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Draft Regulations laid before the Scottish Parliament under section 96(2) of the Social Security (Scotland) Act 2018 and paragraphs 2 and 2A of schedule 2 of the European Communities Act 1972 for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2020 No.

EXITING THE EUROPEAN UNION SOCIAL SECURITY

The Carer's Allowance Supplement and Young Carer Grants (Residence Requirements and Procedural Provisions) (EU Exit) (Scotland) Regulations 2020

<i>Made</i>	- - - -	2020
<i>Coming into force</i>	- -	2020

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 28(2), 81(8) and 95 of the Social Security (Scotland) Act 2018⁽¹⁾ (“the 2018 Act”), section 2(2) of the European Communities Act 1972⁽²⁾, section 13 of the European Union (Withdrawal Agreement) Act 2020⁽³⁾ and all other powers enabling them to do so.

(1) 2018 asp 9.

(2) 1972 c.68. Section 2(2) of the European Communities Act 1972 (“the 1972 Act”) was amended by paragraph 15(3) of schedule 8 of the Scotland Act 1998 (c.46) (“the 1998 Act”) (which was amended by section 27(4) of the Legislative and Regulatory Reform Act 2006 (c.51) (“the 2006 Act”). Section 2(2) was also amended by section 27(1)(a) of the 2006 Act and by Part 1 of the schedule of the European Union (Amendment) Act 2008 (c.7). Section 2(2) was repealed by section 1 of the European Union (Withdrawal) Act 2018 (c.16) from 31 January 2020. However, the obligations under section 2(1) of the 1972 Act, which may be implemented via section 2(2), are subject to savings provision under section 4(1) of the 2018 Act. The use of section 2(2) is preserved by section 1A of the European Union (Withdrawal) Act 2018, until IP completion day, being 31 December 2020 at 11:00pm, as defined in section 39(1) of the European Union (Withdrawal Agreement) Act 2020. The powers in section 2(2) are exercised as regards regulations 4, 5, 6, 7, 8, 9 and 10, and schedule 2 (other than paragraph 15) of these Regulations, so far as they apply to determinations as to whether the conditions in section 81(9) of the Social Security (Scotland) Act (“the 2018 Act”) are met. The functions conferred upon the Minister of the Crown under section 2(2), insofar as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the 1998 Act. The transfer is in terms of regulation 4 of S.I. 2017/444, which causes section 53(1) and (2) of the 1998 Act to have effect in relation to pre-commencement enactments, within the meaning of section 32 of the Scotland Act 2016 (c.11) as read with section 22(2) of that Act, relating to carer’s benefits, upon commencement of a provision which relies on the exception in relation to carer’s benefits in Section F1 of Part 2 of schedule 5 of the 1998 Act. Section 81 of the 2018 Act was commenced on 3 September 2018 by regulation 2 of S.S.I. 2018/250. Accordingly, responsibility for the exercise of functions in relation to carer’s benefits, within the meaning of section 22 of the Scotland Act 2016 (c.11), has transferred to the Scottish Ministers.

(3) 2020 c.1.

In accordance with section 97(2) of the 2018 Act, the Scottish Ministers have informed the Scottish Commission on Social Security (“the Commission”) of their proposals, notified the Scottish Parliament that they have done so and made their proposals publicly available by such means as they consider appropriate.

The Scottish Ministers have laid a response to the Commission’s report on the proposals for the regulations in accordance with section 97(9)(a) of the 2018 Act.

In accordance with section 96(2) of the 2018 Act and paragraphs 2 and 2A of schedule 2 of the European Communities Act 1972, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament(4).

PART 1

Introductory

Citation and commencement

1. These Regulations may be cited as the Carer’s Allowance Supplement and Young Carer Grants (Residence Requirements and Procedural Provisions) (EU Exit) (Scotland) Regulations 2020 and come into force on the day after the day on which they are made.

Interpretation

2. In these Regulations—

“qualifying date” means a date determined by the Scottish Ministers in accordance with section 81(3) of the 2018 Act,

“the 2018 Act” means the Social Security (Scotland) Act 2018.

PART 2

Carer’s allowance supplement for individuals resident outside Scotland

Amendment of the Social Security (Scotland) Act 2018

3. Section 81 of the 2018 Act is modified in accordance with schedule 1.

Meaning of determination of entitlement to a carer’s allowance supplement

4.—(1) References in these Regulations to a determination of an individual’s entitlement to a carer’s allowance supplement for the purposes of section 81(2A)(5) of the 2018 Act are references to a determination made—

(a) by the Scottish Ministers—

(4) The powers to make these Regulations are exercised together by virtue of section 33(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10). These Regulations are subject to the affirmative procedure by virtue of section 33(3) of that Act. Paragraph 2 of schedule 2 of the European Communities Act 1972 (c.68) has been amended by section 27(2)(a) of the Legislative and Regulatory Reform Act 2006 (c.51). Paragraph 2A of the European Communities Act 1972 (c.68) has been modified by paragraph 5 of schedule 3 of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10).

(5) Section 81(2A) is inserted by schedule 1 of these Regulations.

- (i) under regulation 5, or
- (ii) (following a request for a re-determination) under paragraph 6 of schedule 2 of these Regulations,
- (b) by the First-tier Tribunal for Scotland—
 - (i) under paragraph 12 of schedule 2 of these Regulations in an appeal against a determination made by the Scottish Ministers, or
 - (ii) (subsequent to such an appeal) under its Tribunals Act powers,
- (c) by the Upper Tribunal for Scotland under its Tribunals Act powers (subsequent to an appeal against, or a review of, a decision of the First-tier Tribunal),
- (d) by the Court of Session under its Tribunals Act powers (in an appeal against a decision of the Upper Tribunal), or
- (e) by the Supreme Court of the United Kingdom—
 - (i) in an appeal under section 40 of the Court of Session Act 1988⁽⁶⁾ against a decision of the Court of Session, or
 - (ii) on a reference made by the Court of Session under schedule 6 of the Scotland Act 1998.
- (2) In this regulation—
 - “determination” means—
 - (a) a decision about whether the individual meets the conditions in section 81(9), (11) or (13) of the 2018 Act,
 - (b) if those conditions are satisfied, a decision about what assistance by way of carer’s allowance supplement the individual is entitled to be given,
 - (c) a decision about whether the individual’s application for a carer’s allowance supplement is possibly premature,
 - “Tribunals Act powers” means the powers under Part 6 (review or appeal of decisions) of the Tribunals (Scotland) Act 2014⁽⁷⁾.

Determination of entitlement to a carer’s allowance supplement for individuals resident outside Scotland

5.—(1) The Scottish Ministers are to make a determination of an individual’s entitlement to a carer’s allowance supplement for the purposes of section 81(2A) of the 2018 Act—

- (a) on receiving an application from the individual, or
- (b) when required to do so by regulation 7, 8 or 9, without receiving an application.

(2) A determination may be made under paragraph (1) in respect of any qualifying date before or after the coming into force of these Regulations.

(3) Paragraph (4) applies where there is a subsequent determination of an individual’s entitlement to a carer’s allowance supplement in respect of a qualifying date.

- (4) Where this paragraph applies—
 - (a) the latest determination supersedes any earlier determination insofar as it deals with the individual’s entitlement to a carer’s allowance supplement in respect of the same qualifying date, and

⁽⁶⁾ 1988 c.36. Section 40 was substituted by section 117 of the Courts Reform (Scotland) Act 2014 (asp 8).

⁽⁷⁾ 2014 asp 10.

- (b) the individual is not entitled, and is not to become entitled, to a carer's allowance supplement in respect of that qualifying date by the earlier determination.

Timing of applications for a determination of entitlement to a carer's allowance supplement for individuals resident outside Scotland

6. For the purposes of regulation 5, an individual may make an application on, or at any time after, the first qualifying date on which an individual considers themselves to have been a person to whom section 81(2A) of the 2018 Act applies.

Determination of entitlement to a carer's allowance supplement without application for individuals resident outside Scotland

7. The Scottish Ministers are to make a determination of an individual's entitlement to a carer's allowance supplement under regulation 5, without receiving an application, where—

- (a) it appears to the Scottish Ministers from information available to them that the individual is likely to meet the conditions in section 81(9) or (as the case may be) section 81(11) or (13) of the 2018 Act in respect of one or more qualifying dates,
- (b) the Scottish Ministers have previously made a determination that an individual does not meet the conditions in section 81(9) or (as the case may be) section 81(11) or (13) of the 2018 Act in respect of a qualifying date (“the original determination”), and—
 - (i) the Scottish Ministers establish that the individual has received an award of carer's allowance under section 70 of the Social Security Contributions and Benefits Act 1992(8),
 - (ii) the award referred to in sub-paragraph (i) is backdated to include the relevant qualifying date, and
 - (iii) it appears to the Scottish Ministers that, had the backdated award been made before the original determination, it is likely that a determination that the individual met the conditions in section 81(9) or (as the case may be) section 81(11) or (13) of the 2018 Act would have been made instead,
- (c) the individual received a payment of carer's allowance supplement in respect of the most recent qualifying date pursuant to a determination made by the Scottish Ministers under regulation 5.

Determination following official error - underpayments

8.—(1) The Scottish Ministers are to make a determination under regulation 5 without receiving an application where—

- (a) they have previously made a determination under regulation 5 of the individual's entitlement to a carer's allowance supplement, and
- (b) they establish that due to an official error that determination was incorrect resulting in the individual not being paid a carer's allowance supplement to which they were entitled.

(2) In this regulation, “official error” means an error made by someone acting on behalf of the Scottish Ministers or on behalf of a Minister of the Crown that was not materially contributed to by anyone not so acting.

(8) 1992 c.4. Section 70 was relevantly amended by S.I. 2002/1457.

Determination following error – overpayments

9.—(1) The Scottish Ministers are to make a determination under regulation 5 without receiving an application where—

- (a) they have previously made a determination under regulation 5 of the individual's entitlement to a carer's allowance supplement, and
- (b) they establish that due to an error that determination was incorrect resulting in the individual being paid a carer's allowance supplement to which they were not entitled.

(2) In this regulation, “error” means an error in the performance of a function conferred by these Regulations which leads to a determination being made—

- (a) wrongly, or
- (b) correctly but on the basis of incorrect information.

Procedure

10. Schedule 2 makes further provision about matters of procedure for applying for, and determining entitlement to, a carer's allowance supplement for the purposes of section 81(2A) of the 2018 Act.

PART 3

Young carer grants

Amendment of eligibility conditions

11.—(1) The Carer's Assistance (Young Carer Grants) (Scotland) Regulations 2019⁽⁹⁾ are amended in accordance with paragraphs (2) to (5).

(2) In regulation 4 (making of applications)—

- (a) for paragraph (3), substitute—

“(3) An application is to be treated as made—

- (a) in a case where paragraph (7) applies, on the day after the end of the 13 week period to which the application relates,
- (b) in any other case, on the day it is received by the Scottish Ministers.”.

- (b) after paragraph (6), insert—

“(7) This paragraph applies where—

- (a) an application for a young carer grant is made on or after the day on which the Carer's Allowance Supplement and Young Carer Grants (Residence Requirements and Procedural Provisions) (EU Exit) (Scotland) Regulations 2020⁽¹⁰⁾ came into force,
- (b) the application relates to a period of 13 weeks beginning after 21 October 2019 and ending before the day mentioned in sub-paragraph (a), and
- (c) it appears to the Scottish Ministers that the applicant would be likely to have been entitled to a young carer grant on making an application on the day after the end of that 13 week period were it not for the requirement in regulation 8(3)(a) of these Regulations to have previously been properly paid a young carer grant,

⁽⁹⁾ S.S.I. 2019/324, to which there are no amendments relevant to these Regulations.

⁽¹⁰⁾ S.S.I. 2020/xxx.

as it had effect immediately before the date on which the Carer's Allowance Supplement and Young Carer Grants (Residence Requirements and Procedural Provisions) (EU Exit) (Scotland) Regulations 2020 came into force.”.

- (3) In regulation 7 (further eligibility conditions)—
- (a) for paragraph (3), substitute—
- “(3) An applicant is not entitled to a young carer grant if they have previously received a young carer grant, unless—
- (a) the day their application is made is at least one year after the day of the application in respect of which that grant was paid, or
- (b) in a case where regulation 4(7) applies, the day their application is made is at least one year either before or after the application in respect of which the grant was paid.”.
- (b) for paragraph (4), substitute—
- “(4) Paragraph (5) applies if—
- (a) any other person has been paid a young carer grant in respect of care of any of the persons being cared for in an application for a young carer grant, and
- (b) either—
- (i) that grant was paid as a result of an application made during the year immediately preceding the day the applicant makes his or her application, or
- (ii) in a case where regulation 4(7) applies, that grant was paid as a result of an application made during the year immediately preceding or following the day the applicant makes his or her application.”.
- (c) after paragraph (6), insert—
- “(7) In paragraph (5)(a), in a case where regulation 4(7) applies, the reference to the other person who was paid a young carer grant having died is to be read as a reference to that other person having died before the day on which the applicant's application was made.”.
- (4) In regulation 8 (conditions relating to residence)—
- (a) for paragraph (3) substitute—
- “(3) An applicant who is not ordinarily resident in the United Kingdom does not have to meet the condition in paragraph (1)(b) (and therefore is entitled to a young carer grant) if—
- (a) they satisfy the conditions in paragraph (4) on the day on which the application is made, if the application is made before IP completion day,
- (b) they satisfy the conditions in paragraph (5) on the day the application is made, if the application is made after IP completion day and the individual has rights arising from a relevant EU regulation, or
- (c) they satisfy the conditions in paragraph (6) on the day the application is made, if the application is made after IP completion day and the individual has rights arising from the UK-Ireland convention mentioned in that paragraph.
- (4) The conditions referred to in paragraph (3)(a) are that the applicant must—
- (a) be an individual—
- (i) to whom a relevant EU Regulation applies, and

- (ii) in respect of whom the United Kingdom is competent for payment of sickness benefits in cash for the purposes of Chapter 1 of Title III of the Regulation in question,
 - (b) be resident in—
 - (i) Switzerland, or
 - (ii) an EEA State other than the United Kingdom,
 - (c) have a genuine and sufficient link to Scotland, and
 - (d) meet the other conditions prescribed in these Regulations.
- (5) The conditions referred to in paragraph (3)(b) are that the applicant must—
- (a) be an individual—
 - (i) to whom the rules set out in a relevant EU regulation apply by virtue of—
 - (aa) Title III of Part 2 of the EU withdrawal agreement,
 - (bb) Part 3 or Article 23(4) of the Swiss citizens' rights agreement (as defined in section 39(1) of the European Union (Withdrawal Agreement) Act 2020⁽¹¹⁾),
 - (cc) Title III of the EEA EFTA separation agreement (as defined in that section), or
 - (dd) the agreement constituted by the exchange of letters set out in the schedule of the Family Allowances, National Insurance and Industrial Injuries (Gibraltar) Order 1974⁽¹²⁾, and
 - (ii) in respect of whom the United Kingdom is, as a result, competent for payment of sickness benefits in cash,
 - (b) be resident in—
 - (i) Switzerland,
 - (ii) an EEA state, or
 - (iii) Gibraltar,
 - (c) have a genuine and sufficient link to Scotland, and
 - (d) meet the other conditions prescribed in these Regulations.
- (6) The conditions referred to in paragraph (3)(c) are that the applicant must—
- (a) be an individual—
 - (i) to whom the convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland signed at Dublin on 1 February 2019⁽¹³⁾, as modified from time to time in accordance with any provision of it, applies, and
 - (ii) in respect of whom the United Kingdom is, as a result, competent for payment of long term care benefits,
 - (b) be resident in Ireland,
 - (c) have a genuine and sufficient link to Scotland, and
 - (d) meet the other conditions prescribed in these Regulations.

⁽¹¹⁾ 2020 c.1.

⁽¹²⁾ S.I. 1974/555.

⁽¹³⁾ 2019 CP 49.

(7) The reference in paragraph (4)(c) to an individual's link to Scotland being sufficient is to it being sufficiently close that if the individual were not entitled to a young carer grant paragraph (4)—

- (a) would be incompatible with EU law, or
- (b) would have been incompatible with EU law immediately preceding IP completion day.

(8) The reference in paragraph (5)(c) to an individual's link to Scotland being sufficient is to it being sufficiently close that if the individual were not entitled to a young carer grant, paragraph (5) would be incompatible with the applicable agreement referred to in that paragraph.

(9) The reference in paragraph (6)(c) to an individual's link to Scotland being sufficient is to its being sufficiently close that if the individual were not entitled to a young carer grant, paragraph (6) would be incompatible with the convention mentioned in that paragraph.

(10) In this regulation—

“EEA State” means—

- (a) any member state of the European Union or
- (b) any other state that is party to the agreement on the European Economic Area signed at Oporto on 2 May 1992⁽¹⁴⁾, together with the Protocol adjusting that Agreement signed at Brussels on 17 March 1993⁽¹⁵⁾, as modified or supplemented from time to time,

“EU law” has the meaning given by subsection (9) of section 126 of the Scotland Act 1998⁽¹⁶⁾ or, if that subsection has been repealed, the meaning given by that subsection immediately before its repeal⁽¹⁷⁾,

“relevant EU Regulation” means—

- (a) one of the following Regulations—
 - (i) Council Regulation (EC) No 1408/71 of 14 June 1971⁽¹⁸⁾ on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community,
 - (ii) Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004⁽¹⁹⁾ on the coordination of social security systems, or
- (b) in relation to an individual to whom the exchange of letters mentioned in paragraph (5)(a)(i)(dd) applies, a Regulation mentioned in paragraph (a) as it forms part of domestic law by virtue of section 3 of the European Union (Withdrawal) Act 2018⁽²⁰⁾.”

(5) In regulation 12 (amount and form of young carer grants)—

- (a) in paragraph (1), for “A young carer grant” substitute “Subject to paragraph (1A), a young carer grant”,

⁽¹⁴⁾ Command Paper 2073 and OJ L 1, 3.1.1994, p.3.

⁽¹⁵⁾ Command Paper 2183 and OJ L 1, 3.1.1994, p.572.

⁽¹⁶⁾ 1998 c.46, as amended by S.I. 2011/1043.

⁽¹⁷⁾ The repeal of section 126(9) of the Scotland Act 1998 is provided for by paragraph 19 of schedule 3 of the European Union (Withdrawal) Act 2018 (c.16). A date for the coming into force of that repeal is to be appointed by the Secretary of State.

⁽¹⁸⁾ OJ No. L 28, 30.1.1997, p.1.

⁽¹⁹⁾ OJ L 166, 30.4.2004, p.1.

⁽²⁰⁾ 2018 c.16.

(b) after paragraph (1) insert—

“(1A) Where the application for a young carer grant relates to a qualifying period which ended before the date on which the Carer’s Allowance Supplement and Young Carer Grants (Residence Requirements and Procedural Provisions) (EU Exit) (Scotland) Regulations 2020 came into force, the amount of young carer grant to be given is the amount specified in paragraph (1) as it had effect on the day on which the application was made.”.

St Andrew’s House,
Edinburgh
Date

Name
A member of the Scottish Government

SCHEDULE 1

Regulation 3

Amendment of the Social Security (Scotland) Act 2018

1. Section 81 (carer's allowance supplement) of the Social Security (Scotland) Act 2018⁽²¹⁾ is amended as follows.

2. After subsection (1) insert—

“(1A) A qualifying individual is an individual to whom subsection (2) or (2A) applies.”.

3. In subsection (2), for “A qualifying individual is” substitute “This subsection applies to”.

4. After subsection (2) insert—

“(2A) This subsection applies to an individual whom the Scottish Ministers have determined in accordance with Part 2 of the Carer's Allowance Supplement and Young Carers Grants (Residence Requirements and Procedural Provisions) (EU Exit) (Scotland) Regulations 2020 (S.S.I. 2020/XX)—

- (a) met the eligibility conditions in subsection (9) on the qualifying date (where the qualifying date is before IP completion day),
- (b) met the eligibility conditions in subsection (11) on the qualifying date (where the qualifying date is after IP completion day and the individual has rights arising from a relevant EU regulation), or
- (c) met the eligibility conditions in subsection (13) on the qualifying date (where the qualifying date is after IP completion day and the individual has rights arising from the UK-Ireland convention mentioned in that subsection).”.

5. After subsection (8) insert—

“(9) An individual met the eligibility conditions referred to in subsection (2A)(a) on a given date if, on that date, the individual—

- (a) was in receipt of a carer's allowance under section 70 of the Social Security Contributions and Benefits Act 1992⁽²²⁾,
- (b) was an individual—
 - (i) to whom a relevant EU Regulation applied, and
 - (ii) in respect of whom the United Kingdom was competent for payment of sickness benefits in cash for the purposes of Chapter 1 of Title III of the Regulation in question,
- (c) was resident in—
 - (i) Switzerland, or
 - (ii) an EEA State other than the United Kingdom, and
- (d) had a genuine and sufficient link to Scotland.

(10) The reference in subsection (9)(d) to an individual's link to Scotland being sufficient is to it being sufficiently close that if the individual were not entitled to the carer's allowance supplement this section—

- (a) would be incompatible with EU law, or
- (b) would have been incompatible with EU law immediately before IP completion day.

⁽²¹⁾ 2018 asp 9. Section 81 applies with the modification made by Part 3 of schedule 1 of the Coronavirus (Scotland) (No. 2) Act 2020 (asp 10).

⁽²²⁾ 1992 c.4. Section 70 was relevantly amended by S.I. 2002/1457.

(11) An individual met the eligibility conditions referred to in subsection (2A)(b) on a given date if, on that date, the individual—

- (a) was in receipt of a carer's allowance under section 70 of the Social Security Contributions and Benefits Act 1992,
- (b) was an individual—
 - (i) to whom the rules set out in a relevant EU regulation applied by virtue of—
 - (A) Title III of Part 2 of the EU withdrawal agreement,
 - (B) Part 3 or Article 23(4) of the Swiss citizens' rights agreement (as defined in section 39(1) of the European Union (Withdrawal Agreement) Act 2020⁽²³⁾),
 - (C) Title III of the EEA EFTA separation agreement (as defined in that section), or
 - (D) the agreement constituted by the exchange of letters set out in the schedule of the Family Allowances, National Insurance and Industrial Injuries (Gibraltar) Order 1974 (S.I. 1974/555) between the United Kingdom and Gibraltar, and
 - (ii) in respect of whom the United Kingdom is, as a result, competent for payment of sickness benefits in cash,
- (c) was resident in—
 - (i) Switzerland,
 - (ii) an EEA State, or
 - (iii) Gibraltar, and
- (d) had a genuine and sufficient link to Scotland.

(12) The reference in paragraph (d) of subsection (11) to an individual's link to Scotland being sufficient is to it being sufficiently close that if the individual were not entitled to the carer's allowance supplement this section would be incompatible with the applicable agreement mentioned in paragraph (b)(i) of that subsection.

(13) An individual met the eligibility conditions referred to in subsection (2A)(c) on a given date if, on that date, the individual—

- (a) was in receipt of a carer's allowance under section 70 of the Social Security Contributions and Benefits Act 1992,
- (b) was an individual—
 - (i) to whom the convention on social security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland signed at Dublin on 1 February 2019⁽²⁴⁾, as modified from time to time in accordance with any provision of it, applied, and
 - (ii) in respect of whom the United Kingdom is, as a result, competent for payment of long term care benefits,
- (c) was resident in Ireland, and
- (d) had a genuine and sufficient link to Scotland.

(14) The reference in paragraph (d) of subsection (13) to an individual's link to Scotland being sufficient is to it being sufficiently close that if the individual were not entitled to

⁽²³⁾ 2020 c.1.

⁽²⁴⁾ 2019 CP 49.

Draft Legislation: This is a draft item of legislation. This draft has since been made as a Scottish Statutory Instrument: *The Carer's Allowance Supplement and Young Carer Grants (Residence Requirements and Procedural Provisions) (EU Exit) (Scotland) Regulations 2020 No. 475*

the carer's allowance supplement, this section would be incompatible with the convention mentioned in paragraph (b) of that subsection.

(15) In this section—

“EEA State” means—

- (a) a member State of the European Union, or
- (b) any other State that is a party to the agreement on the European Economic Area signed at Oporto on 2 May 1992⁽²⁵⁾, together with the Protocol adjusting that Agreement signed at Brussels on 17 March 1993⁽²⁶⁾, as modified or supplemented from time to time, “EU law” has the meaning given by subsection (9) of section 126 of the Scotland Act 1998⁽²⁷⁾, or if that subsection has been repealed, the meaning given by that subsection immediately before its repeal⁽²⁸⁾,

“relevant EU Regulation” means—

- (a) one of the following Regulations—
 - (i) Council Regulation (EC) No 1408/71 of 14 June 1971⁽²⁹⁾ on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community,
 - (ii) Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004⁽³⁰⁾ on the coordination of social security systems, or
- (b) in relation to an individual to whom the exchange of letters mentioned in subsection (11)(b)(i)(D) applies, a Regulation mentioned in paragraph (a) as it forms part of domestic law by virtue of section 3 of the European Union (Withdrawal) Act 2018⁽³¹⁾.”.

SCHEDULE 2

Regulation 10

Procedural Matters: Carer's Allowance Supplement

PART 1

Application and determination of applications

Form of application

1.—(1) An application under regulation 5 must be—

- (a) made in such form, and
- (b) accompanied by such evidence as the Scottish Ministers require.

⁽²⁵⁾ Command Paper 2073 and OJ L 1.3.1.1994, p.3.

⁽²⁶⁾ Command Paper 2183 and OJ L 1.3.1.1994, p.572.

⁽²⁷⁾ 1998 c.46, as amended by S.I. 2011/1043.

⁽²⁸⁾ The repeal of section 126(9) of the Scotland Act 1998 is provided for by paragraph 19 of schedule 3 of the European Union (Withdrawal) Act 2018 (c.16). A date for the coming into force of that repeal is to be appointed by the Secretary of State.

⁽²⁹⁾ OJ No. L 28, 30.1.1997, p.1.

⁽³⁰⁾ OJ L 166, 30.4.2004, p.1.

⁽³¹⁾ 2018 c.16.

(2) The Scottish Ministers must publicise any requirements for the time being set under sub-paragraph (1).

(3) Once—

- (a) an individual has applied for a carer's allowance supplement in respect of a particular qualifying date, and
- (b) the Scottish Ministers have made a determination of the individual's entitlement to a carer's allowance supplement in respect of that date,

the individual cannot make another application for carer's allowance supplement in respect of that qualifying date.

(4) Despite paragraph (3), an individual may make another application for a carer's allowance supplement in respect of that qualifying date if the latest determination of the individual's entitlement to assistance in respect of that date states that the individual may make another application.

(5) If the Scottish Ministers reject something purporting to be an application for a carer's allowance supplement they must inform the individual of—

- (a) the decision to do that,
- (b) the reasons for it, and
- (c) the individual's right to appeal under paragraph 13.

Withdrawal of application

2.—(1) An individual who has made an application for a carer's allowance supplement under regulation 5 may request that the Scottish Ministers disregard it.

(2) If an individual requests that an application be disregarded—

- (a) the Scottish Ministers are not to make a determination of entitlement on the basis of the application, and
- (b) accordingly, their duty to do so under regulation 5 ceases to apply.

(3) A request under sub-paragraph (1) must be made in such form as the Scottish Ministers require.

(4) The Scottish Ministers must publicise any requirements for the time being set under sub-paragraph (3).

Notice of determination

3.—(1) Having made a determination under regulation 5 of an individual's entitlement to a carer's allowance supplement the Scottish Ministers must inform the individual—

- (a) of the determination,
- (b) of the reasons for it,
- (c) of the individual's right under paragraph 4 to request that the Scottish Ministers re-determine the individual's entitlement to the payment, and
- (d) that the individual will have the right under paragraph 9 to appeal to the First-tier Tribunal against the determination should the Scottish Ministers fail to deal with a request for a re-determination in the period allowed for re-determination.

(2) The Scottish Ministers must fulfil their duty under sub-paragraph (1) in a way that leaves the individual with a record of the information which the individual can show to, or otherwise share with, others.

PART 2

Re-determination of entitlement

Right to request re-determination and periods allowed

4.—(1) An individual may request that the Scottish Ministers re-determine the individual's entitlement to a carer's allowance supplement after being informed (in accordance with paragraph 3) of a determination by the Scottish Ministers of the individual's entitlement to such a payment.

(2) Unless sub-paragraph (3) applies, a request for re-determination is valid only if it is made before the end of the period of 31 days beginning with the day that the individual is informed (in accordance with paragraph 3) of the right to make the request.

(3) A request for re-determination is valid if it is made after that period has ended, but before the end of the day that falls one year after the day on which the individual is informed (in accordance with paragraph 3) of the determination, if the individual has a good reason for not requesting a re-determination sooner (see paragraph 5).

(4) A request for re-determination is valid only if it is made in such form as the Scottish Ministers require.

(5) The Scottish Ministers must publicise any requirement for the time being set under sub-paragraph (4).

(6) If the Scottish Ministers decide that something purporting to be a request for a re-determination does not satisfy the condition in sub-paragraph (4), they must inform the individual concerned of—

- (a) the decision,
- (b) the reasons for it, and
- (c) the individual's right to appeal under paragraph 13.

Late request for re-determination

5.—(1) It is for—

- (a) the Scottish Ministers, or
- (b) on appeal under paragraph 13 the First-tier Tribunal for Scotland,

to decide whether, for the purpose of paragraph 4(3), an individual has a good reason for not requesting a re-determination sooner.

(2) Where the Scottish Ministers have made a decision under sub-paragraph (1), they must inform the individual concerned—

- (a) of the decision, and
- (b) if the decision is that the individual has no good reason for not requesting a re-determination sooner, of—
 - (i) the reasons for the decision, and
 - (ii) the individual's right to appeal under paragraph 13.

Duty to re-determine and period allowed

6.—(1) On receiving a valid request under paragraph 4 to re-determine an individual's entitlement to a carer's allowance supplement the Scottish Ministers are to make a determination of the individual's entitlement to that payment.

- (2) The Scottish Ministers must aim to make that determination within the period of 16 working days beginning with—
- (a) the day that the request for a re-determination is received by the Scottish Ministers, or
 - (b) in the case of a request for a re-determination to which paragraph 4(3) applies (late requests), the day on which it is decided by the Scottish Ministers or (as the case may be) the First-tier Tribunal for Scotland that the individual has a good reason for not requesting a re-determination sooner.
- (3) If the Scottish Ministers fail to make the determination within that period—
- (a) their duty to make the determination ends (but they may still make it), and
 - (b) paragraph 8 applies.
- (4) For the purpose of sub-paragraph (2), a “working day” is a day other than—
- (a) a Saturday
 - (b) a Sunday, or
 - (c) a bank holiday in Scotland under the Banking and Financial Dealings Act 1971⁽³²⁾.

Notice of re-determination

7.—(1) Having made a determination under paragraph 6 of an individual’s entitlement to a carers allowance supplement, the Scottish Ministers must—

- (a) inform the individual—
 - (i) of the determination,
 - (ii) of the reasons for it,
 - (iii) of the individual’s right to appeal to the First-tier Tribunal under regulation 9 against the determination, and
- (b) provide the individual with a form that the individual can complete and submit to the Scottish Ministers in order to bring an appeal against the determination.

(2) The Scottish Ministers must fulfil their duty under sub-paragraph (1)(a) in a way that leaves the individual with a record of the information which the individual can show to, or otherwise share with, others.

Notice where re-determination not made timeously

8.—(1) Where the Scottish Ministers fail to make a determination under paragraph 6 within the period allowed by paragraph 6(2), the Scottish Ministers must—

- (a) inform the individual—
 - (i) that the individual’s request for a re-determination has not been dealt with within the period allowed, and
 - (ii) that the individual therefore has the right to appeal to the First-tier Tribunal against the determination under regulation 5 which prompted the request for a re-determination, and
- (b) provide the individual with a form that the individual can complete and submit to the Scottish Ministers in order to bring an appeal against the determination.

(32) 1971 c.80, paragraph 2 of schedule 1 sets out the Scottish bank holidays and was amended by section 1 of the St Andrew’s Day Bank Holiday (Scotland) Act 2007 (asp 2).

(2) The Scottish Ministers must fulfil their duty under sub-paragraph (1)(a) in a way that leaves the individual with a record of the information which the individual can show to, or otherwise share with, others.

PART 3

Appeals

Right to appeal to First-tier Tribunal against determination

- 9.—(1) An individual may appeal to the First-tier Tribunal for Scotland—
- (a) against a determination under paragraph 6 of the individual's entitlement to a carer's allowance supplement, or
 - (b) in a case where sub-paragraph (2) applies, against the determination under regulation 5 referred to in that sub-paragraph.
- (2) This sub-paragraph applies where—
- (a) having been informed of a determination under regulation 5 of the individual's entitlement to a carer's allowance supplement, the individual has made a request for a re-determination under paragraph 4, and
 - (b) the Scottish Ministers have failed to make a determination under paragraph 6 in consequence of that request within the period described in paragraph 6(2).

Initiating an appeal

10.—(1) To bring an appeal against a determination, an individual must submit to the Scottish Ministers the form provided under paragraph 7(1)(b) or (as the case may be) paragraph 8(1)(b) in relation to the determination.

- (2) On receiving a form submitted under sub-paragraph (1), the Scottish Ministers must send—
- (a) the form, and
 - (b) the information held by them that they used to make the determination in question,
- to the First-tier Tribunal.

(3) Having complied with sub-paragraph (2), the Scottish Ministers must inform the individual to whom the determination in question relates that they have done so.

(4) In this paragraph, references to a form include a copy of a form.

(5) For the avoidance of doubt, the form that the Scottish Ministers provide under paragraph 7 or 8 need not be a physical form.

Deadline for appealing

- 11.—(1) An appeal under paragraph 9—
- (a) may be brought without the First-tier Tribunal's permission if an appeal application is made within the period of 31 days beginning with the day the relevant event occurred,
 - (b) may be brought only with the First-tier Tribunal's permission if an appeal application is made after the period mentioned in sub-paragraph (1)(a),
 - (c) may not be brought if an appeal application has not been made within the period of one year beginning with the day the relevant event occurred.
- (2) In sub-paragraph (1)—

- (a) “the relevant event” means—
 - (i) in the case of an appeal against a determination under paragraph 6, the individual to whom the determination relates being informed of it in accordance with paragraph 7(1),
 - (ii) in the case of an appeal against a determination under regulation 5, the individual to whom the determination relates being informed (in accordance with paragraph 8(1)) that the individual has the right to appeal against it,
 - (b) an appeal application is made when a form, that relates to the determination in question and has been completed to the extent that Scottish Tribunal Rules require, is received by the Scottish Ministers having been submitted in accordance with paragraph 10(1).
- (3) The First-tier Tribunal may give permission under sub-paragraph (1)(b) for an appeal to be brought only if it is satisfied that there is a good reason for the application not having been made sooner.
- (4) In sub-paragraph (2)(b), “Scottish Tribunal Rules” has the meaning given by section 68(2) of the Tribunals (Scotland) Act 2014(33).

First-tier Tribunal’s power to determine entitlement

12. In an appeal under paragraph 9 against a determination of an individual’s entitlement to a carer’s allowance supplement, the First-tier Tribunal may—

- (a) uphold the determination, or
- (b) make its own determination of the individual’s entitlement to a carer’s allowance supplement.

Appeal to First-tier Tribunal against process decisions

13.—(1) An individual may appeal to the First-tier Tribunal for Scotland against a decision by the Scottish Ministers—

- (a) to reject something purporting to be an application for a carer’s allowance supplement (see paragraph 1)),
 - (b) that something purporting to be a request for a re-determination does not satisfy the condition in paragraph 4(4),
 - (c) that an individual has no good reason for not requesting a re-determination sooner (see paragraph 5).
- (2) An appeal under this paragraph—
- (a) may be brought without the First-tier Tribunal’s permission within the period of 31 days beginning with the day the individual was informed of the decision in accordance with these Regulations,
 - (b) may be brought only with the First-tier Tribunal’s permission after the period mentioned in sub-paragraph (2)(a),
 - (c) may not be brought after the end of the period of one year beginning with the day the individual was informed of the decision in accordance with these Regulations.
- (3) The First-tier Tribunal may give permission under sub-paragraph (2)(b) for an appeal to be made only if it is satisfied that there is a good reason for the appeal not having been made sooner.
- (4) A decision by the First-tier Tribunal about—
- (a) the outcome of an appeal under this paragraph, or

(33) 2014 asp 10.

(b) whether to give permission under sub-paragraph (2)(b) for an appeal to be brought, is final.

(5) Accordingly (and without prejudice to the generality of sub-paragraph (4)), any such decision by the First-tier Tribunal may be neither—

- (a) reviewed under section 43 of the Tribunals (Scotland) Act 2014, nor
- (b) appealed against under section 46 of that Act.

Presumption for purposes of paragraphs 1, 3, 4, 5, 7, 8 and 10

14.—(1) Sub-paragraph (2) applies in relation to the references in paragraphs 1, 3, 4, 5, 7, 8, and 10 to an individual being informed of something by the Scottish Ministers in accordance with a provision of these Regulations.

(2) Where, in order to fulfil their duty to inform an individual of something, the Scottish Ministers send information—

- (a) through the postal service to the last known address the Scottish Ministers have for the individual, or
- (b) by email to the email address most recently provided to the Scottish Ministers by the individual for the purposes of these Regulations,

the individual is to be taken to have received the information 48 hours after it is sent by the Scottish Ministers unless the contrary is shown.

Amendment of the Social Security Appeals (Expenses and Allowances) (Scotland) Regulations 2018

15.—(1) The Social Security Appeals (Expenses and Allowances) (Scotland) Regulations 2018⁽³⁴⁾ are amended in accordance with paragraph (2).

(2) In regulation 3(1) (payment of expenses) for the words from “by” in the second place where it appears to “before” substitute “by the Social Security (Scotland) Act 2018⁽³⁵⁾, by regulations made under that Act or by the Carer’s Allowance Supplement and Young Carer Grants (Residence Requirements and Procedural Provisions) (EU Exit) (Scotland) Regulations 2020⁽³⁶⁾, before”.

PART 4

Further provision about determining entitlement

Obtaining information to make a determination

16.—(1) When the Scottish Ministers are determining an individual’s entitlement to a carer’s allowance supplement for the purposes of section 81(2A) of the 2018 Act—

- (a) they require further information in order to satisfy themselves about any matter material to the making of the determination, and
- (b) they may request that the individual provide them with the information within such period as they specify.

(2) If the individual fails to provide the requested information by the end of the specified period, the Scottish Ministers may, without further consideration, proceed to make the determination on

⁽³⁴⁾ S.S.I. 2018/275.

⁽³⁵⁾ 2018 asp 9.

⁽³⁶⁾ S.S.I. 2020/XX.

the basis that the individual does not satisfy the conditions in section 81(9) or (as the case may be) section 81(11) or (13) of the 2018 Act.

Duty to inform about possible eligibility

17.—(1) Paragraph (2) applies if, in the course of their making a determination of an individual's entitlement to a carer's allowance supplement under regulation 5, it appears to the Scottish Ministers that the individual may be entitled to a type of assistance described in Chapter 2 of Part 2 of the 2018 Act or to assistance provided for by regulations made under section 79 of that Act.

(2) The Scottish Ministers must—

(a) inform the individual that the individual may be eligible for the assistance, and

(b) either—

(i) provide the individual with information about how to apply for it, or

(ii) if regulations made under section 52 or 79 of the 2018 Act so allow, ask the individual whether they should proceed with making a determination of the individual's entitlement to the assistance without receiving an application.

(3) Paragraph (2)(b)(ii) does not preclude the Scottish Ministers from requesting further information under paragraph 16 for the purpose of determining the individual's entitlement to the assistance described in paragraph (1).

Appointment of a person to act on behalf of an individual

18. Section 58 or (as the case may be) section 85B(37) of the 2018 Act applies in respect of the determination of an individual's entitlement to a carer's allowance supplement under regulation 5 as it does to a determination of entitlement to assistance under Part 2 or 3 of the 2018 Act.

PART 5

Coronavirus – relaxation of deadlines

Re-determination and appeal deadlines

19.—(1) A request for a re-determination is valid, despite being made after the expiry of the period described in paragraph 4(3), if the person deciding whether the individual has a good reason for not requesting a re-determination sooner decides that the individual has a good reason that is related to coronavirus.

(2) An appeal may be brought under paragraph 9 despite the appeal application being made after the expiry of the period described in paragraph 11(1)(c), if the First-tier Tribunal gives permission for the appeal to be brought under sub-paragraph (1)(b) of that paragraph on the basis of being satisfied that the good reason for the application not being made sooner is related to coronavirus.

(3) Any provision of Scottish Tribunal Rules that would (but for this sub-paragraph) have the effect of precluding an appeal being brought by virtue of sub-paragraph (2) is to be disregarded to the extent that it would have that effect.

(4) In this paragraph—

“coronavirus” has the meaning given by section 1 of the Coronavirus (Scotland) Act 2020(38),

(37) Section 85B is to be inserted by section 2(4) of the Social Security Administration and Tribunal Membership (Scotland) Act 2020 (asp 18) (“the 2020 Act”). Section 58 of the Social Security (Scotland) Act 2018 is prospectively repealed by section 2(2) of the 2020 Act.

(38) 2020 asp 7.

“Scottish Tribunal Rules” has the meaning given by paragraph 11(4).

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations extend provision of both Carer’s Allowance Supplement (“CAS”) and Young Carer Grants (“YCG”). In relation to YCG, these Regulations extend the circumstances in which a person may claim YCG from outside the UK. In relation to CAS, these Regulations provide for claims from outside the UK for the first time.

These Regulations seek to ensure that the rules on social security co-ordination provided for in Council Regulation (EC) No 1408/71 of 14 June 1971⁽³⁹⁾ on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004⁽⁴⁰⁾ on the coordination of social security system are given full effect. This relates, in particular, to Article 19 of Regulation 1408/71 and Article 21 of Regulation 883/2004. These deal with claims made for cash sickness benefits by persons resident in a state other than the state which is competent for payment of such benefits to them. The power in section 2(2) of the European Communities Act 1972 is exercised for this purpose as regards regulations 4 and 5, as well as regulations 6, 7, 8, 9, 10 and schedule 2 other than paragraph 15, in so far as they are applied to determinations as to whether the conditions in new section 81(9) of the Social Security (Scotland) Act (“the 2018 Act”) are met.

Regulation 11(4) inserts new paragraph (5) into regulation 8 of the Carer’s Assistance (Young Carer Grant) (Scotland) Regulations 2019 (“the Young Carer Grants Regulations”), and paragraph 5 of schedule 1 of these Regulations inserts new subsection (11) into section 81 of the 2018 Act. These provisions look to ensure that the provision on social security co-ordination in Title III of Part 2 of the EU withdrawal agreement is given effect to, along with that in Part III of the EEA EFTA separation agreement, Part 3 of the Swiss citizens’ rights agreement, and the exchange of letters between the Governments of the United Kingdom and Gibraltar on arrangements for social security co-ordination. The provision in regulation 11(4) where it inserts new paragraph (6) into regulation 8 of the Young Carer Grants Regulations, and paragraph 5 of schedule 1 where it inserts new subsection (13) into section 81 of the 2018 Act, ensures that the entitlement of those covered by the convention on social security between the UK and Ireland is also provided for.

In terms of CAS, the extension in provision is by amendment of section 81 of the 2018 Act relating to payment of CAS, along with provisions within Part 2 and schedule 2 of these Regulations. The amendments to the 2018 Act, found in schedule 1 of these Regulations, modify the definition of a “qualifying individual” so that persons resident out with Scotland, who would otherwise be entitled to receive CAS, may now be included within the definition where they satisfy the eligibility criteria. The addition of section 81(9), (11) and (13) to the 2018 Act details the eligibility criteria for such persons. The Scottish Ministers have a duty, in terms of regulations 5 to 9, to make a determination of an individual’s entitlement to CAS, either on receiving an application or, when required by these Regulations, to make a determination without an application.

⁽³⁹⁾ OJ No. L 28 30.1.1997 p.1.

⁽⁴⁰⁾ OJ L 166, 30.4.2004, p.1.

In terms of YCG, Part 3 of these Regulations makes amendments to the Young Carer Grants Regulations, so that persons who are not ordinarily resident in the United Kingdom may be entitled to a YCG if they satisfy the eligibility criteria detailed in regulation 8 (4) or as the case may be (5) or (6), as inserted by these Regulations into the Young Carer Grants Regulations. Provision is also made so that persons who have met the new criteria in regulation 8(4) may make an application to receive a YCG for any 13 week period which falls within the period commencing with the day that the Young Carer Grants Regulations came into force, and ending with the day that these Regulations came into force. This is to allow for persons to now apply for the periods for which they would have been eligible for a YCG, had the benefit been capable of being claimed from outside the UK, on this basis, at the time the Young Carer Grant Regulations came into force. The Regulations enable applications for past periods of care to be made in any order, while maintaining the position for YCG claims from within Scotland that a carer may only receive one YCG in any 12 month period.

Schedule 2 makes further provision about matters of procedure for applying for, and determining entitlement to, a carer's allowance supplement for the purposes of section 81(2A) of the 2018 Act, including challenging determinations.