

06-24: AT and the EU Charter of Fundamental Rights Assessment

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Introduction

1. This Memo clarifies the position for Decision Makers (DMs) following the judgment of the Court of Appeal (“CoA”) handed down on the 08 November 2023 in the case of *SSWP v AT* [2023] EWCA Civ 1307¹ (“AT”). The Secretary of State applied for permission to appeal to the Supreme Court and this was refused on the 07 February 2024, meaning the CoA decision is now final and needs to be implemented.

¹ [SSWP v AT \[2023\] EWCA Civ 1307](#)

2. This judgment relates to EU national claimants with pre-settled status (“PSS”) under the EU Settlement Scheme (“EUSS”), as well as PSS holding non-EU national claimants who were family members of EU nationals in scope of the Withdrawal Agreement at the end of the transition period (31 December 2020), and who have no other legal right to reside for the purpose of the habitual residence test (“HRT”).
3. This judgment applies to claims made to the following benefits:
 - Universal Credit (“UC”),
 - State Pension Credit (“SPC”),
 - Housing benefit (“HB”)
4. This affects new claims, existing cases at the mandatory reconsideration stage, and HRT review cases (both single and joint claimants) which relate to entitlement of EU nationals and their family members with PSS from 12 December 2022 onwards.

5. This judgment does not affect:

- claims from non-EU nationals, who are not family members of EU nationals in scope of the Withdrawal Agreement, including those from Norway, Iceland, Liechtenstein and Switzerland,
- claimants who were not in scope of the Withdrawal Agreement at the end of the transition period (31 December 2020) (please see paragraph 12),
- claims from those with Settled Status, a Certificate of Application, or any other form of leave,
- decisions considering entitlement before 12 December 2022.

Such cases should be decided in accordance with existing processes.

Background

6. The case of AT concerns an EU national with PSS who claimed UC in 2021. As she had no qualifying right to reside for the purposes of UC, her claim was disallowed – she was not considered to be in GB. AT appealed to the First-Tier Tribunal (“FTT”) who allowed her appeal on the grounds that without UC, AT and her daughter would not be able to live “in dignified conditions” in accordance with the judgment of *CG v the Department for Communities in Northern Ireland C-709/20*¹ (“CG”).

¹[*CG v the Department for Communities in Northern Ireland C-709/20*](#)

7. In law, the FTT found that the EU Charter of Fundamental Rights (“the Charter”) applied through the Withdrawal Agreement and that the case of CG meant AT’s individual circumstances should be assessed. The FTT found on AT’s particular facts that it was a breach of her Charter rights not to grant her UC and, accordingly, reg 9(1), (2) and 3(c)(i) of the UC Regs 2013 (the provisions that require the claimant to be in GB) were disapplied on Charter grounds, meaning that the Secretary of State was wrong to disallow the UC claim.

8. In the Upper Tribunal (UT) decision¹ dated 12 December 2022, the UT dismissed the Secretary of State’s appeal but gave permission to appeal to the CoA. On 08 November 2023, the CoA dismissed the Secretary of State’s appeal against the decision of the UT, finding that the Charter rights continued to apply to EU nationals and their family members with PSS in scope of the Withdrawal Agreement. The CoA held that where the case of AT applies, the Secretary of State was required to consider if a refusal of UC would put a person at risk of destitution.

¹[*SSWP v AT \(Aire Centre and IMA intervening\) UC: \[2022\] UKUT 330 \(AAC\)*](#)

9. On the 07 February 2024 the Supreme Court refused the Secretary of State’s permission to appeal.

Actions for Decision Makers

10. The UT findings in *AT* are declaratory in law, meaning that they can be applied to new cases from the date of the decision (12 December 2022 onwards) and this date is the relevant determination date.

11. Any cases stayed under s.25(2) of the Social Security Act 1998 should now be processed and an appropriate decision made.

12. By way of overview, please note the following key points:

- Each claim should first and foremost be considered under BAU HRT rules. This means that all new claims for UC, both from single and joint claimants, in which an HRT is needed should firstly proceed for an HRT assessment in the usual way. This also applies to all changes of circumstances received after 12 December 2022 which potentially affect the claimant's existing right to reside. In either case, if the claimant/both partners pass the HRT, the UC claim/existing award continues on this basis.
- At mandatory reconsideration stage, if the original HRT refusal decision is overturned, the claim for UC is awarded in the usual way. If the original HRT refusal is maintained but the claimant is found to satisfy the HRT at a later date, the initial disallowance should be maintained, and the claimant invited to make a new claim.
- For claimants who do not meet the HRT, DMs must consider whether they come within the scope of the *AT* judgment. For those not in scope of the *AT* judgment, their UC claim should be refused for not passing the HRT.
- Claimants covered by the *AT* judgment are EU nationals and their family members with PSS who are in scope of the Withdrawal Agreement. EU nationals in scope of the Withdrawal Agreement at the end of the transition period are those who exercised a Treaty right such as being a worker, self-employed person, a job seeker, self-sufficient person, a student, having a permanent, retained, or derived right of residence, or being within the initial 3 months of arrival in the UK (see Note). Their family members are also in scope, including family members who joined after the end of the transition period.
- If the claimant is unable to demonstrate any qualifying right to reside, the DM must consider whether the claimant is able to work and if not, whether the claimant meets the *AT* threshold identified in the UT decision and set out below.

Note. Family members of British citizens (Surinder Singh cases) covered by regulation 9(1) of the Immigration (EEA) Regulations 2016, as saved by [the Immigration and Social Security Co-ordination \(EU Withdrawal\) Act 2020 \(Consequential, Saving, Transitional and Transitory Provisions\) \(EU Exit\) Regulations 2020](#), and Zambrano carers covered by regulation 16(5) of the same Regulations are not in scope of the Withdrawal Agreement.

13. For any cases and at any stage where the DM is unsure of how to proceed, the case (with all

evidence) should be escalated to DMA Leeds for further consideration using this [link](#).

The EU Charter Assessment

14. In light of the *AT* CoA judgment, where a claimant is able to work, refusal of UC will not violate their Charter rights as they themselves are able to avoid destitution by working. When determining a claimant's inability to work, consideration should reasonably be given to factors preventing the claimant from working. Examples of these could be physical or mental health conditions, homelessness, having childcare or other caring responsibilities, being a victim of domestic violence, or having other complex needs which mean the claimant is unable to work at that moment.
15. For claimants assessed as unable to work, a DM must thoroughly assess and determine whether the claimant meets the *AT* threshold.
16. *AT* threshold test for this memo means the inability to 'meet their most basic needs' at present or in the near future and should be considered in all cases. The threshold is high and the claimant's position must amount to extreme material poverty incompatible with human dignity. Areas to be considered for basic needs are:
- Food,
 - Personal hygiene,
 - Clothing,
 - Housing, and
 - Adequate heating.
17. When looking at a claimant's inability to meet their most basic needs, DMs should consider what alternative financial resources claimants are in receipt of and whether those are sufficient to meet their most basic needs at present or in the near future.

Examples

Example 1

Louisa is a Romanian national and has been residing in the UK since 08.11.2018. She was granted pre-settled status on 02.02.2021. On 22.12.2022 Louisa applied for UC with the support of her local women's domestic violence refuge. With the assistance of her support worker she entered the following information to her UC journal: Louisa was in genuine and effective work up until the birth of her son in September 2021 and was on maternity leave until September 2022. After this she was jobseeking. Whilst looking for work she was financially supported by her partner and struggled to find work whilst balancing childcare. As the time passed and the bills started to

increase her partner started to become violent towards her. On the 20.11.2022 the police were called and Louisa and her son had to move to a safe accommodation. The accommodation, provided by a shelter, is not suitable to be lived in for a prolonged period of time, and local authority made it clear that presently they are unable to provide a more suitable accommodation for a mother with a young child. Louisa has health conditions and her son (after having been assessed by the local authority) is showing signs of delayed development. Louisa is isolated and the sole carer of her young son. She has only received the occasional food voucher and had no further support from family or friends, and despite receiving some support from the local authority, it is not sufficient to cover the food cost for Louisa and her baby in the immediate term. Louisa is happy to provide evidence if supported. She was not receiving any other benefits for herself or her child.

On initial consideration of the HRT it is apparent that Louisa has no qualifying right to reside for UC purposes. However, given the details provided regarding her current circumstances, the DM considers that Louisa is currently unable to work due to her caring commitments and is unable to meet her and her child's most basic needs. The DM accepts that as Louisa was a worker at the end of transition period, she was covered by the Withdrawal Agreement at the relevant time, and decides that she meets the AT threshold. Louisa's claim is allowed.

Example 2

Antonio is an Italian national who came to the UK in 1990 as a child aged 9. Antonio believes he should be considered as having Settled Status under EUSS – previously he was granted Pre-Settled Status in 2019 and has appealed the Home Office decision. He applied to UC on the 13.12.2022. Antonio has disabilities and lives with his parents in a local authority property and is named on the tenancy agreement. Both of his parents are retired now and receive State Pension Credit. His mother also receives Carer's Allowance for Antonio. Antonio is actively jobseeking but is struggling to secure a job due to his disabilities. During the HRT interview, the DM determines Antonio to have been covered by the Withdrawal Agreement at the relevant time on account of his previous work but decides that he has no qualifying right to reside and can't derive any from his parents for the purposes of his claim to UC. Both his parents have Settled Status and are now inactive, previously they had derived their rights of residence through another son. Antonio explains to the DM that he is unable to survive without UC.

The DM considers the AT threshold to assess if Antonio can meet his most basic needs. Following the conversation with him, alongside the information from departmental systems, the DM decides that although Antonio might be struggling to find work, he is able to work and signposting to support him would be sensible. Furthermore, the DM believes there are no concerns of Antonio's basic needs not being met due to other benefits received by the household. The DM makes a decision to disallow Antonio's claim because he does not have a qualifying right to reside and does not meet the AT threshold.

Example 3

Viktor is a Dutch national. He is separated from his Canadian national spouse and has one child born in 2013. Viktor came to the UK on 25.07.2019 and was granted pre-settled status on 29.10.2019. During his stay in the UK, Viktor has never worked because his spouse was the breadwinner and he looked after their daughter. The relationship broke down in October 2022 and his partner left the UK. His ex-partner ceased paying rent on the property and Viktor approached the Local Authority who placed him and his daughter in a temporary accommodation and covered the accommodation fees. Viktor applied for UC on 01.01.2023. He was considered by the DM to have no qualifying right to reside for UC.

Viktor is contacted by the DM and he explains that he is receiving no other help or assistance and his savings are running out. The DM accepts that at the relevant time Viktor had been covered by the Withdrawal Agreement as a self-sufficient person and considers whether Viktor's and his daughter's basic needs can be met. The DM notices that on the claim disclosure Viktor declared having £4,000 in savings. During their call it is determined that Victor still has £3,600 of these savings and he is looking for work, to fit around his daughter's school time. The DM determines that Viktor is able to meet his and his daughter's basic needs and that there are no blockers to him obtaining employment. The DM makes a decision to disallow Viktor's claim as he does not meet the AT threshold.

Example 4

Anna is a Polish national and applied for UC on 14.01.2023. Whilst the DM conducted the HRT the following information was gathered: she arrived in the UK in September 2018. Studied at University from 2018 until she graduated on 03.07.2021. She was granted PSS in 2020, valid until 2025. To this date she has never worked in the UK, she has declared health conditions and considers herself unfit for work. Anna has no dependents or family in the UK to derive a right to reside from. Prior to her application to UC she had been sectioned under the Mental Health Act. She is still recovering from Psychosis and continues receiving treatment from her Mental Health team. Her application to PIP is ongoing. In the claim disclosure Anna declared to have no housing costs.

Anna stated in her journal that she will be destitute if she is refused UC. The DM contacts Anna and assesses whether her basic needs can be met. During the call Anna explains that she lives with her new partner who is covering the housing costs and other expenses. He currently earns £19,000 per year. The DM determines that Anna is not at risk of being unable to meet her basic needs. The DM makes a decision to disallow Anna's claim because she does not meet the AT threshold.

Annotations

The number of this memo should be annotated against the following paragraphs of the ADM: [C1872](#)

Contacts

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 3E zone E, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in – Memo [4/19](#) Requesting case guidance from DMA Leeds for all benefits.