

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

S.R. 2023 No. 184

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), 129A(2), 131(1), 132(3) and (4), 132A(3), 133(2)(a) and 171(1), (3) and (4) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992, Articles 6(5), 14(1) and (4) of, and paragraph 11(2) of Schedule 1 to, the Jobseekers (Northern Ireland) Order 1995, sections 1(5)(a), 15(3) and (6) and 19(1) to (3) of the State Pension Credit Act (Northern Ireland) 2002, section 17(1) and (3) of, and paragraph 5 of Schedule 2 to, the Welfare Reform Act (Northern Ireland) 2007 and Articles 9(5)(a), 48(1) and (2), 82(3), 97(1) and 99(1)(a) of, and paragraphs 4(1) and (3) of Schedule 1 to, the Welfare Reform (Northern Ireland) Order 2015 and is subject to the negative resolution procedure.

2. Purpose

- 2.1 This legislation, with effect from 28 October 2023, inserts an additional 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. This new category covers a person who was residing in Israel, the Occupied Palestinian Territories⁽¹⁾ 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 28 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.

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

3. Background

Habitual Residence Test and Past Presence Test

3.1 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)

3.2 Pursuant to section 115 of the Immigration and Asylum Act 1999 (c. 33), 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 (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.

3.3 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.

- 3.4 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 those who arrive in NI, 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.
- 3.5 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 claimant is both present in NI when they make their claim and has also been present in NI for a prescribed period before this. There have been a number of modifications to the test over time.
- 3.6 These Regulations will add to the disability and carer benefit regulations an additional category of exempt persons to those listed under the relevant provisions for the purpose of both the factual Habitual Residence Test and the Past Presence Test. This category is those who arrive in NI, 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.
- 3.7 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.
- 3.8 Those arriving from Israel, the Occupied Palestinian Territories or Lebanon would ordinarily need to satisfy the residency tests before they could access the listed income-related, and disability and carer benefits. This is because these tests apply to everyone in the UK, including UK and Irish nationals, and those with immigration leave in the UK, unless they are exempt.

- 3.9 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 NI in such exceptional circumstances, the exemption from the residency tests will assist those who need access to benefits quickly as they settle in NI as long as they meet the other eligibility criteria.
- 3.10 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.
- 3.11 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.
- 3.12 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. To satisfy the Past Presence Test, those aged 16 or over need to have been present in NI for 104 out of the last 156 weeks (104/156) and those aged 3-16 need to have been present in NI 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.
- 3.13 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 NI 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.

- 3.14 In recognition of, and in response to, the violence which 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 a right to reside/immigration leave 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 in 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.
- 3.15 These Regulations will exempt from the factual Habitual Residence Test for income-related benefits, persons arriving in NI, 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. 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.
- 3.16 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 Northern Ireland 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

- 3.17 This Rule makes amendments to the following income-related benefit regulations:
- Income Support (General) Regulations (Northern Ireland) 1987
 - Jobseeker's Allowance Regulations (Northern Ireland) 1996
 - State Pension Credit Regulations (Northern Ireland) 2003
 - Housing Benefit Regulations (Northern Ireland) 2006
 - Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations (Northern Ireland) 2006
 - Employment and Support Allowance Regulations (Northern Ireland) 2008
 - Universal Credit Regulations (Northern Ireland) 2016

- 3.18 This Rule 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.
- 3.19 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.
- 3.20 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.
- 3.21 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.
- 3.22 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, meaning a recipient may be entitled to less money or might not be entitled to benefit at all. This would include payments made to the eligible family members of those killed in the Hamas attack in Israel on 7 October 2023.
- 3.23 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 2010 (c. 17). Individuals can claim compensation if they themselves are injured, if they are a relevant family member of an individual killed, or both.
- 3.24 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 Europe.

- 3.25 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.
- 3.26 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.
- 3.27 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.
- 3.28 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.

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, Past Presence, and Capital Disregards) (Amendment) Regulations 2023 (S.I. 2023/1144), which come into force on 27th October 2023.

11. Additional Information

11.1 Not applicable.