NOTE:

This template can be used by advisers assisting EU nationals with PSS to whom *SSWP v AT (UC)* [2022] UKUT 330 (AAC) applies who have cases in the First-tier Tribunal (see the note for advisers available on [this page](https://cpag.org.uk/welfare-rights/resources/test-case/destitute-eu-nationals-pss-can-rely-eu-charter-fundamental-rights) for when the judgment might apply).

The template is designed to be used specifically in a case where the DWP argue that *AT* does not apply because they say the claimant does not come within article 10 of the Withdrawal Agreement on account of the fact the claimant did not have an EU law right of residence as at 31 December 2020.

The template does not deal with the more general issues of whether the claimant would suffer a breach of dignity if Universal Credit was refused and additional submissions and evidence will need to be presented on that point.

The submissions repeat arguments on this point made by the3million in a homelessness appeal in the County Court (the3million instructed Public Law Project and were represented as interveners by Tom Roysont of Garden Court North and Charles Bishop of Landmark Chambers).

Advisers will need to attach to the submissions the Independent Monitoring Authority’s submissions on this point in the same case which are here: <https://ima-citizensrights.org.uk/app/uploads/2024/02/IMA-Supplementary-Note-Redacted.pdf>

Advisers will need to go through the template filling in and adapting the text in yellow highlighting and reading the other text to make sure it is relevant to the appeal. Advisers can seek further advice with this from CPAG.

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| **In the First-tier Tribunal  (Social Entitlement Chamber)**  **BETWEEN:** |  |
| **[APPELLANT NAME]**  **Appellant**  **-and-**  **SECRETARY OF STATE FOR WORK AND PENSIONS**  **Respondent** | |
| **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**  **Submissions on Article 10 Withdrawal Agreement**  **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** | |

# Introduction

1. The Secretary of State for Work and Pensions (**‘the Respondent’**) has submitted as part of his response to the appeal that [Appellant Name] (**‘the Appellant’**) is outside the personal scope of the Withdrawal Agreement (**‘WA’**). Essentially the argument is that as the Appellant did not have a right to reside in accordance with Union law as at 31/12/2020 they are outside the scope of art. 10.
2. The submissions in this document[[1]](#footnote-1) explain why that is wrong and argue for the correct position: that a Union Citizen, such as the Appellant, who moved to the UK before 11pm on 31/12/2020 (**‘IP Completion Day’**) and remained here thereafter is within scope of the Withdrawal Agreement.

# A Union citizen is within the personal scope of the Withdrawal Agreement if they came to the UK before 11pm on 31 December 2020 (‘IP Completion Day’) and remained here thereafter

1. Art.10(1) WA places within the personal scope of the WA 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’.
2. Every EU citizen entering the UK before 31 December 2020 was entitled to rely on Art.21(1) of the Treaty on the Functioning of the European Union (**‘TFEU’**),[[2]](#footnote-2) and will have exercised a three month right of initial residence under Art.6 of Directive 2004/38/EC. So that period uncontroversially involves exercise of a ‘right to reside in the United Kingdom in accordance with Union law’.
3. The dispute about interpreting Art.10 WA concerns what kind of ‘residence’ is required following expiry of that three month period. That question did not arise in *SSWP v AT* [2023] EWCA Civ 1307 (8 November 2023) as it was common ground that AT herself was within the scope of art.10.
4. It is submitted that any form of residence following that initial period of residence is sufficient:
   1. it is the ordinary textual meaning;
   2. it is consistent with relevant case law about the meaning of ‘residence’, when used without qualifying adjective, in EU law;
   3. it avoids absurd policy outcomes.
5. Finally, it is noted that the Independent Monitoring Authority of the Citizens Rights Agreement (‘**IMA**’) has a different analysis but one that leads to a similar result for the Appellant. Effectively, the IMA argues that anyone with pre-settled status comes within art. 10 (IMA’s submissions from a County Court homelessness appeal – “the Oldham case” to that effect are attached). This is because the IMA considers that some aspects of Art.21 TFEU are preserved by a grant of PSS, for the purposes of the Charter. These submissions do not deal further with the IMA position (but note that if the FTT adopted it then the result on the art. 10 point has the same outcome for our client as the argument made here).

(i) Ordinary meaning

9. In *SSWP v AT* the Court summarised the correct approach to the interpretation of the WA at §80. Of particular relevance are the following principles:

* + - 1. 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;
      2. the WA must be construed in good faith; and
      3. 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.

1. What the parties to the WA meant falls to be considered against the relevant background, which is part of the ‘context’ mentioned in art.31 of the Vienna Convention on the Law of Treaties. The relevant background here is EU law: *R (oao IMA) v SSHD* [2022] EWHC 3274 (Admin), §132.
2. The Tribunal must examine the scope and effect of the WA to determine whether, applying normal principles of international law, provisions of EU law have been given effect as international law which have then become domestic law: *SSWP v AT*, §80.
3. Where the WA refers to Union law or to concepts or provisions thereof, it must be interpreted and applied in accordance with EU legal concepts as those would apply in an EU court: *R (oao IMA)*, §131 (applying art.4(3) WA); *SSWP v AT*, §85.
4. Applying those principles, the ordinary meaning of art.10 is consistent with these submissions. Art.10(1)(a) has two requirements.
5. First, it requires the individual to have ‘exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period’. There are four notable features of this formulation:
   * 1. it is in the past tense; it does not express that someone must be exercising, or even have been exercising, their right to reside;
     2. it refers to the ‘right to reside’ rather than to someone merely residing;
     3. it specifies that the right to reside must be exercised in accordance with Union law; and
     4. the exercise of that right to reside must have been before the end of the transition period; but it does not state that the right to reside must continue to be being exercised at the end of the transition period.
6. Second, it requires the individual to ‘continue to reside thereafter’. The latter formulation is not qualified by any of the above features. There are no references to Union law or any exercise of any right. The thing that needs to have ‘continued’ is only residence simpliciter. That continuation is to take place after the ending of the transition period and thus by definition cannot be in accordance with Union law. There is no requirement for anything else to have ‘continued’ prior to the ending of the transition period.
7. The scheme plainly thus envisages a difference in the two requirements, otherwise the same language would be used. The Appellant’s interpretation ensures meaning is given to the additional words used in the first formulation.
8. Any contrary interpretation would require words to be read in: for example reading art.10 as if it had stated ‘… and continue to reside there thereafter on an equivalent basis’. The omission of any such words must not be ignored. Alternatively, it could say ‘was exercising their right to reside’.
9. Further, the reading in of words would be particularly problematic here, because there would be a variety of possible formulations. It was possible to reside in the UK in accordance with Union law until IP Completion Day, but plainly it is not possible to exercise a ‘right to reside in the United Kingdom in accordance with Union law’ after the end of the transition period. After the end of the transition period, it may have been possible to specify that the requirement could be met by:
   1. any form of residence;
   2. any form of lawful residence (on which see below);
   3. a form of residence specifically authorised or contemplated by the WA; or
   4. an alternative provision.
10. Art.10(3) identifies a further possible formulation, by introducing the concept of post-transition period ‘residence...being facilitated by the host State in accordance with its national legislation thereafter’.
11. Consistency with analogous case law
    1. *SSWP v Gubeladze* [2019] UKSC 31, [2019] AC 885, addresses an analogous provision in art.17 of Directive 2004/38. The issue in that case was whether the references in art. 17 to periods of residence should be read to include only certain forms of residence.
    2. Art.17 of 2004/38 provides a derogation from the art.16 right to permanent residence enjoyed after five continuous years of ‘legal’ residence. Legal residence means, in that context, residence in accordance with the Directive: C-424/10 and C-425/10 *Ziolkowski v Land Berlin* [2014] All ER (EC) 314, §46. But the three year period of residence sufficient under Art.17 for retired workers does not refer to ‘legal residence’, just residence:

Article 17 - Exemptions for persons no longer working in the host Member State and their family members

1. By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:

(a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years…

* 1. The UKSC held unanimously that the Art.17(1)(a) requirement to have ‘resided there continuously for more than three years’ did not require any special form or right of residence, and in particular did not require worker status: *Gubeladze*, §§76-92. That is despite the art.17 2004/38 EC reference being not merely to ‘Union citizens’, but to ‘workers or self-employed persons’.

1. Avoidance of absurd policy consequences
   1. If the scope of art.10 were limited:
      * 1. it would lead to undesirably complex arguments about whether a person is or was in scope at the particular time;
        2. it would lead to people believing they have rights under the WA when they ultimately do not, inconsistently with the purpose and function of art.18 WA; and
        3. it would create an invisible disjuncture, permanently but secretly stripping hundreds of thousands of people of WA rights, leading to disputes over decades over whether each and every EUSS beneficiary fell outside of the scope of the WA at some point in the past, and denuding the entire system of certainty.
   2. As to the first point, the SSWP’s position would require, whenever a State party to the WA needs to determine whether someone holds WA rights, that they would have to consider:
      1. whether that individual at some point exercised their right to reside in accordance with Union law before the end of the transition period;
      2. whether that individual was continuing so to exercise those rights at the moment of the ending of the transition period;
      3. whether that individual continued to reside there (on any basis, it would seem); and
      4. whether that individual qualifies procedurally and substantively for the particular right which is engaged (eg. residence, rights as a worker, recognition of professional qualifications, social security co-ordination, etc.)
   3. The introduction of the second requirement would change dramatically the nature of the exercise performed. To introduce such a requirement would be arbitrary and bizarre. It would also have made it impossible to rely on any grants of PSS made before 31 December 2020, because they would all need to be re-examined as of that date.
   4. As to the second point, the grant of PSS could not be relied on by individuals as any comfort that they fell within the personal scope of art.10, because, as set out above, there was no process in granting PSS to determine whether or not someone fell within Art.10 as interpreted by the IMA in this case.
2. As to the third point, there is no mechanism within the WA for being put back into scope if (or once) not in scope. The SSWP position leads to an analysis under which perhaps hundreds of thousands of people would be outwith the scope of the WA, but unaware of this (unless they happen to apply for social assistance while still holding PSS). As a result, no one with EUSS status who has not made such a claim would be able to know whether the UK considers them to have WA rights, and neither would the UK government consider itself to have made a decision as to scope in any such case.
3. This means that there would be a cohort, who even on attaining settled status, would, by this logic, do so purely on the basis of domestic law and not by virtue of the WA.
4. In future, there may be increasing regulatory divergence between the UK and the EU. The UK government may choose to make changes to the rights of those reliant on domestic immigration law (and their family members and future children) which would not affect those covered by the WA.
5. Should the SSWP position prevail, many Union citizens would not be able to invoke WA rights without an extensive retrospective investigation. Evidential hurdles would make it impractical for many to show that they were and continued to be in scope of the WA.
6. This is precisely the problem posed by a declaratory scheme that the UK government said it would avoid by its adoption of a constitutive scheme. Asked by the Home Affairs Committee why the Home Office was instituting an application scheme at all for EU nationals in the UK rather than declaring rights through primary law, the then Home Secretary’s response was: ‘In a word, Windrush’. He added:

… the Windrush generation have always, quite correctly, had their rights. The problem was by doing it only through a declaratory system it meant that there was no documentation to prove that, which many years later became a problem….[[3]](#footnote-3)

# Conclusion

1. For the reasons given above then the Appellant is within the scope of the WA and the FTT is invited to determine that as a matter of law.

Adviser Name

Adviser Organisation

Date

1. The submissions here are based on arguments made on behalf of the3million in *C v Oldham* (the “Oldham case”), a section 204 Housing Act 1996 appeal heard by the Manchester County Court in February 2024 (on which see para 7 below). [↑](#footnote-ref-1)
2. C-709/20 CG v Department for Communities in Northern Ireland [2022] 1 CMLR 26, §58. [↑](#footnote-ref-2)
3. House of Commons Home Affairs Committee, Oral evidence: The work of the Home Secretary, (HC 434, Wednesday 27 February 2019), Q759 and Q764. [↑](#footnote-ref-3)