

EXPLANATORY MEMORANDUM TO
THE SOCIAL SECURITY (HABITUAL RESIDENCE AND PAST PRESENCE)
(AMENDMENT) REGULATIONS 2022

2022 No. 344

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 This legislation, with effect from 22 March 2022, inserts a category to the list of persons who are exempted from having to satisfy the Habitual Residence Test (HRT) and Past Presence Test (PPT) for the listed benefits. The category covers those who have left Ukraine in connection with the Russian invasion on 24 February 2022 and who were residing in Ukraine immediately before 1 January 2022.
- 2.2 An amendment is also made in the listed income-related benefits, to the existing list of persons exempted from having to satisfy the HRT, to make clear that all those granted types of leave outside the Immigration Rules (LOTRs) are exempted from the HRT requirement for the listed benefits.
- 2.3 A further amendment is made in the listed disability and carer benefits to make it clear that persons with refugee status or humanitarian protection under the immigration rules, and those granted leave as a dependant of these persons, are also exempted from the HRT requirement for the listed disability and carer benefits.

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 Ukraine and the immediate need to provide support to those arriving from Ukraine. Delay in the legislation coming into force will cause potential delays in access to benefits and services.
- 3.2 The legislation is also urgently required because:
 - (i) As explained at paragraph 2.2, and further below, an amendment is made to broaden a current exemption in income related benefit legislation to enable all those granted LOTR to be exempt from the HRT requirement for the listed benefits. Without this amendment, those who have already arrived from Ukraine and those arriving, until such time as the Home Office Ukraine Schemes are made part of the Immigration Rules, will not be able to access income related benefits immediately should this be needed. This is because they would be subject to meeting an existing residence requirement which can take up to three months to establish.

(ii) DWP had intended to align exemptions from residency tests with the new schemes being introduced for those arriving from Ukraine. This has not been possible as the schemes have not become part of immigration rules as yet. It has therefore become necessary to introduce general exceptions from the residency tests for those either with leave inside or outside of immigration rules. Anyone arriving in the UK under one of the Home Office schemes as a result of the invasion will however still be able to benefit from these exemptions.

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 and 5) 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 and 5) 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

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

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

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

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

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

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

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

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

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

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

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

- 6.2 Pursuant to s. 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 has been granted leave, whether under or outside the Immigration Rules, by the Secretary of State for the Home Department which is with recourse to public funds. For persons who have a right of abode, recourse to public funds is inherent in that status.
- 6.3 The HRT 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.
- 6.4 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 HRT. This category is those who have a right of abode or leave in the UK, and who have left Ukraine in connection with the Russian invasion which took place on 24 February 2022 and who were residing in Ukraine immediately before 1 January 2022. Individuals will still need to meet all other benefit specific eligibility requirements, such as income thresholds.
- 6.5 These Regulations also amend an existing provision for income-related benefits which exempts from the HRT people with certain types of LOTRs. This amendment provides that all those granted LOTRs by the Secretary of State for the Home Department can be exempt from the HRT. This will align the wording of this general exemption with the current policy rationale for how and when the Secretary of State for the Home Department grants LOTRs. Such leave is granted on an exceptional basis taking into account the particular circumstances of an individual and will include those granted LOTR (which is on the basis of the HO policy on exceptional leave on compelling compassionate grounds) because of the situation in Ukraine but will also encompass other people granted such leave in the future.
- 6.6 The PPT, in addition to the factual HRT, is part of the eligibility criteria for claiming certain disability and carer benefits. The PPT ordinarily ensures that as well as being present in the UK at the time a claim is made for a benefit, that the claimant has also been in the UK for a prescribed period of time before entitlement.
- 6.7 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 both the HRT and the PPT. This new category is those who have a right of abode or have been granted leave under or outside the Rules in the UK with recourse to public funds and who have left Ukraine in connection with the Russian invasion which took place on 24 February 2022 and who were residing in Ukraine immediately before 1 January 2022. Individuals will still need to meet all other benefit specific eligibility requirements, such as the age criteria (a claimant needs to be over the age of 16 to claim for PIP).
- 6.8 There is no existing exemption from the PPT for people granted LOTRs in the regulations for the disability and carer benefits.
- 6.9 These Regulations also amend an existing provision for disability and carer benefits to make clear that persons with refugee status or humanitarian protection under the immigration rules, and those granted leave as a dependant of these persons, are also exempted from the factual habitual residence requirement for the listed disability and

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

carer benefits. This confirms the policy intention that these groups are able to meet the residency requirements for the disability and carer benefits from day one.

- 6.10 For both the HRT and PPT exemptions individuals will need to have been resident in Ukraine prior to the Russian invasion. This aligns the position with the Government's commitment on assisting those coming to the UK who have had to flee their homes and country of residence. Further, the Home Office has prioritised granting leave to those arriving under the concessionary Ukraine Scheme which covers those resident in Ukraine immediately before 1 January 2022. The 1 January 2022 date will mean that those who left as a result of the Russian threat, but in advance of the actual Russian invasion will not be excluded.

7. Policy background

What is being done and why?

- 7.1 The Home Office has announced the Ukraine Scheme¹³ to allow Ukrainian family members (and certain eligible non Ukrainian family members) of British citizens and persons settled in the UK, to come to the UK. This scheme covers extended family members of the British citizen or person settled in the UK, and their immediate family members. A second sponsorship route, "Homes for Ukraine"¹⁴, has been announced by the Department for Levelling Up, Housing and Communities which will offer a route for individuals, charities, community groups and businesses in the UK to "sponsor" an individual in the Ukraine to come to the UK by agreeing to provide accommodation for a minimum of 6 months.
- 7.2 The Home Office has announced that those arriving in the UK from Ukraine under the Ukraine Scheme and the sponsorship route will be granted 'Leave to Enter or Remain' for 36 months, with the exception of arrivals before the Home Office legislation comes into force who will be granted 36 months LOTR (on the basis of the HO policy for exceptional leave on compelling compassionate grounds). This leave provides the right to work and recourse to public funds, including access to benefits and services.
- 7.3 The Department for Work and Pensions also recognises that there will be others who were resident in Ukraine, who have fled in response to the Russian invasion, and who have or will arrive in the UK. This will include individuals with pre-existing leave in the UK, and UK nationals.
- 7.4 Those arriving from Ukraine would ordinarily need to satisfy the HRT, and the PPT, before they could access the listed income-related, and disability and carer benefits, as these tests apply to all those who have recently arrived in the UK including UK nationals, and those with pre-existing leave.
- 7.5 To ensure that those arriving from Ukraine are able to meet the residency conditions for relevant benefits from day one, these regulations will exempt those arriving from Ukraine from the HRT and the PPT. This will mean that they will meet the residency conditions for the listed income-related and disability and carer benefits from day one and will be eligible subject to all other entitlement conditions being met.

¹³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1060447/ukraine-scheme-guidance.pdf

¹⁴ <https://homesforukraine.campaign.gov.uk/>

- 7.6 Exempting from residence tests has previously been done in exceptional situations such as the regulations brought forward in 2006 in response to the situation in Lebanon¹⁵ and in 2021 in response to the fall of Kabul in Afghanistan¹⁶.
- 7.7 The speed at which the Russian invasion has escalated has forced large volumes of residents in Ukraine to flee their homes and the country, clearly with little or no belongings. In terms of assistance of those who have pre-existing links with the UK, and in order to facilitate arrival in the UK in such exceptional circumstances, the exemption from the PPT will include all those arriving from Ukraine including fleeing UK nationals and those with pre-existing immigration status. Many will be returning as family units where each family member ought to be provided the same support in the UK. Further context is provided at paragraph 7.15.
- 7.8 A new amendment is also being made to the existing HRT exemption for those granted LOTRs for income-related benefits. This will broaden the exemption in that it will now apply to clarify that this exemption applies to all those granted whichever type of LOTRs with recourse to public funds in line with how the Secretary of State for the Home Department grants exceptional leave. Such leave is always granted outside of the Immigration Rules but can for example be discretionary leave if granted for reasons such as asylum and Art 3 medical grounds and LOTR if granted for reasons that are on the basis of compelling compassionate grounds. The latter type of leave is not covered by the existing HRT exemption but is what is being granted under the concessionary Ukraine Scheme to those arriving presently in the UK and who are likely to need more immediate support, of which access to income related benefits is key. Whichever type of leave outside the Immigration Rules which the Secretary of State for the Home Department grants in the future where immediate access to income related benefits is needed will now be covered by this exemption. This is also an important and necessary change therefore for any future humanitarian crisis or other situations of exceptionality, where, if granted with recourse to public funds, the Secretary of State for the Home Department has assessed that a person needs such immediate assistance. If such a person has not already resided in the UK long enough to satisfy the factual habitual residence test, they will now be exempt, and if they have resided in the UK for that period, they would have met the test anyway.
- 7.9 An amendment has also been made to the existing exemption for disability and carer benefits, for persons with refugee status or humanitarian protection under the immigration rules, and those granted leave as a dependant of these persons, in order that they are also now exempt from the factual habitual residence test. In the majority of cases individuals would have satisfied the factual habitual residence conditions by the point their asylum claim was concluded and (with refugee or humanitarian protection status granted) such that the factual habitual residence requirement would not have been a barrier to eligibility, this amendment clarifies that those with these forms of leave will meet the residency requirements from day one.

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

- 7.10 A claimant is required to meet the HRT to be eligible for income-related benefits including Universal Credit and housing benefit. The purpose of the factual part of the HRT 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

¹⁵ <https://www.legislation.gov.uk/uksi/2006/1981/made>

¹⁶ <https://www.legislation.gov.uk/en/uksi/2021/1034/made>

shall be treated as habitually resident in the UK if he or she does not have a right to reside there.

- 7.11 “Habitual residence” is not defined in legislation but case law has established that, to be factually 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.
- 7.12 For disability and carer benefits, a claimant will, in addition to being considered factually habitually resident, need to meet the PPT 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. Those aged 16 or over are required to have been present in the UK for 104 out of the last 156 weeks. PPT does not apply if you are terminally ill in AA, DLA and PIP.
- 7.13 There are existing exemptions for those granted refugee status and humanitarian protection (as well as their dependants) for both tests. For the HRT there is also an existing exemption for those granted LOTRs where this is: discretionary leave, granted under the Destitution Domestic Violence concession, granted by virtue of regulation 3 of the Displaced Persons (Temporary Protection) Regulations 2005, or granted under the Afghan Citizen’s Resettlement Scheme.
- 7.14 There are also existing exemptions from the PPT and the factual habitual residence requirement for disability and carer benefits for those granted leave to enter or remain under the Afghan relocation and resettlement schemes, and those granted leave as a dependant of those granted leave under the Afghan Relocations and Assistance Policy or the previous scheme for locally-employed staff in Afghanistan.

Why is it being changed?

- 7.15 In recognition of, and in response to, the very sudden and difficult situation caused by the Russian invasion, in which individuals will have had to flee Ukraine with very little, if any, planning and possessions, it is the UK Government’s policy 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 from residence tests for the listed benefits, so as to enable immediate assistance, which would otherwise not be available. A statement made by the Secretary of State for Levelling Up, Housing and Communities and Communities and Minister for Intergovernmental Relations in the House of Commons on March 14 2022, on the Government’s response to help those fleeing the conflict in Ukraine supports this approach: “The scheme will be open to all Ukrainian nationals and residents, and they will be able to live and work in the United Kingdom for up to three years. They will have full and unrestricted access to benefits, healthcare, employment and other support.”¹⁷
- 7.16 In line with the UK Government intention to support those fleeing from Ukraine, these Regulations will ensure those arriving from Ukraine are able to meet the residency conditions from day one for relevant benefits. Without this change individuals would not be eligible to claim these benefits until they had been resident in the UK for the relevant periods.

- 7.17 The amendment to the existing HRT exemption in income-related benefit legislation for those granted LOTRs will broaden the exemption to align with the policy intention, that all those granted LOTRs should be exempt from the HRT for income-related benefits, including those arriving from Ukraine who are granted LOTR by the HO on compelling compassionate grounds.
- 7.18 The amendment to the existing exemption for disability and carer benefits, to include those persons with refugee status or humanitarian protection under the immigration rules, and those granted leave as a dependant of these persons, will clarify the position that they should also be exempt from factual habitual residence, and align with the policy intention that these cohorts should meet the residency requirements for disability and carer benefits from day one.

What will it now do?

- 7.19 These Regulations will exempt persons who have left Ukraine in connection with the Russian invasion on 24 February 2022, and were residing in Ukraine immediately before 1 January 2022, who have a right of abode or leave in the UK with recourse to public funds, from the HRT for income-related benefits. 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.
- 7.20 These Regulations amend the existing list of those exempt from the HRT when they have leave outside the Immigration Rules to broaden it so that all those granted LOTRs are exempted from the HRT for income-related benefits.
- 7.21 These Regulations will also exempt persons who have a right of abode or have been granted leave under or outside the Rules in the UK with recourse to public funds, who left Ukraine in connection with the Russian invasion on 24 February 2022, and were residing in Ukraine immediately before 1 January 2022, from the PPT, as well as the HRT for disability and carer benefits. 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.
- 7.22 These Regulations will amend the existing list of those exempt from the factual habitual residence requirement for disability and carer benefits to include those persons with refugee status or humanitarian protection under the immigration rules, and those granted leave as a dependant of these persons.

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 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 the urgency provisions have been relied upon. 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.

- 10.2 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 Department for Work and Pensions decision makers in line with the regulations coming into force 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 for Work and Pensions is firmly committed to evaluating and monitoring the impact of its policies. These are emergency measures intended to help people leaving Ukraine as a result of the Russian invasion on 24 February 2022, and as such the department will continue to review these provisions in response to developments in Ukraine.

- 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 David Rutley, Minister for Welfare Delivery at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.