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31 August 2020

Dear Dr Witcher,

As you are aware, European Union (EU) rules on social security coordination require that certain devolved benefits are 'exportable' from Scotland, in that they should in certain circumstances be paid to people who are living outside of Scotland but in the European Economic Area (EEA) or Switzerland.

Under these rules the EU Administrative Commission for the Coordination of Social Security Systems considers any new benefits created and provides a view on the 'exportability' of these benefits. In considering the new devolved benefits currently available, the Administrative Commission has taken the view that both Carer's Allowance Supplement and Young Carer Grant should be 'exportable'.

To ensure both forms of support are fully 'exportable' in line with the EU rules we are now expanding the residency criteria to allow carers living outside of Scotland in the EEA and Switzerland, to receive these forms of support in certain circumstances. To do this we will be bringing forward regulations, and I am pleased to provide a copy of these – the draft Carer's Allowance Supplement (Qualifying Individuals) and Young Carer Grant Amendment (Scotland) Regulations – to SCoSS for formal scrutiny as required by section 97 of the Social Security (Scotland) Act 2018.

In addition to setting out the circumstances in which eligible carers may be able to receive either Carer's Allowance Supplement or Young Carer Grant outside of Scotland, the regulations will also provide for a determination, re-determination and appeals processes for Carer's Allowance Supplement payments to be made outside Scotland, as these are not currently required for payments made in Scotland.

The regulations also provide for applications for both benefits to be backdated to their respective launch dates, where eligible carers may have missed payments before these provisions come into force.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

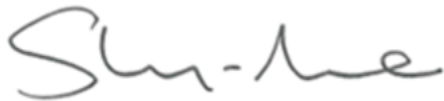


The timetable for these regulations has been impacted by the effects of the coronavirus pandemic on the overall social security programme, as well as the uncertainty around the implications of EU exit for social security coordination. As such I appreciate your agreement to consider these draft regulations in a reduced timescale.

I would ask that SCoSS provide their scrutiny report on these regulations by 18 September to ensure that any recommendations provided can be considered before the regulations are laid at the end of the October recess.

As ever, I am grateful for your ongoing work to ensure that devolved social security delivers a system that meets the needs of the people of Scotland.

Yours sincerely,



SHIRLEY-ANNE SOMERVILLE

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

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Draft Regulations laid before the Scottish Parliament under section 96(2) and 96(3) of the Social Security (Scotland) Act 2018 and paragraph 2A of Schedule 2 of the European Communities Act 1972 for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2020 No.

SOCIAL SECURITY

**The Carer’s Allowance Supplement (Qualifying Individuals) and
Young Carer Grants Amendment (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, 41(4)(a), 43(5), 52, and 81(8) of the Social Security (Scotland) Act 2018(a) and section 2(2) of, and paragraphs 1A and 2A of Schedule 2 to, the European Communities Act 1972(b) and all other powers enabling them to do so.

These Regulations make provision for a purpose mentioned in section 2(2) of the European Communities Act 1972(c), and it appears to the Scottish Ministers that it is necessary and expedient for references to the relevant EU Regulations as defined in regulation 2 to be references to those EU Regulations amended from time to time.

In accordance with section 97(2) of the Social Security (Scotland) Act 2018(d) the Scottish Ministers have consulted the Scottish Commission on Social Security.

In accordance with section 96(2) and 96(3) of the Social Security (Scotland) Act 2018 and paragraph 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(e)

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- (a) 2018 asp 9
 - (b) 1972 c.68. Section 2(2) was amended by the Scotland Act 1998 (c.46) (“the 1998 Act”), Schedule 8, paragraph 15(3) (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 the European Union (Amendment) Act 2008 (c.7), Schedule, Part 1. 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. [TO EDIT - Paragraph 1A of schedule 2 of the 1972 Act was inserted by section 28 of the 2006 Act and was relevantly amended by Part 1 of the schedule of the 2008 Act. Section 2(2) and paragraph 1A of schedule 2 were repealed by section 1 of the European Union (Withdrawal) Act 2018 (c.16) from exit day. However, the obligations under section 2(1), which may be implemented via section 2(2), are subject to savings provision under section 4(1). The powers in section 2(2) are exercised as regards the introduction of rights of application and appeal for carer’s allowance supplement, necessary to support the making of applications from outside the United Kingdom. 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.]
 - (c)
 - (d) 2018 asp 9.
 - (e) 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.

PART 1.

Introductory

Citation and commencement

1. These Regulations may be cited as the Carer's Allowance Supplement (Qualifying Individuals) and Young Carer Grants Amendment (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 the date determined by the Scottish Ministers in accordance with section 81(3) of the Social Security (Scotland) Act 2018(a),

“the 2018 Act” means the Social Security (Scotland) Act 2018, and

“the Young Carer Grants Regulations” means the Carer's Assistance (Young Carer Grants) (Scotland) Regulations 2019(b).

PART 2

Carer's allowance supplement for EEA residents

Amendment of the Social Security (Scotland) Act 2018

3. The schedule sets out amendments to the 2018 Act.

Determination of EEA resident's entitlement to carer's allowance supplement

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

- (a) on receiving an application, or
- (b) in terms of regulation 6, 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) For the purposes of section 41 of the 2018 Act, the period for requesting a re-determination of entitlement in terms of paragraph (1) is 42 days beginning with the day that the individual is informed, in accordance with section 40 of that Act, of the right to make that request.

(4) The period allowed for re-determination (within the meaning of section 43 of the 2018 Act) is 56 days beginning with—

- (a) the day that the request for a re-determination is received by the Scottish Ministers, or
- (b) where the request for a re-determination is received by the Scottish Ministers later than the period prescribed by paragraph (3), the day on which the Scottish Ministers or, on appeal, the First-tier Tribunal for Scotland, decide that the applicant has a good reason for not requesting a re-determination sooner.

(5) For the purposes of section 81(2A) of the 2018 Act and regulations 4 to 8—

- (a) sections 40 to 50 of the 2018 Act apply to a determination under paragraph (1) as they do to a determination of entitlement to assistance of a type described in Chapter 2 of Part 2,

(a) 2018 asp 9.

(b) S.S.I. 2019/324.

- (b) sections 25, 27, 38, 39, 53, 54, 58, 61, and 62 of the 2018 Act apply, and
 - (i) references in those sections to section 37 are to be read as if they are references to paragraph (1) of this regulation.
 - (ii) references in those sections to assistance under Chapter 2 are to be read as if they include assistance by way of carer's allowance supplement payable to a person falling within section 81(2A) of the 2018 Act.

Applications for determination of entitlement to carer's allowance supplement by EEA residents

5. For the purposes of regulation 4, an application may be made on, or at any time after, the first qualifying date on which an individual considers themselves to have been in receipt of a carer's allowance under section 70 of the Social Security Contributions and Benefits Act 1992(a).

Determinations without application

6. The Scottish Ministers must make a determination under regulation 4 without receiving an application, where—

- (a) it appears to the Scottish Ministers from information available to them that an individual is likely to meet the eligibility conditions in section 81(9) of the 2018 Act,
- (b) after the Scottish Ministers make a determination that an individual does not fall within section 81(2A) of the 2018 Act—
 - (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, backdated to include the relevant qualifying date, and
 - (ii) it appears to the Scottish Ministers that, had that award been made when due, the individual would from the information available to them have been likely to meet the eligibility conditions in section 81(9) of the 2018 Act,
- (c) the individual received a payment of carer's allowance supplement in respect of the most recent qualifying date as a result of falling within section 81(2A) of the 2018 Act.

Determination following official error - underpayments

7.—(1) The Scottish Ministers must make a determination under regulation 4 without receiving an application where—

- (a) they have previously made a determination under regulation 4 in relation to the individual's entitlement to carer's allowance supplement, and
- (b) they establish that, due to official error, that determination was incorrect resulting in the individual not being given an award of carer's allowance supplement to which they were entitled.

(2) In this regulation, "official error" means an error made by the Scottish Ministers or a Minister of the Crown that was not materially contributed to by anyone else.

Determination following error – overpayments

8.—(1) The Scottish Ministers must make a determination under regulation 4 without receiving an application where—

- (a) they have previously made a determination under regulation 4 in relation to the individual's entitlement to carer's allowance supplement, and

(a) 1992 c.4.

- (b) they establish that, due to error, that determination was incorrect resulting in the individual being given an award of 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—

- (i) wrongly, or
- (ii) correctly but on the basis of —
 - (aa) incorrect information, or
 - (bb) an assumption which proves to be wrong.

PART 3

Young carer grants

9.—(1) The Young Carer Grants Regulations are amended in accordance with paragraphs (2) to (9).

(2) In regulation 2, within the definition of “the qualifying period”, after “regulation 5(1)” insert “or where an application is made under regulation 4(7), the period of 13 weeks as described in regulation 5(5)”.

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

- (a) in paragraph (1), for “A” substitute “Except where paragraph (1A), applies, a”.
- (b) after paragraph (1) insert—

“(1A) Where a person has provided care over any period of 13 weeks falling within the period commencing with the day on which these Regulations came into force, and ending with [X December 2020], they are entitled to a young carer grant if they were aged at least 16 and were under the age of 19 at the end of any period of 13 weeks over which care was provided.”

- (c) in paragraph (6), for “For”, substitute “Except where paragraph (7) applies, for”, and
- (d) after paragraph (6), insert—

“(7) If a person who meets the criteria in regulation 8(3) has provided care over any period of 13 weeks falling within the period commencing with the day on which these Regulations came into force, and ending with [X December 2020], —

- (a) the person may make an application in respect of that period of 13 weeks,
- (b) for the purposes of paragraph (6), the period of that application is not required to end with the day before the day of the application, and
- (c) that application will be determined in terms of the eligibility conditions within these Regulations as amended on [X December 2020].”

(4) In regulation 5 (conditions relating to the care being provided)—

- (a) in paragraph (1), for “To” substitute “Except where paragraph (5) applies, to”, and
- (b) after paragraph (4) insert—

“(5) Where a person has made an application in terms of regulation 4(7), for the purposes of paragraph (1)—

- (a) “the qualifying period” is the 13 week period in respect of which the application is made, and
- (b) that period is not required to end with the day before the day on which the application for a grant is made.”

(5) In regulation 6 (conditions relating to the person or persons being cared for), after paragraph (3), insert—

“(4) Where a person has made an application in terms of regulation 4(7), for the purposes of paragraph (1), the person or persons cared for—

- (a) must each have been a person to whom a qualifying disability benefit was normally payable throughout the qualifying period in respect of which the application is made, but
- (b) are not required to still be a person to whom a qualifying disability benefit is normally payable on the day the application for a young carer grant is made.”

(6) In regulation 7(a) (further eligibility conditions)—

- (a) in paragraph (1), for “An”, substitute “Except where paragraph 1A applies, an”
- (b) after paragraph (1) insert—

“(1A) Where an application is made in terms of regulation 4(7), the applicant is not entitled to a young carer grant if, on the day after the qualifying period as defined in regulation 5(5) ended, the applicant was in receipt of a benefit named in regulation 6(3)(a) or (b) in respect of any of the persons being cared for.”,

- (c) in paragraph (2), for “An” substitute “Except where paragraph 2A applies, an”,
- (d) after paragraph (2), insert—

“(2A) Where an application is made in terms of regulation 4(7), the applicant is not entitled to a young carer grant if they have applied for a benefit named in regulation 6(3)(a) or (b) in respect of a period that includes the day after the qualifying period as defined in regulation 5(5) ended, unless it has already been determined that the applicant is ineligible for that benefit in respect of that day.”

- (e) in paragraph (3), for “An” substitute “Except where paragraph (3A) applies, an”,
- (f) after paragraph (3), insert—

“(3A) Where an application is made in terms of regulation 4(7), the applicant is not entitled to a young carer grant if they have previously received a young carer grant, unless—

- (a) that application was also made in terms of regulation 4(7), and
- (b) the day after the qualifying period as defined in regulation 5(5) ended is at least one year after the day the qualifying period as defined in regulation 5(5), for the earlier application, ended.”,

- (g) in paragraph (4), for “Paragraph” substitute “Except where paragraph (4A) applies, paragraph”, and
- (h) after paragraph 4, insert—

“(4A) Where an application is made in terms of regulation 4(7), 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) that grant was paid as a result of an application made in respect of a qualifying period during the year immediately preceding the day after the qualifying period as defined in regulation 5(5) in respect of the applicant’s own application ended.”

(7) In regulation 8 (conditions relating to residence)—

- (a) in paragraph (1), after “paragraphs”, insert “(1A),”
- (b) after paragraph (1), insert—

“(1A) Where an application is made in terms of regulation 4(7), the conditions in paragraph (1) must be satisfied on the day after the qualifying period as defined in ‘regulation 5(5) ends.’,

(a) There is an amendment to regulation 7 which is not relevant to these Regulations.

(c) for paragraph (3) substitute—

“(3) An applicant who is not habitually 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 they satisfy the conditions in paragraph (4) either—

- (a) on the day that the application is made, or
- (b) where the application is made in terms of regulation 4(7), on the day after the qualifying period as defined in regulation 5(5) ends.

(4) The conditions referred to in paragraph (3) are that the applicant must—

- (a) be resident in—
 - (i) Switzerland, or
 - (ii) an EEA State other than the United Kingdom,
- (b) 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,
- (c) have a genuine and sufficient link to Scotland, and
- (d) meet the other conditions prescribed in these Regulations.

(5) For the purposes of paragraph (4)—

“sufficient”, in relation to an individual’s link to Scotland, means a link to Scotland that is of such a close nature that this regulation would be incompatible with EU law if the individual were not entitled to a young carer grant,

“EEA state” means—

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

“relevant EU Regulation” means one of the following Regulations as modified or supplemented from time to time—

- (a) Council Regulation (EC) No 1408/71 of 14 June 1971(b) on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community,
- (b) Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004(c) on the coordination of social security systems,

“EU law” has the meaning given by section 126(9) of the Scotland Act 1998(d).”.

(8) In regulation 9 —

(a) in paragraph (1), for the word “The” substitute “Except where paragraph (1A) applies, the”,

(b) after paragraph (1) insert—

“(1A) Where an application has been made in terms of regulation 4(7), the period for requesting a re-determination of entitlement to a young carer grant, under section 41` of 2018 Act, is 42 days beginning with the day that the applicant is informed, in accordance with section 40 of that Act, of the right to make the request.”,

(a)

(b)

(c)

(d) 1998 c.46. 1998 c.46. Section 129(6) was amended by Article 6(1)(a) and (2)(a) of S.I. 2011/1043.

(c) in paragraph (2), for the word “The” substitute “Except where paragraph (2A) applies, the”, and

(d) after paragraph (2) insert—

“(2A) Where an application has been made in terms of regulation 4(7), the period allowed for re-determination (within the meaning of section 43 of the 2018 Act) is 56 days beginning with—

(a) the day that the request for a re-determination is received by the Scottish Ministers, or

(b) where the request for a re-determination is received by the Scottish Ministers later than the period prescribed by paragraph (1), the day on which the Scottish Ministers or, on appeal the First-tier Tribunal for Scotland, decide that the applicant has a good reason for not requesting the re-determination sooner.”

(9) Where an application under regulation 4(7) of the Young Carer Grants Regulations relates to a qualifying period which ended before 1 April 2020, regulation 12(1) has effect as it did on 31 March 2020, in relation to the amount of assistance to be given.

Name

A member of the Scottish Government

St Andrew’s House,
Edinburgh

Date

SCHEDULE

Regulation 3

Amendment of the Social Security (Scotland) Act 2018

1. Section 81 (carer's allowance supplement) of the Social Security (Scotland) Act 2018 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 (Qualifying Individuals) and Young Carer Grants Amendment (Scotland) Regulations 2020 (S.S.I. 2020/00)) met the eligibility conditions in subsection (9) on the qualifying date.”.

5. After subsection (8) insert—

“(9) An individual meets the eligibility conditions referred to in subsection (2A) 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 a relevant EU Regulation applied, and
 - (ii) in respect of whom the United Kingdom is competent for payment of sickness benefits in cash to the person for the purposes 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) For the purposes of subsection (9)—

“sufficient”, in relation to an individual's link to Scotland, means a link to Scotland that is of such a close nature that this section would be incompatible with EU law if the individual were not entitled to the carer's allowance supplement,

“EEA State” means—

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

“relevant EU Regulations” means one of the following Regulations as modified or supplemented from time to time—

- (a) Council Regulation (EC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community,
- (b) Regulation (EC) No 883/2004 of the European Parliament and of the Council on 29 April 2004 on the coordination of social security systems,

“EU law” has the meaning given by section 126(9) of the Scotland Act 1998.”.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend section 81 of the Social Security (Scotland) Act 2018 relating to payment of carer's allowance supplement. They also make amendments to the Carer's Assistance (Young Carer Grants)(Scotland) Regulations 2019, in relation to residence criteria.

The amendments enable payments of carer's allowance supplement and young carer grants to be made to people who are who are living outside the United Kingdom, where certain conditions are met, and regardless of whether they have received a payment before leaving Scotland. One of the main conditions is that they are able to demonstrate an adequate link to Scotland, such that payment is necessary to ensure compliance with the current approach to EU law in relation to what amounts to a sufficient link. The changes seek to ensure that the rules of social security co-ordination provided for in Council Regulation (EC) No 1408/71 and Regulation (EC) No 883/2004 are given effect to fully. This relates, in particular to Article 21 of Regulation 883/2004 and Article 19 of Regulation 1408/71. These provide for continued enjoyment of cash benefits while residing or staying temporarily in an EEA member state other than the competent state, in circumstances where the "original" state remains competent for payment of benefits. *[Explanatory note to be expanded].*