**APPENDIX B**

# Claimants with Pre-Settled Status making a claim to Universal Credit

## Background

1. This notice clarifies the position for Decision Makers following the decision of the Upper Tribunal handed down on 12/12/22 in the case of *SSWP v AT (AIRE Centre and IMA Intervening) [2022] UKUT 330 (AAC)* ("AT") and should be read in conjunction with **AT Charter Instructions - Decision Making Steps** which can be accessed using this link.

2. This affects Universal Credit entitlement for claimants with pre-settled status ("PSS") under the EU Settlement Scheme ("EUSS") who have no other legal right to reside for the purpose of the habitual residence test ("HRT"). **This means that decisions for certain cases are now to be stayed.**

3. This affects new claims to UC, existing UC cases at the mandatory reconsideration stage, and HRT review cases (both single and joint claimants) **which relate to entitlement of PSS holders from 12 December 2022 onwards**. It does not affect decisions considering entitlement before 12 December 2022, claims from those with Settled Status, a Certificate of Application or any other form of leave, or claims to other benefits. This also does not affect claims from non-EEA national claimants, including those from Norway, Iceland, Liechtenstein and Switzerland, as well as claimants who were not in scope of the Withdrawal Agreement at the end of the transition period (31 December 2020). Such cases should be decided in accordance with existing processes.

## AT decision

4. The case of AT concerns an EU national with PSS who claimed UC in 2021. As she had no qualifying right to reside for the purposes of UC, her claim was disallowed – she was not considered to be in GB. AT appealed to the First-Tier Tribunal ("FTT") who allowed her appeal on the grounds that without UC, AT and her daughter would not be able to live "in dignified conditions" in accordance with the judgment of *CG v The Department for Communities in Northern Ireland C-709/20* ("CG").

5. In law, the FTT found that the EU Charter of Fundamental Rights applied through the Withdrawal Agreement and that the case of CG meant her individual circumstances should be assessed. The FTT found on her particular facts that it was a breach of her Charter rights not to grant her UC and accordingly, reg 9(1), (2) and 3(c)(i) of the UC Regs 2013 (the provisions that require the claimant to be in GB) were disapplied on Charter grounds, meaning that the SSWP was wrong to disallow the UC claim.

6. The SSWP appealed this decision on various grounds including that as AT had made her UC claim after 1 January 2021 (and so post the end of transition period), the Charter did not apply through the Withdrawal Agreement in the way argued by AT. It was also argued that the judgment of CG had been wrongly applied by the FTT in her case, that it was not authority for the SSWP needing to do an individualised assessment of a claimant's position on Charter grounds in this way and that the SSWP could rely on an individual being able to seek relevant support, for example from local authorities as needed.

7. The case was dealt with as a lead case in the Upper Tribunal ("UT") as there are several appeals both in the FTT and UT raising similar issues and it is recognised that the legal issues are complex and novel. The UT ultimately dismissed the Secretary of State's appeal but has already granted leave to appeal to the Court of Appeal.

8. Pending the onward appeal, the UT findings in AT are declaratory in law, meaning that they can be applied to new cases from the date of the decision. The SSWP can, however, stay decision making pending an appeal in a lead case which is what will happen now, subject to the below.

9. The AT case is listed to be heard in the Court of Appeal on 9 and 10 March 2023.

**Next steps for Decision Makers**

10. The next steps are set out more fully in the **AT Charter Case Assessment – Decision Making steps** (link) and so those instructions should be followed as relevant. However, by way of overview, please note the following key points:

11. Each claim should first and foremost be considered under BAU HRT rules. This means that all new claims for UC, both from single and joint claimants, in which an HRT is needed should firstly proceed for an HRT assessment in the usual way. If the claimant passes the HRT, the UC claim proceeds in the usual way.

12. This also applies to all changes of circumstances received after 12 December 2022 which potentially affect the claimant's existing right to reside. In either case, if the claimant/both partners pass the HRT, the UC claim/existing award continues on this basis.

13. At mandatory reconsideration stage, if the original HRT refusal decision is overturned, the claim for UC is awarded in the usual way. If the original HRT refusal is maintained but the claimant is now found to be able to pass the HRT, the UC claim proceeds from when the HRT was met.

14. For claimants who do not meet HRT, this does not necessarily mean that they are in scope of the AT decision. For those not in scope of the AT decision, their UC claim should be refused for not passing the HRT in the usual way.

15. The AT cohort are EU nationals with pre-settled status who are in scope of the Withdrawal Agreement. If they are assessed as able to work, their UC claim should be refused for not passing the HRT. For claimants assessed as not able to work, the decision to refuse on HRT grounds should be stayed under Section 25(2) of the Social Security Act 1998, however in the event of a claimant raising hardship, this should be considered in line with the AT Charter threshold as per the link above.

16. For any cases and at any stage where the DM is unsure of how to proceed, the case (with all evidence) should be escalated to DMA Leeds for further consideration using this link.