

*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.*

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DRAFT SCOTTISH STATUTORY INSTRUMENTS

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**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**

*Made* - - - - 2020  
*Coming into force* - - 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.

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.

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(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 Section 2(2) was repealed by section 1 of the European Union (Withdrawal) Act 2018 (c.16) from 31 January 2020.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. 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 Social Security (Scotland) Act 2018 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 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 EEA residents

#### 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—

(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

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(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.

- (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<sup>(6)</sup> 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),
  - (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<sup>(7)</sup>.

### **Determination of EEA or Switzerland resident's entitlement to a carer's allowance supplement**

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
- (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 by EEA and Switzerland residents for a determination of entitlement to a carer's allowance supplement**

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.

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

<sup>(7)</sup> 2014 asp 10.

### **Determination of EEA or Switzerland resident's entitlement to a carer's allowance supplement without application**

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) 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) 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<sup>(8)</sup>,
  - (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) 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.

### **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.

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

## 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<sup>(9)</sup> 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<sup>(10)</sup> 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, 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.”,

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

<sup>(10)</sup> S.S.I. 2020/xxx.