5. What the parties to the WA meant falls to be considered against the relevant background, which is part of the 'context' mentioned in Art.31 of the Vienna Convention on the Law of Treaties. The relevant background here is EU law: *R (IMA)*, §132.

6. The court must examine the scope and effect of the WA to determine whether, applying normal principles of international law, provisions of EU law have been given effect as international law which have then become domestic law: *AT*, §80.

[2] C-709/20 *CG v Department for Communities in Northern Ireland* [2022] 1 CMLR 26, §58.

7. Where the WA refers to Union law or to concepts or provisions thereof, it must be interpreted and applied in accordance with EU legal concepts as those would apply in an EU court: *R (IMA)*, §131 (applying Art.4(3) WA); *AT*, §85.

8. Applying those principles, the ordinary meaning of Art.10 is consistent with the position set out in this note. Art.10(1)(a) has two requirements.

9. First, it requires the individual to have 'exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period'. There are four notable features of this formulation:

    a. it is in the past tense; it does not express that someone must be exercising, or even have been exercising, their right to reside;

    b. it refers to the 'right to reside' rather than to someone merely residing;

    c. it specifies that the right to reside must be exercised in accordance with Union law; and

    d. the exercise of that right to reside must have been before the end of the transition period; but it does not state that the right to reside must continue to be being exercised at the end of the transition period.

10. Second, it requires the individual to 'continue to reside thereafter'. The latter formulation is not qualified by any of the above features. There are no references to Union law or any exercise of any right. The thing that needs to have 'continued' is only residence simpliciter. That continuation is to take place *after* the ending of the transition period and thus by definition cannot be in accordance with Union law. There is no requirement for anything else to have 'continued' prior to the ending of the transition period.

11. The scheme plainly thus envisages a difference in the two requirements, otherwise the same language would be used. the3million's interpretation ensures meaning is given to the additional words used in the first formulation.

12. Any contrary interpretation would require words to be read in: for example reading Art.10 as if it had stated '… and continue to reside there thereafter *on an equivalent basis*'. The omission of any such words must not be ignored. Alternatively, it could say 'was exercising their right to reside'.

13. Further, the reading in of words would be particularly problematic here, because there would be a variety of possible formulations. It was possible to reside in the UK in accordance with Union law until IP Completion Day, but plainly it is not possible to exercise a 'right to reside in the United Kingdom in accordance with Union law' *after* the end of the transition period. After the end of the transition period, it may have been possible to specify that the requirement could be met by:

    a. any form of residence;

    b. any form of lawful residence (on which see below);

    c. a form of residence specifically authorised or contemplated by the WA; or

d. an alternative provision.

14. Art.10(3) identifies a further possible formulation, by introducing the concept of post-transition period 'residence...being facilitated by the host State in accordance with its national legislation thereafter'.

15. The wording of Art.10, indicating a continuity of residence immediately before and after the end of the transition period, points in favour of interpreting 'residence' as meaning any form of residence, *both before and after* IP Completion Day.

16. Any contrary suggestion that the purpose of Part 2 of the WA is to take a snapshot of the cohort of EU citizens (and their relevant family members) who, as at the end of the transition period, are residing in accordance with EU law in the UK, is a 'bootstraps' argument – ie. it assumes the correctness of what needs to be proven . The purpose of Art.10 is to identify the cohort of individuals to whom Part 2 of the WA applies, but that purpose does not identify who was 'residing' within the meaning of Art.10.

17. The Court of Appeal decision in *Celik v SSHD* [2023] EWCA Civ 921 does not help either: the court was in that case addressing the exclusion of people who purport to exercise rights only after IP Completion Day; it was not intending to say anything at all about the necessary character of residence before that point: *Celik*, §54.

18. Art.11 does not support an alternative analysis. The fact that continuity of residence will not be affected by certain absences makes no difference to the proper approach to interpretation. Residence *simpliciter*, when considered as a question of fact rather than a question of law, also requires a consideration of its continuity: see the wider case law on ordinary residence, etc.

19. Note that although these provisions relate to Union citizens, the same logic applies to family members by virtue of Art.10(1)(e)(i), in which materially similar language appears[3].

(ii) Consistency with analogous case law

20. The case of *Secretary of State for Work and Pensions v Gubeladze* [2019] UKSC 31, [2019] AC 885 addresses an analogous provision in Art.17 of 2004/38. It is significant because *Gubeladze* addressed an argument that an EU law reference to 'residence' should be read to include only certain forms of residence.

21. Art.17 of 2004/38 provides a derogation from the Art.16 right to permanent residence enjoyed after five continuous years of 'legal' residence. Legal residence means, in that context, residence in accordance with the Directive: *C-424/10 and C-425/10 Ziolkowski v Land Berlin* [2014] All ER (EC) 314, §46. But the three year period of residence sufficient under Art.17 for retired workers does not refer to 'legal residence', just residence:

> *Article 17 - Exemptions for persons no longer working in the host Member State and their family members*

[3] The position of extended family members is not considered by this note

1. By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:

(a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months ***and have resided there continuously for more than three years****…*

22. The UKSC held unanimously that the Art.17(1)(a) requirement to have 'resided there continuously for more than three years' did not require any special form or right of residence, and in particular did not require worker status: *Gubeladze*, §§76-92. That is despite the Art.17 2004/38 EC reference being not merely to 'Union citizens', but to 'workers or self-employed persons'.

(iii) Avoidance of absurd policy consequences

23. If the scope of Art.10 were more limited:

    a. it would lead to undesirably complex arguments about whether a person is or was in scope at the particular time;

    b. it would lead to people believing they have rights under the WA when they ultimately do not, inconsistently with the purpose and function of Art.18 WA; and

    c. it would create an invisible disjuncture, permanently but secretly stripping hundreds of thousands of people of WA rights, leading to disputes over decades over whether each and every EUSS beneficiary fell outside of the scope of the WA at some point in the past, and denuding the entire system of certainty.

24. As to the first point, it would require that whenever a State party to the WA needs to determine whether someone holds WA rights, that they would have to consider:

    a. whether that individual at some point exercised their right to reside in accordance with Union law before the end of the transition period;

    b. whether that individual was continuing so to exercise those rights at the moment of the ending of the transition period;

    c. whether that individual continued to reside there (on *any* basis, it would seem); and

    d. whether that individual qualifies procedurally and substantively for the particular right which is engaged (eg. residence, rights as a worker, recognition of professional qualifications, social security co-ordination, etc.)

25. The introduction of the second requirement would change dramatically the nature of the exercise performed. To introduce such a requirement would be arbitrary and bizarre. It would also have made it impossible to rely on *any* grants of PSS made before 31 December 2020, because they would all need to be re-examined as of that date.

26. As to the second point, the grant of PSS could not be relied on by individuals as any comfort that they fell within the personal scope of Art.10, because, as set out above, there was no process in granting PSS to determine whether or not someone fell within Art.10.

27. As to the third point, there is no mechanism within the WA for being put back into scope if (or once) not in scope. A contrary analysis could place perhaps hundreds of thousands of people outwith the scope of the WA, but without them being aware of this (unless they happen to apply for social assistance while still holding PSS). As a result, no one with EUSS status who has not made such a claim would be able to know whether the UK considers them to have WA rights, and neither would the UK government consider itself to have made a decision as to scope in any such case.

28. This means that there would be a cohort, who even on attaining settled status, would, by this logic, do so purely on the basis of domestic law and not by virtue of the WA.

29. In future, there may be increasing regulatory divergence between the UK and the EU. The UK government may choose to make changes to the rights of those reliant on domestic immigration law (and their family members and future children) which would not affect those covered by the WA.

30. Should the position set out above prevail, many Union citizens would not be able to invoke WA rights without an extensive retrospective investigation. Evidential hurdles would make it impractical for many to show that they were and continued to be in scope of the WA.

31. This is precisely the problem posed by a declaratory scheme that the UK government said it would avoid by its adoption of a constitutive scheme. Asked by the Home Affairs Committee why the Home Office was instituting an application scheme at all for EU nationals in the UK rather than declaring rights through primary law, the then Home Secretary's response was: 'In a word, Windrush'. He added:

> … the Windrush generation have always, quite correctly, had their rights. The problem was by doing it only through a declaratory system it meant that there was no documentation to prove that, which many years later became a problem….[4]

(b) A Union citizen or family member with PSS is 'residing on the basis of' the WA, and is consequently entitled to equal treatment under Art.23 WA

UK chose a constitutive not declaratory scheme, which allowed greater immigration control

32. The UK had choices under Art.18 WA. One would have been to continue the approach to immigration control which had operated during its membership of the EU. Unlike most foreign nationals, a Union citizen could lawfully stay in the UK without their right to reside, or the basis for it, being verified by government (indeed, without even needing to report their *presence* to government). If at any stage they wished to claim some entitlement which was contingent on establishing an EU law right of residence (eg. social security, or housing assistance), the question of whether they had any such right would have been confronted and verified only at the point of application for that specific entitlement.

[4] House of Commons Home Affairs Committee, *Oral evidence: The work of the Home Secretary*, (HC 434, Wednesday 27 February 2019), Q759 and Q764.

Nothing in the WA would have prevented continuation of that approach. Fourteen EU countries are recorded by the Commission as having adopted declaratory schemes under the WA.[5]

33. The UK did not choose that approach, no doubt for a range of policy reasons. The UK instead chose to require EU citizens '*to apply for a new residence status*'. See *R (IMA)*, §7. An EU national is required to have leave to enter or remain, and if they have not applied for and/or been granted it – whether under Appendix EU or otherwise – they have no right to be in the UK, regardless of their activities and whether they would have engaged EU law rights. They are unlawfully present, liable to prosecution and removal, and prohibited from working.[6] That marks a radical change from the pre-Brexit position, under which EU citizens did not need permission to enter the UK and were not in breach of any law by remaining, unless and until positively directed to leave: *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657, [2008] 1 WLR 254, §§8-15 and §25.

<u>Adoption of constitutive scheme has various legal consequences pursuant to WA obligations</u>

34. The UK having made the above policy decision about post-Brexit immigration control, certain legal consequences follow:

    a. the status of PSS is one '*which confers the rights under this Title*' within Art.18(1): there is no WA power to require applications for a lesser status which does not *confer* those rights, but merely prevents a person being prosecuted as an illegal immigrant or removed from the UK and otherwise continues the pre-Brexit approach to individual verification of rights: Art.13(4);[7]

    b. the WA would prohibit using a domestic law power to grant PSS to those who could in theory have been refused residence under the WA without that also constituting a binding recognition of WA rights. If PSS were given both to people with WA rights and people without WA rights, the consequential ambiguity would prevent the grant of PSS from being a *conferral* of the rights: holders would still have to demonstrate which category of PSS they fell into in order to enjoy many of the rights.[8] And the *conferral* of the rights is the quid pro quo for a state being permitted to operate a constitutive scheme; the UK would further be in breach of the WA by failing to grant a document that confers the rights in Part II, as it is obliged to do under Art.18;

    c. a person with PSS is therefore 'residing on the basis of [the Withdrawal] Agreement' for the purposes of Art.23(1), since the 'new' status comes directly from it. For that reason the IMA is wrong to describe PSS as merely 'a domestic right of residence' in respect of the period after IP Completion Day [IMA §4.1, §32]. This analysis is confirmed in *AT*, §4. Note also that the letters sent by the UK Government to people granted PSS make an express assertion about the legal basis of PSS:

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[5] European Commission, *Information about national residence schemes for each EU country* (undated), <https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement/citizens-rights/information-about-national-residence-schemes-each-eu-country_en>. See also Annex 2 to the judgment in *R (IMA)* (not produced in the WLR report but included in the official transcript).

[6] *R (IMA)*, §§75 and 110.

[7] 'The host State may not impose any limitations or conditions for obtaining, retaining or losing residence rights… other than those provided for in this Title.'

[8] This would *itself* constitute a breach of the right to equal treatment.

Legal basis of status

This status has been granted to you in accordance with the EU exit separation agreements. For EU citizens, and those applying as the family members of EU citizens, this is the Withdrawal Agreement…

d. it is irrelevant whether at some later point an individual with that status does or does not appear to meet all of the criteria for a person to be required to have residence rights recognised under Art.13 WA (for example, whether they do or do not appear to satisfy all the conditions of being recognised as a worker, or a self-sufficient person).[9] By granting the new status, the UK has not *declared* that a person appeared to have rights at one point in time, it has *conferred* the rights for a specified period.[10] The WA specifically permits discretion to be exercised to waive limitations and conditions on rights of residence: Art.13(4);[11]

e. one of the 'rights' is to equal treatment: Art.23.

35. Some might argue that claimants cannot benefit from Art.23 WA, because the rights contained therein are subject to Art.24 of Directive 2004/38/EC.

36. Yet contrary to that suggestion, the opening words of Art.23 WA, '*In accordance with Article 24 of Directive 2004/38/EC…*' do not restrict the beneficiaries of Art.23 to people who would have a right of residence under 2004/38/EC. The basic principle of what an equal treatment right entails is the same as between the WA and 2004/38/EC (see the interpretive principles as to EU law concepts in the WA set out above), and in a declaratory scheme its scope of application would probably be the same too; but the UK *has not chosen a declaratory scheme*. As such it has chosen to create a right under the WA which does not have a direct parallel in Directive 2004/38, and Art.23 WA is expressly applicable to people *residing on the basis of the WA*.

Equal treatment right is artefact of constitutive scheme

37. The UK Government may be said to have been exercising generosity over the scope of who was allowed to remain in the UK, by granting PSS to people who in principle might lawfully have been refused residence.[12]

[9] At least in the absence of abuse of rights or fraud sufficient to justify a termination or withdrawal of the status in accordance with Art.20 WA.

[10] See *R (IMA)*, §100 where the Secretary of State is recorded as having positively argued that '*the declaratory system…. would give rise to inherent uncertainty about whether a person enjoys a right to reside in the United Kingdom. It would always be necessary to perform a fact-sensitive analysis of their circumstances on any given date, in order to decide whether they enjoy such a right. The position of the United Kingdom government, from the outset, is said to have been that an applications-based scheme, such as the EUSS, provides secure evidence of status and is a better way of protecting people, including vulnerable individuals, compared with the declaratory system*'.

[11] '… There shall be no discretion in applying the limitations and conditions provided for in this Title, other than in favour of the person concerned.'

[12] Note that the principal act of 'generosity', ie. the UK Government's decision that EU citizens would not be required to demonstrate private health insurance (see UK Government, *The United Kingdom's Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU* (Cm 9464, June 2017), §22), has subsequently been shown not to represent a discretionary act of generosity, but merely a concession that the law requires no less: *VI v Commissioners for Her Majesty's Revenue and Customs* [2022] EUECJ C-247/20, [2022] 3 CMLR 17, §69.

38. It is important to recognise that the triggering of equal treatment rights does not flow from that 'generosity'. On the contrary, it flows from the decision to exercise the Art.18 WA state right to require applications to obtain a new status, ie. to operate a constitutive rather than declaratory scheme.

39. A declaratory scheme could have included the same level of 'generosity' about the range of people *permitted to remain* in the UK by merely tolerating the continued presence of people lacking EU law rights, as had been the case pre-Brexit. That would not have caused such persons to be residing on the basis of the WA. But the UK wanted to be able to insist on a greater degree of immigration control. That is the real reason why a right to equal treatment arises.

Equal treatment right for lawfully resident is consistent with other principles of international law

40. Note that the existence of an equal treatment right for people with PSS is harmonious with the UK's international law obligations concerning nationals of states which have signed the European Convention on Social and Medical Assistance.[13] Art.1 ECSMA requires equal treatment in the provision of social and medical assistance of persons of a signatory state 'lawfully present' in a state's territory and there is obviously no basis for treating people with PSS as not lawfully present within the meaning of ECSMA. A view to the contrary would be impossible to reconcile with those international law obligations.

CG distinguishable

41. Note also how the applicable legal analysis set out in this note differs from the situation considered by the CJEU in C-709/20 *CG v Department for Communities in Northern Ireland* [2022] 1 CMLR 26. Part II WA was not in force at the time of the events concerning *CG*.[14] Therefore the relevant legislation was 2004/38/EC, not the WA. As the CJEU held, where a person was not resident in accordance with 2004/38, the equal treatment provisions did not apply, and CG was resident with a domestic law status only, not on the basis of 2004/38: *CG*, §56, §75 and §83. However, since IP Completion Day, PSS has not been merely a domestic law status. It is a status existing under the WA by virtue of Art.18. The UK did not have to create that new status at all, but having done so, it must now also recognise the holders' concomitant rights.

Observations regarding Art.17(2) Withdrawal Agreement

42. For those granted PSS as dependent family members of EEA nationals, on the basis that they were the family members of an EEA national who was lawfully resident in the UK before the end of the transition period, consideration of Art.17(2) may assist.

43. Art.17(2) states:

[13] Most of the EU member states are also ECSMA signatories.

[14] Art 185 WA: '… Parts Two and Three, with the exception of Article 19, Article 34(1), Article 44, and Article 96(1), as well as Title I of Part Six and Articles 169 to 181, shall apply as from the end of the transition period…'. For the timings of the relevant events concerning CG, see *CG*, §§31-32.

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

44. As such, a family member who was granted PSS based on their dependency does not need to continue to be dependent on that Union citizen in order to enjoy residence rights under the WA, and when decision-makers are assessing eligibility for access to welfare benefits or homelessness assistance, it is not a requirement that the family member is still a dependent family member.