

EXPLANATORY MEMORANDUM TO
THE SOCIAL SECURITY (HABITUAL RESIDENCE AND PAST PRESENCE)
AMENDMENT REGULATIONS 2021

2021 No. 1034

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The proposed legislation, with effect from 15 September 2021, inserts a category to the list of persons who are exempted from having to satisfy the Habitual Residence Test and Past Presence Test for the listed benefits. For the Habitual Residence Test the additional category exempts persons who have come to the UK from Afghanistan under one of the listed Home Office resettlement schemes (see 7.1 for a list of the schemes), and those who are not covered by one of the listed schemes but who have left Afghanistan in connection with the collapse of the Afghan government on 15 August 2021. For the Past Presence Test the additional category exempts persons who have come to the UK from Afghanistan under one of the listed Home Office resettlement schemes.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument is being made under emergency procedures and breaches the 21 day rule. The Secretary of State believes that this is necessary because of the sudden and unexpected nature of the situation in Afghanistan and the immediate need to provide support to those arriving from Afghanistan. Delay in the legislation coming into force will cause potential delays in access to benefits and services.

4. Extent and Territorial Application

- 4.1 The territorial extent of Part 2 (Regulation 2 and 3) is England and Wales and Scotland. The territorial extent of Part 3 (Regulation 4) is England and Wales.
- 4.2 The territorial application of Part 2 (Regulation 2 and 3) is England and Wales and Scotland. The territorial application of Part 3 (Regulation 4) is England and Wales.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 This Instrument makes amendments to the following benefit regulations:
Income related benefits:

- Income Support (General) Regulations 1987¹
- Jobseeker's Allowance Regulations 1996²
- State Pension Credit Regulations 2002³
- Housing Benefit Regulations 2006⁴
- Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006⁵
- Employment and Support Allowance Regulations 2008⁶
- Universal Credit Regulations 2013⁷

Disability and carer benefits

- Social Security (Invalid Care Allowance) Regulations 1976⁸
- Social Security (Attendance Allowance) Regulations 1991⁹
- Social Security (Disability Living Allowance) Regulations 1991¹⁰
- Social Security (Personal Independence Payment) Regulations 2013¹¹

- 6.2 The Habitual Residence Test was introduced into income-related benefit regulations by the Income-Related Benefits Schemes (Miscellaneous Amendments) (No.3) Regulations 1994¹². There have been a number of modifications to the test over time.
- 6.3 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 come to the UK from Afghanistan under the Home Office resettlement schemes, and those who are not covered by one of the listed schemes but who have left Afghanistan in connection with the collapse of the Afghan government on 15 August 2021.
- 6.4 The Past Presence Test, in addition to the Habitual Residence Test, is part of the eligibility criteria for claiming disability and carer benefits but has been amended over time.
- 6.5 These Regulations will add to the disability and carer benefits an additional category of exempt persons to those listed under the relevant provision for the purpose of the Past Presence Test. This category covers those who have come to the UK from Afghanistan under one of the listed Home Office resettlement schemes.

¹ <https://www.legislation.gov.uk/uksi/1987/1967>

² <https://www.legislation.gov.uk/uksi/1996/207>

³ <https://www.legislation.gov.uk/uksi/2002/1792>

⁴ <https://www.legislation.gov.uk/uksi/2006/213>

⁵ <https://www.legislation.gov.uk/uksi/2006/214>

⁶ <https://www.legislation.gov.uk/uksi/2008/794>

⁷ <https://www.legislation.gov.uk/uksi/2013/376>

⁸ <https://www.legislation.gov.uk/uksi/1976/409>

⁹ <https://www.legislation.gov.uk/uksi/1991/2740>

¹⁰ <https://www.legislation.gov.uk/uksi/1991/2890>

¹¹ <https://www.legislation.gov.uk/uksi/2013/377>

¹² <https://www.legislation.gov.uk/uksi/1994/1807>

7. Policy background

What is being done and why?

- 7.1 The UK Government has established three schemes to relocate and resettle those living in Afghanistan to the UK:
- a) The Afghan Relocations and Assistance Policy (ARAP). This scheme was set up to assist Afghan citizens who worked with the British armed forces, and their family members.
 - b) The Afghan Citizens Resettlement Scheme (ACRS). This scheme was set up for those considered particularly vulnerable. The government has announced that the scheme will resettle 20,000 individuals over 5 years, with a focus on women, girls and minority groups
 - c) The previous scheme for locally-employed staff in Afghanistan (sometimes referred to as the ex-gratia scheme. This scheme was announced in December 2012 and was set up to support locally employed staff who have worked for the British forces. This scheme is set to close in November 2022.
- 7.2 The Home Office has announced that those arriving in the UK under resettlement schemes will be granted Indefinite Leave to Remain, with the exception of initial arrivals under the ACRS who have been initially granted 6 months Leave Outside the Rules ahead of being granted Indefinite Leave to Remain. Granting Indefinite Leave to Remain provides certainty and stability to those resettling in the UK. It provides the right to work and recourse to public funds, including DWP benefits and services.
- 7.3 Those granted Indefinite Leave to Remain, however, still need to meet the Habitual Residence Test, and where appropriate the Past Presence test, before they can access DWP income related, and disability and carer benefits. These tests also apply to UK nationals who have recently returned to the UK.
- 7.4 To ensure those arriving from Afghanistan are able to meet the residency conditions for DWP benefits from day one, and based on similar regulations brought forward in 2006 in response to the situation in Lebanon¹³ at that time, these regulations will exempt those arriving from Afghanistan under the listed Home Office resettlement schemes, and those arriving in connection with the collapse of the Afghan government on 15 August 2021, from the Habitual Residence Test. This will mean that they will meet the residency conditions for DWP income related benefits and services from day one, and will be eligible subject to all other entitlement conditions.
- 7.5 Provisions have also been included to exempt those arriving from Afghanistan under one of the listed Home Office resettlement schemes from the Past Presence Test, in addition to the Habitual Residence Test. This will mean they will meet the residency conditions for disability and carer benefits from day one, and will be eligible subject to all other entitlement conditions.

What did the law do before the changes to be made by this instrument?

- 7.6 A claimant is required to meet the Habitual Residence Test to be eligible for income related benefits including Universal Credit and housing benefit. Its purpose 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

¹³¹³ <https://www.legislation.gov.uk/uksi/2006/1981/made>

treated as habitually resident in the United Kingdom if he or she does not have a right to reside there.

- 7.7 “Habitual residence” is not defined in any of the regulations but case law has established that, to be 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.
- 7.8 For disability and carer benefits, a claimant will, in addition to being considered habitually resident, need to meet the Past Presence Test to be able to access the relevant benefits. The claimant must have been present in Great Britain for a specified number of weeks over a reference period. The number of weeks depends upon the age of the disabled person.

Why is it being changed?

- 7.9 The UK government has set out its intention to ensure that those arriving from Afghanistan under the relocation and resettlement schemes receive the support they need to rebuild their lives in the UK, integrate into their local communities and find work. These regulations will align the position with this policy intention by ensuring those arriving under the Afghan relocation and resettlement schemes are able to meet the residency conditions from day one for relevant DWP benefits and services.
- 7.10 The provisions will also ensure that those not covered under the scheme and returning to the UK in exceptional circumstances, including UK nationals returning from Afghanistan, in connection with the collapse of the Afghan government, will meet the residency conditions for DWP income-related benefits from day one, to help with immediate needs.

What will it now do?

- 7.11 These Regulations will exempt persons who have come to the UK from Afghanistan under the Home Office resettlement schemes, and those who are not covered by one of the listed schemes but who have left Afghanistan in connection with the collapse of the Afghan government on 15 August 2021, from the Habitual Residence Test. This will mean they will meet the residency conditions for DWP income-related benefits from day one, and will be eligible subject to all other entitlement conditions.
- 7.12 The regulations will also exempt those arriving in the UK under one of the listed Home Office resettlement schemes from the Past Presence Test, in addition the Habitual Residence Test. This will mean this cohort will meet the residency conditions for disability and carer benefits from day one, and will be eligible subject to all other entitlement conditions.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to the withdrawal from the European Union.

9. Consolidation

- 9.1 This instrument does not involve consolidation and there are no plans to consolidate the relevant legislation at this time.

10. Consultation outcome

- 10.1 No consultation has been carried out and the instrument has not been scrutinised by the Social Security Advisory Committee or the Local Authority Associations as the urgency provisions have been relied upon. The Regulations will be referred to the Social Security Advisory Committee once they are in force. Letters have been exchanged with the Local Authority Associations and the Social Security Advisory Committee to inform them of these changes.
- 10.2 These Regulations shall be referred to the Social Security Advisory Committee as soon as practicable after the date on which they have been made.
- 10.3 Drafts have been shared with the Scottish Government and Northern Ireland Executive.

11. Guidance

- 11.1 Guidance will be issued to local authority staff and DWP decision makers to ensure that they are aware of these new exceptions and how to apply them.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument because there is no impact on businesses.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The Department is firmly committed to evaluating and monitoring the impact of its policies. These are emergency measures intended to help people leaving Afghanistan as a result of the collapse of government in 2021, and as such the department will continue to review of these provisions in response to developments in Afghanistan.
- 14.2 The regulations do not contain a statutory review clause.

15. Contact

- 15.1 Helen Birch at the Department for Work and Pensions email: internationalaccessto.benefitpolicyteam@dwp.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Ronan O'Connor, Deputy Director for International Strategy, at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Will Quince, Minister for Welfare Delivery at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.