Department for Work and Pensions Legal Advisors

Government Legal Department

2nd Floor Caxton House,
Tothill Street,
London
SW1H 9NA

By email: legal.queries@dwp.gov.uk

**Our Ref:**

**DATE:**

**Dear Sir or Madam**

**Re: Proposed claim for judicial review against the Secretary of State for Work and Pensions (DWP) by X**

##### We are instructed by X **in relation to her/his claim for universal credit (“UC”). 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 **DATE**.**

**Proposed Defendant:** The Secretary of State for Work and Pensions

**Claimants:** X

**NINO:** Not yet allocated

**Address:**

**Date of Birth:**

**The details of the matter being challenged**

X challenges the unlawful requirement of the DWP for her/him to have been allocated a National Insurance Number (“NINo”), as distinct from her/him having applied for a NINo, in order to award and pay her/his Universal Credit (“UC”) and the failure of the DWP to follow their own internal procedure to ensure his/her NINo was issued prior to his/her first UC payment date.

***Background facts INCLUDING:***

1. FAMILY DETAILS INC DoB AND IMMIGRATION STATUS
2. DATE CLAIMED UC as a couple
3. AWARD MADE (IF MADE TO ONE PARTNER OF A COUPLE)
4. WHEN OTHER PARTNER BECAME ELIGIBLE E.G. RECEIVED BIOMETRIC CARD DATED... AND WHEN AND HOW TOLD DWP
5. CONTACTS WITH DWP, HOW E.G. VIA THEIR UC JOURNAL, WHAT WAS SAID
6. WHEN APPLIED FOR NINO AND WHEN/HOW TOLD DWP
7. ANY REQUESTS FOR ASSISTANCE / ADVANCE PAYMENT BY X
8. DWP CONFIRMATION THAT ELIGIBLE FOR UC?
9. Detail DWP ADVICE THAT ‘NEED NINO’ TO MAKE PAYMENT
10. EFFECT ON X E.G. Y and X and their baby continue to be left without UC and do not have enough money for food, heating or bare essentials and are at risk of losing their home.

**Defendant’s position as stated to Child Poverty Action Group (CPAG) on UC without a NINO**

1. The Defendant has previously stated in correspondence dated 25/02/19 to CPAG that the DWP’s internal process will ensure a NINO is received before a claimant’s first UC payment is due (the date of the *“decision on entitlement”*) so that their first UC payments is not delayed:

*“Upon receipt of an application where the claimant does not have a NINO, DWP staff should refer the claimant via an internal process to complete the NINO application (rather than the onus being on the claimant to telephone and make an appointment). When implemented as intended, this would enable the NINO to be allocated prior to the decision on entitlement…*

*It is those procedures that should ensure a prompt allocation of a NINO so that Universal credit payments are not delayed.”*

1. The Defendant set out the details of the ‘internal process’ in correspondence dated 03/04/19:

“*If a NINO cannot be identified after an in-depth trace has been performed then staff have been instructed to follow the procedure summarised below. It has been emphasised that claimants should not be advised or encouraged to apply for a NINO via the contact centre/employee route.*

*The agent will complete a dedicated form for the NINO application. This will be largely pre-populated, but agents are expected to check the information carefully. Such forms are then sent to a deducted inbox monitored by the NINO allocations team. The claimant will be notified that this step has been taken on their behalf with a message on the UC journal as follows:*

***A request has been sent to the NINO allocation office for them to commence the process for you to be allocated a National Insurance number. You will be contacted by them directly to attend an interview. Once you have been allocated a National Insurance number you must tell us so we can proceed.***

*Subject to the claimant’s availability and engagement with the NINO staff, this should enable a NINO to be allocated much more quickly than under the employee route.”*

1. We do not accept the Defendant’s legal position as it relates to the legality of delaying payment of Universal Credit until a claimant has a NINO, which we understand to be for the reason of ‘preventing fraud’.
2. We understand that CPAG have not pursued judicial review on this issue to allow time for the above improved ‘internal process’ to be implemented and to monitor the efficacy of the process in ameliorating the effects of the unlawful refusal to pay UC until a NINO is issued (rather than once an application is made).
3. We further understand an ‘updated operational instruction’ was sent out to Jobcentres on 29/03/19, with the result that Jobcentres are aware of the availability of the process and their obligation to use it.
4. C made a claim for UC after 29/03/19, after the ‘operation instruction’ was sent out.
5. It is therefore clear that the DWPs ‘internal process’ is not effective in preventing financial harm to claimant’s in C’s position, and the below arguments apply.

**Grounds for Judicial Review**

**Ground 1: Defendant’s failure to apply the law and follow own guidance and/or operating a system that is incapable of making payment of a UC award when all lawful conditions to the same have been met**

**Legislation**

1. **The only issue for the Defendant to consider in respect of a NINo is whether X meets the NINo requirement set out in section 1(1A) to (1B) of the Social Security Administration Act 1992 (SSAA 1992).**
2. **This provides that the NINo requirement may be satisfied where the claimant provides a NINo or evidence or information necessary to ascertain a NINo or, under s1(1B)(b) SSAA 1992, where:**

**“*the person makes an application for a national insurance number to be allocated to him which is accompanied by information or evidence enabling such a number to be so allocated*.” (Emphasis added.)**

**Case law**

1. **S1(1B)(b) SSAA 1992 was considered by Commissioner Rowland of the Upper Tribunal in CH/4085/2007 [2008] UKUT 14 (AAC):**

***“It is to be observed that there is no requirement that a national insurance number have [sic] been allocated before benefit is awarded. It is sufficient that an application has been made. That is consistent with the idea that having the national insurance number is not really necessary for entitlement to a non-contributory benefit but is merely a tool in the fight against fraud. The payment of benefit is not generally to be delayed while the application for the national insurance number is processed.”* (Emphasis added)**

1. That possession of a NINo is not required to process a claim to benefits, rather the claimant need only have applied for a NINo and provided the appropriate evidence, was recently confirmed by the **Upper Tribunal in** CF/1556/2016, OM v H.M. Revenue & Customs [2018] UKUT 50 (AAC) which related to the analogous NINo provisions relating to child benefit and overturning the First Tier Tribunal’s decision:

*“The Tribunal wrongly held that actual allocation (or ‘possession’) of a N.I. number is the only way to satisfy the N.I. number-related child benefit entitlement condition.”*

**Defendant’s own guidance**

1. The DWP’s own Advice for Decision Making confirms that an award should be made where a NINo has been applied for at A2148:

*There is no entitlement to benefits unless the claim is accompanied by sufficient information or evidence*

*…*

*to enable a NINO to be allocated where the claimant or adult does not have a NINO and they apply for one.* (Emphasis added)

1. The same guidance goes on to make clear that as well as where a new claimant has a NINo, where the new (or newly eligible) partner *has applied for a NINo*, an award *should* be made at ADM A2151:

*... If a single claimant forms a joint claim couple with someone who was not a UC claimant and that person does not have a NINO* ***or does not apply for one*** *to be allocated then no award should be made.* (Emphasis added)

1. **The Defendant is aware that X has applied for a NINo, yet has continued to ask for the number itself, failing to follow its own guidance at** A2148 and A2151 **which provides an award should be made when the application for a NINo is made, not when the NINo is awarded.**
2. **The legislation, the case law, and the Defendant’s own guidance are clear that an award can be made once a NINo application has been made. The Defendant has accepted that X is eligible for UC. The Defendant has however advised that payment is not possible due to the DWP’s “system”. This is not a justification for withholding payment from an eligible claimant, and in this case a very vulnerable family. If DWP does not have a system in place for enabling payment to be made where someone is accepted as eligible for UC and has applied for a NINo, then DWP’s system and/or processes are unlawful.**

**Ground 2: Unlawful discrimination**

1. **Article 14 of the European Convention on Human Rights provides:**

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

1. **Welfare benefits are a recognised form of property for the purposes of Article 1, Protocol 1.**
2. **The DWP’s failure to put in place a system which allows for payment of UC when the claimant is legally entitled to it on the basis that a NINo is required and to withhold or delay payment until a NINo is actually acquired, is likely to disproportionately affect non-UK nationals, their partners, children and dependants. It is for the Defendant to justify such differential treatment but we are not aware of any justification for the same. Accordingly, the insistence on an actual NINo amounts to unlawful discrimination contrary to Article 14 ECHR in conjunction with A1/P1.**

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

**The Defendant is requested:**

* **without further delay to award and pay X and Y UC from DATE;**
* **to amend its system to enable payments to be made without any requirement for an actual NINo provided that an application for a NINo has been made; and**
* to accept that it has unlawfully discriminated against C and to pay her/him damages

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

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

* **Form of authority signed by the Claimants**

**All other relevant documents/information are already in the possession of the Defendant and accessible from the Claimants UC journal.**

**ADR proposals**

**Please confirm in your reply whether the Defendant is willing to consider alternative dispute resolution.**

**The address for reply and service of court documents**

**Proposed reply date**

We expect a reply promptly and in any event no later than **DATE**. This is less than the usual 14 days. However, we consider this shortened timeframe to be entirely appropriate given (a) the unlawfulness of the insistence on the allocation of an actual NINo rather than simply the application for one has already been brought to the Defendant’s attention via a posting on the UC journal and (b) the family of 2 adults and one young child have no other source of income and are currently reduced to using a foodbank and receiving handouts and are at risk of homelessness due to their mounting rent arrears. EDIT AS APPROPRIATE OR DELETE IF 14 DAYS ALLOWED

**If you consider** that you require 14 days from the date of this letter to reply, please immediately inform us in writing, giving full reasons. S**hould we not have received such a request for further time nor a substantive reply by the given deadline we will issue proceedings for judicial review without further notice to you.**

Yours faithfully,

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