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CPAG information note for welfare rights advisers

SSWP v AT (AIRE Centre and IMA Intervening) [2022] UKUT 330 (AAC); *SSWP v AT* [2023] EWCA Civ 1307

This note is aimed at welfare rights advisers assisting claimants with pre settled status who do not have any qualifying right to reside for the purposes of universal credit ("UC") and who are applying for or have applied for UC.

Introduction

On 12 December 2022, the Upper Tribunal ("UT") gave judgment in *SSWP v AT (AIRE Centre and IMA Intervening)* [2022] UKUT 330 (AAC), dismissing the Secretary of State for Work and Pension's ("SSWP") appeal. The Court of Appeal dismissed an appeal against that decision on 08 November 2023 and the Supreme Court refused an application for permission to appeal on 07 February 2024. That means the decision of the Upper Tribunal on the issue is the final one and other similar cases must be decided according to that decision. For more background and a link to the judgment are available on the CPAG website.

Whilst the litigation was ongoing the SSWP "stockpiled" cases where it was thought the judgment in *AT* might assist the claimant- rather than make a decision in line with the judgment, the SSWP instead chose to wait to see if it could be overturned. Over 2800 cases were stockpiled in this way and the SSWP should by now have decided those cases.

If there are any cases where DWP have not yet lifted the stay and applied *AT* these could potentially be identified by advisers from notes on universal credit journals or letters uploaded to the journal which are in the following (or similar) terms:

> *"we have not made a decision disallowing your Universal Credit because there is legal lead case about Universal Credit which may affect your claim. This case is SSWP v AT (AIRE Centre and IMA intervening) [2022] UKUT 330 (AAC). This was handed down by the Upper Tribunal on 12/12/22 but is being appealed to the Court of Appeal with permission already granted.*
>
> *The Secretary of State for Work and Pensions has exercised his powers under Section 25(2) of the Social Security Act 1998 to stay decision making on claims affected by the decision. This means that we will not make a decision on your claim until such time as the lead case has been decided in the Court of Appeal (or even the Supreme Court). There is no right of appeal against the Secretary of State's decision to stay decision making on your claim, but if this decision will cause you particular hardship, please let us know."*

Below, we set out:

a) Claimants who can benefit from the UT judgment
b) Core facts that need to be established for the UT judgment to assist a claimant
c) Steps to take if the Decision Maker/First-tier Tribunal ("FtT") has stayed applying the UT judgment whilst *AT* was ongoing.

a) Claimants who can benefit from the judgment

CPAG's position is that arguably, all those with PSS (whether EU nationals or third country nationals) can potentially rely on the judgment if their core facts are similar to those of AT (see below).

It does not matter therefore whether the claimant is themselves an EU national or has PSS because they are the family member of an EU national.

The possible exceptions to that are:

- for those who have PSS because they have a "*Zambrano*" right to reside (i.e. obtained PSS as the primary carer of British children). These persons are not exercising rights conferred via the Withdrawal Agreement so it is difficult to see how they could still rely on the Charter of Fundamental Rights of the EU, which was made applicable in *AT* via the Withdrawal Agreement).
- third country nationals who have obtained PSS in reliance on being a family member of a British national who has previously lived in another EU Member State ("*Surinder Singh"* cases). Again, such persons are not exercising rights under the Withdrawal Agreement.
- nationals of EEA member states that are not also EU citizens (nationals of Norway, Iceland and Liechtenstein). The extent to which rights under the EEA Separation Agreement are the same as those under the Withdrawal Agreement and the application of the Charter to those with such rights is not clear.

Of course, a claimant with PSS who has another right to reside (for example is a worker, or has a spouse from whom they are separated who is an EU worker, or has a child in education and child's EU national parent had worked at some point whilst the child was resident in the UK etc) will not need to rely on *SSWP v AT.* It is important to ensure that any possible alternative rights have been identified before turning to *SSWP v AT*. Detailed guidance can be found in CPAG's *Benefits for Migrants Handbook*.

Additionally, the case will not assist all those with PSS who have no other right to reside. Those with adequate other income or who at the time of claim are/were not at risk of being in a situation where they cannot, or risk not being able to, meet their family's most basic needs cannot rely on the judgment, so the matters at (b) immediately below and any other source of income will need to be considered in each case before relying on *SSWP v AT*.

However, the DWP has taken a different view of the scope of who can benefit from *SSWP v AT.* We discussed the differences and suggest why DWP are wrong in "A guide to dignity" in *Welfare Rights Bulletin 297*. **However, since that article was written the DWP have changed their position. They have amended ADM 06/24 to now make clear that they accept *SSWP v AT does apply* to the non EU family members of EU citizens who have PSS** (advisers can see copies of the original ADM memo and the revised version here).

Where the DWP say *AT* does not apply because of the remaining differences of view set out in "A guide to dignity" (e.g. they say the claimant is outside the scope of article 10 WA) then advisers should consider assisting claimants to challenge these decisions- CPAG is happy to advise on such case- email testcases@cpag.org.uk

b) Core facts to establish in order to rely on the judgment

The Upper Tribunal decision provides guidance as to what needs to be established by a person with PSS for them to show that a refusal of UC would be unlawful as breaching their right to live in the UK in dignified conditions under Article 1 of the Charter. The claimant should seek to provide evidence of the risk that without UC they would be unable to live in the UK in dignified conditions. To do this, the claimant needs to demonstrate that there is no other reasonable way they could reliably obtain enough support. That can most easily be done in a statement from the claimant, accompanied by any supporting evidence which addresses the headings below (CPAG has prepared a template for a witness statement which if completed should assist advisers to ensure their client's provide sufficient evidence). It may also help to look at the DWP operational guidance (which predates the Supreme Court refusal of permission) to see how they approach the various factors.

i) Unable to work

As recognised in the judgment, many people will be able to avoid such a risk because they are able to obtain an income through work:

> "*117. […] In many cases, there will be nothing preventing the applicant from working; if so, that will provide a complete answer to the claim*."

Therefore, it is important to provide evidence about a claimant's inability to work. That could be due to health problems (such as the psychological trauma AT suffered consequent on fleeing domestic violence) or to caring responsibilities. It may be helpful to point to the rules within universal credit which would not require a particular claimant to work where those apply.

ii) No sufficient and regular support from third party

The Upper Tribunal did not decide definitively whether charitable support could in principle obviate a need for UC, as AT did not have such support available to her at sufficient and reliable levels. The Upper Tribunal comments that this may need to be decided in another case (see [153] of judgment). In any case where the evidence shows the claimant cannot get "*regular and reliable payments from a charitable source which were adequate to meet their most basic needs*" charitable support will not (at least by itself) be a sufficient answer.

Similar points could be made in relation to support from friends or family.

It is important therefore to provide evidence that the claimant cannot obtain regular support from a third party (charity / friends etc) which would be sufficient for them to meet their most basic needs (see below). A statement detailing steps taken to obtain such support and the support that was provided (focussing, where applicable, on its unreliable and irregular nature) would help to do this.

iii) No other adequate support from a Local Authority

The Decision Maker cannot refuse to provide UC using the argument that social services support (usually under s.17 of the Children Act 1989 for families with children) *might or ought to* be available at a level that enables the claimant and her children to meet their most basic needs. As the Upper Tribunal held at [134]:

> "*What matters is whether such support will actually be provided by a local authority which may be subject to severe resource constraints*".

Also at [151] the UT holds that Decision Makers should "*focus on the concrete factual position, not the theoretical legal one*". The Upper Tribunal does not rule out cases existing where s.17 support might be adequate (see [152]) so everything will depend on what the evidence shows in a particular case.

Therefore, it will be important for a claimant to provide any evidence they can about the steps that they, or their advisers or support workers, have taken to attempt to obtain support from social services and what the response has been. Such evidence could come in the form of copies of correspondence with the Local Authority or in the form of a brief statement about the steps

taken to obtain support and the result of those steps from an adviser/support worker or the claimant. (If there is no evidence of contact with social services, it may be appropriate to pursue UC and social services support simultaneously.)

iv) Risk assessment

The Upper Tribunal makes it clear that the legal test is not that the claimant and her children are currently without adequate resources to meet their most basic needs (on which see below) but rather whether there is an actual and current *risk* that they might not have such resources.

For a claimant who currently has sufficient resources, it will therefore be important to provide an account and evidence of why that situation is at risk of changing imminently for the worse. For a claimant who already does not have sufficient resources, where that is unlikely to change imminently that should be noted.

v) Unable to meet basic needs

The Upper Tribunal provides guidance on what it means to be unable to live in dignified conditions at [125] of the judgment:

> *"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."*

Accordingly, it will assist claimants if advisers can set out why whatever income they do have is insufficient for them to meet their most basic needs which includes at least a need for housing, adequate heating, food, clothing and hygiene items. In many cases, where a claimant has no

other income that should be straightforward. Where there is some other income (perhaps a small amount of child maintenance etc.) then a bit more explanation of what items a claimant cannot afford (skipping meals, choosing not to put heating on etc.) is called for.

c) Steps to take if Decision Maker or FtT stayed decision making

Now that the litigation in this case is at an end, the DWP no longer have a power to stay making decisions in line with the judgment of the Upper Tribunal. They should decide all of the cases which are stayed. If you are advising a person whose case was stayed then you should ask the DWP to decide the case without further delay. Any delays in the DWP deciding these cases will be unlawful if it can be established that the DWP are taking longer than is reasonably needed to decide the case. How long they should have to do this depends on all the issues (especially whether the client is still at risk of destitution). If you think there is an unlawful delay in your client's case then consideration should be given to threatening the DWP with judicial review if the case is not decided.

For cases stayed in the First-tier Tribunal then these stays should now be lifted and the cases heard. Advisers can make applications for directions lifting the stay and dependent on the client's current situation may also want to apply for directions enabling determination of the appeal to be expedited.

Resources

CPAG has prepared resources to assist advisers both in attempting to get *SSWP v AT* applied to their clients and to deal with problems where cases are stayed because of the ongoing appeal. These include:

- Template witness statement explaining why SSWP v AT applies to a claimants case.
- Template application to FTT for expedition and for lifting of stay (where one was imposed).
- Template for EU national with pre-settled status refused universal credit under SSWP v AT because DWP say that they are outside the personal scope of article 10 of the Withdrawal Agreement This template is for use in an appeal case where DWP have said that a claimant with pre-settled status does not fall within article 10 of the Withdrawal Agreement (due

to not having an EU law right of residence at 31 December 2020). The submissions repeat arguments on this point made by the3million in a homelessness appeal in the County Court (the3million instructed Public Law Project and were represented as interveners by Tom Royston of Garden Court North and Charles Bishop of Landmark Chambers).

Further advice

Advisers can contact testcases@cpag.org.uk for further advice. Please note your query may be passed on to CPAG's UC Advice service, or, where appropriate, to our Judicial Review Project for assistance with pre-action judicial review correspondence.

We are also interested to hear about outcomes from your cases to the same email address.

Please note CPAG are generally unable to directly advise members of the public, other than in a small number of test cases each year.

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