**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**

**This letter challenges:**

* The unlawful application of the habitual residence test to a refugee
* Frustration of appeal rights by failure to advise of the same due to ‘claim closure’

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

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

**Delete box before posting.**

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

* refugee status / humanitarian protection / leave outside the immigration rules.
* claimed universal credit
* been required to satisfy the habitual residence test
* has had their UC claim ‘closed’ because they have failed the HRT

As well as sending this letter, seek a mandatory reconsideration of the decision to refuse your client benefit.

**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 [full name] in relation to [her/his] claim for universal credit (“**UC**”). We write in accordance with the Pre-action Protocol for judicial review. Please note that we are requesting your response as soon as possible and in any event no later than by 4pm on [date].

**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-2) 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-3) **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**.*

**The details of the matter being challenged**

1. C challenges **the unlawful** imposition of the Habitual Residence Test to process C’s claim for UC **and unlawful ‘closure’ of that claim for the reason that C has failed the** Habitual Residence Test**.**

***Background facts:***

1. C is a refugee [Change throughout if status is humanitarian protection/leave outside the rules]. C entered the UK on [date] from [country].
2. [Family details].
3. C received notification of [her/his] refugee status on [date], dated [date].
4. C made a claim online to UC on [date]and on [date] provided [her/his] Biometric Residence Card (“**BRP**”).
5. On [date] C was advised that:

*“Not all claimants with refugee status are exempt from the HRT, it is only those who come through ‘resettlement routes’ that are (ie Ukrainians, Afghans and Sudanese at present)”*

1. On [date], a decision maker of the DWP made a decision which was expressed as being a decision that the “claim was closed”.
2. On [date], C requested a mandatory reconsideration of the decision dated date to “close” [her/his] universal credit claim.
3. No response to that request has been received.

**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***

**A. Exemption from the Habitual Residence Test**

*Legislation*

1. **Under Regulation** 9(4) of the Universal Credit Regulations 2013 (“**UC Regs**”)**:**

***9.****—(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, the Channel Islands, the Isle of Man or the Republic of Ireland.*

 *(4) A person falls within this paragraph if the person is—*

 [*…*]

*(d) a refugee within the definition in Article 1 of the Convention relating to the Status of Refugees done at Geneva on 28th July 1951, as extended by Article 1(2) of the Protocol relating to the Status of Refugees done at New York on 31st January 1967;*

*(e) a person who has been granted, or who is deemed to have been granted, leave outside the rules made under section 3(2) of the Immigration Act 1971;*

*(f) a person who has humanitarian protection granted under those rules; or*

*(g) a person who is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999 and who is in the United Kingdom as a result of their deportation, expulsion or other removal by compulsion of law from another country to the United Kingdom.*

*DWP Guidance and status of guidance*

1. **SSWP’s Advice for Decision Making (”ADM”) guidance** Chapter ‘C1: Universal Credit - International Issues’**, demonstrates DWP policy and includes:**

 ***C1280*** *Persons who are determined to have certain specific rights to reside are not subject to the requirement that they be habitually resident in the CTA. These persons are*

[…]

1. *a refugee7 (see C1376 to C1377)*
2. *a person 8 who*

 *5.1 has been granted discretionary leave to enter or remain in the UK outside the Immigration Rules (see C1378)* ***or***

*5.2 has been granted leave to remain outside the Immigration Rules under the Domestic Violence concession (see C1380 to C1383)* ***or***

*5.3 is deemed to have been granted leave outside the Immigration Rules by virtue of specific legislation which, in accordance with an EU directive provides temporary protection to persons affected when the Council of the EU decides that there is (or will be) a mass influx of displaced persons who cannot return to their country of origin.*

*[…]*

1. *a person who has humanitarian protection granted under the immigration rules9 (see C1384)*
2. *a person who is not a PSIC (see paragraph C1040 et seq) who is in the UK as a result of his deportation, expulsion or other removal by compulsion of law from another country to the UK10*

*7 UC Regs reg 9(4)(d); 8 reg 9(4)(e); 9 reg 9(4)(f); 10 reg 9(4)(g)*

***C1376*** *Refugees1 are people who are outside their country of origin and are unwilling to return there for fear of persecution because of their*

*• race*

*• religion*

*• nationality*

*• political opinion*

*• membership of a social group.*

 *1 Convention relating to the Status of Refugees, Art. 1 (as extended)*

***C1378*** *The HO may alternatively grant discretionary leave outside the immigration rules.*

***C1379*** *Humanitarian protection and discretionary leave replaced exceptional leave to enter or remain from 1 April 2003 but there will still be residual cases of exceptional leave to 2007. Whereas indefinite leave to remain gave a right to permanent residence, limited leave, humanitarian protection, discretionary leave and exceptional leave do not guarantee that right.*

*The HO may refer to*

*1. limited leave given to refugees or*

*2. exceptional leave to remain or*

*3. leave to remain on an exceptional basis or*

*4. humanitarian protection or*

*5. discretionary leave.*

***A claimant given one of the above is not subject to the habitual residence test****1 for as long as the leave lasts, including periods when he/she has applied in time for an extension of leave.*

*1 UC Regs, reg 9(4)(e) & (f)*

***C1384*** *The HO may grant humanitarian protection within the immigration rules to persons who have not been recognised as refugees but who are considered likely to face serious harm in their country of origin. As with refugees the family members of a person granted humanitarian protection are allowed to join that person and are granted the same leave. Under EU law common criteria for the identification of persons genuinely in need of international protection are applied across EU Member States1. A new category of protection is introduced, known as subsidiary protection, which is aligned with the present category of humanitarian protection.* ***Persons granted humanitarian protection within the immigration rules do not have to satisfy the habitual residence test****2.*

*1 Directive 2004/83/EC; 2 UC Regs, reg 9(4)(f)*

***C1671*** *People recognized as refugees by the Immigration and Nationality Directorate are granted asylum. From 30 August 2005 they will have been granted limited leave to enter or remain for five years, rather than indefinite leave. Spouses, recognized civil partners, and dependent children under the age of 18 are normally allowed to join a refugee in the UK immediately, and are also granted asylum. Refugees, their spouses or recognized civil partners and dependants who are granted asylum are* ***not subject to the habitual residence test1****.*

*1 UC Regs, reg 9(4)(d)*

**(Emphasis added)**

1. Where published policy exists, there is a public law for duty for decision-makers to follow it. Lord Dyson in *R (Lumba) v SSHD* [2011] UKSC 12 at [26]:

“*a decision-maker must follow his published policy … unless there are good reasons for not doing so*.”

**B. ‘Closing’ claims and appeal rights**

1. Under section 8(1)(a) of the Social Security Act 1998 (“**SSA**”) a decision maker must decide whether to make an award of benefit in respect of a claim made for that benefit:

##### *Decisions by Secretary of State*

***8.*** *— (1) Subject to the provisions of this Chapter, it shall be for the Secretary of State—*

*(a) to decide any claim for a relevant benefit;*

1. In situations where the decision maker needs to decide whether something constitutes a claim, or whether something is a ‘defective’ claim, that decision is also made under s. 8(1)(a) SSA.
2. Decisions made under s. 8(1)(a) SSA carry a right of appeal under s. 12 SSA:

***Appeal to First Tier Tribunal***

***12****.—(1) This section applies to any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above) which–*

*(a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act; or*

*(b) is made otherwise than on such a claim or award, and falls within Schedule 3 to this Act.*

1. SSWP’s guidance Advice for Decision Making (“**ADM**”) ‘Chapter A1 - Principles of decision making and Evidence[[3]](#footnote-4) confirms a decision on a claim carries a right of appeal:

*What decisions are made by DMs*

***A1030*** *The DM*

1. *decides any claim for a relevant benefit*

*…*

*These decisions are called outcome decisions. It is important that DMs distinguish between outcome decisions and other decisions and determinations. This is because only outcome decisions carry the right of appeal to the FtT1. See A1100-A1102 for further guidance on outcome decisions.*

1 R(IB) 2/04

***A1100*** *The most important issue for a claimant who makes*

1. *a claim*

*...*

*is the outcome of that claim or application. For a claim, the claimant wants to know whether the claim has been successful, and if so, how much benefit will be paid and from when. …*

***A1102*** *The claimant has a right of appeal against outcome decisions only1 as listed in ADM Annex D. An outcome decision on a claim, for example, is whether or not the claimant is entitled to benefit. ...*

*1 SS Act 98, s12 & Sch 3; 2 s12 & Sch 2*

***ADM Annex D[[4]](#footnote-5)***

***Decisions and determinations that are appealable***

***Benefit decisions***

1. *All decisions, other than those in Annex E, made on a claim for or award of a relevant benefit,* ***including whether there has been a valid claim2 or if the claim is defective****.*

*1 SS (NI) Order 98, art 9(1)(a); 2 UC, PIP,*

*JSA & ESA (C&P) Regs (NI), regs 8, 11, 13, 15, 19, 21 & 23*

1. SSWP’s operational guidance ‘Claim closure’(V22) further confirms ‘closing’ a claim is a decision on a claim which carries a right of appeal[[5]](#footnote-6):

***Closing the claim***

*If the claim is to be closed, all outstanding appointments must be cancelled. The claimant will receive a decision notification that the claim has been closed,* ***including consideration of their appeal rights. .****..*

(Emphasis added)

**C. *Duty to provide a decision notice and advise of appeal rights***

1. Regulation 51 of the Universal Credit (Decisions and Appeals) Regulations 2013 confirms written notice of a decision must be provided when decisions are made under the SSA (set out above):

***Notice of a decision against which an appeal lies***

***51****.-(1) This regulation applies in the case of a person (“P”) who has a right of appeal under the 1998 Act or these Regulations.*

*(2) The Secretary of State must –*

*(a) give P written notice of the decision and of the right to appeal against that decision; and*

*(b) inform P that, where that notice does not include a statement of the reasons for the decision, P may, within one month of the date of notification of that decision, request the Secretary of State provide a written statement of reasons for that decision.*

1. SSWP’s operational guidance ‘Claim closure’ includes that a claimant must be notified of the decision to close their claim and be advised of their appeal rights:

***Closing the claim***

*If the claim is to be closed, all outstanding appointments must be cancelled.* ***The claimant will receive a decision notification that the claim has been closed*** *including consideration of their appeal rights.* ***A journal note entry is added to this effect.***

(Emphasis added)

1. SSWP’s ADM Chapter A1 guidance ‘Principles of decision making and Evidence’ states a decision is not effective until a claimant has been notified of it:

***A1015*** *A decision is valid as soon as it is properly recorded by the DM. If a decision is not acted upon or not communicated to the relevant parties, this does not invalidate the decision1.* ***However a decision is not fully effective unless, and until it is notified****.*2

 (Emphasis added)

***1*** *R(P) 1/85,* ***2*** *R(U) 7/81; R (Anufrijeva) v Secretary of State*

*for the Home Department & Another [2003] UK HL 36*

***How is the decision notified***

***A1116*** *The written notification of an outcome decision is issued to the claimant either clerically or by computer1. The notification contains*

***1****. information which gives the effect of the decision such as whether there is entitlement to benefit and where appropriate the amount payable and where appropriate when it is payable from* ***and***

***2****. a statement to the effect that there is only a right of appeal if the Secretary of State has considered an application for a revision2–see ADM Chapter A3*

***3****. information regarding time limits for making an application for reconsideration.3*

*Where the claimant has the right of appeal following reconsideration of an application for revision then the claimant must be given written notice of the decision and the right of appeal.4*

1 SS Act 98, s 2(1)(a); 2 UC, PIP, JSA &

ESA (D&A) Regs, reg 7(1)(b); 3 reg 7(3) (a); 4 reg 51(2)(a

**Grounds for Judicial Review**

**Ground 1: Unlawful application of the ‘Habitual Residence Test’ to a refugee**

1. **C made a claim for UC and been informed by SSWP that [s/he] must meet the habitual residence test (HRT) before [her/his] claim for UC could be determined or paid.**
2. **C has leave to remain as a refugee as shown on [her/his] Biometric Residence Card. As a refugee, C is exempt from the HRT under reg 9(4)(d) UC Regs.**
3. SSWP has therefore acted unlawfully, contrary to **reg 9(4)(d) UC Regs** in refusing C UC for the reason that C does not satisfy the HRT when C is exempt from the HRT.

**Ground 2: Failure to follow guidance on application of the Habitual Residence Test’ to a refugee**

1. **SSWP’s ADM guidance unequivocally confirms that claimants with refugee status are exempt from the HRT and that this also applies to spouses, civil partners and dependent children**
2. **By requiring C to take the HRT, SSWP has unlawfully failed to apply his own guidance** and in doing so has failed to follow the caselaw which says that published policy must, unless there is good reason not to do so, be followed.

**Ground 3: Failure to apply the law and guidance in failing to provide a decision notice and notify the claimant of [her/his] appeal rights**

1. The concept of ‘closing’ a claim does not exist in law. When a claim for benefit is made (including a defective claim), the decision maker has a duty under s. 8(1)(a) SSA to decide whether to make an award of benefit in respect of that claim. This decision, including the decision not to make an award, is an ‘outcome decision’ and carries a right of appealable under s. 12(1)(a) SSA. This is confirmed by the Defendant’s own guidance ‘claim closure’ set out above.
2. Under Reg 51 of the UC (CP) Regs the Defendant must “*give P written notice of the decision and of the right to appeal against that decision*”.
3. Failure to provide a written notice of a decision against which a claimant can request a review of a decision and later appeal, if the decision remains unchanged, is consequently unlawful.

**Ground 4: Failure to provide a decision notice and notification to the claimant of [her/his] appeal rights that is accessible to the Claimant**

1. In the alternative to Ground 3, there has been a failure to provide a decision notice in a manner where the decision is and remains accessible to C.
2. In the event that a decision notification has been placed on the C’s original UC journal, as the SSWP’s guidance suggests it should be where it states “*The claimant should receive* ***a decision notification*** *that the claim has been closed, including consideration of appeal rights.* ***A journal note entry is added to this effect*,”** this is necessarily not accessible to the Claimant as [s/he] no longer has access to [her/his] journal as a result of [following the Defendant’s advice to re-claim UC].
3. In addition, when SSWP advised C to re-claim UC, at no time did they advise C that this would render [her/his] existing journal inaccessible, including access to information about [her/his]appeal rights in respect of [her/his] first claim. It is not reasonable to expect any UC claimant to know this would be a consequence of re-claiming UC.
4. As a result, SSWP has failed adequately to advise C of [her/his] appeal rights and, as such, has unlawfully failed to advise C of [her/his] appeal rights.
5. Failure either to provide a decision notice which advises C of [her/his] appeal rights at all (Ground 3), or in the event that such notification was posted to C’s original UC journal, failure to provide notification in a manner properly accessible to C (Ground 4), fails to comply with the legislative requirements, fails to follow the Defendant’s own guidance and deprives C of [her/his] appeal rights under Article 6 ECHR and is therefore unlawful.

**Details of the action that the defendant is expected to take**

**The Defendant is requested:**

* **without further delay award and pay the Claimant UC from DATE**
* **to remind or make aware his Decision Makers of the exemption from the HRT for all refugees, not only those arriving** through ‘resettlement routes’**.**

**The details of documents that are considered relevant and necessary**

**Please find enclosed copies of the following documents:**

* **Confirmation of grant of refugee status dated**
* **Biometric residence permit**
* **Form of authority**

All other relevant documents/information are already in the possession of the Defendant and accessible from the Claimant’s UC journal.

**ADR proposals**

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

**The address for reply and service of court documents**

 **ADVICE AGENCY NAME ADDRESS AND EMAIL**

**Proposed reply date**

We expect a reply promptly and in any event no later than DATE. This is less than the usual 14 days. However, we consider this shortened timeframe to be entirely appropriate given (a) the discriminatory impact of the Defendant’s unlawful insistence that the Claimant meet the habitual residence test and (b) that the Defendant is already aware of the Claimant’s status and of the relevant law.

**If you consider** that you require 14 days from the date of this letter to reply, please immediately inform us in writing, giving full reasons. S**hould we not have received such a request for further time nor a substantive reply by the given deadline we will issue proceedings for judicial review without further notice to you.**

Yours faithfully

ADVISER SIGNATURE

Enc.

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-2)
2. gov.uk/government/organisations/government-legal-department [↑](#footnote-ref-3)
3. [assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/933142/adma1.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933142/adma1.pdf) [↑](#footnote-ref-4)
4. [assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/245962/Annex\_D\_-\_Decisions\_and\_determinationsthat\_are\_appealable.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/245962/Annex_D_-_Decisions_and_determinationsthat_are_appealable.pdf) [↑](#footnote-ref-5)
5. <https://data.parliament.uk/DepositedPapers/Files/DEP2023-0791/031._Claim_closure_V22.0.pdf> [↑](#footnote-ref-6)