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

* refugee status / humanitarian protection / leave outside the immigration rules.
* claimed pension credit
* been required to satisfy the habitual residence test
* has had their PC 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 sending**

**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 **verify then include all relevant dates** in your letter.

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

**Delete box before sending.**

[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]

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

**Our Ref:**

**DATE:**

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 pension credit (“**PC**”). 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:** The Secretary of State for Work and Pensions (“**SSWP**”)

**Claimant:** [xxxx] (“**C**”)

**NINo:** [xxxx]

**Address:** [xxxx]

**Date of Birth:** [xxxx]

**The details of the matter being challenged**

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

**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 asCabinet 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**.*

***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 to PC 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] PC claim.
3. No response to that request has been received.

***Legal background***

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

*Legislation*

1. **Under Regulation** 2 of The State Pension Credit Regulations 2002 (“**PC Regs**”)**:**

***Persons not in Great Britain***

***2****.—(1) A person is to be treated as not in Great Britain if, subject to the following provisions of this regulation, he is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.*

*[…]*

*(4) A person is not to be treated as not in Great Britain if he is—*

*[…]*

*(g) 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;*

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

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

 [*…*]

*DWP Guidance and status of guidance*

1. **SSWP’s Decision Maker’s Guide (”DMG”)** Volume 2 Chapter 7 Part 03 ‘Habitual residence and right to reside - IS, JSA, SPC, ESA’**, demonstrates DWP policy and includes:**

 ***Exemptions to the Habitual Residence Test 073174 – 073200***

 ***[…]***

 ***Refugees/Persons granted humanitarian protection***

***073175*** *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)*

***073176*** *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 persons from abroad (or persons not treated as in GB for SPC purposes).*

***073177*** *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 EC 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.*

*1 Directive 2004/83/EC*

***Discretionary leave***

***073178*** *The HO may alternatively grant discretionary leave outside the immigration rules.*

***073179*** *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.*

***073180*** *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 a person from abroad (or a person not treated as in GB for SPC purposes) for as long as the leave lasts, including periods when he/she has applied in time for an extension of leave.***

**(Emphasis added)**

1. Where published policy exists, there is a public law for duty for decision-makers to follow it, as held by 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 DMG Volume 1 Chapter 1 ‘Principles of Decision Making and Evidence’ confirms a decision on a claim carries a right of appeal:

***What decisions are made by DMs***

***01030*** *The DM*

***1.*** *decides any claim for a relevant benefit (see Annex A to this Volume)*

***…***

*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 DMG 01100 - 01102 for further guidance on outcome decisions.*

*1 R(IB) 2/04*

***01100*** *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, [….]*

*01101 The decision on a claim or application is called an outcome decision because it tells the claimant the outcome of the claim or application. [….]*

*01102 The claimant has a right of appeal against outcome decisions only1 as listed in Annex D to this Volume. 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*

***Annex D: Decisions and determinations that are appealable[[3]](#footnote-4)***

*…*

*Benefit decisions*

*1. All decisions, other than those in Annex E, made on a claim for or award of a relevant benefit1,* ***including whether there has been a valid claim2 or if the claim is defective.***

*1 SS Act 98, s 12(1)(a); 2 SS (C&P) Regs, reg 4*

1. SSWP’s universal credit (UC) operational guidance ‘Claim closure’(V22) further confirms ‘closing’ a claim is a decision on a claim which carries a right of appeal[[4]](#footnote-5):

***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 28(1) of The Social Security and Child Support (Decisions and Appeals) Regulations 1999 (“**D&A Regs**”) confirms written notice of a decision must be provided when decisions are made under the SSA (set out above):

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

***28****.—(1) A person with a right of appeal under the Act or these Regulations against any decision of the Secretary of State or the Board or an officer of the Board shall—*

1. *be given* *written notice of the decision against which the appeal lies;*
2. *be informed that, in a case where that written notice does not include a statement of the reasons for that decision, he may, within one month of the date of notification of that decision, request that the Secretary of State or the Board or an officer of the Board provide him with a written statement of the reasons for that decision; and*
3. *be given* *written notice of his right of appeal against that decision.*
4. SSWP’s UC 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 guidance DMG Volume 1 Chapter 1 ‘Principles of Decision Making and Evidence’ states a decision is not effective until a claimant has been notified of it:

***01015*** *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. See DMG 01116 - 01117 for guidance on how decisions are notified.*

*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***

*01116 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 when it is payable from and*

*2. an explanation of revision and appeal rights2 because a party who is notified of an outcome decision and is unhappy with that decision may apply for revision or appeal it.*

*1 SS Act 98, s 2(1)(a); 2 SS CS (D&A) Regs, reg 28(1)(c)*

**Grounds for Judicial Review**

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

1. **C made a claim for PC and been informed by SSWP that [s/he] must meet the habitual residence test (HRT) before [her/his] claim for PC 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 2(4) PC Regs.**
3. SSWP has therefore acted unlawfully, contrary to **reg 2(4) PC Regs** in refusing C PC 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 DMG 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 Respondent’s own guidance ‘claim closure’ set out above.
2. Under Reg 28(1) of the D&A Regs the Respondent must provide “*written notice of the decision against which the appeal lies’ and ‘written notice of his right of 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.

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

**The Respondent is requested:**

* **without further delay award and pay the Claimant PC 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**
* **Copies of correspondence dated [dates]**

All other relevant documents/information are already in the possession of the Defendant.

**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 our client will seek representation to 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/media/61f28523d3bf7f78e469cd05/dmganx-a-to-m.pdf](https://assets.publishing.service.gov.uk/media/61f28523d3bf7f78e469cd05/dmganx-a-to-m.pdf) [↑](#footnote-ref-4)
4. [data.parliament.uk/DepositedPapers/Files/DEP2023-0791/031.\_Claim\_closure\_V22.0.pdf](https://data.parliament.uk/DepositedPapers/Files/DEP2023-0791/031._Claim_closure_V22.0.pdf) [↑](#footnote-ref-5)