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Judicial Review Guidance

Section 2

The Pre-Action Protocol (PAP)

2.1 General

2.1.1 A JR pre-action protocol (PAP) is normally a letter sent to the UK Border Agency which challenges an action taken by the UK Border Agency and threatens that a JR will be lodged if a satisfactory response is not received. The challenge can be to any part of our activities and can include not only a decision we have made but also a delay in us making a decision. The pre-action protocol (PAP) allows a potential Judicial Review (JR) claimant to present their grounds for dispute against a decision to the potential defendant for these to be considered in full. This gives the parties an opportunity for the case to be settled without recourse to the Courts. A copy of the PAP that applies in England and Wales is available on the [Ministry of Justice](#) website. The [PAP](#) operating in Northern Ireland does not currently apply in Scotland.

2.1.2 It is important for caseworkers to bear in mind when dealing with PAPs that if the UK Border Agency does not respond to a PAP - or responds to the PAP but does not settle the dispute and then subsequently settles, the Court will take that into account in deciding costs and will normally order the Agency to pay both sides costs. It is therefore important that PAPs are dealt with in a timely and appropriate manner.

2.2 Administrative process for PAP

2.2.1 Before starting JR action the claimant should send a standard format letter – letter before claim - to the defendant giving a clear account of the decision being challenged and a summary of the facts on which the claim will be made. Letters before claim should be addressed to the Judicial Review Unit (JRU).

2.2.2 JRU will allocate PAPs to designated contacts in the appropriate caseworking areas for action. If it is wrongly allocated the caseworking unit should - as a matter of urgency - return the letter before claim to the JRU email address UKBAPAP@UKBA.gsi.gov.uk or fax the letter to JRU on 020 8196 3526 for re-allocation.

2.2.3 The caseworker allocated the letter before claim should respond to it within 14 days using the standard format laid down in the PAP. The 14 days should be calculated as:

- 14 calendar days from date of receipt in JRU. Where the JRU date stamp has been omitted or is illegible, caseworkers should calculate the 14 day time limit from the date of the removal barrier entry on the

CID removals screen. Alternately, If the letter was sent by JRU from its email account to the caseworking team's designated inbox the receiving casework area should calculate the 14 days from the date the letter was received in the JRU inbox.

2.2.4 Any letters before claim not sent to the designated contact – JRU - should not be accepted as being compliant with the PAP. Caseworking units which receive a letter before claim directly from the claimant/claimant's representative should send a brief standard acknowledgement saying it will not be accepted as a letter before claim under the PAP and will be dealt with as regular correspondence. A standard paragraph to be used in these circumstances is at Annex A (1).

2.3 Cases where the PAP does not apply

2.3.1 The PAP in England and Wales states that the protocol will not be appropriate in urgent cases, for example, when directions have been set, or are in force, for the claimant's removal from the UK. It is not therefore to be used in cases where removal directions have been set. If a PAP is received after removal directions have been set, caseworkers should advise that receipt of a valid PAP letter is disputed (see standard wording at Annex A (3)).

2.3.2 The PAP does not apply if the defendant does not have the legal power to change the decision being challenged. If a letter before claim is received seeking to challenge a tribunal determination to refuse to grant an appeal to the Upper Tribunal, that the Secretary of State does not have the power to overturn, the claimant should be told this is an inappropriate use of the PAP. They should also be told the Agency will proceed to remove unless prevented from doing so by an injunction or the issue of a JR if such proceedings would create a legal barrier to removal. A standard paragraph is at Annex A (6). Caseworkers should update CID notes to record that receipt of a valid PAP is disputed.

2.4 Incomplete information

2.4.1 To comply with the PAP the letter before claim should contain information to identify the case - either the Home Office reference or full name, date of birth and nationality. Any purported letters before claim which do not contain these details should not be accepted as a valid letter before claim. Caseworkers should advise the representatives that receipt of a valid PAP letter is disputed as it contains insufficient information to comply with the PAP and it will not be treated as a letter before claim. A standard paragraph to be used in these circumstances is at Annex A (2). Caseworkers should update CID notes to record that receipt of a valid PAP is disputed.

2.5 No letter of authority

2.5.1 There may be cases where a new legal representative will submit a letter before claim without enclosing a letter of authority from the claimant, confirming that the representative has authority to act on their behalf. Many

cases involve confidential information - for example in relation to previous asylum claims - so the caseworker will need to satisfy themselves that the person concerned is authorised to receive that information. In these circumstances the caseworker should respond to the representatives advising that as no letter of authority is enclosed the UK Border Agency is not able to enter into further correspondence unless the solicitors provide a letter of authority and their letter is not being accepted as a valid letter before claim. A standard paragraph is at Annex A (4). Caseworkers should update CID notes to record that receipt of a valid PAP is disputed.

2.6 Compensation claims

- 2.6.1 If a PAP relates to seeking compensation - or redress for a historic failure in the UK Border Agency's administrative procedures (for example failure to return a passport on request or delay in issuing status letters) the caseworker should reply to the PAP referring the claimant to the UK Border Agency's [complaints procedure](#) and advising that this is a more appropriate route to resolve the matter rather than pursuing by way of JR.

2.7 Interim response to a PAP

- 2.7.1 Court judgments have made clear that the UK Border Agency needs to deal as efficiently as possible with PAP letters. If it is not possible to send a letter of response within 14 days, an interim letter should be sent to the claimant proposing an extended time for a reply - see standard paragraph at Annex A (5). There is an obligation on claimants to issue a JR promptly - and in any event within 3 months of the decision being challenged. The UK Border Agency cannot guarantee that a Court will accept a JR that has been lodged late even where that is a result of us delaying our response to the letter before claim. For that reason caseworkers must always try and respond before the 3 months are up. However where that is not possible and a JR is lodged late because the UK Border Agency has provided a delayed response it would be disingenuous for us to argue that a JR should be struck out. Caseworkers must not allow Treasury Solicitors to argue the timeliness point if those circumstances apply.
- 2.7.2 A request for an extension should be supported by reasons. Government departments are in no special position simply to say they cannot respond to a PAP because of volumes of work and resources. Reasons for an extension that may be accepted include - for example - difficulty in locating the Home Office file or the need to obtain information from entry clearance posts.

2.8 Substantive response to the letter before claim

2.8.1 If the caseworking unit is able to respond substantively within 14 days and - on reviewing the decision - it is decided to settle the dispute as a result of the letter before claim, the letter of response should clearly say so. Remember that settling a dispute does not necessarily mean we will grant leave. It may simply mean that we reconsider our decision or consider whether it would be appropriate to make an immigration decision that would give a right of appeal. The response should make it clear exactly what the UK Border Agency is agreeing to do to settle the dispute and in what timeframe. It is very important that the agreed action is then taken. In cases where a PAP was received and we subsequently settle the JR on the same information as when we received the PAP, caseworkers may be asked to explain by their managers why the case was not conceded at the PAP stage.

2.8.2 If it is decided to settle part of the dispute only - or to defend the dispute - the letter of response should:

- (i) clearly identify what aspects of the dispute can be settled;
- (ii) if appropriate, include a new decision - or say when a new decision will be made;
- (iii) if appropriate provide more detailed reasons for the decision;
- (iv) address the points of dispute or explain why they cannot be addressed;
- (v) enclose any relevant documentation requested by the claimant or explain why the documents are not being enclosed; and
- (vi) if appropriate - confirm whether an application for an injunction or other interim remedy will be opposed.

2.9 Entry clearance officer decisions

2.9.1 The UK Border Agency wants to minimise the numbers of cases referred by entry clearance officers (ECO) to the UK. Posts abroad should therefore take responsibility for responding to PAPs on decisions they have made without a referral, reviewing them when challenged by a letter before claim. Only cases that been returned for a view should be handled in the UK.