

DELEGATED POWERS AND LAW REFORM COMMITTEE

8th Meeting, 2021 (Session 6)

Tuesday 26 October 2021

Instrument Responses

Valuation and Rating (Coronavirus) (Scotland) Order 2021 (2021/Draft)

On 8 October 2021 the Scottish Government was asked:

The instrument establishes a rule to be applied when calculating the rateable value of non-domestic premises on the current valuation roll which provides that no account is to be taken of any matter arising on or after 1 April 2021 that is (whether directly or indirectly) attributable to coronavirus. The rule is applied retrospectively from 1 April 2021 and will apply both to new entries and re-determination of the rateable value of existing properties on the current valuation roll. This means that, when an assessor is considering an appeal against the rateable value of a property on the basis of a 'material change of circumstances' which is already lodged, this rule will apply retrospectively to determine the outcome.

1. Notwithstanding that section 6(6) of the Local Government (Scotland) Act 1975 allows Scottish Ministers to introduce rules for rates valuations by assessors with retrospective effect, please advise whether it is considered that this rule engages rights under Article 6 (Right to a fair trial) and/or Article 1 of Protocol 1, and (Protection of Property) of the European Convention on Human Rights.
2. If so, please explain why it is considered there is no breach of these Convention rights.

On 15 October 2021 the Scottish Government responded:

(1) It is considered that the rule set out in the Order engages Article 1 of Protocol 1 (protection of property) of the European Convention on Human Rights ("the Convention") and that it would have the effect of interfering with the peaceful enjoyment of possessions. However, it is not considered that the rule set out in the Order engages Article 6 rights, under its civil limb. Tax proceedings, and the obligation to pay tax, continue to constitute part of the core of public authority prerogatives within the realm of public law which fall outwith the scope of civil rights and obligations under Article 6 of the Convention (*Ferrazzini v Italy* (2001) [Grand Chamber] application no. 44759/98, paragraphs 29 and 30).

(2) It is acknowledged that there is a general public interest in the law not being changed retrospectively. However, in the context in which the rule would apply, it is considered that this is outweighed by a competing public interest justifying the retrospective application of the rule. The policy note explains the background to this and the factors that have been taken into account.

In the analysis of rights under Article 1 of Protocol 1 of the Convention, it is considered that the application of the rule set out in the Order is proportionate to the aims pursued. Article 4(3) of the Order sets out an exception to the rule, to the effect that the physical state of the lands and heritages may be taken into account in making a relevant determination, whether or not the matter is attributable to coronavirus.

A fair balance must be struck between ratepayers' interests and the general interest. It is not considered that the retrospective application of the rule imposes an unreasonable burden or that it fails to strike a fair balance between the various interests involved (*M.A. and Others v. Finland* [2003] 37 EHRR 210 at 217).

In considering the fair balance to be struck, and adherence to the principle that the legislative measure should ensure that no excessive burden falls on non-domestic ratepayers, it is also relevant to consider the package of non-domestic rates relief that the Scottish Government has provided for as part of its pandemic response to date and any provisional plans for future support in the 2022-23 budget.

It is considered that national authorities, particularly the legislature, are in principle best placed to determine the public or general interest. The Scottish Government also observes that the Strasbourg Court has given a considerable margin of appreciation to the decisions of the government and the legislature in areas of taxation, revenue and economic strategy – for example, in *Ferrazzini v Italy* (2001) [GC] application no. 44759/98, paragraph 29; *N.K.M. v Hungary* (2013) application no. 66529/11, paragraphs 49-50 and 55-57; and *Koufaki and Adedy v Greece* (2013), application nos. 57665/12, 57657/12, paragraphs 31 and 48. This is also reflected in domestic caselaw (for example, in *R (Robert Huitson) v HMRC* [2011] EWCA Civ 893, paragraphs 29-30 and 95; and *Cartref & Others v Commissioners for HMRC* [2019] EWHC 3382 (Admin), paragraph 178).

In so far as the rule set out in the Order engages rights under Article 1 of Protocol 1 of the Convention, the Scottish Government considers that there is a compelling public interest justification in introducing the rule set out in the Order with retrospective effect, and that this outweighs the public interest in the law not being changed retrospectively.

NHS Education for Scotland Amendment Order 2021 (SSI 2021/330)

On 29 September 2021 the Scottish Government was asked:

The Delegated Powers and Law Reform Committee intends to consider SSI 2021/330 the NHS Education for Scotland Amendment Order 2021 at its meeting on 26 October 2021. The Committee has delegated authority to its legal advisers to ask questions directly of the Scottish Government Legal Directorate.

1. The instrument amends article 4(1) of the NHS Education for Scotland Order 2002 (the 2002 Order) by conferring additional functions on NHS Education Scotland (NES) to “provide information services in support of the functions of the Scottish Ministers, Health Boards and other Special Health Boards including, without prejudice to the foregoing generality, services provided by digital means;”. Please can you provide further detail on what “information services” are and whether this is considered to be sufficiently clear given the term is not defined within the parent statute, or within the 2002 Order. Are there other examples of what this term means or where this approach has been taken?
2. Is any corrective action proposed, and if so, what action and when?

On 5 October 2021 the Scottish Government responded:

1. The term “information services” would take its ordinary meaning, being services to do with information, that is “knowledge communicated concerning some particular fact, subject or event” (Oxford English Dictionary Online definition of “information”). Such services might involve ingathering information or disseminating information, and the policy note for the instrument describes some of the particular things that NHS Education for Scotland is going to do in delivering such services.

We consider that the term is sufficiently clear to be used without definition in the instrument. A similar approach has been taken in section 2 of the National Library of Scotland Act 2012¹, article 2 of the National Health Service (Functions of the Common Services Agency) (Scotland) Order 2008² and article 4 of the Public Health Scotland Order 2019³.

No corrective action is proposed.

Council Tax Reduction (Scotland) Amendment (No. 4) Regulations 2021 (SSI 2021/337)

On 5 October 2021 the Scottish Government was asked:

Regulation 2 of the instrument amends regulation 16(5) of the Council Tax Reduction (Scotland) Regulations 2012 in accordance with paragraphs (2) and (3). In regulation 2(2)(b), the inserted text refers to the “Afghan Citizens Resettlement Scheme” and footnote (c) on page 1 of the instrument is inserted providing details of this scheme and a weblink to it. Further, in regulation 2(3), reference is made to “(i) the Afghan Relocations and Assistance Policy; or (ii) the previous scheme for locally-employed staff in Afghanistan (sometimes referred to as the ex-gratia scheme)”, and footnote (a) (included within the inserted text) on page 2 refers to Part 7 of the Immigration Rules, and particularly to rules 276BA1 – 276BS2.

1. Is footnote (a) on page 2 of the instrument intended to provide further explanation of the Afghan Relocations and Assistance Policy, *and* the ex-gratia scheme, or just the latter? If not, please explain whether, and if so why, it is considered that the reference to the Afghan Relocations and Assistance Policy is sufficiently clear.

¹ 2012 asp 3.

² S.S.I. 2008/312.

³ S.S.I. 2019/336.

2. Neither of these footnotes are repeated in the equivalent text inserted into the equivalent provisions of Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012 by regulation 3(2) and (3) of the instrument. Please explain whether, and if so why, it is considered sufficiently clear to the reader of regulation 16(5) the “State Pension Credit Regulations” as amended by this instrument what the terms referred to above mean.
3. Please explain whether any corrective action is proposed, and if so, what action and when.

On 14 October the Scottish Government responded:

1. Footnote (a) on page 2 of the instrument is intended to provide further explanation of the Afghan Relocations and Assistance Policy and the ex-gratia scheme. It is considered that the reference to the Afghan Relocations and Assistance Policy is sufficiently clear for the following reasons.

The Immigration Rules are published by the Home Office on the UK Government website. Rule 276BB1 of the Immigration Rules refers to the “Relocations and Assistance Scheme”. The Afghan Relocations and Assistance Policy is a UK Government policy. Information and guidance on the policy is published by the Home Office and the Ministry of Defence on the UK Government website. UK Government statements include a number of references to the Afghan Relocations and Assistance Policy (ARAP) as a “scheme”, or indeed “the ARAP scheme”, which was launched on 1 April 2021 – see for example, <https://www.gov.uk/government/publications/afghan-relocations-and-assistance-policy/afghan-relocations-and-assistance-policy-information-and-guidance>.

A number of other instruments made in the wake of the collapse of the Afghan government that took place on 15 August 2021 include references to the Afghan Relocations and Assistance Policy, with similar footnotes – for example, SSI 2021/320, SI 2021/1034, SI 2021/1045 and SR 2021/269. SI 2021/1039 includes references to the Afghan Relocations and Assistance Policy but does not contain a footnote highlighting relevant immigration rules.

Against this background, it is considered that references in the instrument to the Afghan Relocations and Assistance Policy are appropriate, that the reference in the footnote to the relevant immigration rules is sufficiently clear and that it is also sufficiently clear that the “Relocations and Assistance Scheme” referred to in rule 276BB1 of the Immigration Rules is a reference to the Afghan Relocations and Assistance Policy.

2. It is considered that it would be sufficiently clear to the reader of regulation 16(5) of the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012, as amended by this instrument, what the terms referred to above mean.

It is not considered necessary to repeat identically worded footnotes on the same page of, or otherwise closely grouped together in, a short amending instrument such as this one.

In published versions of the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012, the reader will be directed to the amending instrument, where the footnotes appear in close proximity to the amended text of regulation 16(5) of those Regulations. Where a consolidated version of an instrument is produced on legislation.gov.uk, the footnote in the amended instrument will usually be a reference to the amending instrument; the detail of the footnote in the amending instrument is not usually reproduced. For example, the footnote which appeared in SSI 2021/349 providing the citation to the Human Medicines Regulations 2012 in regulation 7E(2)(a)(ii) of SSI 2021/277 does not appear in the amended text on legislation.gov.uk. Instead, the footnote is to SSI 2021/349 (the amending instrument), from where the reader can obtain the relevant information - <https://www.legislation.gov.uk/ssi/2021/277/regulation/7E>.

3. In light of the responses to questions (1) and (2), it is not considered that any corrective action is required.

Social Security Administration and Tribunal Membership (Scotland) Act 2020 (Commencement No. 3) Regulations 2021 (SSI 2021/338)

On 29 September 2021 the Scottish Government was asked:

3. The instrument commences section 7 of the Social Security Administration and Tribunal Membership (Scotland) Act 2020 which modifies sections 77 and 78 of the Social Security (Scotland) Act 2018. These sections concern Scottish Ministers' duties to consider the effect of inflation on the value of assistance under devolved benefits schemes and uprate certain types of assistance annually. The instrument includes the Scottish Child Payment in the types of assistance for which annual uprating is required. Regulation 2 appoints 11 October 2021 as the day on which section 7 comes into force.

Section 8 of the 2020 Act makes transitional provision in consequence of section 7. In the absence of a Policy Note, please explain why the transitional provision in consequence of section 7 is not commenced at the same time as section 7.

4. Is any corrective action proposed, and if so, what action and when?

On 5 October 2021 the Scottish Government responded:

The Scottish Government is grateful for the Committee drawing this point to our attention. Not commencing section 8 is an oversight and we shall bring forward another set of regulations to commence section 8 before the report considering the effects of inflation is carried out in November.