**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**

**This letter can be used where:**

* Claimant has/had pre-settled status under the EU Settlement Scheme **but now also has a qualifying RIGHT TO RESIDE / has EU settled status**
* UC claim has not been decided and claimant has been sent a journal message along the following lines:

*“we have not made a decision disallowing your Universal Credit because there is legal lead case about Universal Credit which may affect your claim. This case is* *SSWP v AT (AIRE Centre and IMA intervening) [2022] UKUT 330 (AAC). This was handed down by the Upper Tribunal on 12/12/22 but is being appealed to the Court of Appeal with permission already granted.*

*The Secretary of State for Work and Pensions* *has exercised his powers under Section 25(2) of the Social Security Act 1998 to stay decision making on claims affected by the decision. This means that we will not make a decision on your claim until such time as the lead case has been decided in the Court of Appeal (or even the Supreme Court). There is no right of appeal against the Secretary of State’s decision to stay decision making on your claim, but if this decision will cause you particular hardship, please let us know.*”

* **Before sending this letter you should explain in detail the basis on which the claimant has a qualifying right to reside via representations on their Journal, and request the s25 stay to be lifted and a decision made on the basis of that qualifying right to reside, requesting a response within 7 days.**

Please read whole letter carefully and edit as appropriate, in particular any text in red, [square brackets] and/or CAPS.

**DELETE THIS 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] universal credit (“**UC**”) 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 **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-1) 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-2) 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**.*

1. **Details of the matter being challenged**
2. C is challenging SSWP’s ongoing failure to lift the stay on making a decision on C’s claim for universal credit in exercise of his powers under section 25(2) of the Social Security Act 1998, on the basis of the purported relevance of the SSWP’s pending appeal in *SSWP v AT (AIRE Centre and IMA intervening)* [2022] UKUT 330 (AAC) and the ongoing failure to decide C’s claim on the basis of [his/her] notified change of circumstances.

***Background facts* [EDIT WHOLE SECTION]**

1. C is a [NATIONALITY] national and [has / on [date] when C made a claim for universal credit (“**UC**”) had] limited leave to remain under the European Union Settlement Scheme (“**EUSS**”), also known as pre-settled status.
2. On [DATE] C submitted a claim online for UC. C provided [LIST INFORMATION / EVIDENCE CONFIRMING HIS/HER RIGHT TO RESIDE] via [HER/HIS] UC online journal.
3. On [DATE] C had a change of circumstances in that C was [GRANTED INDEFINITE LEAVE TO REMAIN UNDER THE EUROPEAN UNION SETTLEMENT SCHEME (“**EUSS**”), ALSO KNOWN AS SETTLED STATUS / STARTED WORK AS … FOR HOW MANY HOURS A WEEK/ OTHER CHANGE RELEVANT TO R2R].
4. C provided [LIST INFORMATION / EVIDENCE] confirming [her/his] new [leave to remain/qualifying right to reside] via [HER/HIS] UC online journal and receipt was confirmed [HOW].
5. Irrespective of whether or not C met the conditions of entitlement for UC prior to acquiring [his/her] new [leave to remain/qualifying right to reside], C now meets the conditions of entitlement for UC [EXPLAIN QUALIFYING RIGHT TO RESIDE BRIEFLY EG. ‘AS AN EEA WORKER’].
6. On [DATE], C was informed that a decision on [his/her] UC has been stayed, and that D is exercising his powers under section 25(2) of the Social Security Act 1998. The message states:

[UPDATE TO REFLECT ACTUAL MESSAGE REFERRING TO STAY / S25 SSA 1998]

*“we have not made a decision disallowing your Universal Credit because there is legal lead case about Universal Credit which may affect your claim. This case is SSWP v AT (AIRE Centre and IMA intervening) [2022] UKUT 330 (AAC). This was handed down by the Upper Tribunal on 12/12/22 but is being appealed to the Court of Appeal with permission already granted.*

*The Secretary of State for Work and Pensions has exercised his powers under Section 25(2) of the Social Security Act 1998 to stay decision making on claims affected by the decision. This means that we will not make a decision on your claim until such time as the lead case has been decided in the Court of Appeal (or even the Supreme Court). There is no right of appeal against the Secretary of State’s decision to stay decision making on your claim, but if this decision will cause you particular hardship, please let us know.*”

1. To date, no decision has been received and C has been left with no access to universal credit and any other applicable passported benefits that would flow from a universal credit award, to which [s/he] is entitled.
2. Since C notified SSWP of [her/his] change of circumstances [WHAT CONTACT HAS BEEN MADE WITH THE DWP] no decision has been made and C has been deprived of [her/his] appeal rights by the failure to provide a decision 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.

**B. Grounds for Judicial Review**

**Ground 1*:* Unlawful refusal to decide a claim**

1. Decisions as to whether to make an award in respect of a claim for benefit are made under s. 8(1)(a) of the Social Security Act 1998 (“SSA”) under which the Secretary of State shall “*decide any claim for a relevant benefit*”.
2. For each day until that claim is decided it subsists under s. 8(2) SSA:

##### *Decisions by Secretary of State*

***8****.- (2) Where at any time a claim for a relevant benefit is decided by the Secretary of State—*

*(a) the claim shall not be regarded as subsisting after that time; and*

*(b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time.*

1. Thus, changes of circumstances on any day until a decision is made on a claim are relevant to the decision on the claim.
2. SSWP’s Guidance ‘Advice for Decision Making’ (“**ADM**”) confirms:

***Making decisions***

***A1010*** *Generally, each decision must be given on the facts as they exist at the date of the decision and not in anticipation of a future state of facts1. But there are variations and exceptions, for example* ***where entitlement begins after the date of the claim.******Entitlement can be established from a date after the date of the claim under***

*1. the advance claim provisions2 or*

***2. the principle that the DM must consider the claimant’s circumstances down to the date on which the claim is decided.***

*1 R(G) 2/53.pdf; 2 UC, PIP, JSA & ESA (C&P) Regs, reg 32 – 34*

1. D’s guidance ‘Suspension and termination guide’[[3]](#footnote-3) further makes clear what should happen in relation to a stay when entitlement is clear for part of a claimant’s claim (in C’s case, for the period since [her/his] change of circumstances]:

***4051****Sometimes the point of law in dispute in the lead case affects only a part of benefit entitlement.* ***In these cases pay any part of a customer’s benefit that is not in doubt.***

*Calculate benefit on the assumption that the lead case has been decided and the outcome is unfavourable to the customer in the lookalike case.*

(Emphasis added)

1. Accordingly, the SSWP’s refusal to decide C’s claim on the basis of C’s current circumstances and from the date of C’s change of circumstances, is unlawful and fails to follow SSWP’s own guidance.

**Ground 2: *Ultra vires* use of s. 25 SSA 1998 power**

1. The circumstances in which the SSWP need not make a decision on one case whilst an appeal in another case is pending are:

*“if he considers* *it possible that the result of the appeal will be such that, if it were already determined, there would be no entitlement to benefit*” (s.25(2) SSA 1998)

1. The only aspect of the decision on C’s UC entitlement which is in any way related to the case of *SSWP v AT (AIRE Centre and IMA intervening)* [2022] UKUT 330 (AAC), is in relation to the question of whether C meets the condition of entitlement for UC of being “*in Great Britain*” (as set out in s. 4(1)(c) Welfare Reform Act 2012), before and after [her/his] change of circumstances.
2. However, in C’s case, from the date of C’s change of circumstances, irrespective of how the SSWP’s appeal of *SSWP v AT (AIRE Centre and IMA intervening)* [2022] UKUT 330 (AAC) is determined, C meets the condition of entitlement of being “*in Great Britain*” due to C having [settled status/ a qualifying right to reside (as set out below), other than C’s [previous] pre-settled status], and not in reliance on *AT*.
3. C’s case is therefore not one where it is possible that the result of the appeal in *AT* will result in “*no entitlement to benefit*” (after C’s change of circumstances) and it is not an *AT* “lookalike” case which can be properly subjected to a stay behind *AT* by D.

C’s right to reside

1. Whether a person is ‘in Great Britain’ is defined by regulation 9 of the UC Regulations 2013 (as amended) (“**UC Regs**”). Under reg 9(1) and (2) UC Regs a person is treated as “*in Great Britain*” if they are habitually resident including that they have a right to reside in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.
2. Rights of residence specified under reg 9(3) UC Regs do not fulfil the requirement in reg 9(2). At reg 9(3)(c) this includes those with limited leave to remain under Appendix EU, i.e., pre-settled status. However, reg 9(3) does not exclude [those with pre-settled status who also have another right of residence which is not excluded under that paragraph.
3. A person with pre-settled status can rely on the rights of residence set out in the Immigration (European Economic Area) Regulations 2016 (“**EEA Regs”**”) after the end the end of the transition period on 31 December 2020, when the EEA Regs were, in general, revoked. That is because reg 83 and sch 4 paras 1-4 Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (“**ISS Regs**”) contain savings provisions allowing persons with pre-settled status to continue to possess the rights of residence in the EEA Regs for the purposes of accessing benefits. As D’s Advice for Decision Making Guidance (“**ADM**”) Memo 29/20 explains:

*87. Part 7 and Schedule 4 contain* ***savings provisions in relation to access to benefits and services. These provisions ensure that those with limited leave to enter and remain in the UK (pre-settled status) under the EUSS are treated in the same way after the end of the transition period as they are now for the purposes of accessing benefits and services*** *(post-transition period group – see paragraph 89). They also save relevant provisions of the Immigration Act 1988 and the Asylum and Immigration Act 1996 so that EEA citizens protected by the Withdrawal Agreements continue to be considered as a person not subject to immigration control in the instances where they would previously have been eligible for the allocation of social housing and homelessness assistance.*

(Emphasis added)

1. Under Sch 4, para 3(w) ISS Regs this savings provision applies to regulations 2 (interpretation) and 9 (persons treated as not being in Great Britain) of the UC Regs.
2. A person with pre-settled status can therefore continue to rely on the EEA Regs for the purpose of claiming benefits. As C has pre-settled status, C can therefore continue to rely on the EEA Regs.
3. C has a right to reside as [ADD **DETAILED ARGUMENTS** FOR QUALIFYING RIGHT TO RESIDE INCLUDING REFERENCES TO EVIDENCE ALREADY PROVIDED AND ANY ADDITIONAL EVIDENCE ENCLOSED WITH THIS LETTER]. ]
4. As such, C’s current entitlement to benefit is independent of the SSWP’s appeal in *AT*. The SSWP’s decision to apply a stay to making a decision on [her/his] UC claim is therefore *ultra vires* use of his powers under s25 SSA 1998.

**Ground 3: Failure to take account of relevant factors when exercising discretionary power to refuse to lift stay**

1. In the alternative to ground 1 and 2, if D does not accept that C has a qualifying right to reside so that the use of his s.25 SSA 1998 power in C’s case is *ultra vires* by virtue of C’s case not being one on which the power bites, the power is nonetheless a discretionary one.
2. In exercising a discretionary power, the SSWP is required to take into account relevant factors when deciding to apply a stay to C’s case.
3. The decision as posted on C’s journal on [DATE] and response to C’s notification of [her/his] change of circumstances posted on [date] indicated that the SSWP had imposed a stay on decision-making in C’s case does not include any individualised reasons for imposing or continuing the stay. In the absence of any such reasons, C is left with the understanding that [s/he] has been subjected to a blanket policy imposed by the SSWP to stay making all UC refusal decisions for pre-settled status holders and not to review that stay when claimants have relevant changes of circumstance, without considering the factors relevant to [his/her] specific case.
4. D’s ‘*Suspension and termination guide*’[[4]](#footnote-4) recognises that the decision maker must consider all available facts when deciding whether to maintain the stay:

***4053*** *There is no right of appeal against a decision to stay. If a customer challenges a decision to stay,* ***reconsider the decision in the light of all the available facts,*** *including any additional facts that are presented by the customer. […]*

(Emphasis added)

1. Factors which may be relevant for the SSWP in deciding whether to use his discretionary power to stay C’s case behind his appeal in *AT* include:
	1. Whether C has an arguable qualifying right to reside, independent of *AT*, which he/she wishes to argue on mandatory reconsideration and/or appeal;
	2. The degree of probability that the court’s decision in *AT* will provide significant assistance with the determination of C’s case; and
	3. Any hardship which C may face as a result of the stay.
2. C’s primary position is that from [date] [s/he] has a qualifying right to reside for the purposes of entitlement to UC as a [ADD BRIEF REFERENCE TO RIGHT OF RESIDE EG. WORKER]. DETAILS OF CORRESPONDENCE SINCE INITIAL STAY MESSAGE INCLUDING REPRESENTATIONS THAT C HAS AN ALTERNATIVE RIGHT TO RESIDE AND REQUESTS TO LIFT STAY.
3. Even if the SSWP does not agree that C has a qualifying right to reside, the SSWP must at least accept that C’s right to reside is arguable. D’s decision to apply / maintain a stay on C’s case has failed to take this relevant factor into account with the effect that C is being prevented from accessing mandatory reconsideration or appeal rights.
4. [IMPORTANT NOTE – THIS AMOUNTS TO A CONCESSION WHICH MIGHT MAKE IT DIFFICULT TO RELY ON AT IN AN APPEAL IF UC IS REFUSED, ONLY INCLUDE THIS PARAGRAPH IF YOU ARE SURE THAT IT CANNOT BE ARGUED THAT *AT* APPLIES] C does not consider that *AT*, which – in exercising his discretion to stay - the SSWP has concluded might result in C having no entitlement to benefit – applies in his/her case. This is because C [HAS INCOME FROM WORKING / SUPPORT FROM WORKING PARTNER etc.] and is able to meet his/her [and his/her family’s] basic needs. In any event, on the other hand if *AT* did apply to C’s circumstances due to them being unable to meet their basic needs, then C would also be in hardship, meaning that it would be appropriate for D to lift the stay under his own guidance.[[5]](#footnote-5)

**Ground 4: Failure to give sufficient reasons for decision to maintain stay**

**[Delete this note before sending: Only include this ground if DWP have indicated that they do not accept that C has settled status / a qualifying right to reside following the change of circumstances]**

1. Again, in the alternative to ground 1 and 2, in exercising his discretionary power to maintain a stay on C’s case following notification by C of a change of circumstances, D has failed to give sufficient reasons for his decision.
2. It is accepted there is no express statutory duty for the SSWP to give reasons for applying a stay under s.25 SSA 1998, nor is a there a general common law duty to give reasons.
3. However, a common law duty to give reasons can arise when procedural fairness and good administration nevertheless requires that reasons be given. In applying a stay to C’s case, D has exercised a power which is not subject to statutory appeal and which can only be challenged by way of judicial review. To exercise its supervisory jurisdiction over D in making this decision, a court must be able to assess whether D’s decision is flawed, ie. whether he has applied the correct legal test, whether he took account of all relevant factors and whether he took account of irrelevant factors.
4. A duty to give reasons arises in this context, in particular, due to the following context:
	1. UC is a ‘all-in-one’ benefit for low-income households which includes amounts for basic living costs, housing / rent costs, amounts for children, additional amounts in respect of disabilities and childcare costs. The consequences of decisions taken in respect of this benefit, including decisions to stay making entitlement decisions, can therefore have extremely significant and wide-reaching implications for those to whom they relate;
	2. In the normal course of Habitual Residence Test decision-making by D, it would be possible for the claimant to request a statement of reasons for the decision that they did not have a right to reside, which would provide reasons for D’s decision. Because of the stay, and the failure to incorporate D’s apparent determination that C has no right of residence within an appealable decision, that option is not available to C. In absence of this route, D should provide his reasons for maintaining a stay;
	3. In the normal course of Habitual Residence Test decision-making by D, if the claimant disagrees with D’s decision after a reconsideration has been carried out by D, s/he has the option to appeal to the first-tier tribunal, at which stage D is required to set out in further detail the reasons for his decision. Because of the maintenance of the stay, that option is not available to C, lending further support for D to provide his reasons at this stage;
	4. C has provided information and evidence to support that s/he has a qualifying right to reside unaffected by the SSWP’s appeal in *AT* and maintains s/he is entitled to UC on that basis. That information and evidence has not been expressly disputed by D. There is therefore *prima facie* evidence that C’s case is not one which will be impacted by the outcome of D’s appeal in *AT*;
	5. [IMPORTANT NOTE – SEE PARA 33 re. concession] C recognises that his/her circumstances are materially different from AT’s in that s/he has income from [DETAILS] and so is able to meet his/her most basic needs. D has not made any enquiries about C’s circumstances in this regard so in the absence of reasons it is difficult to understand how D has concluded that C’s case is one to which *AT* may be relevant and therefore warrants the maintenance of the stay;
	6. D has not published or otherwise made publicly available any of his instructions to decision-makers on when to apply stays behind *AT*. Nor is there anything available in D’s published decision-making guidance which assists C to understand why a stay has been applied to his/her case, in circumstances where C maintains s/he has a qualifying right to reside which entitles him/her to UC, irrespective of *AT*. C is aware that Child Poverty Action Group have requested this information but it has not been made available.
5. In these circumstances, procedural fairness requires that reasons should be provided.

**No alternative route to challenge the decision to stay**

1. A decision to stay under s.25 SSA 1998 is not an appealable decision (Universal Credit, Personal Independence Payments, Jobseekers Allowance & Employment Support Allowance (Decision & Appeal) Regulations, Sch 3, para 8). C has asked the Secretary of State to revise the decision to stay and [DELETE AS APPROPRIATE that has been refused/received no answer]. As such, judicial review is the only available route for C to challenge D’s decision.
2. D’s *Suspension and Termination Guide* recognises this:

***4054*** *If the customer challenges the decision to stay and you decide that staying is still appropriate, the customer can apply to the Courts for a judicial review.*

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

1. The Secretary of State should immediately issue a decision on C’s UC claim awarding C UC, on the basis of C’s qualifying right to reside as [EG. WORKER] from [date] and make payment of the same.
2. If D is unable to issue a decision awarding UC, D should:
	* provide a copy of his instructions to his decision-makers on when they should apply / maintain stays behind *AT*;
	* provide a copy of any reasons recorded by a Habitual Residence Test decision-maker as to why they have determined / are minded to determine that C does not have a qualifying right to reside;
	* OPTIONAL in the absence of any recorded reasons as to why C does not have a qualifying right to reside, provide such reasons in response to this letter and provide C with a further opportunity to provide evidence/respond;
	* issue a refusal decision on C’s UC claim detailing why he does not consider C to have a qualifying right to reside.

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

1. Please find enclosed copies of the following documents:
* Correspondence with the DWP
* Signed form of authority.

**ADR proposals**

1. 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 AND EMAIL]

**Proposed reply date**

We expect a reply promptly and in any event no later than [DATE]. Should we not have received a reply by this time we will issue proceedings for judicial review without further notice to you.

Yours faithfully

ADVISER SIGNATURE

Enc

1. assets.publishing.service.gov.uk/media/657c891d83ba380013e1b66c/List-of-Authorised-Government-Departments-under-s.17-Crown-Proceedings-Act-1947-15.12.2023.pdf [↑](#footnote-ref-1)
2. gov.uk/government/organisations/government-legal-department [↑](#footnote-ref-2)
3. gov.uk/government/publications/suspension-and-termination-of-benefits-staff-guide/suspension-and-termination-guide#staying [↑](#footnote-ref-3)
4. [gov.uk/government/publications/suspension-and-termination-of-benefits-staff-guide/suspension-and-termination-guide#how-to-apply-staying](file:///C%3A/Users/jstrode/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/UGDTBDTA/gov.uk/government/publications/suspension-and-termination-of-benefits-staff-guide/suspension-and-termination-guide) [↑](#footnote-ref-4)
5. Para 4053, *Suspension and Termination Guide* states “*[i]f the claimant is suffering hardship, a determination on the substantive benefit issue should be made, and any payments due from that award must then be made*”. [↑](#footnote-ref-5)