

POLICY NOTE

THE UPPER TRIBUNAL FOR SCOTLAND (SOCIAL SECURITY RULES OF PROCEDURE) REGULATIONS 2018

SSI 2018/274

The above instrument was made in exercise of the powers conferred by paragraph 4(1)(b) and (2) of schedule 9 of the Tribunals (Scotland) Act 2014 (the 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.

In the course of drafting the package of Tribunals Regulations for social security appeals, a need was identified for a separate set of rules of procedure for the Upper Tribunal when dealing with appeals from the Social Security Chamber. They will apply where the Tribunal is dealing with proceedings relating to Scottish Ministers' exercise of functions which are conferred on them by the 2018 Act or by Regulations made under that Act which confer a right of appeal.

The draft rules of procedure take as their starting point the generic rules of procedure for the Upper Tribunal for Scotland, set out in the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016. Modifications have been made where this is thought necessary in the social security context. This partly reflects the outcome of consultation; and partly changes otherwise thought necessary to give effect generally to the principles underlying the Scottish social security system. The modifications are highlighted below.

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

As consulted upon, the draft rules for the Upper Tribunal for social security did not contain any provisions for delegation to SCTS staff. The view was expressed at consultation that provision for delegation to staff in cases before the Upper Tribunal would be helpful. A delegation to staff provision has therefore been added to the Upper Tribunal procedural rules for social security cases. This mirrors the provision for the Social Security Chamber. As a result, there is no requirement that the staff to whom functions are delegated have legal qualifications.

Reinstatement of dismissed or withdrawn cases

The generic rules of procedure for the Upper Tribunal for Scotland do not include any express provision for the reinstatement of cases which have been withdrawn or dismissed. The draft rules as consulted upon included provision for parties to apply for reinstatement of withdrawn or dismissed cases. There was no restriction as to when an application could be made. This mirrors the rules of the Upper Tribunal, in the reserved jurisdiction, as they apply to cases appealed from the Social Entitlement Chamber. 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 a party 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 Tribunal that they have good reason to do so.

Holding an oral hearing - or not

The draft rules for the Upper Tribunal as consulted upon followed the generic rules of procedure of the Upper Tribunal for Scotland in starting from the point that a decision may be made without an oral hearing. However, they also included a requirement that account be taken of any views expressed by a party as to whether an oral hearing should be held and, if so, the form it should take. This was an addition to the generic rules of procedure. No

respondent expressed concern on any aspect of this approach and the provision has therefore been retained in the Regulations as laid.

Role of supporters and representatives

The generic rules of procedure of the Upper Tribunal for Scotland spell out specific ways in which a supporter may assist a party, including by advising on points of law and procedure and on issues which the party might wish to raise with the Tribunal. For social security cases, the draft rules consulted upon followed the same approach. There were concerns amongst representative organisations that this element of the provision might give rise to overlap with the role of a representative, producing doubt and confusion as to the respective roles of supporters and representatives.

It was suggested by respondents that the overriding objective of the generic rules of the Upper Tribunal 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 party they are accompanying gives permission for this. Some respondents thought that this approach should be followed in the social security rules of the Upper Tribunal for Scotland, 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 for this.

Respondents viewed the rule on having to communicate the details of a representative 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 therefore be excluded from the hearing.

The provision in relation to details of a representative have 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.

Expenses and allowances for loss of remunerative time

The draft rules of procedure as consulted upon, made provision for the Upper 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 person applying for assistance. This could act as a barrier to those claiming assistance bringing onward appeals. Concerns were also expressed that dealing with expenses would give rise to an unwelcome distraction from the intended function of the Upper 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 for the Upper Tribunal, as it has been 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 the Scottish Ministers.

Application for permission to appeal/giving notice of appeal to the Upper Tribunal

An appeal to the Upper Tribunal for Scotland may be brought only with permission. Permission is sought, in the first instance, from the First-tier Tribunal for Scotland. If this is refused, it must be sought from the Upper Tribunal. The rules for social security cases as consulted upon, followed the approach of the generic rules in having one rule dealing with (a) applying for permission to appeal to the Upper Tribunal and (b) giving notice of appeal to the Upper Tribunal. Respondents to the consultation suggested that it would make for a more accessible and user friendly system to have two separate rules dealing with this. The Regulations as laid therefore contain two separate rules dealing with permission to appeal, and giving notice of appeal. The rules also state expressly that if it is necessary to seek the permission of the Upper Tribunal to appeal, and this is given, matters will go forward as though the appellant had lodged a notice of appeal. They will not have to actually lodge a notice. This was not a feature of the rules consulted upon. And there is no express statement about it in the generic rules of procedure for the Upper Tribunal for Scotland. But it does not seem necessary to require the appellant to submit a notice of appeal in this situation.

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 consultaiton 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 replicated 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

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