

EXPLANATORY MEMORANDUM TO
THE SOCIAL SECURITY (HABITUAL RESIDENCE AND PAST PRESENCE)
(AMENDMENT) REGULATIONS (NORTHERN IRELAND) 2022

S.R. 2022 No. 149

1. Introduction

- 1.1 This Explanatory Memorandum has been prepared by the Department for Communities to accompany the Statutory Rule (details above) which is laid before the Northern Ireland (NI) Assembly.
- 1.2 The Statutory Rule is made under sections 64(1), 70(4), 71(6), 122(1)(a) and (d), 133(2)(a) and 171(3) and (4) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992, Article 36(2)(a) of, and paragraph 11(2) of Schedule 1 to, the Jobseekers (Northern Ireland) Order 1995, sections 1(5)(a) and 19(1), (2)(a) and (3) of the State Pension Credit Act (Northern Ireland) 2002, section 25(2)(a) of, and paragraph 5 of Schedule 2 to, the Welfare Reform Act (Northern Ireland) 2007 and Articles 9(5)(a), 48(1) and (2)(a), 82(3), 97(1) and 99(1)(a) of the Welfare Reform (Northern Ireland) Order 2015 and is subject to the negative resolution procedure.

2. Purpose

- 2.1 This legislation, with effect from 24th March 2022, inserts a category into the list of persons who are exempted from having to satisfy the Habitual Residence Test and the Past Presence Test for the listed benefits. The category covers those who have left Ukraine in connection with the Russian invasion on 24 February 2022 and who were residing in Ukraine immediately before 1 January 2022.
- 2.2 An amendment is also made in the listed income-related benefits, to the existing list of persons exempted from having to satisfy the Habitual Residence Test, to make clear that all those granted types of Leave Outside the Immigration Rules are exempted from the Habitual Residence Test requirement for the listed benefits.
- 2.3 A further amendment is made in the listed disability and carer benefits, to make it clear that persons with refugee status or humanitarian protection under the Immigration Rules, and those granted leave as a dependant of these persons, are also exempted from the Habitual Residence Test requirement for the listed disability and carer benefits.

3. Background

- 3.1 The Home Office has announced the Ukraine Scheme to allow Ukrainian family members (and certain eligible non Ukrainian family members) of British citizens and persons settled in the UK, to come to the UK. This scheme covers extended family members of the British citizen or person settled in the UK, and their immediate family members. A second sponsorship route, “Homes for Ukraine”, has been announced by the Department for Levelling Up, Housing and Communities which will offer a route for individuals, charities, community groups and businesses in the UK to “sponsor” an individual in the Ukraine to come to the UK by agreeing to provide accommodation for a minimum of 6 months.
- 3.2 The Home Office has stated that those arriving in the UK from Ukraine under the Ukraine Scheme and the sponsorship route will be granted ‘Leave to Enter or Remain’ for 36 months, with the exception of arrivals before the Home Office legislation comes into force who will be granted 36 months Leave Outside the Rules (on the basis of the Home Office policy for exceptional leave on compelling compassionate grounds). This leave provides the right to work and recourse to public funds, including access to benefits and services.
- 3.3 It has also been recognised that there will be others who were resident in Ukraine, who have fled in response to the Russian invasion, and who have already arrived or will arrive in the UK. This will include individuals with pre-existing leave in the UK, and UK and Irish nationals.
- 3.4 Those arriving from Ukraine would ordinarily need to satisfy the Habitual Residence Test, and the Past Presence Test, before they could access the listed income-related, and disability and carer benefits, as these tests apply to all those who have recently arrived in the UK, including UK and Irish nationals, and those with pre-existing leave.
- 3.5 To ensure that those arriving from Ukraine are able to meet the residency conditions for relevant benefits from day one, these Regulations will exempt those arriving from Ukraine from the Habitual Residence Test and the Past Presence Test. This will mean that they will meet the residency conditions for the listed income-related and disability and carer benefits from day one and will be eligible subject to all other entitlement conditions being met.
- 3.6 This Rule makes amendments to the following benefit regulations:

Income-related benefits:
 - Income Support (General) Regulations (Northern Ireland) 1987 (S.R. 1987 No. 459)
 - Jobseeker’s Allowance Regulations (Northern Ireland) 1996 (S.R. 1996 No. 198)
 - State Pension Credit Regulations (Northern Ireland) 2003 (S.R. 2003 No. 28)
 - Housing Benefit Regulations (Northern Ireland) 2006 (S.R. 2006 No. 405)
 - Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations (Northern Ireland) 2006 (S.R. 2006 No. 406)

- Employment and Support Allowance Regulations (Northern Ireland) 2008 (S.R. 2008 No. 280)
- Universal Credit Regulations (Northern Ireland) 2016 (S.R. 2016 No. 216)

Disability and carer benefits:

- Social Security (Invalid Care Allowance) Regulations (Northern Ireland) 1976 (S.R. 1976 No. 99)
- Social Security (Attendance Allowance) Regulations (Northern Ireland) 1992 (S.R. 1992 No. 20)
- Social Security (Disability Living Allowance) Regulations (Northern Ireland) 1992 (S.R. 1992 No. 32)
- Personal Independence Payment Regulations (Northern Ireland) 2016 (S.R. 2016 No. 217)

- 3.7 The Habitual Residence Test was introduced into income-related benefit regulations by the Income-Related Benefits (Miscellaneous Amendments No. 3) Regulations (Northern Ireland) 1994 (S.R. 1994 No. 266). There have been a number of modifications to the test over time. A claimant is required to meet the Habitual Residence Test to be eligible for income-related benefits including Universal Credit and housing benefit. The purpose of the factual part of the Habitual Residence Test is to ensure that income-related benefits are paid to people with reasonably close ties to the UK and an intention to settle here. The test also provides that no person shall be treated as habitually resident in the UK if he or she does not have a right to reside there.
- 3.8 “Habitual residence” is not defined in legislation but case law has established that, to be factually habitually resident in the UK, a claimant must (i) have a settled intention to reside there, and (ii) have been resident for an “appreciable period of time”. It is a factual assessment on a case by case basis and on the balance of probabilities. For a person who has never previously lived in the UK, it can commonly take up to three months to establish factual habitual residence.
- 3.9 For disability and carer benefits, a claimant will, in addition to being considered factually habitually resident, need to meet the Past Presence Test to be able to access the relevant benefits. The claimant must have been present in NI for a specified number of weeks over a reference period. The number of weeks depends upon the age of the disabled person. Those aged 16 or over are required to have been present in the UK for 104 out of the last 156 weeks. The Past Presence Test does not apply if you are terminally ill in Attendance Allowance, Disability Living Allowance and Personal Independence Payment.
- 3.10 There are existing exemptions for those granted refugee status and humanitarian protection (as well as their dependants) for both tests. For the Habitual Residence Test there is also an existing exemption for those granted Leave Outside the Rules where this is: discretionary leave, granted under the Destitution Domestic Violence concession, granted by virtue of regulation 3 of the Displaced Persons (Temporary Protection) Regulations 2005, or granted under the Afghan Citizen’s Resettlement Scheme.

- 3.11 There are also existing exemptions from the Past Presence Test and the factual Habitual Residence Test requirement for disability and carer benefits for those granted leave to enter or remain under the Afghan relocation and resettlement schemes, and those granted leave as a dependant of those granted leave under the Afghan Relocations and Assistance Policy or the previous scheme for locally-employed staff in Afghanistan.
- 3.12 In recognition of, and in response to, the very sudden and difficult situation caused by the Russian invasion, in which individuals will have had to flee Ukraine with very little, if any, planning and possessions, it is necessary to assist those arriving in NI and ensure that they receive the support they need. Some of that support - such as access to benefits and services - will for some be needed very quickly upon arrival in NI. As such, these Regulations will exempt relevant people from residence tests for the listed benefits, so as to enable immediate assistance, which would otherwise not be available.
- 3.13 These Regulations will add to the income-related benefits an additional category of exempt persons to those listed under the relevant provision for the purpose of the Habitual Residence Test. This category is those who have a right of abode or leave in the UK, and who have left Ukraine in connection with the Russian invasion which took place on 24 February 2022 and who were residing in Ukraine immediately before 1 January 2022. Individuals will still need to meet all other benefit specific eligibility requirements, such as income thresholds.
- 3.14 These Regulations also amend an existing provision for income-related benefits which exempts from the Habitual Residence Test people with certain types of Leave Outside the Rules. This amendment provides that all those granted Leave Outside the Rules by the Secretary of State for the Home Department can be exempt from the Habitual Residence Test. Such leave is granted on an exceptional basis taking into account the particular circumstances of an individual and will include those granted Leave Outside the Rules (which is on the basis of the Home Office policy on exceptional leave on compelling compassionate grounds) because of the situation in Ukraine but will also encompass other people granted such leave in the future.
- 3.15 The Past Presence Test, in addition to the factual Habitual Residence Test, is part of the eligibility criteria for claiming certain disability and carer benefits. The Past Presence Test ordinarily ensures that as well as being present in the UK at the time a claim for a benefit is made, that the claimant has also been in the UK for a prescribed period of time before entitlement. There is no existing exemption from the Past Presence Test for people granted Leave Outside the Rules in the regulations for the disability and carer benefits.

- 3.16 These Regulations will add to disability and carer benefits an additional category of exempt persons to those listed under the relevant provision for the purpose of both the Habitual Residence Test and the Past Presence Test. This new category is those who have a right of abode or have been granted leave under or outside the Rules in the UK with recourse to public funds and who have left Ukraine in connection with the Russian invasion which took place on 24 February 2022 and who were residing in Ukraine immediately before 1 January 2022. Individuals will still need to meet all other benefit specific eligibility requirements, such as the age criteria (a claimant needs to be over the age of 16 to claim for Personal Independence Payment).
- 3.17 These Regulations also amend an existing provision for disability and carer benefits to make clear that persons with refugee status or humanitarian protection under the Immigration Rules, and those granted leave as a dependant of these persons, are also exempted from the factual habitual residence requirement for the listed disability and carer benefits. This confirms the policy intention that these groups are able to meet the residency requirements for the disability and carer benefits from day one.
- 3.18 For both the Habitual Residence Test and Past Presence Test exemptions individuals will need to have been resident in Ukraine prior to the Russian invasion. This aligns the position with the commitment to assisting those coming to the UK who have had to flee their homes and country of residence. Further, the Home Office has prioritised granting leave to those arriving under the concessionary Ukraine Scheme which covers those resident in Ukraine immediately before 1 January 2022. The 1 January 2022 date will mean that those who left as a result of the Russian threat, but in advance of the actual Russian invasion, will not be excluded.
- 3.19 The speed at which the Russian invasion has escalated has forced large volumes of residents in Ukraine to flee their homes and the country, clearly with little or no belongings. In terms of assistance of those who have pre-existing links with the UK, and in order to facilitate arrival in the UK in such exceptional circumstances, the exemption from the Past Presence Test will include all those arriving from Ukraine including fleeing UK and Irish nationals and those with pre-existing immigration status. Many will be returning as family units where each family member ought to be provided the same support in the UK.
- 3.20 These Regulations will ensure those arriving from Ukraine are able to meet the residency conditions from day one for relevant benefits. Without this change individuals would not be eligible to claim these benefits until they had been resident in NI for the relevant periods.

4. Consultation

- 4.1 There is no requirement to consult on these Regulations.

5. Equality Impact

5.1 In accordance with its duty under section 75 of the Northern Ireland Act 1998, the Department has conducted a screening exercise on the legislative proposals for these Regulations and has concluded that they do not have significant implications for equality of opportunity. In light of this, the Department considers that an Equality Impact Assessment is not necessary.

6. Regulatory Impact

6.1 These Regulations do not require a Regulatory Impact Assessment as there is no significant impact on costs on business, charities or voluntary bodies.

7. Financial Implications

7.1 There are no significant financial implications for the Department.

8. Section 24 of the Northern Ireland Act 1998

8.1 The Department has considered section 24 of the Northern Ireland Act 1998 and is satisfied that these Regulations–

(a) are not incompatible with any of the Convention rights,

(b) do not discriminate against a person or class of person on the ground of religious belief or political opinion, and

(c) do not modify an enactment in breach of section 7 of the Northern Ireland Act 1998.

9. EU Implications

9.1 Not applicable.

10. Parity or Replicatory Measure

10.1 The Great Britain Regulations are the Social Security (Habitual Residence and Past Presence) (Amendment) Regulations 2022 (S.I. 2022/344), which come into force on 22nd March 2022.

11. Additional Information

11.1 Not applicable.