***This letter challenges*** DWP’s failure to:

* Follow DWP policy that says where a claimant has a change of circumstances within 3 months and one day of the date on their managed migration notice that brings them within an ‘excluded’ category (in this template being within 6 months of retirements age), their migration notice should be cancelled.

Please read whole letter carefully and make any changes needed. In particular check and edit all text in red or [square brackets], return all text to black and delete any comments before sending.

Please contact jrproject@cpag.org.uk for assistance using this letter and to send for review 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**

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

* Has received managed migration notice
* On her/his deadline day will be less than 6 months away from state pension age
* Was/is more than 6 months away from state pension age on the date on the managed migration notice
* Currently receives WTC including the disabled worker element

Please contact jrproject@cpag.org.uk if your client gets PIP and/or is significantly disabled such that managing UC would be difficult for them (for discrimination arguments).

**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 notice sent to xxxx within an initial deadline to claim universal credit (“**UC**”) of** [date]****.****

We write in accordance with the Pre-action Protocol for Judicial Review. We are requesting your response by 4pm on [date] (14 days).

Please note that in light of C’s initial deadline to claim Universal Credit of xxxx C 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 her initial deadline set out in [her/his] migration notice has been extended.

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

**Claimant:** [full name] (“**C**”)

**NINo:** [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 C’s 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 is a single [wo/man] with [health condition]. C lives [alone / with …]
2. C is in receipt of Working Tax Credits (“**WTC**”) with the disabled worker element included in [her/his] award.
3. Due to [her/his] health condition, C is unable to work full time. C has held [her/his] current part time position (xxx hours per week) for [how long]. C does not intend to work past State Pension age.
4. C is one of approximately 61,000 disabled workers benefitting from the disabled worker element of Working Tax Credits, as at April 2023.[[3]](#footnote-3) Some of this cohort will be in receipt of other benefits including Employment Support Allowance (“**ESA**”) or Incapacity Benefit (“**IB**”), but others, like C are not.
5. C received a managed migration notice (“**MMN**”) from D on [date]. The MMN indicates [her/his] initial deadline for claiming UC is [date].
6. C will reach State Pension age on [date]. C will therefore be 6 months from State Pension age on [date], at which point [sh/e] will fall within in one of the Defendant’s current list of designated “excluded groups” for the purposes of managed migration.[[4]](#footnote-4) On the initial deadline date for claiming UC given in her MMN ([date]), C will be [x] months and [x] weeks from State Pension age.
7. [C reports that receiving the MMN has triggered significant anxiety which exacerbates the symptoms of [her/his] health condition. C does not use the internet and the prospect of claiming, adapting to, and managing a UC claim is very stressful.]
8. C reports that the prospect of two major benefit changes within a short space of time is very anxiety provoking. If C claims UC on [her/his] initial managed migration deadline date (xxxx), [s/he] will then need to then claim [her/his] State Pension, and State Pension Credit [x] months and [x] weeks later.
9. [On [date] and [date] C’s [where from?] adviser supported C to call the UC Managed Migration Helpline and requested a cancellation of [her/his] MMN – on the grounds that [s/he] will meet the managed migration exclusion criteria of being 6 months from State Pension age before [her/his] deadline. On both occasions D’s agent stated that it would be “impossible” to cancel C’s MMN as [s/he] was more than 6 months from State Pension age on the date [her/his] MMN was issued. They also stated there is no address available to make this request in writing.]

**Relevant recent background on D’s managed migration programme**

1. In March 2023, following a “Discovery phase” which took place in Bolton & Medway plus 4 additional geographical areas, the Defendant announced that he was ready to increase the numbers of migration notices issued and expand into additional geographical areas, with the aim of covering the whole of Great Britain during 2023-24.[[5]](#footnote-5)
2. The Defendant confirmed that he had decided to proceed with focusing on (exclusively, as we understand it) “*notifying households that receive tax credits only*” during 2023-24 as part of his managed migration programme.[[6]](#footnote-6) The Department committed to continuing to build on its learning from the Discovery Phase “*to ensure the service continues to meet the needs of those required to make the move to Universal Credit*”.
3. In January 2023, the Defendant published analysis of the Department’s learning from (part of) the Bolton and Medway area Discovery Phase and data on its “Earliest Testable Service” (499 migration notices issued in Bolton & Medway) (the “**ETS cohort**”). Of these 499 cases, 51 resulted in the termination of legacy benefits/tax credits without a UC claim subsequently being made. Of the 51 cases, 49 were tax credit awards.[[7]](#footnote-7) 2 migration notices were cancelled, excluded or deferred (neither of which were ‘tax credit only’ claimants). It was noted that there would be further research and analysis on the reasons for the legacy benefit terminations. It was recognised that “*the likelihood of vulnerabilities amongst Employment and Support Allowance (ESA) claimants is higher*” and we understand this cohort is not included within the planned 2023-24 migrations.[[8]](#footnote-8) The Department noted that its findings included that “*in line with our assumptions claimants on tax credits appear to be more digitally capable and able to make the move with less support*”. The analysis did not make reference to disabled workers, tax credits claimants in receipt of the severe disability element or tax credits claimants who are in receipt of other disability benefits such as DLA or Personal Independent Payment (“**PIP**”). We understand that the “Tax Credits Only” cohort that is being migrated in 2023-24 includes disabled workers who are in receipt of DLA or PIP.
4. It is further understood that subsequent analysis of the ‘no claims’ (notified claimants who failed to claim before their initial deadline) in the ETS cohort was conducted by the Department. We are not aware of any analysis by the Department which considers to whether disabled workers on tax credits were less likely to claim UC before their deadline. It is not clear whether any assessment of the barriers faced by the disabled worker cohort was conducted.
5. It is not known whether analysis equivalent to the ETS cohort has been carried out for the other 4 Discovery Phases in different geographical areas, but if it has, C has not had sight of it.
6. In April 2023, the Department announced that its managed migration programme was expanding. In September 2023 MM Notifications have significantly increased.

**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 sections 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.

**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[[9]](#footnote-9)
23. SSWP guidance ‘Migration Notice Helpline’ states that a migration notice may be cancelled where a claimant’s circumstances change within 3 months and one day of the issue of the MMN such that the claimant now falls into one of the excluded categories:

## ***Change of circumstances after the migration notice is issued***

*Once the migration notice is issued, if the claimant has a change of circumstances within the 3 month and one day period, that moves them into an exclusion or deferral category, they may be issued a cancellation notice. See Move to Universal Credit (managed migration): Exclusions and deferrals*

1. SSWP guidance ‘Exclusions and deferral’ confirms that a claimant will be excluded from managed migration where it would be unreasonable to expect them to make a UC claim and that claimants who are within 6 months of State Pension age are in an excluded category who are “permanently excluded” from migration:

# ***Exclusions***

*In certain circumstances, claimants will not be included in the Move to Universal Credit (managed migration) programme. These are claimants who are:*

* *[…]*
* *within 6 months of State Pension age*
* *[…]*

*Claimants with any of these circumstances* ***will be permanently excluded from this move to Universal Credit.***

(Emphasis added)

1. ‘Exclusions and Deferrals’ recognises that a claimant may not immediately fall into an excluded category when the MMN is issued but may come to do so at a later stage, as in C’s case:

“*It may be identified that a claimant falls into one of the exclusion or deferral categories at different points in the Move to Universal Credit (managed migration) journey. This could be:*

* *Before the migration notice issued*
* *After the migration notice is issued but before they make a claim*
* *After they make a claim to Universal Credit*

*Depending on when this is identified, the support provided to claimants will differ.*”

1. However, the guidance appears to be silent on how a claimant who is identified as falling into one of the deferral groups after a notice is issued but prior to claiming UC (and prior to their deadline) should be withdrawn from the managed migration process. The version control table records that a section called “*Withdrawing a claimant from the Move to Universal Credit (managed migration) programme”* was removed from the guidance on 04/04/22.

**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.

**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’s circumstances change within 3 months and one day of issue of the MMN such that they fall into an excluded category, and SSWP’s guidance ‘Exclusions and deferral’ confirms that claimants within 6 months of State Pension age are “*permanently excluded from th[e] move to Universal Credit”.*
2. C’s date of birth is [date]. C will turn State Pension age on [date].  C’s MMN was issued on [date] (at which point C was [x] months [x] weeks from State Pension age) and her deadline to apply for UC is [date].
3. C will be 6 months away from State Pension age on [date].
4. On C’s MMN deadline day she will be [x] months and [x] weeks from State Pension age.
5. Within 3 months and one day of the issue of C’s MMN, C will be within 6 months of [his] State Pension age.
6. This is clearly a case to which SSWP’s guidance applies, C will within 3 months of her MMN be in within 6 months of State Pension Age, ie, in a category of claimants “*permanently excluded*” from migration.
7. SSWP’s advisers’ statements on both 8th and 13th September 2023 that ‘your migration notice cannot be cancelled as you were more than 6 months from State *Pension age on the date of the Managed Migration Notice*’ unlawfully fails to follow SSWP’s clear guidance on this subject.
8. Further, SSWP’s guidance ‘Exclusions and deferral’ states that a MMN can be cancelled if it is unreasonable to expect a claimant to make a Universal Credit claim. C has a serious chronic health condition that is exacerbated by stress. It is not reasonable to require her to make 2 significant benefit changes within a period of under 5 months (moving from WTC to UC, then from UC to State Pension Credit).

**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. That 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 in even more so the case in circumstances where D has information to suggest *prima facie* that the migration of C’s UC award will not be in C’s best interests, gives rise to a duty to carry out an assessment and 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 is disabled (via information provided by HMRC of C’s disabled worker element in C’s tax credit award).
4. 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 and her Adviser were informed that a cancellation would be “impossible”, without D seeking any further information from C or C’s adviser 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 does not appear to have considered information about disability available to him via HMRC,
		2. the Defendant has not taken into account or applied guidance which states that once the migration notice is issued, if the claimant has a change of circumstances within the 3 month and one day period, that moves them into an exclusion or deferral category, they may be issued a cancellation notice. C is 6 months from State Pension age on 08/10/23 – during her 3 month and one day period,
		3. the Defendant has not sought information about or taken into account the stress and potential exacerbation of C’s health condition that may arise if she is required to claim UC, and make 2 different benefit claims within a short period of time.

**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, she has been informed initially that a cancellation is “*impossible*”.

**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 she 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**

**CAB name, address and email**

**Proposed reply date**

We are requesting your response by **4pm** on [date](14 days).

As noted about 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 her initial deadline has been extended.

**Yours faithfully,**

Adviser name and signature

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. *Child and Working Tax Credits statistics: provisional awards, April 2023, Table 5.1*, HMRC statistics published June 2023. [↑](#footnote-ref-3)
4. *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-4)
5. Move to Universal Credit Update, Statement made on 28 March 2023 UIN HLWS664 (available at: [questions-statements.parliament.uk/written-statements/detail/2023-03-28/HLWS664](https://questions-statements.parliament.uk/written-statements/detail/2023-03-28/HLWS664)). [↑](#footnote-ref-5)
6. Move to Universal Credit Update, Statement made on 28 March 2023 UIN HLWS664 [questions-statements.parliament.uk/written-statements/detail/2023-03-28/HLWS664](https://questions-statements.parliament.uk/written-statements/detail/2023-03-28/HLWS664) [↑](#footnote-ref-6)
7. [gov.uk/government/publications/completing-the-move-to-universal-credit-learning-from-the-discovery-phase/completing-the-move-to-universal-credit-learning-from-the-discovery-phase#applying-the-learning-from-discovery](http://www.gov.uk/government/publications/completing-the-move-to-universal-credit-learning-from-the-discovery-phase/completing-the-move-to-universal-credit-learning-from-the-discovery-phase#applying-the-learning-from-discovery) [↑](#footnote-ref-7)
8. Completing the move to Universal Credit: Learning from the Discovery Phase [gov.uk/government/publications/completing-the-move-to-universal-credit-learning-from-the-discovery-phase/completing-the-move-to-universal-credit-learning-from-the-discovery-phase](http://www.gov.uk/government/publications/completing-the-move-to-universal-credit-learning-from-the-discovery-phase/completing-the-move-to-universal-credit-learning-from-the-discovery-phase) [↑](#footnote-ref-8)
9. [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-9)