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

* Has limited leave to remain (LTR) which has not expired
* Their BRP expires on 31/12/24, before their LTR expires
* PIP has been awarded to 31/12/24 only

**This letter assumes** (so can be edited if it does not apply)

* It is too early for your client to apply for new LTR.
* They have sought a mandatory reconsideration of the PIP decision and it has not been responded to.

**Delete box before sending**

**This letter challenges**:

* DWP error of law in awarding PIP only to BRP expiry date
* DWP error of law in awarding PIP only to LTR expiry date

Please **verify and include all relevant dates** in your letter.

Please **read the whole letter carefully** and make any changes needed, in particular any text in red or [square brackets]. Delete all comments and put on headed paper.

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

**Delete box before sending**

**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 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; 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 [NAME] in **relation to [her/his] Personal Independence Payment (“**PIP**”) award. 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 [date]** (14 days).**

**Proposed Defendant:** The Secretary of State for Work and Pensions (“**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 is challenging SSWP’s unlawful decision to award C PIP only to the expiry date of C’s** Biometric Residence Permit (“**BRP**”).

**Background Facts [edit whole section]**

1. [C’ circumstances, other income, housing, children, etc].
2. [immigration details including current LTR and when this will end].
3. [disability details]
4. On [date] C [claimed PIP / made a PIP renewal claim] by telephoning the PIP helpline.
5. On [date] C was awarded PIP from [date] to [date] including [what components at what rates].
6. On [date] C provided [her/his] biometric residence permit (“**BRP**”) to SSWP. This shows that C’s BRP expires on 31/12/2024.
7. The duration of C’s Limited Leave to remain (“**LTR**”) is however evidenced by [what], which was provided to SSWP on [date] [how] and receipt was confirmed [when and how].
8. [what LTR C intends to apply for at the end of the current LTR and why cannot apply now].
9. [brief disability details including how long has had conditions for and how long is expected to have them for]. C has [both daily living and mobility] needs for the purposes of PIP.
10. [details of contact with DWP – has the end date been queried, how and on what date?]
11. On [date] C sought a mandatory reconsideration of the decision to award PIP only to 31/12/24 and not to award PIP until [date].
12. To date, no response has been received to C’s mandatory reconsideration request.

**Note on D’s duty of candour**

1. **As SSWP will be aware, the duty of candour arises as soon 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. In particular, if DWP guidance ‘**12 Setting an award period’ has been updated or replaced, please provide a copy of the current guidance relied upon by decision makers when fixing the length of PIP awards.

**Legal background and relevant guidance**

***Immigration conditions***

*C is not a person subject to immigration control until C’s LTR expires (if not extended)*

1. Under section 77(3) of the Welfare Reform Act 2012 (“**WRA**”) a person is not entitled to PIP unless they are resident and present in Great Britain:

#### **Personal independence payment**

***77****.- (1) An allowance known as personal independence payment is payable in accordance with this Part.*

*[…]*

*(3) A person is not entitled to personal independence payment unless the person meets prescribed conditions relating to residence and presence in Great Britain.*

1. The Social Security (Personal Independence Payment) Regulations 2013 (“**PIP Regs**”) are made under the WRA and provide under reg 16 that a claimant must be currently present and meet the ‘past presence’ test, be habitually resident and under reg 16(d) not be a person subject to immigration control (“**PSIC**”):

### ***Conditions relating to residence and presence in Great Britain***

***16.****Subject to the following provisions of this Part, the prescribed conditions for the purposes of section 77(3) of the Act as to residence and presence in Great Britain are that on any day for which C claims personal independence payment C—*

*(a) is present in Great Britain;*

*(b) has been present in Great Britain for a period of, or periods amounting in aggregate to, not less than 104 weeks out of the 156 weeks immediately preceding that day;*

*(c) is habitually resident in the United Kingdom, the Republic of Ireland, the Isle of Man or the Channel Islands; and*

*(d) is a person–*

***(i) who is not subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999****; or*

*(ii) to whom, by virtue of regulation 2 of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, section 115 of that Act does not apply for the purpose of personal independence payment.*

(Emphasis added)

1. It is not disputed by SSWP that C meets the age conditions and the residence conditions contained in reg 16 (a) – (c) PIP Regs.
2. C has LTR as [on what basis].
3. Under s.115 Immigration and Asylum Act 1999 no person is entitled to PIP who falls under that section. A person falls under s.115 if under subsection (3) s/he is a PSIC:

***115****.- (3) This section applies to a person subject to immigration**control unless he falls within such category or description, or satisfies such conditions, as may be prescribed.*

1. Under s.115(9) a PSIC is someone who requires leave to enter or remain in the United Kingdom but does not have it, has leave that has a condition they have no recourse or public finds, has leave as a result of a maintenance undertaking or certain persons appealing refusals of leave.

***115****.-(9) “A person subject to immigration control” means a person who—*

*(a) requires leave to enter or remain in the United Kingdom but does not have it;*

*(b) has leave to enter or remain in the United Kingdom which is subject to a condition that he does not have recourse to public funds;*

*(c) has leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking; or*

*(d) has leave to enter or remain in the United Kingdom only as a result of paragraph 17 of Schedule 4.*

1. C has [what LTR], this does not contain a ‘*recourse to public funds*’ condition, was not ‘*given as a result of a maintenance undertaking*’ and C is not appealing an immigration decision. C therefore also meets the condition under reg 16(d) PIP Regs as C is not a PSIC based on C’s current LTR.

*The expiry date of C’s Biometric Residence Permit is not instructive*

1. C’s Biometric Residence Permit is dated [date] and expires on 31/12/24.
2. 31/12/2024 is not when C’s LTR ends, rather from 01/01/25 claimants will be able to prove their immigration status online and BRPs are therefore only issued up until this date. The publicly available gov.uk webpage ‘Biometric residence permits (BRPs)’[[3]](#footnote-4) confirms:

***If your BRP expires on 31 December 2024***

*You do not need to tell UKVI if your BRP expires on 31 December 2024 but your immigration status (for example, your visa) allows you to stay longer.*

***You will not need a BRP from 1 January 2025. You’ll be able to prove your immigration status online, without a BRP.***

*UKVI will update their information on how to prove your immigration status in early 2024. You do not need to do anything and* ***your immigration status will not be affected.***

(Emphasis added)

*Evidence other than C’s BRP should be taken into account*

1. DWP guidance Advice for Decision Making (“**ADM**”) Chapter C2: ‘Personal Independence Payment’ confirms a BRP is not needed to confirm eligibility for PIP where a valid passport containing the immigration stamp or vignette or a Home Office decision letter is provided:

***C2014*** *Evidence of nationality must be in the form of*

*1.* ***a valid passport containing the immigration stamp or vignette*** *granting them leave to remain* ***or***

*2. a Biometric Residence Permit.*

***Note****: A Home Office Immigration Status Document with a residence permit vignette granting leave to remain* ***or a Home Office decision letter granting leave to remain*** *may accompany a passport.*

***C2015*** *The evidence in C2014 should contain information detailing*

*1. the type of leave to enter or remain that has been granted (where limited leave to enter or remain has been granted, an expiry date should also be shown) and*

*2. whether the person has been granted recourse to public funds.*

(Emphasis added)

1. DWP Parliamentary Under-Secretary of State, Mims Davies, confirmed in a written answer to a question on 13/11/23 (in the context of Universal Credit and refugees) that:

*““DWP Staff are instructed to consider all available evidence when assessing a benefit claim, including checking directly with the Home Office to confirm immigration status where they are unsure.”* [[4]](#footnote-5)

In C’s case, C has provided [her/his] passport [containing the immigration stamp or vignette] and Home Office notification letter confirming [her/his] LTR as [type of leave] until [expiry date].

*The expiry date of C’s current LTR is not instructive*

1. Further, there is no legal basis to set the length of C’s PIP award in line with the end of [her/his] LTR. C will, before [her/his] current LTR ends, apply for a continuation of [her/his] LTR.
2. Under section 3C of the Immigration Act 1971, a person whose immigration application is being considered by the Secretary of State has their immigration status extended until a decision has been made:

***“Continuation of leave pending variation decision***

***3C****.-(1) This section applies if—*

*(a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,*

*(b) the application for variation is made before the leave expires, and*

*(c) the leave expires without the application for variation having been decided.*

*(2) The leave is extended by virtue of this section during any period when—*

*(a) the application for variation is neither decided nor withdrawn,*

*(b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),*

*(c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom,] is pending (within the meaning of section 104 of that Act),*

*(ca) an appeal could be brought under the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020 (“the 2020 Regulations”), while the appellant is in the United Kingdom, against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),*

*(cb) an appeal under the 2020 Regulations against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of those Regulations), or*

*(d) an administrative review of the decision on the application for variation—*

*(i) could be sought, or*

*(ii) is pending.”*

1. D’s Advice for Decision Making’ (‘**ADM**’) published for decision makers acting under the authority of D explains:

***Continuation of leave***

***C2017*** *Where a person has a limited period of leave to remain in the UK and they make a timeous application (i.e. before their existing leave to remain expires) to the HO to have their leave extended, the person’s existing leave continues until the HO has made a decision on the application (or until the application is withdrawn)1 . If the application to extend the leave period is made after the applicant’s current leave has expired, the applicant’s leave period is not extended and the person is treated as an ‘overstayer’.*

1. *Immigration Act 1971, s 3C*
2. Providing C does so, C’s eligibility for PIP will continue uninterrupted.

*Factors to be taken into account when setting the length of a PIP award*

1. Section 88 of the Welfare Reform Act 2012 (“**WRA**”) provides:

#### **Claims, awards and information**

***88****.-(2) An award of personal independence payment is to be for a fixed term except where the person making the award considers that a fixed term award would be inappropriate.*

*(3) In deciding whether a fixed term award would be inappropriate, that person must have regard to guidance issued by the Secretary of State.*

1. DWP ‘Advice for Decision Making’ (“**ADM**”) is guidance issued by the Secretary of State. ADM Chapter P2: ‘Assessment for PIP’ sets out factors to be taken into account in setting the length of an award of PIP:

***P2064*** *When deciding the length of the award the DM will have regard to*

*1. the advice from the HP, within the PIP assessment report and*

*2. any further evidence gathered by the HP and*

*3. the evidence given by the claimant in the questionnaire (How your disability affects you), and any additional information supplied by the claimant.*

***Note****: DMs should refer to the procedural guidance on Award Periods and Reviews (within the Decision Making Process Guidance), when deciding the length of the award and setting review periods*

1. The factors to be taken into account in setting the length of an award of PIP under ADM Chapter P2 are all health related. ADM Chapter P2 does not include ‘the expiration of a claimants BRP’ or ‘the expiration of a claimant’s LTR’, since these dates are irrelevant to the making of an award of PIP.
2. The “Decision Making Process Guidance” referred to under paragraph P2064 is covered by the following sections of SSWP’s Operational Instructions, published in response to an FOI by Jessica Strode[[5]](#footnote-6) on 28/03/24:

• 02 ‘PIP Award Reviews’

• 12 ‘Setting an award period’

• 13 ‘Setting a review date’

• Instructions where decisions are required on a CoC/UI (decision outstanding) and a previously Planned Award Review

1. These documents also do not include any instruction to set a PIP award end date as the same date on which either a claimant’s BRP expires or leave to remain ends, as these dates are irrelevant to current PIP eligibility and therefore irrelevant to deciding a PIP award.[[6]](#footnote-7)
2. ‘PIP Award Reviews’ makes clear, for example, that the type (duration) of a PIP award is entirely contingent on the claimant’s daily living and/or mobility needs, and not on any other factors:

*1. When making award decisions, CM/APs will put cases into one of three groups.*

*• Fixed period award no review date - where there is a reasonable expectation to see a significant improvement in needs arising from the claimant’s health condition or disability, to the extent they no longer require PIP. These cases won’t have an AR.*

*• Fixed period award with review date - where it’s likely the claimant’s level of restriction in daily living and mobility activities may change at a later stage. That is the claimant may have some improvement or deterioration that could result in a change in the rate of PIP entitlement. The CM decides the review point and then sets the end date of the award for 12 months after the review date.*

*• On-going award - where the claimant’s restrictions on daily living and/or mobility are unlikely to change significantly, or where the Award Review date goes beyond the claimant’s SPa, these cases will have an AR at least every 10 years.*

**Grounds for Judicial Review**

**Ground 1: Taking into account irrelevant factors and *ultra vires* imposition of conditions**

1. The criteria for PIP are provided under Welfare Reform Act 2012, Social Security (Personal Independence Payment) Regulations 2013 and DWP guidance (which s.88 WRA states “must” be had regard to when deciding the term of a PIP award) and none include expiry of LTR, or earlier expiry of a claimant’s BRP as factors for a decision maker to consider in setting the length of an award of PIP.
2. In *R(Winder and Ors) v Sandwell MBC* [2014] EWHC 2617 (Admin) the High Court analogously found Sandwell MBC’s Council Tax Reduction Scheme to be *ultra vires* the Local Government Finance Act 1992 as it imposed a 2-year residence requirement on claimants, which was not provided for in the Local Government Finance Act.
3. Consideration of length of leave to remain (or earlier BRP expiry) therefore unlawfully takes account of an irrelevant factor and is *ultra vires* the legislation as this is not a factor provided by the legislation.
4. Curtaining a PIP award in line with the expiry of Limited LTR, (or earlier expiry of BRP) when the law provides ongoing eligibility for PIP providing C applies for [her/his] leave to be extended before it expires, is further outside the legitimate purpose of the Act, which is to provide financial assistance to disabled persons.

**Ground 2: Failure to take into account relevant factors**

1. C has provided:
* [what evidence]

Which clearly confirms that C is not a PSIC until [date] at the earliest. SSWP has seemingly not taken this highly relevant evidence into account as C has been awarded PIP until only 31/12/24, the date when C’s BRP expires.

1. In doing so SSWP has unlawfully failed to have regard to SSWP’s published policy, as demonstrated by SSWP’s guidance ADM chapters C2014 and C2015 which make clear that ‘a valid passport’ either ‘containing the immigration stamp or vignette granting them leave to remain’, or accompanied by a ‘Home Office Immigration Status Document with a residence permit vignette granting leave to remain or a Home Office decision letter granting leave to remain’ are acceptable evidence.

Further, if SSWP was “unsure” of C’s LTR beyond 31/12/24, the appropriate course of action is to ‘check with the Home Office’ in line with the answer given by Parliamentary Undersecretary, Mims Davies MP. Not to do so unlawfully fails to follow government policy.

1. Note, it is not possible for C to replace [her/his] BRP for an extended date, since from 01/01/25 claimants will be able to prove their immigration status online and BRPs are therefore only issued up until 31/12/24. This includes if C were to apply for a continuation of [her/his] LTR now, before it is necessary / possible for C to do so.
2. Further, if SSWP has taken the expiry date of C’s BRP as the expiry date of C’s LTR, ands SSWPs’ decision has been reached on this basis, this constitutes a material error of fact and is unlawful.

**Alternative remedies**

1. **C recognises that [s/he] has a right of appeal against the length of [her/his] award, and is exercising this right by having requested a mandatory reconsideration. However, these issues (awarding PIP only to the expiry of a claimant’s BRP) is an issue frequently reported to CPAG from several sources across the UK. C’s case therefore represents an issue of wider public importance. Judicial review is therefore the only effective available remedy to C to improved future decision making.**

**The Details of the Action the Defendant is Expected to Take**

1. SSWP should revise C’s PIP award in accordance with the expected longevity of C’s daily living and mobility needs.
2. SSWP should remind his staff of the duty to take evidence other than a claimant’s BRP into account to establish that claimant’s LTR.
3. ADM P0264 goes on to state:

***Note****: DMs should refer to the procedural guidance on Award Periods and Reviews (within the Decision Making Process Guidance), when deciding the length of the award and setting review periods.*

**The Details of Documents that are Considered Relevant and Necessary**

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

* **Signed form of authority**
* **Confirmation of C’s LTR**
* **Correspondence with SSWP**

**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 and address]**

**Proposed Reply Date**

We expect a reply promptly and in any event no later than **[date]** (14 days).

Should you require more time to consider the matter fully please send an interim reply and propose a reasonable extension, giving a date by which SSWP expects to respond substantively, accompanied with reasons why the deadline cannot be met.

**Should we not have received a reply by this time we will issue proceedings for judicial review without further notice to you.**

Yours faithfully,

*Encs.*

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. gov.uk/biometric-residence-permits/report-problem [↑](#footnote-ref-4)
4. Mims Davies MP Parliamentary Under-Secretary (DWP) UIN 746, 8/11/23 [↑](#footnote-ref-5)
5. whatdotheyknow.com/request/pip\_procedural\_guidance\_on\_award#describe\_state\_form\_1 [↑](#footnote-ref-6)
6. Note, previous versions of this guidance did include this instruction, see documents published in response to an FOI by Dan Manville on 02/03/21 whatdotheyknow.com/request/pip\_decision\_making\_process\_guid [↑](#footnote-ref-7)