

05-24: AT and the EU Charter of Fundamental Rights Assessment

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Introduction

1. This Memo clarifies the position for Decision Makers 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 which relate to entitlement of PSS holders 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 note at paragraph 11),
- 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 citizens 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. 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 SPC 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 passes the HRT, the SPC claim/existing award continues on this basis.
- At mandatory reconsideration stage, if the original HRT refusal decision is overturned, the claim for SPC 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 SPC 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 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.

12. 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

13. In light of the *AT* CoA judgment, a DM must thoroughly assess and determine whether the claimant meets the *AT* threshold.

14. AT threshold test for this guidance 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.

15. 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 SPC with the support of her local women's domestic violence refuge. With the assistance of her support worker she detailed the following information to SPC: Louisa was in genuine and effective work up until the birth of her grandson in September 2021 and worked part-time until September 2022. After this she was jobseeking. Whilst looking for work she was financially supported by her partner. Soon after Louisa found herself applying for guardianship of her grandson 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 grandson had to move to a safer 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 parent with a young child. Louisa has health conditions and her grandson (after having been assessed by the local authority) is showing signs of delayed development. Louisa is isolated and the sole carer of her young grandson. 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 grandson in the immediate term. Louisa is happy to provide evidence if supported. She was not receiving any other benefits for herself or her grandchild.

On initial consideration of the HRT it is apparent that Louisa has no qualifying right to reside for SPC purposes. However, given the details provided regarding her current circumstances, the DM considers that Louisa is currently unable to meet her and her grandchild'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 1999 as an adult dependent aged 59. Antonio believes he should be considered as having Settled Status under EUSS – previously he was granted PSS in 2019 and has appealed the Home Office decision. He applied to SPC on the 13.12.2022. Antonio has disabilities and lives with his son and daughter-in-law in a local authority property and is named on the tenancy agreement. Both his son and daughter-in-law have Settled Status, are now inactive and in receipt of UC. His son also receives Carer's Allowance for Antonio. 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 employment but decides that he has no qualifying right to reside for the purposes of his claim to SPC. Antonio also explains that he is unable to survive without SPC.

The DM considers the *AT* threshold to assess if Antonio can meet his basic needs. Following the conversation with him, alongside the information from departmental systems, the DM decides that 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. Viktor came to the UK on 25.07.2019 and was granted PSS on 29.10.2019. Since arriving in the UK he has not worked because his ex-partner was the breadwinner. The relationship broke down in October 2022 and his partner left the UK. His partner ceased paying rent on the property and he approached the local authority who placed him in a temporary accommodation and covered the accommodation fees. Viktor applied for SPC on the 01.01.2023. He was considered by the DM to have no qualifying right to reside for SPC.

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 basic needs can be met. The DM notices that on the claim disclosure Viktor declared £4,000 in savings. During their call it is determined that Victor still has £3,600 of these savings. The DM determines that Viktor is able to meet his basic needs and makes a decision to disallow Viktor's claim because he does not meet the *AT* threshold.

Example 4

Anna is a Polish national and applied for SPC on the 14.01.2023. Whilst the Decision Maker 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. She has declared health conditions. Anna has no dependents or family to derive a right to reside from in the UK. Prior to her application to SPC 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 AA is ongoing. In the claim disclosure Anna declared to have no housing costs.

Anna contacted SPC by telephone to state that she will be destitute if the decision is negative. The Decision Maker contacts Anna and assesses whether her basic needs can be met. During the call Anna explains that she lives with her new British partner who is covering the housing costs and other expenses. He currently earns £19,000 per year and in receipt of a modest State Pension. The Decision Maker 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 DMG: [073490](#)

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.