**Only use this letter if your client:**

* has an award of CTC and
* a child in full time non advanced education (FTNAE) aged 19 and
* has received a managed migration notice (MMN) to move to universal credit and
* DWP have refused to cancel the MMN

**Delete box before posting.**

**This letter challenges:**

DWP refusal to follow DWP policy not to migrate tax credit claimants with 19 year olds in FTNAE to UC.

Read whole letter carefully and edit all text in red or [square brackets]. Delete all comments and return text to black before sending.

Please send your letter for review to jrproject@capg.org.uk before sending to DWP.

**Delete box before posting.**

**IMPORTANT:** the address for service changed in February 2024, as below.

Please send your letter by post to DWP and by email to the Treasury Solicitor.

Please seek advice from JRProject@CPAG.org.uk if no response is received within 14 days, or consider referring to a solicitor to issue judicial review proceedings, see [this CPAG page](https://cpag.org.uk/welfare-rights/support-advisers/support-advisers-england-and-wales/support-judicial-review-process/pursuing-court-and) for more information.

**Delete box before posting**

[address your letter to either the:

address on your client’s decision letter,

address your client sent their claim to, or

address on relevant DWP correspondence; or

request an upload link to post it to your client’s online UC account]

**And by email to:** thetreasurysolicitor@governmentlegal.gov.uk

**Our Ref:**

**Date:**

**Judicial Review Pre-Action Protocol Letter Before Claim**

**Dear Sir or Madam,**

**Re: Proposed claim for judicial review against the Secretary of State for Work and Pensions by [full name]**

##### We are instructed by xxxx **in relation to the Defendant’s refusal to cancel the managed migration notices sent to [her/him], with an initial deadline to claim universal credit (“**UC**”) of xxxx**.****

We write in accordance with the Pre-action Protocol for Judicial Review. We are requesting your response by 4pm on xxxx.

Please note that in light of the Claimant’s initial deadline to claim Universal Credit of xxxx, the Claimant will only be able to consider any reasonable request for an extension of time to this deadline if it is also accompanied by confirmation that the initial deadline set out in [her/his] migration notice has been extended.

**Proposed Defendant:**  Secretary of State for Work and Pensions (“**SSWP**”) (“**D**”)

**Proposed Claimant:**  xxxx (“**C**”)

**NI No:** xxxx

**Address:** xxxx

**Date of birth:** xxxx

**Note on the address for Pre-action Protocol correspondence**

1. This letter is sent to you because in February 2024 a Senior Lawyer at Decision Making and Debt DWP Legal Advisers, Government Legal Department, Ground Floor Caxton House, Tothill Street, London, SW1H 9NA advised that:

*Pre-action correspondence should now be sent directly to DWP, not to DWP Legal Advisers. DWP Legal Advisers is part of the Government Legal Department, not DWP itself. Pre-action correspondence should be sent to the relevant section of DWP. This will normally be the section of DWP responsible for the decision which is the subject of the pre-action correspondence via their usual communication methods. For example if it relates to a particular benefit decision then the pre-action letter should be sent to the address at the top of that letter.*

1. **This letter is also sent by email to the Treasury Solicitor as** Cabinet Office practice direction ‘Crown Proceedings Act 1947’ (December 2023)[[1]](#footnote-1) requires:

*“****All documents*** *required to be served on the Crown for the purpose of or in connection with any civil proceedings by or against the Crown shall, if those proceedings are by or**against an authorised Government department,* ***be served on the solicitor****, if any, for that department”*

(Emphasis added)

1. The practice direction provides that the solicitor for service in connection with civil proceedings against the Department for Work and Pensions is “The Treasury Solicitor”.
2. **The Government Legal Department webpage[[2]](#footnote-2) further instructs:**

***[…]***

*The email addresses above are for the service of new proceedings only.
They should not be used for letters before action, or pre action protocol correspondence. If sending such documents to GLD please email these to**thetreasurysolicitor@governmentlegal.gov.uk**.*

**Details of the decision being challenged:**

1. Our client, C, challenges the refusal by SSWP to cancel [her/his] migration notice, contrary to SSWP’s own guidance and without exercise of the discretion available to SSWP under regulation 44 of the Universal Credit (Transitional Provisions) Regulations 2014.

**I: Background**

**Background facts**

1. C lives [alone / together with xxx] and lives in a [socially rented property].
2. C has an award of working tax credit and child tax credit, and has no other existing benefits in payment.
3. Included in C’s award of child tax credit is an amount for [her/his] 19-year-old [daughter/son] (xxxx), who is currently in non-advanced full-time education (“**NAFTE**”).
4. C received a managed migration notice (“**MMN**”) from D on xxxx. The MMN indicates [her/his] initial deadline for claiming UC is xxxx.
5. C currently falls within one of the groups on the Defendant’s list of designated “deferred groups” for the purposes of managed migration.[[3]](#footnote-3)
6. On a number of occasions, C called the UC Managed Migration Helpline and requested a cancellation of [her/his] MMN – on the grounds that [s/he] meets the managed migration deferral criteria of having a 19-year-old child in NAFTE. D’s agent stated that it would be “impossible” to cancel C’s MMN. They also stated there is no address available to make this request in writing.

**Note on D’s duty of candour**

1. As D will be aware, the duty of candour arises as soon as a public authority becomes aware that someone is likely to test or challenge a decision or action. The duty is engaged at every stage of the proceedings, including the pre-action stage, as confirmed in *R (HM, KH and MA) v Secretary of State for the Home Department* 3 [2022] EWHC 2729 (Admin).
2. If any guidance, policy or guidelines exists concerning any of the matters raised in the Background section above, we consider that compliance with the pre-action protocol and the duty of candour requires that it be i) disclosed and ii) provided in full for inspection, as part of the response to this letter.

**Legal background**

**Relevant law**

1. Section 42 of the Welfare Reform Act 2012 provides as follows:

***42****.-(2) A power to make regulations under this Part may be exercised-*

1. *so as to make different provision for different cases or purposes;*
2. *in relation to all or only some of the cases or purposes for which it may be exercised.*

*(3) Such a power includes-*

*[…]*

*(b) power to provide for a person to exercise a discretion in dealing with any matter.*

1. Regulation 44 of the Universal Credit (Transitional Provisions) Regulations 2014 (“**UC (TP) Regs**”) states:

*(5) The Secretary of State may cancel a migration notice issued to any person—*

*[…]*

1. ***in any other circumstances where the Secretary of State considers it necessary to do so in the interests of the person****, or any class of person, or to safeguard the efficient administration of universal credit*.

**Relevant decision-maker guidance and policy documents**

SSWP guidance

1. We are not aware of any published guidance, policy or guidelines on how the DWP handles requests for cancellation of migration notices. We are similarly not aware of any published guidance/policy on how the DWP assesses when a cancellation would be in the “*interests of the person*” under regulation 44 UC(TP) Regs, nor on factors taken into account by the proposed Defendant when exercising the discretion available to him to cancel notices.
2. We understand that all current guidance for teams working on managed migration is contained in the following documents provided by SSWP 07 March 2023, 13 April 2023 and 28 June 2023 in response to a FOI request by Owen Stevens dated 07 February 2023 and subsequent Internal Reviews of the same:
3. Case Manager Guidance
4. Front of House Guidance
5. Migration Notice Helpline – Specialist teams guidance (“**Migration Notice Helpline**”)
6. Work Coach Guidance
7. Service Centre Team Leader Guidance
8. Case Manager Guidance - ‘Move to Universal Credit (managed migration)’
9. Front of House Guidance – ‘Move to Universal Credit (managed migration)’
10. Migration Notice Helpline - Specialist teams guidance
11. Service Centre Team Leader Guidance - ‘Managing workflow in Move to Universal Credit (managed migration)’
12. Work Coach Guidance
13. Annex A - Move to Universal Credit (managed migration) v2
14. Annex B - Move to Universal Credit (managed migration) transitional protection top-up payment v2
15. Annex C - Move to Universal Credit (managed migration) transitional capital disregard v2
16. Annex D - Migration Notice Helpline LTT v14
17. Annex E - Move to Universal Credit (managed migration) overview (specialist teams)
18. Annex F - Transitional Protection (specialist teams)
19. Annex G - Claimant loses entitlement to legacy benefits before claiming UC
20. Annex H - Difference in additional support for UC claimants compared to legacy benefits
21. Annex I - Exclusions and deferral v1 (“**Exclusions and deferral**”)
22. Annex J - Managing workflow in Move to Universal Credit[[4]](#footnote-4)
23. SSWP guidance ‘Exclusions and deferral’ confirms that a claimant will be deferred from managed migration where it would not be beneficial for them to make a UC claim and that claimants who have a 19-year-old child in NAFTE are in a category who are “deferred” from the managed migration programme:

# ***Deferrals***

*In certain circumstances, claimants may be deferred from being invited to the Move to Universal Credit (managed migration) programme.*

|  |  |
| --- | --- |
| ***Group*** | ***Defer until:*** |
| *[…]* | *[…]* |
| *Claimants with a child in non-advanced education who are aged 19.* | *The child reaches 20.* |
| *[…]* | *[…]* |

**Note on D’s duty of candour**

1. As D will be aware, the duty of candour arises as soon as a public authority becomes aware that someone is likely to test or challenge a decision or action. The duty is engaged at every stage of the proceedings, including the pre-action stage, as confirmed in *R (HM, KH and MA) v Secretary of State for the Home Department* 3 [2022] EWHC 2729 (Admin).
2. If any guidance, policy or guidelines exists concerning any of the matters raised in the Background section above, we consider that compliance with the pre-action protocol and the duty of candour requires that it be i) disclosed and ii) provided for inspection, as part of the response to this letter.

**II: Grounds for Judicial Review**

**A. Failure to follow policy on exclusion from managed migration**

1. SSWP’s guidance ‘Migration Notice Helpline’ is clear that SSWP policy is that a MMN may be cancelled where a claimant falls into an excluded category, and SSWP’s guidance ‘Exclusions and deferral’ confirms that claimants with a child aged 19 in NAFTE are “*deferred from being invited to the Move to Universal Credit (managed migration) programme*”until “*[t]he child reaches 20*”*.*
2. C’s MMN was issued on xxxx and [her/his] deadline to apply for UC is xxxx.
3. C has an award of Tax Credits which includes an amount for [her/his] [daughter/son] xxxx (DOB xxxx) who is aged 19 and in NAFTE.
4. This is clearly a case to which SSWP’s guidance applies: C, from prior to the issue of [her/his] MMN, and continuing past [her/his] initial deadline, has a child aged 19 in NAFTE, i.e., is in a category of claimants “*deferred*” from migration.
5. SSWP’s advisers’ statement by phone that ‘your migration notice cannot be cancelled’ unlawfully fails to follow SSWP’s clear guidance on this subject.

**B. Failure to carry out duty to assess whether it is necessary to cancel the MMN in C’s interests**

1. D has a discretionary power to cancel migration notices issued to any person in circumstances *where he considers it is necessary to do so in that person’s interests* contained in regulation 44 of the UC (TP) Regs.
2. The existence of this discretionary power involves a duty to ask the right questions and apply the correct test when considering whether or not to exercise this power (*R (AB) v Ealing LBC* [2019] EWHC 3351 (Admin)).
3. As C’s child turned 19 prior to [xxxx], [s/he] would not receive the Universal Credit child element for this child, due to the rule set out in regulation 5(1)(b) of the Universal Credit Regulations 2013.
4. It may be arguable that transitional protection should be applied, however D is likely to argue that under regulation 54(2)(a), no transitional protection is provided for this scenario.
5. Even were D to agree that transitional protection can be applied in this scenario, C would still lose out, as any transitional protection will erode over time (for example, in April 2024 with the annual uprating of benefits).
6. D thus has a duty to undertake an assessment of C’s interests which incorporates a duty to ask the right questions to be able to do so, and even more so in circumstances where D has information to suggest *prima facie* that the migration of C to UC at this point will not be in C’s best interests. D must then make a decision on whether or not it is necessary to cancel the MMN in C’s interests. In this case, SSWP has information that C has a 19-year-old child in NAFTE (via information provided by HMRC of C’s Tax Credits award).
7. D has not complied with his duty to assess C’s best interests in C’s case nor applied the correct test. This is apparent from the fact that C was informed that a cancellation would be “impossible”, without D seeking any further information from C in order to inform any assessment of C’s interests.

**C. Failure to take relevant factors into account**

1. When exercising the discretionary power contained within regulation 44 of the UC (TP) Regs, D is required to take all relevant factors into account.
2. In exercising his discretionary power to refuse to cancel C’s notice, D has failed to take relevant factors into account in C’s case as follows:
	* 1. the Defendant has not taken into account or applied guidance which states that even where a migration notice is issued, if the claimant is in a deferral category, they may be issued a cancellation notice.
		2. The Defendant has not taken onto account the rules which do not provide sufficient transitional protection for claimant’s who have a 19-year-old child in NAFTE.

**D. Fettering by inflexible policy**

1. D is required not to fetter his discretionary powers; D has not published his policy on how he plans to exercise his discretionary power to cancel migration notices under regulation 44 UC (TP) Regs. Per Morris J in *R (MAS Group Holdings Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2019[ EWHC 158 (Admin):

“*A person upon whom a discretionary power have been conferred: (1) must exercise it on each occasion in the light of the circumstances at the time; (2) cannot fetter its exercise in the future by committing himself now as to the way it will be exercised in the future, nor by ruling out of consideration factors which may then be relevant; (3) may nevertheless develop and apply a policy as to the approach which he will adopt in the generality of cases, as long as it does not preclude departure from the policy or taking in account circumstance which are relevant to the particular case; if such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful*” [56]

1. Absent a published policy, it is difficult for C to know what that policy consists of.
2. However, in C’s case, he has been informed initially that a cancellation is “*impossible*”.

**III: The details of the action the Defendant is expected to take:**

**The SSWP is requested to:**

* **Cancel C’s migration notice;**
* **Commit to introducing and publishing managed migration programme guidance/policy on how SSWP deals with cancellation requests made via the helpline; how decisions on cancellation requests are made; and how decisions on cancellation requests will be notified to claimants; and**

**Should SSWP not agree to the above courses of action, the SSWP is requested to take the following interim action:**

* **Extend C’s initial deadline for 4 weeks (or longer if possible) to allow for further attempts to resolve this matter and to avoid causing C further stress whilst he challenges the decisions complained of.**

**Documents enclosed:**

* **C’s signed authority**

**ADR proposals**

**Please confirm in your reply whether the SSWP is willing to consider alternative dispute resolution.**

**The address for reply**

**[advice agency name, address, and email]**

**Proposed reply date**

We are requesting your response by **4pm** on **xxxx**.

As noted above, C is only likely to be able to agree to any request for an extension of time to this deadline unless it is also accompanied by confirmation that [he/his] initial deadline has been extended.

**Yours faithfully**

**xxxx**

1. assets.publishing.service.gov.uk/media/657c891d83ba380013e1b66c/List-of-Authorised-Government-Departments-under-s.17-Crown-Proceedings-Act-1947-15.12.2023.pdf [↑](#footnote-ref-1)
2. gov.uk/government/organisations/government-legal-department [↑](#footnote-ref-2)
3. *Move to Universal Credit (managed migration): Exclusions, deferrals*, Department for Work and Pensions, v.1.0 updated 05/05/22. Provided on 28 June 2023 in response to Second Internal Review IR2023/19791 of an FOI request by Owen Stevens [whatdotheyknow.com/request/guidance\_for\_teams\_working\_on\_ma#incoming-2347050](https://www.whatdotheyknow.com/request/guidance_for_teams_working_on_ma#incoming-2347050) [↑](#footnote-ref-3)
4. [whatdotheyknow.com/request/guidance\_for\_teams\_working\_on\_ma#incoming-2347050](https://www.whatdotheyknow.com/request/guidance_for_teams_working_on_ma#incoming-2347050) [↑](#footnote-ref-4)