

EXPLANATORY MEMORANDUM TO
THE SOCIAL SECURITY (GENUINE AND SUFFICIENT LINK TO THE UNITED KINGDOM) (AMENDMENT) REGULATIONS 2024

2024 No. 936

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by the Command of His Majesty.

2. Declaration

- 2.1 The Rt Hon Sir Stephen Timms MP, Minister for Social Security and Disability at the Department for Work and Pensions confirms that this Explanatory Memorandum meets the required standard.
- 2.2 Ronan O'Connor, Deputy Director for International Strategy at the Department for Work and Pensions confirms that this Explanatory Memorandum meets the required standard.

3. Contact

- 3.1 Will Holland-King at the Department for Work and Pensions email: EU.AGREEMENTS@DWP.GOV.UK can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

- 4.1 The Social Security (Genuine and Sufficient Link to the United Kingdom) (Amendment) Regulations 2024 (“this Instrument”) removes the words ‘social security system’ following the phrase ‘genuine and sufficient link to the United Kingdom’ in the regulations for Carer’s Allowance, Attendance Allowance, Disability Living Allowance, and Personal Independence Payment (“the disability and carers’ benefits”).

Where does the legislation extend to, and apply?

- 4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.
- 4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. Policy Context

What is being done and why?

- 5.1 A person to whom a relevant European Union (EU) Regulation¹ applies who can show a genuine and sufficient link (GSL) to the UK is exempt from the Past Presence Test (PPT). Subject to meeting all eligibility criteria, they may gain access to disability or carers’ benefits.

¹ A relevant EU regulation refers to regulation 1408/1971 and regulation 883/2004 for the purpose of the coordination of social security systems, which is applied to those in scope of the Withdrawal Agreement, the EEA-EFTA Separation Agreement and the UK-Switzerland Citizens’ Rights Agreement.

5.2 This legislation amends the genuine and sufficient link (GSL) provisions for the disability and carers' benefits, placing on a statutory footing operational practice that has existed following a Court of Appeal judgment in 2019, which found the department's current wording of the GSL provisions for non-contributory social security benefits too narrow.

What was the previous policy, how is this different?

- 5.3 Usually, those arriving in the United Kingdom, including United Kingdom nationals, have no access to disability and carers' benefits until they meet the conditions of the Past Presence Test (PPT) and the factual Habitual Residency Test (HRT).
- 5.4 The PPT requires a claimant over the age of 16, to have been present in Great Britain for 104 out of the 156 weeks immediately before their claim (for children over 3 years old, they are required to have lived in Great Britain for at least 6 of the last 12 months).²
- 5.5 The HRT is not defined in legislation, but case law has established that, to be habitually resident in the UK, a claimant must have a settled intention to remain in the UK and have been resident for an "appreciable period of time". It is a factual assessment made on a case-by-case basis and on the balance of probability.
- 5.6 In 2011 the Court of Justice of the European Union (CJEU) judgment in the *Stewart* case, found that the application of the PPT was too exclusive in nature as it unduly favoured presence in the United Kingdom to the "exclusion of all other representative elements"³ which may demonstrate a connection between the claimant and the United Kingdom. The PPT could therefore be bypassed if a claimant could demonstrate a "genuine link" to the United Kingdom. Following this judgment, the department brought in domestic legislation and updated its guidance, requiring a decision maker to establish a claimant's GSL to the United Kingdom's social security system.
- 5.7 In 2019, the Court of Appeal held in *Kavanagh & Anor v The Secretary of State for Work and Pensions*⁴ that the current wording of the United Kingdom's non-contributory social security benefit regulations (which includes the disability and carers' benefits), was too narrow and incompatible with the earlier CJEU judgment (discussed above). A claimant need only demonstrate a "genuine and sufficient link to the United Kingdom" and not the "United Kingdom social security system".
- 5.8 This judgment was given immediate operational effect and incorporated into the decision makers' guidance in 2020. Since this time, the current operational policy is that eligible claimants need only demonstrate a GSL to the United Kingdom, which may include considerations beyond contributions to the domestic social security system, potentially taking into consideration the relationship between the claimant and the United Kingdom, family circumstances and other personal circumstances of the claimant.⁵
- 5.9 This instrument will not change the operational process which has been established and implemented since 2019. It will regularise the differences between the existing legislation and the current operational guidance by removing the words 'social security system' following the phrase 'genuine and sufficient link to the United Kingdom'.

² Where applicable, the Regulations being amended set out the GSL exemption to the PPT. These form part of the legislative framework to determine the residency conditions to be eligible for non-contributory benefits.

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0503>

⁴ <https://www.bailii.org/ew/cases/EWCA/Civ/2019/272.html>

⁵ <https://assets.publishing.service.gov.uk/media/669fbd5349b9c0597fdb02f4/admc2.pdf> C2130 prescribes how claimants should be assessed using the GSL regarding establishing eligibility for Personal Independence Payment. These instructions are mirrored for Carer's Allowance, Attendance Allowance, and Disability Living Allowance.

6. Legislative and Legal Context

How has the law changed?

6.1 This Instrument will amend the following Regulations:

The Social Security (Invalid Care Allowance) Regulations 1976 (S.I. 1976/409)⁶

The Social Security (Attendance Allowance) Regulations 1991 (S.I. 1991/2740)⁷

The Social Security (Disability Allowance) Regulations 1991 (S.I. 1991/2890)⁸

The Social Security (Personal Independence Payment) Regulations 2013 (S.I. 2013/377)⁹

6.2 This Instrument will remove the words ‘social security system’ following the phrase ‘genuine and sufficient link to the United Kingdom’.

Why was this approach taken to change the law?

6.3 This is the only possible approach to make the necessary changes. This instrument will tidy up the statute book to provide legal certainty and align with departmental decision-making processes.

6.4 The policy intent of the genuine and sufficient link (GSL) exemption from the PPT has been met by this Instrument as it recognises that a claimant should only be required to demonstrate a link to the UK, not just the UK social security system.

7. Consultation

Summary of consultation outcome and methodology

7.1 This Instrument was referred to the Social Security Advisory Committee on 21 May 2024, who confirmed they are content for the regulations to proceed.

7.2 Drafts of this Instrument have been shared with the Scottish Government and Northern Ireland Executive.

7.3 No formal consultation was undertaken for this Instrument.

8. Applicable Guidance

8.1 These changes were incorporated into departmental guidance in 2020.

8.2 Relevant GOV.UK references to the GSL have been updated to reflect that claimants are only required to establish a GSL to the UK.¹⁰

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because our legislation is not a regulatory provision.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies because this instrument makes technical changes to existing secondary legislation which relates to Social Security.

9.3 The legislation does not impact small or micro businesses.

⁶ <https://www.legislation.gov.uk/uksi/1976/409/regulation/9A>

⁷ <https://www.legislation.gov.uk/uksi/1991/2740/regulation/2A>

⁸ <https://www.legislation.gov.uk/uksi/1991/2890/regulation/2A>

⁹ <https://www.legislation.gov.uk/uksi/2013/377/made>

¹⁰ <https://www.gov.uk/claim-benefits-abroad/disability-benefits>

9.4 There is no, or no significant, impact on the public sector because this instrument makes technical amendments to existing policy which do not impose any costs.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 Monitoring of customer experience and responses is undertaken following the usual operational process which includes monthly quality assurance of genuine and sufficient link (GSL) decisions.

10.2 The instrument does not include a statutory review clause because the instrument is not in scope of the definition of ‘Regulatory Provision’ provided in the Better Regulation Framework guidance.¹¹

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

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

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 (“relevant European Union Acts”). It does however relate to the withdrawal of the United Kingdom from the European Union because the GSL exemption is available to persons to whom a relevant EU Regulation applies, which for the purposes of the coordination of social security systems, refers to regulation 1408/1971 and regulation 883/2004 which is applied to those in scope of the Withdrawal Agreement, the EEA-EFTA Separation Agreement and the UK-Switzerland Citizens’ Rights Agreement.

¹¹https://assets.publishing.service.gov.uk/media/65420ee8d36c91000d935b58/Better_Regulation_Framework_guidance.pdf