Carer’s Allowance

Palatine House

Lancaster Road

Preston

PR1 1HB

[Date]

Dear Sir or Madam

**RE: Mandatory reconsideration request**

 **Name; NINO; Address**

We are instructed by X in relation to his/her claim for carer’s allowance. We are writing to request a mandatory reconsideration of your decision of [date] refusing our client’s claim for carer’s allowance from [date] on the basis that our client was ‘not in Great Britain for at least 104 weeks out of 156 weeks before the date claimed from.’

**Background**

Our client is the mother/father of XX who is currently in receipt of DLA, at X rate care and X rate mobility, and who has been entitled to the same since [date].

Our client, along with [detail family members], arrived in the UK on [date] from [country] where the family had lived since [date]. The family were coming/returning to live in the UK on a permanent basis.

A claim made on behalf of [child] for DLA on [date] resulted in an award of DLA from [date] in line with the judgment of the Upper Tribunal in *EK and TS v SSWP* [2020] UKUT 284 (AAC) i.e. the original 6 month past presence test was applied rather than the 2 year past presence test introduced in 2013 to avoid a breach of the child’s rights under article 14 of the European Convention on Human Rights, read with article 1, Protocol 1.

Following the award of DLA, our client made a claim for carer’s allowance given that she is [child’s] full-time carer. That claim was refused.

**Reason for MR request**

It has been accepted by the SSWP that our client’s son/daughter was entitled to DLA, including the higher/middle rate care component, after he/she had been in Great Britain for 6 months following the family’s arrival from [country]. This is because, to do otherwise, would breach [child]’s right not to be discriminated against contrary to article 14 ECHR taken with article1, Protocol 1.

To refuse our client’s claim for carer’s allowance from the date his/her son/daughter is now recognised as being first entitled to DLA on the basis that she herself/he himself does not meet the 2 year past presence test for carer’s allowance is, in summary:

(i) in breach of his/her own right not to be discriminated against contrary to article 14 ECHR taken with article1, Protocol 1 and/or article 8;

(ii) in breach of his/her son’s/daughter’s right not to be discriminated against contrary to article 14, taken with article 8 on the basis that it denies the child his/her mother’s care without unnecessary financial and emotional stress at a critical period of his/her physical and emotional development; and

(iii) irrational given the passporting nature of DLA to CA and the intention to ensure that presence conditions were in alignment.

As the main carer for his/her severely disabled son/daughter, our client could not have preceded the child’s arrival in the UK by a full 18 months so as to meet the 2 year past presence test being applied to her at the point her son/daughter met the separate 6 month past presence test for DLA following his/her arrival. To do so would have left him/her without anybody to care for him given the remaining parent’s need to work to earn a livelihood for the family. Equally, subjecting our client on arrival in the UK at the same time as her child, to a past presence test which is 18 months longer than that being applied to the person he/she is providing regular and substantial care to severely impacts on his/her ability to provide that care without causing considerable financial and emotional stress to the family in circumstances where there is no better placed person to provide such care at a critical stage in [child’s] physical, emotional and intellectual development.

While the decision in *EK and TS* necessarily concerns DLA, the analysis there of the article 14 discrimination arguments can be applied by analogy to our client’s situation:

(i) carer’s allowance is a benefit which comes within the ambit of article 1, Protocol 1, as much as DLA was held to in *EK and TS* [130]. Furthermore, where carer’s allowance is payable in relation to a parent caring for their disabled child it is also within the ambit of article 8 as it is one of the ways in which the state shows respect for disabled children and the family life of which they are part and from where they receive the care that they need. Conversely, not paying carer’s allowance to our client frustrates her ability to care for his/her disabled child.

 (ii) she/he is a parent-carer of a disabled child who has recently arrived in the UK to settle on a permanent basis with that child. This constitutes sufficient status for an article 14 claim in the same way as being a disabled child who has recently arrived in the UK to settle was sufficient status in *EK and TS* [131-2];

(iii) she/he is treated differently from a parent-carer of a disabled child who has always lived in the UK. The two groups are in an analogous position just as much as children coming from abroad and resident children were held to be in *EK and TS* [133-4];

(iv) as to justification for this difference in treatment, the only legitimate aim for the extension of the past presence test for carer’s allowance was to save money in the same way as this was the only accepted aim for extending the equivalent requirement for DLA, *EK and TS* [140]. Specifically, in *EK and TS* the judge rejected the SSWP’s submissions that the aim was to ensure a sufficient connection with the UK [141].

(v) While saving money may be a legitimate aim, the extension of the past presence test from 6 months to 2 years is disproportionate to this aim in our client’s and his/her child’s situation given:

* It is contrary to the best interests of his/her child given the emotional and financial stress caused within the family by the lack of additional income to the household at a time when our client’s ability to look for external work is severely curtailed due to his/her caring responsibilities. This was something expressly recognised in *EK and TS* where the interests of children affected were held to be ‘complex and substantial including by way of the knock on effects on other benefits and the impact of the family in dealing with disability with a reduced level of assistance’ [158].
* The considerable negative impact of the 2 year past presence requirement on family life generally (potentially having to go out to work to be able to pay somebody else to look after the child/the family being placed under considerable financial and emotional stress/in extreme situations, consideration of placing the child in local authority care which would inevitably cost the state more money).
* The stated policy aim at the time of consultation on personal independence payment and associated changes to DLA, CA and AA of aligning the past presence test as between benefits.
* The undermining of the passporting nature of DLA to carer’s allowance despite its recognised importance and the reality that in relation to disabled children the carer is almost invariable one of the parents.

Accordingly, to avoid breaching our client and his/her child’s rights under article 14 ECHR and so acting unlawfully contrary to s6(1) Human Rights Act the amendments to Social Security (Invalid Care Allowance) Regulations 1976 reg9(1)(c) made by Social Security (Attendance Allowance, Disability Living Allowance and Carer’s Allowance) Amendment Regulations 2013 SI 2013/389 reg 2(2)(c) must be disapplied and the original 6 month past presence test applied to our client’s claim for carer’s allowance.

Equally, it is irrational to apply a 2 year past presence test to our client for his/her care of a disabled child who is subject to a 6 month past presence test. This completely undermines the aim of aligning the past presence test across the disability and caring benefits (i.e. PIP, DLA, CA and AA) as stated in the consultation on PIP in March 2012. It similarly undermines the passporting nature of DLA for CA despite the 2010 DLA reform consultation recognising the ‘importance of [the] feature’ whereby DLA passports individuals to other help and support in circumstances where the vast majority of those claiming carer’s allowance for disabled children are an immediate family member, most usually a parent.

For all the above reasons, we look forward to you allowing our client’s MR request and awarding him/her carer’s allowance from [date from when 6 months in country].