

SOCIAL SECURITY (SCOTLAND) ACT 2018

EXPLANATORY NOTES

OVERVIEW

Part 2 (Giving of Assistance by Scottish Ministers)

Chapter 3 (Determining entitlement)

Determination by the Scottish Ministers

52. [Section 37](#) places a duty on the Scottish Ministers to decide whether or not a person is entitled to assistance as provided for in Chapter 2. This may be as the result of an application or, where regulations under section 52 so provide, without application.
53. One example of when Ministers may determine entitlement without an application is in circumstances where they already hold sufficient information to determine an individual's entitlement. An example could be where a person was entitled to winter heating assistance in the previous year and Ministers have no reason to believe the person's circumstances have changed since. Regulations under section 52 could, in that case, provide for Ministers to determine such a person's entitlement and make a payment without any application for winter heating assistance having been made.
54. Another example of when Ministers may make a determination of entitlement unprompted by an application is where it has been determined that an individual is entitled to assistance on an ongoing basis (see paragraphs [42](#) to [45](#) above) and before the end of the period covered by that forward-looking determination of entitlement Ministers learn that there has been a change in the individual's circumstances. In that event, Ministers would determine again the individual's entitlement to the type of assistance in question in light of the change in circumstances. As explained in paragraph [47](#) above, the resulting determination may (to some extent) supersede the earlier one.
55. As all the information required to make a determination of entitlement may not be available where there has been no application, section 52(2) allows for regulations to specify the information and assumptions that are to be used in making a determination in such circumstances. For instance, in the winter heating example given in paragraph [52](#) above, a determination of entitlement to that type of assistance in succeeding years would necessarily rest on an assumption that the individual's circumstances have not materially changed between times.
56. [Section 38\(1\)](#) allows Ministers to specify how applications for assistance are to be made and to require evidence to be provided along with applications. For example, an application for early years assistance might require to be accompanied by evidence of pregnancy. A purported application for assistance will not trigger Ministers' duty to make a determination under section 37 if it is not made in the form, or not accompanied by the evidence, required by Ministers. If Ministers do not accept that something is a valid application, they have to advise an individual of their reasons and that there is a right of appeal (provided for by section 61(1)(a)). Section 38(2) places Ministers

under a duty to make the public aware of the requirements for applications set under subsection (1).

57. [Section 38\(3\)](#) provides that, ordinarily, once a person has applied for assistance in respect of a particular period or event and a determination of entitlement has been made as a result, the person cannot apply again for the same type of assistance in respect of the same period or event. This means that if someone applies for early years assistance in relation to the birth of a child, and Ministers make a determination of whether or not the individual is entitled to early years assistance as a result of the child's birth, the individual cannot apply again for early years assistance in respect of the birth of the same child. (This rule is, however, qualified by subsection (4), as explained in the next paragraph.) If the individual is aggrieved by the Scottish Ministers' determination, he or she can request a re-determination under section 41 and, if still dissatisfied, can appeal under section 46 (see paragraphs 36 and 37 for a fuller summary of the various ways in which a determination of entitlement can be made). To be clear, section 38(3) would not prevent a different individual applying for early years assistance in respect of the birth of the same child. Nor would it prevent the same individual applying for early years assistance in respect of a different event in the life of the same child.
58. Subsection (4) of section 38 qualifies the effect of subsection (3). It allows another application for assistance to be made in respect of an event despite the rejection of an earlier application where the last determination made in respect of the event says it can. Section 50(2) requires that a determination state that a further application can be made if the application being determined is found to be possibly premature. An application is possibly premature where the applicant does not qualify for assistance in respect of the event at the time the determination is made but may qualify in future should circumstances change (see section 50(3)). For example, someone may apply for early years assistance while pregnant but not be eligible as a result of applying too early in the pregnancy. In that case, the application is possibly premature and the applicant will be able to re-apply later. By contrast, if an application is rejected on account of being made after the deadline for applying, the application is not possibly premature (i.e. there is no possibility that a subsequent application can be made before the deadline). In that case, section 38(4) will not apply, with the result that the individual cannot subsequently apply for assistance in respect of the event.
59. [Section 39](#) allows an applicant to withdraw an application prior to its determination. Where this is requested, the duty imposed on the Scottish Ministers by section 37 to determine the application ceases and no determination must be made. Ministers may require that such requests are made in a particular form, for example a written and signed request might be required (though in practice most applications are likely to be capable of being made electronically). As section 38(3) only prevents a further application being made in respect of a period or event if the preceding application results in the Scottish Ministers making a determination under section 37, it follows that if an individual withdraws an application before a determination is made, the individual can apply again for the same type of assistance in respect of the same period or event.
60. [Section 40](#) requires that all persons who have applied for assistance, or whose entitlement to assistance has been determined without an application, must be notified of the Scottish Ministers' determination under section 37 and the reasons for it. The person must also be told that they have the right to have their entitlement considered again by the Scottish Ministers (see section 41), and that they will have the right to appeal to the First-tier Tribunal if the Scottish Ministers do not complete their re-determination within a certain period (see section 46). This must be done in a way that gives the person a record of the information that can be shared with others. That would prevent, for example, the information being given solely by a telephone call. Where an assessment report was used in making the determination, the person must be advised that he or she has a right to request a copy of it (that right is provided for by section 60).

Re-determination by the Scottish Ministers

61. [Section 41](#) enables an individual to ask that their entitlement be looked at again by the Scottish Ministers if they are not content with a determination by the Ministers under section 37.
62. A request for a re-determination will be considered only if it satisfies the requirements set out in subsections (3) and (4) of section 41. Subsection (3) enables the Scottish Ministers to set requirements for how a request for a re-determination must be made. For example a written and signed request might be required (though in practice most applications are likely to be capable of being made electronically). Subsection (5) requires Ministers to publicise requirements as to the form in which requests for a re-determination should be made. If Ministers do not accept that something is a valid request, they have to advise an individual of their reasons and that there is a right of appeal (provided for by section 61(1)(b)).
63. Subsection (4) of section 41 deals with the period within which a request for a re-determination must be made. Subsection (4)(a) empowers the Scottish Ministers to make regulations setting a deadline for re-determination requests (section 96 provides for such regulations to be subject to the negative procedure). Subsection (4)(b) allows for a request for a re-determination to be considered after the deadline specified in regulations if the individual can show that he or she has a good reason for not requesting the re-determination sooner. Section 42 provides that it is for the Scottish Ministers to decide whether an individual has a good reason, with an appeal against the Ministers' decision being possible, to the First-tier Tribunal for Scotland. In no case can a request for a re-determination be considered more than one year after the individual was told of the original determination under section 37 (see section 41(4)(b)(ii)).
64. [Section 43](#) places a duty on the Scottish Ministers to re-determine of new the person's entitlement to assistance, where a request is made under section 41. (As section 43(6) makes clear, the Ministers' duty to consider a re-determination request only triggers if the request complies with the requirements of section 41(3) and (4).) Subsections (2) and (5) provide that Ministers must aim to make the re-determination within a timescale to be set by regulations. If Ministers fail to do this, subsection (3) and section 46(1)(b) provide that the person who made the request has the immediate right of appeal to the First-tier Tribunal for Scotland. Subsection (3)(a) also makes clear, however, that the Scottish Ministers may still make the re-determination out of time. An individual may wish to wait for the Ministers to do so before deciding whether or not to take a case to the Tribunal.
65. [Section 44](#) sets out what the Scottish Ministers must do when they have re-determined a person's entitlement to assistance. The person must be informed of the determination, the reasons for that determination, and that they have the right to appeal the determination if they so wish. The Scottish Ministers must also provide the individual with an appeal form, which the individual can return to the Scottish Ministers in order to initiate an appeal. This must be done in a way that gives the person a record of the information that can be shared with others. That would prevent, for example, the information being given by a telephone call. Where an assessment report was used in making the determination, the person must be advised that he or she has a right to request a copy of it (that right is provided for by section 60).
66. Where a decision following a request for re-determination is not made within the period allowed by regulations, section 45 provides that the Scottish Ministers must inform the individual of their right immediately to appeal to the First-tier Tribunal for Scotland and provide the individual with an appeal form, which the individual can return to the Scottish Ministers in order to initiate an appeal. The information must be provided in a way that gives the person a record of the information that can be shared with others. As mentioned above, the individual could choose to wait for the Scottish Ministers' re-determination before deciding whether or not to go to the Tribunal.

Appeal against the Scottish Ministers' determination

67. [Sections 46 to 49](#) provide rights of appeal to the First-tier Tribunal for Scotland against a determination by the Scottish Ministers of an individual's entitlement to assistance under section 24.
68. [Section 46\(1\)](#) provides that an appeal can only be taken to the Tribunal if either the initial determination required by section 37 has been re-determined as provided for by section 43 or if the duty to make such a re-determination has not been completed within the timescale set by regulations.
69. [Section 47](#) sets out the process for initiating an appeal. It provides that an appeal is initiated by the individual returning to the Scottish Ministers the appeal form given to the individual under section 44 or 45. On receipt of a form, the Scottish Ministers must send it, together with the information they hold and used in making the determination being appealed against, to the First-tier Tribunal for Scotland.
70. Ordinarily it is for Tribunal Rules under the Tribunals (Scotland) Act 2014 to specify what is required in order to initiate an appeal to the First-tier Tribunal. Section 47(6) makes clear that Tribunal Rules can make further provision about the form and manner of initiating appeals, but they cannot contradict subsection (1) (for example they may not say that an appeal cannot competently be made by returning an appeal form to the Scottish Ministers).
71. [Section 48](#) provides the timescales within which appeals to the First-tier Tribunal can be made. An appeal can be made within 31 days of the relevant event without having to get the Tribunal's permission to bring it. Beyond 31 days from the relevant event, an appeal can only be brought with the Tribunal's permission (subsection (3) sets the test by which the Tribunal will decide whether to give permission). And in no event can an appeal be taken more than a year after the relevant event. What constitutes the relevant period depends on what type of determination by the Scottish Ministers the appeal is brought against. If it is brought against a re-determination by the Scottish Ministers under section 44, the relevant event is Ministers notifying the individual of the re-determination. If it is brought against a determination under section 37 (i.e. it is brought following a failure by Ministers to make a re-determination within the period allowed by regulations under section 43(5)), the relevant event is Ministers notifying the individual that they have failed to make a re-determination within the period allowed. (Section 62, which is discussed in paragraphs [88](#) and [89](#) below, creates a presumption about when information is received, which is relevant for calculating timescales under section 48.) An appeal is brought, for the purposes of section 48, when a duly completed appeal form is returned to the Scottish Ministers. Any period between the Ministers receiving the appeal form and sending it to the Tribunal as required by section 47(2) is therefore not counted in relation to the timescales referred to in section 48.
72. The period of 31 days is allowed for an appeal without the Tribunal's permission on the basis that it represents a month, but specifying the period in days rather than as one calendar month ensures nobody is disadvantaged by the fact of a relevant event occurring in a short calendar month (such as February).
73. The powers of the First-tier Tribunal in appeals are set out in section 49. The Tribunal can uphold the determination (in effect, refuse the appeal), or it can make a different determination of its own as to the person's entitlement to assistance.
74. As mentioned in paragraph [37](#) above, it follows from giving the First-tier Tribunal jurisdiction that the further rights of appeal and review set out in Part 6 of the Tribunals (Scotland) Act 2014 apply.

The determination of entitlement

75. For discussion of section 50 (decisions comprising determination) see paragraphs [38](#) to [41](#) above.

*These notes relate to the Social Security (Scotland) Act
2018 (asp 9) which received Royal Assent on 1 June 2018*

76. For discussion of section 51 (determination on basis of ongoing entitlement) see paragraphs [42](#) to [45](#) above.
77. For discussion of section 52 (determination without application) see paragraphs [52](#) to [54](#) above.