**Only use this letter if:**

Your client has an overpayment of tax credits

The o/p is due to relationship status change

You have asked HMRC to offset notional entitlement

HMRC have made a decision within the last 3 months to refuse because notional entitlement has been offset in respect of the claimant on a previous occasion.

**This letter assumes (but can be edited if circumstances are not the same):**

* Current partner has NRPF
* Client is registered blind
* Client renews their TCs over the phone and was not asked if relationship status had changed.
* Previous o/p was caused by relationship breakdown, current o/p is due to relationship formation.
* o/p is being deducted from UC

**Delete box before sending**

**This letter challenges** HMRC’s reliance on an unpublished policy to only apply notional entitlement once in respect of a claimant.

This letter further challenges HMRC’s indirect discrimination in respect of C.

Read whole letter carefully and edit all text in [square brackets]

**Please seek assistance if needed with this letter** **jrproject@cpag.org.uk**

**Delete box before sending**

HM Revenue and Customs

Solicitor’s Office

South West Bush

Bush House

Strand

London

WC2B 4RD

By email only: preactionletters@hmrc.gov.uk

Date:

Dear Sir/Madam,

**Re: Proposed Judicial Review Claim – R ([client name]) v HMRC – refusal to apply notional entitlement; refusal to cancel overpayment**

**I. Introduction**

1. We have been instructed by [client name] to assist with taking steps under the Pre-Action Protocol for Judicial Review. [Client name] seeks to challenge HMRC’s refusal to review their decision not to apply notional entitlement to [her/his] overpayment of tax credits (“**TCs**”) and/or not to cancel that overpayment of TCs. In line with pre-action protocol, we require a response in 14 days i.e. by 16:00 on [date].
2. This is a letter before action in accordance with the pre-action protocol for judicial review. The Proposed Claimant will lodge the application for judicial review and seek the costs of doing so from the Respondent if the Respondent fails to reply to this letter, or provides a response that is either late or is in a form that does not comply with the requirements for a response as set out in Annex B of the Pre Action Protocol, in particular section 5 which requires a response to set out **whether the issue is conceded in part or in full, or will be contested.**

**II. The Proposed Claimant**

1. The Proposed Claimant is:

**Claimant**: [client name] (“**C**”)

**Address**:

**Date of Birth:**

**NINo:**

**III. The Proposed Defendant**

1. The Proposed Defendant (‘**D**’) is:

The Commissioners for His Majesty’s Revenue and Customs (“**HMRC**”)

**IV. The Details of the Claimant’s Legal Advisers**

1. The Legal Advisors of the C are:

[name of advice agency]

**V. The Details of the Matter Being Challenges**

1. The decision under challenge is that of [date] refusing to apply notional entitlement to C’s award and refusing to cancel any overpayment because there were no exceptional circumstances.
2. D has acted unlawfully insofar as:
	1. D has relied on an unpublished policy concerning notional entitlement in breach of common law principles of judicial review.
	2. D has fettered their discretion to apply notional entitlement to offset C’s overpayment. There is good reason to apply the offset more than once in C’s case.
	3. D has acted irrationally and unlawfully by refusing to cancel the overpayment due to exceptional circumstances.
	4. D has indirectly discriminated against C.

**VI. The Details of any Interested Party**

1. N/A

**VII. The Issue**

**The Factual Background**

The Claimant

1. C is [claimant’s details ie, age, immigration status, relationship status, children, disability, work, any other income etc].
2. C is registered blind [edit depending on disability] and is assisted to complete [her/his] annual TC renewals over the phone rather than via completing a paper form provided under s.17 Tax Credits Act 2002.
3. In the past, C has had a notional entitlement offset applied to [her/him]:
	1. C originally claimed tax credits on [date]. This was a [couple] claim with [her/his] previous partner, [name and DoB]. When they separated on [date], C made a single claim.
	2. For a period following their relationship breakdown C and [name] continued to be paid TCs as a couple rather than as separate single claimants (which would have resulted in a higher total amount of TCs). When the award was brought to an end, this caused an overpayment. [C or ex partner’s name] applied to HMRC for their notional entitlement to be offset against the overpayment, and HMRC granted the offset for the tax years [tax year] and [tax year].
4. From this time C started to receive TCs as a single claimant.
5. On [date], C remarried and [her/his] [wife/husband], [name, [**initials**] and DoB], moved in with [her/him]. [initials] is a Person Subject to Immigration Control (“**PSIC**”) and has No Recourse to Public Funds. [Initials] had, and has, no income to be taken into account for TCs, and C believed that [s/he] was ineligible for TCs as [s/he] is a PSIC. Indeed, C and [initials] believed that were [initials] to claim TCs would jeopardise [her/his] immigration status.
6. Previously, C had not been aware that [her/his] [wife/husband], despite being a PSIC and having no income, was required to jointly claim TCs with [her/him]. On [date], for the first time since [date married], C was asked, while on the telephone with an officer working for D, about whether [s/he] lived alone or with a partner. At that point, C indicated that [s/he] had been living with a partner since [date]. Prior to this phone call, and despite D regularly contacting C concerning [her/his] TC renewals, C had neither been asked about whether [s/he] lived with a partner nor advised that a joint claim would need to be made notwithstanding that [her/his] partner is a PSIC.
7. As a result of this change of circumstances, C’s TC award came to an end and [s/he] needed to claim Universal Credit (‘**UC**’). A deduction is being made at the rate of [amount] per month from [her/his] UC award.
8. On [date], [advice agency], on C’s behalf, requested that the overpayment should not be recovered and that notional entitlement should be applied to offset the overpayment in full. This is because the amount that C received is less or equal to what [s/he] would have received if [s/he] had made a joint claim for Tax Credits. D refused to apply the offset. because it had been applied previously. D wrote:

“*Because we have already applied Notional Entitlement in [year] for an overpayment from your joint award, we are unable to consider it again*.

*Our guidance does not allow any exceptions to the Notional Entitlement rules. However, when we investigate a dispute, we can consider the impact any exceptional circumstances may have had on a customer’s ability to meet their responsibilities.*

*[…]*

*I cannot cancel any of [name] overpayments, because there is no evidence to show there were exceptional circumstances, at the time s/he began living with her/his partner, which prevented her/him from telling us about the change.”*

The Policy

1. The relevant policy on Notional Entitlement is set out in the Tax Credits Manual TCM0228220. It sets out the circumstances where a person can have a notional entitlement applied to offset any overpayment. This is the only *published* policy concerning notional entitlement.
2. In D’s responses, they have indicated that they will only apply a notional entitlement once. There is no published policy which indicates that this will be the case. C is aware of, via HMRC’s Freedom of Information request response to Citizens Advice Cardiff and Vale on 30 November 2022, the *unpublished* policy which sets out that notional entitlement can only be applied once in each case.
3. Previous publications had not indicated that this *unpublished* policy exists.
4. On 16 February 2017, D stated in an email to the Benefits and Credits Consultation Group that offsetting a claimant’s notional entitlement will be applied in all cases to any overpayment which has occurred as a result of a change in single/couple status in the current year, regardless of why the claimant did not notify the change.[[1]](#footnote-1)
5. On 1 August 2018, D stated in correspondence to Child Poverty Action Group that notional entitlement will be applied unless there is evidence of fraudulent behaviour that has resulted in financial gain.[[2]](#footnote-2)
6. Accordingly, in public facing correspondence, and in their published policies, D has not indicated that they will not apply the notional entitlement offset where a claim for the notional entitlement offset has been made. This is only present in an *unpublished* policy.

**Legal Framework**

***Joint Claims for Tax Credits where one partner is PSIC***

1. Insofar as C’s entitlement to Tax Credits goes, under regulation 3(2) Tax Credit (Immigration) Regulations 2003, C and C’s wife were eligible to claim TC’s as a couple as while [name] is a PSIC, C is not, and C’s [wife/husband] was therefore entitled to be treated also as not a PSIC.

*3. (2) Where one member of a married couple or unmarried couple is a person subject to immigration control, and the other member is not or is within any of Cases 1 to 5 or regulation 5—*

*(a) the calculation of the amount of tax credit under the Act, the Child Tax Credit Regulations and the Working Tax Credit Regulations (including any second adult element or other element in respect of, or determined by reference to, that person),*

*(b) the method of making (or proceeding with) a joint claim by the couple, and*

*(c) the method of payment of the tax credit,*

*shall, subject to paragraph (3), be determined in the same way as if that person were not subject to such control.*

**Grounds of Review**

***Ground A: D has relied on an unpublished policy concerning notional entitlement in breach of common law principles of judicial review***

1. D has acted unlawfully by relying on an unpublished policy in their refusal to apply notional entitlement to C’s overpayment.
2. In *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 at [26], Lord Dyson held:

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

1. It is a fundamental principle of the rule of law that the law must be accessible, intelligible, clear and predictable. On the contrary, where public authorities are relying on unpublished policies to bind their caseworkers, this is not accessible and in breach of the rule of law. Accordingly, D has acted unlawfully by relying on their unpublished policy and must, in line with *Lumba*, apply the published policy which indicates clearly that C should have benefitted from the notional entitlement offset.

***Ground B: D has fettered their discretion to apply a notional entitlement to offset C’s overpayment. There is good reason to apply the offset more than once in C’s case.***

1. It is submitted that D has fettered their discretion by rigidly applying their unpublished policy on notional entitlement offsets.
2. In *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 at [21], Lord Dyson held:

*“it is a well-established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision-makers.”*

1. In *R v Secretary of State for the Home Department ex parte Venables* [1998] A.C. 407 at 433, Lord Woolf approved the following passage from Wade’s *Administrative Law, 7th ed. (1994), p. 360*:

*“It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its merit and decided as the public interest requires at the time.”*

1. Further, a public authority acts unlawfully if, in making a decision, it fails to take into account a material consideration (see, for example, *R (Alconbury Investments Limited) v Secretary of State for the Environment, Transport and the Regions [2001]* UKHL 23 at para. 50). A consideration is material if the decision-maker might have decided the matter differently had she taken it into account (*R v Royal Borough of Kensington and Chelsea ex parte Kassam* (1994) 26 HLR 455 at p. 465).
2. D has fettered their discretion because, despite C meeting all the other criteria for having a notional entitlement offset being applied, they have refused to do so. In particular, in their refusal, they have failed to take into account the extent of C’s disabilities and how they impact on the management of [her/his] Tax Credits claim. It is insufficient to simply state “*our guidance only allows us to offer this concession once.*”
3. C is disabled as defined by s.4 Equality Act 2010. Accordingly, HMRC, when making the determination about whether to apply a notional entitlement to C’s overpayment, *must* take into account the public sector equality duty under s.149 Equality Act 2010 (‘**PSED**’). The factors that D must take into account include the extent of C’s disabilities, how those impacted [her/his] ability to manage his Tax Credits claim, and the extent to which [her/his] disability contributed to [her/his] late notification that [s/he] had a partner living with [her/him]. It is submitted that D has fettered their discretion and breached the PSED by failing to take these matters into account. D blanket refused to apply the notional entitlement to C not because of the merit’s of C’s matter but because of the rigid application of their *unpublished* policy.

***Ground C: D has acted irrationally and unlawfully by refusing to cancel the overpayment due to exceptional circumstances.***

1. It is submitted that D has acted irrationally and unlawfully in refusing to cancel the overpayment due to exceptional circumstances.
2. It is by now well established that the exercise of a discretion is justiciable irrespective of the legal source of that power.[[3]](#footnote-3)
3. In *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223, Lord Greene M.R. held:

“*It is true the discretion must be exercised reasonably. Now what does that mean? […] He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.*”

1. In *R v Somerset County Council, ex p. Fewings* [1995] 1 WLR 1037, 1049, Simon Brown LJ clarified the three categories of considerations:

“*[T]he judge speaks of a ‘decision-maker who fails to take account of all and only those considerations material to his task’. It is important to bear in mind, however, … that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decisionmaker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process.*”

1. This approach was confirmed by the Supreme Court in *R (oao Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] UKSC 52 at [116-118].
2. As indicated above, C is a disabled person as defined by s.4 Equality Act 2010. Therefore, D was required to consider whether they should treat C more favourably under s.149 Equality Act 2010.
3. It is submitted that, in applying the “exceptional circumstances” test, D failed to reach a reasonable decision and breached their duties under the Equality Act 2010:
	1. D does not engage with the obviously relevant consideration that C was not aware of the rules concerning partners with PSIC. C’s previous claim was with a person who was not a PSIC and cannot be expected to have an intricate knowledge of the benefits system. As Lady Hale held in *Kerr v DSS* [2004] UKHL 23, the relevant benefits authority has an obligation to ask the relevant questions to determine entitlement to a claim:

“*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.*” (emphasis added)

* 1. It is understood that D’s position is that C had “failed to meet his responsibilities” because he [“*did not tell us until 23 May 2021, that s/he had been living with a partner since [date]*”.] However, the burden is on D to ask the right questions to ensure that a correct decision is made. Ordinarily, a claimant would be expected to read the information set out in the s. 17 Tax Credits Act 2002 notice and then the s.18 Tax Credits Act 2002 decision letter. Clearly, in this case, that was not possible for C, because [s/he] is blind. This is why there are exceptional circumstances in this case. It is exceptional insofar as an ordinary claimant would not be blind and would be able to ensure that HMRC are not making mistakes in their decision-making process.
	2. Further, there is no engagement whatsoever with s.149 Equality Act 2010. Insofar as the decision letter states that “[*I appreciate that [name] is blind, and you have explained that this makes it difficult for him to navigate the benefits system]*”, there is very limited if any consideration of how this contributed to the overpayment. D has manifestly failed to comply with the principles set out by the Court of Appeal in *Bracking and others v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2013] EWCA Civ 1345.
	3. Because C is unable to read, [s/he] cannot complete the annual s.17 Tax Credits 2002 renewal forms. Rather, as stated above, [s/he] is called by D who assists [her/him] to complete the renewal. It is for that reason that C “*was able to maintain [her/his] single claim*".
	4. The consequence of these arrangements is that C would be responding to questions put to him by D’s officer who calls [her/him]. As in *Kerr*, it is for the officer to ask the right questions. If D did not expressly ask C whether [s/he] had a partner living with [her/him], it is unreasonable for C to be expected to realise an error had been made.
	5. Accordingly, the overpayment arose as a consequence of the relevant officers’ handling C’s claim to inquire as to whether [s/he] had a partner living with [her/him]. This is made particularly clear by the fact that it was as a result of D’s officer making an inquiry about whether [s/he] was living with a partner. Why did none of D’s other officers ever ask this question since [date]?
	6. Further, C’s case is exceptional insofar as it is a case that falls into the exception to the notional entitlement offset as set out in the *unpublished* policy (without prejudice to the submission that this is unlawful), but would otherwise have been subject to the notional entitlement offset. The *published* policy gives the following as an example which would apply to C’s case:

*“****Example 4***

*Julia made a claim for tax credits on 18 November 2005. She lives with Ed but she did not put his details on the claim form because he is a student who has no earnings or income. It is a very volatile relationship and so she never knows how long it will last.*

*She did not think this made her claim incorrect because Ed has no income to take into account. Julia has made incorrect claims for 2005-2006, 2006-2007 and 2007-2008. Although she knew she had a partner, she reasonably believed her award was correct because Ed did not have any income to take into account. Notional entitlement will therefore be available for all the award years.”*

(Emphasis added)

C reasonably believed [her/his] award was correct because [her/his] [wife/husband] did not have any income and was a PSIC. Notional entitlement ordinarily would have been available. This is an exceptional circumstance, accordingly.

* 1. Taking into account C’s disabilities which affect [her/his] ability to manage [her/his] Tax Credits claim and know what change of circumstances might be material to [her/his] claim, the fact that D did not ask C about whether [s/he] was living with a partner despite assisting [her/him] regularly to renew [her/his] Tax Credits award, the fact that C would have received equal to or more Tax Credits if he had notified D of the change in circumstances, and that C is not trying to mislead D but rather made an honest mistake contributed to by [her/his] disability, D should decide that there are exceptional circumstances which warrant cancellation of the overpayment.

***Ground D: D has indirectly discriminated against C.***

1. It is submitted that in refusing to apply the notional entitlement to C and in refusing to cancel the overpayment, D has indirectly discriminated against C contrary to s. 19 Equality Act 2010 and Articles 8 and 14 ECHR.

Provision, criterion or practice (“**PCP**”)

1. There are two relevant PCPs in this matter:
	1. The policy not to apply the notional entitlement more than once per award;
	2. The practice of applying a very high threshold of “exceptional circumstances” when determining whether to cancel an overpayment.

The PCP puts blind (disabled) persons with whom C shares the characteristic at a particular disadvantage when compared with persons with whom C does not share it,

1. Claimants for Tax Credits who are blind are at a particular disadvantage when compared to claimants who are not blind. This is because:
	1. A non-blind claimant would be given ample opportunities to check whether their claim was correct, including reading the s.17 notice and s.18 decision letter. A blind claimant would not be able to read these documents.
	2. A non-blind claimant would be able to read the information provided on decision letters or would be able to research online what changes of circumstances may be material, such as whether a person with PSIC can claim a joint Tax Credit claim. A blind claimant would be unable to do these things.
	3. As a result, a blind claimant would be more likely to rely on HMRC to manage their claim via telephone and for HMRC to ask them questions relevant to whether they had any material change of circumstances. If those questions were not asked, the blind claimant would be more likely to experience multiple overpayments to which the notional entitlement offset and/or cancellation of overpayment policies might apply. Additionally, the blind claimant is more likely to notify of a change of circumstances late when HMRC does contact them.
	4. Further, as a result of being unable to check the information that HMRC has, or research the rules for Tax Credits, a blind claimant is more likely to experience error in their decisions and awards. As a result, they are more likely to experience multiple overpayments to which the national entitlement offset and/or cancellations of overpayment policies might apply.
	5. Accordingly, as a result of the PCPs identified above, a blind claimant is more likely to be required to pay back overpayments to HMRC than a non-blind claimant. These factors place them at a significant disadvantage.

The PCP has put C at the above disadvantage

1. C has been placed at a disadvantage because of the PCPs.
	1. C was only able to manage [her/his] claim with the assistance of others and, in particular, by receiving phone calls from D when renewing [her/his] Tax Credits under ss 17 and 18 of the Tax Credits Act 2002.
	2. C was not able to check the accuracy of his Tax Credits award nor research the relevant rules to check whether his wife would be eligible for Tax Credits.
	3. As a result, C relied on D to ask the right questions but these questions were not asked until too late. This led to C having an overpayment.
	4. The PCP not to allow the notional entitlement offset to be made twice has put C at a disadvantage because he is now required to pay back an overpayment which, had the notional entitlement applied, he would not need to do. The PCP of setting the “exceptional circumstances” threshold so high causes a similar disadvantage.

HMRC cannot show it to be a proportionate means of achieving a legitimate aim.

1. Quite simply, it is disproportionate to recover Tax Credits from a blind claimant, in this case C, where [s/he] would have received the same amount of or more Tax Credits if [s/he] had reported the change of circumstances. C should clearly be treated differently to other claimants who are not blind. This policy cannot be justified.

**VIII. The details of the actions that the Defendant is expected to take**

1. D is requested to:
	1. Apply the notional entitlement offset to C’s overpayment; or
	2. Cancel C’s overpayment as there are exceptional circumstances.

**IX. ADR Proposals**

1. It is unlikely that ADR will be appropriate to resolve this dispute. However, the Claimant is willing to consider any proposals the Defendant makes.

**X. The details of any information sought**

1. [detail if relevant].

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

1. There are no relevant documents not already provided.

**XII. The Address for Reply and Service of Documents**

 [advice agency] address above.

**XIII. The Proposed Reply Date**

1. We expect a response by [date] by 16:00.
2. Should we not have received a reply by this time we will considering taking steps to commence judicial review proceedings.

Yours Sincerely,

1. Benefits and Credits Consultation Group email, 16 February 2017 [↑](#footnote-ref-1)
2. HMRC email to CPAG, 1 August 2018. [↑](#footnote-ref-2)
3. *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9. [↑](#footnote-ref-3)