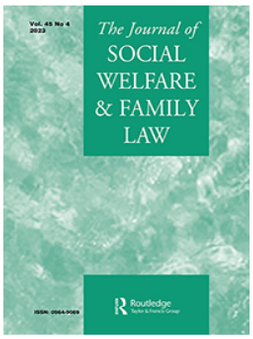

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Court of appeal decides the secretary of state is wrong, wrong, wrong: the charter applies to people with pre-settled status

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Previously in the saga of benefits and pre-settled status (PSS - the status awarded to EU nationals and their family members covered by the Withdrawal Agreement if they have been in the UK less than 5 years), the UK government introduced regulations in 2019 stipulating that PSS awarded under the EU Settlement Scheme was not a sufficient right to reside for EU nationals to pass the habitual residence test when claiming many benefits. These regulations were challenged on the basis that they were discriminatory on the grounds of nationality, and while the Court of Appeal (COA) agreed in *Fratila v SSWP* [2020] EWCA Civ 1741, the Court of Justice of the European Union (CJEU) found in *CG* that people with PSS were not protected from nationality discrimination (Case C-709/20 *CG v The Department for Communities in Northern Ireland* EU: C:2021:602).

However, there was a degree of protection of last resort; those with PSS had moved exercising rights under Article 21 TFEU, on free movement for EU citizens, and so were entitled to protection from the Charter of Fundamental Rights – in particular, the Article 1 right to dignity. Before refusing subsistence benefits, the national authorities should ascertain that a refusal would not expose the claimant and their children 'to an actual and current risk of violation of their fundamental rights, as enshrined in Articles 1, 7 and 24 of the Charter' (para. 92). Both *Fratila* and *CG* concerned facts arising before the transition period ended on 31 December 2020, when EU law was still applicable in the UK. The *AT* case asks whether the findings in *CG* still hold good after transition ended, now that the relevant law is the Withdrawal Agreement (WA), not EU law. Every single one of the seven judges faced with this question (a First tier Tribunal judge; a three-judge panel in the Upper Tribunal; and now, three COA judges) have concluded that yes, it does. Most recently, in the COA (*SSWP v AT* [2023] EWCA Civ 130), the Secretary of State reiterated three core arguments; first that the Charter no longer applied in the UK; second, the discretionary framework of support 'in principle' discharged the duties of the Charter and finally, that the State had allocated responsibility for the protection of Charter rights to local authorities.

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In relation to the first ground, that the Charter no longer applied in the UK, the COA dealt with five arguments from the Secretary of State, which were all found to be wrong.

First, the SSWP argued that the WA was driven by the 'opposite philosophy' to that of the Charter – it was not aiming for an 'ever closer union' but embodying a 'sovereign decision by the UK to leave the Union' (para. 78). The COA instead relied on a 'normal interpretation' of the Agreement (para. 82), the Charter was in fact carried through, albeit within limits, as it was part of the definition of 'Union law' (Withdrawal Agreement, Article 2(a)(i)).

Second, the Secretary of State argued that because the WA did not mention specific provisions of the Charter, the principles of interpretation laid down in Article 4(1) of the WA could not include the Charter, and that it was not a 'method' or 'interpretation' for the purposes of Article 4(3). The Court rejected this submission on a number of grounds – including the observation that it would have been surprising for the WA to enumerate specific provisions of the Charter. The Court also noted the duty of reciprocity imposed by Article 4(1), and agreed with counsel for the IMA (who were intervening) who said it was 'inconceivable that Article 13 would be construed without reference to the Charter' in the EU, and so the same would apply in the UK (para. 85). Further, case law showed that consistency with the Charter is a 'general principle of interpretation' and was therefore required by Article 4(3) WA (Case C-12/11 *McDonagh* EU:C:2013:43, para. 44).

Third, the Secretary of State argued that Article 13 WA only brought forward the limitations and conditions of Article 21 TFEU, not the right to reside relied on in *CG*. The Court contrasted the purported interpretation of the government with what the text 'actually' says and made three points in dismissing this argument (*AT*, para. 93). First, when 'naturally read', the term 'conditions' was used to indicate the bringing forwards of the right from Article 21 TFEU. Secondly, the use of the definite article in Article 13 indicated that 'the' right to reside flows from Article 21 TFEU. And thirdly, Articles 13(2) and (3) were worded in such a way to make clear that the rights conferred on family members derived from Article 21 TFEU. The Court noted that there was no basis for suggesting that the parties to the Agreement intended to curtail the rights of principal beneficiaries while extending the rights of their dependants.

The Secretary of State's fourth argument relied on the reference to EU law 'being applicable . . . until the end of the transition period' in *CG*, maintaining that it could not apply to a UC application that post-dated the end of transition (*CG*, paras. 57, 59). The Court rejected this argument, as *CG* did not concern what happened post-transition (*AT*, para. 101). Instead, the COA drew focus to the 'anchoring right' which 'pre-dated but also subsists beyond the transition period' (para. 97–99). AT had had an EU law right to reside under Article 21 TFEU, which was transformed into an international law right under the WA 'and is now encapsulated into PSS' (para. 99). The SSWP's argument incorrectly assumed that neither the UK nor the EU 'intended that any woman, whether from the UK or EU, with a right to reside in a host state who later became a victim of violence and fled, thereby becoming in need of support, could claim the bare minimum support needed to make her existing right of residence sustainable in a dignified manner' (para 99). Lord Justice Green memorably summarised this as 'an attack upon the basic, anchoring, right; on the analysis of the SSWP the tail eviscerates the dog' (para 99).

Finally, it was argued that, even were the Charter to apply, Article 1 creates no greater right than Article 3 ECHR (reflected in Article 4 of the Charter): to not be subjected to inhuman and degrading treatment. The Secretary of State argued that this high threshold had not been met by AT. The COA disagreed, Article 1 is freestanding and 'cast in language as unequivocal and emphatic as it is concise: "Human dignity is inviolable"' (para. 105). Case law dealing with an overlap between the two, treated Article 4 cases as a 'subset' of Article 1 cases, and the benchmark for Article 1 is now established in *CG*, which was framed in relation to living in dignified conditions (para. 105).

The SSWP's second ground argued that any Charter rights duty was discharged by pointing to an 'in principle' statutory framework, regardless of whether any support was actually provided in practice (para. 116). Lord Justice Green outlined four rejoinders to this position. First, that *CG* outlined a duty to 'ensure' that the person concerned could 'live in dignified conditions' (para. 124). This required the State to ascertain whether there was 'an actual and current risk of violation' of fundamental rights, taking account of benefits that were 'actually and currently' available (para. 124). Secondly, the 'in principle' defence was found to be 'the antithesis of direct effect', where individuals should be able to assert their rights and access 'remedies effective to remediate individual harm' (para. 125). Thirdly, to interpret Article 1 as requiring no more than an 'in principle' system would be to 'render the right violable, subject to disrespect, and unprotected' (para. 126). Finally, the COA found that the system 'in principle' failed to offer protection. Green LJ made various observations about the purported framework, including that people with PSS were ineligible for housing and homelessness support – apart from access to advice. Green LJ added pointedly that 'advice is not housing' (para. 128). While the section 17 Children Act 1989 duty to promote the welfare of children was the 'centrepiece of the SSWP's system of protection' (para. 133), the COA was not convinced, pointing to the lack of evidence that the section 17 system 'could in theory be more fulsomely applied' (para. 143), and to a report covering the 'considerable complexity and uncertainty of the section 17 regime' (Price and Spencer 2015). While SSWP relied on the supposedly wide powers of local authorities under the Localism Act 2011 as a catch-all, the Court found that the Act was never intended to be used this way, nor had local authorities accepted that responsibility; nor were they 'adequately resourced' to do so (*AT*, paras. 128 and 164).

The SSWP's final ground argued that adherence with fundamental rights had been allocated to local authorities; if they had failed in their duties, the remedies lay in judicially reviewing those authorities. The Court disagreed: 'the simple fact of allocation does not absolve the state from the continuing duty to ensure that rights … remain capable of being effectively enforced' (para. 169).

In short, the Court of Appeal comprehensively dismissed all the Secretary of State's grounds of appeal. The Charter applies to those within scope of the WA and a purely hypothetical system of support does not provide a licence under which violations of fundamental rights become lawful. In February 2024, the Supreme Court refused the Secretary of State's permission to appeal. The Court of Appeal's decision in AT is therefore binding and can be relied on by those with pre-settled status to ensure that risks to their Charter rights are assessed before

access to Universal Credit is refused. The Secretary of State will also have to revisit the 2900 claims that had been stayed pending the outcome of the litigation (DWP Central Freedom of Information Team 2024). Questions still remain about the extent to which the judgment could be relied on for access to other social assistance, such as housing. In addition, new DWP operational guidance on AT excludes other claimants in the scope of the WA, such as non-EEA national family members or those with pending EUSS applications (Department for Work and Pensions, 2023), so it is likely that the pre-settled status, Charter rights and benefits saga is not quite over.

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