

POLICY NOTE

THE LEGAL AID AND ADVICE AND ASSISTANCE (MISCELLANEOUS AMENDMENTS) (SCOTLAND) REGULATIONS 2020

SSI 2020/424

The above instrument is made in exercise of the powers conferred by sections 12(3), 17(2B), 36(2)(a) and 42 of the Legal Aid (Scotland) Act 1986 and by all other powers enabling them to do so. The instrument is subject to the negative procedure.

This instrument will allow for payments from or in connection with the Windrush Compensation Scheme and the Scottish Child Payment to be disregarded from financial assessments for legal aid eligibility.

Background

Windrush Compensation Scheme

The Windrush Compensation Scheme was published by the Home Office in 2019 in order to compensate certain categories of individuals who have suffered loss in connection with being unable to demonstrate their lawful immigration status in the United Kingdom.

Those most affected are often referred to as the ‘Windrush generation’. This refers to the “Empire Windrush”, one of the first ships that brought workers from Caribbean islands to the United Kingdom in 1948 in response to labour shortages in the UK following the Second World War.

The Home Office committed to ensuring that individuals do not lose access to justice as a result of making a successful claim to the Windrush Compensation Scheme. As a result, the Home Office introduced the Legal Aid (Financial Resources and Contributions Orders) (Amendment) Regulations 2019 in England and Wales. This statutory instrument amends legal aid regulations in England and Wales to disregard compensation payments made by, or in connection with, the Scheme for legal aid applications where eligibility is means-tested.

Scottish Child Payments

The Scottish Child Payment is a new benefit to be delivered by Social Security Scotland and which is designed to tackle and alleviate child poverty.

The Scottish Child Payment will be available to families on low income benefits with children under 16, paying the equivalent of £10 a week for each eligible child by 2022. The first payments are likely to be made by the end of February 2021 and will initially be available only to those eligible families with responsibility for a child aged under 6.

Policy Objectives

The Scottish Government is committed to ensuring that individuals living in Scotland do not lose access to justice as a result of (i) making a successful claim to, or in connection with, the Windrush Compensation Scheme, or (ii) receiving Scottish Child Payments. The Scottish Government considers that it would not be appropriate for low income families in receipt of Scottish Child Payments or those who have suffered loss and are in receipt of a payment from, or in connection to, the Windrush Compensation Scheme to be put in a position which could threaten their access to justice.

Both these payments would usually automatically be considered as part of an applicant's financial resources when being assessed to determine their eligibility for publically funded legal assistance. As a result, an applicant might find that they require to make a contribution to legal fees or costs, or may even become ineligible for any publically funded legal assistance by virtue of receiving such payments.

The Scottish Government does not consider it would be appropriate to disadvantage these groups by taking account of these payments. It is critical that a payment specifically being made to families in the most financially precarious positions to bring children out of poverty, or a payment to compensate for loss suffered, does not impact on the ability of those families to access justice in the future. The Scottish Government therefore consider it correct to disregard these payments in this way.

The main purpose of this instrument is to give effect to these disregards by amending legal assistance legislation so that Scottish Child Payments and payments from, or in connection with, the Windrush Compensation Scheme will be disregarded by the Scottish Legal Aid Board (SLAB) when assessing the disposable income or disposable capital of a person who wishes to receive advice and assistance, civil legal aid or children's legal aid.

The instrument will also disregard Scottish Child Payments and payments from, or in connection with, the Windrush Compensation Scheme from calculations of any amount of fees and outlays to be taken from any property recovered or preserved for an individual in the course of proceedings.

Consultation

The representative body for solicitors in Scotland is the Law Society of Scotland (the LSS) and the representative body for advocates in Scotland is the Faculty of Advocates (the FoA). The LSS, the FoA and SLAB have been informally consulted in the course of drafting these regulations.

Impact Assessments

The following impact assessments were considered:

Child Rights & Wellbeing Impact Assessment – no CRWIA required. A Child Rights and Wellbeing Impact Assessment Declaration is attached.

Equality Impact Assessment – an EQIA has been completed and is attached. No negative impacts on groups with protected characteristics were identified.

Business & Regulatory Impact Assessment – a BRIA has been completed and is attached. No negative impacts were identified.

Fairer Scotland Duty – not required.

Strategic Environmental Assessment – not required.

Data Protection Impact assessment – not required.

Financial Effects

A Business and Regulatory Impact Assessment has been completed on these Regulations and is attached. The impact of this policy on business that it may offer legal aid providers some relief in administrative time and cost when processing cases which include the Scottish Child Payment. It may also have the effect of making more applicants eligible for publically funded legal assistance and therefore support further business continuity for legal aid providers.

Scottish Government
Justice Directorate
December 2020