

EXPLANATORY MEMORANDUM TO
THE SOCIAL SECURITY (HABITUAL RESIDENCE AND PAST PRESENCE)
(AMENDMENT) (NO. 2) REGULATIONS 2022

2022 No. 990

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 His Majesty.

2. Purpose of the instrument

- 2.1 This instrument, with effect from 18 October, will correct a drafting error in The Social Security (Habitual Residence and Past Presence) (Amendment) Regulations 2022¹ (the “Principal Regulations”). In connection with the Russian invasion of Ukraine, the Principal Regulations inserted 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 identified drafting error meant that Irish citizens were not necessarily covered by the exemption which this instrument will correct.
- 2.2 This explanatory memorandum should be read in conjunction with the explanatory memorandum for the Social Security (Habitual Residence and Past Presence) (Amendment) Regulations 2022².

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of Part 2 (Regulation 2) is England and Wales and Scotland. The territorial extent of Part 3 (Regulation 3 and 4) is England and Wales. The amendments made by Part 4 (Regulation 4) have the same extent as the respective provisions amended.
- 4.2 The territorial application of Part 2 (Regulation 2) is England and Wales and Scotland. The territorial application of Part 3 (Regulation 3) is England and Wales. The territorial application of the amendments made by Part 4 (Regulation 4) follows the application of the respective provisions amended.

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.

¹ <https://www.legislation.gov.uk/uksi/2022/344/made>

² <https://www.legislation.gov.uk/uksi/2022/344/memorandum/contents>

6. Legislative Context

6.1 This instrument makes amendments to the following benefit legislation:

Relating to income-related benefits (referred to as the “income-related benefit regulations”):

- Income Support (General) Regulations 1987³
- Jobseeker’s Allowance Regulations 1996⁴
- State Pension Credit Regulations 2002⁵
- Housing Benefit Regulations 2006⁶
- Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006⁷
- Employment and Support Allowance Regulations 2008⁸
- Universal Credit Regulations 2013⁹

Relating to disability and carer benefits (referred to as the “disability and carer benefit regulations”):

- Social Security (Invalid Care Allowance) Regulations 1976¹⁰
- Social Security (Attendance Allowance) Regulations 1991¹¹
- Social Security (Disability Living Allowance) Regulations 1991¹²
- Social Security (Personal Independence Payment) Regulations 2013¹³

6.2 Pursuant to the income-related benefits regulations, in order to access the income-related benefits, as well as meeting the other eligibility conditions, a person must be factually habitually resident and have a legal right to reside in the Common Travel Area. This is commonly referred to as the “Habitual Residence Test”.

6.3 Pursuant to the disability and carer benefit regulations, to access the disability and carer benefits, only the factual element of the Habitual Residence Test applies. The Past Presence Test is also part of the eligibility criteria for claiming disability and carer benefits. The Past Presence Test 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.

6.4 The Principal Regulations added to the income-related benefit regulations an additional category of exempt persons to those listed under the relevant provisions for the purpose of the Habitual Residence Test. The Principal Regulations made the same amendment in respect of the factual element of the Habitual Residence Test, and the Past Presence Test in the disability and carer benefit regulations. This new category was those who have a right of abode or have been granted leave to enter or remain in

³ <https://www.legislation.gov.uk/uksi/1987/1967>

⁴ <https://www.legislation.gov.uk/uksi/1996/207>

⁵ <https://www.legislation.gov.uk/uksi/2002/1792>

⁶ <https://www.legislation.gov.uk/uksi/2006/213>

⁷ <https://www.legislation.gov.uk/uksi/2006/214>

⁸ <https://www.legislation.gov.uk/uksi/2008/794>

⁹ <https://www.legislation.gov.uk/uksi/2013/376>

¹⁰ <https://www.legislation.gov.uk/uksi/1976/409>

¹¹ <https://www.legislation.gov.uk/uksi/1991/2740>

¹² <https://www.legislation.gov.uk/uksi/1991/2890>

¹³ <https://www.legislation.gov.uk/uksi/2013/377>

the UK under the immigration rules, as made under s3(2) of the Immigration Act 1971¹⁴, 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 still need to meet all other benefit specific eligibility requirements. This meant that the exempt groups meet the residency conditions and, subject to all other entitlement conditions being met, are eligible for the listed income-related benefits and disability and carer benefits from day one.

- 6.5 This instrument will add to the income-related benefit regulations an additional category of exempt persons to those listed under the relevant provisions for the purpose of the Habitual Residence Test, and the same category to the disability and carer benefit regulations for the purpose of the factual element of the Habitual Residence Test and Past Presence Test. This category is those who do not require leave to enter or remain in the UK, in accordance with section 3ZA of the Immigration Act 1971¹⁵. This cohort, in line with the conditions in the Principal Regulations, will need to have left Ukraine in connection with the Russian invasion on 24 February 2022 and have been resident in Ukraine immediately before 1 January 2022. This will mean that Irish citizens in those conditions will also be exempted from the residency conditions for the listed income-related benefits and disability and carer benefits.
- 6.6 This instrument also makes technical amendments to the Principal Regulations to correct minor drafting errors identified by the Joint Committee on Statutory Instruments.

7. Policy background

What is being done and why?

- 7.1 In response to the Russian invasion of Ukraine, the Principal Regulations came into force on the 22 March, which exempted those arriving from Ukraine from the Habitual Residence Test and the Past Presence Test. This meant that individuals would meet the residency conditions for the listed income-related and disability and carer benefits from day one and would be eligible subject to all other entitlement conditions being met.
- 7.2 Following the Principal Regulations coming into force a technical drafting error was identified which meant that Irish citizens were not explicitly covered by the drafting of the exemption. The exemptions in the Principal Regulations covered those with a right of abode in the UK or who were granted leave in accordance with the immigration rules. As Irish citizens are normally exempt from the requirement to hold leave to enter or remain in the UK, in accordance with section 3ZA of the Immigration Act 1971, and are not covered by the right of abode provision, they were not covered by the exemption as drafted.

Explanations

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

- 7.3 A claimant is required to meet the Habitual Residence Test to be eligible for income-related benefits. For disability and carer benefits, a claimant will, in addition to being

¹⁴ <https://www.legislation.gov.uk/ukpga/1971/77>

¹⁵ <https://www.legislation.gov.uk/ukpga/1971/77>

considered factually habitually resident, need to meet the Past Presence Test to be able to access the relevant benefits.

- 7.4 The Principal Regulations provided an exemption to the Habitual Residence Test in the income-related benefit regulations, and to the factual element of the Habitual Residence Test and the Past Presence Test in the disability and carer benefit regulations, for those who have a right of abode or have been granted leave under the immigration 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. However, Irish citizens are normally exempt from the requirement to hold leave to enter or remain in the UK, and do not have a right of abode, and were therefore inadvertently excluded from the exemption.

Why is it being changed?

- 7.5 The intention of the Principal Regulations was to provide an exemption to the residency tests for the listed benefits for all those who had fled Ukraine in connection with the Russian invasion on 24 February, who had been residing in Ukraine immediately before 1 January 2022. This exemption was intended to cover all those who had fled Ukraine regardless of nationality. This instrument will correct a deficiency in the drafting of the Principal Regulations, by adding persons who do not require leave to enter or remain in the UK in accordance with section 3ZA of the Immigration Act 1971 to the persons exempt from the residency tests. This will mean that Irish citizens will be covered by the exemption in line with the intention of the legislation.

What will it now do?

- 7.6 This instrument will add to the list of exempt persons those who do not require leave to enter or remain in the UK in accordance with section 3ZA of the Immigration Act 1971, who have left Ukraine in connection with the Russian invasion on 24 February 2022, and were residing in Ukraine immediately before 1 January 2022, from the Habitual Residence Test for income-related benefits, and from the factual element of the Habitual Residence Test and Past Presence Test for disability and carer benefits. This will mean that Irish citizens are covered by the exemption as intended. This will mean that they will meet the residency conditions and, subject to all other entitlement conditions being met, will be eligible for the listed income-related benefits and disability and carer benefits from day one.

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 These Regulations were referred to the Social Security Advisory Committee on 14 August 2022, who confirmed that they are content for the regulations to proceed without formal reference.

10.2 Consultation has taken place with Local Authority Associations in relation to Housing Benefit. No issues were raised.

10.3 Drafts of these Regulations have been shared with the Scottish Government and Northern Ireland Executive.

11. Guidance

11.1 Local Authority staff and Department for Work and Pensions decision maker guidance will be updated in line with these 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. This instrument is intended to benefit 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 These 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 Victoria Prentis at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.