

POLICY NOTE

THE FIRST-TIER TRIBUNAL FOR SCOTLAND SOCIAL SECURITY CHAMBER (PROCEDURE) REGULATIONS 2018

SSI 2018/273

The above instrument was made in exercise of the powers conferred by paragraph 4(2) of schedule 9 of the Tribunals (Scotland) Act 2014 (2014 Act). The instrument is subject to the negative procedure. In accordance with paragraph 4(3) of schedule 9 the President of the Scottish Tribunals has been consulted on these Regulations.

Policy Objectives

Background

The Social Security (Scotland) Act 2018 (the 2018 Act) allows Scottish Ministers to deliver new, improved benefits, to replace the 11 Department for Work and Pensions benefits for which legislative competence has been transferred to the Scottish Parliament. The Scottish Ministers will deliver those benefits in a phased manner. The First Minister announced on 4 September in the Programme for Government that the first full benefit to be delivered by Social Security Scotland (the agency) will be the Best Start Grant (BSG). The agency will start making payments for BSG by this Christmas.

The Scottish Government has made clear its intention is to take a different approach that is rights-based and to build a social security system that is founded on the principles of fairness, dignity and respect ensuring those with lived experience of the current system co-design the new social security system in Scotland. These ambitions are at the heart of everything the new system will do, including how the tribunal system for social security appeals will operate.

The Scottish Government has always been clear that people will have a right to challenge if they believe that the agency has not made the right decision and that the process for challenging a decision is as simple and straight forward as possible.

To ensure an individual is able to challenge the decision of the agency through an independent institution, Scottish Ministers decided that a new chamber of the First-tier Tribunal for Scotland will be created to hear appeals in relation to social security cases in the Scottish system. This was decided against the background of discussions that are currently taking place with the UK Government on the transfer of responsibility for the management and operation of reserved tribunals, including the Social Security and Child Support Tribunal, in terms of the changes to the devolution settlement brought about by the Scotland Act 2016. The transfer will not take place prior to the first wave of social security benefits being delivered by the agency and it has therefore been necessary to set up a new chamber of the First-tier Tribunal for Scotland and ensure necessary provisions are made for the Upper Tribunal for Scotland in relation to social security cases from First-tier Tribunal.

The 2014 Act allows rules to be made to regulate the practice and procedure of both the First-tier and Upper Tribunals for Scotland. Paragraph 4(2) of schedule 9 of the 2014 Act allows rules to be made by Scottish Ministers until such time as responsibility for rule making passes to the Court of Session.

The Scottish Government's proposals for amending the Regulations as consulted upon are set out below. Some of the provisions in the draft Regulations had to be updated to reflect the changes that were made to the then Social Security (Scotland) Bill (the Bill) which are now enacted in the 2018 Act. This includes: reference to the Scottish social security charter, how the agency will have a role in supporting individuals who wish to exercise their right to appeal, creation of new appeal rights for challenging process decisions, duty to promote uptake and inclusive communication, amongst other changes.

In addition to giving effect to the views of the respondents, further changes have been taken forward in areas where there was no direct input from respondents. This was the product of identifying an element where there seemed scope for change to ensure that the dignity and respect agenda is fully given effect to or, more generally, to lay the foundations of an effective chamber.

Delegation of functions to Scottish Courts and Tribunal Services (SCTS) staff

Rules of procedure for some of the chambers of the First-tier Tribunal include provision for certain functions to be delegated to SCTS staff. The general approach is that those members of staff must have appropriate legal qualifications. At consultation, the draft rules for the Social Security Chamber included a provision which followed this approach.

Concerns were raised by respondents that this could impinge upon the efficient running of cases, in a way which is unnecessary. Requiring that staff have appropriate legal qualification is likely to lead to delays if there is a lack of appropriately qualified people. As the functions to be delegated will in practice be administrative in nature, the 'appropriate legal qualification' is not required and has been, therefore, removed from the First-tier Tribunal Rules.

Immediate dismissal; reinstatement of dismissed or withdrawn cases

The 2008 Rules for the reserved Social Entitlement Chamber allow for immediate dismissal of a party's case where the Tribunal considers that there is no reasonable prospect of the appellant's case succeeding. This was not included in the draft rules as consulted. It is rarely used and the Scottish Government's view was that it is unlikely that the Tribunal can reasonably predict in advance whether there is any real prospect of a case succeeding.

There were mixed views from respondents with some supporting its removal while others felt the rule should be retained. Those asking for its retention did so on the basis that it allows for cases to be struck out where an appellant is trying to come forward with what is an obviously fruitless appeal. An example cited by respondents was where there has been an application for the mobility component of Child Disability Living Allowance before a child has reached the age at which they are potentially eligible for that.

The Scottish Government has carefully considered the views and believes there is merit in including provision in the rules, but that the scope for immediate dismissal should be narrower than under the 2008 Rules. This is to mean only allowing immediate dismissal where there is clearly no possibility of the relevant eligibility criteria being met.

The general approach of rules of procedure of chambers of the First-tier Tribunal for Scotland is that there is no possibility of any party applying for reinstatement of a case which has been dismissed or withdrawn.

The draft rules as consulted upon included provision for parties to apply for reinstatement, There was no restriction as to when an application could be made. The Scottish Government believes that an option to ask for reinstatement is necessary to give effect to the dignity and respect agenda. In particular, it provides some protection against the possibility that appellants in a state of vulnerability may later regret a decision to withdraw. Respondents to the consultation did not object to this approach in principle, but suggested that, without some sort of restriction, an opportunity to ask for reinstatement might be vulnerable to abuse. A “good reason” requirement has therefore been introduced, to help protect against use of the process for spurious reasons. In other words, a party, in applying for reinstatement, will have to set out the basis on which they are asking for reinstatement and will have to satisfy the First-tier Tribunal that they have good reason to do so.

Role of supporters and representatives

The rules as consulted upon replicated the provision on supporters that is typically included in the rules of the chambers of the First-tier Tribunal for Scotland. The provision sets out the specific ways in which a supporter may assist a party, including by advising on points of law and procedure and issues which the party might want to raise with the Tribunal. There were concerns amongst representative organisations that this element of the provision might give rise to overlap with the role of a representative, producing doubts and confusion as to the respective roles of supporters and representatives.

It was suggested by respondents that the overriding objective of the 2008 Rules in the reserved system is relied upon effectively to ensure that appellants are provided with support where they are in need of it. There is no provision in those rules dealing expressly with “supporters”, yet the Tribunal can invite people who are there offering support to input into the hearing, where the appellant gives permission for this. Some respondents thought that this approach should be followed in the rules of the Social Security Chamber, rather than having specific provision for supporters.

The Scottish Government has carefully considered the differing views expressed. As ensuring that people have a right to a supporter is key to the principle of dignity and respect, the provision has been simplified to explain more clearly the intention behind involving supporters. A person can be accompanied by a person, who is not acting as their representative, to provide them with support. Expressing the provision in these basic terms should avoid confusion with the role of representatives. In practice the input of the supporter might go no further than being ‘there.’ But equally, this support might include making submissions to the Tribunal, where the supporter is invited to do so. The overriding objective of the rules would allow this to happen.

Respondents viewed the rule on having to communicate the details of a representative to the Tribunal in advance of any hearing as unnecessarily inflexible. If a different representative attended the hearing on the day, and the Tribunal had not been informed in advance, they were concerned that the representative could be excluded from the hearing.

The provision in relation to details of a representative has therefore been amended to remove the requirement to inform the Tribunal in advance of the representative's contact details. Appellants will still have the option of passing on the details, but will not be required to do so. This is to ensure an appellant can be fully supported at a hearing, even if there is a last minute change in representative, or there is no representative at all until the last minute.

Independence of interpreters

As consulted upon, the draft rules for the Social Security Chamber contained express provision requiring that any interpreter appointed to assist the Tribunal be independent of the circumstances of any case. No such express provision exists in the 2008 Rules for the reserved Social Entitlement Chamber. Instead, reliance on the overriding objective is used to appoint an interpreter by Her Majesty's Courts and Tribunals Service where they are required to assist the Tribunal. Respondents to the consultation welcomed the express provision as it provided a specific requirement for independent interpreters in the rules.

It will be for SCTS to arrange and provide for interpreters to assist the First-tier Tribunal as necessary. The independence requirement should promote impartiality in the proceedings, as well as acting as a potential quality control mechanism. The rule is likely to necessitate appointment of a professional interpreter, who can be presumed to have the necessary level of skill for the role. If, for example, a family member is simply brought along to interpret, they may not necessarily be suitably skilled.

Routine recording of hearings

In Scotland only, hearings of social security cases in the reserved Social Entitlement Chamber are recorded as a matter of routine. However, there is no *requirement* for this in the rules of procedure of the Social Entitlement Chamber.

The draft rules of procedure consulted upon for the Social Security Chamber contained an express requirement that hearings be recorded. This was generally welcomed. Some concerns were expressed by a small number of respondents about the effects of recordings of hearings on those with certain health conditions and that it may add to the formality of the proceedings. But the balance of feedback was that this would be a positive step towards transparency, fairness and accuracy. It was highlighted that if the recording equipment were to fail that should not lead to the postponement of a hearing.

The rules therefore contain a requirement that hearings of the Social Security Chamber be recorded. This will be done for the purpose of ensuring there is an accurate record of proceedings. Hearings will generally be recorded digitally. In the event that equipment failure prevents a hearing from being digitally recorded, a written note of proceedings will be produced by the legal member considering the case.

Cases to be resolved, where possible, without an oral hearing

For the Social Security Chamber, the draft rules as consulted upon set out that the First-tier Tribunal was to consider a case after holding an oral hearing unless it was satisfied that it could make a decision without such a hearing, and no party had objected to that. During the consultation, respondents highlighted that the rules did not clearly set out that a case could be dealt with through consideration only of the papers (a “paper case”) without an oral hearing taking place.

The Regulations that have been laid therefore contain express reference to paper-based cases and indicate the circumstances in which matters may go ahead without an oral hearing. This will ensure that oral hearings are avoided where there is consensus that an oral hearing is not needed. But equally, it will allow an appellant to have the opportunity to express a preference to present their case in person, if they wish to do so.

Publication of decisions of the Social Security Chamber

The draft rules of procedure as consulted upon conferred a general discretion to publish decisions where this was thought to be in the public interest. With regard to the First-tier Tribunal in particular, respondents were concerned that even if the decisions were redacted there would be a risk that appellants could be identified. Conversely, the level of redaction needed could be such that publication ceased to have merit in giving a flavour of the decision reached.

It was suggested the approach of the Health and Education Chamber be adopted. This leaves open the option of publishing, but with express safeguards that the welfare, wellbeing and interests of the appellant and any other person be taken into account. As this ensures the privacy of the appellant remains at the heart of decision making and is consistent with the principle of dignity and respect, the rules of procedure for the Social Security Chamber have been revised to replicate this approach.

Review of decisions of the Social Security Chamber

The draft rules for the Social Security Chamber, as consulted upon, followed the approach taken in other chambers, of allowing a party to request a review of the decision reached by the First-tier Tribunal. A review request would require the First-tier Tribunal to look again its decision. This might lead to an outcome the appellant is content with and therefore avert the need for an appeal to the Upper Tribunal. For example, the First-tier Tribunal might decide to set aside the decision (in other words, declare that it no longer holds good), and substitute a new one in its place. However, if the appellant was not happy with the outcome, they would still be able to apply for permission to appeal to the Upper Tribunal. Alternatively, if they had started an appeal, but sisted (postponed it to wait for the outcome of the review, they could continue the review.

Respondents to the consultation expressed concerns that unless the grounds of review were in some way limited, there is a risk that the Upper Tribunal may be called on regularly to determine issues of fact. This would not be appropriate as the function of the Upper Tribunal is, first and foremost, to determine points of law. The risk could arise because the First-tier Tribunal may refer a case to the Upper Tribunal, in the course of dealing with a review.

There was also concern that the provisions allowed a review and appeal to be ongoing at the same time, which seemed to be a waste of resources. It was suggested that provision should be made in the First-tier Tribunal rules to allow the time period for seeking permission to appeal to be suspended until the review had been dealt with and the outcome was known.

Having considered the views from the consultation, the Scottish Government has proposed that the request for a review should be limited to alleged points of law. In addition, the review request is to be treated also as an application for permission to appeal, unless the appellant specifically states they do not wish it to be treated as an appeal. This will mean that, once the review outcome is known, the appellant will be asked if they would like to go forward with an appeal. There will also be the opportunity to go straight to appeal, if the appellant does not wish a review.

From the point of view of the appellant, as well as one imposing a minimal burden upon them, this system offers advantages of being an efficient option. There is no automatic suspension of the running of time while a review happens, and no two stage process of requesting a review and then, later, potentially having to continue with an appeal or ask for permission to appeal. This would make the process more protracted for the appellant. The appellant only has to request a review, and the review/appeal process will run from there, so far as the appellant wants it to do so. To further promote efficiency, the period for requesting a review remains at 14 days; it has not been extended to 30, as suggested at consultation. So far as can be seen there is no precedent in the rules of other chambers of the First-tier Tribunal for Scotland for requests for review to be classed as applications for permission to appeal. However, by going down this route, a precedent could be set for providing for a more appellant friendly approach.

Expenses and allowances for loss of remunerative time

The draft rules of procedure as consulted upon, made provision for the First-tier Tribunal to make orders for payment of travel and subsistence expenses, as well as loss of remunerative time, to parties attending hearings, and to other persons required to attend. The provision was intended to allow people to reclaim expenses for travel and subsistence and loss of remunerative time only and not for any other expenses to be claimed or for any party to make a claim against another.

However, many respondents were concerned that the provision may allow more substantive payments to be ordered, and potentially to be ordered against the appellant. A person might be discouraged from bringing an appeal at all if they thought they might face potential expenses claims from the agency. Concerns were also expressed that dealing with expenses would give rise to an unwelcome distraction from the intended function of the First-tier Tribunal.

The clear consensus among respondents was that claims for attendance expenses should be dealt with administratively. Provision for expenses has therefore been removed from the rules of procedure for the Social Security Chamber. Separate Regulations have been made under the 2018 Act to provide a basis for a scheme to be administered for payment of travel and subsistence expenses, as well as allowances towards loss of remunerative time. These will be payable to parties (other than representatives of the Scottish Ministers) attending hearings, as well as witnesses cited to attend. SCTS will administer the scheme, with the policy underlying it being the responsibility of Scottish Ministers.

Taking account of the Scottish social security charter

At consultation, the draft rules of procedure made express reference to account being taken of the Scottish social security charter, where relevant.

There were mixed views; the reference was not welcomed by all respondents. The concerns lay around how taking cognisance of the social security charter would sit alongside the standards by which Tribunal members must already abide (including the SCTS User Charter and the Principles of Judicial Ethics) as well as potential compromising of judicial independence.

The consultation took place while the the Bill was undergoing its passage through the Scottish Parliament. At the time the consultation was launched, there was no provision in the Bill allowing a court or tribunal to take the charter into account. However, the Bill as passed was amended to include provision for this. Section 19 of the 2018 Act makes clear that a court or tribunal may take the charter into account when determining any question arising in the proceedings to which the charter is relevant. The Scottish Government believes it is unnecessary, and potentially unhelpful, for the effect of the provision to be duplicated in the Regulations. There is, therefore, no reference to the charter in the Regulations as laid.

Consultation

Paragraph 4(3) of schedule 9 of the 2014 Act requires that, in addition to the President of the Scottish Tribunals, consultation must take place with such other persons as the Scottish Ministers consider appropriate.

A consultation process was undertaken in relation to the draft Regulations between January and July 2018. This included a full public consultation and consultation with senior members of the judiciary that the 2014 Act requires. In addition, the Social Security Committee of the Scottish Parliament undertook an evidence gathering session with key stakeholders. The full public consultation lasted for 12 weeks and took place from 22 January to 16 April 2018. There were 25 responses to the full public consultation, 4 from individuals and 21 from representative organisations. The independent analysis of the responses was undertaken by KSO Research. Where permission was received, individual responses were published online on the Citizen Space website at:

https://consult.gov.scot/social-security/provision-for-social-security-appeals/consultation/published_select_respondent

The full Scottish Government response to the consultation is available at www.gov.scot/ISBN/9781787812123

There is discussion above as to the way in which the outcome of consultation has been given effect to.

Impact Assessments

The following impact assessments have been completed and are attached separately:

- The Equality Impact Assessment
- Islands Communities Screening Assessment
- Child Rights and Wellbeing Impact Assessment

Financial Effects

A partial Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. No impacts of this policy were found on business. The Scottish Courts and Tribunals Service will be expected to handle appeals related to social security, which it does not currently, and ensure sufficient members are available to deal with matters before the Tribunal. The impact of the new system on local organisations is that they would be expected to provide advice on the new system whereas the burden on such organisations having to lodge appeals on behalf of their clients will be undertaken by Social Security Scotland. The overall impact would therefore be neutral.

Scottish Government
Social Security Directorate

13 September 2018