EXPLANATORY MEMORANDUM TO

THE SOCIAL SECURITY (GENUINE AND SUFFICIENT LINK TO THE UNITED KINGDOM) (AMENDMENT) REGULATIONS (NORTHERN IRELAND) 2024

S.R. 2024 No. 163

1. 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) and 171(1) and (3) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 and Articles 5 and 82(3) of the Welfare Reform (Northern Ireland) Order 2015 and is subject to the negative resolution procedure.

2. Purpose

2.1 This Statutory Rule amends Regulations providing for Carer's Allowance, Attendance Allowance, Disability Living Allowance and Personal Independence Payment ("disability and carer benefits") placing on a statutory footing operational practice that has existed following a Court of Appeal judgment in 2019 which found the previous genuine and sufficient link (GSL) provisions for non-contributory social security benefits to be too narrow.

2.2 In practice the changes made by this legislation are already in operation, as Departmental guidance was revised following the 2019 judgment. These are technical amendments giving legislative effect to the judgment.

3. Background

3.1 A person to whom a relevant European Union (EU) Regulation applies[(1)] who can show a GSL to the UK is exempt from the Past Presence Test (PPT). Subject to meeting all eligibility criteria, they may gain access to disability and carer benefits.

3.2 Usually, those arriving in the United Kingdom (UK), including UK and Irish nationals, have no access to disability and carer benefits until they meet the conditions of the PPT and the factual Habitual Residence Test (HRT). To satisfy the PPT, a claimant aged 16 or over must have been present in NI for 104 out of the 156 weeks immediately before their claim (claimant children aged 36 months

(**1**) A relevant EU regulation refers to Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community and Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, which are applied to those in scope of the Withdrawal Agreement, the EEA EFTA Separation Agreement and the UK-Switzerland Citizens' Rights Agreement.

or over are required to have lived in NI for at least 26 of the last 52 weeks) [(2)]. The HRT is not defined in legislation, but case law has established that, to be habitually resident, a claimant must have a settled intention to remain in NI and have been resident for an "appreciable period of time". This is a factual assessment made on a case-by-case basis and on the balance of probabilities.

3.3 In 2011 the Court of Justice of the European Union (CJEU) judgment in the *Stewart* case had found that the application of the PPT was too exclusive in nature as it unduly favoured presence in the UK to the "exclusion of all other representative elements"[(3)] which may demonstrate a connection between the claimant and the UK. The PPT could therefore be bypassed if a claimant could demonstrate a "genuine link" to the UK. The Department amended domestic legislation and its guidance, requiring a decision maker to establish a claimant's GSL to the UK social security system.

3.4 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 carer 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".

3.5 Following the judgment in *Kavanagh* in 2019, the Department updated guidance for decision makers. The current operational policy is that eligible claimants need only demonstrate a GSL to the UK, which may include considerations beyond contributions to the domestic social security system, potentially taking into consideration the relationship between the claimant and the UK, family circumstances and other personal circumstances of the claimant.

3.6 This Rule will not change the current operational process. This Rule will tidy up the statute book to provide legal certainty. 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'.

3.7 This Rule will amend:

- The Social Security (Invalid Care Allowance) Regulations (Northern Ireland) 1976 (S.R. 1976 No. 99);
- The Social Security (Attendance Allowance) Regulations (Northern Ireland) 1992 (S.R. 1992 No. 20);
- The Social Security (Disability Living Allowance) Regulations (Northern Ireland) 1992 (S.R. 1992 No. 32); and
- The Personal Independence Payment Regulations (Northern Ireland) 2016 (S.R. 2016 No. 217).

(**2**) The GSL exemption to the PPT is set out in the Regulations being amended. 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

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 is content that these Regulations comply with section 24 of the Northern Ireland Act 1998 (Convention rights, etc.).

9. EU Implications

9.1 Not applicable. This Rule provides legal certainty in relation to the existing GSL exemption for persons to whom a relevant EU Regulation applies.

10. Parity or Replicatory Measure

10.1 The Great Britain Regulations are the Social Security (Genuine and Sufficient Link to the United Kingdom) (Amendment) Regulations 2024 (S.I. 2024/936), which come into force on 7th November 2024.

11. Additional Information

11.1 Not applicable.