**Only use this letter if**

* your client has a Right to Reside for UC and DWP say they do not.
* your client has told DWP their immigration details, provided all the evidence they have and explained why they cannot provide what DWP are asking for.

**This letter assumes** (edits needed if does not apply):

* Client is an estranged spouse of an EEA national who is a worker and there is a history of domestic abuse
* Client has previously claimed and been awarded housing benefit

Please **send your letter for review** to JRProject@CPAG.org.uk before sending to DWP.

Delete Box before Posting

**This letter challenges:**

DWP’s failure to make enquiries when making an HRT decision when C cannot provide the evidence requested, has explained why, and that evidence would be available to DWP from HMRC, DWP, or the Home Office.

**Ask your client to** consider setting up a UKVI account to evidence their immigration status (https://www.gov.uk/guidance/online-immigration-status-evisa) if the Home Office has their documentation

Please **read the whole letter carefully** and make any changes needed, in particular any text in [square brackets]. Address then delete all comments.

Delete Box before Posting

**Note**: If your client is an EU national / non EU national with a Right to Reside (R2R) dependent on the R2R of an EU national) they will only be able to rely on a R2R under the EEA Regs if they have EU pre-settled status, or are awaiting a decision.

The requirement to have applied to the EUSS does not affect any immigration leave other than that granted under the EUSS /EEA Regs.

Edits are need to this letter depending on whether :

1. Your client has an independent right to reside (eg, indefinite leave to remain), or
2. Your client’s right to reside is dependent on on the R2R of an EEA national.

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 contained in the Civil Procedure Rules. Please note that we require you to respond as soon as possible and in any event no later than 4pm on [DATE] (14 days).**

**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. The failure of D to make any or any adequate enquiries before deciding C’s claim for UC and D’s failure to take account of C’s oral evidence and D’s own guidance in deciding whether C is ‘in Great Britain’ for the purpose of [her/his] UC claim.

**The issue – factual background**

1. [Family / household]
2. [Disability]
3. [Housing]
4. [Work history]
5. [Contacts with DWP – what has happened so far in relation to C’s current UC claim? Include quotes, and list in chronological order with a new numbered paragraph per entry].
6. [Effect on claimant. What is C living on?]
7. [Immigration status. What is C’s right to reside and how do they meet the requirements? E.g. C is a family member of an EEA worker and has pre-settled status.]
8. C was until[date] receiving Housing Benefit [and any other benefits?] and passed the ‘Habitual Residence Test’ (“**HRT**”) in order to do so.
9. C made an application online for UC on [date]. [Reason C applied for UC]
10. On [date] C attended an interview to establish whether he is ‘in Great Britain’ for the purposes of UC, the Habitual Residence Test (“**HRT**”).
11. On [date] ([number] weeks after submitting [her/his] claim) C received an HRT decision that he is not ‘in Great Britain’.
12. As a result of non-payment of UC, C [describe the consequences of C not having UC]
13. [Why can C not provide the evidence requested and how has this been communicated to SSWP?]
14. C requested a statement of reasons and mandatory reconsideration on [date], a decision on which is pending.
15. Pending this decision C is [homeless and destitute. Edit as appropriate].
16. C meets the conditions of entitlement for UC, [s/he] is working age, not in education and is in Great Britain.

**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 and grounds for judicial review**

**Ground 1: Failure to take account of relevant facts and unlawful decision making**

1. C applied to the EU Settlement Scheme before the deadline of 30/6/21 and has been granted [EU pre-settled status[[3]](#footnote-4)/ is awaiting a decision[[4]](#footnote-5)]. This is not disputed by D. As such C continues to have a free movement right to reside under the Immigration (European Economic Area) Regulations 2016 as a [What right to reside?]
2. C was previously in receipt of Housing Benefit. Under reg. 10 of the Housing Benefit Regulations 2006 it was only possible for C to be paid HB if [s/he] met the HRT and had a right to reside:

***Persons from abroad***

***10****.- (1) A person from abroad who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable but this paragraph shall not have effect in respect of a person to whom and for a period to which regulation 10A (entitlement of a refugee to housing benefit) and Schedule A1 (treatment of claims for housing benefit by refugees) apply.*

 *(2) In paragraph (1), “person from abroad” means, subject to the following provisions of this regulation, a person who is not* ***habitually resident*** *in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.*

 *(3) No person shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless he has a* ***right to reside*** *in (as the case may be) the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland other than a right to reside which falls within paragraph (3A).*

(Emphasis added)

1. The standard of proof in decision making is ‘on the balance of probability’ as detailed in D’s guidance ADM ‘Chapter A1 Chapter A1: Principles of decision making and evidence’:

*A1340* ***The DM must decide claims and applications on the balance of probability.*** *This is not the same as "beyond reasonable doubt", the standard test for proof in criminal trials.*

(Emphasis added)

1. ADM ‘Chapter C1: Universal Credit - International Issues’ confirms the standard of proof is also ‘on the balance of probability’ specifically in the context of the HRT, with reference to Chapter A1:

*C1824 […] Where oral evidence is the only evidence available,* ***the DM must decide******on the balance of probability*** *(ADM A1343) whether the claimant has discharged the burden of proof (ADM A1405 et seq)*

(Emphasis added)

1. ADM Memo 30/20[[5]](#footnote-6) further confirms the same, citing the decision in *Department for Social Development v Kerr* [2004] UKHL 23, stating that when aquestion arises as to whether the Immigration (EEA) Regulations 2016 continue to apply to a person:

***42****. […] where the claimant cannot provide documentary evidence, DMs should be mindful of utilising additional records2 available to them, and* ***taking a pragmatic approach*** *in cases where for example, domestic violence is an issue (ADM C1824), so the claimant cannot provide anything other than oral evidence to demonstrate their residency status.* ***It must be remembered that a claimant’s oral statement is evidence (ADM A1400),*** *and where that oral evidence is the only evidence available,* ***the DM must decide on the balance of probability (ADM A1340 - 1342)*** *whether the claimant has discharged the burden of proof (ADM A1405 et seq).*

*2 Department for Social Development v Kerr [2004] UKHL 23*

(Emphasis added)

1. C has lived in the UK for [number] years, has worked in the UK and [2 of [her/his] children are British citizens EDIT AS APPROPRIATE]. C has provided [her/his] National Insurance Number which [s/he] used both whilst working and claiming benefits in the UK.
2. C has further provided [her/his] estranged spouse’s name, date of birth and National Insurance Number, which her/his] estranged spouse has used whilst working and claiming benefits in the UK.
3. C has provided compelling reasons for why [s/he] is unable to provide [what physical evidence] to evidence [her/his] right to reside and demonstrated that this is a matter beyond [her/his] control.
4. C has already been subject to and passed the HRT for [her/his HB] award.
5. The decision that C is ‘*not in Great Britain*’ appears to have been made without reference to these highly pertinent facts and in a situation where clearly on the ‘*balance of probability*’ C meets the HRT, and is therefore unlawful.
6. Further, in deciding that C does not have a Right to Reside when C has provided oral evidence and explained why further evidence is not available to [her/him], D has failed to take account of D’s own guidance at ADM Chapters A1 and C1 and ADM Memo 30/20 where D has:
* failed to take account of C’s relevant oral evidence including details of C’s relevant circumstances
* failed to ‘take a pragmatic approach’ in consideration of this evidence, and failed to make the decision ‘on the balance of probabilities’

and the decision is therefore unlawful.

**Ground 2: Failure to make enquiries**

1. D is under a duty to make reasonable enquiries to establish C’s HRT.
2. In *Department for Social Development v Kerr* Lady Hale confirmed the DWP’s duties when determining a claim where relevant facts are available to the DWP and it is not possible for C to provide evidence of the same:

*62.  What emerges from all this is a* ***co-operative*** *process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But* ***where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced****.*

*63.  If that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof. The first question will be whether each partner in the process has played their part. If there is still ignorance about a relevant matter then generally speaking it should be determined against the one who has not done all they reasonably could to discover it. As Mr Commissioner Henty put it in decision CIS/5321/1998, "a claimant must to the best of his or her ability give such information to the AO as he reasonably can,* ***in default of which a contrary inference can always be drawn."******The same should apply to information which the department can reasonably be expected to discover for itself****.*

(Emphasis added)

1. D’s guidance ADM Memo 14/18[[6]](#footnote-7) confirms that a HRT decision is to be reached on evidence ‘held by DWP **and the Home Office**’.:

***11****. Where the evidence of nationality and status provided to and* ***held by DWP and the Home Office*** *indicates that* ***the balance of probabilities*** *is that the claimant is likely to have legal and habitual residence, the DM may determine that the claimant is eligible to claim UC. The claim can go forward to be assessed for benefit entitlement.*

(Emphasis added)

1. It is clear in C’s case that information has not been sought from the Home Office by D when reaching the decision as C [has what leave to remain] and this information would be confirmed by the Home Office.
2. C has further provided her/his spouse’s name, date of birth and national insurance number to D, from which information to enable D to confirm C’s right to reside is readily available to D, including whether and which benefits are being paid to C’s spouse, potentially whether C’s spouse has capital, and whether C’s spouse has earnings (as reported by Her Majesty’s revenue and Customs to D) and thus whether C’s spouse remains a ‘worker’ for right to reside purposes. D’s duty to discover this information is clear from *Kerr:*

*65…. the department freely acknowledges that such information is available to it.* ***All it needs is a name and a date of birth, from which it can trace the National Insurance number, which in turn should enable it to discover whether benefits are being paid. In many cases, if there is a claim, the department can also discover whether or not the claimant has capital. Section 3(1) and (2) of the Social Security Act 1998 makes it clear that the relevant departments are able to use the information relating to social security which they hold for any purposes connected with their functions in relation to social security.*** *Yet the department never asked the claimant for this information. Indeed, the section of the claim form asking for details of other relatives does not ask for dates of birth (perhaps it will do so as a result of this case). Nor did the department seek this information from the claimant despite making further inquiries of him which revealed that it should have been asked. In those circumstances,* ***the department cannot use its own failure to ask questions which would have led it to the right answer to defeat the claim.***

(Emphasis added)

1. C has explained why [s/he] cannot provide evidence of [her/his] right to reside because [summarise reason]. Under the principles set out in *Kerr* and under D’s own guidance, D had a duty in such circumstances to consult D’s own records for information held on [C/C’s spouse] and to obtain information about C’s immigration status from the Home Office.
2. D has failed to do all that it reasonably could to discover the information available to it from either the Home Office or within D’s own records and as such, following the approach in *Kerr* above, an ‘inference’ should be drawn in favour of C meeting the HRT.

**Ground 3: Unlawful discrimination**

1. SSWP is under a duty to avoid unlawful discrimination pursuant to duties under international and domestic legal instruments.
2. Article 14 of the European Convention on Human Rights provides:

“*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*.”

1. Welfare benefits, including universal credit, are a recognised form of property for the purposes of Article 1, Protocol 1.
2. D’s failure to make reasonable enquiries before making HRT decisions is likely to disproportionately affect non-UK nationals, their partners, children and dependants as they are the ones more likely to have negative decisions made on whether or not they meet the HRT in the first place. While the operation of a HRT requirement is justified, the failure to make inquiries when conducting the HRT process is not. It is for the Defendant to justify this failure and the consequential differential impact on non-UK nationals, and we are not aware of any such justification for the same.
3. Accordingly, the decision making in deciding C’s claim, as well as the substantive outcome, amounts to unlawful discrimination and is contrary to Article 14 ECHR in conjunction with A1/P1.

**Alternative remedies**

1. **C has requested a mandatory reconsideration of the decision, however there is no fixed time scale for a mandatory reconsideration decision to be made and if C is required to go through the full appeals process, this could take many months. C [is homeless and has no income at all, and is thus destitute. He/she is reliant on handouts from family and friends and is ‘sofa surfing’ EDIT AS APPROPRIATE].** Judicial review is thus the remedy of last resort, and the only effective way to provide an expedient resolution in this case in view of the Claimant’s severe hardship.
2. **C is seeking damages pursuant to the human rights act, which are not available through the First Tier Tribunal. Judicial review is the only way to achieve the remedy sought.**

**The details of the action the defendant is expected to take**

1. In order to circumvent the necessity of further action by way of judicial review, we expect the defendant to take the following action:
* The Secretary of State should make relevant enquiries of the Department for Work and Pensions department and of the Home Office and revise and award C UC immediately and from [date].
* In the alternative the Secretary of State should take account of C’s oral evidence and revise and award C UC immediately and from [date].
* If the Secretary of State is unable to do so, the Secretary of State should provide a Mandatory Reconsideration decision immediately.
* Award C, a vulnerable person, HRA damages for the significant financial loss as well as suffering and distress caused by the D’s breach of [her/his] right not to be discriminated against.
* Ensure that decision makers are aware of the requirements, as set out in *Kerr*, of the need for a co-operative process of investigation, including the requirements for D to seek out information reasonably available to D rather than simply relying on C’s failure to provide supporting evidence where a clear explanation for the same has been given. [Adapt as necessary]

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

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

* **Correspondence with D**
* **[immigration evidence]**
* **Signed form of authority.**

**ADR proposals**

Please confirm in your reply whether D 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] (14 days)**. **Should we not have received a reply by this time our client may issue proceedings for judicial review without further notice, and will seek to recover costs from you. We remind you of your duties pursuant to the duty of candour at this stage, and that the claimant reserves the right to refer to the conduct of the parties at the pre-action stage should the issue of costs arise.**

Yours faithfully

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. Reg 83 and sch 4 paras 1-4 The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 [↑](#footnote-ref-4)
4. Regs 3 and 4 The Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regs 2020/1209 [↑](#footnote-ref-5)
5. ADM 30/20 para 42 in relation to ‘*Where a question arises as to whether the Imm (EEA) Regs 2016 continue to apply to a person’.* See also DMG Memo 26/20 at para 42. [↑](#footnote-ref-6)
6. ADM Memo 14/18 para 11 in relation to claimants of the *Windrush* generation, but applicable to all cases. Now incorporated into ADM Chapter C1: Universal Credit - International Issues. See also DMG Memo 8/18 para 11. [↑](#footnote-ref-7)