

## POLICY NOTE

### THE EDUCATION (FEES AND STUDENT SUPPORT) (EU EXIT) (SCOTLAND) (AMENDMENT) REGULATIONS 2021

#### SSI 2021/28

The above instrument was made in exercise of the powers conferred by sections 49(3), 73(f), 73B and 74(1) of the Education (Scotland) Act 1980, section 1 of the Education (Fees and Awards) Act 1983, paragraph 1(1) and (3) of schedule 2 of the European Union Withdrawal Act 2020 and section 14(1), (2) and (3) of the European Union (Withdrawal Agreement) Act 2020. The instrument is subject to negative procedure.

#### **Policy Objectives**

These Regulations make a number of amendments to the Education (Student Loans for Tuition Fees) (Scotland) Regulations 2006 (“the SLTF Regulations”), the Education Authority Bursaries (Scotland) Regulations 2007 (“the Bursaries Regulations”), the Nursing and Midwifery Student Allowances (Scotland) Regulations 2007 (“the Nursing Regulations”), the Students’ Allowances (Scotland) Regulations 2007 (“the Allowances Regulations”), the Education (Student Loans) (Scotland) Regulations 2007 (“the Loans Regulations”), the Education Maintenance Allowances (Scotland) Regulations 2007 (“the EMA Regulations”) and the Education (Fees) (Scotland) Regulations 2011 (“the Fees Regulations”). The policy objectives of these amendments are to ensure that the student support legislation is updated in advance of the first academic year following the end of the UK’s transitional period following its withdrawal from the EU. This reflects the announcement from Scottish Ministers on 9 July 2020 confirming that EU students coming to Scotland to study will no longer be eligible for home tuition fee status and also takes into account the terms of the Withdrawal Agreement between the UK and the EU. The main changes included within the regulations are summarised in more detail below.

#### *Person With Protected Rights*

The regulations introduce a new definition of ‘Person with protected rights’ and is used across the student support regulations, listed above. This definition covers any person who falls within the personal scope of the EU Withdrawal Agreement, the EEA/EFTA Separation Agreement or the Swiss Citizens Rights Agreement. These are known collectively as the ‘Citizens Rights Agreements’. The personal scope of the Citizens Rights Agreements covers: an EU citizen (including EEA, EFTA & Swiss Nationals) who exercised a right to reside in the UK before the end of the UK’s transition period for leaving the EU (31 December 2020) and have continued to reside there following this; an EU citizen (including EEA, EFTA & Swiss Nationals), who have exercised their rights as frontier workers in the UK before the end of the transition period and have continued to do so thereafter; and family members of the individuals mentioned above.

#### *Right of Permanent Residence*

The regulations include a definition of ‘right of permanent residence’ and is referred to as such across the student support regulations, listed above. In order for individuals to be considered as having a right of permanent residence as defined in the regulations they must

firstly be considered to be a ‘person with protected rights’ as outlined above, and satisfy the following criteria: they must be settled in the UK by virtue of having gained a right of permanent residence (i.e. they have been granted ‘settled’ status under the requirements of the EU Settlement Scheme); or have made an application for settled status within the ‘grace period’ (the period up until the 30 June 2021 where individuals can apply through the EU Settlement Scheme); or be awaiting the outcome of an application for settled status or appeal for such an application through the EU Settlement Scheme; an Irish national who is settled in the UK and who would have been granted leave to enter/remain in the UK if an application under the residence scheme was made; or be a family member of a relevant person of Northern Ireland who is settled in the UK following the granting of indefinite leave to remain under the residence scheme immigration rules.

*The amendments ensure that EU Nationals who are living in the UK by the end of the transition period (31 December 2020) continue to receive equal treatment under the terms of the EU Withdrawal Agreement.*

Regulations 4(d), 8(e), 13(e), 18(e), 22(e), 25(d) and 29(e) amend the SLTF Regulations, the Bursaries Regulations, the Nursing Regulations, the Allowances Regulations, the Loans Regulations, the EMA Regulations and the Fees Regulations. The purpose of these changes is to ensure that EU Nationals who are living in the UK before the end of the transition period receive equal treatment as required under the terms of the EU Withdrawal Agreement. The EU Withdrawal Agreement makes specific provision for the non-discrimination of all union citizens residing in the host state, ensuring that they receive equal treatment to a national of the host state. The regulations therefore ensure that EU Nationals who meet the criteria above will be eligible for the home tuition fee rate for their studies at a Scottish higher education institution. Access to additional maintenance support is not a specific requirement of the Citizens Rights Agreements unless the individual has been granted settled status or meets any minimum residency rules.

These changes will ensure that any individual with ‘protected rights’ who has been ordinarily resident in the UK, Islands, Gibraltar or the EEA/Switzerland for the 3 years immediately before the first day of the first academic year of the course, and is ordinarily resident in the UK on the course start date will be eligible for the home tuition fee rate and tuition fee support from the Scottish Government, via the Student Awards Agency Scotland (SAAS). The regulations also ensure that any individual with ‘protected rights’ who has been ordinarily resident in the UK for 3 years, and is ordinarily resident in Scotland on the first day of the first academic year of the course will be eligible for the home tuition fee rate and full student support (including maintenance support) from SAAS. These changes will also cover those individuals who have dual UK/EU nationality and who have exercised their EU treaty rights by living in another EU member state (other than the UK) for more than 3 months.

*The amendments ensure the rights of EEA/Swiss Workers, employed persons, self-employed persons and their family members are protected and they continue to receive equal treatment under the terms of the Withdrawal Agreements between the UK and the EU.*

Regulations 4(a), 8(a), 13(a), 18(a), 22(a), 25(a) and 29(a) amend the SLTF Regulations, the Bursaries Regulations, the Nursing Regulations, the Allowances Regulations, the Loans Regulations, the EMA Regulations and the Fees Regulations. The purpose of these changes is to ensure that EEA migrant workers/EEA self-employed persons, Swiss employed persons/Swiss self-employed persons, EEA frontier workers/EEA frontier self-employed

persons, Swiss frontier employed person/Swiss frontier self-employed person or their family members continue to be eligible for the home tuition fee rate and full support from the Scottish Government, via SAAS following the UK's withdrawal from the EU. These amendments ensure that the terms of the 'Citizens Rights Agreements', which state that workers, self-employed persons and their family members should not be excluded from access to maintenance support, are adhered to. Also included within this category are Irish citizens, provided they were resident in the UK by the end of the transition period, migrant workers and frontier workers working in the UK by the end of the transition period.

These changes confirm that individuals in the categories listed in the above paragraph are required to have been ordinarily resident in the UK, Islands, Gibraltar or the EEA/Switzerland for the 3 years immediately prior to the start of the course. They must also be ordinarily resident in Scotland on the course start date (other than an EEA frontier worker/self-employed person, a Swiss frontier employed/self-employed person or their family members). This extends to the children of former migrant workers who, under EU law, would have been entitled to access to general education within Member States under the same conditions as nationals of that State. These rights continue under the terms of the 'Citizens Rights Agreements' provided the individual is a 'person with protected rights', has been ordinarily resident in the UK, Islands, Gibraltar, or the EEA/Switzerland for the 3 years immediately prior to the course start date and is ordinarily resident in Scotland on this same date.

*The amendments ensure that UK nationals who have exercised a right of residence in the EU and decided to return to live in the UK ('UK Returners') are entitled to home tuition fee and living cost support from the Scottish Government.*

Regulations 4(c), 8(c), 13(c), 18(c), 22(c), 25(c) and 29(c) amend the SLTF Regulations, the Bursaries Regulations, the Nursing Regulations, the Allowances Regulations, the Loans Regulations, the EMA Regulations and the Fees Regulations. Scottish Ministers have confirmed that UK nationals who have exercised a right of residence in the EU, and decided to return to live in the UK, will be entitled to the home tuition fee rate and living cost support from the Scottish Government, via SAAS for courses starting before 31 July 2028. A decision was made to extend this offer of student support for 7 years following the UK's withdrawal from the EU to allow individuals who may have had a reasonable expectation (while the UK was still part of the EU) that they would be able to receive support to study in the UK when they had finished their secondary education.

In order to be eligible under this category, individuals must be settled in the UK on the first day of the first academic year of the course and have been ordinarily resident in Scotland for at least 3 years prior to exercising their right of residence in the EU. They must also have been ordinarily resident in the UK, Islands, Gibraltar or the EEA/Switzerland for 3 years before the start of the course, including by the end of the transition period. This category will also apply to the family members of 'UK Returners' who are accompanying or joining them in the UK.

*The amendments protect the rights of the Children of Swiss Nationals who are entitled to support in the UK under the terms of the Swiss Citizens Rights Agreement.*

Regulations 4(e), 8(g), 13(g), 18(g), 22(f), 25(e) and 29(g) amend the SLTF Regulations, the Bursaries Regulations, the Nursing Regulations, the Allowances Regulations, the Loans Regulations, the EMA Regulations and the Fees Regulations. These changes ensure that the children of Swiss nationals are eligible for the home tuition fee rate and full support from the Scottish Government, via SAAS following the UK's withdrawal from the EU as per the terms set out in the Swiss Citizens' Rights Agreement. This agreement protects the rights of citizens living in either country before the end of the transition period and ensures that those Swiss nationals living in the UK at this time can apply through the EU Settlement Scheme. The child of the Swiss national can join the parent after the end of the transition period and still be eligible to apply under the EU Settlement Scheme, as long as the parent was resident in the UK by the end of the transition period. They are also required to have been ordinarily resident in the UK, Islands, Gibraltar or the EEA/Switzerland for the 3 years immediately prior to the start of the course and be ordinarily resident in Scotland on this same date.

*The amendments protect the rights of children of Turkish workers who were living in the UK before the end of the transition period following the UK's withdrawal from the EU.*

Regulations 4(f), 8(h), 13(g), 18(g), 22(g), 25(g) and 29(g) amend the SLTF Regulations, the Bursaries Regulations, the Nursing Regulations, the Allowances Regulations, the Loans Regulations, the EMA Regulations and the Fees Regulations. These changes ensure that the children of Turkish workers are eligible for the home tuition fee rate and living cost support from the Scottish Government, via SAAS following the UK's withdrawal from the EU. Individuals in this category are no longer covered by the 'Ankara Agreement', however their rights will be protected if the child and the Turkish worker were both ordinarily resident in the UK before the end of the transition period. In order to be eligible for this support they must have been ordinarily resident in the UK, Islands, Gibraltar or the EEA/Switzerland and Turkey for the 3 years immediately prior to the first day of the first academic year of the course. They are also required to be ordinarily resident in Scotland on the course start date.

*Updating the eligibility criteria for access to tuition fee loans for studying at higher education institutions in Scotland for UK Nationals living in the EU who are not considered 'UK Returners' as they have not left the UK to exercise a right of residence in the EU.*

Regulation 22(h) inserts a new paragraph 10A in schedule 1 of the Loans Regulations. The purpose of this amendment is to include an additional eligibility category for access to student loans for tuition fees to study at higher education institutions in Scotland. Scottish Ministers have confirmed that UK nationals living in the EU, who are not considered 'UK returners', will be eligible for tuition fee loans to study in Scotland and will be charged the same tuition fee rate as students from the rest of the UK who choose to study in Scotland. This category will generally include those UK nationals who were born and are living in the EU, having never lived in the UK. Scottish Ministers have confirmed that these arrangements will continue for 7 years following the end of the transition period (in the same way it will for UK Returners).

In order to be eligible under this category, individuals must have been ordinarily resident in the UK, Islands, Gibraltar or the EEA/Switzerland for 3 years before the first day of the first academic year of the course and be ordinarily resident in Scotland on the same date.

Updating the eligibility criteria for access to tuition fee loans for studying at higher education institutions in Scotland for Irish citizens who are resident in the 'Common Travel Area', other than the UK.

Regulation 22(h) also inserts a new paragraph 10B in schedule 1 of the Loans Regulations. The purpose of this amendment is to include an additional eligibility category for access to student loans for tuition fees to study at higher education institutions in Scotland. Scottish Ministers have confirmed that Irish citizens who are resident in the 'Common Travel Area', other than the UK, will be eligible for tuition fee loans to study in Scotland and will be charged the same tuition fee rate as students from the rest of the UK who choose to study in Scotland. These changes are therefore drafted to ensure that these individuals are eligible to receive a tuition fee loan from the Scottish Government, via SAAS, to study at any higher education institution in Scotland.

The rights of Irish citizens who are resident in the UK by the end of the transition period are protected under the Withdrawal Agreement between the UK and the EU. They are not necessarily required to apply for a status under the EU Settlement Scheme, however they are considered a 'person with protected rights' for the purpose of these amendments.

Updating the eligibility criteria for access to tuition fee loans for studying at higher education institutions in Scotland for those individuals with a right of residence in Gibraltar.

Regulation 22(h) also inserts a new paragraph 10C in schedule 1 of the Loans Regulations. The purpose of this amendment is to include an additional eligibility category for access to student loans for tuition fees to study at higher education institutions in Scotland. Scottish Ministers have confirmed that individuals who have a right of residence in Gibraltar will be eligible for tuition fee loans to study in Scotland and will be charged the same tuition fee rate as students from the rest of the UK who choose to study in Scotland. Scottish Ministers have confirmed that these arrangements will continue for 7 years following the end of the transition period (in the same way it will for UK Returners).

In order to be eligible under this category, individuals must have been ordinarily resident in the UK, Islands, Gibraltar or the EEA/Switzerland for the 3 years immediately prior to the first day of the first academic year of the course.

Continuity provision – An amendment has been made to ensure that students who were eligible for courses starting in the 2020/21 academic year and before continue to be eligible for the rest of their course of study.

Regulations 4(g), 8(g), 13(h), 18(h), 22(i), 25(f) and 29(j) amend the SLTF Regulations, the Bursaries Regulations, the Nursing Regulations, the Allowances Regulations, the Loans Regulations, the EMA Regulations and the Fees Regulations. The purpose of these amendments is to ensure that any individual who received support from the Scottish Government in the previous academic year (2020/21), will continue to be eligible for that support on the same basis for the following year and to the completion of their course of study. This amendment will ensure that these individuals are not impacted by any of the more detailed changes to the regulations and will reflect the decision by Scottish Ministers to allow individuals who started a course of study in the 2020/21 academic year or before, to

complete their education in Scotland. The Minister for Further Education, Higher Education and Science confirmed this in an announcement to the Scottish Parliament on 9 July 2020.

### *Miscellaneous Amendments*

Regulations 7, 12 and 17 amend the Bursaries Regulations, the Nursing Regulations and the Allowances Regulations to provide that bursaries or allowances payable to EU students with pre-settled status are only in respect of tuition and other fees.

Regulations 9, 14, 19, 26 and 30 make minor amendments to the Bursaries Regulations, the Nursing Regulations, the Allowances Regulations, the EMA Regulations and the Fees Regulations. These changes relate to references in schedule 2 regarding the definition of ordinary residence used in the aforementioned regulations and are made in consequence of the wider changes to the eligibility categories in these regulations.

### **Explanation of the law being amended by the regulations**

These Regulations amend the SLTF Regulations, the Bursaries Regulations, the Nursing Regulations, the Allowances Regulations, the Loans Regulations, the EMA Regulations and the Fees Regulations.

The SLTF Regulations provide for loans for tuition fees for eligible students attending designated courses provided by an institution located in the UK but outside of Scotland.

The Bursaries Regulations regulate the exercise by education authorities of their powers under section 49 of the Education (Scotland) Act 1980 to pay bursaries to persons undertaking courses of study. They prescribe that bursaries may only be paid to persons who fulfil certain criteria as to eligibility and they prescribe the conditions and requirements subject to which allowances may be paid.

The Nursing Regulations enable allowances to be paid to persons attending courses of education in nursing and midwifery in Scotland and prescribe the conditions and requirements subject to which allowances may be paid.

The Allowances Regulations enable allowances to be paid to persons attending courses of education who fulfil certain criteria as to eligibility and they prescribe the conditions and requirements subject to which allowances may be paid.

The Loans Regulations provide for loans for maintenance for eligible students attending designated courses of higher education.

The EMA Regulations regulate the exercise by the Scottish Ministers of their powers under section 73(f) of the Education (Scotland) Act 1980 to pay education maintenance allowances to persons aged 16 to 19 who are attending courses of education. They prescribe that education maintenance allowances may only be paid to persons who fulfil certain criteria as to eligibility and they prescribe the conditions and requirements subject to which such education maintenance allowances may be paid.

The Fees Regulations provide that it is lawful for a fundable body to charge certain students fees at a higher level than other students. “Fundable body” means a fundable body providing

fundable higher education in terms of section 5(3) of the Further and Higher Education (Scotland) Act 2005.

### **Reasons for and effect of the proposed change or changes on retained EU law**

These Regulations amend the definition of “Directive 2004/38” to ensure that references to a provision of this Directive is reference to the Directive as it had effect immediately before IP completion day and that the provision referred to is to be read, where appropriate, as if references to a “Member State” include the United Kingdom. This is to ensure that the definition continues to operate effectively now that the United Kingdom is no longer a Member State for the purposes of the Directive.

These Regulations also amend the definition of the “Switzerland Agreement” contained within the regulations to provide that a reference to a provision of the Switzerland Agreement is a reference to the Agreement as it had effect immediately before IP completion day and is to be read, where appropriate, as if references to a “Member State” include the United Kingdom.

### **Statements required by European Union (Withdrawal) Act 2018**

#### **Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate**

The Minister for Further Education, Higher Education and Science, Richard Lochhead has made the following statement “In my view the Education (Fees and Student Support) (EU Exit) (Scotland) (Amendment) Regulations 2021 do no more than is appropriate. This is the case because the amendments are being made to ensure that the rights for students set out in the Citizens’ Rights Agreements are upheld following the UK’s exit from the European Union”.

#### **Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action**

The Minister for Further Education, Higher Education and Science, Richard Lochhead has made the following statement, “In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. This is the case because the provisions within these regulations ensure that the rights of those individuals provided for within the terms of the Citizens’ Rights Agreements are protected in terms of access to appropriate student support for studying in Scotland”.

#### **Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation**

The Minister for Further Education, Higher Education and Science, Richard Lochhead has made the following statement, “In my view the Education (Fees and Student Support) (EU Exit) (Scotland) (Amendment) Regulations 2021 do not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts”.

**Statement that Scottish Ministers have, in preparing the regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010**

The Minister for Further Education, Higher Education and Science, Richard Lochhead has made the following statement, “In my view, in preparing the Education (Fees and Student Support) (EU Exit) (Scotland) (Amendment) Regulations 2021, due regard was given to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010”.

**Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament**

**Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare**

This heading is not applicable for these regulation amendments.

**Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)**

This heading is not applicable for these regulation amendments.

**An indication of how the regulations should be categorised in relation to the significance of the change proposed**

Medium – These changes relate to technical changes to student support regulations which do not create/amend any powers to legislate but may require some subject committee scrutiny.

**Statement setting out the Scottish Ministers’ reasons for their choice of procedure**

Negative procedure is considered appropriate as the instrument contains minor and technical amendments and does no more than is necessary to ensure continuity of law and operability at the end of the implementation period. The regulations do not include provisions which fall within paragraph 1 (2) of schedule 7 of the European Union (Withdrawal) Act 2018.

**Consultation**

A consultation was not considered necessary due to the nature of the amendments.

**Impact Assessments**

An Equality Impact Assessment (“EQIA”) has been carried out for the amendments relating to the continued fee policy of EU students, UK Nationals living in the EU, Gibraltarian Nationals and Irish Nationals. EQIAs for the other amendments were not considered necessary due to the nature of the amendments.

## **Financial Effects**

A Business and Regulatory Impact Assessment (“BRIA”) is not necessary as the instrument has no impact upon business, charities or voluntary bodies.

Scottish Government  
Directorate for Advanced Learning and Science  
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