

Benefits Bulletin

EEA Nationals and Benefits...

20th January 2023

Issue **1** [2023]

1. Introduction

1.1: This Benefits Bulletin bring news on the latest development concerning the benefit rights of EEA Nationals who are living in the United Kingdom in the wake of Brexit.

1.2: It comes in light of the recent ruling by the Upper Tribunal (Three-Judge Panel) in [SSWP v AT - \[2022\] - UKUT 330 \(AAC\)](#) which found that, in this respect, the United Kingdom was still bound by European Union law and that given this it had a duty to provide financial support to EEA Nationals who were lawfully living in the United Kingdom if, without that financial support there would be a risk to their well-being and that of any children for whom they were responsible.

1.3: The case concerned AT, a Romanian national who was living in the United Kingdom in a women's refuge and without sufficient funds to support herself and young daughter following separation from her husband due to domestic violence. Her original application for Universal Credit was refused. When AT appealed to the First-tier Tribunal, it allowed her appeal, finding that without Universal Credit AT (and her daughter) would have been destitute.

1.4: The DWP then, in turn, appealed against the decision of the First-tier Tribunal to the Upper Tribunal. The Upper Tribunal held that the decision of the First-tier Tribunal in the case of AT was not erroneous in law and so stood.



1.5: This ruling by the Upper Tribunal is very important. This is because it broadens the circumstances in which those with PRE-SETTLED STATUS can access the benefit system.

1.6: Whilst post-Brexit it has been accepted that EEA Nationals with SETTLED STATUS have access to the benefit system, the rights of those who with PRE-SETTLED STATUS has been less clear unless they have been either a 'worker' or 'self-employed' person or a family member of such a person.

1.7: However, the decision by the Upper Tribunal makes clear that irrespective of the employment status of a person with PRE-SETTLED STATUS, they may have access to Universal Credit if, as a result of having no income (or a very limited income) there is a risk to their overall well-being. The same argument exists in the case of EEA Nationals who have reached state pension age and Pension Credit.



1.8: The difficulty here is that whilst reporting the findings of the Upper Tribunal, which is clearly favourable to EEA Nationals, we must also advise that the Department for Work and Pensions (DWP) have been given permission to appeal against the findings of the decision to the Court of Appeal. Therefore, whilst we need to report on the ruling of the Upper Tribunal, we also need to provide information on what we believe this all means in practical terms.

1.9: It may well be that this matter will run and run. If the DWP's appeal to the Court of Appeal proves unsuccessful it may seek to appeal to the Supreme Court. By the same token if the appeal succeeds, those representing AT may seek to appeal further. Therefore, it may well prove that we only have final resolution to this matter once the case has been determined by the Supreme Court and that could take some considerable time. Please see 3. Advice and Further Information.

2. SSWP v AT

2.1: The decision of the Upper Tribunal concerned AT, a Romanian national who had been granted PRE-SETTLED STATUS and was living in the United Kingdom and who had claimed Universal Credit but been refused.

2.2: At the material time AT:

- was living in a women's refuge with her young daughter following separation from her husband due to domestic violence
- had financial resources comprising only of her Child Benefit (see Comment below), £200 in a bank account, a £25.00 Tesco voucher and £15.00 which had been given to her by a fellow resident of the refuge
- had applied for Universal Credit because she did not have sufficient income to cover her and her daughter's basic needs.

2.3: Her claim for Universal Credit was refused. Put simply, the claim was refused on grounds that AT had not shown that she had a 'qualifying right' to Universal Credit because following Brexit, it was understood that Universal Credit was only available to those who could be treated as though they were living in Great Britain, and that whilst PRE-SETTLED STATUS allowed AT to live and work in the United Kingdom, it did not entitle her to be treated as though she was living in Great Britain for the purposes of Universal Credit.



Comment: It is our understanding that those with PRE-SETTLED STATUS are not ordinarily entitled to Child Benefit unless they are a 'worker' (see 4.5 on page 7) or 'self-employed' person (see 4.6 on page 7) or 'self-sufficient person' (see 4.7 on page 6) or a 'student' (see 4.7 on page 6) or a family member of such a person (see 4.8 on page 7).

Therefore, we do not know why AT appears to have been getting this after her separation from her husband, presuming that he was e.g. a worker / self-employed or outside of any analogous arguments surrounding the findings of the Upper Tribunal.

2.4: AT appealed. Her appeal was allowed. The First-tier Tribunal ruled that AT's claim for Universal Credit should have been allowed. This was because both AT and her daughter would not be able to live in dignified conditions without Universal Credit. The First-tier Tribunal held that it was bound by the findings of the European Court of Justice in *CG v Department of Communities for Northern Ireland* and so should disapply the part of the Universal Credit regulations which otherwise disqualified AT from Universal Credit.

2.5: The European Court of Justice had held that, in the case of Universal Credit, providing an EEA National claimant was residing legally in the United Kingdom (which someone with PRE-SETTLED STATUS would be), then before being able to refuse a claim to Universal Credit, the DWP needed to 'check' that in turning them down it did not expose them and any children from whom they were responsible for, to any actual violation or the risk of violation of their human dignity, respect for family life and/or their overall well-being.



2.6: The DWP appealed the decision of the First-tier Tribunal on grounds that it was wrong to apply *CG v Department of Communities for Northern Ireland* to cases concerning those with PRE-SETTLED STATUS after 31st December 2020.

2.7: After considerable analysis of the rules and regulations surrounding the rights of EEA Nationals to Universal Credit and the position of European Union law, the Upper Tribunal held that there was no legal error in the decision of the First-tier Tribunal.

2.8: It held that the First-tier Tribunal was correct in its decision to apply *CG v Department of Communities for Northern Ireland*. This was despite the fact that unlike in that case the application for Universal Credit was made after 31st December 2020 (i.e. the end of the 'transition period') - this being the point up to when European Union law would be applicable in the United Kingdom and beyond this date only specific European Union law which was contained within the Withdrawal Agreement between the United Kingdom and European Union, would apply.

2.9: The agreed finding was that the law did not allow the United Kingdom to withhold 'social assistance' from an EEA National who had albeit a temporary right to reside in the United Kingdom, if that person was 'economically inactive' and did not have 'sufficient resources' to support themselves if social assistance was guaranteed to British nationals. However, to apply it needed to be established (considering all the means of assistance provided by United Kingdom law) that a refusal to award the benefit in question would not mean that the individual (and the children for whom they were responsible) was exposed to an actual risk or potential risk of living in undignified conditions.

2.10: The issues then to be resolved surrounded the matter of the 'human dignity' question - to what level of support was required and whether some form of specific assessment was required.



2.11: On the first point the Upper Tribunal held that the provision only needed to be for a person's 'most basic needs' and whilst that would vary from person to person typically it extended to housing (including a basic level of heating adequate for a person's health), food, clothing and hygiene.

2.12: On the second point the Upper Tribunal held that whilst *CG v Department of Communities for Northern Ireland* did not explain how, in this instance the United Kingdom should discharge its responsibility to ensure that there was no breach of ‘human dignity’ it did, in effect, provide that an application for social assistance (in this instance that being Universal Credit) could only be refused after ascertaining that that refusal would not expose the applicant (and any children from whom they were responsible for) to the risk of a violation of their fundamental ‘human dignity’ rights. It held that the use of the word ‘only’ showed the exercise was mandatory. Moreover, it held that the exercise must be an individual one which looked at both the ‘actual and current risk’ and that that was a ‘forward-looking’ assessment and within that even if it was established that there was a potential source of support in the future the ‘actual and current risk’ could exist until that time.

2.13: Also, on this point the Upper Tribunal held that whilst other forms of state support could in principle be taken into account in the assessment, it would be necessary for the assessor to be confident that the support would ‘actually and currently’ be made available.



2.14: Mere signposting to the availability of potential support would not be sufficient. On the issue of the availability of support from local authorities under Section 17 of the Children Act 1989 for those with children, the Upper Tribunal held that whilst such support could in principle be available to abate / protect Human Right interests, it was nonetheless well known that the availability in practice of Section 17 support differed between local authorities.

2.15: Therefore, it would not, in the opinion of the Upper Tribunal, be sufficient for there to be a ‘generalised assertion’ that Section 17 support would be available. What mattered was whether such support was actually available. Indeed, the Upper Tribunal noted that AT gave evidence to the First-tier Tribunal of her own difficulties in obtaining support from her local authority.

2.16: In final analysis the Upper Tribunal found that the decision of the First-tier Tribunal was not erroneous in law. It observed that its job could have been made easier had the DWP assessed the application for Universal Credit as it should have (i.e. it had undertaken the human dignity assessment) but acknowledged that the application for Universal Credit in the case of AT was made prior to the judgement in *CG v Department of Communities for Northern Ireland* being handed down.

2.17: It held that the First-tier Tribunal was able to reach the decision it did having taken evidence from both AT and her support worker surrounding AT’s financial plight. It held that the decision of the First-tier Tribunal could not be criticised in holding that AT had no potential to avoid destitution through obtaining paid employment, as she had no prospects within the near future of obtaining employment.

2.18: It held that the decision of the First-tier Tribunal could not be criticised for holding that AT’s (and her daughter’s) circumstances posed an ‘actual or current risk’ that could not be alleviated by AT finding paid employment, not least because of the lack of free childcare, the psychological trauma in having to flee a violent relationship and the fact that she needed a period of recovery and time to access support to assist her with that recovery.



2.19: It held that the decision of the First-tier Tribunal could not be criticised for rejecting child maintenance and support in kind from charitable organisations as a source of funding. This was because, as the First-tier Tribunal made clear, child maintenance was not in payment at the point in time when AT made her application for Universal Credit and it was not until nearly 4 months after the date of the application that the Child Maintenance Service had managed to locate AT's former partner and assess his liability and that at the material time AT was not receiving any regular and reliable charitable support.



2.20: The Upper Tribunal also dismissed the argument that the decision of the First-tier Tribunal was flawed because it failed to take fully into account the evidence AT gave about her willingness or reluctance to return to Romania.



2.21: It held that this argument was irrelevant as it was contrary to AT's right to reside in the United Kingdom given her PRE-SETTLED STATUS. Moreover, it held that in any event that assertion failed to take into account evidence that AT's partner had cut up her (and her daughter's) passport to prevent her from leaving the United Kingdom and the fact that it would possibly be easier for AT's ex-partner to track her down in Romania as he knew where her family lived in Romania.

3. Advice and Further Information...

3.1: In final analysis the case law affecting the benefit rights of EEA Nationals with PRE-SETTLED STATUS to 'Means-tested Benefits' (see 4.10 on page 7), may not prove to be of any practical benefit to those who seek to rely on it.

3.2: This is because unless the DWP adopts the current case law position when assessing claims of this nature, it could take several months (indeed years) before any claims are fully assessed or decided upon.

3.3: The feeling is that the DWP may seek to stockpile / stay such claims (including the determination of any mandatory reconsideration requests) until *SSWP v AT* has been considered by the Court of Appeal. Even then, if the appeal is 'lost' then there could be a further appeal to the Supreme Court.

3.4: If there is evidence that the DWP has stockpiled / stayed a particular case, then please be mindful that the following is contained in the [DWP Suspension and Termination](#) guide (dated 27.4.2015):

"4053: There is no right of appeal against a decision to stay. If a customer challenges a decision to stay, reconsider the decision in the light of all the available facts, including any additional facts that are presented by the customer. If the claimant is suffering hardship, a determination on the substantive benefit issue should be made, and any payments due from that award must then be made." [Our emphasis]



3.5: Even if a person should get past the mandatory reconsideration stage and lodge an appeal, the First-tier Tribunal could use its own case management powers under Rule 5 and Rule 18 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (see this [LINK](#)) to 'stay' the case until the outcome of *SSWP v AT* has been determined by the Court of Appeal / Supreme Court.

3.6: In such cases it could be argued that the appeal should progress on grounds:

- that Article 47 of the European Union's Charter of Fundamental Rights provides that "everyone is entitled to a fair and public hearing within a reasonable time..." (see this [LINK](#)); and
- that Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (see this [LINK](#)) provides that appeals should be dealt with 'avoiding delay', so far as compatible with proper consideration of the issues.

3.7: Even if the DWP did decide to process claims of this nature in due course, the process for challenging any unfavourable decisions could be a lengthy one.



3.8: In all cases it is important that in any application for benefit or following this any application for mandatory reconsideration / appeal the nature of the financial predicament of the claimant is made clear. Details of any income and/or savings should be stated along with details of why other means of financial support is not available to them.

3.9: It could be that given the very nature of these cases, when seeking an appeal (should things get to this stage) an application be made for the listing of the appeal to be expedited given the financial circumstance and risks involved.

3.10: It is important that if, as expected, things become drawn out that the claimant ensures to advise the DWP / Tribunal Service of any change in financial circumstances and/or address, or if they leave the United Kingdom, etc.

3.11: Child Poverty Action Group (CPAG) has produced an excellent paper on the Upper Tribunal's decision in *SSWP v AT* which explains who may benefit from the decision of the Upper Tribunal. Please see this [LINK](#).



3.12: CPAG has also produced a supplement explaining how advisers can use the decision of the Upper Tribunal to support those with PRE-SETTLED STATUS, in an attempt to make a successful claim for Universal Credit.

3.13: The supplementary information also advises on the steps that may be taken should the DWP seek to 'stockpile' such cases pending the ongoing challenge against the decision of the Upper Tribunal (or thereafter the judgement of the Court of Appeal pending an appeal to the Supreme Court if it reaches the same or similar conclusions), thereby delaying any decisions on a claim or mandatory reconsideration request. Please see this [LINK](#).

3.14: If you are supporting a person living in Wolverhampton and would like some advice on the issues covered in this Benefits Bulletin then please contact our Specialist Support Team on 01902 555351 or by emailing them at: wrs@wolverhampton.gov.uk.



4. The Backdrop

4.1: We have in our Benefits Bulletins been reporting as best we can on the benefit rights of EEA Nationals in the wake of Brexit. First in [Benefits Bulletin 2 2021](#), (dated 20th January 2021), then [Benefits Bulletin 4 2021](#) (dated 22nd June 2021) and more recently in [Benefits Bulletin 8 2021](#) (dated 14th December 2021) we have sought to bring news of the different rights to benefit between those EEA Nationals with SETTLED STATUS (because they had lived in the United Kingdom for 5 years or more) and those with PRE-SETTLED STATUS (because they had lived in the United Kingdom for less than five years).

4.2: We have explained that those with SETTLED STATUS have the same rights and access to Social Security benefits as British Nationals.

4.3: We have explained how those with PRE-SETTLED STATUS could not ordinarily apply for (or continue to receive) '**Means-tested Benefits**' (see 4.10 opposite) other than in limited circumstances. The main circumstances being where the person concerned has been able to show that they were a 'worker' (see 4.5 below) or 'self-employed person' (see 4.6 below) or family member / extended family member of such a person (See 4.7 below).

4.4: We have also explained that those with PRE-SETTLED STATUS could seek to access **Non-Means-Tested Benefits** (see 4.11 opposite) providing they are able to meet the general rules for those benefits.

4.5: A '**worker**' is a person who undertakes work at the direction of another person in return for remuneration and that work must be considered to be 'genuine and effective work' rather than 'marginal and ancillary'.

4.6: A '**self-employed**' person is a person who provides services (which are not undertaken under the direction of another) in return for remuneration and the undertaking must be considered to be 'genuine and effective work' rather than 'marginal and ancillary'.



4.7: A '**student**' is a person on a course of education who is sufficiently self-sufficient not to have to claim 'Means-tested Benefits' (see 4.10 below) and who has comprehensive sickness insurance whilst studying in the United Kingdom.

4.8: A '**self-sufficient person**' is a person who is sufficiently self-sufficient not to have to claim 'Means-tested Benefits' (see 4.10 below) and who may be deemed to have comprehensive sickness insurance whilst residing in the United Kingdom

4.9: A '**family member**' includes a spouse, a civil partner and a child (aged under 21). An '**extended family member**' includes a partner (i.e. not a spouse or a civil partner) with whom the EEA National has a 'durable relationship' with.

4.10: By **Means-tested Benefits** we mean: Universal Credit, Pension Credit, Child Benefit, Income-related ESA, Income-based JSA, Income Support, Child Tax Credit, Housing Benefit and Council Tax Support.

4.11: By **Non-Means-Tested Benefits** we mean: Personal Independence Payment, Attendance Allowance, Disability Living Allowance, Carer's Allowance, New Style JSA, New Style ESA, Maternity Allowance and Industrial Injuries Disablement Benefits.

4.12: However, within all this we have looked to make clear that within this ever-evolving saga, there were at the time, two potentially important test cases which examined whether EEA Nationals with PRE-SETTLED STATUS should be afforded the same right to access Social Security benefits as EEA Nationals who have SETTLED STATUS.

4.13: One of the test cases was being heard in the European Court of Justice ([CG v Department of Communities for Northern Ireland](#)) and the other was being heard in the Supreme Court of the United Kingdom ([Fratila and Another v SSWP](#)). Both cases involved Universal Credit and both argued that it was discriminatory to refuse access to Universal Credit (and other means-tested benefits) to those with PRE-SETTLED STATUS who were not in employment or undertaking self-employed or a family member of such a person.

4.14: The argument was that those with PRE-SETTLED STATUS should be afforded the same access to Social Security benefits as those with SETTLED STATUS. We can now report that both cases have been concluded and that in both cases it was held that it was not unlawful for those with PRE-SETTLED STATUS to be treated differently than those with SETTLED STATUS.

4.15: However, in its judgement the European Court of Justice held that in the case of Universal Credit, providing the EEA National claimant was residing legally in the United Kingdom (which someone with PRE-SETTLED STATUS would be), before refusing Universal Credit the DWP needed to 'check' that in turning them down it did not expose the claimant and any children from whom they were responsible for to any actual violation or the risk of violation of their rights under the [Charter of Fundamental Rights of the European Union](#) in relation to human dignity, respect for family life and/or the well-being and best interests of the child. Although the Supreme Court had full details of the judgement in the European Court of Justice it did not deal with this issue other than to say that the circumstances of the claimants in its case was different. The European Court of Justice, concerned a single mother with two young children. Whereas the case considered by the Supreme Court concerned a severely disabled man and his carer.



5. EUSS and The Numbers...

5.1: The [European Union Settlement Scheme](#) (EUSS) made provision for EEA Nationals (and others) who had been living in the United Kingdom on 31st December 2020, to apply for permission to remain lawfully living in the United Kingdom post Brexit.



5.2: People had up to the 30th June 2021 to make applications to the scheme, although late applications could be accepted where it could be shown that there were '**reasonable grounds**' for the deadline having been missed.

5.3: Successful applicants to the EUSS have been granted either SETTLED STATUS or PRE-SETTLED STATUS.

5.4: SETTLED STATUS: Is granted to people who have lived in the United Kingdom for 5 or more years. Successful applicants will have indefinite leave to remain (live and work) in the United Kingdom.

5.5: PRE-SETTLED STATUS: Is granted to people who have lived in the United Kingdom for less than 5 years. Successful applicants have limited leave to remain (live and work) in the United Kingdom for a period of up to five years. If it is then their intention to remain living in the United Kingdom beyond 5 years, then they must apply again to the EUSS before their PRE-SETTLED STATUS expires.

5.6: Nationally: Statistical Data

As of 30th September 2022, a total of 6,874,700 (6.9 million) people had applied to the EUSS.

- Nationally: Of the 6.9 million applications:
 - 1,355,870 were from Romanian nationals
 - 1,171,400 were from Polish nationals
 - 606,260 were from Italian nationals

with 89% being received from people living in England, 5% living in Scotland, 2% living in Wales and 2% living in Northern Ireland.

- Nationally: Of the 6.9 million applications:
 - 50% (3,359,250) were granted SETTLED STATUS
 - 40% (2,677,190) were granted PRE-SETTLED STATUS

whilst 375,400 applications were refused with a further 274,700 applications being either withdrawn or considered void / invalid.

- Nationally: Of the 6.9 million applications 91% were from EEA nationals whilst 8% (532,810) were from non-EEA nationals, with the highest number of applications being from Indian nationals (86,510), Pakistani nationals (73,950), Brazilian nationals (54,870) and Nigerian nationals (32,990)
- Nationally: Of the 6.9 million application 13,860 (3%) were from Ukrainian nationals
- Nationally: Of the 6.9 million applications:
 - 5,366,640 were aged 18 to 64
 - 1,148,660 were aged under 18
 - 171,210 were aged 65 or over

A total of 334,990 late applications were received between period 1st July 2021 to 30th September 2022.

Please *click* [HERE](#) for more national statistical information.

5.7: West Midlands: Statistical Data

The picture for parts of the West Midlands is such that up to 30th September 2022 the number of people who had made an application to the EUSS was:

- 164,540: Birmingham - population of 1.149 million
- 50,780: Sandwell - population of 328,774
- 44,780: Wolverhampton - population of 256,600
- 26,130: Walsall - population of 304,400
- 14,480: Dudley - population of 315,800

In Wolverhampton of the total number of applicants 17,320 have been granted SETTLED STATUS whilst 20,440 have been granted PRE-SETTLED STATUS.

**Wolverhampton has
20,440 residents with
PRE-SETTLED STATUS**

In Wolverhampton the highest represented communities making applications were 12,210 Romanian nationals, 6,860 Italian nationals, 4,730 Polish nationals and 2,850 Lithuanian nationals. Whilst a total of 6,120 people who were non-EEA nationals made applications.

Please click [HERE](#) for more West Midlands (including statistical information relating to other local authority areas) statistical information.



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