**IMPORTANT:** the address for service changed in February 2024, as below.

Please send your letter by post to DWP and by email to the Treasury Solicitor.

Please seek advice from JRProject@CPAG.org.uk if no response is received within 14 days, or consider referring to a solicitor to issue judicial review proceedings, see [this CPAG page](https://cpag.org.uk/welfare-rights/support-advisers/support-advisers-england-and-wales/support-judicial-review-process/pursuing-court-and) for more information.

**Delete Box Before Posting**

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

* Has limited leave to remain (LTR) which has not expired
* Has applied for PIP
* DWP have refused or send the PIP2 until they have applied to extend their LTR

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

* It is too early for your client to apply for new LTR.

**Delete Box Before Posting**

**This letter challenges** DWP’s unlawful requirement for the claimant t have applied for new LTR when their current LTR meets the requirement under reg 16(d)(i) PIP Regs.

Please read the whole letter carefully and make any changes needed, in particular any text in [square brackets]

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

**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 [NAME] in **relation to [her/his] Personal Independence Payment (“**PIP**”) claim. 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: 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 refusal of SSWP to decide and pay C’s PIP claim until C has applied for new Leave to Remain (“**LTR**”), when C is within the duration of [her/his] current Limited LTR, by SSWP’s refusal to send C a ‘How your disability affects you’(“**PIP2**”) form to enable SSWP to assess C’s daily living and mobility needs.

**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 and details of existing PIP award if relevant and when awarded and when ends]
4. On [date] C [claimed PIP / made a PIP renewal claim] by telephoning the PIP helpline.
5. [what happened next].
6. On [date] C provided [her/his] biometric residence permit (“**BRP**”) to SSWP. This shows that C’s BRP expires on 31/12/2024. Note, this is not when C’s LTR ends[[3]](#footnote-4), 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 duration of C’s LTR is evidenced by [what].
7. [what LTR C intends to apply for at the end of the current LTR and why cannot apply now]
8. [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.
9. On [date] SSWP stated:

“*we cannot send you a PIP2 until you have applied to extend your leave*”

1. It has been [how long] since C made [her/his] [renewal] claim for PIP yet to date C has not received a PIP2 form to complete, has not been referred for a medical assessment and no decision has been made on C’s claim.

**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**

***Immigration conditions***

*C is not a person subject to immigration control*

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. Before sending out a PIP2 form SSWP must confirm, as well as the age condition, that a claimant meets the conditions under reg 16 PIP Regs including that C is not a PSIC as confirmed by DWP guidance ‘The PIP Handbook[[4]](#footnote-5)’:

“*Once we have established that the claimant has met basic entitlement conditions relating to age and residence, a ‘How your disability affects you’ form and an information booklet will be sent by post.”*

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 Limited 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 no recourse or public finds, has leave as a result of a maintenance undertaking or as a result of para 17 of schedule 4.

***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.

*If C becomes a person subject to immigration control in the future*

1. Providing that C applies for [her/his] LTR to be extended before C’s current LTR runs out, C’s current LTR will continue to apply until C’s application is decided under s.3C of the Immigration Act 1971. This is acknowledged by SSWP’s guidance ‘Advice for Decision Making’ (“**ADM**”) chapter C2: Personal independence Payment:

***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*

1. Claims for benefit are decided under s.8 Social Security Act 1998 (“**SSA**”) on circumstances which pertain at the time the claim is made and are final under s.17(1) SSA until revised under s.9 or superseded under s.10 SSA.
2. The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (“**D&A Regs**”) are made under the SSA.
3. In the unlikely event that, in the future, C does not apply for [her/his] LTR to be extended before C’s current LTR expires, C will become at that point a PSIC and C’s entitlement to PIP will end, SSWP should then supersede C’s PIP award to remove entitlement under reg 23 D&A Regs from the date that C’s current LTR ends, and not before:

#### **Changes of circumstances**

***23.****—(1) The Secretary of State may supersede a decision in respect of which—*

*(a) there has been a relevant change of circumstances since the decision to be superseded had effect or, in the case of an advance award under regulation 32, 33 or 34 of the Claims and Payments Regulations 2013, since it was made; or*

*(b) it is expected that a relevant change of circumstances will occur.*

1. While C’s current LTR persists, C meets the condition under reg 16(d) PIP Regs and is eligible for PIP. A decision to award C PIP may be superseded at future time when C’s current LTR expires and if C ceases to be eligible because C has not applied to extend [her/his] LTR before this happens.

**Ground 1: Unlawful application of reg 16(d) PIP Regs**

1. The law is clear that C meets the immigration conditions of entitlement to PIP on the basis of C’s current LTR, yet SSWP has unlawfully told C that C must apply for a continuation of [her/his] LTR before a decision can be made on C’s PIP claim.
2. This applies the wrong test, ie, ‘will C become a PSIC during the life of a potential PIP award?’ while the correct test under reg 16(d) PIP Regs is ‘is C a PSIC now?’.
3. Under immigration law it is not necessary for C to apply to extend [her/his] LTR now, that necessity only arises before C’s current LTR expires and once C has applied, providing this is before C’s current LTR expires, C will continue not to be a PSIC (under s.3C Immigration Act 1971).
4. An application by C to extend [her/his] LTR made now is likely to be refused [why]. Applications for [what leave] cost [eg, £2,404 per applicant as of 6 April 2022]. C does not have this money to waste on an application that is not yet necessary and will probably be refused. Government guidance is clear that applications for LTR should be made once an applicant meets “*all the eligibility requirements”[[5]](#footnote-6).*

“*You can submit your application as soon as you meet all the eligibility requirements - you do not need to wait until your current visa expires*”

1. Under social security law it is not necessary for C to apply to extend [her/his] LTR now since C’s eligibility for PIP is dependent on C’s current LTR under reg 16(d) PIP Regs.
2. There is no legal basis to refuse to decide C’s PIP claim , or to refuse C’s PIP claim, because C has not yet applied to extend [her/his] LTR. SSWP’s refusal to decide is therefore unlawful.
3. SSWP’s requirement, when not required by reg 16(d) PIP Regs, for C to apply to extend [her/his] LTR now before SSWP will decide C’s claim for PIP is further unreasonable as it will cost C unnecessary time and money and is irrational as it does not serve to confirm C’s currently eligibility for PIP, rather C’s future eligibility.

**Ground 2: Consideration of irrelevant factors**

1. SSWP has decided that C does not meet reg 16(d) PIP Regs because C’s LTR ends on [date] while there is no requirement under the legislation for a claimant’s LTR to continue throughout an award of PIP, rather SSWP has the power to supersede an award under reg 23 D&A Regs if a claimant’s eligibility changes during the life of the award.
2. In C’s case, there is no requirement under the WRA or PIP Regs an application for an extension of leave to have been made. To refuse to decide C’s PIP claim on the grounds such an application has not been made is unlawful as entitlement has been made dependent on irrelevant facts (see for example *R(Iran) v SSHD* [2005] EWCA Civ 982 para 9(iv)) and is further ultra vires the legislation which includes no such requirement.

**Ground 3: Unlawful immigration advice and instruction for C to change [her/his] legal position**

1. As above, it is unlikely to be advisable for C to apply to extend [her/his] LTR yet as if C applies now, C will not be eligible and C’s application is likely to be refused.
2. SSWP’s instruction to “*apply to extend your leave*” in order for a decision to made on C’s PIP claim is tantamount to immigration advice as it advises C to make an immigration application. SSWP is not competent to give immigration advice and is acting illegally. Gov.uk guidance confirms:

#### “A person who is not registered with the OISC or a member of an [approved professional body](https://www.gov.uk/government/publications/how-to-become-a-regulated-immigration-adviser/how-to-become-a-regulated-immigration-adviser#immigration-advisers) has not been assessed as being fit and competent to provide you with immigration advice or services. … Unregulated advisers do not give you these benefits and are acting illegally”.

1. Under regulation 38 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (“**UC (C&P) Regs**”) SSWP has the power to request information and evidence from claimants:

***38****.-(2) Subject to regulation 8 of the Personal Independence Payment Regulations, a person to whom this regulation applies must supply in such manner as the Secretary of State may determine and within the period applicable under regulation 45(4)(a) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013****such information or evidence as the Secretary of State may require*** *for determining whether a decision on the award of benefit should be revised under section 9 of the Social Security Act 1998 or superseded under section 10 of that Act.*

(Emphasis added)

1. Under regulation 45 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (“**UC (D&A) Regs**”) where SSWP has requested information or evidence from a claimant under reg 38(2) UC (C&P) Regs, that requirement to provide that information or evidence is met where the claimant either provides it or satisfies SSWP that it does not exist or cannot be obtained.

***45.****—(1) This regulation applies where* ***the Secretary of State requires information or evidence*** *from a person mentioned in paragraph (2) (“P”) in order to determine whether a decision awarding a benefit should be revised under section 9 of the 1998 Act or superseded under section 10 of that Act.*

*(2) The persons are—*

*(a) a person in respect of whom payment of any benefit has been suspended in the circumstances set out in regulation 44(2)(a) (suspension in prescribed cases);*

*(b) a person who has made an application for a decision of the Secretary of State to be revised or superseded;*

**(c) a person from whom the Secretary of State requires information or evidence under regulation 38(2) (evidence and information in connection with an award) of the Claims and Payments Regulations 2013;**

**[…]**

*(3) The Secretary of State must notify P of the requirements of this regulation.*

*(4) P must either—*

*(a) supply the information or evidence within—*

*(i) a period of 14 days beginning with the date on which the notification under paragraph (3) was given or sent to P or such longer period as the Secretary of State allows in that notification, or*

*(ii) such longer period as P satisfies the Secretary of State is necessary in order to comply with the requirements, or*

*(b) satisfy the Secretary of State within the period applicable under sub-paragraph (a)(i) that either—*

*(i) the information or evidence does not exist, or*

*(ii) it is not possible for P to obtain it.*

(Emphasis added)

1. SSWP has no power to request that a claimant changes their legal position in order to meet SSWP’s evidence requirements. SSWP’s statement ““*we cannot send you a PIP2 until you have applied to extend your leave*” is an instruction for C to change [her/his] legal position in order to be eligible for PIP (which is not accepted, see Ground 1). SSWP is not competent to give immigration advice and has no power to require claimants to change their legal position.

**Alternative remedies**

1. **SSWP is refusing to decide C’s claim for PIP. C therefore has no effective alternative remedy to judicial review.**

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

1. SSWP should immediately send C a PIP2 form, progress and decide C’s PIP claim on the basis of C’s daily living and mobility needs.
2. SSWP should ensure that staff know to send out PIP2 forms as soon as SSWP is satisfied a claimant *currently* meets the immigration conditions, rather than that they will throughout the term of any PIP award.

**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. [Biometric residence permits (BRPs): Report a problem with your new BRP - GOV.UK (www.gov.uk)](https://www.gov.uk/biometric-residence-permits/report-problem) [↑](#footnote-ref-4)
4. https://www.gov.uk/government/publications/personal-independence-payment-fact-sheets/pip-handbook [↑](#footnote-ref-5)
5. https://www.gov.uk/long-residence/apply-to-extend [↑](#footnote-ref-6)