UA-2022-001067-USTA

Case No: UA-2022-001067-USTA

IN THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL (SOCIAL ENTITLEMENT CHAMBER)

ORDER

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, there is to be no disclosure or publication of any matter likely to lead members of the public to identify the Respondent, her daughter, her support worker or the body providing the refuge used by the Respondent without the permission of a judge of the Upper Tribunal. Breach of this order may constitute contempt of court and be punishable by a fine or imprisonment.

Before :

MR JUSTICE CHAMBERLAIN
UPPER TRIBUNAL JUDGE WARD
UPPER TRIBUNAL JUDGE WRIGHT

SSWP

Appellant

-and-

AT

Respondent

-and-

(1) THE AIRE CENTRE
(2) THE INDEPENDENT MONITORING AUTHORITY

Interveners

Julia Smyth, James Cornwell and Stephen Kosmin
(instructed by the **Government Legal Department**) for the SSWP
Thomas de la Mare KC and Tom Royston
(instructed by the **Child Poverty Action Group**) for AT
Galina Ward KC and Yaaser Vanderman
(instructed by the **AIRE Centre**) for the 1st Intervener
Marie Demetriou KC, Emma Mockford and Aarushi Sahore
(instructed by the **IMA**) for the 2nd Intervener

Hearing dates: 15 & 16 November 2022
Decision date: 12 December 2022

DECISION

The decision of the Upper Tribunal is to dismiss the Secretary of State's appeal. The decision of the First-tier Tribunal made on 31 May 2022 under case number SC299/21/00158 did not involve any material error of law.

REASONS

Introduction

1 AT is a Romanian national. After she came to the UK in August 2016, she lived with her then partner, V, also a Romanian national. Their daughter, D, was born in the UK in February 2018. In June 2018, she returned with V to Romania for what he said was a holiday. When they got there, he cut up her passport and told her she must remain in Romania with D while he returned to the UK. AT obtained new travel documents. In October 2020, V returned to Romania and brought AT and D back to the UK with him. In December 2020, AT was granted Pre-Settled Status ("PSS") under the EU Settled Status Scheme ("EUSS"), pursuant to Appendix EU of the Immigration Rules ("Appendix EU").

2 In January 2021, there was an incident at the home AT shared with V. The police were called and V was arrested, though not charged. AT and D were temporarily placed in a hotel and then went to a refuge run by a charity. In her evidence before the First-tier Tribunal ("FtT"), AT explained that she had been subjected by V to domestic violence throughout the course of their relationship, including when she had been pregnant. V had controlled all aspects of her life. After their return to the UK, he had prevented her from working by refusing to pay for childcare and had cut up AT's and D's passports. He had made threats to kill her, in particular if she moved back to Romania. He had also held her captive and subjected her to emotional and physical abuse.

3 AT left the home she shared with V with no cash at all. After arrival at the refuge, her resources comprised £200 in a bank account into which her child benefit had been paid, a £25 Tesco voucher and £15 from a fellow resident. She continued to receive child benefit (£84.20 paid every 4 weeks). This was not enough to cover her and D's basic needs. So, she applied for universal credit ("UC").

4 On 15 February 2021, her claim was refused by the Secretary of State for Work and Pensions ("SSWP") because she had not demonstrated any qualifying right to it. This was because UC is only available to those who are "in Great Britain" (s. 4(1)(c) of the Welfare Reform Act 2012) and persons granted limited leave to remain in the United Kingdom pursuant to Appendix EU are for these purposes treated as not in Great Britain (reg. 9(1), (2) and (3)(c)(i) of the Universal Credit Regulations 2013 ("the UC Regulations": SI 2013/376)).

5 AT appealed to the First-tier Tribunal ("FtT"). Her appeal was heard in May 2022 by FtT Judge G. Newman ("the judge"). In a decision dated 31 May 2022, he concluded that, without UC, AT and D would not be able to live in dignified conditions. In the light of the judgment of the Court of Justice of the EU ("CJEU") in Case C-709/20 *CG v Department of Communities for Northern Ireland* [2022] 1 CMLR 26, the judge considered himself bound by s. 5(5) of the European Union (Withdrawal) Act 2018 ("the 2018 Act") to disapply reg. 9(3)(c)(i) of the UC Regulations. He therefore allowed the appeal and set aside SSWP's decision, substituting a decision that AT is entitled to UC.

6 SSWP has appealed against the judge's decision on the ground that the judge was wrong to regard *CG* as applicable to those with PSS after 31 December 2020, the end of the "transition period" in the Withdrawal Agreement between the UK and EU on the UK ("the WA").

7 This is one of a number of appeals raising the same issue. It was identified as a suitable lead case and designated by the Chamber President, Farbey J, as involving a question of law of special difficulty and/or an important point of principle and allocated to a three-judge panel. In fact, it involves several such questions. The Aire Centre and the Independent Monitoring Authority ("IMA") were permitted to intervene.

8 The legal issues between the parties include some that were not determined by the judge and others that were not even canvassed before him. The decision was taken to leave some of these to be argued, if necessary, at a later hearing. During the hearing on 15 and 16 November 2022, the parties proposed, and we agreed, that we should concentrate exclusively on the issues relating to the applicability and effect of *CG*. This decision is accordingly limited to those issues. As our decision on the applicability and effect of *CG* is determinative of the appeal, it is not necessary for us to decide any of the other issues.

The issues for determination

9 The parties now agree that s. 5(5) of the 2018 Act does not require or authorise the disapplication of reg. 9(3)(c)(i) of the UC Regulations in this case. However, AT submits that the error was immaterial because s. 7A of the 2018 Act (which gives effect in domestic law to the WA) does. The submission has three limbs. First, under the WA, the UK is required, when deciding claims for UC by persons in AT's position, to comply with the EU Charter on Fundamental Rights ("the Charter"). Second, in the light of the judgment in *CG*, the Charter required SSWP and the judge to check that the refusal of UC would not leave AT unable to live in dignified conditions. Third, the judge's decision that it would contains no error of law. The Aire Centre supports AT in the first two submissions. The IMA supports AT in the first submission but says nothing about the second and third.

10 SSWP takes issue with each of AT's submissions. As to the first, he denies that the Charter applied at all, so that the reasoning in *CG* is not applicable. Second, he submits that, in any event, CG does not require an individualised assessment;

it is sufficient to note that there are other sources of state support to which CG is in principle entitled. Third, he challenges as erroneous in law the judge's conclusion that the refusal of UC would prevent AT from living in dignified conditions.

The law

EU free movement law

11 While it remained a Member State of the EU, the UK was obliged to comply with EU free movement law. The sources of this law included what are now Articles 21, 45 and 49 TFEU, Directive 2004/38/EC ("the Citizens' Rights Directive" or "CRD") and the substantial and ever-developing body of CJEU case law interpreting these provisions.

12 Prior to the Maastricht Treaty, free movement rights were conferred by what are now Articles 45 and 49 TFEU. These guaranteed, respectively, the free movement of workers and the freedom of establishment, in each case subject to express limitations and conditions (see Articles 45(3) and 50-55).

13 The Maastricht Treaty established for the first time the concept of EU citizenship, a status enjoyed by nationals of the Member States (see, now, Article 20(1) TFEU). Under Article 20(2), citizens have a range of rights, all to be "exercised in accordance with the conditions and limits defined by the treaties and by the measures adopted thereunder". These rights include (a) the right to move and reside freely within the territory of the Member States (dealt with in Article 21) and (b) the right to vote and stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State (dealt with in Article 22).

14 Article 21(1) TFEU contains a general right of free movement and residence not specifically anchored to the status of worker or self-employed person. It provides:

> "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

15 Article 21 does not itself lay down any limitations or conditions. The reference to "limitations and conditions laid down in the Treaties" is to other provisions of the TFEU, notably Article 45 and the provisions referred to in Articles 49 (Articles 50-55). The intention was that the right would be fleshed out by legislation adopted under Article 21(2) (as regards free movement) and Article 21(3) (as regards social security or social protection).

16 Article 18 TFEU prohibits discrimination on the ground of nationality "[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein".

17 The principal legislation currently in force in the EU is the CRD, Chapter III of which is headed "Rights of residence". In that Chapter, Article 6(1) confers on EU citizens a right of residence on the territory of another Member State for up to three months "without any conditions or formalities other than the requirement to hold a valid identity card or passport". Article 6(2) confers the same right on family members in possession of a valid passport, even if they are not EU citizens.

18 Article 7(1) confers a right of residence for more than 3 months on EU citizens if they:

> "(a) are workers or self-employed persons in the host Member State; or
>
> (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
>
> (c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
>
> – have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or
>
> (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c)."

19 Article 7(2) provides that this right extends to accompanying or joining family members who are not nationals of a Member State provided that they satisfy the conditions in Article 6(1)(a) to (c). Article 7(3) provides:

> "For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:
>
> (a) he/she is temporarily unable to work as the result of an illness or accident;
>
> (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;
>
> (c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered

> as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;
>
> (d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment."

20 Article 16 confers rights of residence which are not subject to conditions on those who have been legally resident in the host state for 5 years. Article 17 confers a right of residence on workers and self-employed persons who have retired or become incapable of work on the basis of continuous residence for a period shorter than 5 years.

21 Article 24(1) confers on EU citizens residing "on the basis of this Directive" a right to be treated equally with nationals of the host state, subject to certain derogations in Article 24(2).

The Charter

22 In its Preamble, the Charter indicates that its purpose was to reaffirm:

> "the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights".

23 In December 2017, when the Bill which became the 2018 Act was before Parliament, the Government produced the document entitled *Charter of Fundamental Rights of the EU: Right by Right Analysis* to explain its understanding of the effect of the treatment of fundamental rights in the Bill. This document predated the WA and the provisions giving effect to it, so it provides no assistance on the extent to which the Charter is applicable under the WA. Its introductory sections are, however, of some interest when considering the general effect of the Charter. They include this:

> "The Charter of Fundamental Rights did not create any new rights. Rather, it reaffirmed the existing legally binding fundamental rights, in a new and binding document. This is made clear in the Charter itself and in Protocol 30 on the application of the Charter to Poland and to the United Kingdom, which states that 'the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles'. CJEU case law has also confirmed this."

24 Many of the rights which find expression in the Charter correspond to and adopt the language of the European Convention on Human Rights ("ECHR"). Article 52(3) provides that the meaning of these rights is to be the same as those laid down by the ECHR. Similarly, where the Charter recognises fundamental rights as they result from the constitutional traditions of the Member States, those rights are to be interpreted in harmony with those traditions (Article 52(4)). More generally, the Praesidium, which was responsible for the drafting of the Charter, drew up a set of "Explanations", to which due regard is to be given by the courts of the EU and the Member States (Article 52(7)).

25 Article 1 has no equivalent in the ECHR. It provides:

> "Human dignity is inviolable. It must be respected and protected."

But this right is not new. As noted in the Explanations:

> "The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. The 1948 Universal Declaration of Human Rights enshrined human dignity in its preamble: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' In its judgment of 9 October 2001 in Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR I-7079, at grounds 70-77, the Court of Justice confirmed that a fundamental right to human dignity is part of Union law."

Prior to its recognition in EU law, the right to dignity was part of the constitutional traditions of a number of Member States, in particular Germany, whose constitutional case law has found repeated expression in the jurisprudence of the CJEU. This, together with the other sources of the right, is helpfully documented by Peers, Hervey, Kenner and Ward, *The EU Charter of Fundamental Rights: A Commentary* (2d ed, 2021), at paras 01.07 to 01.20.

26 Article 7 is modelled on Article 8(1) ECHR. It provides:

> "Everyone has the right to respect for his or her private and family life, home and communications."

27 As the Explanations make clear, Article 24 is based on the UN Convention on the Rights of the Child ("the CRC"). Article 24(2) reflects Article 3(1) of the CRC and provides as follows:

> "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."

28 Article 51 of the Charter provides as follows:

> "1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.
>
> 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."

29 This too is an attempt to codify the existing position in EU law. The Explanations provide:

> "As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: 'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...' (judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds). Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law."

30 As can be seen, the question whether a Member State is "implementing Union law" within the meaning of Article 51(1) depends on whether it is acting "in the scope of Union law" as that phrase has been explained in the case law of the CJEU. The answer to that question is often of central importance, because it delimits the area within which Member State action is subject to the substantive supervision of the CJEU. The correct answer is often heavily contested. Giving that answer in various fields of law has occupied a great deal of the CJEU's time. It may be observed that the CJEU's case law on this topic is dynamic, not static.

<u>The judgment of the CJEU in *Dano*</u>

31 In Case C-333/13 *Dano v Jobcentre Leipzig* EU:C:2014:2358 [2015] 1 WLR 2519, a Romanian national resident in Germany for more than 3 months but less than 5 years claimed a jobseeker's allowance available to German nationals. The CJEU held that an EU citizen could claim equal treatment with nationals of the host member state pursuant to Article 24(1) of the CRD only if his residence in the territory of the host member state complied with the conditions of the

Directive, including, in the case of economically inactive EU citizens, the condition laid down in Article 7(1)(b). At [74], the CJEU said this:

> "To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host member state would run counter to an objective of the Directive, set out in recital (10) in its Preamble, namely preventing Union citizens who are nationals of other member states from becoming an unreasonable burden on the social assistance system of the host member state."

32 The German court also referred a further question about whether the Charter had to be interpreted as requiring Member States to grant Union citizens non-contributory cash benefits by way of basic provision such as to enable permanent residence or whether those States may limit their grant to the provision of funds necessary for return to the home state. The answer was that, because the Charter applies to Member States only when implementing EU law (see its Article 51(1)), and the conditions for entitlement to the benefit were set by domestic law rather than EU law, the Charter did not apply: see at [85]-[92].

The Withdrawal Agreement

33 On 31 January 2020 ("exit day"), the UK ceased to be a Member State of the EU. The terms on which it did so were embodied in a new treaty between the EU and the UK, the WA, signed on 19 October 2019, which came into force on 1 February 2020. The recitals record the UK's sovereign decision to leave the EU, with the effect that "subject to the arrangements laid down in this Agreement, the law of the Union… in its entirety ceases to apply to the United Kingdom" from the date of its entry into force. They also record one of the WA's key purposes: "to provide reciprocal protection for Union citizens and for United Kingdom nationals, where they have exercised free movement rights before a date set in this Agreement, and to ensure that their rights under this Agreement are enforceable and based on the principle of non-discrimination".

34 To this end, the WA established two periods. The period from 1 February to 31 December 2020 was the "transition period", during which it was anticipated the future relationship between the UK and EU would be negotiated. During the transition period, EU law was to be applicable to and in the UK in its entirety, save to the extent that the WA provided otherwise: see Article 127(1). From 1 January 2021 onwards, however, only those provisions of EU law specifically identified in the WA would apply and only to the extent provided for in the WA.

35 Part One of the WA contains "common provisions", Part Two citizens' rights, Part Three social security co-ordination, Part Four the transition period, Part Five financial provisions and Part Six institutional and final provisions.

36 All parties agree that the WA is an international treaty which must be interpreted by reference to Article 31 of the Vienna Convention on the Law of Treaties. The general rule is that it must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. However, as is also common ground, Part One of the WA contains its own bespoke provisions which record the common intention of the parties about how it is to be interpreted and applied.

37 Article 2 defines "Union law" as:

> "(i) the Treaty on European Union ("TEU"), the Treaty on the Functioning of the European Union ("TFEU") and the Treaty establishing the European Atomic Energy Community ("Euratom Treaty"), as amended or supplemented, as well as the Treaties of Accession and the Charter of Fundamental Rights of the European Union, together referred to as "the Treaties";
>
> (ii) the general principles of the Union's law;
>
> (iii) the acts adopted by the institutions, bodies, offices or agencies of the Union;
>
> (iv) the international agreements to which the Union is party and the international agreements concluded by the Member States acting on behalf of the Union;
>
> (v) the agreements between Member States entered into in their capacity as Member States of the Union;
>
> (vi) acts of the Representatives of the Governments of the Member States meeting within the European Council or the Council of the European Union ("Council");
>
> (vii) the declarations made in the context of intergovernmental conferences which adopted the Treaties".

38 Article 4 provides:

> "1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.
>
> Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
>
> 2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities

to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.

3. 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.

4. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period."

39 Article 9(c) contains a definition of "host state". For EU citizens and their family members, it is defined as "the United Kingdom, if they exercised their right of residence there in accordance with Union law before the end of the transition period and continue to reside there thereafter".

40 Article 10 defines the personal scope of the WA. It includes materially "(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".

41 Article 13, headed "Residence rights", provides:

"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."

42 Article 23 of the WA confers on those residing in accordance with the WA a right "in accordance with" Article 24 of the CRD to equal treatment with nationals of the host state.

43 In Part Three, provision is made for "Judicial procedures". Article 86(2) provides that the CJEU is to continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period. Article 89(1) provides that judgments and orders of the CJEU handed down before the end of the transition period, as well as those handed down afterwards in proceedings referred to in Article 86, shall have "binding force in their entirety on and in the United Kingdom".

44 In Part Six, separate provision is made about references to the CJEU concerning Part Two. Under Article 158(1), in a case commenced at first instance within 8 years from the end of the transition period, a court or tribunal in the UK can request a preliminary ruling from the CJEU on a question concerning the interpretation of Part Two of the WA "where that court or tribunal considers that a decision on that question is necessary to enable it to give judgment in that case". By Article 158(2), the CJEU has jurisdiction to give preliminary rulings pursuant to such requests and the legal effects of such rulings are to be the same as those of preliminary rulings under Article 267 TFEU.

The judgment of the CJEU in *CG*

45 CG was an EU national who came to Northern Ireland in 2018 with her EU national partner and their two children. He became violent and she moved to a women's refuge. She had never been economically active and had no resources to support herself. She was granted PSS in 2020. She applied for UC but was refused, also before the end of the transition period.

46 No-one has suggested that there are any relevant factual differences between her situation and AT's save that in CG's case the decision to refuse UC was taken before the end of the transition period and therefore at a time when, under the WA, EU law applied in its entirety to and in the UK, save in certain immaterial respects; whereas in AT's case it was taken after the end of the transition period, when EU law applied only to the extent specifically provided for in the WA.

47 The Appeal Tribunal for Northern Ireland referred two questions to the CJEU on 30 December 2020, the penultimate day of the transition period. The questions concerned whether reg. 9(3)(d)(i) of the Universal Credit Regulations (Northern Ireland) 2016, the equivalent to reg. 9(3)(c)(i) of the UC Regulations was directly or indirectly discriminatory contrary to Article 18 TFEU. The case was heard on an expedited basis.

48 The CJEU began by considering whether it had jurisdiction to consider the questions referred. Since the reference post-dated the UK's exit from the EU, the answer depended on the terms of the WA. At [48], it noted that during the transition period EU law was to be applicable in the UK and was to produce the

same legal effects as those it produces within the EU and its Member States. It was to be interpreted and applied in accordance with the same methods and general principles as those applicable within the EU. At [49], it noted that Article 86(2) provided that the CJEU was to continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals during the transition period. Since the request for a preliminary ruling had been submitted before the end of the transition period in the context of a dispute concerning an application for social assistance made during the transition period, it followed that the situation fell within the scope *ratione temporis* of EU law pursuant to Articles 126 and 127 of the WA and that the CJEU had jurisdiction under Article 86(2) of the WA to consider the reference, insofar as it sought a ruling on the interpretation of Article 18 TFEU: [50]-[51].

49 As to the admissibility of the questions referred, the UK Government had argued that the situation at issue was governed by national law alone and therefore did not fall within the scope of EU law. The CJEU rejected this argument. Given the reliance placed on its reasoning by SSWP, it is necessary to set out that reasoning in full:

> "57. Since EU law is applicable in [the UK] until the end of the transition period by virtue of art.127 of the Agreement on the withdrawal of the UK, unless otherwise provided in that agreement, it must be recalled that a Union citizen, a national of a Member State, who has moved to another Member State has made use of his or her right to move freely, meaning that his or her situation falls within the scope of EU law (see, to that effect, *Criminal proceedings against ZW* (C-454/19) EU:C:2020:947 at [23] and the case law cited).
>
> 58. Likewise, it follows from the Court's case law that a national of a Member State, who by virtue of that fact has Union citizenship, and who is lawfully residing in the territory of another Member State, falls within the scope of EU law. Accordingly, by virtue of having Union citizenship, a national of a Member State residing in another Member State is entitled to rely on art.21(1) TFEU and falls within the scope of the Treaties, within the meaning of art.18, which sets out the principle of non-discrimination on grounds of nationality (*Proceedings Relating to the Extradition of BY* (C-398/19) EU:C:2020:1032; [2021] 2 C.M.L.R. 11 at [29] and [30] and the case law cited).
>
> 59. It follows that CG's situation falls within the scope of EU law until the end of the transition period laid down by the Agreement on the withdrawal of the UK. In those circumstances, it must be held that the questions referred are admissible insofar as they concern the interpretation of the first paragraph of art.18."

50 The CJEU noted that Article 20(1) TFEU confers the status of citizen on any person holding the nationality of a Member State and that this status was "destined to be the fundamental status of nationals of the Member States",

enabling them to rely on the right to equal treatment within the scope *ratione materiae* of the provisions of the TFEU, including those relating to the exercise of the right to move and reside within the territory of the Member States: [62]-[63]. At [64], it noted that CG was an EU citizen who had made use of her right to move and reside in order to settle and reside in the UK and, as such, her situation fell within the scope *ratione materiae* of EU law. But the settled case law of the CJEU was to the effect that the principle of non-discrimination in this respect was given specific expression in Article 24 of the CRD: [65]-[66].

51 At [67], the CJEU reasoned that EU citizens who move to or reside in a Member State other than one of which they are a national fall within the scope of the CRD and are beneficiaries of the rights conferred by it. This applied to CG, since she had made use of her right to move and reside before the end of the transition period. So, a person in her position falls within the scope of the Directive. Since UC was "social assistance" in Article 24 of the CRD, the question referred could be reformulated by reference to Article 24: [72]. The CJEU had already held that the right to equal treatment conferred by Article 24 could only be claimed by persons whose residence complies with the conditions of the CRD: [75]. To accept that persons who do not have a right of residence under the CRD could claim entitlement to social benefits under the same conditions as nationals would run counter to the objective of preventing those exercising their free movement rights from becoming an unreasonable burden on the social assistance system of the Member State (as noted in *Dano*, [71]): [76]-[77]. Since CG did not have sufficient resources to support herself, it followed that she was likely to become an unreasonable burden on the social assistance system of the UK and she could not, therefore rely on Article 24: [80]. At [81], the CJEU held that this assessment could not be called into question by the fact that she had a temporary right of residence under national law, granted without conditions as to resources. It continued:

> "If an economically inactive Union citizen who does not have sufficient resources and resides in the host Member State without satisfying the requirements laid down in Directive 2004/38 could rely on the principle of non-discrimination set out in art.24(1) of that directive, he or she would enjoy broader protection than he or she would have enjoyed under the provisions of that directive, under which that citizen would be refused a right of residence."

52 At [82]-[83], the CJEU accepted that, as the Advocate General had noted, national provisions granting a right of residence to those not satisfying the conditions in the CRD fell within the scenario identified in Article 37 of the CRD, but went on to hold that this did not mean that they were granted "on the basis of" the CRD within the meaning of Article 24 (following *Ziolkowski*).

53 Thus far, the CJEU judgment in *CG* follows an orthodox trajectory, applying settled case law and declining to give effect to the Advocate General's proposal to enlarge the range of situations in which Article 24 of the CRD applies. However, from [84] onwards, the judgment takes a new turn.

54 At [84], the CJEU noted that, as pointed out in [57], an EU citizen like CG has made use of his or her fundamental freedom to move and reside within the territory of the Member States, conferred by Article 21(1), with the result that his or her situation falls within the scope of EU law, including where his or her right of residence derives from national law. Under its Article 51(1), the Charter applies to the Member States when implementing EU law and that the fundamental rights guaranteed in the EU legal order are applicable in all situations governed by EU law: [85]-[86]. At [87], the CJEU made the point that, by granting her a right of residence even though she did not have sufficient resources, the UK "recognised the right of a national of a Member State to reside freely on its territory conferred on EU citizens by art.21(1) TFEU, without relying on the conditions and limitations in respect of that right laid down by Directive 2004/38". This led to the conclusion at [88] 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 at [62] of the present judgment, is destined to be the fundamental status of nationals of the Member States, and that they are accordingly obliged to comply with the provisions of the Charter."

55 This meant that, under Article 1 of the Charter, the host Member State had to ensure that an EU citizen who has made use of his or her freedom to move and reside, 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: [89]. Furthermore, Articles 7 and 24(2) of the Charter had to be read together to permit children, who are particularly vulnerable, to stay in dignified conditions with the parent or parents responsible for them: [90]-[91]. Thus, at [92], the CJEU held:

> "In the present case, it is apparent from the order for reference that CG is a mother of two young children, with no resources to provide for her own and her children's needs, who is isolated on account of having fled a violent partner. In such a situation, the competent national authorities may refuse an application for social assistance, such as Universal Credit, only after ascertaining that that refusal does not expose the citizen concerned and the children for which he or she is responsible to an actual and current risk of violation of their fundamental rights, as enshrined in arts 1, 7 and 24 of the Charter. In the context of that examination, those authorities may take into account all means of assistance provided for by national law, from which the citizen concerned and his or her children may actually and currently benefit. In the dispute in the main proceedings, it will be for the referring court, in particular, to ascertain whether CG and her children may benefit actually and currently from the assistance, other than Universal Credit, referred to by the representatives of the UK Government and the Department for Communities in Northern Ireland in their observations submitted to the Court."

56 Thus, the answer to the referring court's first question (set out at [93] and in the *dispositif*) was:

> "Article 24 of Directive 2004/38 must be interpreted as not precluding the legislation of a host Member State which excludes from social assistance economically inactive Union citizens who do not have sufficient resources and to whom that State has granted a temporary right of residence, where those benefits are guaranteed to nationals of the Member State concerned who are in the same situation.
>
> However, provided that a Union citizen resides legally, on the basis of national law, in the territory of a Member State other than that of which he or she is a national, the national authorities empowered to grant social assistance are required to check that a refusal to grant such benefits based on that legislation does not expose that citizen, and the children for which he or she is responsible, to an actual and current risk of violation of their fundamental rights, as enshrined in arts 1, 7 and 24 of the Charter. Where that citizen does not have any resources to provide for his or her own needs and those of his or her children and is isolated, those authorities must ensure that, in the event of a refusal to grant social assistance, that citizen may nevertheless live with his or her children in dignified conditions. In the context of that examination, those authorities may take into account all means of assistance provided for by national law, from which the citizen concerned and her children are actually entitled to benefit."

The judgment of the CJEU in *Préfet du Gers*

57 In C-673/20 *Préfet du Gers*, a UK national resident in France was denied the right to vote in a French municipal election held during the transition period. She applied to be reinstated to the electoral roll and the application was refused. She complained of an infringement of her rights under Articles 18, 20 and 21 TFEU and of Articles 39 and 40 of the Charter.

58 The CJEU noted that citizenship of the Union requires possession of the nationality of a Member State: [46]. Article 20 TFEU conferred the fundamental status of citizen on nationals of the Member States: [49]. Article 20(2) and Articles 21 and 22 attached a series of rights to the status of citizen: [50]. These included, under Articles 20(2)(b) and 22 TFEU and Article 40 of the Charter, the right to vote and stand in municipal elections, but none of these rights were conferred on third country nationals: [51]. But being a national of state that was a Member State was not enough to enable an individual to retain the status of citizen and the rights attached thereto if the State decides to leave the EU: [52]-[53]. From 1 February 2020, the UK ceased to be a Member State and became a third state: [56]. In those circumstances, UK nationals ceased to be citizens and ceased to enjoy, under Articles 20(2)(b) and 22, the right to vote and stand in municipal elections: [58].

59 The CJEU noted that there was nothing in the WA to say that those who exercised their free movement rights before 1 February 2020 retained their right to vote and stand in municipal elections: [63]. The application of Articles 20(2)(b) and 22 TFEU and Articles 39 and 40 of the Charter were expressly excluded during the transition period by Article 127(1)(b) of the WA: [67]. This applied not only to the territory of the UK, but also to UK nationals who exercised their free movement rights before the end of the transition period: [68]. An interpretation which limited the exclusions to the territory of the UK would create an asymmetry between the rights conferred on UK national and EU citizens, which would be contrary to the purpose of the WA, which is to ensure mutual protection for citizens of the EU and for UK nationals who exercised their free movement rights before the end of the transition period: [72].

60 Furthermore, the rules in Part Two were designed to protect "on a reciprocal and equal basis" the situation of EU citizens and that of UK nationals who exercised their free movement rights before the end of the transition period: [73]. These rules include among other things "the rights connected with residence", but not the right to vote and stand in municipal elections: [74]-[75]. The prohibition in Article 12 of the WA of discrimination on grounds of nationality within the meaning of Article 18 TFEU, in respect of the persons referred to in Article 10 of the WA, "concerns, according to the wording of Article 12 itself, Part Two of that agreement", which does not include any right to vote or stand in municipal elections: [76]-[77].

61 At [80], the CJEU said this:

> "In so far as the first paragraph of Article 18 TFEU and the first paragraph of Article 21 TFEU were made applicable by the Withdrawal Agreement during the transition period and thereafter, those provisions cannot, without disregarding the wording of Article 20(2)(b) TFEU, Article 22 TFEU, Article 40 of the Charter and the provisions of the Withdrawal Agreement, be interpreted as also conferring on United Kingdom nationals who are no longer nationals of a Member State the right to vote and to stand as a candidate in municipal elections held in their Member State of residence."

62 It followed that UK citizens did not retain their right to vote in municipal elections in EU Member States after 1 February 2020.

<u>Domestic legislation giving effect to EU law and to the Withdrawal Agreement</u>

63 Thus far, we have said nothing about the mechanisms by which EU law was and the WA is given effect in domestic law. This is because the effect of these mechanisms was common ground.

64 While the UK was an EU Member State, EU law was given effect by s. 2 of the European Communities Act 1972 ("the 1972 Act"). That provision was famously described by Professor John Finnis, and then by the UK Supreme Court, as creating a "conduit pipe" though which EU law flowed into the UK's domestic legal

systems: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, [65].

65 The 1972 Act was repealed with effect from 1 February 2020 by s. 1 of the European Union (Withdrawal) Act 2018, which contains a detailed mechanism to give effect to "retained EU law". The FtT thought that *CG* was applicable though this mechanism, but as we have made clear, none of the parties have sought to support this reasoning. So, is not necessary to consider it further.

66 Following the conclusion of the WA, the 2018 Act was amended to maintain the 1972 Act in force until the end of the transition period, subject to minor modifications: see s. 1A, inserted by the European Union (Withdrawal Agreement) Act 2020 ("the 2020 Act").

67 In order to give effect to the WA, as required by Article 4(1) and (2), the 2020 Act also inserted a new s. 7A into the 2018 Act. This provides:

> "7A:-(1) Subsection (2) applies to—
>
> (a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and
>
> (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement,
>
> as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.
>
> (2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—
>
> (a) recognised and available in domestic law, and
>
> (b) enforced, allowed and followed accordingly.
>
> (3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2)."

68 The Explanatory Notes say this:

> "31. The approach in the Act is intended to give effect to Withdrawal Agreement law in a similar way to the manner in which EU Treaties and secondary legislation were given effect through section 2 of the ECA. Although the ECA gives effect to EU Treaties and secondary legislation, it is not the originating source of that law but merely the 'conduit pipe' by which it is introduced into UK domestic law. Further, section 2 of the ECA can only apply to those rights and remedies etc that are capable of being 'given legal effect or used' or 'enjoyed'.

> 32. The approach in the Act to give effect to Article 4 is to mimic this 'conduit pipe' so that the provisions of the Withdrawal Agreement will flow into domestic law through this Act, in accordance with the UK's obligations under Article 4. The approach also provides for the disapplication of inconsistent or incompatible domestic legislation where it conflicts with the Withdrawal Agreement. This ensures that all rights and remedies etc arising under the Withdrawal Agreement are available in domestic law."

69 AT submits that, in determining her application for UC and her appeal, SSWP and the FtT were obliged in domestic law to act compatibly with her Charter rights by virtue of s. 7A of the 2018 Act. SSWP accepts that, if on a proper interpretation the WA imposes an obligation on the UK to act compatibly with the Charter in AT's situation, s. 7A gives effect in domestic law to that obligation.

Submissions of the parties and interveners

Submissions for AT

70 For AT, Tom de la Mare KC submits that AT was residing in accordance with EU law before the end of the transition period. Accordingly, she falls within the personal scope of the WA under Article 10(1)(a), as recognised by the grant of PSS. That being so, she enjoys the right to reside in the UK conferred by Article 13(1) of the WA. CG is authority for the propositions that:

(a) where a person has been resident in the UK with a Directive 2004/38 right of residence, then remains resident with pre-settled status, that person is residing within the scope of Article 21 TFEU: see [84] and [87]-[88];

(b) the fundamental rights guaranteed by the legal order of the EU (including the fundamental rights as recognised before the Charter and codified in it) are applicable in all situations governed by EU law: [85]-[86].

71 Thus, where a person is resident in the UK with PSS, they maintain their full rights under EU law and are entitled to assert their Charter rights as well as fundamental rights as general principles of EU law. For those (like AT) within the personal scope of the WA, EU free movement rights are "grandfathered".

72 The FtT correctly interpreted *CG* as requiring a case specific analysis of whether refusal of UC would risk a violation of her and her child's Charter rights. The language of [92] is unmistakably that of individualised assessment. This is put beyond doubt by the CJEU's statement that it was necessary to ascertain "whether CG and her children may benefit actually and currently from the assistance, other than Universal Credit, referred to by the representatives of the United Kingdom Government and the Department for Communities in Northern Ireland in their observations submitted to the Court".

73 Lastly, the FtT did not err in law in concluding on the facts that the refusal of UC would leave AT unable to live in dignified conditions.

Submissions for the Aire Centre

74 For the Aire Centre, Galina Ward KC supports the first two of AT's submissions. She notes that Article 13 of the WA makes specific reference to Article 21 TFEU, which was "the route by which the CJEU in *CG* held that [EU] law, including the [Charter], applied to a person with PSS before the end of the implementation period". This means that, under Article 4(3) of the Charter, it must be interpreted and applied in accordance with the methods and general principles of EU law.

75 *CG* requires SSWP in all cases to ensure that individuals to whom reg. 9(3)(c)(i) of the UC Regulations applies are able to live in dignified conditions before refusing the benefit. This obligation cannot be discharged other than by an individualised assessment.

76 As to the effect of this, the Aire Centre receives about 10-15 requests per month from EEA nationals and their family members with PSS and pending applications to the EUSS. Of these, in the 12 months to September 2022, there were only 21 cases where the individual did not have a qualifying right to reside under the CRD. Of those, 11 were (like AT) victims of domestic violence, 13 were (like AT) unable to work due to caring obligations and 6 were unable to work due to illness or disability. It follows that those affected by reg. 9(3)(c)(i) of the UC Regulations were a small group comprising some of the most vulnerable in society.

Submissions for the Independent Monitoring Authority

77 For the IMA, Aarushi Sahore addressed only the first issue of principle, namely, whether the Charter applied in AT's situation. She submitted that it does. Under Article 4(3) of the WA, it is clear that the Charter may have a role to play in the interpretation of provisions of the WA which refer to EU law or concepts or provisions thereof. In this regard, it is well established that there is a general principle of interpretation that "an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular with the provisions of the charter": Case C-358/16 *UBS Europe* [2019] Bus LR 61, [53].

78 Furthermore, Article 4(1) imposes a mandatory requirement that the effect of (i) any provision of EU law made applicable by the WA and (ii) the provisions of the WA itself must be the same in the UK as in the EU. This gives effect to the aim of introducing reciprocal rights and obligations.

79 In *CG*, the CJEU's key reason for concluding that CG's situation fell within the material scope of EU law was that she had previously exercised her free movement rights. In this case, on the facts as understood, AT was residing in accordance with EU law at the end of the transition period (because at that time she had been in the UK for less than 3 months) and so was within Article 6 of the CRD. She was therefore within the personal scope of the WA under Article 10(1)(a).

80 When initially residing in the UK during the transition period, AT was exercising her free movement rights under Article 21 TFEU. Therefore, she has the right to reside in the UK under Article 13(1) of the WA. After the end of the three month period, her right to reside was based on her PSS under domestic law (as in CG's case). But, *CG* establishes that, as a person who has previously exercised a right to move and reside under Article 21 TFEU, she is entitled to derive some protection from that right, namely the protection of the Charter in the manner set out in *CG*.

Submissions for SSWP

81 For SSWP, the submissions on the applicability of the Charter were made by Julia Smyth. She submitted that the UK's exit from the EU brought about a fundamental change to the UK's legal order. EU law no longer applies as such. Discrete provisions of EU law continue to apply but only to the extent provided for in the WA. The WA is an international treaty which falls to be interpreted according to its terms and subject to the rules in Article 31 of the Vienna Convention.

82 Article 2 of the WA defines "Union law" as including the Charter. The Charter applied during the transition period, but only because Article 127 made EU law applicable in its entirety (including the Charter), save as expressly provided. After the end of the transition period, the position is reversed: EU does not apply at all, save to the extent expressly applied. The WA does not apply any of the provisions of the Charter.

83 The aim and effect of Article 4(1) is concerned with the mode of application of the provisions of the WA (i.e. requiring that individuals be able to rely directly on them), and not with the substantive content of those provisions. Article 4(3) does not apply EU law (including the Charter) directly, but provisions of the WA which make reference to EU law, or to concepts or provisions thereof, must be interpreted and applied in accordance with the methods and general principles of EU law.

84 Ms Smyth identifies what she submits is a fundamental flaw underpinning the submissions of AT and the interveners: that it is "business as usual" for those within the scope of the WA. The WA does not continue the legal status of EU citizen for those within its personal scope and does not confer the rights attendant on that status. As *Préfet du Gers* shows, both the status and the attendant rights have gone.

85 Nor does the WA preserve accrued free movement rights or "grandfather" such rights. It refers to certain provisions of EU law, but does not seek to replicate these rights. There is no support for AT's proposition that the Charter rights are among those given effect by the WA. That proposition is inconsistent with Article 4(3) of the WA, which makes clear that: (a) the Charter is engaged only in relation to specific provisions of the WA referring to EU law or to concepts and provisions thereof; (b) even then, the Charter is only relevant for the purposes of interpreting and applying that specific provision. In contrast to the position under EU law, as

applied in *CG*, that is not a wholesale import or application of the provisions of the Charter, nor the general principles of EU law.

86 More generally, the reason why the WA did not simply continue in effect EU free movement law is that the right of free movement in the EU Treaties flows from the status of EU citizenship and is closely linked to that right: see *Préfet du Gers,* [50]. But by its sovereign decision to leave the EU, the UK has chosen not to recognise that status or its attendant rights.

87 Residence rights under the WA are significantly different from those under EU free movement law in various ways, including that: (a) they apply only in the host state and do not confer any right on UK nationals to move freely within the Member States generally, (b) the UK and other EU Member States can introduce "constitutive" residence schemes, (c) a person can fall out of scope by absence and rights can only be enjoyed under a specific Title if a person continues to meet the conditions in that Title.

88 The right to reside conferred by Article 13 does not replicate the wording of Article 21 TFEU and (unsurprisingly) does not confer a right to move within the Member States. Rather, it introduces a new *sui generis* right of residence in the host state, does not continue Article 21 TFEU in effect and only applies the limitations and conditions set out in Article 21, not the right itself.

89 The Charter does not apply to AT's situation for five reasons:

(a) The WA is an international treaty, so the central question is what the UK and EU intended. Nothing in the WA indicates an intention to continue the rights flowing from EU citizenship. So far as social assistance is concerned, the parties' aims are expressed in Article 23 of the WA, which expressly provides for equal treatment but only applies to those residing in accordance with the WA. AT is not so residing.

(b) If Article 13 were a "portal" though which rights in the Charter could flow, then on AT's and the interveners' case, that must be <u>all</u> Charter rights, since nothing in the WA specifies otherwise. But that would be perverse, since it would include, for example, the right to vote in European and municipal elections (contrary to *Préfet du Gers*). It would also include the right to free movement within the Member States, notwithstanding the UK's exit from the EU. AT's and the interveners' submissions entail that the UK and EU simply forgot to address which Charter rights would and which would not be applicable, despite addressing that very question in relation to the transition period in Article 127 ("a proposition which need only be stated to be rejected").

(c) *CG* itself makes clear that its reasoning was not intended to apply after the end of the transition period. Under EU law, the Charter only applies to Member States when they are implementing EU law. But the UK is no longer implementing EU law, because EU law no longer applies. The trigger for the

application of Charter rights in *CG* was the grant of a domestic right of residence in circumstances where *CG* enjoyed direct rights under Article 21 TFEU. But AT did not enjoy rights under Article 21 TFEU at the time of SSWP's decision. At [52] of its judgment in *Préfet du Gers,* the CJEU expressly rejected the submission that a person enjoys EU law rights after exit simply because she exercised them beforehand.

(d) Article 13(1) provides for a right of residence, subject to the limitations and conditions in Article 21 TFEU. This is very different from providing that the right in Article 21 continues. That would be flatly inconsistent with the UK's exit from the EU. If Article 13 did continue the protection of Article 21 TFEU, the applicant in *Préfet du Gers* could have relied on it against France by arguing that a refusal to allow her to vote was a national measure liable to obstruct the exercise of her residence rights in France. She could not, because, as the judgment makes clear, she did not enjoy rights under Article 21. So, Article 13 does not import the protections conferred by Article 21.

(e) AT's and the interveners' submissions are contrary to the express wording of Article 4(3), which is about the interpretation and application of the WA. In this case, no issue of interpretation or application of Article 13 arises, since AT is not complying with the limitations and conditions referred to in that Article. The relevant provision is Article 23 of the WA (which deals with social assistance), but AT cannot benefit from that either, since she was not residing in accordance with the WA.

The applicability of the Charter in this case

General

90 We have no doubt that Ms Smyth was right to submit that the UK's exit from the EU brought about a fundamental change in the UK's legal order. As the Preamble to the WA recognised, subject to the arrangements laid down in the WA, EU law in its entirety ceased to apply to the UK with effect from 1 February 2020. From that point onwards, it was not "business as usual": as the 2018 Act made clear, the law that applied in the UK was WA law, not EU law. But there is also no doubt that the effect of the WA is to make applicable certain parts of EU law, often with modifications to its temporal, personal and/or material scope.

91 The question central to this case was sometimes framed in very general terms: does the Charter apply following the end of the transition period? In our view, however, Ms Smyth was correct to point out that the key question for us is much more specific: was SSWP, when deciding AT's application for UC, made after the end of the transition period, obliged to act compatibly with AT's and her child's rights as recognised in Articles 1, 7 and 24(2) of the Charter?

What did *CG* decide?

92 By the time CG acquired PSS and applied for UC, the fundamental change in the UK's legal order brought about by the UK's exit from the EU had already happened. EU law, as such, had ceased to apply to the UK in its entirety. It applied only by virtue of the WA, and only insofar as the WA said so.

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.

94 We do not read [59] of *CG* ("CG's situation falls within the scope of EU law until the end of the transition period") as saying anything about the position after the end of the transition period. It reflects the CJEU's practice of concentrating on the law applicable to the factual situation before it. By the same token the analysis at [45]-[52] focuses on the jurisdictional provisions applicable during the transition period (Articles 127 and 86(2)), though it is common ground that another provision (Article 158) would confer jurisdiction on the CJEU to give a preliminary ruling on a reference made after the end of the transition period.

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.

To what extent does Article 13 of the WA make applicable EU law after the end of the transition period?

96 Ms Smyth submitted that Article 13(1) of the WA created a *sui generis* right, subject to the limitations and conditions in the EU provisions there referred to. AT and the interveners insisted that Article 13(1) of the WA made those EU provisions applicable to those within personal scope under Article 10, albeit in modified form. This debate had a slightly casuistic quality, but insofar as it is necessary for us to resolve it, we consider that AT and the interveners are correct for three reasons.

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.

98 Second, as Mr de la Mare pointed out, although Article 21 TFEU refers to "the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect", it does not itself lay down any such limitations or conditions. So, there would have been no point in including a reference to Article 21 TFEU unless to make clear that the right being conferred was a modified form of that right.

99 Third, [80] of the CJEU's judgment in *Préfet du Gers* ("Insofar as … the first paragraph of Article 21 TFEU [was] made applicable by the Withdrawal Agreement during the transition period and thereafter…") is consistent with, and provides some support for, the proposition that Article 21 TFEU is, to some extent, "made applicable" after the end of the transition period.

100 We accept that the rights enjoyed by EU citizens under Article 21 TFEU are different in content from that enjoyed under Article 13. Most obviously, Article 21 TFEU confers rights to move and to reside freely within the territory of the Member States, whereas Article 13 of the WA confers a more limited right to reside (but not to move) and is limited to residence in the host state. Nonetheless, the language of Article 13 shows that it was intended to confer on those within the personal scope of the WA a narrower and more limited form of the Article 21 TFEU right.

101 Bearing all this in mind, the ending of the transition period brings effects that are more significant for some EU citizens than for others. Those who have not yet done so have lost the right to move to the UK. But those who are already here (and want to stay) do not need to exercise the right to move. All they need is the right, having moved, to continue to reside. In that respect, Article 13 of the WA confers on them the only part of the Article 21 TFEU bundle of rights that they need.

102 It is true, of course, that the right conferred by Article 13 of the WA is a right to reside under the limitations and conditions as set out in the TFEU and the CRD, but so was the Article 21 TFEU right. It is also true that there are differences in the mechanisms and modalities by which the rights may be exercised and lost, but it is not suggested that any of these differences was relevant to AT's case. What AT retained, after the end of the transition period, was that part of her bundle of Article 21 TFEU rights which entitled her to continue to reside in the UK. *CG* shows that that right continues to generate legal effects even when the residence does not comply with the conditions in the CRD, at least for those who have a right of residence granted under national law.

How does the WA make the Charter applicable after the end of the transition period?

103 Ms Smyth attached significance to the fact that, during the transition period, Article 127(1) made "Union law" – defined in Article 2 to include the Charter – applicable in its entirety, save to the extent expressly disapplied; whereas afterwards Union law was applicable only to the extent positively applied by the provisions of the WA – and none of those provisions refers directly to the Charter.

104 There are two difficulties with this submission. The first is that, even when the UK was an EU Member State, Charter rights had no freestanding application. Whereas the ECHR imposes on the contracting parties a general obligation to secure to everyone within their jurisdiction the rights and freedoms it confers (Article 1 ECHR), the Charter is addressed to the Member States "only when they are implementing Union law" (Article 51(1) of the Charter). In this respect, the Charter's field of application is identical to that of the general principles of EU law, including the fundamental rights. As the Explanations make clear, "it follows unambiguously from the case-law of the [CJEU] that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law". Accordingly, "[t]he fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties".

105 The second difficulty is that, after the end of the transition period, Article 4(3) of the WA provides that provisions of the WA "referring to Union law or to concepts or provisions thereof" are to be "interpreted and applied in accordance with the methods and general principles of Union law" and the definition of "Union law" in Article 2 includes the Charter. So, the "methods" in accordance with which the provisions of the WA are to be interpreted and applied include those of the Charter. Thus, Article 4(3), taken with Article 2, requires the parties to act compatibly with any Charter or fundamental rights relevant to the situation, whenever they are "applying" (as well as when "interpreting") the WA. This mirrors the effect of the Charter and fundamental rights in EU law, i.e. constraining Member State action when they are "implementing Union law".

Was SSWP "applying" a provision of the WA referring to EU law when determining AT's application for UC?

106 *CG* establishes that the UK was "implementing" (or acting "in the scope of") Article 21 TFEU when granting CG a domestic law right of residence on terms more favourable than required by the CRD; the same is true in relation to AT. *CG* also establishes that SSWP was acting in the scope of CG's Article 21 TFEU right to reside when deciding her application for the social assistance necessary to make that right effective; by parity of reasoning, SSWP was "applying" AT's modified Article 21 right to reside (the right conferred by Articles 10 and 13 of the WA) when determining AT's application for UC. Since both Articles 10 and 13 of the WA refer to provisions or concepts of EU law, he was obliged by Article 4(3) to comply with AT's and her child's Charter rights, insofar as they were relevant to the situation. To put the point another way, applying the methods of Union law

(including the Charter), SSWP could refuse AT's application on the basis of the limitations referred to in Article 13 of the WA (precisely the limitations referred to in Article 21 TFEU) only to the extent compatible with AT's Charter rights.

107 We reject Ms Smyth's characterisation of this reading of the WA as opening a "portal" through which all the Charter rights must flow. *Préfet du Gers* shows that some Charter rights (e.g. the rights to vote and stand in European Parliament and municipal elections in Articles 39 and 40) are inextricably linked to the status of citizenship. That case is authority for the proposition that those rights did not survive the UK's exit from the EU. But the rights at issue here (those conferred by Articles 1, 7 and 24(2)) are not in that category. They are, by their nature, capable of being enjoyed by anyone whose situation falls within the material scope of EU law (including in cases where that law is made applicable by the WA).

Article 4(1) of the WA

108 If, contrary to our view, there were any doubt about the effect of Article 4(3) in this case, it is resolved by Article 4(1). We do not accept Ms Smyth's submission that this provision is addressing only the mode by which the WA is given effect in national law. If that were so, it would have been unnecessary to include the first sub-paragraph of Article 4(1) at all. The inclusion of the first sub-paragraph and the word "Accordingly" in the second sub-paragraph point unmistakably to the intention that the WA is to produce, more generally, the same legal effects in the UK as in the EU and its Member States. This accords with what Ms Smyth submitted was one of the WA's principal purposes: reciprocity.

109 Ms Smyth's submissions concentrated on the legal effect of the WA in the UK legal order. From the UK perspective, the WA is an international treaty and must be interpreted as such. From the perspective of the EU Member States, however, the WA is a Treaty between the EU and a third country, which is binding on the Member States by virtue of EU law (Article 216(2) TFEU) and accordingly forms "an integral part of the EU legal order": see e.g. Case C-266/16 *Western Sahara* ECLI:EU:C:2018:118, [2018] 3 CMLR 15, [46].

110 A Member State considering whether to grant social assistance to a UK national falling within the personal scope of the WA in AT's position would, as it seems to us, clearly be obliged to comply with Charter and fundamental rights when acting in the scope of WA provisions referring to EU law. If that is so, the same must be true for the UK, by operation of Article 4(1).

Does *CG* require an individualised assessment?

111 If, contrary to the SSWP's submission, *CG* is applicable at all, his Ground 2 is that the FtT erred in law in one or more of the following ways in its application of CG:

(a) by failing to address SSWP's written submission to the FtT that *CG* does not require a case-specific assessment;

(b) by failing to address why *CG* required such an assessment in AT's case; and

(c) by misdirecting itself in law or failing to give adequate reasons in rejecting the argument that SSWP could rely on the overall system of non-mainstream support, including in particular that available under s. 17 of the Children Act 1989.

112 Key to resolving each of (a) to (c) is establishing what *CG* requires. If it requires what the FtT thought, then any failure to give adequate reasons will be immaterial.

113 Mr de la Mare submits that the question whether it is necessary for an assessment in every case is engaged is an academic one. Ms Ward submits that there is such an obligation. In our judgment, while the question before us falls to be determined by reference to AT's case, the answer depends on what the CJEU said in *CG*. If we conclude that they said that an assessment is necessary in every case, we should say so.

114 We note that in any event any obligation to assess can only arise where a claimant has previously made use of their EU rights under Article 21 TFEU and where they no longer have a right to reside by reason of the limitations and conditions to which Article 13 WA refers. The pool of potential claimants to whom any assessment obligation might apply is a limited one and will diminish as they either progress to settled status (which carries with it an entitlement to means-tested benefits) or leave the UK.

115 Mr Cornwell submits that if the CJEU had intended to indicate that there was a general obligation in such cases to consider possible violation of Charter rights, it would have said so. We were referred to an extract from Marc Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice* (CUP 2014), Chapter 3, and note that it is appropriate to take into account the terms of the judgment as a whole and not merely the *dispositif*.

116 Nonetheless, we do not read the obligation imposed by *CG* as arising only where a person is in a "vulnerable" situation. The references to vulnerability in [89] and [91] can be explained by the fact that the CJEU was addressing the case before it, where CG and her children were indeed vulnerable. But the concept of vulnerability is an inherently uncertain one. We do not consider that the CJEU could have intended to use it as a gateway condition. If it had been used in that way, it would not be possible reliably to distinguish between those cases where Charter obligations were engaged and those where they were not. More importantly, it would not be possible to gauge whether an applicant is vulnerable without undertaking in some form or other the assessment which *CG* requires.

117 That is not to say that the assessment will need to be a sophisticated or lengthy one. In many cases, there will be nothing preventing the applicant from working; if so, that will provide a complete answer to the claim. In other cases, it may be obvious that there is some other source of state support, to which the claimant actually and currently has access, and that this is sufficient to meet the applicant's "most basic needs". It should be possible to elicit the relevant information by designing a relatively straightforward form. But in all cases where the claimant has PSS, some information will have to be gathered and some form of assessment undertaken.

118 We do not consider this view to be inconsistent with the view expressed obiter by Lord Lloyd-Jones (with whom the rest of the UK Supreme Court agreed) in *R (Fratila) v SSWP* [2021] UKSC 53, [2022] PTSR 448, at [14]. He was considering whether the claimants should be permitted to raise an argument under the Charter as a wholly new point at Supreme Court level. Permission was refused on the basis that this would require new findings of fact. Lord Lloyd-Jones added that it was "immediately apparent" that the claimants' circumstances were "materially different" from those of CG. So they were, but it is not possible to derive from that remark, apparently a "belt and braces" reason why permission to raise a new point should be refused, the proposition that the law requires "vulnerability", or a particular level of "vulnerability", before the obligation to assess will even arise.

119 In considering what *CG* requires we return to the terms of the Charter. Articles 1, 7 and 24 are set out at [25]-[27] above. As noted at [24], by Article 52(3), in so far as the Charter contains rights which correspond to those guaranteed by the ECHR, they have the same meaning and scope. We accept that Article 8 ECHR, to which Article 7 of the Charter corresponds, has a very limited role in challenges to social security or welfare provision: see e.g. *LO v SSWP* [2017] UKUT 440 (AAC) (Judge Ward), [91]-[98], and the case law cited there. The same applies to Article 24 of the Charter: *R (HC) v SSWP* [2013] EWHC 3874 (Admin) (Supperstone J), [70].

120 Article 1, however, does not have a corresponding provision in the ECHR and it appears intended to add something. We have referred to the origins of the principle of human dignity at [25] above. At first sight, the concept is a protean one. If it had not been further elucidated, it would be capable of giving rise to an unacceptable risk of variance and subjectivity in decision-making in this field. However, the case law now provides considerable assistance in understanding what is required to comply with the principle of human dignity.

121 In Case C-163-17 *Jawo v Germany* EU:C:2019:218 [2019] 1 WLR 3925, at [78], the CJEU noted that Article 4 of the Charter (which is equivalent to Article 3 ECHR) is "closely linked" to respect for human dignity, as referred to in Article 1. It went on to set out its understanding of Article 4 whose engagement depended on treatment of "a particularly high level of severity": [91]. It continued as follows:

> "92. That particularly high level of severity is attained where the indifference of the authorities of a member state would result in a person wholly dependent on state support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity: see *MSS v Belgium and Greece*, paras 252-263.
>
> 93. That threshold cannot therefore cover situations characterised even by a high degree of insecurity or a significant degradation of the living conditions of the person concerned, where they do not entail extreme material poverty placing that person in a situation of such gravity that it may be equated with inhuman or degrading treatment."

122 Mr de la Mare KC, in support of a submission that the Upper Tribunal should not be too ready to follow the "close link" between respect for human dignity under Article 1 and the demanding test under Article 4 of the Charter, sought to characterise *Jawo* as relating to the particular situation where one Member State was criticising arrangements in another Member State, contrary to the mutual trust which is presumed to exist in relation to the operation of the Dublin III arrangements. We do not find that a compelling reason to take the CJEU's decision other than at face value. The observations we have cited are, as we see it, of general application.

123 In Case C-233/18 *Haqbin v Federaal Agentschap voor de opvang van asielzoekers* EU:C:2019:956 [2020] 1 WLR 2633, the CJEU was concerned with a minor asylum-seeker who had been accommodated in a reception centre and who fell within the scope of Council Directive 2013/33 ("the Reception Directive"). Following a brawl, he was excluded and ceased to benefit from the meals, clothing, activities and medical, social and psychological support (though he still had access to urgent medical assistance if required). During the exclusion period the applicant slept in a park or stayed with friends.

124 Applying *Jawo*, the CJEU observed as follows at [46]:

> "…respect for human dignity within the meaning of that article requires the person concerned not finding himself or herself in a situation of extreme material poverty that does not allow that person to meet his or her most basic needs such as a place to live, food, clothing and personal hygiene, and that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity..."

At [56] it answered the question referred to it as follows:

> "article 20(4) and (5) of [the Reception Directive], read in the light of article 1 of the Charter…, must be interpreted as meaning that a member state cannot, among the sanctions that may be imposed on an applicant for serious breaches of the rules of the accommodation centres as well as seriously violent behaviour, provide for a sanction consisting in the withdrawal, even temporary, of material reception conditions, within the meaning of article 2(f) and (g) of the Directive, relating to housing, food or clothing, in so far as it would have the effect of depriving the applicant of the possibility of meeting his or her most basic needs. The imposition of other sanctions under article 20(4) of the Directive must, under all circumstances, comply with the conditions laid down in article 20(5) thereof, including those concerning the principle of proportionality and respect for human dignity. In the case of an unaccompanied minor, those sanctions must, in the light, inter alia, of article 24 of the Charter…, be determined by taking particular account of the best interests of the child."

125 Those two paragraphs, taken together, lead us to the conclusion that the range of matters with which Article 1 is concerned, albeit strictly limited, extends to the provision of support for a person's "most basic needs". These will no doubt vary from person to person, though typically they will include housing (which we take as including a basic level of heating adequate for a person's health), food, clothing and hygiene. *Haqbin* also shows that the state may breach its obligations under Article 1 if a person lacks these things even for a very limited time, though it is right to note that the applicant in that case, as an unaccompanied minor asylum-seeker, was particularly vulnerable. In cases where a person is deprived of the means to meet his most basic needs for a very short time, the question whether Article 1 is breached will be sensitive to contextual matters of this kind.

126 *CG* does not explain how the Member State is to discharge the responsibility to ensure that there is no breach of Charter rights. However, the decision goes on to specify that, in the case of an application for social assistance, the "competent authorities" (in the case of the UK, SSWP) "may refuse an application… only after ascertaining that that refusal does not expose the citizen concerned and the children for which he or she is responsible to an actual and current risk of violation of their fundamental rights, as enshrined in arts 1, 7 and 24 of the Charter". The use of the word "only" shows that the exercise of "ascertaining" is mandatory.

127 Although we accept that the CJEU has recognised the importance of administrative practicability (see Case C-546/11 *Danish Jurist* EU:C:2013:603 [2014] 1 CMLR 41, at [70]), its face is not immutably set against individualised assessments where it considers them appropriate, as in Case C-140/12 *Brey* EU:C:2013:565 [2014] 1 WLR 1080, at [77]. In cases such as C-67/14 *Alimanovic* EU:C:2015:597 [2016] QB 308, it has sought to define more closely when such assessments are, and are not, appropriate. In this case, however, the language used by the CJEU in *CG* leaves no room for doubt. The references to "the citizen concerned and the children for which he or she is responsible" (in [92]) and "that

citizen" (in [93]) make it clear that the exercise must be an individualised one, undertaken by reference to the facts of the claimant's case.

128 In the context of an application for social assistance (UC), the assessment must be directed to ensuring that refusal does not expose the people concerned to an "actual and current risk" of a violation of their rights as set out in the identified provisions of the Charter. That is directed to assessing a "risk" and therefore is necessarily forward-looking. However, the key question is whether the risk is "actual and current". Risks that are contingent on future adverse events whose occurrence cannot be predicted with confidence are likely to be too remote.

129 Conversely, an "actual and current risk" may remain even where there is a potential source of support that may become available only at some time in the future. By the same token, as the CJEU made clear, the availability of other sources of help (specifically, other sources of help available under national law) is only relevant if the people concerned "may actually and currently" benefit from them. In this context, "may" is not the language of theoretical possibility, but refers to the claimant's actual and current ability to benefit. The French, German and Italian versions of the judgment are of assistance in this regard. Unlike the English, they are all consistent as between [92] and [93] and use the language of actual ability to benefit.

130 The other forms of state support that can be taken into account are not, in our judgment, restricted to those to which the applicant is entitled as of right. We see no reason why "all means of assistance provided for by national law" should not in principle include support available under national law on a discretionary basis. But for the latter to be taken into account, it would be necessary to be confident that the support would "actually and currently" be made available. The language of the CJEU makes clear that the question whether a source of support is one from which a particular claimant can "actually and currently" benefit is a question of fact. This is consistent with the CJEU's consistent jurisprudence that rights guaranteed by EU law must be practically effective. Pointing to the availability of a particular source of support <u>in principle</u> will not be enough.

131 Thus, it follows that sources of public support which can only be accessed (if at all) after prolonged application processes, and *a fortiori* after bringing legal proceedings or invoking other dispute resolution mechanisms, cannot be taken into account.

132 Mr Cornwell placed considerable reliance on the availability of support from the local authority under s. 17 of the Children Act 1989. He submitted that the power to provide support under s. 17 will become a duty if not providing it would lead to a breach of ECHR rights. This may be so in principle, but it is well known that the availability in practice of funding under s. 17 differs as between local authorities.

133 Ms Ward on behalf of the Aire Centre drew our attention to a report published in 2015 by Jonathan Price and Sarah Spencer of the Centre on Migration Policy and Society at Oxford University, *Safeguarding Children From Destitution: Local Authority Responses to Families with No Recourse to Public Funds*. That report suggests that the availability of s. 17 support was, at the time of publication, patchy at best. That report was not before the judge in this case and is not formally in evidence before us either. However, the judge did have evidence from AT and from those who had assisted her about the difficulties that had been encountered in obtaining support from the local authority. We consider that evidence in greater detail below.

134 For present purposes it is sufficient to note that the CJEU's focus on whether a particular individual can actually and currently benefit from particular state support means that it will not be permissible to rely on a generalised assertion as to the availability in principle of support under s.17. What matters is whether such support will actually be provided by a local authority which may be subject to severe resource constraints.

135 All of this does, we acknowledge, place a burden on the SSWP and in disputed cases will place a like burden on the FtT. In the present case, the decision in *CG* had not been handed down when AT's application was before the SSWP, so the FtT's task was particularly onerous, because it was assessing the material facts for the first time. The burden on the FtT is likely to be less when it is hearing an appeal against a decision in which SSWP has already considered the matter, though we acknowledge such cases may still be challenging and time-consuming.

136 How SSWP administratively discharges the task required by *CG* is a matter for him, not for courts and tribunals. It is, however, relevant in testing the validity of our interpretation to note that there are other contexts in which structures exist enabling what is in effect a similar personalised assessment to be carried out.

137 Thus, for example, reg. 116 of the UC Regulations provides for the possibility of hardship payments where a claimant has been sanctioned under ss. 26 and 27 of the Welfare Reform Act 2012 for failing to meet requirements imposed by SSWP. It provides a mechanism for an application to be made, information or evidence to be provided (in each case in accordance with requirements specified by SSWP) and for SSWP to be satisfied that the claimant is "in hardship" (as tightly defined) and (to paraphrase) has done all that they can to mitigate the severity of their economic position.

138 Equally, for those whose immigration status is subject to the condition of "No Recourse to Public Funds" or "NRPF", a mechanism exists enabling Secretary of State for the Home Department to consider, on a case by case basis, whether that condition should be lifted because of hardship. The mechanism is established by a combination of provisions in the Immigration Rules and the instructions to caseworkers entitled *Family Life (as a Partner or Parent) and*

Private Life: 10-Year Routes. The detail may be found in the decision of the Divisional Court in *R (W) v Secretary of State for the Home Department (Project 17 intervening)* [2020] EWHC 1299 (Admin), [2020] 1 WLR 4420 (Bean LJ and Chamberlain J). We observe that, in that case, there was evidence from Project 17, an NGO set up to assist those without recourse to public funds in making applications for support under s. 17 of the Children Act 1989, about the "considerable practical difficulties" faced in making such applications: see at [12]. In the light of this evidence, the Secretary of State did not contend that the availability of s. 17 support was relevant to the circumstances in which the NRPF condition must, as a matter of law, be lifted.

Did the FtT err in law in concluding on the facts that the refusal of UC would leave AT unable to live in dignified conditions?

139 The final part of SSWP's challenge to the FtT's decision is a challenge to its approach to the evidence that led it to allow AT's appeal and hold that she was entitled to UC from 5 February 2021.

140 It is worth noting at this stage that it was no part of SSWP's argument that, if all his grounds of appeal failed, the FtT erred in law in disapplying reg. 9(3)(c)(i) of the UC Regulations (see further [69] above).

141 We say at the outset that we do not consider there is any merit in "error of law" terms in any of the various grounds on which SSWP seeks to impugn the judge's fact-finding and reasoning in the individualised assessment it made of AT's case following *CG*. In our judgment, his approach on the evidence before him entitled him to conclude as he did. That evidence included witness statements from AT and her support worker as well as oral evidence from them both at the hearing before the FtT.

142 The first criticism SSWP makes of the judge's approach is that he erred in law in holding that the potential for AT to work was not relevant. An immediate difficulty with this argument is that it is plain that the judge did consider (in [60]-[68] of his reasons) whether AT could avoid destitution by taking up paid employment. He concluded on the evidence that, at the time, AT could not avoid destitution by working and there was "no prospect in the near future that she could do so". So, AT's ability to work was considered.

143 A key aspect of SSWP's argument here was founded on AT's "potential" to work in the future as a means of avoiding destitution. Thus, it was argued that AT would have been able to receive free childcare within eight weeks of the UC decision, so removing one barrier to AT working, and it had therefore been wrong for the judge to dismiss that possibility as "speculative or theoretical".

144 However, as the judge's reasoning shows, there were a number of features of AT's circumstances in early to mid-February 2021 that led him to conclude that the then actual and current risk to AT and her child of their Charter rights being

violated would not in fact be alleviated by AT finding employment. These included, along with the lack of free childcare, the psychological impact on AT of her recent trauma in having to flee a violent relationship, her need for a period of recovery and the time she needed to access support to assist her with that recovery. He also took into account the fact that a further Covid-19 lockdown was in place in February 2021.

145 We reject SSWP's argument that there was "no evidence" about the psychological impact on AT of her circumstances or its potential to prevent her from working. The judge had evidence on both matters from AT and her support worker. He did not need to have evidence from a medical or other professional to corroborate this. It was for him to evaluate the evidence he did have before making findings upon it. Likewise, it was neither wrong in principle nor unfair to accord weight to the impact of the Covid-19 lockdown when evidence about that had not been specifically adduced by either party. The fact of the lockdown was known to everyone. It was a matter of which judicial notice could be taken. Its significance in the case of an applicant whose prior work experience was in the hospitality industry was obvious. Despite our invitation to do so, SSWP could not identify anything compelling that might have been said in response if the point had been specifically identified by the judge at the hearing.

146 The second argument SSWP makes about the individualised assessment the judge made is that he erred in law in rejecting child maintenance as a source of funds to meet AT's and her daughter's needs. SSWP says that the judge failed to have regard to the fact that, at the time of the challenged decision on 15 February 2021, AT had applied for and received child maintenance from her ex-partner. This argument is also without merit. It is clear from the judge's reasoning that he was well aware that AT had claimed and subsequently received child maintenance.

147 The real basis of SSWP's argument here is that the future likelihood of AT receiving child support maintenance ought to have been taken into account as diminishing the risk that, unless UC were granted, AT's and her child's rights under the Charter would be violated. But, as the judge's reasoning makes clear, it had not been until nearly 4 months after her application for UC, in early June 2021, that the Child Maintenance Service had managed to locate AT's ex-partner (V) and assess his liability. In our judgment, there was no error of law in the judge's conclusion at [72] that:

> "Given the history of the relationship with [V], the periods when he seemed to have returned to Romania, the fact that he was self-employed in the construction industry, the history of violence and threats, there was not, at the date of the DWP's decision, a reliable prospect of maintenance being received or [such an] award being effectively enforced, a picture that was confirmed by subsequent events."

148 The third ground of challenge against the judge's decision on the evidence is that he erred in law in rejecting SSWP's reliance on the availability of support under s. 17 of the Children Act 1989. In the end, and despite the effort devoted it, we consider this argument was no more than an attempt to re-argue the facts.

149 The essence of SSWP's case before the FtT (as before us) was that, if AT's and her child's predicament was such that there was a risk that their Charter rights would be violated, an application to a local authority for financial or other support under section 17 of the Children Act 1989 would be successful. This was argued on the basis that the general duty in s. 17 would arise in such circumstances and it would, accordingly, be unlawful for a local authority not to support AT's child (and AT). No evidence was advanced by SSWP to show that s. 17 support would in fact have been provided to AT and her child in February 2021.

150 The difficulty is that the judge had evidence before him that AT, with considerable assistance from her support worker, had sought and failed to obtain any ongoing support from her local authority. There had been a one-off cash payment of £40, apparently at the time her UC claim was refused, after the local authority had assessed that AT did not meet the threshold for support. The support worker went on to detail steps she had taken to challenge this and to try and secure support from the local authority. She was "involved in numerous TAF (Team around family) meetings" where AT's situation was discussed and in which she was informed there would be "no point" making a multi-agency referral "as a support worker from Early Help was assured by her mangers that [AT] would not meet the threshold for help". The support worker concluded by explaining that AT's case had been closed (by social services) on 16 July 2021 and there had been no help from them since then.

151 In accepting this evidence, the judge made no error of law. Given that – as we have held – *CG* required him to focus on the concrete factual position, not the theoretical legal one, this was a complete answer to SSWP's case that s. 17 of the Children Act 1989 ought to have provided a route by which support could be given to AT and her child. Legal theory had to yield to reality. At [76], the judge said this:

> "In concluding remarks, Mr Cornwell suggested that, if the local authority were acting improperly in their decision-making that was capable of being challenged…. That is theoretically an option but the possibility would not protect the Appellant from being subject to 'risk' for an uncertain period while remedies were being pursued, even if she had the means and capacity to do so."

In our view, the judge correctly understood and applied the law to the facts before him.

152 It may be that, in other cases, the evidence as to the availability of s. 17 support will be different. If so, this might be sufficient to alleviate any risk that would otherwise arise of a breach of the claimant's Charter rights. But, as we have said, that will depend on the evidence in the individual case.

153 SSWP's fourth argument is that the judge erred in law by excluding from consideration payments and support in kind from charities. It may be necessary in another case to consider whether it would ever be permissible – given the language used by the CJEU in *CG* – to take into account support provided by charities. At first blush, the required focus on "all means of assistance provided for by national law" would seem to exclude support from charities. On the other hand, if there were evidence that a particular claimant was receiving regular and reliable payments from a charitable source which were adequate to meet their most basic needs, it is difficult to see why such payments should be in principle be excluded from consideration.

154 But this issue does not arise on the present facts, because AT was not receiving regular or reliable payments from charitable sources. On the contrary, the support she had received was dependent on constant approaches to charities, which she felt embarrassed about making, as they always required her to put forward argument about how desperate her situation was. She felt ashamed about asking her sister (who lives abroad) for money. On the evidence before him, it was open to the judge to conclude that the availability to AT of charitable support was unpredictable, unreliable and precarious and so could not be relied upon to mitigate the risk of a breach of Charter rights.

155 Next, SSWP argued that the judge erred in law as to the threshold it applied for finding a risk of the violation of Charter rights. We do not consider this argument has any legal merit. We have already explained our understanding of the approach mandated by the CJEU in *CG*. We can find nothing in the judge's analysis showing that he misdirected himself as to the test he had to apply. SSWP was unable to identify any passage showing that the judge had applied a test that was insufficiently demanding. The judge had *Haqbin* and *Jawo* before him and considered his conclusion to be consistent with those cases. Moreover, in concluding that the "high bar" of a risk of violation of Charter rights was met, he expressly applied [46] of *Haqbin*. In those circumstances, we are not persuaded he erred in law by applying too low a threshold.

156 We should add that we heard little or no oral argument about the judge's reliance on [56] of *RJ v SSWP* (PIP) [2017] UKUT 105 (AAC); [2017] AACR 32, where it was said that "risk" connotes "a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the harm in the particular case". SSWP's written argument suggested that such reliance was misplaced because *RJ* was not an EU or Charter case and because it set the bar for risk too low. We do not read *RJ* as setting the bar for "risk" too low or as watering down the test required by *CG*. The main significance of that case lies in its insight that, in deciding whether a risk is sufficient, it is necessary to bear in mind the nature

and gravity of what will happen if it eventuates. That is as true in this context as it was in the different context considered in *RJ*.

157 SSWP's final argument is that the judge erred in law by failing to take account of the reasons AT actually advanced for not wishing to return to Romania. The short and decisive answer to this criticism is that AT's evidence about being willing, or not willing, to return to Romania was irrelevant to the question of her lawful exercise of her WA and Charter rights in the UK. Contemplation of funding or steps to remove AT from the UK, as part of the assessment of whether AT could exercise her right of residence in the UK with dignity, would be contrary to her lawful exercise of her right of residence in the UK and the Charter rights which, as we have found, attach to that right of residence.

158 In any event, the reach (if any) of arguments about AT returning to Romania, particularly in the context of alleviating the "actual and current" risk in February 2021 of AT's and her daughter's Charter rights being violated, would need to take account of the evidence that V had cut up AT's and her daughter's passports to prevent them from travelling out of the UK and AT's fear that it would much easier for V to track her down in Romania as he knows where her family live in Romania. Insofar as he made any error of law in failing to consider these matters, the error could not have affected the outcome and was therefore immaterial.

Should we refer any question to the CJEU?

159 Mr de la Mare's primary submission, for AT, was that the answers to any questions concerning the interpretation of the WA were clear enough for us to decide those questions for ourselves. We accept that submission. This means that we do not consider it necessary to request a preliminary ruling from the CJEU under Article 158 of the WA. We note that SSWP did not invite us to make such a request.

Mr Justice Chamberlain

Upper Tribunal Judge Ward

Upper Tribunal Judge Wright

(Approved for issue on 12 December 2022)