

Residence and Presence

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Introduction

1. This chapter is relevant to Pension Age Disability Payment (PADP) applicants, both:
 - new applicants; and
 - those already in receipt of the assistance reporting a change of address.
2. It describes how rules for PADP should be applied to decide if the applicant meets the residence and presence criteria.
3. An applicant must satisfy a number of residence and presence criteria to be eligible for a PADP 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

4. 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.

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 another EEA member state or Switzerland since before 1 January 2021; and
 - 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, the Swiss Citizens' Rights Agreement or the EEA EFTA Separation 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.

7. If the individual is:
 - a UK national not in the 'protected cohort';
 - a national of a country which is not in the EEA, a 'third country national'; or
 - a national of an EEA member state or Switzerland who is not in the 'protected cohort'

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; and
- they are not 'subject to immigration control'.

8. The Common Travel Area (CTA) includes the whole of the United Kingdom, the whole island of Ireland, the Isle of Man and the Channel Islands (Jersey and Guernsey).

9. 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';
 - 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.

¹ PADP Regs, Reg 9 (1)

² PADP Regs, Reg 14 (1)

10. EEA and Swiss nationals in the protected cohort and living in the UK must:

- be ordinarily resident in Scotland;
- be habitually resident in the UK; and
- be subject to Title III of Part 2 the Withdrawal Agreement between the UK and the EU, Part 3 or Article 23(4) the Swiss Citizens' Rights Agreement, Title III of the EEA EFTA Separation Agreement, or the 1974 exchange of letters between the UK and Gibraltar.³

11. Individuals of any nationality who are in the protected cohort living in Europe must:

- be habitually resident in the EEA, Switzerland or Gibraltar;
- have the UK as the competent state for the payment of their benefits; and
- have a genuine and sufficient link to Scotland⁴.

12. 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.

13. Individuals moving between Ireland and Scotland are therefore exempt from the requirement to be ordinarily resident in Scotland, if they⁵:

- are habitually resident in the Republic of Ireland;
- have a Genuine and Sufficient Link to Scotland; and
- are a UK or Irish national.

This means that individuals who live in Ireland can be eligible for PADP, as long as the UK remains the competent state for payment of that individual's benefits.⁶

14. Individuals living in Scotland who have moved there from Gibraltar are exempt from the requirement to be present in the Common Travel Area for 26 of the past 52 weeks, as long as they are:

- ordinarily resident in Scotland; and
- habitually resident in the United Kingdom.⁷

These individuals can be of any nationality.

15. Individuals living in Gibraltar can be eligible for PADP, if:

- they are habitually resident in Gibraltar; and

³ PADP Regs, Reg 14 (2) (a)

⁴ PADP Regs, Reg 14 (2) (b) and (c)

⁵ PADP Regs, Reg 9 (3)

⁶ PADP Regs, Reg 9 (3) (c) (ii)

⁷ PADP Regs, Reg 13 (c) (i) (dd)

- they have a genuine and sufficient link to Scotland.⁸

Ordinary residence in Scotland

16. All individuals living in Scotland must be ordinarily resident in Scotland to be eligible for PADP, regardless of that individual's nationality.⁹

17. 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 live there lawfully; and
- they have decided to live there voluntarily.

18. 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.

19. 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.

20. PADP regulations prevent an individual from receiving PADP and Attendance Allowance or other disability benefits at the same time.¹⁰

21. In cases where ordinary residence might be established at more than one address, including an address outwith Scotland, decision makers should check whether the individual has an ongoing Attendance Allowance award or a pending application for Attendance Allowance with the DWP or the Department for Communities in Northern Ireland.

22. When an individual has no fixed address, their intentions 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.

Examples of ordinary residence in Scotland

Kate lives in Inverness. Kate is ordinarily resident in Scotland.

Andrea lives in Berwick-upon-Tweed and travels across the border into Scotland during the week each day for work. Andrea is not ordinarily resident in Scotland.

⁸ PADP Regs, Reg 14 (2)

⁹ PADP Regs, Reg 9 (1) (a)

¹⁰ PADP Regs, Reg 4

Anthony lives in a house in Alnwick. He also owns a flat in Edinburgh, where he spends most weekends. Anthony is ordinarily resident in both England and Scotland and can therefore qualify for PADP.

Ola lives in Carlisle, and travels almost every day across the border from England to Scotland to visit her sister Frances who lives in Dumfries. Ola never stays overnight and always returns to her home in Carlisle. Ola is not ordinarily resident in Scotland and is not eligible for PADP, but might be eligible for Attendance Allowance from the DWP.

Habitual residence in the Common Travel Area

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

24. To be considered habitually resident a person must satisfy two conditions:^{11 12}

- that they have lived in the place in question for an ‘appreciable’ period (this is usually for a minimum of 1-3 months); and
- that 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 a place, the shorter the period required to establish habitual residence is likely to be. People who:

- were formerly habitually resident in a place; and
- are returning to that same place,

can be considered habitually resident from the day they arrive back in the country. They do not necessarily have to have lived in that place for an appreciable period.

25. Applicants to PADP who are:

- UK nationals not in the ‘protected cohort’;
- third country nationals; or
- EEA or Swiss nationals not in the ‘protected cohort’,

must be habitually resident in the Common Travel Area (CTA). Different rules may apply to a family member of an EEA or Swiss national. See residence criteria for the ‘protected cohort’.

26. Applicants for PADP who are residing outside of the UK and are in the ‘protected cohort’ must be habitually resident in one of the following:

- an EEA member state;

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

¹² PADP Regs, Reg 9

- Switzerland; or
- Gibraltar.

27. The Common Travel Area (CTA) comprises:

- the United Kingdom (England, Scotland, Wales and Northern Ireland);
- the Republic of Ireland;
- the Isle of Man; and
- the Channel Islands (Jersey and Guernsey).

28. 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'. 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; and
- bringing substantial possessions with you to Scotland.

29. 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 granted leave to enter or remain in the UK under:

- the Afghan Relocations and Assistance Policy (ARAP);
- the scheme ARAP replaced which was for locally employed staff in Afghanistan (sometimes known as the 'ex-gratia' scheme); or
- the Afghan Citizens Resettlement Scheme (ACRS).

30. The following people are also exempt from the habitual residence test:

- people who were residing in Ukraine immediately before 1 January 2022, and left Ukraine in connection with the Russian invasion which took place on 24 February 2022;
- people who were residing in Sudan before 15 April 2023 and left Sudan in connection with the escalating violence which started on 15 April 2023; and
- people who were residing in Israel, the West Bank, the Gaza Strip, East Jerusalem, the Golan Heights or Lebanon before 7 October 2023 and left in connection with the Hamas terrorist attack in Israel in October 2023, or the violence which rapidly escalated in the region following the attack.

31. 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.

As with ordinary residence, 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 of habitual residence in the Common Travel Area

Yassin has a permanent address in Chicago 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 the USA. As the USA is outside of the CTA, Yassin is not eligible for PADP.

Sabina lives in Carlisle. She works in Scotland for a recycling firm which puts her up in a rental flat in Edinburgh during the week. As both England and Scotland are in the Common Travel Area, Sabina's habitual residence in Carlisle is in the CTA.

Presence in the Common Travel Area

32. UK nationals, third country nationals, EEA and Swiss nationals who:

- have moved to the UK since the beginning of 2021; and
- are applying for PADP

must be present in the Common Travel Area at the date an application is made.¹³

There are some exceptions:

- serving members of the armed forces or civil servants working abroad, or their families; and
- mariners, aircraft workers and continental shelf workers

do not need to be physically present in the CTA on the date of their application.

33. Any absences in accordance with the rules on temporary absence can be treated as though the individual is actually present in the Common Travel Area.¹⁴

Past presence in the Common Travel Area

34. If living in the UK, each of the following groups:

- UK nationals;
- third country nationals; and
- EEA and Swiss nationals not in the 'protected cohort',

¹³ PADP Regs, Reg 9 (1) (d)

¹⁴ PADP Regs, Regs 11 and 12

must have been present in the Common Travel Area for 26 of the past 52 weeks before the date they apply for PADP¹⁵, this is known as the 'past presence test'.

35. There are certain situations in which no past presence test ever applies:

- terminally ill applicants;¹⁶
- applicants who are a serving member of the armed forces or a civil servant, or a member of their family;
- applicants who are a mariner, aircraft worker or continental shelf worker and their absence is in connection with their contract of employment;
- applicants who are refugees or their dependant;¹⁷
- 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), or the Afghan Citizens Resettlement Scheme, and their dependents;¹⁸
- people who were residing in Ukraine immediately before 1 January 2022, and left Ukraine in connection with the Russian invasion which took place on 24 February 2022;¹⁹
- people who were residing in Sudan before 15 April 2023 and left Sudan in connection with the escalating violence which started on 15 April 2023;²⁰ and
- people who were residing in Israel, the West Bank, the Gaza Strip, East Jerusalem, the Golan Heights or Lebanon before 7 October 2023 and left in connection with the Hamas terrorist attack in Israel in October 2023, or the violence which rapidly escalated in the region following the attack.²¹

36. Both:

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

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

37. Some absences do not count for the purpose of the past presence test.

Absences:

- up to 13 weeks for any reason; and
- up to 26 weeks where the absence is related to medical treatment for a condition which commenced before leaving the CTA

¹⁵ PADP Regs, Reg 9 (1) (e)

¹⁶ PADP Regs, Reg 9 (6)

¹⁷ PADP Regs, Reg 15

¹⁸ PADP Regs, Reg 9 (7) (a), (b) and (c)

¹⁹ PADP Regs, Reg 9 (7) (d)

²⁰ PADP Regs, Reg 9 (7) (e)

²¹ PADP Regs, Reg 9 (7) (f)

should be treated as presence.²²

38. Special rules also apply to some types of workers who routinely work overseas.

Example of past presence in the Common Travel Area

Vivien makes an application for PADP in January 2024. She has been out of the CTA on holiday three times in the preceding 52 weeks, amounting to a total of 3 weeks. None of these absences are deducted from Vivien's past presence. This is because they are all within the 13 week period allowed for temporary absence for any reason. Vivien is treated as present for all of the preceding 52 weeks.

Shazia makes an application for PADP in June 2024. She has recently returned to Scotland from New Zealand, after living there for five years continuously. She makes her application to PADP on 22 June, having arrived back in the UK on 20 April. As Shazia 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.

Edward has a rare type of brain tumour which he has been receiving treatment for in the UK. Edward is taken to Italy for the purpose of receiving specialist radiotherapy. He is away for 20 weeks and is treated as present in the CTA for that period of time. These 20 weeks can also be treated as presence for any future past presence calculations.

'Subject to immigration control'

39. An individual who is 'subject to immigration control' is not usually eligible for PADP.

40. 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 (known as 'No Recourse to Public Funds'/NRPF); or
- have been awarded leave to enter or remain in the UK on the condition that someone will be responsible for their maintenance (known as a 'maintenance undertaking').²³

41. Some people who are 'subject to immigration control' may still be eligible for PADP. For example, where someone is:

- working in the UK and is a national of Morocco or Tunisia;
- a family member of, and living with, the person to which this exemption applies; or

²² PADP Regs, Reg 10

²³ PADP Regs, Reg 9 (1) (c)

- where they have been given leave to enter or remain in the UK by the Secretary of State upon an undertaking by another person, in accordance to the immigration rules, to be responsible for their maintenance and accommodation.²⁴

Members of the armed forces and civil servants

42. 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; or
- a family member of one of these individuals²⁵

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 armed forces or as a civil servant.

43. 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 2006.²⁶

44. A 'civil servant' means a person employed in the civil service of the state. Essentially this means individuals working for governments or their agencies.²⁷

45. 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; or
- a child in the care of that individual.²⁸

²⁴ PADP Regs, Reg 9 (5)

²⁵ PADP Regs, Reg 11

²⁶ PADP Regs, Reg 11 (4)

²⁷ PADP Regs, Reg 11 (4)

²⁸ PADP Regs, Reg 11 (3) (b)

46. References to 'step' relationships or 'in-laws' are to be read as including situations where that relationship arises through civil partnership or marriage. References to spouse or civil partner apply regardless of the individuals' sex.
47. Individuals who fall 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 their family member. This means that ongoing PADP awards should continue to be paid for the duration of those absences.
48. 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.

Mariners, aircraft workers and continental shelf workers

49. Mariners, aircraft workers, 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 job²⁹.

50. A mariner is an individual who is or has been in employment either:

- as a master or member of the crew; or
- 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 UK. It must be for work carried out while the ship or vessel is on her voyage. This can be wholly or partly.

51. 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.

52. An individual is a continental shelf worker if they are:

- employed offshore in a specific geographic area; and
- working on the exploration, exploitation, transport, storage or offloading of oil, gas or mineral resources.

The area prescribed in UK legislation³⁰ includes UK territorial waters in the parts of the North Sea, the North Atlantic, the Irish Sea and the English Channel.

Temporary absence from the Common Travel Area

²⁹ PADP Regs, Reg 12

³⁰ Continental Shelf (Designation of Areas) Order 2013

53. Rules on temporary absence apply both to new applications and ongoing entitlement. A temporary absence is defined as one which is expected at its beginning to last no more than 52 weeks³¹. The absence ends when the person returns to the CTA.
54. 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 considered present for that whole day. This is when leaving or returning to the UK.
55. Where an award has been made, PADP should continue to be paid for the first:
- 13 consecutive weeks for any reason;³² and
 - 26 consecutive weeks where the absence is related to medical treatment for a condition which commenced before leaving the CTA.³³
56. The same periods, for the same reasons, can also be applied retrospectively when considering whether an applicant satisfies the past presence test.
57. Absences from the CTA which fall into these categories should be treated as presence for these purposes.
58. Each absence is considered separately. An absence of up to 13 weeks for any reason cannot be immediately followed by another absence of up to 26 weeks for medical treatment. The individual must be present in the CTA between such absences.
59. The 26 week period only applies where the absence is for the medical treatment of either:
- a disease; or
 - bodily or mental disablement

which started before the person left the CTA.³⁴

60. During the period of temporary absence from CTA, the treatment must be either:
- undertaken by; or
 - under the supervision of

³¹ PADP Regs, Reg 10 (2) (a)

³² PADP Regs, Reg 10 (1) (a)

³³ PADP Regs, Reg 10 (1) (c)

³⁴ PADP Regs, Reg 10 (1) (b) (i)

a person appropriately qualified to carry out that treatment. 'Medical treatment' means medical, surgical or rehabilitative treatment. This includes any course, diet or other regime.³⁵

61. An individual who goes abroad for a holiday and falls ill after leaving the CTA:

- is not absent for the specific purpose of being treated; and
- 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

62. Individuals with entitlement to PADP 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 PADP.

63. 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 alternative accommodation or detention, case managers 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.

64. 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 PADP.

65. 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 area.³⁶ 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.³⁷

EU rules on social security coordination

66. EU rules on social security coordination apply across the European Economic Area (EEA). The EEA is comprised of the EU Member States as well as Norway, Liechtenstein and Iceland. Switzerland is not in the EEA but the rules also apply there.

³⁵ PADP Regs, Reg 10 (2) (b)

³⁶ PADP Regs, reg 9(1)(d) and (e)

³⁷ PADP Regs, reg 10

67. The following countries are the member states of the EU:

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czechia (also known as the Czech Republic)
- Denmark (excluding the Faroe Islands and Greenland)
- Estonia
- Finland (including the Åland Islands)
- France (including Corsica, Guadeloupe, Martinique, Mayotte, Réunion, French Guiana, Saint Barthélemy and Saint-Martin but excluding Monaco)
- Germany
- Greece (including Crete and the Greek islands)
- Hungary
- Ireland (excluding Northern Ireland)
- Italy (including Elba, Sardinia and Sicily, but excluding the Vatican City and San Marino)
- Latvia
- Lithuania
- Luxembourg
- Malta
- The Netherlands (excluding Aruba, Bonaire, Curaçao, Saba, Sint Eustatius and Sint Maarten)
- 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

68. 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; and
- which benefits are granted and under what conditions.

69. 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. Regulations for PADP are drafted on the basis that it will be classified in the same way as Attendance Allowance for the purposes of EU law. Attendance Allowance is classified as a 'cash sickness benefit'.

70. A separate set of residency criteria applies to some:

- EEA member state nationals;
- Swiss nationals;
- UK nationals living in EEA member states or Switzerland; and
- third country nationals;

who apply for PADP to Social Security Scotland. The past presence test has been ruled unlawful in certain circumstances by the European Court of Justice. This means individuals covered by EU rules do not have to satisfy those tests.

71. The EU rules also require that some payments should continue to be made to individuals when they have left Scotland to live in an EEA member state or Switzerland. (This is known as 'export' – see Export, below) Some individuals should also be able to apply from abroad. (This is known as 'first applications from abroad' – see First Applications from Abroad, below).

Personal scope of the EU coordination rules

72. As a result of the UK leaving the EU, 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; and
- whether or not they have remained in a 'cross-border situation' (by continuing to live abroad) until the point of their application.

73. 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, Part 3 or Article 23(4) of the Swiss Citizens' Rights Agreement, or Title III of the EEA EFTA Separation Agreement. In most cases that will mean both:

- EEA or Swiss nationals who arrived in the UK before the end of 2020; and
- UK nationals living in an EEA member state or Switzerland, who were 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.

74. For someone to be part of this protected cohort in the UK they must have moved to the UK before 1 January 2021. The Home Office requires that these individuals apply to the European Union Settlement Scheme (EUSS) to obtain either pre-settled or settled status. Individuals who arrived before this date but

have yet to apply to the EUSS are subject to immigration control and are therefore ineligible for PADP unless and until an application to the 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.

75. Individuals who arrived on or after 1 January 2021 should be treated in the same way as third country nationals, except for where they are joining a family member with pre-settled or settled status. Individuals 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 three 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.
76. For the purposes of PADP, it is irrelevant which of the two statuses the applicant holds, as long as they have one of them.
77. Where an individual is granted pre-settled or settled status, they will remain eligible for PADP assuming no relevant change in circumstances occurs and subject to them meeting all of the other eligibility criteria.
78. Where an individual is refused EUSS (EU Settlement Scheme) status and has no other valid immigration status, they will become subject to immigration control and their eligibility for benefits will be revoked. This will constitute a change in circumstance and will trigger a determination without application.
79. The people able to enter the protected cohort in this way are:
- nationals of an EEA member state or Switzerland;
 - workers from the countries with which the UK has an agreement replicating EU agreements (Morocco and Tunisia);
 - third country nationals who have lawfully worked in an EEA member state or Switzerland and have arrived in Scotland from the EEA or Switzerland; and
 - family members of those nationals. Family member here means spouse (including same-sex marriage where applicable), children who are minors and dependent adult children.³⁸
80. The coordination rules apply to people in the protected cohort and 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: and

³⁸ Article 1 Title 1(i) Regulation EC 883/2004

- their immigration status

in order to apply the correct rules.

81. Individuals with settled status will stay in the protected cohort unless they leave the UK for more than five years.

82. 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 six months in a 12 month period; or
- 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.

Residence criteria for the protected cohort

83. 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; and
- is subject to Title III of Part 2 the Withdrawal Agreement, Part 3 or Article 23(4) of the Swiss Citizens' Rights Agreement, or Title III of the EEA EFTA Separation Agreement. See Personal Scope of the EU Coordination Rules, above; and
- has a 'genuine and sufficient link' to Scotland (see below).

Other international agreements

84. 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 the future. This is regardless of whether that movement takes place before or after the end of 2020.

85. 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 UK/Ireland: Convention on Social Security ensures that the position of UK and Irish nationals who move or have moved between the UK and Ireland will not change as a result of the UK's exit from the EU. It guarantees continued

access to, and equality of treatment in relation to, social security provision for UK and Irish nationals and their qualifying family members in each country.

86. 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.

87. Other UK international agreements mean individuals who are both:

- nationals of either Morocco or Tunisia; and
- 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 of 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 PADP to Social Security Scotland; and*
- *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; and*
- *have 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 PADP. 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;*
and
- *should be treated as a third country national.*

First applications from abroad

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

89. 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

90. When an individual in the protected cohort both:

- leaves one country in the EEA or Switzerland for another; and
- does not take up employment in that new country,

any non-contributory benefits such as PADP should continue to be paid, assuming no relevant change in circumstances occurs and subject to them meeting all of the other eligibility criteria. This is regardless of the rules on the competent state.

91. Unless temporary absence rules or an exception applies (see Members of the armed forces and civil servants) (see Mariners, aircraft workers and continental shelf workers) PADP awards should always be ended when:

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

Competent state

92. 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 PADP, the UK must be their competent state.³⁹

³⁹ PADP Regs, Regs 13 (c) (ii) and 14 (2) (a) (ii)

93. The rules on competent states and social security coordination are set out in the EU Regulation (EC) No. 883/2004. Under the terms of the EU-UK Withdrawal Agreement, the Swiss Citizens' Rights Agreement, and the EEA EFTA Separation Agreement, the UK is still bound by this regulation for the protected cohort. The regulations coordinate the national social security systems of the various countries so that a worker moving within the EEA may:

- be protected against the risks covered by EU provisions; and
- maintain rights acquired in one EEA country when moving to another country.

94. An order of priority is used to determine the competent state:

- If the individual is working, then the country where they actually work will be the competent state for paying their benefits.
- If the individual is not working, then the country which already pays the individual a benefit is the competent state. This is when the individual receives a pension or other contributory social security benefit from a country other than the one where they live.
- If the individual is neither working nor receiving any social security benefits, then the country where they live is the competent state.

95. When an individual receives a pension or more than one pension from one or more countries, one of which is the country of residence, then that country will be responsible for payment of sickness benefits (in cash and in kind) to that pensioner and members of their family.

96. Where the person is entitled to benefits in kind under the legislation of two or more EEA States responsible for the pension(s), then the state where the person had pensions insurance for the longest period will bear the cost of benefits in kind and pay cash sickness benefits (or if that results in more than one state, the state in which the person was last subject).

97. The EU definition of a pension includes state provided old-age pensions as well as payments which can be made to younger people who are unable to work or have reduced earnings capacity. More information about the classification of benefits and pensions can be obtained from the EU's Mutual Information System on Social Protection (MISSOC) database.⁴⁰

98. Members of the armed forces and civil servants, and their families, are subject to the legislation to which the administration employing them is subject. For example, if they are employed by the UK Government, the competent state is the UK.

99. No award of PADP should be made where the UK is not the competent state.

In cases where the UK is not the competent state, the application should be refused and the details immediately forwarded to the competent member state.

⁴⁰ [MISSOC - Mutual Information System on Social Protection](#)

100. A person can have rights to benefits as the family member of a pensioner, but also have an independent right to benefits. In this case their independent rights take priority unless that independent right exists solely because of their residence, in which case their competent state is determined by their family member's competent state.

Examples of competent state

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

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

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

Camille is French and she lives in Durness. She is not employed or self-employed and she does not receive any contributory benefits from any other countries. The UK is the competent state as Camille's state of residence.

Frankie has a live award of PADP. He moves to Spain. As long as Frankie does not take up employment in Spain, his award should be paid until it ends for any reason (such as a change of circumstances). Any new applications should be directed to the relevant Spanish authorities, as Frankie's state of residence.

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

Jill lives in Greece. She is entitled to a UK Pension at a reduced rate but she is also entitled to a French Pension. Jill is not entitled to benefits in kind under Greek law. Jill worked and paid pensions insurance in France for 25 years but had only paid National Insurance contributions for 10 years in the UK. Because she paid more contributions in France, the UK is not the competent state.

Paula is 63 years old and lives in Inverness. She is married to Tove, who worked in Sweden for 25 years and receives a retirement pension from Sweden. Tove does not receive a pension from the UK. Paula is not employed or self-employed or have a pension. Sweden is Paula's competent state for the payment of cash sickness benefits. When Paula reaches UK state pension age, she starts receiving a UK state pension and the UK becomes her and Tove's competent state.

Genuine and sufficient link to Scotland

101. 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.

102. 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](#). It is not required in any other context.

103. 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; and
- has frequent contact with those family members;

in the place in question.

104. The purpose of testing an individual's link to Scotland is to establish if Social Security Scotland or the DWP should deal with their application, where the UK is the competent state for paying that person's benefits. When an individual cannot demonstrate this genuine and sufficient link, their application should be denied.

105. The aim is to test for both a:

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

connection to Scotland.

106. The decision maker must take into account all relevant evidence that is established. Such evidence may include:

- the relationship between the applicant and the host Member State;
- family circumstances; and
- other personal circumstances.⁴¹

107. 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.'

108. It is anticipated that some cases will require closer scrutiny than others. For example, an individual who spent their entire working life in Scotland

⁴¹ Kavanagh & Mohamed v SSWP [2019]

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

Katie lives in Portugal. Until she moved to Portugal three years ago, Katie had spent her whole life living in and around Edinburgh. Most of her relatives still live in and around the same area. Before moving, Katie worked in Edinburgh, and she still owns property there which she rents out to private tenants. Katie visits family in Edinburgh regularly; in summer and during the Christmas holidays. Katie has a genuine and sufficient link to Scotland.

Noah lives in Germany. Before moving to Germany, Noah had spent the majority of his life living in Yorkshire where he worked and owned property, except for a year where he relocated to Glasgow for work. All of Noah's family live in Germany or in England. He hasn't returned to Scotland before moving to Germany. Noah does not have a genuine and sufficient link to Scotland.

[END OF CHAPTER]