EXPLANATORY MEMORANDUM TO

THE SOCIAL SECURITY (HABITUAL RESIDENCE AND PAST PRESENCE) (AMENDMENT) REGULATIONS 2023

2023 No. 532

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.

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 15 May 2023, inserts a category into the list of persons who are exempted from having to satisfy the Habitual Residence Test and Past Presence Test for the listed benefits. The category covers those arriving in the UK 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. 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 volatile situation in Sudan and the immediate need to be able to provide support to those arriving from Sudan. Delays in the legislation coming into force would delay access to benefits and services for those who need it.

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 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 1987[1]
- Jobseeker's Allowance Regulations 1996[2]
- State Pension Credit Regulations 2002[3]
- Housing Benefit Regulations 2006[4]
- Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006[5]
- Employment and Support Allowance Regulations 2008[6]
- Universal Credit Regulations 2013[7]

Disability and carer benefits

- Social Security (Invalid Care Allowance) Regulations 1976[8]
- Social Security (Attendance Allowance) Regulations 1991[9]
- Social Security (Disability Living Allowance) Regulations 1991[10]
- Social Security (Personal Independence Payment) Regulations 2013[11]

6.2 Pursuant to section 115 of the Immigration and Asylum Act 1999[12], 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. 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.

6.3 The Habitual Residence Test was introduced into income-related benefit regulations by the Income-Related Benefits Schemes (Miscellaneous Amendments) (No.3) Regulations 1994[13]. There have been a number of modifications to the test over time.

6.4 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 the UK, 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.

[1] https://www.legislation.gov.uk/uksi/1987/1967
[2] https://www.legislation.gov.uk/uksi/1996/207
[3] https://www.legislation.gov.uk/uksi/2002/1792
[4] https://www.legislation.gov.uk/uksi/2006/213
[5] https://www.legislation.gov.uk/uksi/2006/214
[6] https://www.legislation.gov.uk/uksi/2008/794
[7] https://www.legislation.gov.uk/uksi/2013/376
[8] https://www.legislation.gov.uk/uksi/1976/409
[9] https://www.legislation.gov.uk/uksi/1991/2740
[10] https://www.legislation.gov.uk/uksi/1991/2890
[11] https://www.legislation.gov.uk/uksi/2013/377
[12] https://www.legislation.gov.uk/ukpga/1999/33/section/115
[13] https://www.legislation.gov.uk/uksi/1994/1807

6.5 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 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. There have been a number of modifications to the test over time.

6.6 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 in the UK 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.

6.7 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.

7. Policy background

What is being done and why?

7.1 Those arriving from Sudan would ordinarily need to satisfy the DWP 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.

7.2 To ensure that those arriving from Sudan are able to meet the residency conditions for relevant benefits from day one, these regulations will exempt those arriving from Sudan from the Habitual Residence Test and the Past Presence Test. 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.

7.3 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 Lebanon[14], in 2021 in response to the fall of Kabul in Afghanistan[15], and 2022 in response to the Russian invasion of Ukraine[16].

7.4 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 the UK in such exceptional circumstances, the

[14] https://www.legislation.gov.uk/uksi/2006/1981/made
[15] https://www.legislation.gov.uk/en/uksi/2021/1034/made
[16] https://www.legislation.gov.uk/uksi/2022/344

exemption to the residency tests will assist those who need access to benefits as they settle in the UK.

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

7.5 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.

7.6 "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.

7.7 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 Great Britain 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 the UK 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.

7.8 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 the UK in various exceptional situations such as after the fall of Kabul in Afghanistan in 2021 and after the Russian invasion in Ukraine in 2022.

Why is it being changed?

7.9 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 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.

What will it now do?

7.10 These Regulations will exempt persons arriving in the UK 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.

7.11 These Regulations will also exempt persons arriving in the UK 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.

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 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 such 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 exemptions 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 Sudan in connection with the violence which rapidly escalated in Sudan on 15 April 2023, and as such the department will continue to review these provisions in response to developments in Sudan.

14.2 The Regulations do not contain a statutory review clause.

15. Contact

15.1 Farzana Choudhury 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, Director for International Strategy, at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.

15.3 Mims Davies, Minister for Social Mobility, Youth and Progression at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.