



OFFICIAL REPORT
AITHISG OIFIGEIL

Social Security Committee

Thursday 17 December 2020

Session 5



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SOCIAL SECURITY COMMITTEE

27th Meeting 2020, Session 5

CONVENER

*Bob Doris (Glasgow Maryhill and Springburn) (SNP)

DEPUTY CONVENER

*Pauline McNeill (Glasgow) (Lab)

COMMITTEE MEMBERS

*Tom Arthur (Renfrewshire South) (SNP)

*Jeremy Balfour (Lothian) (Con)

*Keith Brown (Clackmannanshire and Dunblane) (SNP)

*Mark Griffin (Central Scotland) (Lab)

*Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con)

Alison Johnstone (Lothian) (Green)

*Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Shirley-Anne Somerville (Cabinet Secretary for Social Security and Older People)

CLERK TO THE COMMITTEE

Ann Peat

LOCATION

Virtual Meeting

Scottish Parliament

Social Security Committee

Thursday 17 December 2020

[The Convener opened the meeting in private at 09:00]

09:56

Meeting continued in public.

Decision on Taking Business in Private

The Convener (Bob Doris): Good morning, and welcome to the public part of the 27th meeting in 2020 of the Social Security Committee. We have apologies from Alison Johnstone, who cannot be with us, and Mark Griffin, who cannot stay for this part of the meeting.

Before we move to item 2, I note that item 1—a briefing on Brexit and devolved social security—was considered in private. I thank Dr Simon Roberts, who took us through a presentation, which was most welcome.

Item 2 is consideration of whether to take further items in private. The committee is asked to agree that item 10, on work programme discussions, and item 11, which is consideration of an issues paper, are taken in private. I will assume that members agree, unless they indicate otherwise.

There have been no such indications, so that is agreed.

Subordinate Legislation

Carer's Allowance Supplement and Young Carer Grants (Residence Requirements and Procedural Provisions) (EU Exit) (Scotland) Regulations 2020 [Draft]

First-tier Tribunal for Scotland Social Security Chamber and Upper Tribunal for Scotland (Allocation of Functions, Procedure and Composition) (Miscellaneous Amendments) Regulations 2020 [Draft]

09:57

The Convener: Item 3 is consideration of subordinate legislation. The committee will take evidence on the two affirmative instruments, which are connected. Members can see why we held our briefing earlier on the implications of Brexit for social security.

I welcome Shirley-Anne Somerville, the Cabinet Secretary for Social Security and Older People, who is attending to support us in the evidence session, and I welcome her accompanying officials from the Scottish Government, who are Jane Sterry, from the carers benefits policy unit; Rebecca Haque, cross-cutting policy team leader; and Susan Robb, who is a solicitor. I invite the cabinet secretary to make an opening statement. We will then move to questions.

The Cabinet Secretary for Social Security and Older People (Shirley-Anne Somerville): Carers allowance supplements and young carer grants are completely new forms of support that we have introduced to improve financial assistance for carers, in recognition of the vital role that they play.

In discussions with the United Kingdom Government and the European Commission's Administrative Commission for the Coordination of Social Security Systems, it was agreed that the benefits are in the scope of European Union rules on social security co-ordination, which means that they should be available to carers who live outside of the UK in the European Economic Area or Switzerland, in certain circumstances. The Carer's Allowance Supplement and Young Carer Grants (Residence Requirements and Procedural Provisions) (EU Exit) (Scotland) Regulations 2020 have been lodged to expand the residency criteria for the benefits.

Although we expect the number of carers affected to be small, the regulations will ensure that all eligible carers can get the support that they are entitled to, which will include past payments

going back to the launches of the two forms of support.

The approach in the regulations will allow carers to apply for and receive carers allowance supplements and young carer grants where they are resident outside the UK in the EEA or Switzerland, where the UK remains the “competent” state for payments of cash sickness benefits to them and where they can demonstrate a “genuine and sufficient link” to Scotland. The “genuine and sufficient link” test was chosen as an approach that has been tried and tested legally, and found to be compatible with EU law.

As we approach the end of the EU exit transition period, it should be noted that the provisions in the regulations are likely to apply only to those in the protected cohort, as set out in the EU withdrawal agreement and similar agreements. In the main, that refers to those who are already in a cross-border situation by 31 December 2020.

The Scottish Government's view is that Scotland's best interests are served by remaining a member of the EU, with all the advantages that membership offers. It is unfortunate that we do not have more clarity on what the social security co-ordination arrangements will be after the end of this year.

10:00

I note my gratitude to Dr Sally Witcher and members of the Scottish Commission on Social Security for their consideration of the regulations in a much-reduced timescale, which has supported us in bringing them to the Parliament ahead of the end of the EU exit transition period. If they are passed, the regulations will come into force shortly after that point, and Social Security Scotland will be ready to take applications for eligible carers outside of the UK. We will work with our stakeholders and networks to get the message out to carers about the changes early in the new year.

The First-tier Tribunal for Scotland Social Security Chamber and Upper Tribunal for Scotland (Allocation of Functions, Procedure and Composition) (Miscellaneous Amendments) Regulations 2020, which the committee is also considering, are needed to give full effect to the carers allowance supplement and young carer grant regulations. They expand the functions of the social security chamber of the First-tier Tribunal for Scotland to include dealing with appeals from outside the UK relating to carers allowance supplement. They also ensure that relevant provisions that apply to appeals relating to other forms of devolved assistance also apply to carers allowance supplement appeals from outside of the UK.

I appreciate the opportunity to assist the committee in its consideration of the regulations, and I am happy to take questions.

The Convener: Thank you, cabinet secretary.

The first question is from Shona Robison.

Shona Robison (Dundee City East) (SNP): Does the Scottish Government have a view on what the entitlement to devolved benefits should be for people who are not protected by the withdrawal agreement, or is it too early to say?

Shirley-Anne Somerville: As the committee knows, we are in the unfortunate position of not knowing what will happen after the end of the transition period. The current negotiation positions of the UK and the EU on the issue are quite far apart. We do not know what will happen during the negotiations and whether an agreement will be reached on that issue or, indeed, on other issues. That means that we are left in the dark about what will happen after 31 December.

As I said in my opening remarks, the Scottish Government would prefer to be a full member of the EU and to have co-ordination of social security at EU level. Unfortunately, given the restrictions on the Scottish Parliament, it is not in the gift of the Scottish Government to make our own arrangements on the matter. Arrangements need to be made at UK level, which is, of course, exceptionally disappointing.

Pauline McNeill (Glasgow) (Lab): We had a session in private this morning to give us some understanding of the co-ordination rules, which are quite complex. I picked up on the fact that, under the withdrawal agreement, domestic courts can refer cases in which there is a question mark or a challenge relating to the application for any benefit, including those that are defined in Scotland, for a period of eight years, although it is not clear what will happen after eight years.

What will you, as a Scottish Government minister, expect of our domestic courts? I expect that you will say that you expect domestic courts to apply the current general principles and not to depart from the system in which people have enjoyed benefits, including the new benefits. There is a certain level of protection for cases up to 31 December, but the position after that is not clear. How do you expect Scottish courts to apply the co-ordination rules?

Shirley-Anne Somerville: We may have to bring further regulations back to the Scottish Parliament if there are changes in what is expected on social security co-ordination. For example, that might happen in due course because of an agreement at a bilateral level or at EU level.

As the member would expect, we would then expect the Scottish courts to rule on the regulations as they stand at the moment. It is the responsibility of the Scottish Government to continue to keep those regulations as up to date as required, given any further arrangements that are made at UK level, either bilaterally or with the EU as a whole, as I said. We will keep the regulations updated, and the courts will fulfil their requirements, ruling on the basis of whatever regulations are in place at the time.

Pauline McNeill: On the purpose of the regulations, I suppose that any Scottish court could rely on them and would not have to refer to the European Court of Justice, because the regulations set out the requirements for benefits that apply to those in EU member states.

Shirley-Anne Somerville: This is a developing situation and policy officials are working closely with Social Security Scotland to develop processes and to co-ordinate any changes to internal and external procedures and guidance that are required as a result of emerging case law. We will do everything that we can internally to move ahead if there is emerging case law that we need to take account of—[Inaudible.]—and the Scottish Government has a responsibility to remain up to date with any requirements on us to change regulations on co-ordination in general.

Pauline McNeill: Perhaps you could get back to the committee at a later date. I suppose that I wanted you to say that you would expect the Scottish courts to implement the regulations. I can see that there could be long delays if the Scottish courts felt that they had to refer cases to the ECJ. Obviously, that would apply over a limited period. If that was possible, that would—[Inaudible.].

Shirley-Anne Somerville: It is possible that I am missing part of Ms McNeill's questions—I thought that I had answered that point. I do not know whether it is my connection—

Pauline McNeill: I have a limited understanding of this. I hoped that you would say that the regulations would clarify for the Scottish courts what is expected of them; otherwise, I believe that they would refer everything to the ECJ, which we would not want.

Shirley-Anne Somerville: In laying the regulations, and in making changes to them during drafting, our intention was to give as much certainty as possible about how the current protected cohort of EU citizens will be provided for. The Scottish courts will absolutely take forward any cases that come before them. The regulations are an attempt to create as much certainty as possible in what is a very uncertain situation.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): Cabinet secretary, what is the definition of

“a genuine and sufficient link to Scotland”?

I ask that so that the people concerned can be clear that they qualify.

Shirley-Anne Somerville: Information on what is meant by “genuine and sufficient link” will be available for potential clients on mygov.scot. Guidance will also be available for client advisers in Social Security Scotland.

It is important to note that the application of the test needs to be flexible, which is why it is set out not in regulations but in guidance. The decision whether someone can demonstrate

“a genuine and sufficient link”,

in line with EU rules, needs to take account of a range of factors. That is why there is no definition in the regulations.

If there was a definition in the regulations, it would be a challenge for us to provide a definitive list of situations that involve people living and working in Scotland for a certain period, and to ensure that we did not accidentally miss someone off that list. The test is designed to enable us to be as flexible as we can be to ensure that we capture as many people as we require to capture. I hope that some of the examples that I have given are helpful to Rachael Hamilton in that regard.

Rachael Hamilton: If there is no specific definition, does that mean that there will be discretion—you used the word “flexibility”—for whomever is dealing with a particular case? Is that what you are saying?

Shirley-Anne Somerville: The Social Security Scotland client advisers will refer to the internal guidance that will be available to them in order to ensure that we capture as many different ways as possible in which a person can have

“a genuine and sufficient link to Scotland”.

That may involve limited discretion for the client advisers, but it will be very limited, because the purpose of the guidance will be to give examples—either concrete examples, such as someone working or staying in Scotland, or examples of the areas in which a client adviser may make a decision.

Rachael Hamilton: How did you come to your estimate of the number of people who will be affected by the provisions? Our briefing notes that the number will be quite low; I think that I am right in saying that it will be somewhere between 20 and 120. How did you come to that conclusion?

Shirley-Anne Somerville: For the carers allowance supplement, we can make an estimate

using Department for Work and Pensions figures on how many people receive carers allowance outwith the UK who may have an attachment to Scotland. However, we cannot follow a similar procedure for the young carer grant because there is no comparator in the current DWP system, which makes it exceptionally problematic to forecast those numbers.

What is clear is that the numbers for both the carers allowance supplement and the young carer grant will be very small. The numbers that you highlight are the estimates for the carers allowance supplement; as I hope the committee will appreciate, it is very difficult to make a firm forecast.

Rachael Hamilton: People will need to apply, because if they do not apply, they will have no right to appeal. What is being done, therefore, between Social Security Scotland and the DWP to source those people, or is that impossible? Do you have to go about it in a different way?

Shirley-Anne Somerville: It is very difficult. We need to ensure that we encourage people to take up their entitlement. We are continuing to liaise with the DWP to see what can be done on the issue. We are also working with carers organisations in Scotland to see whether we can use their links with other carers organisations to highlight the provision to as many people as possible.

We have already been working with stakeholders to find the relevant organisations and networks in Europe with which we might want to link up. If the regulations are approved, we can move forward with that. It is a challenging area, in particular because it involves such a small cohort of people, but we are determined to do what we can to work with stakeholders to raise awareness of entitlement as much as possible.

Rachael Hamilton: Convener, will somebody else ask about the exportability of the other devolved benefits?

10:15

The Convener: I am afraid that I cannot answer that, but you can ask another question if you want to.

Rachael Hamilton: Our earlier presentation suggested that some of the issues would be discussed at the administrative commission. Has the Scottish Government thought about legislating prior to any discussion that goes to the administrative commission, in order to reassure people in this circumstance, such as those who apply for disability benefits?

Shirley-Anne Somerville: As you rightly point out, the decisions around that are for the EU

administrative commission and not for the Scottish Government. However, because the benefits that are being devolved—with the exception of those that we are looking at today—have a DWP equivalent, it is easier to forecast what the administrative commission's determination might be. For example, we expect the care components of the devolved disability assistance, winter heating assistance and Scottish carers assistance to be exportable in the same way as the existing benefits that they will replace are exportable, so we will draft legislation on that basis for those benefits. We will have an easier read-across when it comes to the disability and carers benefits that are being devolved; we will be able to assume that the decision that already applies to the existing benefits will apply to those benefits. Accordingly, we will work to ensure that people do not lose out as we transfer to the new Scottish benefits.

Rachael Hamilton: Can you confirm that that work will include your consideration of the new benefits, such as the best start payment? I know that, because it is such a new benefit, the numbers are very small, but I presume that your consideration would take that into account, too.

Shirley-Anne Somerville: A number of benefits and means of assistance that we already deliver are not exportable, such as best start grants, best start foods, the funeral support payment and the job start payment. That is our view, which is shared by the DWP and Her Majesty's Revenue and Customs. It was due to be presented to the administrative commission in March this year, but the Covid outbreak delayed that, so the issue is still being considered. That is where it stands at the moment, but the view of the Scottish Government and the DWP is that they will not be exportable.

The Convener: Cabinet secretary, our questions will tell you that we had a briefing on that issue just before you came to the committee. It would be good to get clarity around it. As we understand it, you laid out the Government's position on those four new forms of social security assistance, including the best start grant and best start foods, and the European body will have to determine whether those are social security payments, social assistance payments or a halfway house. Will the Scottish Government be able to make direct representation to the administrative commission? Would you have been able to do that in March this year? Would that have been done through the UK Government or in partnership? What is that likely to look like in the new year, when Europe decides the designation—or categorisation, to be more accurate—of the new Scottish benefits?

Shirley-Anne Somerville: The future decisions of the administrative commission will continue to

be important—not only those on the benefits that we have just discussed, but all decisions that might affect the protected cohort. Therefore, we will continue to engage with the relevant EU institutions, but that will be done through the UK's representation at joint UK-EU committees. Such matters are decided at a UK level, so Scotland's opinion on them cannot differ from that of the UK.

The Convener: There being no further questions, we will move to our next agenda item. However, I think that the cabinet secretary will have seen that the committee has a thirst for better understanding of that developing area of social security policy.

We turn to agenda item 4. I invite Ms Somerville to move motion S5M-23567.

Motion moved,

That the Social Security Committee recommends that the Carer's Allowance Supplement and Young Carer Grants (Residence Requirements and Procedural Provisions) (EU Exit) (Scotland) Regulations 2020 [draft] be approved.—[*Shirley-Anne Somerville*]

I hope that we will not now debate the matter, although there is provision for that to happen should members wish to comment. However, we had a good cut at the subject under the previous agenda item, so perhaps they will not. It seems that members have no comments to make. I assume that the cabinet secretary does not wish to wind up.

Shirley-Anne Somerville: No, convener.

The Convener: Is the committee content to recommend approval of the instrument? Unless I see any indication to the contrary in the chat function, I will assume that to be the case.

Motion agreed to.

The Convener: We move to agenda item 5. I invite Ms Somerville to move motion S5M-23353.

Motion moved,

That the Social Security Committee recommends that the First-tier Tribunal for Scotland Social Security Chamber and Upper Tribunal for Scotland (Allocation of Functions, Procedure and Composition) (Miscellaneous Amendments) Regulations 2020 [draft] be approved.—[*Shirley-Anne Somerville*]

The Convener: No member has indicated that they wish to debate the motion. Is the committee content to recommend approval of the instrument? Once more, unless I see any indication to the contrary in the chat function, I will assume that to be the case.

Motion agreed to.

European Union (Withdrawal) Act 2018

Social Security Co-ordination (EU Exit) (Scotland) (Amendments etc) Regulations 2020 (SSI 2020/399)

10:22

The Convener: We move to agenda item 6. I refer members to paper 5.

The Social Security Co-ordination (EU Exit) (Scotland) (Amendments etc) Regulations 2020 are made using powers under the European Union (Withdrawal) Act 2018. Under the protocol between the Scottish Parliament and the Scottish Government, the committee is required to consider whether the procedure attached to the instrument is appropriate or whether it should be changed.

The instrument is subject to the negative procedure. The Scottish ministers have categorised it as being of low significance because the amendments are minor and technical. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 15 December 2020 and agreed that the negative procedure was appropriate.

Is the committee content that the negative procedure is appropriate for this instrument? Again, I will assume that silence in the chat function means that we are so content.

The committee is content.

Subordinate Legislation

Social Security Co-ordination (EU Exit) (Scotland) (Amendments etc) Regulations 2020 (SSI 2020/399)

10:23

The Convener: We move to agenda item 7. I refer members to papers 6 and 7.

As was noted under the previous agenda item, the instrument is subject to the negative procedure. The instrument has two main purposes. It repeals the EU regulations on social security co-ordination in so far as they relate to devolved social security matters, with effect from the end of the transition period. It also amends three Scottish statutory instruments to remove reference to EU legislation, and it makes provision to ensure continued access to specified benefits for persons who are protected under the withdrawal agreement.

Are members content to note the instrument? There being no comments in the chat function, I assume that members are so content.

The committee agrees to note the instrument.

Scottish Child Payment Amendment Regulations 2021 [Draft]

The Convener: Agenda item 8 is also evidence on subordinate legislation. The committee will take evidence on the Scottish Child Payment Amendment Regulations 2021. I refer members to papers 9 and 10. I welcome Shirley-Anne Somerville, the Cabinet Secretary for Social Security and Older People, and her accompanying officials: Dawn Abell, head of the Scottish child payment and reserved benefits team; Rebecca Darge, the Scottish child payment policy lead; and Stephanie Virlogeux, solicitor.

I invite the cabinet secretary to make an opening statement before we move to questions.

Shirley-Anne Somerville: Thank you, convener. The committee's scrutiny throughout the development of the Scottish child payment for under-sixes, which, as you know, has happened—[Inaudible.]—at an unprecedented—[Inaudible.]—is greatly appreciated. The Scottish Fiscal Commission has forecast that up to 194,000 children could be eligible this financial year. That shows the real impact that the payment could have.

The committee is being asked to recommend for approval the Scottish Child Payment Amendment Regulations 2021. The Scottish child payment is provided for under section 79 of the Social

Security (Scotland) Act 2018, which enables the top-up of reserved benefits—the quickest route for us to tackle child poverty. The Scottish Child Payment Regulations 2020, which were recommended for approval by the committee on 24 September, set out the rules and eligibility criteria for children under the age of six.

The amendment regulations make minor technical amendments to the principal regulations to ensure that Scottish child payment eligibility is aligned with our original policy intent on nil awards. They also ensure that the processes are as straightforward as possible for making Scottish child payments to clients who claim for additional children when they are already in receipt of the Scottish child payment for another child.

On nil awards, the Scottish Government is opposed to the punitive sanctions that have been imposed by the UK Government, because we recognise the risk that they pose of pushing people deeper into poverty. If our clients receive a nil award as a result of sanctions, we will continue to pay the Scottish child payment.

The amendment regulations also set out that we expect eligibility to continue if an award is reduced to zero as a result of deductions for liabilities such as gas and electricity arrears. That approach ensures consistency with our other Scottish low-income benefits, such as the best start grant, and it supports families who face a significant reduction in their income.

The principal Scottish child payment regulations set out that a client is not required to complete a new application for additional children if they have on-going entitlement for another child. The amendment regulations make things more straightforward for clients in such a scenario, enabling the date of payment for additional children to be aligned with the client's existing payment cycle. That is based on feedback from clients who have told us that they value both predictability of and certainty on payments because those help with the management of household finances.

Finally, I put on record my thanks to the Scottish Commission on Social Security for its scrutiny of the draft amendment regulations to expedited timescales and for its continued support throughout the development of the payment. The commission published its scrutiny report on 20 November, and I am pleased to advise that we have accepted or partially accepted all of its recommendations.

I hope that the committee will today recommend for approval the amending regulations, to enable them to come into force ahead of the introduction of eligibility for the Scottish child payment in

February, with the first payments to follow soon afterwards.

I am happy to take questions.

The Convener: Thank you very much, cabinet secretary. There are no bids for questions, so we move to agenda item 9.

I invite Ms Somerville to move motion S5M-23673.

Motion moved,

That the Social Security Committee recommends that the Scottish Child Payment Amendment Regulations 2021 [draft] be approved.—[*Shirley-Anne Somerville*]

The Convener: There is an opportunity for contributions from members at this point. I note from the chat box that there are no comments. I therefore ask committee members whether they are content to recommend approval of the instrument. There are no objections in the chat box.

Motion agreed to.

The Convener: I thank the cabinet secretary and her officials. As previously agreed, the committee will move into private session for the remaining agenda items.

10:29

Meeting continued in private until 10:58.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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