Neutral Citation Number: [2023] EWCA Civ 1307

Case No: CA-2023-000085

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Upper Tribunal (Administrative Appeals Chamber)
Mr Justice Chamberlain, UT Judge Ward, UT Judge Wright
[2022] UKUT 330 (AAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2023

Before :

LADY JUSTICE KING
LORD JUSTICE GREEN
and
LORD JUSTICE DINGEMANS

- -

Between :

Secretary of State for Work and Pensions	**Appellant**
- and -	
AT	**Respondent**
- and -	
(1) Advice on Individual Rights in Europe (AIRE) Centre **(2) Independent Monitoring Authority for the Citizens' Rights Agreements**	**Interveners**

- -

Jason Coppel KC, Julia Smyth, James Cornwell, Stephen Kosmin & Harriet Wakeman (instructed by **Government Legal Department**) for the **Appellant**
Thomas de la Mare KC & Tom Royston (instructed by **Child Poverty Action Group**) for the **Respondent**
Galina Ward KC & Yaaser Vanderman (instructed by **Herbert Smith Freehills LLP**) for the **1st Interveners**
Marie Demetriou KC, Emma Mockford & Aarushi Sahore (instructed by **Independent Monitoring Authority**) for the **2nd Interveners**

Hearing dates: Wednesday 8th - Friday 10th March & Tuesday 10th October 2023

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Approved Judgment

Lord Justice Green:

A. Introduction

(1) The appeal

1. There is before the Court an appeal from the decision ("*the Decision*") of the Upper Tribunal (Administrative Appeals Chamber) ("*the Upper Tribunal*") of 12th December 2022 dismissing the appeal of the Secretary of State for Work and Pensions ("*SSWP"*) against a decision of the First-Tier Tribunal (Social Entitlement Chamber) ("*FtT*") of 31st May 2022. The FtT upheld an appeal by a destitute Romanian mother of a young child with a right of residence in the UK against the refusal by the SSWP to make universal credit ("*UC*") available to her.

2. The Upper Tribunal held that, following the withdrawal of the UK from the EU, the right to "*dignity*" under Article 1 of the Charter of Fundamental Rights of the European Union ("*The Charter*") continued to apply in certain limited respects to ensure that a person with a subsisting right of residence could enjoy that right in a manner that was dignified, in the sense of meeting a minimum level of viability. The Upper Tribunal held that on the facts the competent authority failed to ensure that the mother and child were able to enjoy that continuing right.

3. The SSWP challenges this conclusion. Many objections are advanced but at the core of the appeal are three broad issues:

    i) First, that the Charter does not apply at all. It has no continuing application following the departure of the UK from the EU.

    ii) Secondly, whether a violation of fundamental rights has occurred is governed by an analysis of the system as a whole, not the particular facts of the case surrounding the mother and child. The SSWP argues that it is a defence to *any* allegation of violation that "*in principle*" the "*statutory framework*" is capable of providing support, even if it did not in practice. Both the FtT and the Upper Tribunal erred in measuring compliance with fundamental rights by reference to the position of the individual. The SSWP is liable only if the "*statutory framework*", is "*in principle*" deficient, which it is not. In any event, even if this is wrong Parliament has allocated responsibility for compliance to local authorities and any alleged breach of rights must be enforced against them by way of judicial review, and not against the SSWP.

    iii) Thirdly, it is also said that in any event the only fundamental right that can apply is that in Article 3 of the European Convention on Human Rights ("*ECHR*") on degrading and inhuman treatment and that the concept of "*dignity*" in Article 1 of the Charter, even if justiciable, has no broader scope and effect than Article 3 ECHR which reflects a high threshold for state intervention which, in turn, implies a high threshold for breach. The facts of this case come nowhere close to establishing breach.

    The appeal was first heard in March 2023. At the culmination of the oral hearing the Court invited the SSWP, in conjunction with the other parties, to produce a Note, agreed to the maximum degree possible, describing the *"statutory framework*" of

support the SSWP contended was "*in principle*" sufficient. There followed a series of exchanges of written submissions as between the parties. It became apparent to the Court that to understand fully the arguments now advanced by the SSWP a further oral hearing was needed. This was held on 10th October 2023 (See paragraphs [121] and [122] below).

4. The rights of residence in question are found in an international law treaty concluded between the UK and EU on 19th October 2019. This is the "*Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*" – "*the Withdrawal Agreement*" or "*the Agreement*". These rights and obligations were implemented into the domestic law of the UK by the European Union (Withdrawal) Act 2018 ("*EU(W)A 2018*").

5. The Withdrawal Agreement came into force on 1st February 2020 following "*exit day*", which was 31st January 2020. This marked the formal departure of the UK from the EU. It created two periods of relevance. The first was the "*transition period*" which ran from 1st February 2020 to 31st December 2020. During the transition period, EU law applied (more or less) with full application. The second was from 1st January 2021 onwards during which only those provisions of EU law identified in the Agreement applied and then only to the extent set out in that instrument. The relevant parts of the Agreement for the purpose of this appeal are those in Part Two entitled "*Citizens' Rights*". It is important context that the provisions in Part Two, and the rights there conferred, apply as much to UK citizens who resided and/or worked in the EU as of the date of the UK exit from the EU, as they do to comparable EU citizens residing and/or working in the UK. According to published Government statistics there were approximately 1 million UK citizens whose future rights of residence and work *in* the EU were governed by the Withdrawal Agreement. The issues arising in this appeal are hence of relevance to UK citizens as well as to citizens of the EU. It is the Respondent and Interveners' contention that, although there are no exact figures to hand, the cohort of persons to whom this judgment would apply is relatively small in size and steadily diminishing (see paragraph [102] and footnote 2 below).

6. The legal effect of these measures in light of the Charter as they apply to UK and EU citizens was considered by the CJEU in Case C-709/20 *CG v The Department for Communities in Northern Ireland* EU:C:2021:602 (15th July 2021) ("*CG*"). The effect of this judgment is the subject of disagreement between the parties (the judgment is summarised at paragraphs [63] – [75] below).

(2) The facts

7. The facts are not in dispute. AT is a Romanian national who came to the UK in August 2016 at which time she lived with her then partner, V, also a Romanian national. She obtained employment in October 2016. In December 2017 AT took maternity leave though remaining employed. In February 2018 their daughter, D, was born in the UK and she has Romanian citizenship. In June 2018, AT and D returned with V to Romania for what was said to be a holiday. When they arrived V cut up AT's passport and told her that she had to remain in Romania with D whilst he returned to the UK. AT however obtained new travel documents. In October 2020, V returned to Romania and brought AT and D back to the UK with him. Before the FtT, AT gave evidence that she had been subjected by V to domestic violence throughout

the course of their relationship, including during pregnancy. V had controlled all aspects of her life. After their return to the UK, V prevented AT from working by refusing to pay for childcare and he destroyed the passports of both AT and D. V made threats to kill AT if she returned to Romania. He held her captive and subjected her to emotional and physical abuse.

8. On 6th November 2020, AT applied for Pre-Settled Status ("*PSS*"). She was granted PSS on 14th December 2020 under the EU Settlement Scheme pursuant to Appendix EU of the Immigration Rules. This amounts to a limited leave to remain. Both the application and grant occurred therefore during the transition period when EU law applied under the Withdrawal Agreement to its fullest extent.

9. In January 2021, following expiry of the transition period, there was a domestic incident at the home AT shared with V as a result of which police were called. V was arrested, though not ultimately charged. AT and D were temporarily placed in a hotel facilitated by the police and then moved to a refuge run by a charity. At this stage, AT's total resources amounted to £200 in a bank account into which her child benefit had been paid, a £25 Tesco voucher, and £15 gifted to her by a fellow resident in the refuge. She continued to receive child benefit at the rate of £84.20 paid every 4 weeks which was insufficient to cover her basic needs and those of her child.

(3) The decision refusing UC

10. On 5th February 2021 AT applied for UC as a single person with a dependent child. On 15th February 2021 her application was refused by the SSWP upon the basis that she was unable to demonstrate a qualifying entitlement. In particular she was not "*in Great Britain*" (as defined) because she only had limited leave to remain granted by virtue of Appendix EU to the Immigration Rules. According to AT this refusal left her and her child financially destitute and homeless. She was HIV positive and had a diagnosis of clinical depression.

11. The law which resulted in the refusal of UC is as follows. Under the Welfare Reform Act 2012 ("*WRA 2012*") claimants are entitled to UC if they meet (a) the "*basic conditions*" and (b) the relevant "*financial conditions*". Under section 4(1)(c) the "*basic conditions*" include a condition that the claimant must be "*in Great Britain*". Section 4(5) provides that regulations may be made in order, amongst other things, to "*specify circumstances in which a person is to be treated as being or not being in Great Britain*". A person is <u>not</u> treated as being in Great Britain (under the WRA 2012) if they only have limited leave to remain under Appendix EU of the Immigration Rules.

12. The relevant regulations for current purposes are the Universal Credit Regulations 2013 SI 2013/376 ("*the UC Regulations*"). Regulation 9, in material part, provides as follows:

> "9. Persons treated as not being in Great Britain
>
> (1) For the purposes of determining whether a person meets the basic condition to be in Great Britain, except where a person falls within paragraph (4), a person is to be treated as not being

> in Great Britain if the person is not habitually resident in the United Kingdom ...
>
> (2) A person must not be treated as habitually resident in the United Kingdom … unless the person has a right to reside in one of those places.
>
> (3) For the purposes of paragraph (2), a right to reside does not include a right which exists by virtue of, or in accordance with—
>
> …
>
> (c) a person having been granted limited leave to enter, or remain in, the United Kingdom under the Immigration Act 1971 by virtue of—
>
> (i) Appendix EU to the immigration rules made under section 3(2) of that Act;…"

(4) The findings made by the FtT

13. On 16th February 2021 AT requested a mandatory reconsideration ("*MR*") of the refusal, which decision, however, was upheld on the MR. Having refused to pay UC the SSWP did not proceed to consider whether there were other benefits she was entitled to. On 7th May 2021 AT appealed to the FtT which, by a decision dated 31st May 2021, allowed the appeal ("*the FtT Decision*").

14. The Judge set out findings of fact about the payments which the SSWP argued might, "*in principle*", be available to AT but which had not been: See FtT Decision paragraphs [73] – [87]. The experienced Judge also set out findings of fact relating to the specific position of AT. He referred to: (i) her lack of financial resources to care for herself and her dependent child; (ii) the fact that she was in arrears of rent and other charges in a sum of c.£14,000 and that it was only out of a sense of charity that her landlord had not evicted her and the child; (iii) the fact that she had to reside in shared accommodation; (iv) the fact that she did not have enough money to pay for decent food for herself and her child; (v) the history of prior abuse and violence perpetrated by her partner which left her in a state of isolation from friends or other family support in the UK; (vi) the fact that she had to rely extensively upon charitable support and donations which in the view of the Judge, because it was not provided by the state, was "*unpredictable, unreliable and precarious*"; and (vii), the harmful psychological impact of these living conditions upon AT and upon the child including a pervasive state of "*uncertainty and worry*". The Judge found (FtT Decision paragraph [93]) that there was a risk that AT and her child would be unable to live in dignified conditions. At paragraph [108] the Judge concluded that it would not be unfair to describe the position of AT as having been subject to inhuman or degrading treatment within the meaning of Article 3 ECHR. The result was that AT's continuing right to reside in the UK had been violated by the refusal to provide support. The SSWP's argument that there was no breach because of the broad and adequate nature of the support regime which was, in principle, available, was rejected.

15. The SSWP appealed to the Upper Tribunal which, on 13th December 2022, dismissed the appeal of the SSWP and concluded that the FtT had not erred on the facts. It also set out a detailed analysis of the law.

(5) The issues arising on this appeal

16. Ground I concerns a question of law which is whether, and if so to what extent, the Charter applies to any rights set out in the Withdrawal Agreement which have become part of domestic law and which AT can invoke to obtain support. The Upper Tribunal held that the Charter applied to the right of residence set out in Article 13 in Part Two of the Withdrawal Agreement. That right derives from Article 21 of the Treaty on the Functioning of the European Union ("*TFEU*"). The Upper Tribunal held that it applied with the added protection of Article 1 of the Charter which ensured that the right was rendered effective and could be enjoyed on a continuing basis, in a dignified manner. The SSWP disagrees and says that the only right flowing into domestic law is a whittled down right of residence set out in Article 13 of the Withdrawal Agreement. That was a bespoke international agreement between the UK and EU designed to reflect the UK's rejection of free movement and EU "*citizenship*". The express reference in Article 13 to rights in Article 21 TFEU is, more or less, an irrelevance. The Article 13 right is not to be construed or applied by reference to the Charter. In so far as there is any bolstering effect to be applied to the Article 13 right it comes from Article 3 ECHR which serves only to ensure that a person with residence rights is not left in a condition of degrading or inhuman treatment. In Sections B and C below I have: (a) set out the most important provisions of EU, international and domestic law which govern this issue and then (b) analysed the submissions of the SSWP against this legislative framework.

17. Grounds II and III proceed upon the basis that the Charter does apply. They focus upon different aspects of the duty to provide protection. In particular these grounds address the SSWP's argument that "*in principle*" it suffices as compliance with fundamental rights, including Article 1 of the Charter, for the UK to set up a default framework of support that, taken in the round, is capable of being applied for a person with PSS. The particular issues arising on the appeal concern: the correctness of the SSWP's "*in principle*" argument; the role played in the overall scheme by section 17 Children Act 1989 ("*CA 1989*"); whether any assessment of need must be "*individualised*" and as to the meaning of this term; the point in time at which the duty to provide support arises; whether the duty to protect "*dignity*" is the same as a duty to protect the "*vulnerable*"; and, whether there is any difference in law between Articles 1 on "*dignity*" and 4, on degrading and inhuman treatment, of the Charter. These issues are dealt with in Section D below. They take into account a range of arguments which arose in post-hearing submissions, and which led to the reconvened hearing on 10th October 2023.

18. Ground IV concerns the threshold or bar for the triggering of the duty of protection. The central point advanced by the SSWP is that the threshold for intervention in a case under Article 1 of the Charter is the same as that in Article 4 and this implies a high threshold for breach. The threshold for intervention is accordingly high. On the facts of the case AT came nowhere near to meeting that standard and the lower tribunals both erred in finding that she did. I deal with this in Section E below.

(6) Parties to the appeal

19. The appellant is the Secretary of State for Work and Pensions ("*SSWP*"). The position of the respondent, AT, has been described above. The First Intervener is the AIRE Centre (Advice on Individual Rights in Europe) ("*AIRE Centre*") which is a specialist legal charity working in the provision of advice, litigation support, and policy and which works with persons in the position of AT. The Second Intervener is the Independent Monitoring Authority for the Citizens' Rights Agreement ("*IMA*") which is the statutory body responsible for monitoring the implementation and application of Part Two of the Withdrawal Agreement which relates to residence and related rights of EU citizens and their family members residing in the UK in accordance with Union law at the end of the transition period. The UK was required to establish an independent authority with powers equivalent to that of the European Commission, pursuant to Article 159(1) of the Agreement. The IMA was established and given the powers to intervene in legal proceedings by section 15 of and Schedule 2 to the European Union (Withdrawal Agreement) Act 2020 ("*EU(WA)A 2020*").

B. The Charter and the legislative framework

(1) The issue

20. Central to the appeal is an understanding of how the Charter comes, if it does at all, to play a role in domestic law following expiry of the transition period under the Withdrawal Agreement. Before considering the SSWP's particular arguments it is therefore necessary to describe how EU law was, in the Withdrawal Agreement, turned into international law, and then, through an Act of Parliament, became domestic law *via* section 7A EU(W)A 2018. The starting point is to identify the relevant EU law rights. There is no dispute as to this. The most relevant provisions are: (i) Article 21 TFEU; (ii) the Citizens Rights Directive, Directive 2004/38/EC[1] ("*the CRD*"); and (iii) the Charter. I take each in turn before turning to the relevant provisions of the Withdrawal Agreement and then the EU(W)A 2018.

(2) Article 21 TFEU

21. The first relevant provision is Article 21 TFEU. This is important because (see paragraph [56] below) it is expressly incorporated by reference into the Withdrawal Agreement. The right of free movement and residence within the territory of the Member States flows from Article 20(2)(a) TFEU and is conferred upon "*Citizens of the Union".* It is elaborated upon in Article 21 which accords a general right of free movement and residence to citizens of the Union subject to limitations and conditions. The exercise of this right, being a concomitant of citizenship, is not (unlike the equivalent right in predecessor treaties) therefore contingent upon the exercise of the narrower activities of a worker or self-employed person:

> "1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject

[1] The full title is Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance).

> to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.
>
> 2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.
>
> 3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament."

22. The Article 21(1) right is expressed to be subject to limits imposed by (a) other provisions of the Treaties and (b) subordinate legislation. As to the Treaties, the main limitations are those elsewhere in the TFEU and in particular Article 45 and the provisions referred to in Article 49 (Articles 50-55). These are not however in this appeal of any relevance. Article 18 TFEU is however relevant. It is contained in Part Two of the TFEU on "*Non-discrimination and Citizenship of the Union*". It is a right limited by the scope of application of the Treaties and by "*special provisions*" (*lex specialis*) therein. It provides:

> "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

(3) Directive 2004/38/EC – the Citizens Rights Directive or "CRD"

23. The second relevant source of law is the CRD. This is important because it is also expressly incorporated (in part) by references into the Withdrawal Agreement. The intention behind Article 21 TFEU was for the right therein to be elaborated upon *via* legislation adopted under Article 21(2) and/or Article 21(3) in relation to social security or social protection. The CRD is the principal measure implementing Article 21 TFEU currently in force in the EU. Under Article 1 it is stated that it lays down:

> "(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members; (b) the right of permanent residence in the territory of the Member States for Union citizens and their family members; (c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health."

24. A "*Union citizen*" is "*…any person having the nationality of a Member State*" (Article 2 (1)). The "*beneficiaries*" of the rights conferred are, under Article 3:

> "… all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them."

25. Chapter III is headed "*Rights of residence*". Article 6(1), within that Chapter, confers on EU citizens a temporary unconditional right of residence:

> "Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or formalities other than the requirement to hold a valid identity card or passport."

26. Article 6(2) confers the same right on family members in possession of a valid passport, even if not EU citizens. Article 7 is concerned with rights of residence beyond three months. Article 7(1) confers a more durable but conditional right of residence 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)."

27. Article 7(2) extends the right to accompanying or joining family members who are not nationals of a Member State provided they satisfy the conditions in Article 7(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."

28. Article 16 confers rights of residence which are not subject to conditions on those 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.

29. Article 24(1) is a *lex specialis* of the sort referred to in Article 18 TFEU (see paragraph [22] above). It 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).

(4) The Charter of Fundamental Rights of the European Union

(a) Article 6 of the Treaty on European Union ("TEU") – the binding effect of the Charter

30. The third relevant source of EU law is the Charter. The position of the Charter in the hierarchy of EU legal norms is that it is a treaty having binding legal effect. This flows from Article 6 of the Treaty on European Union ("*TEU*") which: (i) recognises the "*rights, freedoms and principles*" in the Charter; (ii) establishes that the Charter takes legal effect as a treaty; (iii) confirms that it does not extend the competences of the Union as defined in the Treaties; (iv) sets out the methods governing its interpretation and application; (v) defines its relationship with the ECHR; and (vi), specifies the role played by fundamental rights generally whether flowing from the ECHR or the constitutional traditions of the Member States. Article 6 provides:

> "1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
>
> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
>
> 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
>
> 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

(b) The Explanations

31. In this case there are four relevant Charter provisions: Articles 1, 4, 7 and 24. The "*Explanations*" indicate the source of the rights, freedoms and principles set out in the Charter (Article 6(1) TEU). These were prepared by the Praesidium of the Convention which drafted the Charter. Their role is described in the introduction:

> "These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. They have been updated under the responsibility of the Praesidium of the European Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention (notably to Articles 51 and 52) and of further developments of Union law. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter."

(c) Article 1 - Dignity

32. The first provision of relevance is Article 1:

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

The Explanations say:

> "The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights…. It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of

> the rights laid down in this Charter. It must therefore be respected, even where a right is restricted."

33. The Explanations make clear that the right to "*dignity*" is derived from international law. It underpins three of the most elemental of UN Conventions. It is set out in the opening recital to the UN Charter itself:

> "**WE THE PEOPLES OF THE UNITED NATIONS DETERMINED** to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom…"

It is also a principal underpinning to the 1948 Universal Declaration of Human Rights where it is described as "*inherent*" in the 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."

And it is also central to the UN Convention on the Rights of the Child ("*CRC*") (see paragraphs [39] – [42] below).

34. The Explanations state that a fundamental right to human dignity is part of the general principles of Community law citing the CJEU in Case C-377/98 *Netherlands v European Parliament and Council* EU:C:2001:523 (9th October 2001) ECR I-7079, at paragraphs [70] – [77]. That case concerned the legality of a regulation on the patentability of human body parts. In considering the compatibility of the measure with general principles the Court treated a right to dignity as a general principle:

> "70 It is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed.
>
> 71 As regards respect for human dignity, this is guaranteed in principle by Article 5(1) of the Directive which provides that the human body at the various stages of its formation and development cannot constitute a patentable invention.
>
> …
>
> 76 Additional security is offered by Article 6 of the Directive, which cites as contrary to *ordre public* and morality, and therefore excluded from patentability, processes for cloning human beings, processes for modifying the germ line genetic

> identity of human beings and uses of human embryos for industrial or commercial purposes. The 38th recital of the preamble to the Directive states that this list is not exhaustive and that all processes the use of which offend against human dignity are also excluded from patentability.
>
> 77 It is clear from those provisions that, as regards living matter of human origin, the Directive frames the law on patents in a manner sufficiently rigorous to ensure that the human body effectively remains unavailable and inalienable and that human dignity is thus safeguarded."

35. The Upper Tribunal, based on published literature (Peers, Hervey, Kenner and Ward, *The EU Charter of Fundamental Rights: A Commentary,* 2nd edition, 2021, at paragraphs 01.07 to 01.20), also recorded that a right to dignity formed part of the constitutional traditions of a number of Member States (Decision paragraph [25]). There is also a longstanding counterpart in the common law. In 1803 Lord Ellenborough CJ in *Reg. v Inhabitants of Eastbourne* (1803) 3 East 103 at page [107], identified the "*law of humanity*" as an anterior underpinning to all positive law. It served to create an obligation of support for "*poor foreigners*":

> "As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving."

This statement was endorsed by Simon Brown LJ in *R v Secretary of State for Social Security ex p. Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 at page 292 (with whom Waite LJ agreed) who referred to the dictum of Lord Ellenborough when he said of a social security rule excluding asylum seekers from benefits if they made late claims, which rule rendered the right to asylum nugatory: "*Either that, or the Regulations necessarily contemplate for some a life so destitute that to my mind no civilised nation can tolerate it. So basic are the human rights here at issue that it cannot be necessary to resort to the European Convention on Human Rights to take note of their violation"*. Both judgments have more recently been endorsed by the Divisional Court in *R(W) v Secretary of State for the Home Department* [2020] EWHC 1299 (Admin) at paragraph [34] which in addition cites equivalent judicial sentiment in *R v Hammersmith and Fulham London Borough Council ex p. M* (1998) 30 HLR 10.

36. There is no express articulation of a right to dignity in the ECHR. However, the SSWP – rightly in my view – pointed out in written submissions that: "*Whilst it is correct that the ECHR does not expressly contain a right to human dignity, the true position is that human dignity pervades all ECHR rights."*

(d) Article 4 – inhuman or degrading treatment

37. Article 4 states*:*

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

This is a direct copy of Article 3 ECHR and according to the Explanations "… *has the same meaning and the same scope*".

(e) Article 7 – Private life

38. The next relevant provision in the Charter is Article 7 which reads:

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

Article 7 is modelled upon the right to private and family life in Article 8(1) ECHR which is a well known provision which of course finds concrete domestic expression in the Human Rights Act 1998 ("*HRA 1998*").

(f) Article 24 - Children

39. The final substantive Charter provision of relevance is Article 24(1): "*In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*" This is modelled upon Article 3 of the CRC. The link is confirmed in the Explanations:

> "Explanation on Article 24 — The rights of the child
>
> This Article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof."

40. The CRC refers to "*dignity*" in its preamble. This makes clear that it reflects the application of the broader 1948 Universal Declaration of Human Rights (see above in relation to Charter Article 1) to the case of children. The preamble places the rights of the child in the context of the broader international law rights of <u>all</u> humans which include, "*recognition of the inherent dignity … of all members of the human family*…". The preamble contains the following:

> "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, 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,
>
> And
>
> Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity…"

41. Article 3 CRC provides:

> "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
>
> 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

42. The CRC, and Article 3 in particular, are accorded considerable weight as a guide to the interpretation and operation of domestic law: See for example the judgments of the Supreme Court in *ZH Tanzania v SSHD* [2011] UKSC 4 which underscored the centrality of the rights of the child in immigration cases and which attached considerable weight to the CRC at paragraph [25] per Baroness Hale and paragraph [46] per Lord Kerr. The CRC is also treated as a general principle of EU law which binds the Member states: See e.g. Case C-540/03 *European Parliament v Council of the European Union* EU:C:2006:429 (27th June 2006) ECR I-5769 at paragraph [37] and case law cited thereat.

(g) Article 51 – Scope and application

43. Finally, it is important to be clear as to the scope of the Charter. Article 6(1) TEU makes clear that it does not expand the competences of the Member States. It applies only where a Member State is implementing EU law and therefore has no free-standing application outside of EU law. Moreover, it is only addressed to and binding upon Member States. Article 51 thus provides:

> "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."

44. The Explanations clarify that the Charter applies not just to central government but to all public bodies when they implement EU law:

> "As regards the Member States, it follows unambiguously from the caselaw 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."

45. It is not in dispute that this includes the courts. The question whether a Member State is "*implementing Union law*" within the meaning of Article 51(1) is treated in the Explanations as the same as whether it is acting "*in the scope of Union law*" (see the discussion of the Upper Tribunal to this effect in the Decision paragraph [30]).

(5) The transformation of EU law into international law: The Withdrawal Agreement

46. The next step is to consider the Withdrawal Agreement. From the perspective of the UK the Agreement is not EU law but an instrument of international law. From the perspective of the EU, whilst recognised as being an instrument governed by international law, it is at the same time an "*integral part of the EU legal order*": See e.g. Case C-266/16 *R (on the Application of Western Sahara Campaign UK) v Commissioners for HM Revenue and Customs* EU:C:2018:118 (27th February 2018) at paragraphs [44] – [47]. It binds not just the EU but also its Member States.

47. The Agreement created a "*transition period*" from 1st February 2020 to 31st December 2020 during which the parties would seek to negotiate an international agreement governing future relations (this became the Trade and Cooperation Agreement). During this period EU law was fully applicable, save to the extent that the Withdrawal Agreement provided otherwise. Article 127 provided that "*Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period*". It is common ground that this means that until the expiry of the transition period the entirety of EU law applied but thereafter *only* those provisions given effect to in the Withdrawal Agreement are applicable. The preamble provides that: "*the law of the Union … in its entirety ceases to apply to the United Kingdom from the date of entry into force of this Agreement*" but this is "*subject to the arrangements laid down in this Agreement*" (fourth paragraph).

48. It is also common ground that the Upper Tribunal accurately summarised the position:

> "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."

49. The fourth and seventh recitals of the Agreement record that its objective was to "*ensure an orderly withdrawal of the United Kingdom from the Union*" and to achieve that aim it was necessary to "*prevent disruption and provide legal certainty to citizens and economic operators … in the Union and in the United Kingdom*". It is perhaps a statement of the obvious, but the Agreement reflected the end result of difficult and complex negotiations, and its final terms embodied compromise or "*overall balance*", as it is diplomatically expressed in the recitals: "*UNDERLINING that this Agreement is founded on an overall balance of benefits, rights and obligations for the Union and the United Kingdom*".

50. Article 2(a) defines "*Union law*" in terms making clear that it includes the Charter (in its capacity as a Treaty) and the general principles of EU law:

> "(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".

51. Article 4 contains special rules on interpretation and application. At the risk of over-simplification these are: (i) the principle of equal legal effect of the Agreement in the UK and EU in Article 4(1); (ii) the principle of direct effect also in Article 4(1); (iii) that the Withdrawal Agreement takes precedence over inconsistent UK law in Article 4(2); (iv) the application of the methods and general principles of Union law to "*Union law or to concepts or provisions thereof*" in Article 4(3); and (v), the applicability of the jurisprudence of the CJEU (prior to the expiry of the transition period) to the implementation and application of the Agreement, in Article 4(4).

52. 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."

53. 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 thereafte*r".

54. Article 10 defines the personal scope of the Withdrawal Agreement. It includes:

> "(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".

55. I turn now to the substantive right to reside. An important purpose of the Withdrawal Agreement was to provide for reciprocal and enforceable rights of residence to those who had, historically, exercised free movement rights. The 6th recital thus explained:

> "… it is necessary 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".

56. Article 13 headed "*Residence rights*", cross-refers to Article 21 TFEU and the CRD. I address below the dispute between the parties as to whether this cross referencing imports the full right in Article 21 (as the Upper Tribunal found) or only its limitations (as the SSWP contends). The provision addresses the rights of citizens of the Union or of the United Kingdom who reside in a host state and also covers the derivative rights of family members. Sub-paragraph (4) lays down a principle of the asymmetrical exercise of discretion when considering limitations and conditions attaching to rights of residence:

> "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."

57. Article 23 confers on those having a right of residence a consequential right, in accordance with Article 24 of the CRD, to equal treatment with nationals of the host state.

58. Part Three governs "*Judicial procedures*". The CJEU has continued jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period (Article 86(2)). 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 which covers references made before the expiry of the transition period, are binding "*in their entirety*" on and in the UK (Article 89(1)).

59. 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 Agreement "*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.

(6) The transformation of international law into domestic law: Section 7A EU(W)A 2018

60. I turn to the final leg in the journey of EU law into domestic law. Whilst the UK was an EU Member State the "*conduit pipe*" through which EU law passed into domestic law was section 2 European Communities Act 1972 ("*ECA 1972"*): see e.g. *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at paragraph [65]. This was repealed with effect from 1st February 2020 by section 1 EU(W)A 2018 which, as is well known, created a system whereby "*retained EU law*" could be given effect to in domestic law.

61. When the Withdrawal Agreement was concluded the EU(W)A 2018 was amended to retain the ECA 1972 until the end of the transition period. This was achieved by the introduction of a new section 1A inserted by means of the EU(WA)A 2020. A new section 7A was also added into the EU(W)A 2018 which was the means by which Parliament now complied with the obligations of implementation under Article 4 of the Withdrawal Agreement:

> "(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)."

62. 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."

(7) The judgment of the CJEU in CG v Department for Communities in Northern Ireland (15th July 2021)

63. There is disagreement between the parties as to the scope and effect of the judgment in *CG* given by a Grand Chamber of the Court comprising 15 judges. The Upper Tribunal set out a full description and analysis of the judgment at paragraphs [45] – [56] of the Decision.

64. The facts bear a strong resemblance to those of the present case, the only difference being that in *CG* the application for UC and the refusal decision pre-dated the expiry of the transition period, not post-dated it as here. CG was an EU national who arrived in Northern Ireland in 2018 with her partner who was an EU national and their two children. She moved to a women's refuge when her partner became violent. She had

never been economically active, and she had no resources with which to support herself. She was granted PSS in 2020. Her application for UC was refused before the end of the transition period.

65. She appealed to the Appeal Tribunal for Northern Ireland which made a reference to the CJEU on 30th December 2020, the penultimate day of the transition period. A reference made before the expiry of the transition period, even where the judgment postdates it, binds the UK (see paragraph [58] above). The question focused only upon discrimination and asked, essentially, whether the provision of domestic law which excluded CG from entitlement to UC was unlawfully discriminatory (either directly or indirectly) pursuant to Article 18 TFEU and Article 24 CRD (see paragraphs [22] and [29] above) and inconsistent with the UK's obligations under the ECA 1972? If the answer was that the provisions were discriminatory, were they nonetheless justified?

66. The CJEU judgment explains (paragraphs [42] and [43]) that by decision of the President of the Court of 26th January 2021, a request for information was sent to the referring tribunal asking it to clarify whether there was a potential risk of violation of the rights of CG and her children under Articles 7 and 24 of the Charter. The Tribunal was also asked to account for the financial resources of CG and the nature of her accommodation and that of her children. In response the Tribunal confirmed that CG had no financial resources, did not currently have access to State benefits, and was living in a women's refuge. It was of the view that the fundamental rights of CG's children risked being violated. The Charter was hence in play during the proceedings.

67. In the judgment the Court sets out the relevant EU and international law provisions at stake, including the provisions of the Withdrawal Agreement. It held, rejecting a submission of the UK to the contrary, that the reference was admissible since it did not concern a pure question of domestic law over which it would have had no jurisdiction. This was because CG's triggering or anchoring right to be in the UK lay in EU law. She had first moved to the UK in 2018 pursuant to the exercise of her right of free movement and residence under Article 21 TFEU, as a citizen of the Union: see paragraphs [56] – [59]. It did not matter that having exercised her EU rights she then resided in the UK upon the basis of national law i.e. the grant of PSS and limited leave to remain. In paragraph [59] the Court thus stated:

> "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 United Kingdom. In those circumstances, it must be held that the questions referred are admissible in so far as they concern the interpretation of the first paragraph of article 18".

68. The Court then considered whether, and if so how, the rule on non-discrimination applied. As to this the Court did not resile from earlier case law demonstrating a marked reluctance to apply the principle of non-discrimination to free movement in the case of non self-sustaining migrants. This was because, by Article 21 TFEU, the right to move and reside had been decoupled from the right to work or seek work (which almost by definition involved persons not seeking to live on state support), and had given rise to the real possibility that the "*economically inactive*" (to use the terminology of the Court – paragraphs [76] and [77]) would seek to move to avail

themselves of more generous social security benefits found elsewhere and they would be able to do this simply because they were "*Union citizens*" not workers. Application of the principle of non-discrimination in such a case risked placing "*an unreasonable burden on the social assistance system of the host Member State*" (paragraph [76]). The Court endorsed its earlier case law to this effect for instance in Case C-333/13 *Dano* EU:C:2014:2358 (11th November 2014), paragraph [71] and the case-law cited thereat.

69. Having dismissed principles of non-discrimination the Court turned to the application of the Charter. Certain rights available under the Charter will be less generous than a right to equality and would not place an "*economically inactive*" citizen on the same footing as a national (a form of levelling up) but instead might provide only a minimum or floor right to support.

70. The Court reiterated that CG was, *via* the Withdrawal Agreement, exercising a right founded in EU law (see paragraph [84]) and proceeded to consider the implications of this for the application of the Charter. Under Article 51 of the Charter (see paragraphs [43] – [45] above) the Charter applied "*when [Member States] are implementing EU law"* (citing the judgment in Case C-258/14 *Florescu and Others* EU:C:2017:448 (13th June 2017), paragraph [44] and the case-law cited thereat).

71. The fundamental rights guaranteed in the legal order of the EU were applicable in all situations governed by EU law. The UK authorities had granted CG a right of residence even though she lacked sufficient resources to support that residence. In so doing the authorities applied more favourable rules, than those established under the CRD. That action by the UK was not therefore an implementation of the CRD but it was still an implementation of the fundamental right of CG to move and reside freely under Article 21(1) TFEU, which provision was to be applied in accordance with the Charter. The Court said:

> "88 It follows 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 TFEU Treaty on Union citizenship, which, as pointed out in paragraph 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."

72. In paragraph [89] the Court applied Article 1 of the Charter, standing alone, to impose a duty of result on the host state to "*ensure*" that a person in the situation of CG had a right of residence to "*live in dignified conditions*":

> "89 In particular, it is for the host Member State, in accordance with Article 1 of the Charter, to ensure that a Union citizen who has made use of his or her freedom to move and to reside within the territory of the Member States, 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."

73. Whilst the CJEU treated Article 1 as conferring a standalone right upon a person exercising a right of residence it combined Article 1 with *other* provisions in relation to family and children. The cumulative effect of Articles 7 and 24(2) of the Charter melding the right to respect for private and family life with the rights of the child extended the duty in Article 1 to dependent children:

> "90 Furthermore, Article 7 of the Charter recognises the right to respect for private and family life. That article must be read in conjunction with the obligation to take into consideration, in all acts relating to children, the best interests of the child, which are recognised in Article 24(2) thereof (see, to that effect, judgment of 26 March 2019, SM (Child placed under Algerian kafala), C-129/18, EU:C:2019:248, paragraph 67 and the case-law cited).
>
> 91 The host Member State is required to permit children, who are particularly vulnerable, to stay in dignified conditions with the parent or parents responsible for them."

74. In paragraph [92] the Court applied these principles in the context of the facts the referring tribunal would have to consider when the case returned to it with the guidance given by the Court. CG was a mother of two young children, with no resources to provide for her own and her children's needs and who was isolated on account of having fled a violent partner. The duty imposed by the Charter meant that a national authority that was minded to refuse UC could not stop there. It had to go on and verify whether, even if UC was not available, some other state provided support was due:

> "92. 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 Articles 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 United Kingdom Government and the Department for Communities in Northern Ireland in their observations submitted to the Court."

75. Finally, in the *dispositif*, setting out its formal answer to the questions referred by the Tribunal, the Court said:

> "93 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."

76. I turn now to the issues which arise under Ground I.

C. Ground I: The arguments of the SSWP – Does the Charter apply in domestic law?

(1) The five issues raised by the SSWP

77. The SSWP contends that the Charter does not apply under the Withdrawal Agreement and it does not therefore flow into domestic law *via* the EU(W)A 2018. The arguments coalesced under five main headings. First, applying the correct approach to interpretation of the Agreement under international law there was no intention on the part of either the UK or the EU to introduce far reaching, "*radical*", new rights and obligations which risked undermining social security systems. The Withdrawal Agreement was a "*bespoke"* instrument which, following expiry of the transition period, did not incorporate the Charter. Secondly, under Article 4 of the Agreement, on principles of interpretation, the Charter was excluded from applying to the Agreement and therefore did not flow into domestic law. Thirdly, properly construed Article 13 of the Agreement created a freestanding right of residence unrelated to Article 21 TFEU. The only parts of Article 21 TFEU incorporated into Article 13 were its conditions and limitations and, for this reason, the Charter did not travel from EU law into Article 13. Fourthly, the judgment of the CJEU in *CG* did not apply outside of the transition period and therefore had no application to the facts of the present case. Fifthly, if contrary to all these submissions, the Charter and Article 1 did apply in domestic law they had no greater effect than already applied under Article 3 ECHR and the HRA 1998. I take each argument in turn.

(2) The general approach to interpretation

78. The SSWP starts by arguing that the Upper Tribunal adopted too sweeping and generous an approach to construction which ignored a proper consideration of what the UK sought to obtain from the Agreement. The Agreement should not be interpreted so as to create radical new rights and obligations which risked undermining the financial equilibrium of domestic social security systems especially as, when the Agreement came into force, the CJEU in its settled jurisprudence had set its face against the rights of the economically inactive migrant amounting to *"… an unreasonable burden on the social assistance system of the host Member State*" (*Dano* (*ibid*) paragraph [76]). The preamble to the Charter emphasised that it was intended to reflect "*an ever closer union*" and the establishment of the fundamental status of Union citizenship. The Withdrawal Agreement however reflected the opposite philosophy, namely a sovereign decision by the UK to leave the Union and no longer be part of its citizenship regime. Further, the Charter went significantly beyond the rights protected by the ECHR and included rights which could only have meaning where the EU Treaties continued to apply which they no longer did after the end of the transition period (e.g. rights to vote, working conditions, environmental and consumer protection, etc). The landscape had now fundamentally changed. This was the context in which the UK and the EU had collectively negotiated and agreed "*bespoke*" provisions to apply after the end of the transition period which excluded operation of the Charter. It was "*scarcely surprising*", argued the SSWP, that neither the UK nor the EU would agree that, in such circumstance, the Charter continued in effect after the transition period. The Upper Tribunal incorrectly interpreted the Agreement and wrongly brought the Charter back into "*full*" play in domestic law.

79. I do not accept this analysis. The SSWP's argument rests upon assumptions about the subjective negotiating positions of both the UK and the EU which it is then asserted are reflected in the Agreement and which serve to govern its interpretation.

80. I have already referred at paragraph [49] above to the recital to the Agreement which makes clear that it reflected an "*overall balance of benefits, rights and obligations*". No easy assumptions can be made as to what each party was negotiating for or as to which negotiating positions were compromised by either the UK or the EU in order to seal a final deal. The task of this Court is narrow and technical. It is to examine the scope and effect of the Agreement to determine whether, applying normal principles of international law (as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("*the Vienna Convention*")), provisions of EU law have been given effect as international law which have then become domestic law. The Agreement must be construed in good faith. The ordinary meaning must be given to its terms in their context and in the light of their object and purpose taking into account only relevant and admissible secondary sources. A court will take into account any special rules of construction and implementation the parties have agreed upon and included in the instrument in question. When Article 31 of the Vienna Convention attaches weight to the "*object and purpose*" of the instrument this is not an invitation to delve into the minefield of negotiating objectives as a substitute for focusing upon the "*text as a source for determining the parties' intentions*": See *Al Malki v Reyes* [2019] AC 735 at paragraph [11]. The duty of this court is not therefore to work out whether, in the hurly burly of negotiations, the UK or the EU got a better or worse deal in any particular respect and then to adjust the interpretation of the Agreement accordingly.

Insofar as the lodestars to construction urged upon the Court by the SSWP are found in the text of the Agreement itself, in inferences properly to be drawn from the language used, or in admissible external sources, then of course they are relevant, but not otherwise.

81. The IMA, in its written submissions, was, rightly, at pains to depoliticise and focus the issues arising on this appeal:

> "Contrary to the impression cultivated by the SSWP's skeleton, there is in reality a substantial amount of common ground between the parties (which was recognised by the UT) as to the legal context in which this issue arises. In particular, there is no dispute that the UK's departure from the EU brought about a fundamental change in the UK's legal order. It is also agreed that the Charter is, in general, no longer applicable in UK law. Rather, the question for the Court is a relatively narrow one: namely, given the express terms of the WA and its context and purpose, does the Charter have a continuing interpretive role for situations which fall within the scope of the WA?"

82. In my judgment, for the reasons expanded upon below, on a normal interpretation of the Agreement and its terms, the Charter applies, albeit within limits. The Charter is brought into the Agreement through the definition of "*Union law*" in Article 2(a)(i) which lists a series of different constituent treaties: see paragraph [50] above. The Charter is but one of these instruments and there is no suggestion that *any* are limited in time and lapse upon expiry of the transition period. It would have been open to the drafters of the Agreement to have created such a temporal exception for the Charter *if* that had been their intention. Indeed, if the non-applicability of the Charter had been so fundamental to <u>both</u> the UK and EU in the negotiations (as the SSWP argues) one would have anticipated some cut off point for its operation to have been set down in the Agreement using clear and express language, a drafting result easy to achieve. But there is no such cut off point. To the contrary in the Agreement the Charter is accorded the same continuing effect as all the other components of "*Union law*".

(3) Article 4 Withdrawal Agreement – does it operate to exclude operation of the Charter?

83. The SSWP next refers to the principles of interpretation set out in Article 4 of the Agreement, the terms of which are set out at paragraph [52] above. It is argued that since there is no reference anywhere in the Agreement to specific provisions of the Charter, then applying Article 4(1), the Charter can have no application. Further, that the competent authority did not purport to apply the Withdrawal Agreement and therefore in no sense was interpreting or applying Article 13 in the refusal decision. Finally, the Charter is not a "*method*" or "*interpretation*" which, applying Article 4(3), could result in it being applied to other provisions in the Agreement. I do not accept these arguments. There are five points to make.

84. First, it is correct that specific articles of the Charter are neither replicated expressly nor referred to by cross reference in the Agreement. As a matter of drafting, it would have been surprising if they had been. Charter rights exist as secondary or supplementary rights which apply only where some other express right has first been established into whose scope the Charter then applies. It is therefore irrelevant that no

Charter provision is explicitly set out or referred to. Article 4(1) differentiates between two types of measure brought into effect by the Agreement: (i) "*The provisions of this Agreement*" and (ii) "*the provisions of Union law made applicable by this Agreement*". The Charter is a provision of Union law "*made applicable by [the] Agreement*". This occurs through the express recognition that the Charter is part of Union law in Article 2(a)(i) and the cross reference in Article 13 of the Agreement to Article 21 which must under Union law be construed and applied in accordance with the Charter, which is thereby "*made applicable*".

85. Secondly, Article 4(1) imposes a duty of reciprocal and identical effect which is intended to ensure that UK citizens and EU citizens working and residing in the EU and UK respectively are treated in the same way. The Agreement, as an international treaty concluded by the EU, is an integral part of EU law. It falls to be construed by Member States in the light of the Charter. In Case C-266/16 *Western Sahara* (*ibid*) EU:C:2018:118 (27th February 2018) at paragraphs [45] and [46] the CJEU held that international agreements concluded by the EU were acts of the institutions and as such they were "…*an integral part of the EU legal order*". They had to be "*entirely compatible*" with the treaties and with the "*constitutional principles stemming therefrom*". Ms Demetriou KC for the IMA argued that it followed from this that when interpreting Article 13 it was important to ask how it would be construed and applied in an EU court and then to ensure that the same result applied in the UK. She argued that in the EU it was inconceivable that Article 13 would be construed without reference to the Charter, which was "*an integral part of the EU legal order*", as confirmed by Article 6 TEU (see paragraph [30] above) and which reflected the constitutional traditions of the Member States. It followed, applying the principle of equivalent effect in Article 4(1), that the same would apply in the UK. The Upper Tribunal agreed, as do I. Mr Coppel KC argued for the SSWP that Article 4(1) was only about direct effect. That is not however a fair reflection of its drafting. I agree with Ms Demetriou KC who argued:

> "Article 4(1) is on its face a mandatory, outcome driven rule: it requires that the provisions of the WA produce the same outcome in the UK and the EU Member States. Contrary to the SSWP's submissions, Article 4(1) is not simply mandating direct effect. First, the WA is intended to give reciprocal protection in the EU and the UK. This is achieved by, among other things, requiring the same legal outcomes to be generated by provisions of EU law that are applied by the WA. Second, the inclusion of the words "accordingly" and "in particular" in the second paragraph show that direct effect is only one consequence of the broader obligation in Article 4(1)."

86. Thirdly, I turn to Article 4(3) and the expression "*methods*". Under this subparagraph "*methods and general principles of Union law*" are relevant in construing and applying "*… provisions of this Agreement referring to Union law or to concepts or provisions thereof*". The SSWP argues that the Charter is not part of the "*methods and general principles of Union law*" so can have no relevance in the construction of either Article 13 of the Agreement or Article 21 TFEU. The expression "*methods*" cover matters such as recourse to *travaux preparatoires*, the admissibility of foreign language versions, and the use of purposive construction, but not the Charter. I

disagree. That is an excessively tight set of shackles to place around that term. Article 51 of the Charter lays down a 3-stage "*method*" of Union Law: (i) determine whether EU law is being applied or implemented; (ii) determine whether the provision in question standing alone leads to a result consistent with the Charter; (iii) if not, interpret the provision by reference to the Charter or otherwise ensure a result is arrived at consistent with the Charter. I fail to see why that is not a "*method*" so called, certainly within the objective and purpose of the Withdrawal Agreement.

87. Fourthly, under Article 4(3) "*general principles*" are relevant in construing and applying "*... provisions of this Agreement referring to Union law or to concepts or provisions thereof*". The SSWP challenges any suggestion that following the UK departure from the EU the general principles of EU law have general application and accuses the respondent and interveners of misreading the Withdrawal Agreement and the EU(W)A 2018 and seeking to apply those principles without limitation. The SSWP accepts however that under Article 4(3) general principles can have application within the confines of the Agreement. In fact there is no real dispute about this. No party suggests that they apply generally, outside the confines of the Withdrawal Agreement. Nonetheless, submissions were made to the Court about the extent to which general principles remained relevant even under the Withdrawal Agreement.

88. The fact that under Article 6 TEU the Charter is classified as a treaty for the purpose of determining its legal effect has not prevented the CJEU also treating the Charter as a source of general principles. It is long established that international law agreements cannot be allowed to violate fundamental principles of EU law: see for example Case C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:461 (3rd September 2008) at paragraphs [280] - [285]. The Charter is a source of general principle guiding interpretation and validity. In Case C-12/11 *McDonagh* EU:C:2013:43 (31st January 2013) at paragraph [44] the Court set out an interpretation of a regulation on the duty of airlines to offer care to passengers whose flights had been cancelled. It benchmarked that interpretation against general principles which included those found in the Charter:

> "… it is necessary to ensure that the interpretation in the preceding paragraph does not conflict with the principles of proportionality, of an 'equitable balance of interests' referred to in the Montreal Convention and of non-discrimination, or with Articles 16 and 17 of the Charter. Under a general principle of interpretation, a European Union 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 (Case C-149/10 Chatzi [2010] ECR I-8489, paragraph 43)."

In Case C-579/12 RX-II *Commission v Strack* EU:C:2013:570 (19th September 2013) at paragraph [40] the CJEU observed that ensuring consistency with the Charter was "*a general principle of interpretation*":

> "It must also be borne in mind that, under a general principle of interpretation, a European Union 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 …"

In Case C-358/16 *UBS Europe and Others* EU:C:2018:715 (13th September 2013) at paragraph [53] the CJEU referred to:

> "… 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…"

Further support is found in the jurisprudence on the CRD, which is incorporated by cross-reference under Article 13. Recital 31 CRD requires its provisions to be implemented "*in accordance with the prohibition of discrimination contained in the Charter*". Article 2(2)(a) of the CRD is now applied by Article 9(a)(i) of the Withdrawal Agreement. In Case C-673/16 *Coman v Inspectoratul General pentru Imigrari* EU:C:2018:2 (11th January 2018) at paragraphs [48] and [49] the CJEU interpreted the term "*spouse*" in Article 2(2)(a) as including same-sex married couples, a conclusion flowing from (*inter alia*) "*the right to respect for private and family life guaranteed by the Charter*". In Case C-165/14 *Rendón Marin* EU:C:2016:675 (13th September 2016) at paragraph [66] the CJEU confirmed that Articles 7 and 8 of the Charter constrained a Member State when applying derogations from residence rights under Article 27 CRD on grounds of public policy.

89. Fifthly, and finally, the SSWP's argues Article 4(3) does not apply because when the decision to refuse UC to AT was taken there was no purported implementation of Article 13 of the Agreement. In the Upper Tribunal Decision at paragraph [106] the following was stated:

> "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."

90. The SSWP disputes this analysis and argues that Article 4(3) of the Withdrawal Agreement was not applicable to the refusal of UC to AT because that refusal did not involve any interpretation or application of Article 13. Paragraphs 47-48 of the SSWP's written submissions stated:

> "47. Crucially, the decision under appeal in this case is a decision about AT's entitlement to UC. In no sense, therefore, can SSWP be said to have been "interpreting or applying" Art.13 WA. Art.13 is a provision about residence rights. AT was not complying with the relevant conditions in the WA in that respect, and in any event, no issue about the interpretation or application of Art.13 WA arose for SSWP, who was deciding benefit entitlement. If SSWP could be said to have been applying any provision of the WA when deciding AT's UC claim, it was Art.23 (anti-discrimination). But that provision made clear that AT did not enjoy any right to social assistance under the WA. Rightly, nobody has attempted to argue that its clear effect was somehow negated by AT's fundamental rights.
>
> 48. For that reason alone, SSWP's appeal should be allowed. No issue about CG arises, and its reasoning is simply not relevant, because the basic gateway condition in Art.4(3) WA for the application of fundamental rights is not met."

91. I agree with the Upper Tribunal. It is correct that on the facts the competent authority did not consider anything other than the narrow entitlement to UC. And to this extent there was no consideration of the Withdrawal Agreement or the Charter. But the gravamen of the complaint is about an omission not a commission. It is that having rejected entitlement to UC the authority did not proceed to consider whether AT and her child were entitled to some *other* form of support. As to this the relevance of the judgment in *CG* is that it concerns the application of Articles 1, 7 and 24 of the Charter to persons who have rights under Article 13 of the Agreement, which is a category that AT falls into. The CJEU held that there was a positive duty on a host state who refuses one form of relief (in that case also UC) to determine ("*ensure*", "*ascertain*", "*check*" – *CG* paragraphs [89], [92] and [93]) whether the person was in need of other forms of protection to secure their dignity and make their residence right in effect viable. That was not in this case done. Article 4 of the Withdrawal Agreement afforded to AT the right to rely upon its provisions and imposed a duty on the competent authorities to ensure observance of the rights in the Agreement including in accordance with the Charter. As the Upper Tribunal observed: "*Since both Articles 10 and 13 of the WA refer to provisions or concepts of EU law, [the competent authority] 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*."

92. In light of the above, in my judgment the Charter is relevant to the construction and the application of substantive provisions of the Agreement such as Article 13 and provisions referred to by cross reference therein such as Article 21 TFEU.

(4) Article 13 Withdrawal Agreement: Self-standing or defined by cross-reference?

93. The SSWP next argues that properly read Article 13 creates a standalone right which brought forth no rights from Article 21 TFEU but only its limitations. The Charter was thereby severed from the right of residence in the TFEU and this had the effect of separating Article 13 from the Charter. In oral argument the Article 13 right was construed as if it read:

> "Union citizens and United Kingdom nationals shall pursuant to this article, but no provision of EU law, have a right to reside in the host State. That right shall however be subject to the limitations and conditions set out in Articles 21."

This can be contrasted with Article 13 as actually framed:

> "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."

94. In my judgment, Article 13 is not self-standing. By its language it brings Article 21 TFEU into effect through cross reference. The SSWP's reformulation alters the substance of the right. It elides "*limitations*" with "*conditions*" when, naturally read, "*conditions*" indicates that the right as defined in Article 21 is brought into Article 13. It also ignores the implication of the definite article which indicates that "*the*" Article 13 right to reside flows from Article 21. It further drafts out the word "*under*" which makes clear that the Article 13 right exists from within the umbrella right in Article 21 TFEU.

95. Perhaps most compelling against the interpretation of the SSWP is the language used in Article 13(2) and (3) (see paragraph [56] above) which confers derivative rights upon family members and others, and which makes clear that the rights being conferred derive from Article 21 TFEU and are not freestanding rights conferred by Article 13. Both say that the persons to be granted derived rights "*shall have the right to reside in the host State as set out in Article 21 TFEU*". The language used ("*as set out in*") is slightly different to that used in Article 13(1) ("*under*") but is clear in equating the Article 13 right with the Article 21 right. Article 13 must be read as a whole. No basis has been advanced in argument, or evidenced by admissible *travaux preparatoires* or other material, upon which it can be said that the parties to the Agreement intended the principal beneficiary to have curtailed rights *only* by reason of Article 13 of the Agreement but that dependants should acquire enhanced derivative rights by virtue of Article 21.

(5) Implication of the judgment in CG

96. The SSWP next argued that the judgment in *CG* applies only to cases arising during the transition period. It does not apply to a person applying for support thereafter. Paragraph [57] of the judgment refers to EU law "*being applicable …until the end of the transition period*". Paragraph [59] refers to the position of CG being within the scope of EU law "*until the end of the transition period*". CG applied for and was refused UC before the expiry of that deadline; AT applied for and was refused UC after the transition period had passed. It is said that because AT's application for UC post-dated the transition period the Charter was not engaged. The corollary is that whilst AT remained entitled to residence she did so absent support governed or affected by the Charter.

97. In my view this is the wrong perspective from which to examine the issue. In *CG* the central issue was the identification of the anchoring or triggering right. That was the historical exercise of the right of free movement, which is a *continuing* right. It was that continuing right which engaged the Charter and triggered the obligation on the

state to ensure that it could be exercised in the future with dignity. Nothing in the reasoning of the Court suggests that the answer would have differed had CG applied after expiry of the transition period. This is logical. The point in time at which a subsisting right of residence becomes undignified might be determined by happenstance such as the moment when the domestic violence became so intolerable that a woman flees with her children and thereby becomes in need of support. Such facts are unconnected to the existence of the right of residence but they are nonetheless critical to that right being exercisable in an effective (dignified) manner on a continuing basis.

98. It is instructive to examine the approach of the CJEU to cases where the anchoring or basic right is rendered ineffective or incapable of enjoyment absent the conferral of some other derivative right. Mr de la Mare KC for AT referred to the example of Case C-133/15 *Chavez-Vilchez* EU:C2016:659 (10th May 2017) where the issue was whether the state was obliged to grant a residence right to a family member in order to make the basic or anchoring right of an EU citizen effective. The claimants were third country nationals residing in the Netherlands without residence permits. They were the mothers of children who were Dutch nationals. They argued that they had derived rights of residence because otherwise their children's right of residence would be compromised. The Court held that denial of the derived right of the mother was unlawful because it would have the "*effect*" of depriving the child "… *of the genuine enjoyment of the substance of the rights conferred*": see paragraphs [61], [62], [68], [74] and [78]. At paragraph [63] the Court equated the right of genuine enjoyment with that of the effectiveness of the basic right. The critical point is that the driving force behind the grant of the derivative right was that the continuing nature of the basic right would be inoperative without it.

99. Applying that approach to the present case AT has a basic or anchoring right of residence which pre-dated but also subsists beyond the transition period. That EU law based right became an international law right under the Withdrawal Agreement and is now encapsulated into PSS, the domestic right protecting prior Withdrawal Agreement and Union law rights. If the SSWP is correct then neither the UK nor the EU, when they agreed the Withdrawal Agreement, 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. To construe the Agreement to have this effect seems to me to be an unacceptable construction to place upon an international instrument intended to confer basic reciprocal rights upon both UK and EU citizens. The failure to provide support amounts to an attack upon the basic, anchoring, right; on the analysis of the SSWP the tail eviscerates the dog.

100. It is no answer for the SSWP to say that, no matter, any lacuna left by this constrained interpretation of the Withdrawal Agreement would be plugged by the ECHR. Whether that be true or not is not an answer to the technical question confronting this Court concerning the interpretation of the Withdrawal Agreement and the judgment of the CJEU in *CG*.

101. As to the references in paragraphs [57] and [59] of the judgment in *CG* which refer to rights existing until the end of the transition period, these do not assist the SSWP. Paragraph [57] is referring to EU law being applicable in its fullest sense in the UK

during the transition period but is not addressing what happens thereafter. Paragraph [59] is also a confirmation that CG's position was within the full scope of EU law during the transitional period. Neither paragraph analyses the situation of a person, such as AT, who made her application at a later point in time. It was not an issue before the Court.

102. I should also address the submission of the SSWP that the judgment in *CG* represented a radical departure from settled case law, was baffling and perplexing, created new and unheralded substantial financial burdens on the state, did not bind, and should not be followed. First, the judgment does represent an evolution in the case law, but it is far from baffling or perplexing; even the SSWP accepts that the ECHR could apply to the situation of AT and on his analysis leads to much the same result as arrived at by application of the Charter. Secondly, even if CG *is* an extension of the law then so be it. Under the Withdrawal Agreement this judgment binds the UK under provisions agreed to by the UK. Thirdly, no one has put any evidence before the Court indicating that the burden on the state brought about by application of the Charter is at all significant[2]. Indeed, if the SSWP is correct and the ECHR applies in any event, there might be no incremental cost at all since the same result would apply regardless of the judgment in *CG*. Finally, as to the implication underpinning much of the argument that the judgment is somehow unfair to the UK, the residence provisions are designed to protect UK citizens living in the EU to the same degree as they protect EU citizens living in the UK. The Agreement imposes obligations on the UK and the EU and the Member States in equal measure. There can be no sense in which the judgment imposes unfair burdens only on the UK.

103. Finally, contrary to the submission of the SSWP, nothing in *CG* or in the Decision of the Upper Tribunal brings the Charter fully back into play in domestic law. This is

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[2] There is uncertainty as to the total number of persons with PSS who do not have an additional qualifying right to reside for the purposes of universal credit, but rough estimates before the court indicated that it might run into some tens of thousands. This group will, at all events, be a diminishing category as holders of PSS either leave the UK or move to settled status (at which point they become entitled to means tested benefits). Logic dictates that many if not most of those with PSS will be in work and not therefore in need of support. Evidence before the Court from the AIRE Centre, based only on individuals turning to that organisation for help, also suggested that the total numbers in the class entitled to support could be modest. In submissions they said of their own experience:

> "Those affected by regulation 9(3)(c)(i) of the 2013 Regulations are a small group comprising some of the most vulnerable in society. As set out in the Witness Statement of Matthew Evans, dated 31 January 2023:
>
> 19…Of the 21 requests for advice dealt with by the AIRE Centre [in the 12 months to September 2022]…where the individual was found not to be exercising a qualifying right to reside, 11 were victims of domestic violence who had fled from an abusive partner, 12 were lone parents unable to work due to child care obligations, 1 was unable to work as the primary carer of a family member with a terminal illness and 6 had never worked, or were unable actively to look for work due to an illness or disability. 5 of these individuals were homeless or at imminent risk of homelessness, whilst the others were living in temporary shelters, or reliant on a combination of foodbanks and local authority support to survive."

clear, for example, from Case C-673/20 *Préfet du Gers* EU:C:2022:449 (9th June 2022) where the absence from the Withdrawal Agreement of any right to vote meant that the Charter had no application to assist a UK resident in France who wished to vote in local elections: See the analysis in the Decision at paragraphs [57] – [62] with which I agree. The Charter only applies if and insofar as it can attach to rights brought into domestic law *via* the implementation of the Withdrawal Agreement. This is a limited category of rights.

(6) Is the duty imposed by Article 1 greater than that already imposed by Article 4/Article 3 ECHR?

104. The final argument of the SSWP is that if, contrary to the SSWP's principal case, the Charter does pass into domestic law *via* the section 7A EU(W)A 2018 conduit pipe, then, Article 1 has no greater effect than Article 4 and its counterpart in Article 3 ECHR. Mr Coppel KC pointed out that it had always been open to AT to invoke her rights under the HRA 1998 but she had not done so. There was in this an implicit albeit muted criticism of AT and her legal team. There are three answers to this criticism.

105. First, at least at the level of principle, Article 1 is freestanding (see paragraphs [32] – [36] above) as was confirmed by the CJEU in *CG* (ibid paragraph [89] set out at paragraph [72] above). It is the founding Article of the Charter. It is cast in language as unequivocal and emphatic as it is concise: "*Human dignity is inviolable*". The concomitant duty is expressed in unflinching terms; it "*must*" be both respected and protected. There is no suggestion that it is to be construed as subordinate to any other Charter provision, such as Article 4. Furthermore, the Explanations (see paragraph [32] above) explicitly say that the right to dignity is both a right in *itself* and the "*real basis*" for (other) fundamental rights. None of the other rights can be "*used*" to "*harm*" the dignity of a person i.e. other rights are subordinate to Article 1 and not *vice versa*. Consistent with this the last sentence of the Explanations stipulates that dignity must therefore be respected*, "… even where a right is restricted.*" In other words, *if* another Charter right is, properly construed, restricted in a way which undermines dignity then it must be supplemented by Article 1. Dignity and degrading and inhuman treatment are not, in the Charter, treated as legally synonymous.

106. Secondly, the SSWP's criticism of AT for not pursuing her Article 3 ECHR/ HRA remedy is misplaced since under the Agreement the UK agreed to enhanced rights of enforcement relative to those available under the HRA 1998. Provisions finding their way into domestic law *via* the Agreement and Section 7A EU(W)A 2018 can be enforced under the conditions set out in Article 4(1) and (2) of the Agreement (see paragraph [52] above) which confers direct effect upon litigants and a connected power and duty on national courts to disapply inconsistent domestic law, an important point emphasised in the Explanatory Notes accompanying Section 7A EU(W)A 2018: see paragraph [62] above. That potency is missing from the HRA 1998 when equivalent rights are being enforced where the remedies available to a court do not stretch to the power of disapplication.

107. Thirdly, the SSWP argues that Articles 1 and 4 of the Charter have been construed in case law as coextensive. In my judgment, although there will be an overlap between Articles 1 and 4, case law does not say that they have the same scope and effect. In Case C-163-17 *Jawo v Germany* EU:C:2019:218 (19th March 2019) ("*Jawo*") at

paragraph [78], the CJEU was concerned with the duty of a Member State when processing an applicant for protection as a third country national or a stateless person in the light of Article 4. The Court observed that the protection under Article 4 was "*closely linked*" to respect for human dignity in Article 1 but the Court did not say that they were identical. The Court (paragraph [90]) addressed the sort of evidence that would be needed to mount a "*systemic or generalised*" Article 4 challenge and said that "*a particularly high level of severity*" was needed (paragraph [91]). The Court held (citing jurisprudence of the European Court of Human Rights):

> "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….
>
> 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."

108. In Case C-233/18 *Haqbin v Federaal Agentschap voor de Opvang van Asielzoekers* EU:C:2019:956 (12th November 2019) ("*Haqbin*") the CJEU was concerned with Article 1 of the Charter in the context of a child asylum-seeker accommodated in a reception centre who fell within the scope of Council Directive 2013/33 ("*the Reception Directive*"). Following a fight, the child was excluded, and he thereafter ceased to benefit from meals, clothing, activities and most medical, social and psychological support. During the exclusion he lived rough in parks or stayed with friends. Applying *Jawo*, the CJEU considered Article 1 in terms of a lack of "*most basic needs*". When the Court referred to a state of degradation or inhumanity this was as an alternative (cf "*or*") to the lack of the ability to meet "*basic needs*":

> "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..."

The Court, in paragraph [56], held:

> " … 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."

109. The SSWP also relies upon joined cases C-411/10 & C-493/10 *R (NS (Afghanistan)) v Secretary of State for the Home Department* EU:C:2011:865 (21st December 2011) at paragraph [114]. This paragraph said that on the facts of the case no different result (to that under Article 4) would be arrived at under Article 1. The SSWP infers from this that Articles 1 and 4 cover the same territory. It is also argued that Article 7 of the Charter has the same effect as Article 8 ECHR citing Case C-400/10 *JMcB v LE* EU:C:2010:582 (5th October 2010) ECR I-8965 at paragraph [53]; and *Patel v Secretary of State for the Home Department* [2019] UKSC 59 at paragraph [19]). Article 8 ECHR (equivalent to Article 7 of the Charter), it is said, will rarely, if ever, impose a positive duty on the State to provide welfare support unless Article 3 ECHR is engaged: see *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406 at paragraph [43]. Similarly, it is argued that Article 24 of the Charter has been held not to provide additional assistance to a claimant over and above Article 8 ECHR: *LO v Secretary of State for Work and Pensions* [2017] UKUT 440 (AAC), [2018] PTSR 663 at paragraphs [67], [90]. The SSWP infers from these, again, that there is no daylight as compared to Article 1.

110. I disagree with this analysis. A judgment holding that a person who is subject to degrading or inhuman treatment which states also that this would be undignified for Article 1 purposes, is articulating an unsurprising conclusion but it is not a precedent for the wider and different proposition that in all cases where Article 1 applies, Article 4 of the Charter also applies. Article 4 cases might well be a significant subset of Article 1 cases, but only a subset. The same applies to Article 8 ECHR even if it be true that Article 8 would not extend the duty to provide welfare over and above that applicable under Article 3 ECHR.

111. In the present case the Upper Tribunal made clear that Article 1 might reinforce or strengthen other Charter rights: see Decision paragraph [120]. It then, based upon paragraphs [46] and [56] of *Haqbin*, articulated, but in my judgment without intending to lay down any sort of a canonical definition, the limited range of "*most basic needs*" to which Article 1 might apply: accommodation, food, clothing, and hygiene and the means to secure them. The Upper Tribunal then articulated a threshold of need (i.e. the lack of) in the phrase "*if a person lacks these things*":

> "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."

112. Ultimately, the approach to determining the benchmark for the standard of review under Article 1 must now be found in the judgment of the CJEU in *CG* which addresses the provisions of law in issue in this case and concerned closely analogous facts. The CJEU did not frame its analysis in terms of degradation or inhumanity. The CJEU applied Article 1 on its own to CG and Article 1 in conjunction with Articles 7 and 24 to the position of mother and children: see paragraphs [89] and [90]. In paragraph [92] the CJEU confirmed that the support relevant to Articles 1, 7 and 24 had to come through "*national law*". The CJEU in paragraphs [92] and [93] identified the following facts as relevant to the analysis: (i) CG was a mother of two young children; (ii) she had no resources to provide for her own or her children's needs; and (iii) she was isolated because she had been forced to flee a violent partner. There is no reference there to accommodation though from facts set out elsewhere in the judgment it is apparent that she was in temporary accommodation in a women's refuge (paragraphs [37] and [44]) a state of affairs the Court seems to have treated as relevant to whether she was "*destitute*" (paragraph [44]). It seems that access to accommodation was viewed as a component of access to means. On the basis of *CG* the facts relevant to a Charter violation are within a relatively narrow compass and focus upon: the availability of means and resources to meet needs (which would include accommodation); the degree of isolation; and, the degree of dependency of children. The provision of accommodation, such as access to a refuge, will not be treated as sufficient if it is merely temporary. It is right, finally, to note that the factors taken into account were those the CJEU considered relevant "*in the present case*" (paragraph [91]) i.e. the conclusion whether there was indignity was fact and context specific. It would therefore be wrong to treat paragraphs [92] and [93] as laying down hard and fast rules. They are nonetheless strongly indicative as to how the standard should be applied.

(7) Conclusion

113. For all the above reasons, I would reject the appeal on Ground I. The Charter applies to Article 13 of the Agreement and to Article 21 TFEU which is made applicable by cross-reference. Those rights are directly effective. Both must be construed by reference to the Charter. Both have become part of domestic law through section 7A EU(W)A 2018 and this includes their application in conjunction with the Charter.

The relevant provision of the Charter is Article 1 as it applies to AT (in conjunction with Articles 7 and 24 as it applies to her and her child). Article 1 is not legally coextensive with Article 4 (and Article 3 ECHR), albeit that in some and possibly many cases there will be a significant evidential overlap. The benchmark determining whether there is a breach of Article 1 (alone and/or in conjunction with Articles 7 and 24) is the approach taken by the CJEU in *CG*.

D. Grounds II-III: The method of assessment / implementation

(1) The grounds of appeal

114. I turn now to Grounds II – III. The issues arise in the following way. In *CG*, the CJEU set out certain broad principles to guide the referring tribunal when it came to decide the case in the light of the CJEU's judgment. This guidance concerned: (i) the requirement on national authorities to conduct an individualised approach to assessing a person's needs; (ii) the extent to which "*risk*" played a part in the assessment; (iii) the point in time when the duty to provide support was engaged; and (iv), the extent to which the overall structure or framework of the national system of support was relevant. The FtT had no difficulty with these matters: no proper individualised assessment had been carried out; AT and her child were at risk; they were entitled to support there and then; the system as a whole had failed them; and, the facts of the case were sufficiently serious to be capable of meeting both the thresholds in Articles 1 and 4 of the Charter. The Upper Tribunal agreed.

115. The SSWP summarised the central objection to this in written submissions in the following way:

> "… CG does not mandate an individualised assessment of the kind contemplated by the UT. That would introduce a radical new right under EU law to social assistance benefits, which would be far more generous than that previously recognised in EU law, simply by virtue of arrangements made in connection with the UK's exit from the EU. As well as making little sense in principle, that is also contrary to long-established principles in the CJEU case-law. Further, as to the risk of violation of Charter rights, the UT adopted an unduly restrictive approach to the potential role of other forms of state support to address such risk and applied an unduly low threshold."

116. In oral argument Mr Coppel KC explained that the Government considered it could satisfy its duty under the Charter without setting up any new system, and by allocating responsibility primarily to local authorities whom, it was said, already had sufficient funding to meet any obligation of support. Mr Coppel KC also explained that in the Government's view the cornerstone of protection in a case such as AT's (where a child was involved) would derive from Section 17 CA 1989 but other schemes and provisions were also relevant. He accepted that there might have to be *some* elements of central government support. For instance, an individual might need support from the NHS which was centrally funded but that might in practice still involve using health facilities operated by local NHS Trusts. He said that decentralised support was better because those in need were distributed nationwide and would naturally turn to local services for support. In the round, the structure or framework of the law was "*in*

principle" adequate and it was relevant to this that, if in a given case an applicant was refused support, there existed administrative (by an ombudsman) and judicial routes of redress. The bottom line was - no new system and no new money.

(2) The issues arising

117. Standing back the issues which divide the parties can be summarised as follows:

a) The "*in principle*" argument: Is the duty to protect fundamental rights satisfied by the existence of an overall statutory framework which is capable (potentially) of providing adequate support?

b) The role of section 17 Children Act 1989: Is section 17 CA 1989 an adequate means of satisfying the SSWP's duty to provide support?

c) The "*individualised*" assessment issue: Must the competent authority perform an individualised assessment of an individual's needs?

d) The "*actual and current risk"* issue: Is the duty to provide support triggered by risk?

e) The vulnerability issue: Is the Article 1 duty applicable only to those categorised as vulnerable?

f) The allocation issue: Can the SSWP avoid liability upon the basis that Parliament has allocated responsibility for compliance with fundamental rights in this area to local authorities?

(3) The "in principle" or "statutory framework" argument

(a) The SSWP's defence

118. Central to the SSWP's case is the "*in principle*" submission. This is that provided there was "*in principle"* a system (or "*statutory framework"*) of support that a person with PSS could benefit from, it was then irrelevant from the perspective of fundamental rights whether that system applied in practice to provide *actual* support to an individual in need. The SSWP's submission is of general application. If correct, it would apply to all alleged violations of fundamental rights.

119. In written submissions the SSWP was very clear that provided the overall system existed it was "*not to the point*" that immediate support was refused, however urgently needed. The very existence of a system of support amounts to a defence to a complaint of breach and "*obviates any risk of violation*". All that is required is a framework which "*allows for support*" or which has "*potential availability*":

> "…either way SSWP was entitled to rely on the statutory framework of fallback support to address any risk of violation of Charter or fundamental rights. *It is not to the point that material support was not, in fact, provided by the local authority in this case*. What is relevant is that SSWP was entitled to rely on a framework being in place that allows for support to be provided to persons in AT's situation that can

> prevent breach of their Charter (or equivalent ECHR) rights. The FtT erred in law in not accepting that the potential availability of s.17 CA 1989 and other state support was sufficient to prevent the risk of violation of AT and D's Charter rights such as not to require payment of UC. The UT erred in failing to correct that error."
>
> (emphasis added)

It is as already observed accepted by the SSWP that for the system to be acceptable there has to be a right of redress.

(b) The SSWP's system

120. The point of departure is to identify the system the SSWP contends is "*in principle*" adequate. Problems of identification emerged during the appeal. In initial submissions the SSWP did not describe the overall system relied upon but cross-referred to its submissions before the FtT. These listed a large number of disparate governmental schemes and types of support, many of which did not apply to AT or were subject to eligibility conditions which were unspecified or were discretionary and in respect of which there was no evidence that they would in practice ever be treated as relevant by any competent authority, or otherwise were benefits provided not by the state but by third parties.

121. Because of this lack of clarity, the Court, at the culmination of the appeal, sought from the SSWP and the other parties a Note setting out what rights were available to AT. This caused difficulties. According to a letter sent to the Court by Government Legal Department ("*GLD*") on 9th June 2023 ("*the GLD letter*") the parties understood the request to be for a statement of the benefits AT and her child were *not* entitled to. This led to the First Note. This contributed to the Court's concern. As appears from the Note, the SSWP set out in 2019 to exclude those residing in the UK upon the basis of PSS from many basic measures of support otherwise available. It confirmed that those with PSS were excluded from eligibility for housing accommodation and homelessness assistance. It also accepted that certain benefits included in the list before the FtT were incorrectly specified, in particular child benefit and council tax reduction. Subsequently, the SSWP, in the GLD letter, argued that in referring in the list to child benefit they were not representing that AT was *entitled in law* to child benefit only that *in fact* some had been paid to her. The correction in the Note was therefore itself an error, there being nothing to correct. This added to my concern. The logical inference of including a reference to payment of child benefit in a list purporting to describe the applicable statutory framework is that this *was* a lawful payment duly made in accordance with the relevant system of child benefit.

122. In the light of this the Court sought further clarification from the SSWP as to the precise benefits which *were* available *to AT* as of the date of the application made by her for UC. The Court directed that the benefits be differentiated according to whether support was available as of right, according to law, or alternatively, might be available only by reason of an exercise of discretion on the part of some competent authority. A Second Note was submitted by the SSWP which purports to describe the overall system said "*in principle*" to be capable of protecting AT and her child. This

is the system relied upon by the SSWP as the defence to AT's claim for breach of fundamental rights. The Court convened the further hearing of the parties on 10th October 2023 to consider this additional material.

(c) Analysis

123. There are a number of answers to the SSWP's "*in principle*" or "*statutory framework*" submission. First, it is inconsistent with the judgment of the CJEU in *CG*. Secondly, it is inconsistent with Article 4(1) of the Withdrawal Agreement. Thirdly, it is inconsistent with principles governing how fundamental rights are required to be protected. Fourthly, the system as presented by the SSWP does not seem even *in principle* to be capable of protecting a person such as AT. I address each separately.

124. *The judgment in CG*: The submission is inconsistent with the judgment of the CJEU in *CG*. The Court held there that the task of the national court was to decide the case by reference to the particular position of the claimant for support, not the system as a whole. It was for this reason that the President of the CJEU sought further information from the referring tribunal concerning the particular position of CG and her children (see paragraph [66] above). In paragraph [59] the Court focused upon "*CG's situation*". In paragraph [89] the Court explained, in relation to a person with a right of residence, that there was a duty on host states to "*ensure*" that the person concerned could "*live in dignified conditions*", an instruction concerning the day to day position of the individual, not the system. In paragraph [91] the Court, in relation to a child, held that the host state was "*required*" to enable that child "*to stay in dignified conditions*" with the parents, again, an instruction relating to the actual position of the children, and not the system. In paragraph [92] the Court clarified that a competent authority could refuse an application for assistance "*only after*" ascertaining that the individuals concerned were not exposed to "*an actual and current risk of violation*" of their fundamental rights, phrases which, yet again, ground the decision in the individual facts and circumstances of the claimant, not the system. And it followed, said the Court, that upon remittal back to the national tribunal it was the duty of that body to ascertain whether CG and her child could benefit "*actually and currently*" from other forms of assistance once again confirming that it is the actual position of the individual that is relevant. It is not possible to glean from this judgment support for the SSWP's argument that the plight of the individual is irrelevant provided the system is capable in theory or principle of providing support.

125. *Article 4(1) Withdrawal Agreement – direct effect*: Next, rights conferred pursuant the Withdrawal Agreement may be directly effective under Article 4(1) (see paragraph [52] above): "*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*" such rights are actionable against the SSWP only by proof. This now forms part of domestic law under the EU(W)A 2018 (see paragraph [61] above). The Preamble to the Agreement acknowledges, in the sixth recital, that it is "*necessary*" to provide "*reciprocal protection*" for EU and UK citizens who have exercised their "*free movement rights*". This covers AT. She relies "*directly*" upon that right which is personal to her and is of direct effect under Union law. It was the basis upon which she became entitled to PSS. The sixth recital provides:

> "RECOGNISING that it is necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, 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; recognising also that rights deriving from periods of social security insurance should be protected…"

It is trite that direct effect is, doctrinally, concerned with the protection of individual rights including by requiring courts to confer remedies effective to remediate individual harm. The SSWP's argument that such rights are actionable against the SSWP only by proof of systemic breach and that the position of the individual is irrelevant is the antithesis of direct effect and inconsistent with Article 4(1).

126. *Article 1 and effective remedies*: Thirdly, the SSWP's submission is inconsistent with ordinary principles of law relating to the protection of fundamental rights under which the rights must be accorded effective protection by the courts (Article 13 ECHR[3]). Article 1 of the Charter by its express terms creates a right that is "*inviolable*" and imposes a duty of both protection and respect. Applying the normal meaning of those words it cannot be argued that they impose a duty on the state only to institute a system capable in principle of respecting and protecting the right of the individual, even if in practice it does not. That would render the right violable, subject to disrespect, and unprotected. The SSWP argues that only Article 3 ECHR is capable of applying and then only systematically, not operationally. The Court asked the parties to address the implications of the judgment of the Supreme Court in *Commissioner of Police for the Metropolis v DSD* [2018] UKSC 11 ("*DSD*"). There the Court considered and rejected this proposition (paragraph [6(i) and (ii)]). The issue concerned the nature of the duty under Article 3 on the police to investigate individual cases of alleged serious sexual assault or rape. The Commissioner and the Secretary of State argued that the duty was systemic only. They contended that the duty sounded at the public or "*communal*" level only (paragraphs [8] and [9]) and there were compelling policy reasons why it should not be operational (i.e. individualised) including issues of scarce resource allocation and the fact that the duty was secondary or contingent in that the real wrongdoer was the perpetrator of the underlying crime, not the police. They relied also upon the fact that there was no common law right to a remedy for an otherwise tortious failure to investigate. The extent of the duty on the state was to "*put in place the legal structures required to ensure that a proper inquiry can be conducted*" (paragraph [10]). The High Court ([2014] EWHC 436 QB) disagreed and held, following a trial, that on the evidence in relation to two actual victims of the serial rapist John Worboys both systemic failures and operational failures had been proven. The Court of Appeal agreed ([2015] EWCA Civ 646) and also held that breach could be proven individually and/or systematically. The Supreme Court rejected the appeal by the Commissioner supported by the Secretary of State. The duty in Article 3 was systemic and/or operational. The Court endorsed a submission of the respondent that the nature of the duty was individual and protective:

[3] The European Court of Human Rights, in a 2022 publication entitled "*Guide on Article 13 of the European Convention on Human Rights – Right to an effective remedy*", sets out in a compendious manner the case law on the need for an effective remedy for violations of Convention rights and in particular how remedial measures must be focused upon the harm sustained by the individual on the facts of the case.

> "12. … the state has a duty under article 3 to conduct an effective investigation into crimes which involve serious violence to an individual. This is a positive, protective obligation to take measures designed to ensure that individuals within its jurisdiction are not subject to the treatment which article 3 prohibits. The duty is not an abstract one owed to the public at large but can be invoked by an individual who demonstrates that the state's failure to fulfil its obligation has led to her or his suffering treatment prohibited by the article."

127. There was a consistent line of jurisprudence from the European Court of Human Rights to the same effect (paragraphs [16] – [43] and [54] – [58]). The absence of a common law duty was not an obstacle to the imposition of a duty under Article 3. Absent an operational duty the duty on the state to investigate would be of "*little value*" (paragraph [92]). Whilst the Court confirmed that there was an operational duty it also held that, in the particular context of policing, the duty was not open ended. It was confined to certain types of serious sexual offences only, not all offences, and the hurdle for proof of breach was set relatively high. The application of Article 3 ECHR in the context of the policing of serious crime is a more difficult and complex issue than that of a duty to protect those in immediate need. The SSWP argues that the judgment is of little or no relevance since it was concerned only with the investigative duty under Article 3 ECHR. In my view, the analysis in *DSD* is at least an indicator as to the approach that should be applied in the present case.

128. *The capability of the system to offer actual protection*: Finally, there is the SSWP's argument that the system described "*allows for support*" and also describes a system or "*framework*" which ensures "*potential availability*" of support (see paragraph [119] above). It was clarified in response to questions from the Court during the oral hearing on 10th October 2023 that it was no part of the SSWP's defence that he must prove that the system, taken as a whole, was actually capable in practice of meeting a person's needs, in the sense, for instance, that the system was adequately funded or resourced and/or that there was guidance making clear to competent authorities that the power or discretion in issue had to be used for the purpose of protecting those in the position of AT. For this reason no evidence has been advanced to show that the system is *in fact* capable of offering support, as opposed to simply being a theoretical construct. Based upon the GLD letter and the First and Second Notes I would make the following observations about this statutory framework:

    i) *Exclusion of housing / homeless benefits*: Housing and accommodation will invariably be an important component of any system of support (as confirmed in *CG*). The First Note explained that persons with PSS (including therefore a person who was otherwise homeless and on the streets) were expressly made ineligible for housing and homelessness support by regulations introduced in 2019. An exception was that a person with PSS could access local authority advice about housing. Advice is not housing. If the advice is that the state will provide none, that cannot amount to a system which even "*in principle*" is adequate. If the advice is that the applicant should seek housing from a charity then that collides with the ruling in *CG* that only state measures are sufficient and simply diverts the problem to third parties who might have no capacity and be under no duty to provide shelter. In the Second Note the SSWP sought

to plug this gap arguing that under section 1 Localism Act 2011 a local authority was empowered *"…to do anything that individuals may generally do"* and argued from this that competent authorities could provide shelter and support. However, this is discretionary and subject to section 2(1) which provides that*: " If an exercise of a pre-commencement power of a local authority is subject to restrictions, those restrictions apply also to the exercise of the general power so far as it is overlapped by the pre-commencement power.*" In *Kalonga v Croydon LBC* [2021] EWHC 2174 (Admin) (cited by the SSWP) at paragraph [51] the High Court held that this did not, for example, permit an authority to conduct a review under section 107E Housing Act 1985 of a decision by an authority to seek possession if the time limit for applying had not been met. In this case the SSWP has expressly legislated to preclude those with PSS from housing and accommodation. I do not accept that the broad brush power set out in the Localism Act can be sufficient "*in principle*" to address the central issue of accommodation where there is a clear cut decision by Government that housing and accommodation should not be made available. At the very least no evidence has been adduced showing that the Act is in fact treated as relevant to housing by local authorities, or that there is funding and resources made available to enable it to be used for that purpose. I return to the Localism Act 2011 further at paragraph [164] below.

ii) *Child benefit*: The SSWP makes clear in the First Note that child benefit was expressly withdrawn from those with PSS. In the Second Note it is suggested that such benefits was *de facto* made available to AT and her child and were thereby relevant to the "*in principle*" analysis. However, the Note suggests that the explanation for the payment might be error on the part of HMRC. It cannot, in my view, be valid to treat as part of a system said "*in principle*" to be sufficient that on one occasion payments were mistakenly made which were thereby, by definition, not part of the statutory framework and were contrary to principle, and even potentially subject to a duty to repay.

iii) *Subsistence payments to adults in need*: It has always been common ground that UC is not available to a person with PSS and, it follows, was not available to AT.

iv) *The breadth of the relevant cohort*: The relevant cohort relied upon in the First and Second Notes by the SSWP is all those with PSS, not just those in need making an application for support (a much smaller subset). The SSWP thus relies as part of his defence upon support measures having no relevance to AT. The SSWP advances this argument even though elsewhere in submissions (see paragraphs [144] and [145] below) the SSWP argues that the relevant cohort is limited to those making an application for support, <u>not</u> the wider body of persons who have PSS (the vast majority of whom are likely to be in work and not therefore in need of urgent support).

v) *The Article 3 ECHR benchmark*: The SSWP's defence is by reference to a system framed to meet the duty in Article 3 ECHR (degrading and inhuman treatment) which the SSWP argues entails a "*high*" threshold for state intervention. It is not predicated upon a legal standard such as Article 1 of the Charter, which might have a lower threshold.

vi) *Powers and discretions*: The defence includes measures conferring a discretionary power to provide support. But it is no part of the defence that the SSWP must establish that the power would *in fact* be exercised in relation either to those with PSS or those comparable to AT (see for instance the analysis of section 17 Children Act below). It is also accepted that some of the powers are subject to "*eligibility*" conditions precedent to their exercise and the SSWP accepts that a person in the position of AT might not be able to satisfy these conditions.

vii) *Future benefits*: The defence relies upon availability of measures of no immediate benefit to a person in present need, such as AT with a young, pre-school, child, which could only ever become relevant in the future, such as the provision of school transport or student grants.

viii) *Support provided by third parties including non-governmental agencies such as charities*: The system includes as legally relevant, support measures not made available by the state but provided instead by non-state third parties. For example, it treats as relevant the provision of support by charities[4] and maintenance payments by ex partners. In fact these were rejected as relevant by the FtT and there was no appeal against those findings. In *CG* the CJEU (*ibid* paragraph [92]) treated as relevant only measures of national law support.

129. In putting this argument into context, it is helpful to identify some elementary propositions that Mr Coppel KC for the SSWP accepted in response to questions posed by the court. These are that: (i) *prima facie* it was for the state to decide how to comply with its obligations under the Withdrawal Agreement; (ii) it was open to the state to allocate responsibility for compliance as between central and local government; (iii) there was however a duty on the state to ensure effective compliance which meant that each eligible individual was entitled to receive the due support; and (iv), if in a case there was no effective compliance then the state as a whole was legally responsible, even if it was local government (as an arm of the state) that was culpable on the ground for the non-compliance.

130. It seems to me that the SSWP's proper acceptance of these propositions necessarily entails acceptance of the requirement for an individualised assessment: how else can the duty in proposition (iii) be satisfied?

131. Finally, as to the point that the SSWP's system will include a redress mechanism, this is not an answer to criticisms made. The SSWP accepted that there has to be some method of formal (court or tribunal) challenge (FtT Decision paragraphs [76]-[78]). The SSWP is clear that the existence of an "*in principle*" framework of support (which includes some species of ability to seek redress) protects the state from "*any risk of violation*" (emphasis added); it is "*not to the point*" that material support was not provided to AT (see paragraph [119] above). This means, to take a hard but not unrealistic hypothetical example, that if a destitute and homeless applicant was denied relief and challenged that refusal the issue for the tribunal or court (as the SSWP says

[4] In the Second Note the SSWP says that there was evidence before the FtT that the local authority had provided funding to the charity which provided accommodation to AT. I can see that *if* the state (*via* a local authority) did adequately fund a third party to provide accommodation this could be relevant to state measures as understood in paragraph [92] of *CG*.

it is for this court in relation to AT) would only be the adequacy of the system as a whole, and not the refusal and its impact upon the individual, however severe. There is, on this basis, no judicial or other means whereby an individual refusal can be remedied by reference to the plight of that individual and relief would only be granted if the claimant established systemic breach and causation which would, by definition, be long after the pressing need arose.[5]

(d) Conclusion

132. For all the reasons set out above I do not accept that the SSWP's "*in principle*" argument is correct as a matter of law.

(4) The role of section 17 Children Act 1989

133. I turn now to the role of section 17 CA 1989. At one level the answer to the section 17 argument is encompassed in the answer to the "*in principle*" argument set out above, since it is but one component of the legal framework the SSWP says, in the round, is adequate. It is however the centrepiece of the SSWP's system of protection and was the subject of detailed written and oral argument. The SSWP's argument in relation to section 17 is that even if it is, as a system, presently deficient and/or ill-applied by local authorities, it is nonetheless "*potentially*" capable of being applied in an improved manner consistent with fundamental rights and it is that which matters not its actual, day to day, application.

134. The SSWP argued as follows:

a) Section 17(1) CA 1989 only imposes a general duty on local authorities to promote the welfare of children. There is no duty to meet every assessed need of each individual child in their area: see *R (G) v Barnet London Borough Council* [2003] UKHL 57 ("*Barnet*") at paragraph [85].

b) Nonetheless, a power may become a duty to act, pursuant to section 6 HRA 1998, if not doing so would breach ECHR rights (see e.g., *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396 at paragraph [5]). In the present context, the section 17 CA 1989 power may become a duty to act if, for example, there would be a breach of Articles 3 or 8 ECHR if the power was not exercised. In *R (HC) v SSWP* [2019] AC 846 ("*HC*") the Supreme Court recognised the drawbacks of section 17 support (of the kind referred to by the Upper Tribunal), but nonetheless was prepared to assume that it offered sufficient support to prevent destitution (having regard to local authority duties).

c) Given that Charter rights and ECHR rights have, essentially, the same content a situation amounting to a breach of Articles 1, 4 or 7 of the

[5] To succeed on a systemic breach basis could in practice require a test case such as occurred in *DSD*. In that case a systemic breach was proven at trial and the Court held on the evidence that there was a causal connection between the systemic breaches and the harm to the claimants, as well as a causal connection between the operational (individualised) breaches and the harm.

Charter would also amount to a breach of Articles 3 or 8 ECHR respectively.

d) The definition of when a child is in need in section 17(10) CA 1989 will inevitably be met if a child is, or is at risk of being, destitute.

e) The services provided by a local authority in exercise of its functions under section 17 CA 1989 may be provided for the (immediate) family (as defined in section 17(10)) of the child in need or any member of their family (section 17(3)) and may include providing accommodation and giving assistance in cash (section 17(6)). The section 17 CA 1989 powers can and must therefore be exercised if necessary to avoid a violation of ECHR rights to provide accommodation and subsistence payments to the child in need's whole family.

f) A local authority is not prevented from exercising its section 17 CA 1989 powers (or its other general support powers) because a child or parent is an EU citizen with residence rights based only on PSS.

135. I start with the conclusions of the FtT which the Upper Tribunal endorsed. The FtT considered section 17 CA 1989 and held that "*minimal support*" had in fact been offered by the local authority. It did not represent a potential source of financial support (FtT Decision paragraph [77]). The Judge pointed out that under the Act there was a general duty on local authorities to promote the welfare of children within their area who were in need but that this did not include specific mandatory requirements about how to discharge that duty in an individual case and local authorities had a wide degree of flexibility and discretion. The Judge observed (FtT Decision paragraph [74]) that "*best efforts*" had been made by professionals acting for AT to obtain section 17 support but "*little had been provided*". The assistance offered amounted to a few toys and clothes for the child and some low value vouchers for redemption through a third party organisation (paragraphs [73] – [78]). Social workers responsible for section 17 support had closed their files on AT in July 2021.

136. The Upper Tribunal held that the decision of the Judge was justified upon the evidence before him (Decision paragraphs [149]-[151]) and pointed out that: "*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"*. The basic facts were summarised:

> "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."

137. In principle, held the Upper Tribunal, the judgment in *CG* required the SSWP to "*focus on the concrete factual position, not the theoretical legal one*". This provided "*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*."

138. The AIRE Centre agrees with this and argued during this appeal that the argument of the SSWP was both long on theory and short on reality. It failed the test of individualisation posited in *CG* and endorsed by the Upper Tribunal. The AIRE Centre made a number of observations about the practical, every day, inadequacy of the section 17 regime.

139. First, the only method open to AT to challenge a refusal decision of a local authority under section 17 CA 1989 was by judicial review which did not permit of a full examination of the facts and the applicant's need for support. A decision as to the level of support required would be quashed only if it was perverse or irrational: see e.g. *R (Blackburn-Smith) v Lambeth LBC* [2007] EWHC 767 (Admin) ("*Blackburn-Smith*") at paragraph [41]. This was an inadequate mechanism for ensuring adherence to the Charter. Secondly, section 17 CA 1989 offered no guarantee of support for the right of residence. In *Blackburn Smith (ibid)* at paragraph [23] it was held lawful for the local authority to fund travel to return to the country of origin if satisfied that this would lead to the children no longer being in need. It is argued that this would be incompatible with the Article 13 right to reside in dignity, *in* the host state. Thirdly, any system whereby an applicant had to proceed by way of judicial review as opposed to a statutory appeal to a specialist tribunal was inadequate and discriminatory. In *HC (ibid)* at paragraph [37] (on which the SSWP relied) Lord Carnwath observed that judicial review was available as a "*backstop*" which was likely to be "*unsatisfactory*" as a means of determining proper levels of support. See also per Baroness Hale at paragraph [43]. It is also said that the right to go to an ombudsman was not a real remedy in cases such as this.

140. The AIRE Centre also referred to a report by J. Price and S. Spencer, "*Safeguarding Children from Destitution: Local Authority Responses to Families with 'No Recourse to Public funds'"* (June 2015) ("*the Price and Spencer Report*") which highlighted the considerable complexity and uncertainty of the section 17 regime and its many associated problems. This was a document which was not formally in evidence before the Upper Tribunal but did not play a major part in that appeal. The authors highlight the tensions imposed on local authorities by existing and conflicting objectives of managing immigration, curbing public expenditure and the safeguarding of children. They refer to significant variations in practice between different authorities, the paucity of resources available to such authorities and the shortage of time and lack of information and evidence available to officials at the point when they came to take a decision. At pages [35ff.] the authors record reasons routinely given by local authorities for refusing support which included: (i) that the immigration status of the family precluded local authorities from providing support under section 17; (ii) that housing was not a duty of Children's Services; (iii) that families were not eligible

because they did not have a pending application with the Home Office; (iv) that the family did not live in the borough and it was therefore the responsibility of a different local authority to provide support; (v) that the duty was to the child and not the parent; (vi) that the applicants could return to their country of origin; (vii) that the family could continue living where they were; and (viii), that the children could go and live with the father. Ms Ward KC accepted that this report was based upon 2015 evidence but argued that the inadequacies of the section 17 regime identified remained true today, in 2023, and she pointed out that the SSWP had tendered no evidence at any point in the proceedings which established that, in actual fact, the section 17 regime was effective or could be made to work effectively.

141. The AIRE Centre concluded:

> "The individual assessment necessary under the Charter requires the national authorities to check that the individual is not exposed to an actual and current risk of violation of their fundamental rights, and that check in this case reveals that support under section 17 is not practically available."

142. The Tribunal was careful in its Decision to confine its conclusion to the facts of the case. It did not rule out the possibility that section 17 CA 1989 might in different circumstances be capable of being used effectively to secure Article 1 rights. In paragraph [152] the Upper Tribunal held:

> "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."

143. The SSWP has not adduced evidence to refute or address these wide ranging criticisms of the section 17 system and nor has it been argued that the observations in the 2015 Price and Spencer Report are incorrect or no longer hold true in 2023. Instead, the SSWP says, in effect, that all of this is irrelevant. What matters is that the section 17 system could in theory be more fulsomely applied and this is enough to defeat a claim based upon fundamental rights. There is though no explanation from the SSWP as to how that idealised position could or would come about. In my judgment the FtT was correct in its finding that section 17 was not an answer and the Upper Tribunal was correct to uphold the FtT.

(5) The "individualised" assessment issue

144. The next criticism of the SSWP flows from paragraphs [111] – [139] of the Decision where the Upper Tribunal addressed the question: "*Does CG require an individualised assessment*?" The answer was in the affirmative. An assessment was needed in every case because that it what the CJEU in *CG* held was required: see e.g. Decision paragraph [127]: "… *the exercise must be an individualised one, undertaken by reference to the facts of the claimant's case*." The SSWP argues, consistent with the "*in principle*" argument, that there is no requirement for *any* individualised assessment. I disagree for the reasons given above. But the SSWP also objects to the

practical implications of a duty to perform an individualised assessment. In paragraph [117] the Upper Tribunal stated:

> "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."

145. The SSWP was concerned in particular about the last sentence which it was said suggested that an evidence collection process would have to be put in place for each and every person with PSS, an exercise the SSWP feared meant that it had to identify, contact, interview and collect detailed information from tens of thousands of persons in circumstances where only a relatively small portion of that cohort would ever become applicants for support. The SSWP says that in law the relevant cohort is only those applying for support, not all those with PSS. The Decision, if correct, contemplated the creation of a scheme which was administratively and practically cumbersome and disproportionate. It would run counter to the recognition in *CG* and other case law that administrative practicality was a relevant consideration when considering how the judgment was to be implemented. I think that these fears are unjustified. There is no need for the SSWP to consider the position of every person with PSS. The relevant cohort which defines the scope of the duty are those with PSS who have applied for support, i.e. those at risk of not being able to reside in dignified circumstances.

146. First, the Upper Tribunal in paragraphs [127] and [128] was clear, correctly, that the CJEU in *CG,* and in previous case law (see e.g. Case C-140/12 *Brey* EU:C:2013:565), made individualised assessments mandatory. The facts of *Brey* also concerned a refusal of benefits but the question being answered there was different: was the refusal proportionate? In paragraph [77] the Court stated that the test had to be applied by reference to the "*personal circumstances characterising the individual situation of the person concerned*". In paragraph [79] the Court reiterated that the test had to be applied by reference to "*a person in Mr Brey's situation*". That individualised approach is consistent with that described in *CG*. An alleged violation of individual rights must be measured against facts relevant to the individual.

147. This conclusion does beg a question as to what is meant by individualisation. The expression "*individualised*" can apply to two related but ultimately different things. First, it can describe the process by which a decision is arrived at. An individualised process will focus upon the mechanics of the evidence collection and evaluation process about an individual. An individualised result however will focus upon the outcome of the process and whether the rights of the individual are met, rather than the decision making process itself. In practice the two will be interlinked in that a process which ignores the position of the individual is intrinsically less likely to lead to an acceptable, individualised, result. If it turns out that every entitled individual

receives their due support in a timely manner, the modalities of the decision making process then become irrelevant. Equally, if the end result is inadequate that might indicate that the process is insufficiently individualised. In my judgment, it is the result that matters.

148. Secondly, the Upper Tribunal was addressing the situation of a person in a state of need making a claim, not all persons with PSS. It held that any new scheme intended to address this cohort would not need to be sophisticated or lengthy (paragraph [117]). It recognised that the CJEU in *CG* had not set out how the state was to discharge the duty to ensure that there was no breach of Charter rights (paragraph [126]). It recognised that the CJEU had endorsed the principle of "*administrative practicability*" (paragraph [127]). And it made clear that: "*How SSWP administratively discharges the task required by CG is a matter for him, not for courts and tribunals*" (paragraph [136]).

149. Finally, the judgment of the CJEU in *CG* is consistent with this. Paragraph [89] and its positive requirement that states must "*ensure*" that a person who has exercised a right of movement and residence "*may nevertheless live in dignified conditions*", lays down a duty of (individualised) result. Paragraphs [92] and [93] are concerned with the situation of a person (such as that of CG, but also of AT) who had made an application for one type of support (UC) which was refused but without the competent authority then checking to ascertain whether some *other* form of support was needed. These paragraphs were not referring to a duty applicable to the state to "*check*" each and every person with PSS to see if they had a potential claim; they are concerned with checking the position of those actually applying for support.

150. Applying the above to the facts of this case, I have no reason to doubt the conclusion of the FtT, upheld by the Upper Tribunal, that the decision taken by the SSWP in this case was insufficiently individualised. Once AT's application for UC was refused the SSWP erred in failing in any meaningful sense, as the FtT Judge found, to go on and address AT's broader legal right to support.

(6) The "actual and current risk" issue

151. The next dispute concerns the expression "*actual and current risk"* in paragraph [93] of the CJEU judgment in *CG*:

> "93. In the light of all the foregoing considerations, the answer to the first question is as follows:
>
> …
>
> 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 articles 1 , 7 and 24 of the Charter…"*

(emphasis added)

152. The FtT found on the facts that AT was at risk of actual and current harm sufficient to trigger the Article 1 duty. The Upper Tribunal agreed. The SSWP argues that this is wrong. It is argued that the expression "*may*" in paragraph [92] of the judgment in *CG* ("*…those authorities may take into account all means of assistance provided for by national law…*") indicates that a system of support is Article 1 compliant where an applicant is "*eligible*" for support. A person is eligible, even if refused support in the first instance, provided that there exists a system whereby that person can challenge that decision before a court, tribunal or through some other "*complaint procedure*" (such as an ombudsman). In such a case there is no risk of harm because the system as a whole obviates the risk.

153. The answer to this is, again, to be found in the rejection of the "*in principle*" argument above. I do not accept the SSWP's analysis of the judgment in *CG*. There are three particular observations to be made about the phrase "*an actual and current risk of violation of their fundamental rights".*

154. First, the duty of protection in Article 1 is triggered by "*risk*" which is, as the Upper Tribunal observed (Decision paragraph [128]), *"forward looking*". I agree with the Upper Tribunal that there is an element of causality and remoteness to be applied: "*Risks that are contingent on future adverse events whose occurrence cannot be predicted with confidence are likely to be too remote.*" The duty arises when it can be predicted that the applicant for relief is at risk of having to exercise their right of residence in an undignified manner. This makes the duty prophylactic in the sense that it is designed to prevent the applicant falling into a position of indignity; it does not only arise once that personal predicament has materialised and, it also follows, the risk is not obviated by saying to the applicant – "*go to court*".

155. Secondly, the expression "*actual and current*" underscores that once the duty is triggered there is an obligation of immediacy, i.e. to meet actual and current needs. Ms Ward KC for the AIRE Centre focused upon the phrase "*actual and current*" in the non-English language versions of the judgment in *CG*, which she argued, gave the prophylactic risk-based duty real muscle. This might well be so but the words "*actual and current*" in their English form speak for themselves. If an applicant is in real need in an "*actual*" and "*current*" sense it would not be an adequate performance of the duty to offer support in (say) 8 weeks' time; justice delayed is justice denied. This conclusion is consistent with the judgment in *Haqbin* (*ibid*) where the CJEU, admittedly in somewhat different circumstances, made clear in paragraphs [47] and [56] that the imposition of a sanction involving the withdrawal of support "*even if only a temporary one*", to a child in need (i.e. "*actual and current*" need) would violate the relevant Directive as construed by Article 1 of the Charter (paragraph [46]).

156. Thirdly, if there are (as the SSWP contends) <u>other</u> sources of state benefits "*provided for by national law*" (paragraph [92] in *CG*) they are only to be taken into account if they are available there and then. The word "*may*" – contrary to the submissions of the SSWP – in *CG* paragraph [92] does not alter this conclusion. The Upper Tribunal explained that this was consistent with various foreign language versions of the judgment of the CJEU:

> "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."

157. Pulling the threads together, the duty of individualised support is one of result. Support must be made available to meet the *risk* of indignity. When the duty is triggered, it involves meeting actual and current need. It is insufficient for the state to say, in the case of a refusal of support, that it suffices to meet an actual and current risk that there is a framework of redress that the applicant is eligible to invoke which permits of a challenge (formal or informal) to that refusal decision.

(7) The vulnerability issue

158. Lastly, the SSWP criticises the Upper Tribunal for describing the class of those entitled to support as going beyond the "*vulnerable*". The issue of law arising is narrow: is vulnerability the defining feature of a lack of dignity under Article 1 of the Charter? In response to a question in the course of oral argument about "*rough sleepers*" from Lady Justice King, Mr Coppel KC stated that Article 1 applied only to the vulnerable and that a person would be vulnerable only if homeless, subject to limited exceptions which were not fleshed out. The SSWP however subsequently clarified in the First Note that its "*in principle*" system does not include housing or homelessness support (see paragraph [128] above).

159. The Upper Tribunal held that vulnerability was not the sole test or gateway for Article 1:

> "116. … 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."

I agree with the Upper Tribunal. It is no doubt true that most of those within the Article 1 class will be vulnerable in some way, but vulnerability is not the juridical lynchpin of the Article 1 regime even if it will be a common feature of such cases. There is no basis upon which the concept of "*dignity*", which is foundational and deeply embedded in international law (see paragraphs [32] – [36] above), and which sits at the apex of the Charter, can, by a forensic side wind, be said to have been rewritten by the CJEU to mean vulnerability. I agree with the Upper Tribunal that when the CJEU was describing in its judgment why CG and her child were within the scope of Article 1 the fact that they were considered vulnerable was simply one relevant factual consideration amongst others. In short: vulnerability may be a relevant factor under Article 1, but it is neither a gateway condition nor its defining characteristic.

(8) The allocation issue

160. At the resumed oral hearing on 10th October 2023 the SSWP argued, in effect as a default position lest its other arguments failed, that in complying with fundamental rights it was open to Parliament to identify the organ of the state which was to have responsibility for ensuring adherence. Parliament had allocated responsibility to local authorities, primarily via the CA 1989. If a local authority failed in its duty a remedy lay against the authority by way of judicial review, which was the appropriate route of challenge under the Act. It followed that the SSWP could not be held to account for a breach by a local authority. AT was wrong to bring proceedings against the Secretary of State in the FtT, as opposed to proceedings against the local authority by way of judicial review in the High Court. In response to a question from the Court the SSWP argued that the FtT had been entitled to accept jurisdiction but should have dismissed the case upon the basis that the SSWP was, in effect, the wrong defendant.

161. This argument, in the detailed form in which it is now advanced, is not found in the very detailed and full skeleton argument of the SSWP before the FtT[6]. It was not set out in the Grounds of Appeal to the Upper Tribunal and is not addressed in the judgment. It is not covered in the Grounds of Appeal before this Court and was not covered in any detail in the skeleton argument of the SSWP supporting the Grounds. The other parties to this appeal did not object to the SSWP raising the point and Mr de la Mare KC, for AT, responded to it orally and in detail. I therefore propose to address it.

162. There are fundamental difficulties with the argument, not least because the Court did not have the benefit of representations from the local authority concerned or from bodies representative of local authorities. The SSWP was unable to assist the Court as to why the local authority had not been joined to the FtT proceedings. Mr de la Mare KC argued that the SSWP was seeking to "*pass the buck*" and that the appeal was turning into a "*budgetary tussle*" between central and local government, but without local government being present in court to put its case. Given the way the SSWP's argument has evolved, the absence of such evidence and submissions is a serious evidential void.

[6] The skeleton seems to accept that the CJEU in *CG* made clear that the responsibility for ensuring compliance with Charter rights law lay with the "*state*" (skeleton paragraph [69]).

163. Next, answering a question from the Court, it was confirmed that the SSWP's case was that there was no obligation on the Government of the day to ensure that, from a resource or funding perspective, the organ of the state to whom responsibility was allocated had the wherewithal to perform that duty. The mere act of allocation sufficed to shield the SSWP from responsibility. There is here an inconsistency. The SSWP accepted in argument that the principle of effectiveness applied (see paragraph [129] above), but no concession was then made that this implied that the state had to take steps to ensure that any body or person to whom responsibility was allocated, possessed the administrative, financial or other resources to carry out its obligations in an effective manner. Mr de la Mare KC relied upon the general principle of effectiveness under the ECHR brought into effect by the HRA 1998 (See paragraph [126] above). And because this case involves the implementation, via domestic law, of principles emanating originally from EU law, he cited various well known authorities upon the duty of Member States to ensure that effective remedies were available to protect individual rights. It was trite that whilst under EU law it was for each state to determine for itself how it allocated responsibility for the enforcement of rights, nonetheless Member States (as indivisible entities) remained responsible for ensuring that, regardless of the allocation, those rights were effectively protected in each case: eg, Case 179/84 *Bozzetti* [1985] ECR 2301, paragraph [17]; Case C-446/93 SEIM [1996] ECR I-73, paragraph [32]; and, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph [40]. He also pointed to Case C-268/06, *Impact v Minister for Agriculture and Food and Others* **(**15th April 2008) at paragraph [53] as an example of the proposition that a Member State could not escape responsibility by setting up a system that made enforcement very difficult. I agree. In this case there is a body of evidence, which the SSWP has chosen not to challenge or respond to, indicating that there are long standing and very real problems in the way of local authorities performing their statutory duties even as they presently stand under Section 17, never mind if enhanced and made more demanding as the SSWP contends they should be (see paragraph [135] – [143] above). On the evidence as it stands this Court is not in a position to accept the SSWP's argument that the mere fact of allocation serves to meet the duty of effective protection.

164. In addition, responding to a criticism made by Mr de la Mare KC that the CA 1989 was not a vehicle that could be used in the case of an adult without a child, which would include a pregnant adult, the only response of the SSWP was that if the CA 1989 did not apply then other measures such as the Localism Act 2011 could. That Act was not one of the measures relied upon by the SSWP before the FtT. I have dealt with the problems relating to the Act at paragraph [128(i)] above. In the circumstances I do not understand how this amounts to an answer, at least not without evidence from the SSWP to demonstrate that the Localism Act: (i) was intended to be used in this way; (ii) has been accepted by local authorities as the legislative vehicle to be used to plug gaps left by the CA 1989 and in other measures which expressly exclude benefits being given to persons such as AT; and (iii), that local authorities were adequately resourced enabling them to meet their obligations under that Act. To this the SSWP reiterated only that he was under no legal requirement to adduce any such evidence. All the SSWP needed to establish was that "*in principle*" the Act formed part of the applicable legislative "*framework*"; nothing else.

165. Finally, as to the argument that the CA 1989 contained a power which could expand to secure fundamental rights (see paragraph [134] above), no explanation was

provided to us as to how the Act, which contains a target duty, could be transmogrified into such an open-ended power. This is not what Parliament enacted nor how it has been construed. The majority of the House of Lords in *Barnet* (*ibid*) held as a matter of construction of section 17(1) CA 1989 that it imposed a "*general*" or "*target*" duty upon local authorities to maintain a level and range of services in their area sufficient to enable them to discharge their functions under CA 1989 Part III for the benefit of children in need. The statutory duty was to *assess* need and was not a hard-edged duty to *meet* the assessed needs of a particular child. The majority also held that as a target duty the courts could not require the expenditure of additional resources in order for the duty to be fulfilled. In other case law it has been held that if there is a challenge to the assessment of "*need*", being a specialist evaluative judgment made by the authority, it is not in the first instance an issue for judicial determination in a judicial review: see per Munby LJ in *R (VC) v Newcastle City Council and Secretary of State for the Home Department* [2011] EWHC 2673 at paragraph [82]. These limitations which relate to scope, financing and enforcement arise from policy choices made by Parliament and are reflected in the language of the Act, as construed in case law. It is too simple an answer for the SSWP to say that because fundamental rights are engaged these statutory limitations simply evaporate, especially given that on the SSWP's analysis the effect of removing these constraints is to increase the burden upon authorities. So far as the Court is aware there has never been any consideration by the SSWP of whether the Act required amendment for such to be achieved.

166. The SSWP relied generally upon *Regina (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148. The Secretary of State published a statutory Code of guidance for hospitals and medical staff on the use of seclusion for detained psychiatric patients. The Trust applied a procedure departing from the Code. The House of Lords held that the Code, whilst important, did not have the binding force of law, was guidance not instruction, and there was no evidence that the Trust had subjected patients to treatment prohibited by Article 3 ECHR.

167. The SSWP cites the judgment of Lord Brown (dissenting in part). He rejected the submission that the state was obliged to promulgate a code whenever the risk arose of a public authority acting incompatibly with a Convention right (*ibid* paragraph [114]). Even in an Article 2 ECHR case a positive obligation arose only where the state knew or ought to know of a real and immediate risk to life. There was no evidence that the approach of the Trust created a risk of ECHR violations such that the Secretary of State was bound to take corrective measures. The SSWP relies upon paragraph [115] where Lord Brown observed, (citing his own dictum in *R (Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] 1 WLR 2515, 2530 at paragraph [36]) that the obligation of the Secretary of State was not himself to act incompatibly with a Convention right but he was not obliged to ensure that other public authorities acted compliantly.

168. This judgment does not assist the SSWP. The absolution of the Secretary of State from liability was upon the basis that (i) the Code reflected best policy and the Secretary of State was not at fault; (ii) the Trust alone was responsible for departing from it; (iii) there was no evidence indicating that the Secretary of State could or should have known of non-adherence with the Code in a manner engaging Article 3 ECHR; and (iv), there was no suggestion that the non-adherence of the Trust to the

Code was due to resource issues. The case was not about the effectiveness of the allocation of responsibility to the Trust. So far as these observations are relevant to this appeal, they suggest only that disputes about effectiveness of an allocation will be fact and context sensitive.

169. In conclusion, I accept that as an indivisible entity the state is entitled to allocate responsibility to its organs for ensuring compliance with fundamental rights. But the simple fact of allocation does not absolve the state from the continuing duty to ensure that rights, in this case conferred under the Withdrawal Agreement and accepted by the United Kingdom, remain capable of being effectively enforced. In this case there is evidence, which the SSWP has not sought to refute or address, that the system under the CA 1989 is subject to serious legal and financial constraints (see also paragraphs [128], [140]-[143] above). In my judgment upon the basis of the evidence before the Court I am unable to accept that the allocation meets the test for effectiveness.

E. Ground IV: The standard or threshold for breach of Article 1 of the Charter

(1) The issue

170. The final issue arising on the appeal concerns the standard of review. The FtT's conclusion, endorsed by the Upper Tribunal, was that there was a "*risk of violation of [AT's] fundamental rights*" and the risk was not remote. AT and D were "*destitute*" and that the "*high bar*" identified in *Haqbin* (*ibid*) was met. The Judge added:

> "… it would not be unfair to describe the Appellant as being subject to "inhuman or degrading treatment" as identified in that judgment, within the meaning of Article 3 of the Human Rights Act."

The SSWP argues that the Upper Tribunal and FtT erred in that they: (i) identified the wrong test and (ii), in any event, misapplied it to the facts. I can deal with both points briefly.

(2) The relevant legal norm – Article 1 of the Charter

171. To determine where the threshold for breach of any legal norm arises a court must, first, identify the norm in question, and then, calibrate the point at which breach occurs. Here the legal norm is Article 1, not Article 4 of the Charter / Article 3 ECHR. I do not repeat the analysis set out at paragraphs [104] – [112] above. As to the point at which breach occurs the benchmark to be applied is the guidance given in *CG* (see paragraph [112] above). I accept that there might, in many cases, be an overlap with Article 4 Charter / Article 3 ECHR; but in law they are not the test. The Upper Tribunal has used the expression "*most basic needs*" as indicating the threshold for intervention (see paragraph [111] above). This must be understood in the light of the judgment in *CG*. It is not necessary in this case to explore in any further detail the extent of any daylight between Articles 1 and 4 of the Charter. Future cases will, no doubt, flesh out how this applies in practice.

(3) The standard of review and the facts

172. I turn now to the particular criticisms made by the SSWP of the factual findings of the FtT which concern accommodation and food and the endorsement of those findings by the Upper Tribunal. In oral argument it was said (assuming the Article 4 Charter (Article 3 ECHR) threshold applied) that the facts pertaining to AT did not come "*anywhere near*" the required "*high*" threshold for a finding of violation. Accordingly, the FtT applied the wrong standard of proof and came to the wrong conclusion.

173. In relation to accommodation the Judge held that AT had accommodation but faced a problem of cost and reliance upon goodwill. The accommodation was not funded by the state but by a charitable body. It was made clear in *CG* that compliance with fundamental rights was to be measured by reference to state funded / provided support (*CG* paragraphs [92] and [93] set out at paragraphs [74] and [75] above). AT was severely in arrears in rent and other charges and her residence was thereby precarious. In relation to food the observations of the Judge were consequential upon his finding that AT had insufficient means to provide even for a subsistence level of support for herself and her child. He observed that one consequence was that AT needed to buy poorer quality or less nutritious food. As inferences to be drawn from primary facts these findings are sensible and beyond challenge.

174. The SSWP does not challenge these findings but says, in effect, that they are irrelevant. The fact that AT was "*embarrassed*" or "*ashamed*" by having to obtain charitable help was insufficient to reach the threshold for breach. The FtT made no findings in respect of personal hygiene and there was no finding of fact that AT could not continue living with her daughter. There was no risk of immediate eviction. In principle AT and her child had access to the NHS, if they needed it. She had (some) money in her bank account and £84 per month in state support. This was not a situation of destitution or degrading and inhuman treatment. AT's condition could be described as one of a "*high degree of insecurity"* characterised by *"a significant degradation of the living conditions*". But just such a state of affairs was identified by the CJEU in *Jawo* (*ibid*) at paragraph [93] as <u>not</u> meeting the threshold for state interaction. I disagree for three reasons.

175. First, the SSWP asks only whether the position of AT and her child had fallen into a state of inhuman and degrading treatment. That is the wrong question to ask. The facts of *CG* provide the benchmark against which Article 1 is to be applied. On the findings of fact made by the Judge the predicament of AT was (at the least) comparable to that of CG. Secondly, the SSWP's approach extracts stray elements of fact, about food and accommodation, from a wider and more rounded assessment, and argues that taken in isolation they do not meet the requisite threshold. This is not an appropriate approach to adopt. The conclusion of the FtT entailed a combinatorial evaluation undertaken with all the facts in mind. The judge properly took into account all the matters identified as relevant in *CG*: means, accommodation, dependency of children, and isolation. Finally, insofar as there was an overlap between Articles 1 and 4 of the Charter, the Judge was of the view that the Article 4 (i.e. inhuman and degrading treatment) threshold had, *on the facts*, been met which was a conclusion the Upper Tribunal endorsed. These were findings within the legitimate scope of the discretion of the specialist fact finder.

(4) Conclusion

176. I do not consider that this complaint is arguable. It invites this court to elevate its own view on a multifaceted issue of fact over that of the FtT and Upper Tribunal both of which have great experience in making these sorts of judgments. I detect no error of principle in the approach of the FtT and the Upper Tribunal was entitled to endorse that evaluation.

F. Caveat

177. Finally, having come to the conclusion that there is a difference *in principle* between Article 1 of the Charter and other provisions, in order to address the detailed and extensive arguments of the SSWP under all of the grounds of appeal, there is an important caveat or word of caution to add.

178. The concept of "*dignity*", as the Upper Tribunal observed, has a protean character to it. The authors of "*The EU Charter of Fundamental Rights* (*ibid* – see paragraph [35] above) at paragraph [01.32] say that it is "*one of the most difficult concepts to understand and define in law*". In the present case the FtT held on the facts of the case that AT was in an undignified position and that her treatment and that of her child fell below the standard required under Article 3 ECHR i.e. degrading and inhuman treatment.

179. Although it has been necessary to address the detailed arguments of the SSWP this judgment is not the place to explore or seek to define in any greater detail, what the principle of "*dignity*" entails in practice. Nor is this the case in which to express detailed views on the nature or extent of any daylight existing between Article 1 and other provisions, such as Article 4 (Article 3 ECHR). This might need to be considered in future cases. Finally, nor is this the case in which to explore in detail the extent to which the common law duty of humanity (see paragraph [35] above) would in a future case serve to cover the situation of a person such as AT, though I do agree with the broad observations below on this by Lord Justice Dingemans.

G. Conclusion on appeal

180. For all the above reasons I would dismiss the appeal on all grounds. I add finally that I am grateful to all parties for their detailed oral and written submissions.

Lord Justice Dingemans:

181. I agree that the appeal ought to be dismissed for the reasons given by Lord Justice Green. Given the wide ranging nature of the submissions which were made to the Court, I wanted only to add the following. First, this appeal concerns only those who have Pre-Settled Status (PSS) under the EU Settlement Scheme established by the UK Government. AT has PSS which was granted on 14 December 2020.

182. Secondly, the judgment of the Court of Justice of the European Union (CJEU) in *CG v Department for Communities for Northern Ireland* [2021] 1 WLR 5919 (CG), referred to in paragraphs 63 to 75 of Lord Justice Green's judgment above, dismissed the complaint that all those with PSS who would otherwise qualify in financial terms for Universal Credit, were being impermissibly discriminated against by the Secretary

of State because they were not being provided with that benefit. In *CG* the CJEU went on to find that the applicant and her children in that case were destitute and were entitled to protection under articles 1, 7 and 24 of the Charter of Fundamental Rights of the European Union (the Charter), which applied because those applicants were exercising EU rights.

183. Thirdly, the fact that the CJEU in *CG* found that there were obligations to prevent such applicants for universal credit from being destitute was not surprising. This is because the obligations to ensure that AT and her child do not remain destitute and in undignified conditions are not, as it was put in paragraph 5.1 of the Skeleton Argument on behalf of the Secretary of State, "radical new obligations on a host state in respect of social assistance benefits …". As the Upper Tribunal (UT) pointed out in paragraphs 22 to 27 of its judgment, the Charter was based on the constitutional traditions and international obligations common to the member states, which at that time included the UK. In England and Wales those constitutional traditions have included the common law duty of humanity, referred to in paragraph 35 of the judgment of Lord Justice Green, and more recently the Human Rights Act 1998 ("*HRA 1998*") giving domestic effect to the European Convention on Human Rights (ECHR). It is not necessary, for the purposes of deciding this appeal, to define the precise boundaries of the common law and the rights available under the HRA 1998 available to AT. Given, however, the genesis of article 1 of the Charter in the constitutional traditions of, among other states, the UK, it is inevitable that the common law rights and the remedies available to AT under the Human Rights Act will overlap with the claims made under the Charter in this appeal. Indeed much of the focus of the Secretary of State's submissions was directed to showing that AT should not be destitute, because the local authority should be providing for her.

184. In this case the First-tier Tribunal Social Entitlement Chamber (FTT) found that AT, who is HIV+ as a result of a contaminated blood transfusion, and who has been the victim of domestic violence and who had been forced to flee her home with her child, was destitute and could not live in dignified conditions. Payments made by the local authority had been minimal. AT was surviving on handouts and could not afford to pay her rent. She was receiving treatment for depression. The FTT, having reviewed the relevant evidence, found that there was a risk of violation of AT's fundamental rights, meaning a real possibility of harm occurring. In the reasons it was said at paragraph [108] by the FTT said that "it would not be unfair to describe the appellant as being subject to "inhuman or degrading treatment" … within the meaning of" article 3 of the ECHR to which effect was given by the Human Rights Act 1998. The FTT was, on the evidence, entitled to find that AT and her child were destitute and at real risk of impermissible treatment, contrary to the ECHR and Human Rights Act.

185. The UT was right to dismiss the appeal from the FTT on the basis of the findings made by the FTT. The conclusions about AT's destitution are only strengthened by the fact that, as is now clear from the joint note submitted on behalf of the parties and interveners after the conclusion of the hearing, there is no other public financial support available for AT and her child.

186. Finally, because it is apparent that the term "individualised assessment" seems to have caused unnecessary confusion, I should say that I agree with what Lord Justice Green has said in paragraph [145]. The obligation to consider whether an individual with PSS is destitute will only arise when that individual makes an application for support.

Lady Justice King :

187. I agree with both judgments.