

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

S.R. 2023 No. 80

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

2. Purpose

- 2.1 This legislation, with effect from 18 May 2023, inserts a 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. The category covers those arriving in NI who resided in Sudan before 15 April 2023 and left Sudan in connection with the violence which rapidly escalated on 15 April 2023 in Khartoum and across Sudan.

3. Background

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, 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 (c. 33). For those with a right of abode (which includes UK nationals) and Irish nationals, they 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, having resided in Sudan before 15 April 2023 and left Sudan in connection with the violence which rapidly escalated on 15 April 2023 in Khartoum and across Sudan. 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 thresholds.
- 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 as well as being present in NI at the time a claim is made for a benefit, that the claimant has also been in NI for a prescribed period of time before entitlement. 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 provision for the purpose of both the factual Habitual Residence Test and the Past Presence Test. This category is those who arrive NI having resided in Sudan before 15 April 2023 and left Sudan in connection with the violence which rapidly escalated on 15 April 2023 in Khartoum and across Sudan. 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 For both the Habitual Residence Test and Past Presence Test exemptions, individuals will need to have been resident in Sudan prior to the escalation of violence. This aligns with the UK Government's intention to assist those arriving in the UK who have had to flee their homes and country of residence. People who resided in Sudan before 15 April 2023, provided they left in connection with the violence which rapidly escalated on 15 April 2023 in Khartoum and across Sudan, are captured by this exemption whether they left shortly before, on, or shortly after 15 April 2023.
- 3.8 Those arriving from Sudan would ordinarily need to satisfy the residency tests, before they could access the listed income-related, and disability and carer benefits, as these tests apply to everyone in the UK, including UK and Irish nationals, and those with leave in the UK, unless exempt.
- 3.9 The speed of the escalation of violence in Sudan has forced many people resident in Sudan to flee their homes and the country, clearly with very few or no belongings. In order to support individuals' arrival in NI in such exceptional circumstances, the exemption to the residency tests will assist those who need access to benefits as they settle in NI.

- 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 purpose of the factual part of the Habitual Residence Test 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 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. The number of weeks depend upon the age of the disabled person. Those aged 16 or over are required to have been present in NI for 104 out of the last 156 weeks (shorter tests apply to those under 16 for Child Disability Living Allowance). The Past Presence Test does not apply to those who are terminally ill in Attendance Allowance, Disability Living Allowance and Personal Independence Payment.
- 3.13 There are various 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 the regulations brought forward in 2006 in response to the situation in Lebanon ([S.R. 2006 No. 320](#)), in 2021 in response to the fall of Kabul in Afghanistan ([S.R. 2021 No. 269](#)), and in 2022 in response to the Russian invasion of Ukraine ([S.R. 2022 No. 149](#)).
- 3.14 In recognition of, and in response to, the very sudden and difficult situation caused by the violence which rapidly escalated on 15 April 2023 in Khartoum and across Sudan, in which individuals will have had to flee Sudan with very little, if any, planning and possessions, it is the UK Government’s intention to assist those arriving in the UK, and to ensure that 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 arriving in NI from residence tests for the listed benefits, so as to enable more immediate assistance subject to meeting other entitlement conditions, which would otherwise not be available.
- 3.15 These Regulations will exempt persons arriving in NI having resided in Sudan before 15 April 2023 and left Sudan in connection with the violence which rapidly escalated on 15 April 2023 in Khartoum and across Sudan, from the Habitual Residence Test for income-related benefits. This exemption will apply to those

with a right of abode (including UK nationals), Irish nationals and those who have 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 persons arriving in NI having resided in Sudan before 15 April 2023 and left Sudan in connection with violence which rapidly escalated on 15 April 2023 in Khartoum and across Sudan from the Past Presence Test, as well as the factual Habitual Residence Test for disability and carer benefits. This exemption will apply to those with a right of abode (including UK nationals), Irish nationals and those who have been granted leave under or outside the 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 from day one and will be eligible subject to all other entitlement conditions being met.

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 and Past Presence) (Amendment) Regulations 2023 (S.I. 2023/532), which come into force on 15th May 2023.

11. Additional Information

11.1 Not applicable.