Neutral Citation Number: [2024] EWHC 2817 (Admin)

Case No: AC-2024-LON-000461

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2024

Before :

THE HONOURABLE MR JUSTICE DOVE

- -

Between :

THE KING **(on the application of HERE FOR GOOD)**	**Claimant**
- v -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Tim Buley KC and Eva Doerr (instructed by **Wilsons Solicitors LLP**) for the **Claimant**
Julia Smyth and Yaaser Vanderman (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 18th June 2024 and 15th August 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 6th November 2024 by circulation to the parties or their representatives by email and by release to the National Archives.

Mr Justice Dove :

Introduction

1. The claimant is a registered charity set up for the purpose of providing free immigration advice to in-need EU, EEA and Swiss citizens and their family members following the departure of the UK from the EU. The claimant provides representation and legal support to marginalised and vulnerable individuals to assist them in securing their immigration status under the EU Settlement Scheme ("the EUSS"), the scheme established to address the immigration status of EU nationals following the exit of the UK from the EU. Further, the claimant has engaged in strategic litigation and policy work in support of the rights of those individuals which it has been set up to support.

2. The claimant's concern in this litigation is that changes which the defendant has made to the Immigration Rules in relation to the EUSS within Appendix EU relating to the approach to late claims for settled status and how they are to be treated are in breach of the requirements of the agreement struck between the UK , and the EU and the Europe Atomic Energy Community in respect of the withdrawal of the UK from the EU ("the Withdrawal Agreement"). Most specifically, the changes made to Appendix EU of the Immigration Rules have the consequence that in the event of a dispute as to whether or not a late applicant has good reason for the delay in making the application there is no entitlement to an appeal in respect of that issue, but solely the opportunity to bring an application for judicial review of a decision refusing to consider the application because it is late without good reason.

3. This matter was heard initially on 18th June 2024 but it was not possible to complete argument within that day and so the matter went part heard until 15th August 2024 when the hearing and argument was concluded. I wish to place on record my gratitude to counsel for their clear and focused written and oral submissions, and also to all of the legal representatives in the case who prepared papers, including in particular a well edited core bundle, which has been of great assistance.

The Withdrawal Agreement

4. On 29th March 2017 the UK notified the EU and the European Atomic Energy Community of its intention to withdraw from both of those organisations. As a consequence it was determined that it was necessary to prepare an agreement to provide arrangements for the withdrawal of the UK from the EU and the European Atomic Energy Community setting out a framework for their future relationship. In particular, a purpose that was stressed ultimately in the Withdrawal Agreement was the need to ensure an orderly withdrawal of the UK from the EU and the European Atomic Energy Community.

5. Whilst the UK was a member of the EU, UK citizens were citizens of the EU with the right to move and reside freely within the territory of member states subject to any limitations and conditions specifically identified in EU treaties and legal instruments. The right to freedom of movement for work and residency was established by articles 45 and 49 of the Treaty on the Functioning of the European Union. Directive 2004/38/EC was the principal EU legislative measure addressing the rights to freedom of movement and residency and setting out the limitations on the exercise of those rights. The Directive was implemented in the UK by the Immigration (European

Economic Area) Regulations 2016, which provided a framework regulating the right to enter and reside in the UK conferred on EU nationals, and incorporated a means of those rights being recognised and documented for instance by the issuing of a residence card. Further, section 7 of the Immigration Act 1988 established that a person entering or remaining in the UK by reason of EU Law was not subject to the requirements of the Immigration Act 1971 in respect of obtaining leave to enter or remain in the UK.

6. Upon the UK exiting the EU these rights and entitlements came to an end. They were replaced by the arrangements put in place by the Withdrawal Agreement as part and parcel of the objective to secure the orderly withdrawal of the UK from the EU. A full account of the provisions of the Withdrawal Agreement was set out by Lewis LJ in his judgment in *Celik v SSHD* [2024] 1 WLR 1946 at paragraphs 19-29. For present purposes it is unnecessary to rehearse all of the details of the Withdrawal Agreement since the arguments in the present case focus in particular upon the provisions within part 2 (Citizens' Rights) Title II (Rights and Obligations), and in particular Chapter 1 "Rights related to residence, Residence documents".

7. The provision of the Withdrawal Agreement which is the particular focus of these proceedings is Article 18 in relation to the issuing of residence documents. Article 18, so far as relevant to these proceedings, provides as follows:

> "1. The host State may require Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this Title, to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form.
>
> Applying for such a residence status shall be subject to the following conditions:
>
> (a) the purpose of the application procedure shall be to verify whether the applicant is entitled to the residence rights set out in this Title. Where that is the case, the applicant shall have a right to be granted the residence status and the document evidencing that status;
>
> (b) the deadline for submitting the application shall not be less than 6 months from the end of the transition period, for persons residing in the host State before the end of the transition period.
>
> For persons who have the right to commence residence after the end of the transition period in the host State in accordance with this Title, the deadline for submitting the application shall be 3 months after their arrival or the expiry of the deadline referred to in the first subparagraph, whichever is later.
>
> A certificate of application for the residence status shall be issued immediately;

> (c) the deadline for submitting the application referred to in point (b) shall be extended automatically by 1 year where the Union has notified the United Kingdom, or the United Kingdom has notified the Union, that technical problems prevent the host State either from registering the application or from issuing the certificate of application referred to in point (b). The host State shall publish that notification and shall provide appropriate public information for the persons concerned in good time;
>
> (d) where the deadline for submitting the application referred to in point (b) is not respected by the persons concerned, the competent authorities shall assess all the circumstances and reasons for not respecting the deadline and shall allow those persons to submit an application within a reasonable further period of time if there are reasonable grounds for the failure to respect the deadline;
>
> …
>
> (n) for cases other than those set out in points k, l and m, the host State shall not require applicants to present supporting documents that go beyond what is strictly necessary and proportionate to provide evidence that the conditions relating to the right of residence under this Title have been fulfilled;
>
> (o) the competent authorities of the host State shall help the applicants to prove their eligibility and to avoid any errors or omissions in their applications; they shall give the applicants the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omissions;
>
> …
>
> (r) the applicant shall have access to judicial and, where appropriate, administrative redress procedures in the host State against any decision refusing to grant the residence status. The redress procedures shall allow for an examination of the legality of the decision, as well as the facts and circumstances on which the proposed decision is based. Such redress procedures shall ensure that the decision is not disproportionate."

8. The other elements of Article 18 provide specifically for the content and nature of these applications. For instance, Article 18(1)(e) provides that administrative procedures should be "smooth, transparent and simple" and Article 18(1)(f) provides that application forms should be "short, simple, user friendly and adapted for the context of this Agreement". Article 18(1)(i) provides that the identity of applicants is to be verified through the presentation of a valid passport or national identity card, and through presentation of a valid passport for family members and other persons who are not EU citizens or UK nationals. Article 18(1)(k), (l) and (m) provide limitations on the nature and extent of supporting documentation which are to be required in respect of the person applying for the residence document and family members.

9. Pursuant to Article 18(1)(b) the transition period ended on 31st December 2020, and therefore 6 months from the end of the transition period was 30th June 2021. The significance of this period, and also of the certificate of application which is to be issued upon receipt of the application, is further addressed in Article 18(2) and (3) in the following terms:

> "2. During the period referred to in point (b) of paragraph 1 of this Article and its possible one-year extension under point (c) of that paragraph, all rights provided for in this Part shall be deemed to apply to Union citizens or United Kingdom nationals, their respective family members, and other persons residing in the host State, in accordance with the conditions and subject to the restrictions set out in Article 20.
>
> 3. Pending a final decision by the competent authorities on any application referred to in paragraph 1, and pending a final judgment handed down in case of judicial redress sought against any rejection of such application by the competent administrative authorities, all rights provided for in this Part shall be deemed to apply to the applicant, including Article 21 on safeguards and right of appeal, subject to the conditions set out in Article 20(4)."

10. The effect therefore of an application having been made is that under Article 18(3) the applicant is able to enjoy all of the rights which are provided for in this part of the Withdrawal Agreement. These rights include, under Article 21 of the Withdrawal Agreement, the safeguards provided by Article 15 of the Directive in respect of any decision to restrict the residence rights of the person concerned by the host state. Article 21 of the Withdrawal Agreement provides as follows:

> "The safeguards set out in Article 15 and Chapter VI of Directive 2004/38/EC shall apply in respect of any decision by the host state that restricts residence rights of the persons referred to in Article 10 of this Agreement"

11. Article 15 of the Directive provides that Articles 30 and 31 of the Directive shall apply to decisions restricting free movement of EU citizens and their family members on grounds other than public policy, public security or public health. Articles 30 and 31 of the Directive provide as follows:

> "Article 30 – Notification of decisions
>
> 1.The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.
>
> 2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State Security.

> 3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal, and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.
>
> Article 31 – Procedural safeguards
>
> 1.The persons concerned shall have access to judicial, and where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.
>
> 2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:
>
> -where the expulsion decision is based on a previous judicial decision; or
>
> -where the persons concerned have had previous access to judicial review; or
>
> -where the expulsion decision is based on imperative grounds of public security under Article 28(3).
>
> 3.The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.
>
> 4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory."

The EUSS

12. The EUSS is the UK's residence scheme pursuant to Article 18(1) of the Withdrawal Agreement. It was formally introduced on 30th March 2019. Prior to the changes which were made on 9th August 2023, and which are the subject of this claim, there was no restriction contained within the EUSS upon making a late application after the deadline specified in Article 18(1)(d) and no requirement to demonstrate reasonable grounds as

to why the application was being made late. In short, the effect of Appendix EU as originally drawn was that an individual was permitted to make a valid late application without any requirement to demonstrate that there were reasonable grounds for the application's tardy submission.

13. In his witness statement Mr Clive Peckover, who is a Senior Policy Official in the EEA Citizens' Rights and Hong Kong Unit in the Migration and Borders Group of the Home Office, explains that at the outset of the implementation of the EUSS a significant investment was made by the UK government in raising awareness of the existence of the scheme and the need for eligible people to apply. Mr Peckover explains that whilst an application made after 30th June 2021 could be refused on eligibility grounds for lateness alone, that in practice did not happen prior to the changes made on 9th August 2023.

14. It appears from Mr Peckover's evidence that by January 2023, some 18 months after 30th June 2021 deadline, the defendant had become concerned that spurious and unmeritorious late applications were being made under Appendix EU solely for the purpose of obtaining the certificate of application pursuant to Article 18(1)(b) which gave rise under Article 18(3) to the entitlement to work and claim benefits in the UK pending the outcome of the application being determined. Since it was considered that Article 18(1)(d) of the Withdrawal Agreement envisaged a two stage approach in relation to late claims, requiring, firstly, the assessment of all circumstances and reasons for not complying with the deadline and, secondly, enquiring as to whether there were reasonable grounds for the failure to meet the deadline, it was decided such a two stage approach to late applications should be given effect by changes to Appendix EU.

15. Under Appendix EU as it was configured prior to 9th August 2023 it was a requirement for the grant of indefinite or limited leave to enter or remain the person made a valid application in accordance with paragraph EU 9. At paragraph EU 9 it provided as follows in respect of the making of a valid application:

> "EU9. A valid application has been made under this Appendix where:
>
> (a) It has been made using the **required application process**;
>
> (b)The **required proof of identity and nationality** has been provided, where the application is made within the UK;
>
> (c) The **required proof of entitlement to apply from outside the UK** has been provided, where the application is made outside the UK; and
>
> (d) The **required biometrics** have been provided."

16. The introduction of the two stage process described by Mr Peckover, and the need for the defendant to be satisfied that there were reasonable grounds for an application having been made late, was given effect by the changes made on 9th August 2023. The

new rules provided as follows in respect of EU 9 and the requirements of a valid application:

> "EU9. A valid application has been made under this Appendix where:
>
> (a) It has been made using the **required application process**;
>
> (b) The **required proof of identity and nationality** has been provided, where the application is made within the UK;
>
> (c) The **required proof of entitlement to apply from outside the UK** has been provided, where the application is made outside the UK;
>
> (d) The **required biometrics** have been provided;
>
> (e) It has been made by the **required date,** where the date of application is on or after 9 August 2023; and
>
> (f) The applicant, if they rely on being a joining family member of a relevant sponsor and where the date of application is on or after 9 August 2023, is not a **specified enforcement case**."

17. To fully understand the provisions of EU 9(e) it is necessary to have reference to the definition of "required date" for the purpose of Appendix EU. The aspect of the definition relevant for present purposes is specified in Annex 1 to Appendix EU as follows:

> "required date:
>
> (a) where the applicant does not have indefinite leave to enter or remain or limited leave to enter or remain granted under this Appendix:
>
> (i) (where sub-paragraphs (a)(ii) to (a)(vii) below do not apply) the date of application is (aa) before 1 July 2021; or
>
> (bb) (where the deadline in sub-paragraph (a)(i)(aa) above was not met and the Secretary of State is satisfied by information provided with the application that, at the date of application, there are reasonable grounds for the person's delay in making their application) on or after 1 July 2021…"

18. An Explanatory Memorandum was provided to support these changes to the Immigration Rules when they were being considered by Parliament. The Explanatory Memorandum set out that the changes had the effect changing the meeting of the time deadline for making the application, or having reasonable grounds for the delay in making an application, from an eligibility to a validity requirement. This was intended to enable the defendant to consider whether there were reasonable grounds for a late application as a preliminary issue before considering whether or not, if the application was valid, it met the relevant eligibility and suitability requirements. As a consequence

of the changes there were alterations to the guidance provided by the defendant to assist Home Office officials in evaluating whether there were reasonable grounds for the delay in making an application. It is unnecessary for present purposes to dwell upon the contents of the guidance which is not the subject of this challenge.

19. The practical consequences of the changes that were made to Appendix EU on 9th August 2023 are that, whereas prior to that date all applications which were made after the relevant deadline were treated as valid and examined for eligibility, after the deadline the changes meant that they had to be examined to see whether there were reasonable grounds for the delay in making the application. Of particular concern to the claimant is the impact of these changes in the event the defendant concludes there are not reasonable grounds for a delayed application as there is no right of appeal to the First-Tier Tribunal on the merits of that decision. The only remedy against the defendant's refusal is an application for judicial review. An application for judicial review does not permit an examination of the merits of the decision but is confined to scrutiny of the decision to examine whether there has been an error of law. The impact of this change is central to the claimant's concerns in relation to this case.

The grounds.

20. The claimant advances its case on three grounds. The first ground is that the failure to provide an applicant with a right of appeal in circumstances where the applicant has made an application out of time and the defendant has concluded there are no reasonable grounds for having done so, is a breach of the requirements of the Withdrawal Agreement. In particular it is submitted that to fail to provide an appellant with a right of appeal in these circumstances is a breach of Article 18(1)(r), as the applicant is not provided with access to redress procedures against this decision which permits an examination of the legality of that decision, as well as the facts and circumstances upon which the decision was based including a consideration of proportionality.

21. The claimant submits that when a person applies for leave under Appendix EU they have made an application for "residence status" within the meaning of Article 18 of the Withdrawal Agreement. As such, the claimant contends that Article 18(1)(r) of the Withdrawal Agreement applies to circumstances where an applicant has made an application outside the relevant deadline but it has been determined by the defendant that there were no reasonable grounds for the application being late. Article 18(1)(r) applies in respect of "any decision to refuse or grant the residence status". The decision that there are no reasonable grounds for the application being late is just such a decision to which the right of redress under Article 18(1)(r) of the Withdrawal Agreement applies.

22. In making this submission the claimant firmly refutes the suggestion made by the defendant that Article 18(1)(d) creates a two-stage process in which scrutiny of a decision that there were not reasonable grounds for delay in bringing the application is escaped. It is, as set out above, a decision to which Article 18(1)(r) clearly applies. The defendant's purported distinction between "validity" of an application and the application's "eligibility" for the grant of the new residence status has no foundation in the proper construction of Article 18(1). The distinction is not referred to in the text of Article 18, and indeed it is inconsistent, for instance, with the identity of "applicants" being verified by the presentation of a valid passport. The claimant submits that it is

evident from this that Article 18(1)(i) treats a person who has applied for status as an applicant whether or not they have furnished a valid passport with their application.

23. The claimant also draws attention to the consonance between the language of Article 18(1)(r) requiring that judicial redress should allow an examination of "the facts and circumstances" on which a decision is based with the language of Article 18(1)(d) requiring the defendant to "assess all the circumstances and reasons" for the application being late. The claimant draws attention to the similarity between the guarantees provided by Article 18(1)(r) and Article 21 of the Withdrawal Agreement. It would, it is submitted, be anomalous if access to legal redress were to be denied solely and uniquely in the context of persons who apply outside the Withdrawal Agreement deadline but whose reasons for doing so are disputed.

24. Furthermore, the claimant argues that judicial review is not a remedy which is capable of satisfying the requirements of Article 18(1)(r) of the Withdrawal Agreement. The specific requirements of Article 18(1)(r) are that the redress procedure should permit an examination of both the legality of the decision and also of the facts and circumstances upon which it has been based. This describes an appeal on the merits of the decision where the Tribunal is able to consider the totality of the merits of the decision and not just whether or not there has been an error of law.

25. This is reinforced in the claimant's submission by the decision of the CJEU in *Banger C 89/17*. That case concerned a South African national whose partner was a UK national and who was issued with a residence card in the Netherlands when she and her partner were living together on the basis that her partner was an EU citizen. The residence card was not acknowledged when Ms Banger and her partner moved to the UK as she was not married to her partner. Since her partner was a UK national she could not benefit from the regulatory regime in the UK transposing the Directive into Domestic Law, as she was not an "extended family member" of an EU citizen from another member state apart from the UK. In that connection she had no right of appeal and judicial review was the only available route for a legal challenge in respect of her decision. This became the fourth question which was referred to the CJEU and which they answered in the following terms:

> "52 In the light of the foregoing considerations, the answer to the fourth question is that article 3(2) of the Directive 2004/38 must be interpreted as meaning that the third-country nationals envisaged in that provision must have available to them a redress procedure in order to challenge a decision to refuse a residence authorisation taken against them, following which the national court must be able to ascertain whether the refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with. Those safeguards include the obligation for the competent national authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence."

26. In addition the claimant contends that the likely nature of the issues arising in respect of whether or not time should be extended are far more suitable for consideration by a judge on the merits than an application for judicial review.

27. In response to these submissions the defendant contends that the provisions of Article 18(1)(r) of the Withdrawal Agreement do not apply at the point in time when a person submits a late application, because at that time reasonable grounds for bringing the application late have not been established and accepted. Unless and until the late application is accepted on the basis that reasonable grounds have been demonstrated the protections under Article 18(1)(r) and Article 18(3) are not engaged because there is no application before the defendant. Until a late application has been allowed to be submitted, because reasonable grounds for its lateness have been established, there is no decision "refusing to grant the new residence status" for the purposes of Article 18(1)(r).

28. The defendant submits that this is the case, firstly, based upon the natural and clear meaning of the words in Article 18(1)(d) of the Withdrawal Agreement which plainly contemplate two discrete stages. The distinction between the validity and eligibility of an application is not artificial, but embedded in the language of the Withdrawal Agreement. The claimant's point in relation to Article 18(1)(i) pertaining to a person whose identity has yet to be verified being treated as an applicant is of no assistance to the claimant on the basis that this does not bear upon the meaning of the language in Article 18(1)(d) directly. Nor does the defendant's prior more generous approach to late applications operating before the change of the rules amount to a matter which should now be held against it. The defendant submits that the construction contended for by the defendant more properly reflects the Withdrawal Agreement's desire for legal certainty and control on the circumstances in which a late application can be submitted.

29. Furthermore, it is submitted that it cannot follow that Article 18(1)(r) applies to all individuals seeking residence status after the relevant deadline, but can only apply to late applications that have been found to have reasonable grounds for their delay and therefore have been permitted to be submitted for consideration. The fact that both Article 18(1)(d) and 18(1)(r) both use the word "circumstances" does not advance the claimant's case at all.

30. The defendant submits that reliance upon the case of *Banger* is also of no avail to the claimant. The CJEU did not determine that EU Law mandated a full merits based appeal in the context of that case. Moreover, the present case pertains to an entirely new provision of the Withdrawal Agreement in the form of Article 18(1)(d) which itself pertains to an entirely new and distinct application process unique to the Withdrawal Agreement which has no counterpart in EU law. Thus, the decision in *Banger* is of no relevance.

31. The defendant submits that a claim for judicial review is capable, in any event, of satisfying the requirements of Article 18(1)(r) since "examination of the facts and circumstances on which the decision is based" does not require that a Tribunal or Court form its own view of whether or not there are reasonable grounds for a late application being late. The question concerns the exercise of judgement which is apt for consideration in an application for judicial review.

32. Turning to ground two, the claimant's case is that, in the alternative, the same outcome contended for in ground one is required by Article 21 of the Withdrawal Agreement. The claimant contends that a decision not to accept a person's application for the residence scheme status that is late amounts to a decision which restricts their right of residence, and is therefore within the scope of Article 21 and the safeguards which are

identified in that Article apply. It is submitted that the terms of Article 18(3) support this submission, in the sense that it establishes that a person who has applied under the EUSS is entitled to be treated at that point as though they enjoyed the residence rights for which they have applied. Thus, it is argued by the claimant, a decision to refuse to consider an out of time application is a decision to "restrict" residence rights and comes within Article 21.

33. The defendant resists this ground for reasons which are closely allied to the reasons for resisting Ground 1. The defendant submits that no late application for residence status is in fact made until the defendant has accepted that there is good reason for the application having been made out of time. Unless and until it has been determined that there are reasonable grounds for the delay in applying there is no application and no status under Article 18(3), and therefore no residence right which could be restricted so as to engage Article 21 of the Withdrawal Agreement. Further the defendant submits that the reality is that pursuant to the Withdrawal Agreement a person does not have residence rights until they have made a successful application under Article 18(1). This is the reason for the necessity of Article 18(1)(r) of the Withdrawal Agreement, in order to enable a challenge to an adverse decision made in relation to an application. The claimant's reliance upon Article 18(3) presupposes the claimant is right to conclude that a person enjoys interim protection when they have not been permitted to make a late claim, and that is a proposition which is incorrect for the reasons set out in the response to Ground 1.

34. The final basis for the challenge is Ground 3. The submission in relation to this ground is that the failure to provide the late applicant with a merits based right of appeal in respect of a decision to refuse to permit a late application to be considered out of time involves a breach of Article 47 of the EU Charter. Article 47 of the EU Charter provides as follows:

> "**Right to an effective remedy and to a fair trial.**
>
> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in the Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

35. The claimant contends that the scope of Article 4(3) of the Withdrawal Agreement enables the reliance upon EU law on the basis that the situation of a person who comes within the personal scope of the Withdrawal Agreement (irrespective of whether they have made a late application for residence status) is not a purely domestic law situation but one which falls within the scope of EU law. The terms of Article 4(3) of the Withdrawal Agreement are as follows:

> "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."

36. The claimant draws attention to the decision of the CJEU in *CG* (C-709/20), which is dealt with in greater detail below, and submits that someone within the personal scope of the Withdrawal Agreement has an arguably closer connection to EU law than a person who, like CG, had been granted status under the EUSS but who did not meet the stricter eligibility criteria of Article 10 of the Withdrawal Agreement.

37. The defendant contends in response that the EU Charter is simply not engaged because the question does not involve concepts or provisions of EU law in the interpretation or application of these provisions of the Withdrawal Agreement. Article 18(1) comprises the introduction of a completely new and unique process of applying for a residential status which did not exist under EU law and one which is different in character from the EU law principles of free movement. The defendant relies upon the recent case of *AT v Secretary of State for Work and Pensions* [2023] EWCA Civ 1307; [2024] KB 633 which is considered in greater detail below. Further, and in any event, the defendant observes that Article 47 of the Charter does not in fact advance the claimant's case, in that what it requires is the availability of an effective judicial remedy and the defendant repeats its submissions in relation to the suitability of judicial review and that this remedy satisfies the requirements identified in the case of *Banger*.

Conclusions

38. The resolution of the claimant's Ground 1 depends on the proper construction of the terms of the Withdrawal Agreement, and in particular the terms of Article 18. The question of the correct approach to the interpretation of the Withdrawal Agreement was addressed by Lane J in the case of *R(IMA) v Secretary of State for the Home Department* [2023] 1 WLR 817, in particular at paragraphs 64 to 70 of the judgment. The Withdrawal Agreement is an international treaty which is given effect in the UK by virtue of section 7A of the European Union (Withdrawal) Act 2018, which was inserted by section 5 of the European Union (Withdrawal Agreement) Act 2020. The principles of construction are derived from the Vienna Convention on the Law of Treaties 1969. Article 31 of the Vienna Convention requires that a treaty is to be interpreted in good faith and in accordance with the ordinary meaning to be ascribed to the terms of the treaty, considering their context and in the light of the object and purpose of the treaty. The meaning of the treaty is to be determined objectively. Article 32 enables recourse to be had to supplementary means of interpretation to confirm the meaning of the treaty, or to determine the meaning if the application of the principles set out in Article 31 leaves the meaning ambiguous or obscure, or would lead to a result which is manifestly absurd or unreasonable.

39. The starting point is that it is clear from the introductory paragraph within Article 18(1) that a host state has a discretion as to whether it will take up the opportunity to adopt a scheme providing for a new residence status after the departure of the UK from the EU, and that if it does then such a scheme "shall be subject to the following conditions". These mandatory conditions include the provisions which are central to Ground 1, namely Article 18(1)(d) and (r). It is clear from the text of Article 18(1)(d) that this provision is related to Article 18(1)(b) and the creation of a deadline for the submission

of applications. In my view the literal reading of Article 18(1)(d) is to provide the basis for an exception from the observance of the deadline which enables an application which might otherwise be rejected as out of time to be accepted and considered if the proposed applicant can show that there are reasonable grounds to accept the application "within a reasonable further period of time". It is clear from the terms of Article 18(1)(d) that at the time when reasonable grounds for a departure from the deadline are being considered there is no application before the defendant, but only a submission that an application should be made out of time and after the deadline.

40. It follows from this conclusion that, again taking the literal and natural meaning of Article 18(1)(r), at the time when this submission is made there is no application for the new residence status before the defendant, and therefore no applicant for the purpose of this Article. The procedural safeguards which are identified in Article 18(1)(r) do not apply, therefore, to a submission seeking to demonstrate that there are reasonable grounds to permit the making of an application for the new residence status after the expiration of the deadline. The provisions of Article 18(1)(r) apply to an application which has been made to the defendant and, for example, been refused. A straightforward reading of the language of Article 18 means that Article 18(1)(r) does not apply to a possible application for the new residential scheme which cannot be made because it is outside the specified deadline and for which permission has not been granted to apply out of time. It also does not apply to the refusal of permission to apply out of time when a request to do so has been made.

41. Whilst the claimant draws attention to the use of the language "any decision refusing to grant the residence status", that clause appears subsequent to the identification that it is the applicant who shall have access to the procedural safeguards, and thus this submission does not alter the analysis. The key question is whether the individual is an applicant and there has been a refusal to grant the application for residence status. A person who is outside the deadline for making an application under the conditions of the new scheme is not an applicant until they have been permitted to make their application and therefore the procedural safeguards under Article 18(1)(r) are not available to them.

42. It is central to the claimant's case under ground one that the defendant has illegitimately created a two stage process out of Article 18, requiring the separate consideration of the "validity" of an application and its "eligibility", with the "validity" stage being created to address the question of whether there are reasonable grounds for an application to be made out of time. This, it is submitted, is an artifice which is not properly grounded in the terms of the Withdrawal Agreement. Whilst I accept that neither the words "valid" or "validity" appear in the terms of Article 18, nonetheless in my view it is clear that its terms contemplate two separate stages of consideration in respect of proposals to apply after the expiration of the deadline. Under Article 18(1)(d) there must be a preliminary assessment of whether there are reasonable grounds to extend time; only if there are can the application be accepted for consideration as to whether the individual qualifies for the new residence status.

43. The claimant points, for instance, to the inclusion within the validity stage of the EUSS of the need to provide a current passport as proof of nationality and identity, and suggests that this is inconsistent with Article 18(1)(i) which requires the verification of identity of "applicants" by the provision of a passport. This is submitted to be inconsistent with the defendant's differentiation of eligibility and validity, and suggests

that there would be no right of appeal from a refusal to grant status based on the fact no passport was provided. In my view there are a number of difficulties with this submission. Firstly, this is a contention which might support the exclusion of verification of nationality and identity at the validity stage, but it has no direct bearing on the meaning of Article 18(1)(d). Secondly, the domestic provision of rules in the EUSS is not an appropriate aid to the construction of the primary source of the scheme in the Withdrawal Agreement. Thus the current configuration of the EUSS in the Rules accurately reflects the provisions of the Withdrawal Agreement in respect of proposed applications outside the deadline.

44. The claimant relies upon a number of other features of Article 18 in support of its construction. The claimant draws attention to the similarity in the language of Article 18(1)(r) requiring a procedure to examine "the facts and circumstances", and Article 18(1)(d) which requires the competent authority to "assess all the circumstances and reasons" for not having adhered to the deadline. For my part I am unconvinced that this similarity is of any material assistance to the claimant. This similar language simply describes the nature of an enquiry into two very different issues: firstly, the enquiry into whether there are reasonable grounds to extend time for a late application; secondly, whether an in-time application ought to have been refused. Neither this, nor the claimant's reliance upon the case of *Banger*, are persuasive that a decision that there are not reasonable grounds to permit an application to be accepted after the deadline attracts the procedural safeguards in Article 18(1)(r).

45. The claimant's contentions under this Ground in relation to the application of Article 21 of the Withdrawal Agreement are dealt with below. The claimant further submits that as both the Withdrawal Agreement does not impose any requirement to provide evidence or reasons in support of a submission that there is good reason to permit an application to be made after the deadline, and also Article 18(1)(k) and (l) prohibit any requirement to provide evidence for why an application is late, this is a further reason for permitting an independent review as of right in respect of a refusal. Again, whilst the claimant's observations are accurate, they do not in my view gainsay what is set out in the clear language of Article 18(1)(d) and (r). Nor does it avail the claimant to rely upon the earlier more generous approach taken by the defendant when the defendant chose not to apply the provisions in respect of applications made after the deadline. That relaxation of the requirements was entirely a matter within the discretion of the defendant and it was equally open to the defendant to change the EUSS to give effect to the provisions of Article 18(1)(d) in full.

46. The claimant relies on two further points in relation to the defendant's reliance upon the case of *Petrea v Ypourgos Esoterikon* (C-184/16) [2018] 1 CMLR 42 and a report on these issues by the Independent Monitoring Authority. The essence of these submissions is defensive, in the sense that they respond to the defendant's use of this material. I have reached the conclusions set out above without the need for reliance upon these aspects of the defendant's case and so nothing further needs to be said in connection with these points. It also follows from my conclusions that the claimant's further submissions that if Article 18(1)(r) does apply to a decision to refuse to permit the making of an application outside the deadline, then judicial review does not satisfy the requirements of Article 18(1)(r) do not arise. As I have already explained, in my judgment a decision concluding that there are not reasonable grounds for failing to respect the deadline for making an application is not a decision covered by the

provisions of Article 18(1)(r). Notwithstanding this, I shall deal below with the question of whether, if I am wrong about the application of Article 18(1)(r), judicial review provides an adequate remedy without the provision of a full merits appeal.

47. Turning to the claimant's ground two the claimant observes that the terms of Article 21 apply the safeguards set out in Article 15 and Chapter VI of the Directive in relation to any decision which "restricts the residence rights" of persons within Article 10 of the Withdrawal Agreement. The claimant contends that, far from the approach taken by the defendant, Article 18 is not a type of gateway provision but is rather a scheme which facilitates the continuity of status for a person within the scope of Article 10. Article 18(3), which enables an applicant to have the benefit of the rights set out in Part 2 of the Withdrawal Agreement pertaining to citizens' rights pending the determination of their application, is consistent with this approach which regards Article 18 as a means of continuing existing rights rather than operating as a threshold for new residence rights. On this basis the refusal of a request to apply after the expiration of the deadline amounts to the restriction of that person's residence rights.

48. In my view it is useful to start the evaluation of this submission by examining the language of Article 18(3), which is set out above but for ease of reference provides as follows:

> "18(3) Pending a final decision by the competent authorities on any application referred to in paragraph 1, and pending a final judgment handed down in case of judicial redress sought against any rejection of such application by the competent administrative authorities, all rights provided for in this Part shall be deemed to apply to the applicant, including Article 21 on safeguards and right of appeal, subject to the conditions set out in Article 20(4)".

49. Article 18(3) is predicated on the existence of an application for the new residence status being before the competent authority or administrative authority following refusal. This is consistent with the defendant's approach that the use of the provisions of Article 18 is designed to create a new scheme of residential status after the departure of the UK from the EU, rather than it amounting to the continuation of any pre-existing status. It is clear that establishing an entitlement to the new residential status, or its provisional status under Article 18(3), requires the existence of an application. After the deadline for submitting applications it is not possible to make an application without the demonstration that there are reasonable grounds for the deadline not being respected and observed. On this analysis I am satisfied that Article 21, which is predicated on the existence of an application, cannot apply to the pre-application consideration of whether there are reasonable grounds for an application to be made after the expiry of the deadline. The claimant's Ground two must be rejected.

50. The third ground advanced by the claimant is the submission that as a consequence of Article 4(3) of the Withdrawal Agreement the failure to identify and notify individuals of a right of appeal against a decision to refuse to accept an application made after the deadline is a breach of Article 47 of the Charter. The claimant refers to the case of *CG* (C-709/20) to support this contention. The case of *CG* concerned a person who had dual Croatian and Netherlands nationality and who moved with her children to Northern Ireland, following which she was granted pre-settled status under the EUSS, providing

her with five years' limited leave to remain in the UK. She applied for universal credit but was refused on the basis that regulation 9(3)(d)(i) of the Universal Credit Regulations (Northern Ireland) 2016 treated persons with limited leave to remain as not having a right to reside in, or be habitually resident in, the UK. CG appealed the refusal on the basis that the regulation was discriminatory and breached Article18 of the FEU Treaty. The conclusions of the CJEU were in the following terms:

> "87. In the present case, it is apparent from the order for reference that the United Kingdom authorities granted CG a right of residence even though she did not have sufficient resources. As noted in para 82 above, those authorities applied more favourable rules, in terms of the right of residence, than those established by the provisions of the Directive 2004/38 with the result that that action cannot be regarded as an implementation of that Directive. In so doing, those authorities by contrast recognised the right of a national of a member state to reside freely on its territory conferred on EU citizens by article 21(1), without relying on the conditions and limitations in respect of that right laid down by Directive 2004/38.
>
> 88. It follows that, where they grant that right in circumstances such as those in the main proceedings, the authorities of the host member state implement the provisions of the FEU Treaty on Union citizenship, which, as pointed out in para 62 above, is destined to be the fundamental status of nationals of member states, and that they are accordingly obliged to comply with the provisions of the Charter.
>
> 89. In particular, it is for the host member state, in accordance with article 1 of the Charter, to ensure that a Union citizen who has made use of his or her freedom to move and to reside within the territory of the member states, who has a right of residence on the basis of national law, and who is in a vulnerable situation, may nevertheless live in dignified conditions."

51. As a result of this reasoning CG established that the authorities were obliged to check that a refusal to grant her benefits did not expose her to an actual and current risk of violation of the fundamental rights enshrined in articles 1, 7 and 24 of the Charter. The claimant relies upon this authority to make the submission that a person who is within the personal scope of the Withdrawal Agreement is not in a simply domestic law situation but one which falls within the scope of EU law. In particular the claimant submits that the circumstances of CG, and her ability to rely upon the provisions of the Charter, demonstrate that those who are within the personal scope of the Withdrawal Agreement ought also to be entitled to rely upon the provisions of the Charter: in particular Article 4(3) of the Withdrawal Agreement should be construed so as to make clear that EU law is engaged and that the protections of the Charter are available.

52. As noted above, reference was also made in the context of these submissions to the decision of the Court of Appeal in *AT v Secretary of State for Work and Pensions* [2024] KB 633; [2023] EWCA Civ 1307. This case concerned a Romanian national who was granted pre-settled status pursuant to the EUSS shortly before the end of the transition

period. After the end of the transition period AT and her daughter had to leave the family home as a consequence of domestic violence and she then claimed universal credit. This was refused on the basis that she did not meet the basic condition for entitlement under the Welfare Reform Act 2012 of being "in Great Britain" since, by virtue of regulation 9(3)(c)(i) of the Universal Credit Regulations 2013, persons present in the UK with limited leave to remain are, for the purposes of those Regulations, not to be treated as being in Great Britain. The First-tier Tribunal applied *CG* and allowed AT's appeal.

53. The Upper Tribunal dismissed the Secretary of State's appeal and the Secretary of State appealed to the Court of Appeal on the basis that the decision in *CG* did not apply after the end of the transition period. At paragraph 82 of his judgment Green LJ accepted that the Charter continued to have an interpretive role in situations falling within the scope of the Withdrawal Agreement. It was brought into the Withdrawal Agreement through the definition of "Union law" in Article 2(a)(i) as one of the instruments listed amongst a number identified. This was to be coupled with Green LJ noting that there was no suggestion of any cut-off point for the Charter ceasing to be of application within the Withdrawal Agreement. The argument turned to whether the situation of AT was one where Article 4(3) of the Withdrawal Agreement applied so as to bring the provisions of the Charter into play. It was argued by the Secretary of State that on the basis that the case was concerned solely with whether AT was entitled to universal credit there was no engagement with EU law so as to bring the Charter into account. Green LJ concluded as follows in respect of the applicability of the case of *CG* and the Charter in this context:

> "91. I agree with the Upper Tribunal. It is correct that on the facts the competent authority did not consider anything other than the narrow entitlement to UC. And to this extent there was no consideration of the Withdrawal Agreement or the Charter. But the gravamen of the complaint is about an omission not a commission. It is that having rejected entitlement to UC the authority did not proceed to consider whether AT and her child were entitled to some *other* form of support. As to this the relevance of the judgment in *CG* [2021] 1 WLR 5919 is that it concerns the application of articles 1,7 and 24 of the Charter to persons who have rights under article 13 of the Agreement, which is a category that AT falls into. The CJEU held that there was a positive duty on a host state who refuses one form of relief (in that case also UC) to determine "ensure", "ascertain", "check"-*CG* paras 89,92 and 93) whether the person was in need of other forms of protection to secure their dignity and make their residence right in effect viable. That was not in this case done. Article 4 of the Withdrawal Agreement afforded to AT the right to rely upon its provisions and imposed a duty on the competent authorities to ensure observance of the rights in the Agreement including in accordance with the Charter. As the Upper Tribunal observed: "Since both articles 10 and 13 of the WA refer to provisions or concepts of EU law, [the competent authority] was obliged by article 4(3) to comply with AT's and the child's Charter rights, insofar as they were relevant to the situation."

54. In a short concurring judgment Dingemans LJ noted at paragraph 181 that the case only concerned those who had the benefit of pre-settled status under the EUSS, and that AT had been granted that status on 14th December 2020.

55. In my view it is of significance to note the important distinction between the case of a person attempting to make an application for the new residence status under Article 18 of the Withdrawal Agreement after the deadline for applications has expired and the appellants in *CG* and *AT*. As noted above the deadline under Article 18(1)(b) is no less than 6 months from the end of the transition date (unless extended by a year under the provisions of Article 18(1)(c)). During that period, within which an application for the new residence status should be made, Article 18(2) makes clear that "all rights provided for in this Part shall be deemed to apply to Union Citizens or United Kingdom nationals, their respective family members, and other persons residing in the host State, in accordance with the conditions and subject to the restrictions set out in Article 20". The converse of this, of course, is that outside of that period none of those rights continue for those individuals. To have a right of residence a person must apply for the new residence status and if they have failed to make that application within the period specified for doing so then they have to demonstrate reasonable grounds for not having respected the deadline.

56. By contrast both CG and AT had, as set out above, made timely applications and been granted pre-settled status. Whereas CG and AT had the benefit of rights of residence under Article 13 of the Withdrawal Agreement which in terms engaged with limitations and conditions prescribed by EU law, the individuals with which this claim is concerned have none. There is simply no element of EU law engaged in their circumstances which could come within Article 4(3) of the Withdrawal Agreement and bring the Charter into play. It follows that the principles established by the cases of *CG* and *AT* are of no application in the present case. As Dingemans LJ succinctly explained, those cases were concerned with the consequences of having obtained pre-settled status under the EUSS; this case is concerned with the circumstances of a person who has no such status and who requires permission to make an application for the new residence status which is a creature of the Withdrawal Agreement under Article 18 and unrelated to EU law provisions relating to the rights of citizens.

57. It follows from this that I am unable to accept that the Charter applies to the circumstances considered in this case, or that it is a breach of the Charter for the defendant to fail to have identified and enacted a right of appeal in relation to a decision not to accept that there are reasonable grounds for a person to have failed to apply prior to the deadline. I therefore conclude that Ground three of this application must also be rejected.

58. As a result of my conclusions the further submissions in relation to the adequacy of judicial review as a remedy in the event that any of the claimant's grounds were made out does not arise. The point that the claimant pursued was that if any or all of grounds one to three were established then, in addition, it was the claimant's case that judicial review would not be an adequate remedy to meet the requirements of either Article 18(1)(r) or, in respect of Ground three, Article 47 of the Charter. The claimant submitted that the terms of Article 18(1)(r) could only be satisfied by the provision of an appeal process which enabled a redetermination of the merits of the application. This was a submission which was said to be supported by the conclusions of the CJEU in *Banger* which have been set out above. The nature of the disputes in cases of this kind

relating to the justification for extending time involved findings of fact and the exercise of broad judgements, and as such they were far better suited to consideration by a judge in a full merits appeal than in an application for judicial review.

59. In response to these submissions the defendant relied upon the evidence of Mr Peckover that by and large the consideration of submissions requesting permission to make an application out of time do not involve the resolution of disputes of fact, but rather an assessment of whether the factual matters relied upon amount to a basis for finding that there are reasonable grounds to extend time. If the person has failed to mention matters, or has further evidence to meet the defendant's concerns, it is open to them to make a further application or to bring the material to the attention of the defendant at the time of writing a pre-action protocol letter. Mr Peckover draws attention to the high percentage of cases that are conceded by the defendant at the pre-action protocol stage.

60. It is further submitted by the defendant that the remedy of judicial review is sufficiently flexible so as to accommodate the requirements specified in the case of *Banger*. In a domestic law context the defendant relied upon the observations of Lord Reed in the case of *R(King) v Secretary of State for Justice* [2016] AC 384; [2015] UKSC 54, a case concerning the segregation of prisoners under the provisions of rule 45 of the Prison Rules 1999. The court had to consider whether the way in which decisions to authorise continued segregation of a prisoner were taken using procedures compliant with article 6.1 of the ECHR. At para 124 to 126 of his judgment Lord Reed observed as follows:

> "124. It is true that judicial review proceedings do not usually involve the determination of questions of fact, and therefore do not usually involve issues of credibility. But, as I have explained, decisions taken by the Secretary of State under rule 45(2) are unlikely to turn on the determination of disputed questions of fact. There may be underlying issues of fact which are contentious, as there were in the present cases, but, if rule 45 is being applied correctly, its application will not normally require the Secretary of State to resolve those issues one way or the other.
>
> 125. The critical question is whether the prisoner's continued segregation is justified having regard to all the relevant circumstances. Those will include the reasonableness of any apprehension that his continued association with the other prisoners might lead to a breakdown in good order and discipline within the prison; the suitability of available alternatives; the potential consequences to the prisoner if authorisation is granted; and the potential consequences to others if it is not. The answer to the question requires the exercise of judgment, having regard to information and advice from a variety of sources, including the governor, health care professionals and the prisoner himself.
>
> 126. In proceedings for judicial review, the court has full jurisdiction to review evaluative judgments of that kind, considering their reasonableness in the light of the material before the decision-maker, whether the appropriate test has been

> applied, whether all the relevant factors have been taken into account, and whether sufficient opportunity had been given to the prisoner to make representations. This court has explained that the test of unreasonableness has to be applied with sensitivity to the context, including the nature of any interests engaged and the gravity of any adverse effects on those interests: see, for example, *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2015] 1 WLR 1591. The potential consequences of prolonged segregation are so serious that a court will require a cogent justification before it is satisfied that the decision to authorise its continuation is reasonable. It should also be noted that although judicial review does not usually require the resolution of disputes of fact, or cross-examination, that is not because they lie beyond the scope of the procedure. Judicial review is a sufficiently flexible form of procedure to enable the court to deal with the situation before it as required: see, for example, *R(Wilkinson) v Broadmoor Hospital Authority* [2002] 1 WLR 419."

61. Turning to the EU law perspective, the defendant returns to the case of *Banger* and introduces the principles set out in paragraph 52 of the judgment of the CJEU by reference to the opinion of the Advocate General in relation to the question of effective judicial protection. At paragraph 102 of the opinion, the Advocate General notes that the CJEU has held that it is not required in all circumstances for the court to be able to substitute the decision under challenge in fact and law with its own decision for there to be an effective remedy. The scope and intensity of judicial review would depend upon the content and nature of the principles and rules of EU law being implemented through the national decision being challenged. Paragraphs 111 to 113 of the opinion provides as follows:

> "111. The elements that must be available for judicial scrutiny flowing from article 3(2) of the Directive are, beyond the requirement of facilitation, essentially threefold: that the decision to be reviewed must be the result of an extensive examination (i), which then logically must be reflected in the reasons given for potentially justifying any denial of entry or residence (ii). Furthermore, that examination must be done on the basis of personal circumstances, which includes the relationship with the Union citizen and the situation of dependence (iii).
>
> 112. All those elements must be reviewable by a court or tribunal. A national court must have the competence to proceed, if it deems necessary, to the verification of the key relevant facts serving as the basis of the administrative decision. It must be possible to gauge whether the reasons adduced by the administration duly correspond to the criteria established by national law, within the limits imposed by Directive 2004/38. It must also be possible to ascertain the sufficiency and adequacy of the justification. In particular, it must be possible to assess

> whether the specific personal circumstances relevant to the pertinent criteria have been duly examined.
>
> 113. Conversely, as long as all those elements can be reviewed and any administrative decision breaching those requirements can be annulled, an effective remedy under article 47 of the Charter does not require, in my opinion, the reviewing court or tribunal to have the competence to examine new evidence. Nor does it require it to establish facts not presented before the administrative authority, or to have power to immediately substitute the administrative decision with its own judgment."

62. The Advocate General qualifies the second sentence of paragraph 112 in a footnote in which it is observed that what this means is that "elements of facts ascertained by the administrative authority cannot be entirely excluded from judicial scrutiny, but the terms of the available pleas under national law will be a matter for national law to determine". The defendant observes on the basis of this material that neither EU nor domestic law would require a full merits review of any decision that reasonable grounds for the submission of an application after the deadline had not been established. The defendant contends that judicial review is an adequate and appropriate remedy.

63. Whilst I have carefully considered the evidence of Mr Peckover, and there is no reason to dispute his material, in my view the issues raised in this part of the case cannot be resolved purely pragmatically, as effectively an issue of practice or fact, but must be analysed as a question of principle. The issue is whether, in the event that contrary to the analysis set out above, the requirements of Article 18(1)(r) or Article 47 of the Charter apply, it is necessary for there to be a full merits review of the defendant's decision to refuse to permit an application to be made after the expiration of the deadline.

64. In my view, having considered the case of *Banger*, it does not appear to me to be a requirement of EU law that there should be an appeal or redress process which enables the appellate tribunal to substitute its own view for that of the defendant. To fulfil the requirements of paragraph 52 it would be necessary for the appellate tribunal to be able to examine whether there was a "sufficiently solid factual basis" for the decision and to ensure that procedural safeguards, including an extensive examination of the applicant's personal circumstances, had been complied with. There needs to be a justification, or reasons, for the decision which has been made and they must be adequate. In my view all of these features of an adequate remedy would be reflected in the determination of an application for judicial review. It is true that is not normal for an application for judicial review to include an entirely fresh fact finding process, or embark upon an assessment of the credibility of the parties to the decision. However, whilst it is not the norm, as the Supreme Court observed in the case of *King*, there is power where it is justified to order factual enquiries including cross examination within the proceedings in an application for judicial review. In my view the qualities and scope of an application for judicial review are capable of fulfilling the requirements of a remedy to satisfy the standard identified in *Banger*. Thus, even if I were wrong in relation to the conclusions which I have reached in relation to the claimant's grounds I would not have reached the additional conclusion that the requirements of Article 18(1)(r) or any breach of Article 47 of the Charter demanded the provision of a full merits appeal, as opposed to the bringing of an application for judicial review.

65. Subsequent to the circulation of this judgment it was pointed out by counsel that the conclusion reached in the preceding paragraph may be inconsistent with a decision of UTIAC in *Banger (EEA:EFM-Right of Appeal)* [2019] UKUT 00194 at paragraph 40, a decision of a Presidential panel following the decision of the CJEU which has been referred to above, and one which was not referred to previously. Given the late emergence of this authority I have not heard further argument on this decision, and bearing this in mind along with the fact that the point about remedy does not alter my decision about the outcome of the case, I do not propose to take this issue any further beyond leaving my reasons and conclusions as they stand.

66. In the light of the matters set out above I have reached the conclusion that each of the grounds upon which this judicial review has been brought must be dismissed.