
DRAFT SCOTTISH STATUTORY INSTRUMENTS

2022 No.

The Disability Assistance for Working
Age People (Scotland) Regulations 2022

PART 5

Residence and Presence Conditions

Residence and presence conditions

15.—(1) An individual satisfies the residence and presence conditions where on any day that individual—

- (a) is ordinarily resident in Scotland,
- (b) is habitually resident in the common travel area,
- (c) is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999⁽¹⁾,
- (d) is present in the common travel area, and
- (e) has been present in the common travel area for a period of, or for periods amounting in the aggregate to, not less than 26 weeks out of the 52 weeks immediately preceding that day.

(2) In this Part, “common travel area” has the meaning given in section 1(3) of the Immigration Act 1971⁽²⁾.

(3) The residence condition set out in paragraph (1)(a) does not apply in relation to the daily living component where on any day the individual—

- (a) is habitually resident in Ireland,
- (b) has a genuine and sufficient link to Scotland, and
- (c) is an individual—
 - (i) to whom the Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland signed at Dublin on 1 February 2019⁽³⁾, as modified from time to time in accordance with any provision of it, applies, and
 - (ii) in respect of whom the United Kingdom is, as a result, competent for payment of long term care benefits.

(4) The reference in paragraph (3)(b) to an individual’s link to Scotland being sufficient is to it being sufficiently close that if the individual were not entitled to Adult Disability Payment, paragraph (3) would be incompatible with the Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland signed at Dublin on 1 February 2019.

(1) 1999 c. 33.
(2) 1971 c. 77.
(3) 2019 CP 49.

(5) Paragraph (1)(c) does not apply to a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999 where the person—

- (a) is lawfully working in United Kingdom and is a national of a state with which the United Kingdom has concluded an agreement which replaces in whole or in part an agreement under Article 217 of the Treaty on the Functioning of the European Union⁽⁴⁾ which has ceased to apply to, and in, the United Kingdom, providing, in the field of social security, for the equal treatment of workers who are nationals of the signatory state and their families,
- (b) is a member of the family of, and living with, a person specified in sub-paragraph (a), or
- (c) has been given leave to enter, or remain in, the United Kingdom by the Secretary of State upon an undertaking by another person or persons pursuant to the immigration rules, to be responsible for their maintenance and accommodation.

(6) The past presence condition in paragraph (1)(e) does not apply where an individual has a terminal illness within the meaning of regulation 26.

(7) The residence and presence conditions set out in paragraphs (1)(b) and (1)(e) do not apply where an individual is a person who—

- (a) has leave to enter or remain in the United Kingdom granted under the immigration rules by virtue of—
 - (i) the Afghan Relocations and Assistance Policy, or
 - (ii) the previous scheme for locally-employed staff in Afghanistan (sometimes referred to as the ex-gratia scheme),
- (b) has been granted discretionary leave outside the immigration rules as a dependant of a person referred to in sub-paragraph (a), or
- (c) has leave granted under the Afghan Citizens Resettlement Scheme.

(8) For the purposes of paragraph (7), “the Afghan Citizens Resettlement Scheme” means the scheme announced by the United Kingdom Government on 18 August 2021⁽⁵⁾.

Temporary absence from the common travel area

16.—(1) Where an individual is temporarily absent from the common travel area, the individual is to be treated as present in the common travel area for—

- (a) the first 13 weeks of that absence for any reason, or
- (b) the first 26 weeks of that absence where—
 - (i) after the first 13 weeks, the absence is in connection with arrangements made for the medical treatment of the individual for a disease or bodily or mental disablement which commenced before leaving the common travel area, and
 - (ii) the arrangements relate to medical treatment—
 - (aa) outside the common travel area,
 - (bb) during the period when the individual is temporarily absent from the common travel area, and
 - (cc) by, or under the supervision of, a person appropriately qualified to carry out that treatment.

(2) For the purposes of paragraph (1)—

- (a) an individual is “temporarily absent” if, at the beginning of the period of absence, that absence is unlikely to exceed 52 weeks, and

(4) OJ C 202, 7.6.2016, p.146.

(5) Published at <https://www.gov.uk/guidance/afghan-citizens-resettlement-scheme>.

- (b) “medical treatment” means medical, surgical, psychological or rehabilitative treatment (including any course or diet regimen).

Serving members of Her Majesty’s forces, civil servants and their family members

17.—(1) A relevant individual is treated as meeting the residence and presence conditions set out in regulations 15(1)(a), (b) and (d) where on any day that individual is outside the common travel area—

- (a) by reason of their capacity mentioned in paragraph (3)(a) provided that the individual satisfied the residence and presence conditions set out in regulation 15(1)(a), (b) and (d) immediately prior to the start of their employment mentioned in paragraph (3)(a), or
- (b) by reason of being a person mentioned in paragraph (3)(b) living with an individual to whom paragraph (3)(a) applies.

(2) The past presence condition set out in regulation 15(1)(e) does not apply to a relevant individual.

(3) A “relevant individual” in paragraph (1) and (2) means an individual who is—

- (a) outside of the common travel area in their capacity as a—
- (i) serving member of Her Majesty’s forces, or
- (ii) civil servant, or
- (b) living with a person mentioned in sub-paragraph (a) and—
- (i) is the child, step-child or child in care of that person,
- (ii) is the parent, step-parent or parent-in-law of that person, or
- (iii) is married to or in a civil partnership with that person, or is living together with that person as if they were married or in a civil partnership.

(4) In this regulation—

“child in care” means—

- (a) under the law of Scotland, a child in respect of whom a relevant individual listed in paragraph (3)(a)—
- (i) is a foster carer within the meaning of regulation 2 of the Looked After Children (Scotland) Regulations 2009⁽⁶⁾,
- (ii) is a kinship carer within the meaning of regulation 2 of the Looked After Children (Scotland) Regulations 2009,
- (iii) has a kinship care order within the meaning of section 72 of the Children and Young People (Scotland) Act 2014⁽⁷⁾, or
- (b) under the law of England and Wales and Northern Ireland, a child in respect of whom a person listed in paragraph (3)(a) has a relationship equivalent to those listed under the law of Scotland,

“civil partnership” is to be read as including a reference to marriage of a same sex couple and a reference to civil partners or to a person who is in a civil partnership is to be construed accordingly,

“civil servant” has the meaning given by section 1(4) of the Constitutional Reform and Governance Act 2010⁽⁸⁾,

⁽⁶⁾ S.S.I. 2009/210.

⁽⁷⁾ 2014 asp 8.

⁽⁸⁾ 2010 c. 25.

“person who is living with another person as if they were in a civil partnership” is to be read as including a reference to a person who is living with another person of the same sex as if they were married, and

“serving member of Her Majesty’s forces” means a member of a regular force or a reserve force (“M”) as defined, in each case, by section 374 (definitions applying for purposes of the whole Act) of the Armed Forces Act 2006⁽⁹⁾, unless—

- (a) M is under the age of 16,
- (b) M is committing an offence under section 8 of the Armed Forces Act 2006 (desertion),
- (c) the force concerned is one of Her Majesty’s naval forces which M locally entered at an overseas base without—
 - (i) previously being an insured person under the National Insurance Act 1965⁽¹⁰⁾, or
 - (ii) paying or having previously paid one or more of the following classes of contributions under the Social Security Act 1975⁽¹¹⁾ or the Social Security Contributions and Benefits Act 1992⁽¹²⁾—
 - (aa) primary Class 1,
 - (bb) Class 2, or
 - (cc) Class 3, or
- (d) the force concerned is one of Her Majesty’s military forces or Her Majesty’s air forces which M entered, or was recruited for, outside the United Kingdom and—
 - (i) where that force is one of Her Majesty’s military forces, the depot for M’s unit is outside the United Kingdom, or
 - (ii) where that force is one of Her Majesty’s air forces, M is liable under the terms of M’s engagement to serve only in a specified area outside the United Kingdom.

Aircraft workers, mariners and continental shelf operations

18.—(1) An individual is to be treated as meeting the presence conditions set out in regulation 15(1)(d) and (e) for any period where that individual is—

- (a) outside the common travel area in their capacity as an aircraft worker or a mariner, or
- (b) in employment prescribed for the purposes of section 120 (employment at sea (continental shelf operations)) of the Social Security Contributions and Benefits Act 1992⁽¹³⁾ in connection with continental shelf operations.

(2) In this regulation—

“aircraft worker” means a person who is, or has been, employed under a contract of service either as a pilot, commander, navigator or other member of the crew of any aircraft, or in any other capacity on board any aircraft where—

- (a) the employment in that other capacity is for the purposes of the aircraft or its crew or of any passengers or cargo or mail carried on that aircraft, and
- (b) the contract is entered into in the United Kingdom with a view to its performance (in whole or in part) while the aircraft is in flight,

⁽⁹⁾ 2006 c. 52. Section 374 was relevantly amended by section 44(3) of the Defence Reform Act 2014 (c. 20).

⁽¹⁰⁾ 1965 c. 51.

⁽¹¹⁾ 1975 c. 14.

⁽¹²⁾ 1992 c. 4.

⁽¹³⁾ Section 120 was relevantly amended by paragraph 30 of schedule 4 of the Petroleum Act 1998 (c. 17), paragraph 26 of schedule 3 and paragraph 8 of schedule 7 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 (c. 2), paragraph 70 of schedule 7 of the Social Security Act 1998 (c. 14), and sections 12(2) to (4) of the National Insurance Contributions Act 2014 (c. 7).

but does not include a person so far as that employment is as a serving member of Her Majesty's forces, and

“mariner” means a person who is, or has been, in employment under a contract of service either as a master or member of the crew of any ship or vessel, or in any other capacity on board any ship or vessel where—

- (a) the employment in that other capacity is for the purposes of that ship or vessel or its crew or any passengers or cargo or mail carried by the ship or vessel, and
- (b) the contract is entered into in the United Kingdom with a view to its performance (in whole or in part) while the ship or vessel is on voyage,

but does not include a person in so far as that employment is as a serving member of Her Majesty's forces.

Persons residing in the United Kingdom to whom a relevant EU regulation applies

19. The past presence condition set out in regulation 15(1)(e) does not apply where on any day the individual is—

- (a) ordinarily resident in Scotland,
- (b) habitually resident in the United Kingdom,
- (c) an individual—
 - (i) to whom the rules set out in a relevant EU regulation apply by virtue of—
 - (aa) Title III of Part 2 of the EU withdrawal agreement,
 - (bb) Part 3 or Article 23(4) of the Swiss citizens' rights agreement (as defined in section 39(1) of the European Union (Withdrawal Agreement) Act 2020 (“the 2020 Act”)(**14**),
 - (cc) Title III of the EEA EFTA separation agreement (as defined in section 39(1) of the 2020 Act), or
 - (dd) the agreement constituted by the exchange of letters set out in the schedule of the Family Allowances, National Insurance and Industrial Injuries (Gibraltar) Order 1974(**15**), and
 - (ii) in respect of whom the United Kingdom is, as a result, competent for payment of sickness benefits in cash.

Persons residing outside the United Kingdom to whom a relevant EU regulation applies

20.—(1) The residence and presence conditions set out in regulation 15(1) do not apply in relation to the daily living component where on any day the individual satisfies the conditions in paragraph (2).

- (2) The conditions referred to in paragraph (1) are that the individual must—
 - (a) be an individual—
 - (i) to whom the rules set out in a relevant EU regulation apply by virtue of—
 - (aa) Title III of Part 2 of the EU withdrawal agreement,
 - (bb) Part 3 or Article 23(4) of the Swiss citizens' rights agreement (as defined in section 39(1) of the European Union (Withdrawal Agreement) Act 2020 (“the 2020 Act”)),

(14) 2020 c. 1.

(15) S.I. 1974/555.

- (cc) Title III of the EEA EFTA separation agreement (as defined in section 39(1) of the 2020 Act), or
 - (dd) the agreement constituted by the exchange of letters set out in the schedule of the Family Allowances, National Insurance and Industrial Injuries (Gibraltar) Order 1974, and
 - (ii) in respect of whom the United Kingdom is, as a result, competent for payment of sickness benefits in cash,
 - (b) be habitually resident in—
 - (i) Switzerland,
 - (ii) an EEA state, or
 - (iii) Gibraltar, and
 - (c) have a genuine and sufficient link to Scotland.
- (3) The reference in paragraph (2)(c) to an individual’s link to Scotland being sufficient is to it being sufficiently close that if the individual were not entitled to Adult Disability Payment, paragraph (2) would be incompatible with the applicable agreement mentioned in sub-paragraph (a) (i) of that paragraph.
- (4) In this regulation, “EEA State” means—
- (a) any member state of the European Union, or
 - (b) any other state that is party to the agreement on the European Economic Area signed at Oporto on 2 May 1992⁽¹⁶⁾, together with the Protocol adjusting that Agreement signed at Brussels on 17 March 1993⁽¹⁷⁾, as modified or supplemented from time to time.

Refugees

- 21.** The residence and presence conditions set out in regulations 15(1)(b) and (e) do not apply where an individual has—
- (a) been granted refugee status or humanitarian protection under the immigration rules, or
 - (b) leave to enter or remain in the United Kingdom as the dependant of a person granted refugee status or humanitarian protection under the immigration rules.

⁽¹⁶⁾ Command Paper 2073 and OJ L 1, 3.1.1994, p.3.

⁽¹⁷⁾ Command Paper 2183 and OJ L 1, 3.1.1994, p.572.