



Scottish
Commission
on Social
Security

Scrutiny report on laid Regulations:

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

**Submitted to Scottish Government and the Scottish Parliament's
Social Justice and Social Security Committee on 15 November
2021.**

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Summary of Recommendations and Observations

Recommendation 1: Scottish Government is invited to consider whether there is a need to provide an exemption for others coming to the UK from Afghanistan who are not covered by the Home Office resettlement schemes.

Recommendation 2: Scottish Government is invited to clarify how it plans to evidence eligibility requirements, other than habitual residence and past presence tests, in order to enable people covered by these Regulations to access payments quickly, in line with the policy goal.

Observation 1: We note that the needs of refugees, such as for language support, may have a particular bearing on Social Security Charter expectations including those on adapting processes and ways of communication, independent advocacy provision for disabled people, and ensuring staff understand the needs of different people and the barriers they face so that no-one experiences discrimination.

Observation 2: Social Security Scotland may in some cases be well-placed to play a facilitative role when it comes to referring refugees to wider support and wrap-around services, consistent with Charter expectations on referring people to other organisations, services or forms of help and working with other organisations to ensure services and policy are joined up.

Observation 3: Scottish Government may wish to consider if and how the experience of refugees in accessing devolved Social Security could contribute to progressing the outcomes of the New Scot Refugee Integration strategy 2018-2022 and the development of future strategy for refugees and how this is integrated into delivery plans.

1. Introduction

The Scottish Commission on Social Security is pleased to report on The Social Security (Residence Requirements) (Afghanistan) (Scotland) Regulations 2021 (henceforth referred to as ‘the Regulations’), that were laid in the Scottish Parliament on 13 September and came into force on 15 September 2021. These regulations fall within our remit to scrutinise, in accordance with 97(1)(a) of the Social Security (Scotland) Act 2018 (hereafter referred to as ‘the Act’).

The purpose of these Regulations is to waive the habitual residence test and, where applicable, the past presence test, for people arriving from Afghanistan under various Home Office schemes¹ with regard to forms of assistance over which Scottish Government has competence. The changes required encompass both those for which Scottish legislation is already in place: Child Disability Payment (CDP), Best Start Grant (BSG), Best Start Foods (BSF), and Young Carer Grant (YCG), and those which are currently being delivered under an agency agreement with the Department of Work and Pensions (DWP): Disability Living Allowance (DLA), Personal independence Payment (PIP), Attendance Allowance (AA) and Carer’s Allowance (CA). Provisions related to Adult Disability Payment (ADP) are not included in these regulations. They will be incorporated into forthcoming ADP regulations.

The need for emergency legislation was driven by the UK Government’s decision to waive habitual residence and past presence tests, for people arriving under the afore-mentioned schemes, with regard to means-tested and disability and carers benefits. The Scottish Government therefore needed to mirror these regulations to the same timetable. Failure to do so would have meant those tests would continue to apply to forms of assistance within devolved areas of competence, with clearly adverse consequences for those individuals and for administrative efficiency. The UK government has committed to welcome around 5,000 people in the first year and up to 20,000 over the coming years². Officials told us that they were currently supporting 341 adults and children in Scotland, located in hotels in two local authority areas. However, it is not known what the eventual number will be.

Due to the pace at which emergency legislation was enacted, the Regulations were laid and referred to the Scottish Commission on Social

¹ [Afghan citizens resettlement scheme - GOV.UK \(www.gov.uk\)](https://www.gov.uk).

² [Afghan citizens resettlement scheme - GOV.UK \(www.gov.uk\)](https://www.gov.uk).

Security (SCoSS) on the same day, Monday 13th September, so they could come into force on Wednesday 15th September, in line with reserved provision.

Since then, two additional related, but separate, Regulations have been given to us for scrutiny:

- Regulations pertaining to ADP (referred on 25 June 2021). Unfortunately, there was insufficient time for us to scrutinise and report on these as part of our scrutiny report on ADP draft regulations. We will therefore comment on them here.
- An amendment to remove the habitual residence test for all refugees, not just those arriving under the Afghanistan schemes (referred on 13 September 2021). Currently, if you have refugee status, you are exempt from the past presence test in CDP and from the habitual residence test in YCG and BSG, but there is no exemption from the habitual residence test for CDP, nor for DLA, PIP and every other disability and carer's benefit. We are pleased that this amendment was prompted by an early query of ours. It is one of three un-related amendments that are to be incorporated into the forthcoming Disability Assistance for Children and Young People (Scotland) Regulations 2021 and the Scottish Child Payment Regulations 2020 (Miscellaneous Amendments) Regulations 2022. Those regulations will also be comprised of what were formally titled; The Suspension of Assistance (Disability Assistance for Children and Young People) (Scottish Child Payment) (Scotland) Regulations 2021 (referred to us 25 June 2021). We will report on these in due course.

We welcome the Regulations that are the subject of this report and that swift action was taken to put them in place. By removing obstacles to quickly accessing devolved social security they should support the realisation of human rights for people whose needs can be expected to be acute and wide-ranging. However, we note that this policy goal will only be realised if the Regulations are translated into efficient delivery.

This is the first time that draft Regulations have been referred to us that specifically concern refugees. We noted that there may be specific implications for refugees concerning human rights and the Social Security principles (the lenses through which we must scrutinise draft Regulations) and expectations in the Social Security Charter. We offer

some brief reflections on these, in addition to matters arising directly from these Regulations.

2. Approach to Scrutiny

The speed with which these Regulations needed to be put into place had direct implications for our approach to scrutiny. This is the first time that SCoSS has been obliged to report after the laying of Regulations. It seems unlikely that this will be the only occasion where there will be a need for emergency legislation. It has been a prompt for us to review our processes to ensure they accommodate such eventualities. The Minister has confirmed that Scottish Government will respond to recommendations and observations to this report in the usual way. We will also seek to explore any implications with the Social Justice and Social Security Committee

As the Social Security (Scotland) Act 2018 is currently framed, Ministers are obliged to refer to SCoSS draft Regulations falling under Chapter 2 Part 2 and section 79 of the Act, and SCoSS is obliged to scrutinise and submit them in the form of a report (see section 97). While SCoSS feels there is still value in our reporting on these Regulations after they have been laid and come into force (as it should help facilitate the identification of issues at an early stage) it may be worth considering whether this will always be the case, or always be a top priority. If not, an amendment to the Act would be required.

SCoSS was first informed about this need to legislate on Wednesday 8 September, when the Chair was briefed by lead officials and members then discussed and sent some immediate thoughts and queries. This included a query on why all refugees are not similarly treated. We are pleased that a draft amendment to address this has subsequently been brought forward. SCoSS had further discussion with officials at our Board meeting of 28 September. We received responses to the points we raised initially and at that meeting on 20 October. Individual members met with Programme officials to understand more about the interface between Scottish Government officials working in different areas and with the UK Government. In view of the critical importance of rapid, efficient delivery to achieve the policy goal, we approached Social Security Scotland officials who helpfully provided information on a number of points. See annex for timeline. We extend our thanks to them all.

We also contacted stakeholders working with refugees to ask if they had views on the draft Regulations. We received no responses, quite possibly because the Regulations themselves are seen as unproblematic. We remain keen to understand more about their perspective on devolved social security and the lived experience perspective of refugees, with the aim of informing future reports.

3. Overview: Social Security Principles and Refugees

Although these Regulations apply just to specific groups of refugees from one country, it is clear that the social security principles have implications not just in this instance but for the approach of devolved social security pertaining to refugees.

Investment in the people of Scotland (principle a)

In effect the starting point is who qualifies as ‘people of Scotland’. When it comes to refugees that is for the UK Government Home Office to determine. However, it is clear that their conclusions can have a direct impact on devolved matters, including social security as ‘an investment in the people of Scotland’. Moreover, there may perhaps on occasion be scope in some areas for Scottish Government to extend entitlements, or at least initiate exploratory dialogue with DWP where their approach remains a constraint.

Human rights and contribution towards reduction in poverty (principles b and e)

The human rights of refugees can reasonably be expected to be far from secure, even down to the right to life. The removal of obstacles to payments clearly contributes to human rights and the reduction in poverty, which may well be acute. We comment below on whether these Regulations are technically drafted to achieve that, with regard to the forms of assistance and groups in question, along with practical and delivery implications to consider.

The extent to which social security serves as a human right that supports the realisation of other human rights (b) may be contingent on the efficacy of co-ordination with other forms of support. There are

several expectations in the Social Security Charter which suggest a facilitative role for Social Security Scotland which we discuss below.

Advancement of equality and non-discrimination (principle g.ii)

It is clear just from these Regulations that there is some complexity about who is covered by which Home Office schemes and who is not, and, therefore, potentially very different treatment of people arriving in this country, even if their immediate circumstances are much the same. That might include refugees arriving from Afghanistan via other routes as well as refugees more generally – anyone granted leave to remain for humanitarian, or discretionary reasons³. This should always prompt questions about equality and non-discrimination and whether scope exists for Scottish Government to advance equitable treatment – as it has already committed to do on this occasion with respect to the subsequent amendment previously flagged.

Dignity and respect, and efficiency and value for money (principles d and h)

This underlines the point about the importance of efficient, rapid delivery if policy goals for are to be met and value for money achieved. There may be staff training and communications issues to address when it comes to understanding of other cultures, meeting their needs and preferences, so that no one experiences discrimination.

Designing with the people of Scotland and putting the needs of people who use assistance first (principles f and g.i)

Clearly, on this occasion, there was no time to ‘design with the people of Scotland’ (f). However, it may be worth carrying out further exploration with stakeholders working with refugees and asylum seekers, and of course people with lived experience of being refugees, or asylum seekers themselves, to ensure understanding of their needs, the implications for the design and delivery of devolved social security policy and to collect feedback on how well this works for refugees.

³ Asylum seekers, unlike people with refugee status, are usually subject to immigration control and cannot claim any benefits because of that. There may also be implications to factor in from a wider UK perspective in regards to the relationship with the planned reforms to the UK’s asylum system through the Nationality and Borders Bill.

4. Technical Issues

People not covered by the Home Office resettlement schemes

The equivalent Regulations in the UK on which these provisions are based⁴ also provide exemptions from the habitual residence test for UK-wide income-related benefits such as Universal Credit. This allows people arriving under the Home Office resettlement schemes to meet residency requirements from day one. For these benefits, there is a further category of people who do not fall within these schemes. That is people who 'left Afghanistan in connection with the collapse of the Afghan government that took place on 15th August 2021'.⁵ This covers others returning to the UK in exceptional circumstances, including returning UK nationals, and is intended to ensure they have access to income-related benefits from day one to help with immediate needs.⁶ This in turn will provide access to Scottish benefits such as BSG which for most people rely on receipt of Universal Credit, or another income-related qualifying benefit. However, it does not ensure early access to disability and carers' benefits for this group.

Immediate needs for disabled people may include extra costs of transport, clothing, fuel and other disability-related needs, or social barriers. While some people returning to the UK will meet residence conditions for disability and carers' benefits without needing a further special exemption (e.g. because returning UK residents can be accepted as habitually resident from day one), there may be others who have to wait to qualify. There may be no scope for Scottish Government to diverge from the UK-led changes for those benefits such as PIP delivered by the DWP on behalf of Scottish Government, but presumably there is scope to diverge, to some extent, for Scottish benefits such as ADP and CDP, in line with principle g (ii).

Recommendation 1: Scottish Government is invited to consider whether there is a need to provide an exemption for others coming to the UK from Afghanistan who are not covered by the Home Office resettlement schemes.

⁴ [The Social Security \(Habitual Residence and Past Presence\) \(Amendment\) Regulations 2021 No. 1034](#)

⁵ Regulations 2(2) and 3(2) of SI 2021 No. 1034

⁶ Paragraph 7.10 [Explanatory Memorandum](#) to SI 2021 No. 1034

We also note a typo in the Regulations which does not alter the legal effect and could be corrected in due course. Regulation 3(2) amends BSG pregnancy and baby payment residence rules in paragraph 4(2) of schedule 2 of the Early Years Assistance (Best Start Grants) (Scotland) Regulations 2018, inserting a new paragraph (ab) ‘a person who – (i) [has] leave to enter’.

5. Practical Issues

5.1 Evidence

To access devolved assistance, it is necessary to provide evidence to show that eligibility criteria are being met. Those criteria clearly extend beyond habitual residence and past presence tests. There may be additional practical problems, such as not having a National Insurance number⁷ or access to the internet⁸, or the need to supply evidence of such things as age, disability; whether you are a child, parent, partner of someone, or an unpaid carer for someone. When it comes to ADP, for example, there are requirements related to the length of time a person has had their impairment and for how long it is expected to last, as well as detailed descriptors to score against.

Unlike the UK system, which relies on formal assessments often carried out by private sector companies, the Scottish system instead requires formal supporting information e.g. from a health professional, or support worker and only requires a ‘consultation’ in person if there is not enough information to make a decision. People recently arrived in the UK may not have had time to establish contacts with the professionals who normally would provide formal evidence – they may not have had time to register with a GP, have a care assessment, or start education. We would expect Social Security Scotland to take this into account when deciding what evidence they need to confirm entitlement, and to make efforts to evidence applications without the need for more formal consultations for this group than for other applicants.

⁷ Social Security Scotland officials informed us that all people covered by this scheme have been issued with a temporary National Insurance number, which will in due course be replaced with a permanent one.

⁸ Social Security Scotland officials informed us that applications are paper-based.

Social Security Scotland officials informed us that the refugees are provided with information on registering with services such as GP services. This should help meet requirements for supporting documentation in disability benefit applications. They also intimated a degree of pragmatism around requiring evidence in support of the qualifying requirements, particularly the length of time the individual in question has the condition giving rise to eligibility for CDP.

Recommendation 2: Scottish Government is invited to clarify how it plans to evidence eligibility requirements, other than habitual residence and past presence tests, in order to enable people covered by these Regulations to access payments quickly, in line with the policy goal.

5.2 Delivery

The practical delivery challenges would clearly differ from a tiny number of people in just two local authority areas to many people who are widely scattered. There will be issues to resolve when designing an appropriate, cost-efficient delivery model for different scenarios.

Meeting delivery needs

A key goal of the Social Security Charter is to help ensure that the way in which devolved social security is delivered is appropriate to the needs of those who apply for it (see also principle g i). There are practical implications of several Charter expectations when it comes to delivery that will be appropriate to the needs of refugees. Notably, these include:

- Part 2, expectation 3: “adapt processes and ways of communicating as much as we reasonably can to meet your needs and preferences, for example by providing interpreters”.
- Part 2, expectation 5: “ensure that disabled people who need help with the application process can get independent advocacy”.
- Part 3, expectation 5: “ensure staff understand the needs of different people and the barriers they face - so that no-one experiences discrimination because of who they are”.

There will be learning that may be helpful to draw on from other exercises⁹, or from previous scheme for refugees¹⁰. This includes the Centre for Social Justice report¹¹ on the Syrian scheme (see also the The UN Refugee Agency (UNHCR) evaluation study¹²) which cites the need for better English language support and for recognising that ethnic and cultural differences exist within the same population. There may also be particular equality issues to consider when designing effective support arrangements for unaccompanied children, women and girls, and refugees with protected characteristics, which should be picked up by Equality Impact Assessments (EQIAs)¹³.

While it may fall to Local Authorities to play a leading role, and many agencies can be expected to have involvement at local level, such learning may, nonetheless, have implications for Social Security Scotland with regard to the delivery of Charter expectations and how this is integrated into its local delivery plans.

Observation 1: We note that the needs of refugees, such as for language support, may have a particular bearing on Social Security Charter expectations including those on adapting processes and ways of communication, independent advocacy provision for disabled people, and ensuring staff understand the needs of different people and the barriers they face so that no-one experiences discrimination.

⁹ For example, see Child Poverty Action Group's (CPAG) report in relation to Universal Credit: [Access to universal credit for refugees and their families | CPAG](#)

¹⁰ The explanatory memo to the UK regulations says they are similar to the 2006 regulations for the situation in Lebanon: [Explanatory Memorandum To The Social Security \(Habitual Residence And Past Presence\) \(Amendment\) Regulations 2021 No. 1034](#)

¹¹ [The Syrian Refugee Crisis: a resettlement programme that meets the needs of the most vulnerable](#) by The Centre for Social Justice.

¹² [UNHCR study: integration efforts advancing in UK Syria refugee resettlement](#)

¹³ For example, there is also learning captured from the Syrian scheme in the Disability Assistance for Children and Young People (DACYP) Equalities Impact Assessment (EQIA) paras 72-75 which also refers to language barriers. The new [take up strategy](#) indicates action to address barriers such as language and stigma and the improved engagement with stakeholders representing seldom heard groups including refugees.

Co-ordination with other services

There appears already to be considerable learning about the importance of simple referrals systems to multiple services. For example, the UNHCR evaluation study highlighted the need for further support for housing and employment facilitation. Access to healthcare services is a clear priority (and also may have a bearing on evidence for claiming devolved social security).

As above, we understand that local co-ordination of services is led by local authorities. Multiple providers along with Social Security Scotland (including DWP, health services, banks) go to the hotels where Afghan refugees are located. We note that the Social Security Charter accords Social Security Scotland a facilitative role in co-ordinating access to other forms of support:

- Part 1, expectation 10, says Social Security Scotland will: “refer you to other organisations, services or forms of help where they could help improve your wellbeing or financial circumstances”.
- Part 1, expectation 11: “tell you if we think you might be entitled to benefits not delivered by Social Security Scotland”.
- Part 3, 9: “work with other organisations to ensure services and policy are joined up to provide the best possible help and support”.

In this particular situation, where wrap-around support co-ordinated by local authorities appears to be in place, there may be no need for Social Security Scotland to perform such a function, although presumably the need to co-ordinate would be a feature of local delivery plans. Social Security Scotland officials told us of links with third sector and other stakeholder at local level. However, wrap-around support for other refugees, particularly if in many different locations and situations, may be less straightforward to co-ordinate, and so there may be a role for it. The application of these Charter expectations when it comes to refugees in general may be worthy of consideration.

Observation 2: Social Security Scotland may in some cases be well-placed to play a facilitative role when it comes to referring refugees to wider support and wrap-around services, consistent with Charter expectations on referring people to other organisations, services or forms of help and working with other organisations to ensure services and policy are joined up.

6. Wider Strategy for Refugees

Among key recommendations of the UNHCR report was the establishment of a national integration strategy to better inform and guide those supporting refugees, for the benefit of this population. Scottish Government's 'New Scot Refugee integration strategy 2018-2022' was shaped with the input of over 700 refugees and asylum seekers, using various methodologies. 78% of the total responses to the engagement exercise in 2017 commented on the theme of employability and welfare rights.

The first year progress report¹⁴ raises a few questions by omission with regard to how devolved social security features within this wider context, particularly as more forms of devolved assistance come on stream. For example, it cites their need for advice and information on how to navigate the benefits system, and that current benefit processes take too long and should be streamlined. Action reported to address this issue appears solely to concern the DWP.

With regard to the involvement of refugees and the input of their lived experience to devolved social security, we have been unable to establish whether they are represented in Social Security Scotland's Client Panel, comprised of people using devolved social security from whom feedback on service delivery is sought. We also do not know to what extent they have been involved in the Experience Panels that input to the design of devolved social security. The lived experience of refugees seems important to include.

Observation 3: Scottish Government may wish to consider if and how the experience of refugees in accessing devolved Social Security could contribute to progressing the outcomes of the New Scot Refugee Integration strategy 2018-2022 and the development of future strategy for refugees and how this is integrated into delivery plans.

¹⁴ [New Scots refugee integration strategy 2018-2022: first year progress report - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/new-scots-refugee-integration-strategy-2018-2022-first-year-progress-report/pages/110/index.aspx)

Annex - Scrutiny Timeline

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|-------------------|--|
| 13 September 2021 | Draft Regulations referred to SCoSS by the Minister for Social Security and Local Government |
| 28 September 2021 | SCoSS Board Meeting discussion |
| 5 October 2021 | SCoSS contacted Social Security Directorate with SCoSS Board questions |
| 1 November 2021 | SCoSS met with Scottish Government Programme and Social Security officials regarding draft regulations |
| 4 November 2021 | SCoSS Chair met with Social Security Scotland |
| 4 November 2021 | Questions issued to Scottish Government Social Security Scotland Outcomes Lead regarding draft regulations |
| 15 November 2021 | Final Scrutiny report signed off at SCoSS |



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