***How to use this template***

Advisers will need to go through the template filling in and adapting the text in yellow highlighting and reading the other text to make sure it is relevant to the appeal. Advisers can seek further advice with this from CPAG by emailing advice@cpag.org.uk.

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***Who is this template for?***

This template can be used by advisers assisting **Third Country Nationals** who have been issued with EU Pre Settled Status (PSS) due to being family members of EU nationals to argue that *SSWP v AT (UC)* [2022] UKUT 330 (AAC) can apply to their case in the First-tier Tribunal (see the note for advisers available on [this page](https://cpag.org.uk/welfare-rights/resources/test-case/destitute-eu-nationals-pss-can-rely-eu-charter-fundamental-rights) for when the judgment might apply).

The template is designed to be used specifically in a case where the DWP argue that *AT* does not apply because they say the claimant is not an EU national but a third country national family member of an EU national. It does not cover claims by those from Norway, Iceland, Liechtenstein or Switzerland who are not themselves family members of an EU national. If you have such a client please get in touch with CPAG and we will advise.

The template deals specifically with a situation where DWP have simply asserted this point (that third country nationals are not covered by *AT* without arguing it. If the DWP have made submissions on why they say that is the case please get in touch with CPAG and we will consider those.

The template does not deal with the more general issues of whether the claimant would suffer a breach of dignity if Universal Credit was refused and additional submissions and evidence will need to be presented on that point.

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| **In the First-tier Tribunal (Social Entitlement Chamber)****BETWEEN:** | **[TRIBUNAL REFERENCE]** |
| **[APPELLANT NAME]****Appellant****-and-****SECRETARY OF STATE FOR WORK AND PENSIONS****Respondent** |
| **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_****Reply for Appellant on issue of whether *SSWP v AT* can be relied on by third country nationals****\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** |

**Introduction**

1. These submissions explain why the Respondent is wrong to submit that a third country national (‘**TCN**’) who has been granted pre-settled status cannot rely on the EU Charter of Fundamental Rights (‘**the Charter**’) to obtain universal credit (‘**UC**’) in circumstances where a refusal to grant that benefit would leave them at risk of being without access to sufficient resources to meet their most basic needs in conditions of dignity.
2. The present submissions address only the point above. The Appellant has produced separate submissions and evidence on why without UC there would be such a risk in their case.

**The Respondent’s case on the Charter and TCNs**

1. Thus far, the Respondent has simply asserted, without reasons, that a TCN with PSS cannot rely on the Charter. The failure to provide any reasons for that position does not assist the First-tier Tribunal to deal with the case fairly and justly. It also puts the Appellant in a position where he/she is required to answer a case against her that has not been made but merely asserted.
2. The Respondent’s position is however consistent with guidance issued to his decision makers,[[1]](#footnote-1) and therefore appears to represent a consistent policy approach. That guidance, obtained via a Freedom of Information Act request was titled: *AT Charter Instructions – Decision Making Steps* and was issued by DMA Leeds in March 2023[[2]](#footnote-2). It included at §5:

5. For claimants **with Pre-Settled Status who are found not to meet the HRT**, they should be managed as follows:

**(1)** The case of AT **does not** apply, and the claim proceeds for HRT refusal for:

[…]

ii. Claimants who are non-EU national claimants, including those from Norway, Iceland, Liechtenstein and Switzerland; or

1. That guidance is also bare assertion – no authority or argument is cited for the proposition it contains. That is not surprising because, as explained below, there is no credible argument that could be made by the Respondent on this point.

**Respondent should not be given further opportunity to explain position on TCNs**

1. The Respondent has chosen not to provide any reasons for his position. The Appellant explains below why that position is wrong. As is apparent from the Appellant’s witness evidence there is an ongoing risk that the Appellant’s fundamental rights may be or are being breached by the failure to award UC. Given all of that, the Appellant’s primary submission is that the First-tier Tribunal should simply accept the Appellant’s case on this point, as hers is the only reasoned argument that has been presented on it. Rule 24(2)(e) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 requires the Respondent to state in the response to the appeal “whether the decision maker opposes the appellant’s case and, if so, any grounds for such opposition”. The Respondent has had that opportunity and has not availed himself of it.
2. The nature of the rights in this case (risk of breach of fundamental rights under the Charter) indicate it would be unfair to introduce more delay to invite further submissions from the Respondent. It would also violate article 47 of that Charter, which requires access to an effective remedy within a reasonable time:

*Article 47*

***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 this 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.

1. A “reasonable time” in circumstances where the right in issue is a right to dignity and there is a risk that will be or is being breached, is necessarily short- certainly too short to justify giving the Respondent further time to deal with a bad point that he has already had an opportunity to deal with.

**Non EU nationals with PSS can rely on Charter**

*Introduction*

1. The Charter applies whenever a Member State is implementing EU law (or in the case of the UK is implementing provisions of EU law made applicable by the Withdrawal Agreement (‘**WA**’)) – see article 51 Charter.
2. The Upper Tribunal and Court of Appeal in the *SSWP v AT* litigation held that the UK was implementing provisions of EU law (specifically article 21 of the Treaty on the Functioning of the European Union (‘**TFEU**’)), when deciding a claim for UC made by a person to whom it had granted a right of residence under domestic law in the form of pre-settled status. Because when deciding the UC claim EU law was being implemented then the Charter could be relied upon.
3. The Appellant’s case is that the UK is also implementing EU law (again article 21 TFEU) when a non EU citizen who has been granted pre-settled status, claims UC. The only difference between the Appellant’s case and that of AT is that the Appellant’s route to the UK implementing article 21 is via article 13(3) WA, whereas AT’s was via article 13(1).
4. Article 13 WA is as follows:

*Article 13*

***Residence rights***

1.Union citizens and United Kingdom nationals shall have the right to reside in the host State under the limitations and conditions as set out in Articles 21, 45 or 49 TFEU and in Article 6(1), points (a), (b) or (c) of Article 7(1), Article 7(3), Article 14, Article 16(1) or Article 17(1) of Directive 2004/38/EC.

2.Family members who are either Union citizens or United Kingdom nationals shall have the right to reside in the host State as set out in Article 21 TFEU and in Article 6(1), point (d) of Article 7(1), Article 12(1) or (3), Article 13(1), Article 14, Article 16(1) or Article 17(3) and (4) of Directive 2004/38/EC, subject to the limitations and conditions set out in those provisions.

3.Family members who are neither Union citizens nor United Kingdom nationals shall have the right to reside in the host State under Article 21 TFEU and as set out in Article 6(2), Article 7(2), Article 12(2) or (3), Article 13(2), Article 14, Article 16(2), Article 17(3) or (4) or Article 18 of Directive 2004/38/EC, subject to the limitations and conditions set out in those provisions.

4.The host State may not impose any limitations or conditions for obtaining, retaining or losing residence rights on the persons referred to in paragraphs 1, 2 and 3, other than those provided for in this Title. There shall be no discretion in applying the limitations and conditions provided for in this Title, other than in favour of the person concerned.

1. Article 13(3) expressly says that non EU citizens to whom the WA applies (see article 10 below) do have a right to reside under article 21. Indeed this is clearer for TCNs under article 13(3) (who “have the right to reside […] under Article 21 TFEU”) than it is for EU citizens under article 13(1) (who on first reading have the right to reside only under limitations in article 21). That is a point relied upon by the Upper Tribunal and Court of Appeal (as explained below).
2. TCNs, such as the Appellant in this case, were issued with pre-settled status because they fell within article 10(1)(e)(i) WA: ie they were family members of EU nationals who had moved to and resided in the UK before 31/12/2020 who themselves had also moved here before that date:

*Article 10*

***Personal scope***

1.Without prejudice to Title III, this Part shall apply to the following persons:

(a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter;

[…]

(c) Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and continue to do so thereafter;

[…]

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

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

*Fundamental rights apply to humans not to EU citizens- that is why they are human rights*

1. TCN family members of EU citizens can rely on the Charter just as EU citizens can:
	1. Article 1 on the right to dignity is precise in its wording: it refers to the dignity of **humans** and not the dignity of EU nationals.
	2. The caselaw is replete with instances of the Court of Justice applying the Charter to TCNs. For example Case C-233/18 *Haqbin v Federaal Agentschap voor de Opvang van Asielzoekers* [EU:C:2019:956](https://www.bailii.org/eu/cases/EUECJ/2019/C23318.html%22%20%5Co%20%22Link%20to%20BAILII%20version) (12th November 2019) ("*Haqbin*") concerned an Afghan citizen (see [18]), and the Court had no hesitation in applying article 1 in his case.
	3. EU legislation is also full of instances where the EU legislature has made express that the instrument, which affects the rights of TCNs, is drafted to respect the principles of fundamental rights in the Charter (see for example recital 3 to Council Directive 2003/9/EC (“the Reception Directive”).
2. The point about fundamental human rights is that, where they apply, they apply to all humans in that situation.

*SSWP position inconsistent with SSWP v AT*

1. In *SSWP v AT* the Court of Appeal upheld the decision of the three judge panel of the Upper Tribunal in *SSWP v AT (AIRE Centre and IMA Intervening)* [2022] UKUT 330 (AAC). The way that decision is reasoned demonstrates its applicability to a TCN with PSS.
2. At §93 the Upper Tribunal explained the steps via which the Court of Justice in Case C-709/20 *CG v DfCNI* [2022] 1 CMLR 26 arrived at the conclusion that EU law applied to CG when her claim for UC was being decided:

93. The steps necessary to reach the conclusion that CG’s situation fell within the material scope of EU law were that: (a) CG had exercised her Article 21 TFEU right as an EU citizen when she came to the UK; (b) in granting CG a right of residence on conditions more favourable than those in the CRD, the UK was implementing Article 21, by virtue of the WA; and (c) Article 21 and 18 continued to apply to her at the time of her application for UC, by virtue of the WA

1. The Upper Tribunal then went on to consider whether the same was true for AT. It posed the question it needed to answer as follows:

95. AT’s situation is similar to CG’s in that she moved to the UK and was granted PSS at a time when she enjoyed rights under Article 21 TFEU, as made applicable by the WA. The difference is that she applied for UC after the end of the transition period. Everyone agrees that, even after the end of the transition period, the WA made some EU law applicable. The question for us is whether the changes that occurred at the end of the transition period were such that the Charter was no longer applicable, as it would have been if she had made her application just over a month earlier.

1. At §§95-102 the Upper Tribunal first dealt with the Secretary of State’s argument that article 13 of the Withdrawal Agreement did not make article 21 TFEU applicable (and hence did not lead to the same result as *CG*). The Secretary of State argued that article 13(1) created a *sui generis* right rather than applying article 21 (it only applied, it was said, the limitations in the TFEU and not the rights). The Upper Tribunal rejected that argument in part because, the language of article 13(2) and (3) (the latter of which applies to TCNs as shown above) made it very clear that these conferred the right in article 21 and not just the limitations. §97 states:

97. First, a comparison of the language of Articles 13(1), (2) and (3) is instructive. The language of Article 13(1) might be thought to lend some support to SSWP’s argument, if taken on its own. However, the language of Article 13(2) (“shall have the right to reside in the host state as set out in Article 21”) and (3) (“shall have the right to reside in the host state under Article 21”) makes it clear that the rights being conferred by those provisions on family members are modified forms of the Article 21 TFEU right. It would make little sense for the WA to be making Article 21 TFEU applicable (in modified form) to family members, but not to the person from whose status their rights are derived.

1. Thus, in reaching its conclusion on whether article 13(1) WA conferred article 21 TFEU rights on EU nationals the Upper Tribunal states that it was obvious that article 13(3) (the provision at issue for the Appellant) did so.
2. That same point is present in the Court of Appeal’s judgment in *SSWP v AT.* See §§93-95:

***(4) Article 13 Withdrawal Agreement: Self-standing or defined by cross-reference?***

93. The SSWP next argues that properly read Article 13 creates a standalone right which brought forth no rights from Article 21 TFEU but only its limitations. The Charter was thereby severed from the right of residence in the TFEU and this had the effect of separating Article 13 from the Charter. In oral argument the Article 13 right was construed as if it read:

"Union citizens and United Kingdom nationals shall pursuant to this article, but no provision of EU law, have a right to reside in the host State. That right shall however be subject to the limitations and conditions set out in Articles 21."

This can be contrasted with Article 13 as actually framed:

"Union citizens and United Kingdom nationals shall have the right to reside in the host State under the limitations and conditions as set out in Articles 21."

94. In my judgment, Article 13 is not self-standing. By its language it brings Article 21 TFEU into effect through cross reference. The SSWP's reformulation alters the substance of the right. It elides "*limitations*" with "*conditions*" when, naturally read, "*conditions*" indicates that the right as defined in Article 21 is brought into Article 13. It also ignores the implication of the definite article which indicates that "*the*" Article 13 right to reside flows from Article 21. It further drafts out the word "*under*" which makes clear that the Article 13 right exists from within the umbrella right in Article 21 TFEU.

95. Perhaps most compelling against the interpretation of the SSWP is the language used in Article 13(2) and (3) (see paragraph [56] above) which confers derivative rights upon family members and others, and which makes clear that the rights being conferred derive from Article 21 TFEU and are not freestanding rights conferred by Article 13. Both say that the persons to be granted derived rights "*shall have the right to reside in the host State as set out in Article 21 TFEU*". The language used ("*as set out in*") is slightly different to that used in Article 13(1) ("*under*") but is clear in equating the Article 13 right with the Article 21 right. Article 13 must be read as a whole. No basis has been advanced in argument, or evidenced by admissible *travaux preparatoires* or other material, upon which it can be said that the parties to the Agreement intended the principal beneficiary to have curtailed rights only by reason of Article 13 of the Agreement but that dependants should acquire enhanced derivative rights by virtue of Article 21.

1. In the same way as in the Upper Tribunal, in that passage Green LJ was dealing with the Secretary of State’s argument that article 13(1) WA did not apply article 21 TFEU but instead created free standing residence rights specific to the WA. That was relevant to the issue of whether art. 13 needed to be “interpreted and applied in accordance with the methods and general principles of Union law” (which importantly include the Charter). The Secretary of State’s argument relied on the wording of article 13(1) (which as AT was an EU national was the one in issue in her case). Specifically, it was said that article 13(1) did not apply the right of residence in art. 21 but only the limitations on that right.
2. In rejecting that argument, Green LJ highlighted the contrasting wording in article 13(3) (which applied to non EU citizens such as the Appellant in this case). It is clear from Green LJ’s reasoning that he thought article 13(3) provided rights under article 21 TFEU for TCNs. It was because of that, that Green LJ decided the same must be true for EU nationals under article 13(1). As Green LJ said “Article 13(2) and (3) […] confers derivative rights upon family members and others, […] which makes clear that the rights being conferred derive from Article 21 TFEU and are not freestanding rights conferred by Article 13”.

**Conclusion**

1. The Tribunal should find that the Charter did apply when the Appellant claimed UC, as the Respondent was implementing EU law in deciding that claim. The Tribunal should go on to determine that the Respondent risked breaching the Appellant’s rights under the Charter by refusing the claim as made clear from the evidence provided in other documents.

[ADVISER NAME]

[ADVISER ORGANISATION]

[DATE]

1. “***SSWP v AT* litigation**” – refers to *SSWP v AT (AIRE Centre and IMA Intervening)* [2022] UKUT 330 (AAC) and
*SSWP v AT (Respondent) (AIRE Centre and IMA Intervening)* [2023] EWCA Civ 1307. [↑](#footnote-ref-1)
2. Available here: [cpag.org.uk/sites/default/files/2023-12/AT-Operational-Guidance-FOI-14-09-2023.pdf](https://cpag.org.uk/sites/default/files/2023-12/AT-Operational-Guidance-FOI-14-09-2023.pdf) [↑](#footnote-ref-2)