

Residence and Presence: ADP

Index

- Eligibility
- Ordinary residence in Scotland
- Habitual residence in the Common Travel Area
- Presence in the Common Travel Area
- Past presence in the Common Travel Area
- 'Subject to immigration control'
- Members of the armed forces and civil servants
- Mariners and continental shelf workers
- Temporary absence
- Effect of time spent in alternative accommodation / legal detention
- EU rules on social security coordination
- Personal scope of the EU social security coordination rules
- First claims from EEA member states, Switzerland, Ireland and Gibraltar
- Export to EEA member states, Switzerland, Ireland and Gibraltar
- Residence criteria and the EU Rules on Social Security Coordination
- Genuine and sufficient Link to Scotland

Introduction

- This chapter is relevant to Adult Disability Payment (ADP) applicants, both:
 - new applicants, and
 - those already in receipt of the assistance reporting a change of address.
- It describes how rules for ADP are applied to deciding if the applicant meets the residence and presence criteria.
- An applicant must satisfy a number of residence and presence criteria to be eligible for a ADP award. Those criteria differ depending on the applicant's personal circumstances. There are special rules for some European nationals and some exceptions which apply to specific categories of people.

Eligibility

- There are different tests which apply depending on both:
 - the applicant's nationality, and
 - the date on which they began living in their country of residence.
- The majority of applications are expected to be from UK nationals living in Scotland.
- UK nationals should be treated in the same way as European Economic Area (EEA) nationals if both of the following statements are true:

- they have been living abroad in another EEA member state or Switzerland since before 1 January 2021
- they have satisfied the conditions of the relevant settlement scheme in their country of residence.

If these two statements are true, then the individual is a member of the 'protected cohort' under the EU-UK Withdrawal Agreement. This group retains their rights under EU social security coordination rules despite EU exit. Individuals from EEA member states or Switzerland living in the UK become a member in the same way. See Personal scope of the EU social security coordination rules below.

- The EEA is comprised of the EU Member States plus Norway, Liechtenstein and Iceland. Switzerland is not in the EEA but the rules also apply there.
- The following countries are the member states of the EU:
 - Austria
 - Belgium
 - Bulgaria
 - Cyprus
 - Croatia
 - Czech Republic
 - Denmark (excluding the Faroe Islands)
 - Estonia
 - Finland (except the Åland Islands)
 - France (including Corsica, Guadeloupe, Martinique, Reunion and French Guiana, but excluding Monaco)
 - Germany
 - Greece (including Crete and the Greek islands)
 - Hungary
 - Ireland
 - Italy (including Sicily, Sardinia and Elba, but excluding the Vatican City and San Marino)
 - Latvia
 - Lithuania
 - Luxembourg
 - Malta
 - Poland
 - Portugal (including Madeira and the Azores)
 - Romania
 - Slovakia
 - Slovenia
 - Spain (including the Balearic Islands, the Canary Islands and the Spanish enclaves of Ceuta and Melilla)
 - Sweden
 - The Netherlands (excluding the Dutch Antilles)
- If the individual is any of these:
 - a UK national
 - a national of a country which is not in the EEA, a 'third country national'

- a national of an EEA member state who is not in the 'protected cohort'. See Personal Scope of the EU Coordination Rules below.
- then they must satisfy all of the following criteria¹:
- they are ordinarily resident in Scotland;
 - they are also habitually resident in the Common Travel Area (CTA);
 - they are present in the CTA on the date their application is made;
 - on the date of their application they have been present in the CTA for at least 26 of the preceding 52 weeks.
 - They are not 'subject to immigration control'.
- If the individual is either:
 - a national of an EEA member state or Switzerland and is in the protected cohort. See Personal scope of the EU Coordination Rules below.
 - a member of the family of an individual described above;
 - in some more rare and complex cases a third country national.
 then they must satisfy one of the following sets of criteria instead².
 - EEA and Swiss nationals in the protected cohort and living in the UK must:
 - be habitually resident in the UK;
 - be ordinarily resident in Scotland; and
 - be subject to Title III of Part 2 the Withdrawal Agreement between the UK and the EU. See EU Exit and the Withdrawal Agreement below³.
 - Individuals who are in the protected cohort living in Europe must be:
 - habitually resident in the EEA or Switzerland; and
 - have a genuine and sufficient link to Scotland⁴.
 - Nationals of the Republic of Ireland or Gibraltar also benefit from UK international social security agreements These broadly replicate the terms of the EU rules.
 - Individuals moving between Ireland and Scotland are therefore exempt from the requirement to be ordinarily resident in Scotland, if:⁵
 - they are habitually resident in the Republic of Ireland;
 - they have a Genuine and Sufficient Link to Scotland; and
 - a UK or Irish national.
 This means that individuals who live in Ireland can be eligible for ADP, as long as the UK remains the competent state for payment of that individual's benefits⁶.
 - Individuals living in Scotland who have moved there from Gibraltar are exempt from the requirement to be present in the Common Travel Area for 25 of the past 52 weeks, as long as they are:
 - Ordinarily resident in Scotland

¹ The Disability Assistance for Working Age People (Scotland) Regulations 2022, Reg 15 (1)

² Reg 20 (2)

³ Reg 19

⁴ Reg 20

⁵ Reg 15 (3)

⁶ Reg 15 (3) (c) (ii)

- Habitually resident in the United Kingdom⁷

These individuals can be of any nationality.

- Individuals living in Gibraltar can be eligible for ADP if:
 - they are habitually resident in Gibraltar; and
 - they have a genuine and sufficient link to Scotland⁸.

Ordinary residence in Scotland

- All applicants living in Scotland must be ordinarily resident in Scotland to be eligible for ADP, regardless of that individual's nationality⁹.
- Ordinary residence is established if:
 - someone lives in a particular place for the time being
 - their stay is of a short or long duration
 - there is continuity in their stay apart from temporary or occasional absences.
 - they have decided to live there voluntarily
- Ordinary residence has been defined by the courts over time rather than in legislation. It is a question of fact to be decided on the circumstances of each case whether and when ordinary residence has been established.
- A person can have more than one ordinary residence at the same time if they genuinely live between two addresses. For example, a student may have a term-time addresses for study and a family home where they spend holidays.
- The intentions of an individual with no fixed address are important in considering where they are ordinarily resident; decision makers should consider where they intend to live, what steps they have taken in that regard, and what their address history suggests.
- ADP regulations prevent an individual from receiving:
 - ADP and Disability Living Allowance (DLA) at the same time
 - ADP and Personal Independence Payment (PIP) at the same time¹⁰ADP is the form of assistance which replaces PIP and DLA for individuals living in Scotland. Decision makers should check whether the individual has an ongoing DLA or PIP award or application with DWP.

Examples on Ordinary Residence in Scotland:

Esme lives in Dundee. Esme is ordinarily resident in Scotland.

Jack lives in Carlisle and travels across the border into Scotland during the week each day for work. Jack is not ordinarily resident in Scotland.

⁷ Reg 19

⁸ Reg 20

⁹ Reg 15 (1) (a)

¹⁰ Reg 4

Ben lives in Carlisle. He attends university in Dumfries, where he lives in student accommodation during term time. Ben is ordinarily resident in both England and Scotland and can therefore qualify for ADP.

Habitual residence

- Habitual residence is a stricter test than ordinary residence. An individual can only have one habitual residence at a time.
- To be considered habitually resident a person must satisfy two conditions:
 - that they have lived in the place in question for an ‘appreciable’ period This is usually for a minimum of 1-3 months.¹¹; .
 - they have a ‘settled intention’ to continue living there for a reasonable although not necessarily permanent period. Consideration should be given to whether the settled intention is voluntary.
- The stronger the intention to settle in Scotland, the shorter the period required to establish habitual residence is likely to be. People who:
 - were formerly habitually resident in Scotland, and
 - are returning to Scotlandcan be considered habitually resident from the day they arrive back in the country. They do not have to have lived in Scotland for an appreciable period.
- Applicants to ADP who are either:
 - UK or third-country nationals,
 - EEA or Swiss nationals not in the protected cohort
 - must be habitually resident in the Common Travel Area (CTA). See Personal Scope of the EU Coordination Rules below. Different rules may apply to a family member of an EEA or Swiss national. See residence criteria for the ‘protected cohort’, below.
- The Common Travel Area (CTA) comprises the following:
 - The United Kingdom (England, Scotland, Wales and Northern Ireland)
 - The Republic of Ireland
 - The Isle of Man
 - The Channel Islands (Jersey and Guernsey)
- Most applicants to ADP will only have one address in Scotland. Where this is the case, that individual will be both:
 - ordinarily resident in Scotland
 - habitually resident in the Common Travel Area, as Scotland is in the CTA.Where a person lives between two addresses, one of which is outside Scotland, their other address must be in a CTA country.
- Whether and when habitual residence is established is a question of fact to be decided on the circumstances of each case. The following factors have been

¹¹ *Nessa v Chief Adjudication Officer* [1999] UKHL 41; see also CIS 1304/97 & CJSA 5394/98

described as relevant considerations by the courts in objectively assessing an applicant's 'settled intention'. This is not however an exhaustive list:

- making arrangements before arriving in Scotland such as accommodation, registration with local authorities, etc.
 - arranging to bring family members to Scotland
 - any existing and durable ties to Scotland
 - bringing substantial possessions with you to Scotland
- Certain groups are exempt from the habitual residence test, such as individuals with refugee status. In certain circumstances, individuals arriving in the UK from Afghanistan do not need to meet the habitual residence test, including people who have been awarded leave to enter or remain in the UK granted under the immigration rules under either (i) the Afghan Relocations and Assistance Policy ("ARAP"), (ii) the scheme ARAP replaced which was for locally employed staff in Afghanistan (sometimes known as the 'ex-gratia' scheme), (iii) or the Afghan Citizens Resettlement Scheme ("ACRS").
 - Individuals who are dependents of the individuals mentioned here, because they have been granted discretionary leave outside the immigration rules, are also exempted from having to meet the habitual residence test. "The Afghan Citizens Resettlement Scheme" was announced by the United Kingdom Government on 18 August 2021, More details can be found here: <https://www.gov.uk/guidance/afghan-citizens-resettlement-scheme>
 - The intentions of an individual with no fixed address are important in considering where they are habitually resident; as they have no address decision makers should consider where they intend to live, what steps they have taken in that regard, and what their address history suggests.

Examples on Habitual Residence in the Common Travel Area

Arnold has a permanent address in Toronto and regularly travels to the UK for business. He rents short-term self-catering accommodation in Scotland for the duration of his trip. He is ordinarily resident in Scotland, but his habitual residence is in Canada. As Canada is outside of the CTA, Arnold is not eligible for ADP.

Joe lives in Newcastle. He works in Scotland for a construction firm which puts him up in a rental flat in Edinburgh during the week. As both England and Scotland are in the Common Travel Area, Joe's habitual residence in Newcastle is in the CTA.

Presence in the Common Travel Area

- UK nationals, third country nationals and EEA and Swiss nationals who both:
 - have moved to the UK since the beginning of 2021
 - are applying for ADP
- must be present in the Common Travel Area at the date an application is made. There are some exceptions.
- Neither:

- serving Members of the Armed Forces or Civil Servants, or their families
- Mariners, Airmen and Continental Shelf Workers

need to be physically present in the CTA in the date of their application. See both Members of the Armed Forces and Civil Servants and Mariners, Airmen and Continental Shelf Workers below. Any absences in accordance with the rules on temporary absence can be treated as though the individual was actually present. See Temporary Absence below.

Past presence in the Common Travel Area

- Each of the following groups:
 - UK nationals
 - third country nationals, and
 - EEA and Swiss nationals not in the 'protected cohort'must have been present in the Common Travel Area for 26 of the past 52 weeks before the date when they apply for ADP¹², known as the 'past presence test'.
- There are certain situations in which no past presence test ever applies:
 - terminally ill applicants
 - applicants who are refugees¹³.
 - applicants arriving in the UK from Afghanistan who have been awarded leave to remain in the UK under either the Afghan Relocations and Assistance Policy, the previous scheme for locally-employed staff in Afghanistan (sometimes referred to as the ex-gratia scheme)¹⁴, or the Afghan Citizens Resettlement Scheme, and their dependents.¹⁵
- Both:
 - EEA or Swiss nationals in the 'protected cohort', and
 - their family membersapplying for ADP generally do not have to satisfy the past presence test. See Residence requirements under the Coordination Rules below.
- Some absences do not count for the purpose of the past presence test. Both temporary absences:
 - up to 13 weeks for any reason,
 - up to 26 weeks where the absence was to obtain medical treatment should be treated as presence. See Temporary absence below. Special rules also apply to some types of workers who are routinely sent overseas for work. See both Armed Forces And Civil Servants and Mariners, Airmen and Continental Shelf Workers below.
- A temporary absence is one which is expected to last for less than a year at the start. However, after 13 weeks the benefit will no longer be paid. Any additional periods of absence cannot be considered presence for past presence. See

¹² Reg 15 (1) (e)

¹³ Reg 21

¹⁴ Reg 15 (7)

¹⁵ The Social Security (Residence Requirements) (Afghanistan) (Scotland) Regulations 2021

Temporary Absence below. The same applies in cases where the absence is due to medical treatment, but the relevant period in these cases is 26 weeks.

Examples of past presence in the Common Travel Area

John makes an application for ADP in January 2023. He has been out of the CTA on holiday three times in the preceding 52 weeks, amounting to a total of 7 weeks. None of these absences are deducted from John's past presence. This is because they are all within the 13 week period allowed for temporary absence for any reason. John is treated as present for all of the preceding 52 weeks.

Sally makes an application for ADP in September 2022. She has recently returned to Scotland from New Zealand. She makes her application to ADP on 22 September, having arrived back in the UK on 20 July. As Sally has only been present in the CTA for 9 of the preceding 52 weeks she has not satisfied the past presence test, which would require an additional 17 weeks' presence.

James has a rare type of brain tumour which he has been receiving treatment for in the UK. He is taken to Germany for the purpose of receiving specialist radiotherapy. He is away for 12 weeks and is treated as present in the CTA for that period of time. His payments should continue during the absence and the 12 weeks can be treated as presence for any future past presence calculations.

'Subject to immigration control'

- An individual who is 'subject to immigration control' is not eligible for ADP¹⁶.
- An individual is subject to immigration control if they:
 - require leave to enter or remain in the UK and do not have it
 - have leave to enter or remain subject to the condition that they do not access public funds. This is known as 'No Recourse to Public Funds'/NRPF
 - have been awarded leave to enter or remain in the UK on the condition that someone will be responsible for their maintenance. This is known as a 'maintenance undertaking'.

Members of the armed forces and civil servants

- Where an individual is absent from the UK in the course of their employment as:
 - a member of the UK armed forces
 - a civil servant
 - a family member of one of these individuals¹⁷,they are treated as though they continue to meet the residence and presence conditions. This is when their absence from the UK is solely due to their work as a member of the forces or as a civil servant.

¹⁶ Reg 15 (1) (c)

¹⁷ Reg 17 (3) (b)

- A serving member of the UK armed forces can be any individual who is a member of a regular or reserve force as defined in the Armed Forces Act 2006:¹⁸
- ‘A civil servant’ means a person employed in the civil service of the state. Essentially this means individuals working for governments or their agencies.
- Someone is a family member of a member of the armed forces or a civil servant where they are that individual’s:
 - spouse
 - civil partner
 - son
 - daughter
 - step-son
 - step-daughter
 - father
 - father-in-law;
 - step-father
 - mother
 - mother-in-law
 - step-mother
 - a child in the care of that individual¹⁹.
- References to ‘step’ relationships or ‘in-laws’ are to be read as including situations where that relationship arises through civil partnership or marriage.
- Individuals falling within these groups are treated as meeting each of the relevant residence and presence criteria. This is for the duration of any work-related absence caused by their employment or the employment of a family member. This means that any ongoing awards of both mobility and daily living components should continue to be paid for the duration of those absences.
- These provisions also have effect retrospectively from the time of application. This applies when an individual in these categories or their family member has returned to the UK from time abroad for work. That time spent abroad counts towards any periods of past presence required.

‘Aircraft Workers’, Mariners and continental shelf workers

- ‘Aircraft Workers’, ‘Mariners’ and ‘continental shelf workers’ are treated as though they continue to meet the presence and past presence tests for the duration of any absence from the Common Travel Area caused by their job²⁰.
- A mariner is an individual who is or has been in employment either:
 - as a master or member of the crew

¹⁸ s374 Armed Forces Act 2006

¹⁹ Reg 17 (3) (b)

²⁰ Reg 18 (1)

- in any other capacity on board any ship or vessel. This is when the employment is for the purposes of that ship or vessel or her crew or any passengers or cargo or mails carried by the ship or vessel. The contract of employment must be entered into in the United Kingdom. It must be with for work carried out while the ship or vessel is on her voyage.²¹ . This can be wholly or partly.
- An aircraft worker is essentially the same as a mariner but whose work takes place on aircraft rather than a ship or vessel. Similarly to mariners, the aircraft worker's contract of employment must have been entered into in the UK.
- An individual is a 'continental shelf worker' if they are:
 - employed offshore in a specific geographic area
 - working on the exploration, exploitation, transport, storage or offloading of oil, gas or mineral resources.

The area prescribed in UK legislation²² includes UK territorial waters in the parts of the North Sea, the North Atlantic, the Irish Sea and the English Channel.

Examples on Armed Forces and Civil Servants

Zaynab lives on a UK military base in Belize, where she is stationed as part of her job as a soldier. Before Zaynab was posted to Belize she lived in Dunfermline, where she attended school. Zaynab is:

- *a serving member of the forces*
- *treated as though she continues to meet the residence and presence conditions for the duration of her stay in Belize.*

Milford has returned to the UK with his family after living for three years in UK military accommodation in Kenya. He was posted there by the Royal Air force. They are now living at their former home address in Wick. Milford is a serving member of the forces and he satisfied the residence and presence conditions before moving abroad. His absence from the UK was as a result of his employment. Therefore, Milford satisfies ADP residence and presence conditions during the three years he spent living in Kenya.

Temporary absence

- Rules on temporary absence apply both to new and ongoing claims. A temporary absence is defined as one which is expected at its beginning to last no more than 52 weeks²³. The absence ends when the person returns to the CTA.
- A person is absent from the CTA if that person is absent for the whole day from midnight to midnight. A person who is present in the CTA for only part of a day, is present on that day. This is when leaving or returning to UK.

²¹ Part 9, The Social Security (Contributions) Regulations 2001

²² Continental Shelf (Designation of Areas) Order 2013

²³ Reg 16 (2) (a)

- Where an award has been made, a ADP claim should continue to be paid for the first:
 - 13 consecutive weeks of any absence for any reason²⁴
 - 26 consecutive weeks of any absence caused by travelling abroad to receive medical treatment²⁵.
- The same periods, for the same reasons, can also be applied retrospectively when considering whether an applicant satisfies the past presence test.
- Absences from the CTA of up to:
 - 13 weeks for any reason
 - 26 weeks to receive medical treatment
 should be counted as presence for these purposes. The absences can be consecutive; an absence of 13 weeks for any reason can be followed by a medical absence of 26 weeks and ADP can remain in payment.
- The 26-week period only applies where the absence is for the medical treatment of the individual for either:
 - a disease, or
 - bodily or mental disablement
 which started before the claimant left the UK²⁶.
- During the period of temporary absence from UK, the treatment must be either:
 - undertaken by
 - under the supervision of
 a person appropriately qualified to carry out that treatment. 'Medical treatment' means medical, surgical or rehabilitative treatment. This includes any course, diet or other regimen²⁷.
- A claimant who goes abroad for a holiday and falls ill after leaving UK, where that illness does not relate to a pre-existing condition or disability :
 - is not absent for the specific purpose of being treated
 - would not satisfy the requirement that the treatment was for an incapacity or disablement condition which began before leaving the CTA.

Time spent in alternative accommodation / legal detention

- Individuals with entitlement to ADP can spend time living in alternative accommodation, such as a hospital or care home, or in legal detention, such as prison, without losing their entitlement to ADP.
- Spending time in prison will not make an individual habitually or ordinarily resident in that place; this is because they lack a settled and voluntary intention to remain there. In circumstances where an individual has no address outside the

²⁴ Reg 16 (1) (a)

²⁵ Reg 16 (1) (b)

²⁶ Reg 16 (1) (b) (i)

²⁷ Reg 16 (2) (b)

alternative accommodation or detention, decision makers should consider the individual's intention on where they intend to live together with their past address history in order to establish that individual's residence.

- Where an individual spends time living in a care home, consideration should be given to whether or not the individual has chosen to live there voluntarily, as this will be determinative of whether or not their ordinary and/or habitual residence has changed. In most cases these places will be in Scotland, so it will have no effect on their eligibility for ADP.
- In some situations there will therefore be no effect of time spent in one of these places on an individual's eligibility in terms of the residence and presence criteria. However, where an individual is in alternative accommodation – including hospitals- in a country outside of the Common Travel Area, this may affect whether they continue to meet the criteria on past presence and presence in the common travel area²⁸. Account should, in these circumstances, also be taken of the provision in relation to temporary absence, allowing 13 weeks absence for any reason and 26 weeks for medical treatment to be treated as presence in the CTA.²⁹

EU rules on social security coordination

- EU rules on social security coordination apply across the European Economic Area (EEA). The EEA is the EU Member States together with Iceland, Norway, Liechtenstein) and Switzerland. The rules do not replace national systems of social security with a single European one. All countries are free to decide:
 - who is insured under their legislation
 - which benefits are granted and under what conditions.

The coordination rules are intended to ensure that people can both:

- exercise their rights of free movement, and
 - not be adversely affected by the application of different national social security systems.
- The coordination rules depend on benefits paid in EEA member states or in Switzerland being classified into different categories. Some categories of benefit must be available to people living in a country other than the country in which their benefit is usually paid. Eligibility for benefits in other categories can be restricted to only those people living in the country where the benefit is paid.
 - A separate set of residency criteria therefore applies to some:
 - EEA member state
 - Swiss, and
 - third countrynationals who apply for ADP to Social Security Scotland. Both the presence and past presence tests have been ruled unlawful in this context by the European

²⁸ Reg 15(1)(d) and (e)

²⁹ Regulation 16

Court of Justice. This means individuals covered by EU rules do not have to satisfy those tests.

- The EU rules also require that some payments should continue to be made to individuals where they have left Scotland to live in an EEA member state or Switzerland. (This is known as ‘exportability’ – see Export, below). Individuals should be able to apply from abroad. (known as ‘first claims from abroad’ – see First Claims from Abroad, below).
- It is important to note that an award of ADP can include both or either:
 - the mobility component
 - the daily living component.
- These two components are in different EU classification categories and only the daily living component is subject to the coordination rules. The daily living component is classed as a ‘cash sickness benefit’ in EU law.
- The mobility component is a ‘special non-contributory benefit’ or ‘SNCB’ and is therefore never paid abroad. However, it can be awarded to individuals in Scotland even where the UK is not the competent state because it falls outside the scope of the coordination rules (see Competent State, below).

Personal scope of the EU coordination rules

- As a result of EU Exit, whether or not an individual is subject to the EU rules on social security coordination will depend on both
 - when that individual moved between European countries
 - whether or not they have remained in a ‘cross-border situation’ (by continuing to live abroad) until the point of their application.
- Individuals are subject to the EU rules if they are covered by Title III of Part 2 the Withdrawal Agreement between the UK and the EU. In most cases that will mean both
 - EEA or Swiss nationals who arrived in the UK before the end of 2020
 - a UK national living in another EEA member state or Switzerland who was living in that country before the end of 2020. These individuals are known as the ‘protected cohort’ while they remain in their cross-border situation.
- For someone to be part of this protected cohort in the UK they must have moved to the UK before 1 January 2021. Individuals who arrived before this date but have yet to apply for EU settled status are subject to immigration control and are therefore ineligible for ADP unless and until an application to the European Union Settlement Scheme (EUSS) is submitted, at which point the individual and any joining family members satisfy the residence and presence criteria unless they receive a negative EUSS decision and have exhausted all appeal rights against that decision. The basis for this position is that during an EUSS application process, individuals are not subject to immigration control unless and until they receive a negative decision and they have exhausted all appeal rights.

Individuals who arrive after the end of 2020 should be treated in the same way as third country nationals, except for where they are joining a family member with settlement status. Family members who are joining a member of their family who already has pre-settled or settled status are able to enter the protected cohort even if they arrive after the end of 2020, provided they make an application within 3 months of arrival. Those who apply after their initial three month period in the UK will be assessed on an individual basis by the Home Office; their EUSS status may be granted if the reason for their late application is accepted, and their rights will be protected during the assessment period.

- Individuals applying for settlement in the UK can be awarded either pre-settled or settled status. For the purposes of ADP, it is irrelevant which of the two statuses the applicant holds, as long as they have one of them.
- Where an individual is awarded settled status after their application has been considered, they will remain eligible for support with no relevant change in circumstances subject to them meeting other eligibility criteria.
- Where an individual is refused settled status after their application has been considered, they will become subject to immigration control and their eligibility for support will be revoked. This will constitute a change in circumstance and will trigger a determination without application.
- The people able to enter the protected cohort in this way are:
 - nationals of an EEA member state or Switzerland
 - workers from the third countries with which the EU has an agreement
 - third country nationals who have lawfully worked in an EEA member state and have arrived in Scotland from the EEA or Switzerland
 - family members of those nationals. Family member here means spouse, children who are minors and dependent adult children³⁰.
- The coordination rules apply to people in the protected cohort, their eligibility is subject to different criteria than that of UK or third country nationals. It is important to establish both:
 - when someone arrived in Scotland
 - their settlement statusin order to apply the correct rules.
- Individuals with settled status will stay in the protected cohort unless they leave the UK for more than 5 years.
- There are more ways the international movements of those with pre-settled status could affect their membership of the cohort. Individuals with pre-settled status can move away either for up to:
 - a total of 6 months in a 12 month period
 - a single period of up to 12 months for an important reason such as pregnancy, serious illness or training

³⁰ Article 1 Title 1(i) Regulation EC 883/04

and still be in the protected cohort. There is no restriction on the number of absences permitted, provided that the total period of absence does not exceed six months in any 12-month period. Longer absences are permitted for compulsory military service.

Other international agreements

- There are additional specific UK international social security agreements with Gibraltar and the Republic of Ireland. Irish or UK nationals moving between Ireland and the UK, and individuals of any nationality, moving between the UK and Gibraltar, will essentially continue to be subject to the EU coordination rules in future. This is regardless of whether that movement takes place before or after the end of 2020. Individuals covered by the Irish Agreement making an application in Scotland must have been present in the Common Travel Area (which includes Ireland) for 26 of the last 52 weeks. The usual rules on competence apply.
- The agreement with Gibraltar essentially replicates the provisions of the EU rules and applies those to individuals of any nationality moving between Gibraltar and the UK, as though the UK and Gibraltar were separate EU member states,
- Other UK international agreements mean individuals who are both:
 - nationals of either Tunisia or Morocco
 - in employment in the UKshould have their applications from within Scotland assessed as though they were in the protected cohort. That is, the EU rules should be applied.

Examples on Personal Scope of the Coordination Rules

Ferenc, an Austrian national, arrived in Scotland in March 2020. He applied to the EU Settlement Scheme and was awarded pre-settled status in June 2020. He is:

- *part of the 'protected cohort'*
- *eligible to apply for ADP to Social Security Scotland*
- *subject to the EU rules on social security coordination in future.*

Sophie, a Belgian national, and her family:

- *arrived in Scotland from Belgium in November 2020*
- *has not made an application to the EU Settlement Scheme.*

She and any joining family members are part of the 'protected cohort'. However, they are subject to immigration control unless and until a successful application to the EUSS is made. If her application is refused and she has exhausted all appeal rights, she and her family members will be subject to immigration control and will no longer be eligible for support.

Juan, a Spanish national, arrived in Scotland from Spain in December 2020. His family joined him in June 2022.

- *Juan has settled status*
- *His family have not yet applied to the EU Settlement Scheme.*

He and his family members are part of the 'protected cohort'. Juan meets the residency requirements for ADP. His family members meet residency requirements for at least the initial three months of their arrival, during which time they are expected to make an application to the EUSS. If they fail to make an application within these three months, they will become subject to immigration control, unless and until they make a late application to the EUSS; in such a case, the Home Office will assess the reason for their late application on an individual basis, during which time their rights will be protected unless and until their application is rejected.

Andreas, a Greek national, arrived in Scotland from Greece in February 2021. As he arrived after 31 December 2020, he:

- *cannot become part of the protected cohort*
- *cannot therefore be subject to the EU rules on social security coordination*
- *should be treated as a third country national.*

First Claims from Abroad

- Individuals in the protected cohort can apply to Social Security Scotland for ADP from within Scotland or from elsewhere in the EEA or Switzerland.
- It is essential to establish first that the UK is the competent state for payment of that individual's benefits (see Competent State, below). This is before applying the relevant residency criteria in these applications.

Export

- When an individual in the protected cohort both
 - leaves one country in the EEA or Switzerland for another
 - does not take up employment in that new countryany non-contributory benefits such as ADP should continue to be paid until the award end date³¹. This is regardless of the rules on the competent state.
- ADP awards should always be ended when:
 - any individual leaves Scotland for somewhere outside of the EEA, Switzerland, Ireland or Gibraltar.
 - an individual in the protected cohort leaves Scotland for somewhere outside of the EEA, Switzerland, or Gibraltar.

Competent State

- Generally only one country at any one time will be responsible for paying benefits to an individual in the protected cohort. The country responsible for paying an individual's benefits is known as the 'competent state'. In order for members of the protected cohort to be eligible for ADP, the UK must be their competent state³².

³¹ Article 7, Regulation EC 883/04

³² Reg 15 (3) (c) (ii), Reg 19 (c) (iii) & Reg 20 (2) (a) (ii)

- An order of priority is used to determine the competent state:
 - If an individual is working then the country where they actually work will be the competent state for paying their benefits;
 - The country which pays an individual a benefit is the competent state. This is when an individual receives a pension or other contributory social security benefit from a country other than the one where they live.;
- If an individual is neither working nor receiving any social security benefits, then the country where they live is the competent state.
- Members of the armed forces and civil servants, and their families, are subject to the legislation to which the administration employing them is subject³³.
 - No award of the daily living component of ADP should be made where the UK is not the competent state. The mobility component can still be awarded if the applicant satisfies all the other eligibility criteria.
 - In cases where both:
 - an individual makes an application for the daily living component
 - the UK is not the competent state
 - the application should be refused and the details immediately forwarded to the competent member state.

Examples of Competent State:

Ruxandra, a Romanian national, lives and works in Glasgow for a Scottish company. The UK is the competent state as Ruxandra's state of employment.

Theo, a UK national, lives in Spain. He receives a state pension from the UK. Theo is injured in an accident while living in Spain and makes a claim for ADP. the UK is the competent state as Theo's state of insurance.

Annika, a Polish national, lives in Poland and works remotely for a company based in Inverness. The UK is competent as Annika's state of employment.

Radek, a Slovakian national, lives in Dumfries. He is not employed or self-employed because he is retired and receives a state pension from Slovakia. Slovakia is the competent state as Radek's state of insurance.

Francois is French and he lives in Dundee. He is not employed or self-employed and he does not receive any contributory benefits from any other countries. The UK is the competent state as Francois' state of residence.

Jimmy has a live award of ADP which lasts for another four years. He moves to France. As long as Jimmy does not take up employment in France, his award should be paid until the award end date. Any new claims should however be directed to the relevant French authorities, as Jimmy's state of residence.

³³ Arts 13(2)(d) & (e) Regulation EC 883/2004

Sandra lives in Brussels. She is employed as a civil servant by the Scottish Government and is posted to Brussels for work. Because Sandra is a UK civil servant, the competent state is the UK.

Residence criteria for the protected cohort

- The criteria which apply to individuals in the protected cohort are that the applicant:
 - is habitually resident in the UK, or habitually resident in an EEA member state other than the UK, or habitually resident in Switzerland. See Habitual Residence in the Common Travel Area, above.
 - is subject to Title III of Part 2 the Withdrawal Agreement. See Personal Scope of the EU Coordination Rules, above.
 - has a 'genuine and sufficient link' to Scotland³⁴ (see below).

Genuine and Sufficient Link to Scotland

- There is no statutory definition of a genuine and sufficient link to Scotland. There are common factors to take into account in assessing an individual's link to a place. However, these are neither prescriptive nor exhaustive.
- The requirement for a genuine and sufficient link to Scotland applies to applications made both from abroad and from within Scotland, provided that the individual making that application is within scope of the coordination rules.
- The factors to consider include whether the individual:
 - has spent a significant part of their life
 - works, or has previously and paid social security or tax contributions
 - has any bank accounts or other financial products
 - has the right to any rented or owned property
 - has any family members living in the place in question
 - has frequent contact with those family members)in the place in question.
- The purpose of testing an individual's link to Scotland is to establish if Social Security Scotland should deal with their application or case where the UK is the competent state for paying that person's benefits. Cases where an individual cannot demonstrate this genuine and sufficient link their claim should be denied.
- The aim is to test for both a:
 - factual and hence 'genuine'
 - sufficient, which is more than incidental or minor connection to ScotlandThe decision-maker must take into account all relevant evidence that it is established. Such evidence may include:
 - the relationship between the applicant and the host Member State
 - family circumstances

³⁴ Reg 15 (3) (b) & Reg 20 (2) (c)

- other personal circumstances.³⁵
- Relevant to the question are both objective evidence and the subjective intentions and motivations of the individual.: The Court of Appeal has previously said: ‘...in assessing whether such a genuine and sufficient link is established, objective evidence of the link is plainly critical but evidence of the motives, intentions and expectations of the applicant are not to be ignored if they are relevant to proof of the link and are convincing.’³⁶
- It is anticipated that some cases will require closer scrutiny than others. For example, an individual who spent their entire working life in Scotland before retiring to Spain or someone who is currently working in Scotland are good examples of a clear genuine and sufficient link. More detailed enquiries will be necessary in cases where the facts are less determinative. This is when the subjective evidence described by the Court of Appeal becomes more relevant.

Examples of a Genuine and Sufficient Link to Scotland:

Barney lives in Spain. Until he moved to Spain three years ago, Barney had spent his whole life living in and around Kilmarnock. Most of his relatives still live in and around the same area. Before moving, Barney worked in Kilmarnock, and he still owns property there which he rents out to private tenants. Barney visits family in Kilmarnock regularly; in summer and during the Christmas holidays. Barney has a Genuine and Sufficient Link to Scotland.

Armando lives in Italy. Before moving to Italy, Armando had spent the majority of his life living in Bristol where he worked and owned property, except for a year where he relocated to Edinburgh for work. All of Armando’s family live in Italy or in the south of England. He hasn’t returned to Scotland before moving to Italy. Armando does not have a Genuine and Sufficient Link to Scotland.

³⁵ *Kavanagh & Mohamed v SSWP* [2019] 1 WLR 3655 at para 67

³⁶ *Ibid*