

Residence and Presence

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Introduction

- 1 This chapter is relevant to individuals who either :
 - are applying for Child Disability Payment (CDP)
 - are already in receipt of the assistance reporting a change of address.
- 2 It describes how rules for CDP are applied to deciding if the individual meets the residence and presence criteria. In relation to CDP, the residence and presence criteria must be met by the child who is the individual applying for CDP. Applications are often made by parents or other adults on behalf of children and although they may be informally called “the applicant” for administrative reasons, it is the child who must meet the eligibility criteria.
- 3 An individual must satisfy a number of residence and presence criteria to be eligible for a CDP award. Those criteria differ depending on the individual’s personal circumstances. There are special rules for some European nationals and some exceptions which apply to specific categories of people.

Eligibility

- 4 There are different tests which apply depending on both:
 - the individual’s nationality, and
 - the date on which they began living in their country of residence.

- 5 The majority of applications are expected to be from UK nationals living in Scotland.
- 6 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 an EEA member state or Switzerland since before 1 January 2021
 - they continue to live in that country at the point of application.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.
- 7 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.
- 8 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
 - Spain (including the Balearic Islands, the Canary Islands and the Spanish enclaves of Ceuta and Melilla)
 - Sweden

- The Netherlands (excluding the Dutch Antilles)

9 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. A shorter period applies to some children. See paragraph 29 for more information.
- they are not ‘subject to immigration control’.

1 CDP regs, reg. 5(1)

10 If the individual is either:

- a national of an EEA member state or Switzerland, has the UK as the competent state for the payment of their benefits, and is in the protected cohort. See Competent State and 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 two following sets of criteria instead¹.

1 CDP regs, regs 8 & 9

11 EEA and Swiss nationals must have the UK as the competent state for the payment of their benefits, and be either:

- habitually resident in the CTA and ordinarily resident in Scotland as the same way as UK nationals, or
- habitually resident in an EEA state, Gibraltar or Switzerland.

Only individuals who are in the ‘protected cohort’ can successfully apply for CDP from their habitual residence in an EEA state or Switzerland. See Personal scope of the EU Coordination Rules below.

12 To make a successful application to CDP under the EU coordination rules EEA member state nationals must:

- be subject to Title III of Part 2 the Withdrawal Agreement between the UK and the EU. See EU Exit and the Withdrawal Agreement below.
- where they live outside of Scotland in an EEA member state, Gibraltar or Switzerland, have a Genuine and Sufficient Link to Scotland.

- 13 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 these places and Scotland must¹:
- under the Irish agreement, be nationals of the UK or Ireland. The Gibraltar agreement covers individuals of any nationality provided they are moving between Gibraltar and the UK.
 - be habitually resident in Scotland, the Republic of Ireland or Gibraltar
 - where they live outside of Scotland in either Ireland or Gibraltar, have a Genuine and Sufficient Link to Scotland.

1 CDP regs, regs 8 & 9

- 14 Individuals both:
- covered by the Ireland or Gibraltar agreements; and
 - satisfying the criteria set out in the preceding paragraph
- should therefore be treated in the same way as members of the protected cohort, but only be where they are moving between these places and Scotland. See Personal Scope of the EU Coordination Rules below for more information.

Ordinary residence in Scotland

- 15 All individuals living in Scotland must be ordinarily resident in Scotland to be eligible for CDP, regardless of that individual's nationality¹.

1 CDP regs, reg. 5(1)(a)

- 16 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.
- 17 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.
- 18 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.
- 19 CDP regulations prevent an individual from receiving CDP and Disability Living Allowance (Child) at the same time¹.

1 CDP regs, reg. 10

Example: Individuals who are ordinary residents in Scotland

Esme (5) lives in Dundee with her parents. Esme is ordinarily resident in Scotland.

Ben (7) lives with his mother from Monday to Friday in Carlisle where he attends school. He lives in Dumfries with his father at weekends. Ben is ordinarily resident in both England and Scotland and can qualify for CDP.

Jack (9) lives with both parents in Carlisle. All of Jack's wider family live in Dumfries, where he lived until he was 6. Jack is not ordinarily resident in Scotland.

Habitual residence

20 Habitual residence is a stricter test than ordinary residence. An individual can only have one habitual residence at a time.

21 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 months¹;
- they have a 'settled intention' to continue living there for a reasonable although not necessarily permanent period.

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

22 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 Scotland

can 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.

23 Applicants for CDP 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.

24 Applicants for CDP who are residing outside the UK and are in the protected cohort must be habitually resident in one of the following:

- Switzerland
- an EEA state
- Gibraltar.

25 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).

- 26 Most applicants for CDP 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.
- 27 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 described as relevant considerations by the courts in objectively assessing an applicant's 'settled intention':
- 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.

This list is not exhaustive.

- 28 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 test¹. "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>

Example: An individual is a habitual resident in the Common Travel Area

Ben lives with his mother from Monday to Friday in Carlisle where he attends school. He lives in Dumfries with his father at weekends. Ben is ordinarily resident in both England and Scotland. As both England and Scotland are in the Common Travel Area, Ben's habitual residence is in the CTA. Ben is eligible for CDP.

Presence in the Common Travel Area

- 29 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 CDP

¹ The Social Security (Residence Requirements) (Afghanistan) (Scotland) Regulations 2021

must be present in the Common Travel Area at the date an application is made. There are some exceptions.

30 Neither:

- serving Members of the Armed Forces or Civil Servants, or their families
 - Mariners, Aircraft Workers 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, Aircraft Workers 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

31 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 CDP¹, known as the 'past presence test'.

1 CDP regs, reg. 5(1)(e)

32 A shorter qualifying period applies to younger children. A child aged up to 6 months old must have been present in the CTA for 13 weeks¹.

1 CDP regs, reg. 5(2)

33 There are situations in which no past presence test ever applies:

- terminally ill applicants
- applicants who are refugees¹.
- 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)², or the Afghan Citizens Resettlement Scheme, and their dependents³.

1 CDP regs, reg. 5(10)

2 CDP regs, reg 5(10)

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

34 Both:

- EEA or Swiss nationals in the 'protected cohort'
- their family members

applying for CDP generally do not have to satisfy the past presence test. See Residence requirements under the Coordination Rules below.

35 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, Aircraft Workers and Continental Shelf Workers below.

36 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 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. An absence of 13 weeks for any reason can be followed by 26 weeks for medical treatment.

Examples: Past presence in the Common Travel Area

The parents of John (8) make an application for CDP in January 2022. 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. This means that, John is treated as present for all of the preceding 52 weeks.

The mother of Sally (7) makes an application for CDP in September 2022. She has recently returned to Scotland from New Zealand, where she has been living with her parents since she was 3 years old. Sally's mother makes her application to CDP 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. The test would require an additional 17 weeks' presence.

The carer of Rita (7) makes an application to CDP in September 2022. She has recently returned to Scotland from Australia, where she has been living with her carer since she was 5 years old. Sally's carer makes her application to CDP on 22 September, having arrived back in the UK on 1 June. An advance award can be made with a delayed payment start date as Rita will satisfy the past presence test within three months,.

James (6) 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 past presence calculations made in the future.

'Subject to immigration control'

- 37 From the national launch of CDP until 8 February 2022 (inclusive), children who are subject to immigration control cannot get Child Disability Payment. Any applications made during the pilot which are likely to be denied because the individual is subject to immigration control should first be referred to Socialsecurityidentityandresidency@gov.scot for advice before a final determination is made.
- 38 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 the cost of their maintenance. This is known as a ‘maintenance undertaking’.
- 39 From 9 February 2022, only individuals who require leave and do not have it, or who are subject to a no recourse to public funds condition, are not eligible for Child Disability Payment. Those whose immigration status is as a result of a maintenance undertaking will be eligible for CDP from 9 February 2022. In addition, individuals who are nationals of Tunisia or Morocco are excepted from this exclusion as long as they are lawfully working in the UK. See paragraph 80 for further detail on the treatment of applications from individuals who are Moroccan or Tunisian nationals.

Members of the armed forces and civil servants

- 40 Where an individual is absent from the UK in the course of their employment as:
- a member of the UK armed forces
 - a civil servant¹,
- they, and the children in their care, 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.

1 CDP regs, reg. 5(7)

- 41 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 2006¹:

1 Armed Forces Act 2006, s374

- 42 A ‘civil servant’ means a person employed in the civil service of the state. Essentially this means individuals working for governments or their agencies.

- 43 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 individual¹.

1 CDP regs, reg. 6(a) & (b)

- 44 References to ‘step’ relationships or ‘in-laws’ are to be read as including situations where that relationship arises through civil partnership or marriage.
- 45 Individuals falling within these groups are treated as meeting each of the relevant residence and presence criteria, as long as they were both ordinarily resident in Scotland and habitually resident in the Common Travel Area before they went overseas, 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 care components should continue to be paid for the duration of those absences.
- 46 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

- 47 ‘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 job¹.

1 CDP regs, reg. 5(8)

- 48 A mariner is an individual who is or has been in employment either:
- as a master or member of the crew
 - 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 (wholly or partly) while the ship or vessel is on her voyage¹.

- 49 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 airman's contract of employment must have been entered into in the UK.
- 50 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 legislation¹ includes UK territorial waters in the parts of the North Sea, the North Atlantic, the Irish Sea and the English Channel.

1 Continental Shelf (Designation of Areas) Order 2013

- 51 It is anticipated that the volume of CDP claims from individuals in these categories will be low, given the types of jobs and the likely ages of applicants.

Examples: Armed forces and civil servants

Zaynab (7) lives with her parents on a UK military base in Belize, where her father is stationed as part of his job as a soldier. Before Zaynab's father was posted to Belize her family lived in Dunfermline, where she attended school. Zaynab is:

- a family member of 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 (11) has returned to the UK with his family after living for three years in UK military accommodation in Kenya. His father was posted there by the Royal Air force. They are now living at their former home address in Wick. Milford is a family member of 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 family member's employment. Therefore, Milford satisfies CDP residence and presence conditions during the three years living in Kenya.

Temporary absence

- 52 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 weeks¹. The absence ends when the person returns to the CTA.

1 CDP regs, reg. 7(2)(a)

- 53 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.

54 Where an award has been made, a CDP claim should continue to be paid for the first:

- 13 consecutive weeks of any absence for any reason¹
- 26 consecutive weeks of any absence caused by travelling abroad to receive medical treatment².

1 CDP regs, reg. 7(a)

2 CDP regs, reg. 7(b)

55 The same periods, for the same reasons, can also be applied retrospectively when considering whether an applicant satisfies the past presence test.

56 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. Absences for either reason can follow each other, so an absence of 13 weeks for any reason can be followed by an absence of 26 weeks to receive medical treatment.

57 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 individual in receipt of CDP left the UK¹.

1 CDP regs, reg. 7(1)(b)(i)

58 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, psychological or rehabilitative treatment. This includes any course, diet or other regimen¹.

1 CDP regs, reg. 7(1)(b)(i)

59 An individual in receipt of CDP who goes abroad for a holiday and falls ill after leaving UK, and the 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.

EU rules on social security coordination

60 EU rules on social security coordination apply across the European Economic Area (EEA) and Switzerland. The EEA is the EU Member States together with

Iceland, Norway, Liechtenstein). 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.

- 61 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.
- 62 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.
- 63 A separate set of residency criteria therefore applies to some:
- EEA member state
 - Swiss, and
 - third country
- nationals who apply for CDP to Social Security Scotland. Both the presence and past presence tests have been ruled unlawful in this context by the European Court of Justice. This means individuals covered by EU rules do not have to satisfy those tests.
- 64 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).
- 65 It is important to note that an award of CDP can include both or either:
- the mobility component
 - the care component.
- 66 These two components are in different EU classification categories and only the care component is subject to the coordination rules. The care component is classed as a ‘cash sickness benefit’ in EU law.
- 67 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 social security coordination rules

- 68 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.

69 Individuals are subject to the EU rules if they are covered by Title III of Part 2 of 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.

70 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 CDP 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.

71 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

72 Individuals applying for settlement in the UK can be awarded either pre-settled or settled status. For the purposes of CDP, it is irrelevant which of the two statuses the applicant holds, as long as they have one of them.

73 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.

74 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

75 The people able to enter the protected cohort in this way are either:

- 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 children¹.

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

- 76 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 therefore important to establish both:
- when someone arrived in Scotland
 - their settlement status
- in order to apply the correct rules.
- 77 Individuals with settled status will stay in the protected cohort unless they leave the UK for more than 5 years.
- 78 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
- 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

- 79 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.
- 80 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,
- 81 Other UK international agreements mean individuals who are both:
- nationals of either Tunisia or Morocco
 - in employment in the UK

should have their applications from within Scotland assessed as though they were in the protected cohort. That is, the EU rules should be applied.

Examples: Personal Scope of the Coordination Rules

Ferenc (10), an Austrian national, arrived in Scotland with his parents in March 2020. His family made applications to the EU Settlement Scheme and they have all been awarded pre-settled status. His family are therefore:

- part of the ‘protected cohort’
- eligible to apply for CDP 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 CDP. His family members do not meet residency requirements unless and until they make a successful application to the EUSS within three months of arrival, because they are otherwise subject to immigration control.

Jock (7) and his grandparents are UK nationals who moved to Spain in 2018 and have since lived in Alicante. Jock’s grandparents are his guardians and both are in receipt of a UK state pension. All of the family:

- were living in Spain before the end of 2020, and continue to live there
- are therefore in the protected cohort
- remain subject to the EU rules on social security coordination.

Andreas (13), a Greek national, and his family arrive in Scotland from Greece in February 2021. As they arrived after 31 December 2020, they::

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

First Claims from Abroad

82 Individuals in the protected cohort can apply to Social Security Scotland for CDP from within Scotland or from elsewhere in the EEA or Switzerland.

83 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

84 When an individual in the protected cohort:

- leaves one country in the EEA or Switzerland for another
- does not take up employment in that new country, and
- has a genuine and sufficient link to Scotland

any non-contributory benefits such as CDP should continue to be paid until the award end date¹. This is regardless of the rules on the competent state.

1 Regulation EC 883/04, Article 7

85 CDP awards should always be ended when:

- an individual who is not in the protected cohort leaves Scotland to live in somewhere other than the Republic of Ireland or Gibraltar.
- an individual in the protected cohort leaves Scotland for somewhere outside of the EEA, Switzerland, the Republic of Ireland or Gibraltar.

Competent State

86 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 CDP, the UK must be their competent state¹.

1 CDP regs, regs 8(d) & 9(2)(a)(i)

87 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.

88 A child can have a right to social security independently and at the same time derive rights from a parent. The general rule is that the independent right takes precedence. However, the independent right will not take precedence where it is based on residence alone.

- 89 It is possible that for CDP there could be two parents or guardians, each living in different countries. In this case, there are two possible competent states. The order of priority above should be used to select the correct one. In some cases, the order of priority cannot resolve the issue. Then the state where the child actually lives will be the competent state for paying that child's benefit.
- 90 Members of the armed forces and civil servants, and their families, are subject to the legislation to which the administration employing them is subject¹.

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

- 91 No award of the care component of CDP 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.
- 92 In cases where both:
- an individual makes an application for the care component
 - the UK is not the competent state
- the application should be refused and the details immediately forwarded to the competent member state.

Examples: Competent State

Ruxandra (9) lives in Scotland with her Romanian parents. Her mother works in Glasgow for a Scottish company and her father is unemployed. None of the family receive payment of a benefit from any other country. Because of Ruxandra's mother's state of employment, the UK is the competent state.

Theo (5) lives in Spain with his grandparents. Both grandparents are retired and receive a state pension from the UK. Theo is injured in an accident while living in Spain and his grandparents make a claim for CDP. Theo has an independent right to Spanish social security based on his state of residence. He also derives a right to UK social security from his grandparents, as the UK is their state of insurance. The UK is therefore the competent state.

Annika (11) lives in Poland with her mother who does not work. Her father lives and works in Inverness for a Scottish company. As the father works in Scotland, and Scotland is in the UK, the UK is competent as it is the state of employment.

Annika (11) lives in Poland with her mother who works there for a Polish company. Her father lives and works in Inverness for a Scottish company. As there are two states of employment, the state in which Annika lives is competent.

Jimmy (14) has an award of CDP which lasts until his 18th birthday. He moves with his mother to France when she takes early retirement. As long as Jimmy does not take up employment in France, his award should be paid until his 18th birthday.

Sandra (9) lives with her mother in Brussels. Sandra's mother is employed as a civil servant by the Scottish Government and is posted to Brussels for work. Because Sandra's mother is a UK civil servant, the competent state is the UK.

Residence criteria for the protected cohort

93 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 of the Withdrawal Agreement. See Personal Scope of the EU Coordination Rules, above.
- where they live in an EEA member state, Switzerland, or in some cases Ireland or Gibraltar, has a 'genuine and sufficient link' to Scotland¹ (see below).

1 CDP regs, reg. 9(2)(c)

Genuine and Sufficient Link to Scotland

94 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.

95 The requirement for a genuine and sufficient link to Scotland applies to applications made from abroad, provided that the individual making that application is within scope of the coordination rules.

96 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.

97 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.

98 The aim is to test for both a:

- factual and hence 'genuine'
- sufficient, which is more than incidental or minor

connection to Scotland The 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
- other personal circumstances¹.

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

99 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.’¹

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

100 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: An individual has a genuine and sufficient link to Scotland

Barney (7) lives in Spain with his parents, where his father is posted for work by a large UK company. Until the family moved to Spain, Barney went to school in Dundee. Most of the family’s relatives live in and around Dundee. Before moving, Barney’s family worked and owned property in Dundee. Barney’s parents still own the family home which is being rented out. Barney visits grandparents in Dundee twice each year; once in summer and again during the Christmas holidays. Barney has a Genuine and Sufficient Link to Scotland.

Armando (4) lives in Italy with his parents, who are both UK nationals. Before moving to Italy, Armando had spent the majority of his life living in Bristol where his father worked and the family owned property, except for a year where the family relocated to Edinburgh for his father’s job. All of Armando’s family live in the south of England. He hasn’t returned to Scotland since he moved back to Bristol before moving to Italy. Armando does not have a Genuine and Sufficient Link to Scotland.