

EXPLANATORY MEMORANDUM TO
THE SOCIAL SECURITY (HABITUAL RESIDENCE AND PAST PRESENCE, AND
CAPITAL DISREGARDS) (AMENDMENT) REGULATIONS 2023

2023 No. 1144

1. Introduction

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

2. Purpose of the instrument

- 2.1 This legislation, with effect from 27 October 2023, inserts an additional category into the list of persons who are exempt from having to satisfy the Habitual Residence Test and Past Presence Test for the listed benefits. This new category covers a person who was residing in Israel, the Occupied Palestinian Territories¹ or Lebanon immediately before 7 October 2023, who left Israel, the Occupied Palestinian Territories or Lebanon in connection with the Hamas terrorist attack in Israel on 7 October 2023 or the violence which rapidly escalated in the region following the attack.
- 2.2 The legislation will also, with effect from 27 October 2023, add the Victims of Overseas Terrorism Compensation scheme to the list of compensation schemes for which payments made under the scheme should be disregarded as capital indefinitely when calculating entitlement to income-related benefits. Although the situation in Israel has highlighted the need to disregard Victims of Overseas Terrorism Compensation payments for this group, the UK Government intends the disregard to apply to all beneficiaries of the Victims of Overseas Terrorism Compensation scheme, regardless of where the act of terrorism took place.

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 Israel, the Occupied Palestinian Territories and Lebanon and the immediate need to be able to provide support to those arriving from this region. Delays in the legislation coming into force would delay access to benefits and services for those who need it.

4. Extent and Territorial Application

- 4.1 The extent of Part 2 (Regulation 2 through to 9) of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales and Scotland. The extent of Part 3 (Regulation 10 and 11) is England and Wales.

¹ Throughout this document the Occupied Palestinian Territories should be read as covering the West Bank, the Gaza Strip, East Jerusalem, the Golan Heights.

4.2 The territorial application of Part 2 (Regulation 2 through to 9) of this instrument (that is, where the instrument produces a practical effect) is England and Wales and Scotland. The territorial application of Part 3 (Regulation 10 and 11) is England and Wales.

5. European Convention on Human Rights

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

6. Legislative Context

Habitual Residence Test and Past Presence Test:

6.1 This Instrument makes amendments to the following benefit regulations:

6.2 Income-related benefits:

- Income Support (General) Regulations 1987²
- Jobseeker’s Allowance Regulations 1996³
- State Pension Credit Regulations 2002⁴
- Housing Benefit Regulations 2006⁵
- Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006⁶
- Employment and Support Allowance Regulations 2008⁷
- Universal Credit Regulations 2013⁸

6.3 Disability and carer benefits:

- Social Security (Invalid Care Allowance) Regulations 1976⁹
- Social Security (Attendance Allowance) Regulations 1991¹⁰
- Social Security (Disability Living Allowance) Regulations 1991¹¹
- Social Security (Personal Independence Payment) Regulations 2013¹²

6.4 Pursuant to section 115 of the Immigration and Asylum Act 1999¹³, it is a prerequisite to accessing any of the benefits covered by these Regulations that a person is not a “Person Subject to Immigration Control”. Person Subject to Immigration Control is defined in section 115(9) of the Immigration and Asylum Act 1999. Those with a right of abode (which includes UK nationals), and Irish nationals

² <https://www.legislation.gov.uk/uksi/1987/1967>

³ <https://www.legislation.gov.uk/uksi/1996/207>

⁴ <https://www.legislation.gov.uk/uksi/2002/1792>

⁵ <https://www.legislation.gov.uk/uksi/2006/213>

⁶ <https://www.legislation.gov.uk/uksi/2006/214>

⁷ <https://www.legislation.gov.uk/uksi/2008/794>

⁸ <https://www.legislation.gov.uk/uksi/2013/376>

⁹ <https://www.legislation.gov.uk/uksi/1976/409>

¹⁰ <https://www.legislation.gov.uk/uksi/1991/2740>

¹¹ <https://www.legislation.gov.uk/uksi/1991/2890>

¹² <https://www.legislation.gov.uk/uksi/2013/377>

¹³ <https://www.legislation.gov.uk/ukpga/1999/33/section/115>

(who are exempt from the requirement to have a right of abode) are not subject to immigration control and so cannot be a Person Subject to Immigration Control.

- 6.5 The Habitual Residence Test was introduced into income-related benefit regulations by the Income-Related Benefits Schemes (Miscellaneous Amendments) (No.3) Regulations 1994¹⁴. There have been a number of modifications to the test over time.
- 6.6 These Regulations will add to the income-related benefits regulations an additional category of exempt persons to those listed under the relevant provision for the purpose of the Habitual Residence Test. This category is for those who arrive in Great Britain who were residing in Israel, the Occupied Palestinian Territories or Lebanon immediately before 7 October 2023, who left Israel, the Occupied Palestinian Territories or Lebanon in connection with the Hamas terrorist attack in Israel on 7 October 2023 or the violence which rapidly escalated in the region following the attack. These individuals also need to have a right of abode (such as a UK national), be an Irish national or have been granted immigration leave in the UK with recourse to public funds. Individuals will still need to meet all other benefit specific eligibility requirements, such as income criteria.
- 6.7 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 a claimant is both present in the UK when they make their claim and has also been present in the UK for a prescribed period before this. There have been a number of modifications to the test over time.
- 6.8 These Regulations will add to the disability and carer benefit regulations an additional category of exempt persons to those listed under the relevant provision for the purpose of both the factual Habitual Residence Test and the Past Presence Test. This category is those who arrive in Great Britain who were residing in Israel, the Occupied Palestinian Territories or Lebanon immediately before 7 October 2023, who left Israel, the Occupied Palestinian Territories or Lebanon in connection with the Hamas terrorist attack in Israel on 7 October 2023 or the violence which rapidly escalated in the region following the attack. These individuals also need to have a right of abode (such as a UK national), be an Irish national or have been granted immigration leave in the UK with recourse to public funds. Individuals will still need to meet all other benefit-specific eligibility requirements.
- 6.9 This aligns with the UK Government's intention to assist those arriving in the UK who have had to flee their place of residence in Israel, the Occupied Palestinian Territories or Lebanon, following the Hamas terrorist attack in Israel on 7 October 2023. People who resided in Israel, the Occupied Palestinian Territories or Lebanon before 7 October 2023, provided they left in connection with the violence which rapidly escalated from 7 October 2023 in Israel, the Occupied Palestinian Territories or Lebanon, are covered by this exemption whether they left on, or after 7 October 2023.

Capital Disregard for Compensation Payments:

- 6.10 This instrument makes amendments to the following income-related benefit regulations:
- Income Support (General) Regulations 1987
 - Jobseeker's Allowance Regulations 1996

¹⁴ <https://www.legislation.gov.uk/ukxi/1994/1807>

- State Pension Credit Regulations 2002
 - Housing Benefit Regulations 2006
 - Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006
 - Employment and Support Allowance Regulations 2008
 - Universal Credit Regulations 2013
- 6.11 This instrument amends regulations relating to the listed income-related benefits to provide for a capital disregard in respect of payments made under the Victims of Overseas Terrorism Compensation Scheme.
- 6.12 An individual's income and capital may be taken into account when calculating whether they are entitled to income-related benefits and if so, the amount they are entitled to. This is to ensure that resources are used most effectively to meet the needs of benefit claimants.
- 6.13 His Majesty's Government (HMG) have declared some aspects of the violence from 7 October 2023 as incidents of terrorism, which means that victims can claim compensation through the Victims of Overseas Terrorism Compensation Scheme. This scheme was introduced under section 47 of the Crime and Security Act 2010¹⁵. Individuals can claim compensation if they themselves are injured, if they are a relevant family member of an individual killed, or both. Under existing entitlement rules, payments for personal injury are already covered by an indefinite disregard, but payment for family members of those killed are regarded as capital and would be taken into account when calculating entitlement to benefits, meaning a recipient may be entitled to less money or would not be entitled to the benefit at all.
- 6.14 Existing legislation disregards several forms of compensation for the purposes of calculating benefit entitlement, including payments made in connection with terrorist attacks in Manchester on 22 May 2017 and London on 22 March and 3 June 2017. There are also existing capital disregards for payments made to individuals under the Victims Payments scheme, for victims of the Troubles for anyone injured in the UK or Europe¹⁶.
- 6.15 These Regulations will add to the list of compensation schemes, for which payments are disregarded as capital for the calculation of income-related benefit entitlement, payments made under the Victims of Overseas Terrorism Compensation scheme. This will ensure compensation payments, including those paid to the family members of victims of the Hamas terrorist attack in Israel on 7 October 2023, are disregarded indefinitely as capital when calculating entitlement to income-related benefits.

7. Policy background

What is being done and why?

Habitual Residence Test and Past Presence Test Exemptions:

- 7.1 Those arriving from Israel, the Occupied Palestinian Territories or Lebanon would ordinarily need to satisfy the DWP residency tests before they could access the listed income-related and disability and carer benefits. This is because these tests apply to

¹⁵ <https://www.legislation.gov.uk/ukpga/2010/17>

¹⁶ <https://www.legislation.gov.uk/ukxi/2020/103/regulation/5/made>

everyone regardless of nationality, including UK and Irish nationals and those with immigration leave in the UK, unless they are exempt.

- 7.2 To ensure that those arriving from Israel, the Occupied Palestinian Territories or Lebanon are able to meet the residency conditions for relevant benefits as soon as possible for income-related and disability and carer benefits, these regulations will exempt those arriving from Israel, the Occupied Palestinian Territories or Lebanon 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 more quickly than would otherwise be the case and will be eligible subject to meeting all other entitlement conditions.
- 7.3 The speed of the escalation of violence in Israel, the Occupied Palestinian Territories and Lebanon has forced many people to flee their homes with very few or no belongings. In order to support individuals' arrival in the UK in such exceptional circumstances, the exemption from DWP residence tests will assist those who need access to benefits quickly as they settle in the UK as long as they meet the other eligibility criteria.

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

- 7.4 Relevant legislation provides that a claimant is required to meet the Habitual Residence Test to be eligible for income-related benefits including Universal Credit and Housing Benefit. The requirement of the Habitual Residence Test is designed to ensure that an individual can only access taxpayer funded benefits if they can show 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 (the Channel Islands, the Isle of Man or the Republic of Ireland) if he or she does not have a right to reside there.
- 7.5 "Habitual residence" is not defined further in legislation, but case law has established that, to be factually habitually resident in the UK, a claimant must (i) have 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.
- 7.6 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 Great Britain for a specified number of weeks over a reference period. To satisfy the Past Presence Test, those aged 16 or over need to have been present in Great Britain for 104 out of the last 156 weeks (104/156) and those aged 3-16 need to have been present in the Great Britain for 26 out of the last 52 weeks (26/52). A shorter test applies to children under age 3. Individuals who are terminally ill are also exempt from the Past Presence Test for disability benefits, but this exception does not apply to carer's allowance.
- 7.7 There are existing exemptions to both residence tests, such as for those granted refugee status and humanitarian protection (as well as their dependants). Specific exemptions have also been provided to assist individuals arriving in the UK in various exceptional situations such as after the fall of Kabul in Afghanistan in 2021, after the Russian invasion in Ukraine in 2022, and following the violence which suddenly escalated in Sudan in 2023.

Why is it being changed?

- 7.8 In recognition of, and in response to, the violence which rapidly escalated on 7 October 2023 in Israel, the Occupied Palestinian Territories and Lebanon, where individuals have had to flee their homes with very little, if any, planning and possessions, it is the UK Government's intention to assist people who arrive in the UK and who have the rights to reside in Great Britain, by ensuring 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 to the UK. As such, these regulations will exempt relevant people from residence tests for the listed benefits, to enable more immediate assistance subject to meeting other entitlement conditions, which would otherwise not be available.

What will it now do?

- 7.9 These Regulations will exempt from the factual Habitual Residence Test for income-related benefits, persons arriving in Great Britain who were residing in Israel, the Occupied Palestinian Territories or Lebanon immediately before the 7 October 2023, who left Israel, the Occupied Palestinian Territories or Lebanon in connection with the Hamas terrorist attack in Israel on 7 October 2023 or the violence which rapidly escalated in the region following the attack. This exemption will apply to those with a right of abode (including UK nationals), Irish nationals and those who have immigration leave in the UK with recourse to public funds. This will mean they will meet the residency conditions for the listed income-related benefits from day one and will be eligible subject to all other entitlement conditions being met.
- 7.10 These Regulations will also exempt from the Past Presence Test, as well as the factual Habitual Residence Test for disability and carer benefits, persons arriving in Great Britain having resided in Israel, the Occupied Palestinian Territories or Lebanon immediately before 7 October 2023 who left Israel, the Occupied Palestinian Territories or Lebanon in connection with the Hamas terrorist attack in Israel on 7 October 2023 or the violence which rapidly escalated in the region following the attack. This exemption will apply to those with a right of abode (including UK nationals), Irish nationals and those who have been granted leave under the immigration rules in the UK with recourse to public funds. This will mean they will meet the residency conditions for the listed disability and carer benefits much more quickly than would otherwise be the case and will be eligible subject to all other entitlement conditions being met.

Capital Disregard for Compensation Payments:

- 7.11 HMG have declared some aspects of the violence from 7 October 2023 as incidents of terrorism, which means that victims can claim compensation through the Victims of Overseas Terrorism Compensation Scheme. Payments under this scheme to family members of those killed in the attack would normally be treated as capital and taken into account when calculating entitlement to income-related benefits.
- 7.12 In line with the approach to other compensation schemes the Regulations will add payments made under the Victims of Overseas Terrorism Compensation scheme to the list of compensations schemes disregarded as capital for the relevant income related benefits. This will ensure compensation payments, including those paid to the family members of victims of the Hamas terrorist attack in Israel on 7 October 2023, are disregarded indefinitely as capital when calculating entitlement to income-related benefits.

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

- 7.13 Relevant legislation provides that a claimant's capital must be below the prescribed amount to be eligible for income-related benefits. The purpose of prescribing a capital threshold is to ensure that income-related benefits are paid to people who might otherwise face significant financial hardship. The prescribed threshold also provides that no person shall be entitled to benefits unless he or she is in genuine need of financial support.
- 7.14 The first £6,000 of capital (or £10,000 for claimants of some benefits if they are in a care home) is ignored and does not affect their benefit award. No benefit is payable if the total capital exceeds £16,000. For every £250 of capital between the lower and upper limit, an income of £1 a week is assumed, and this will reduce the amount of benefit payable. For Universal Credit, the amount is £4.35 a month. More generous rules apply to Pension Credit and pension age Housing Benefit. The first £10,000 of capital is ignored, and the claimant is treated as having a "deemed income" of £1 a week for every £500 of capital above this amount. There is no upper capital limit for Pension Credit.
- 7.15 Under existing rules, payments for personal injury are already covered by a 12-month capital disregard for working age income related benefits. For Pension Credit, the capital disregard for a payment to compensate for a personal injury is indefinite. This means that payments made under the Victims of Overseas Terrorism Compensation scheme for personal injury would benefit from a capital disregard. Payments made under the Victims of Overseas Terrorism Compensation scheme to family members of those killed are not covered by an existing capital disregard, and so would be taken into account when calculating entitlement to income-related benefits. This would include payments made to the eligible family members of those killed in the Hamas attack in Israel on 7 October 2023.

Why is it being changed?

- 7.16 There are existing disregards for compensation payments, including for the victims of the Manchester Arena bombing on 22 May 2017, and the terror attacks in London 22 March and 3 June 2017. It is the intention of His Majesty's Government that those who receive compensation payments under the Victims of Overseas Terrorism Compensation scheme also do not see any reduction to income related benefits as a result of such compensation payments.
- 7.17 It is not the intention of His Majesty's Government to differentiate between compensation payments made to victims of different terrorism attacks which are recognised under the Victims of Overseas Terrorism Compensation scheme. It follows that these regulations will cover all payments under the scheme, including any resulting from the Hamas attack in Israel on 7 Oct 2023.

What will it now do?

- 7.18 These Regulations will disregard as capital any payments made under the Victims of Overseas Terrorism Compensation scheme when calculating entitlement for the relevant income-related benefits. This will mean that those eligible for compensation payments under the scheme, including those paid to the family members of victims of the Hamas terrorist attack in Israel, will not have their entitlement to income related benefits impacted by the compensation payment.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to 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 Due to the urgency of the regulations 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 such the urgency provisions in the Social Security Administration Act 1992 have been relied upon¹⁷. The Regulations will be referred to the Social Security Advisory Committee as soon as practicable after the date on which they have been made. Letters have been sent to the Local Authority Associations and the Social Security Advisory Committee to inform them of these changes.

11. Guidance

11.1 Guidance will be issued to local authority staff and Department for Work and Pensions decision makers in line with the regulations to support this instrument coming into force.

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 business.

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 for Work and Pensions is firmly committed to evaluating and monitoring the impact of its policies. These are emergency measures intended to help those residing in Israel, the Occupied Palestinian Territories or Lebanon immediately before the 7 October 2023, who left Israel, the Occupied Palestinian Territories or Lebanon in connection with the Hamas terrorist attack in Israel on 7 October 2023 or the violence which rapidly escalated in the region following the attack, and as such the department will continue to review these provisions in response to developments in Israel, the Occupied Palestinian Territories and Lebanon.

14.2 The instrument does not include a statutory review clause.

¹⁷ <https://www.legislation.gov.uk/ukpga/1992/5/contents>

15. Contact

- 15.1 Morganna Clarke 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 Mims Davies, Minister for Social Mobility, Youth and Progression at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.