

DELEGATED POWERS AND LAW REFORM COMMITTEE

18th Meeting, 2022 (Session 6) Tuesday 7 June 2022

Instrument Responses

Plant Health (Fees) (Miscellaneous Amendment) (Scotland) Regulations 2022 (SSI 2022/Draft)

On 25 May 2022, the Committee asked the Scottish Government:

The instrument removes the definition of “third country” from the Plant Health (Import Inspections Fees) (Scotland) Regulations 2014. It was previously defined as “any country or territory other than one within the European Union, Switzerland or Liechtenstein”. The term “third country” remains in regulation 3 and is used throughout schedule 1.

1. Please confirm what is now meant by “third country”.
2. Do you consider that the new definition is sufficiently clear to the reader?
3. Finally, given that “third country” was previously used to distinguish EU Member States from other countries when the UK was itself a member of the EU, please explain why it is still considered necessary to continue to use that term in these regulations.

Please confirm whether any corrective action is proposed, and if so, what action and when.

On 31 May 2022, the Scottish Government responded:

1. As it will be amended by the Plant Health (Fees) (Miscellaneous Amendment) (Scotland) Regulations 2022, the Plant Health (Import Inspections Fees) (Scotland) Regulations 2014 (“the 2014 Regulations”) includes provision in regulation 2(3) as follows:

(3) Unless the context otherwise requires, words and expressions which are not defined in these Regulations and which appear in the **Plant Health Regulation** or the **Official Controls Regulation** have the same meaning in these Regulations as in the **Plant Health Regulation** or, as the case may be, in the **Official Controls Regulation**.

The terms in bold are defined in regulation 2(1) of the 2014 Regulations as follows:

"Official Controls Regulation" means Regulation (EU) 2017/625 of the European Parliament and of the Council on official controls and other official

activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, amending Regulations (EC) No 999/2001, (EC) No 396/2005, (EC) No 1069/2009, (EC) No 1107/2009, (EU) No 1151/2012, (EU) No 652/2014, (EU) 2016/429 and (EU) 2016/2031 of the European Parliament and of the Council, Council Regulations (EC) No 1/2005 and (EC) No 1099/2009 and Council Directives 98/58/EC, 1999/74/EC, 2007/43/EC, 2008/119/EC and 2008/120/EC, and repealing Regulations (EC) No 854/2004 and (EC) No 882/2004 of the European Parliament and of the Council, Council Directives 89/608/EEC, 89/662/EEC, 90/425/EEC, 91/496/EEC, 96/23/EC, 96/93/EC and 97/78/EC and Council Decision 92/438/EEC, insofar as it applies to rules referred to Article 1(2)(g) of that Regulation;

"Plant Health Regulation" means Regulation (EU) 2016/2031 of the European Parliament of the Council on protective measures against pests of plants, amending Regulations (EU) No 228/2013, (EU) No 652/2014 and (EU) No 1143/2014 of the European Parliament and of the Council and repealing Council Directives 69/464/EEC, 74/647/EEC, 93/85/EEC, 98/57/EC, 2000/29/EC, 2006/91/EC and 2007/33/EC14;

The references to the **Plant Health Regulation** and the **Official Controls Regulation** in the 2014 Regulations are references to those pieces of legislation as they have effect - as retained EU law - in domestic law: see paragraph 2A(1) and (3) of schedule 8 of the European Union (Withdrawal) Act 2018.

In both the Plant Health Regulation (Article 2b) and the Official Controls Regulation (Article 3(2D)) "third country" is defined as follows:

"third country" means any country or territory outside the British Islands

'British Islands' has the meaning given in schedule 1 of the Interpretation Act 1978 (see section 23ZA of that Act):

"British Islands" means the United Kingdom, the Channel Islands and the Isle of Man

The net effect is therefore that "third country" in the 2014 Regulations means any country or territory outside the British Islands (i.e. outside the United Kingdom, Channel Islands and Isle of Man).

2. Yes.

3. As you note, the term "third country" is used in the 2014 Regulations.

In particular, regulation 3(1) makes clear that an importer to which regulation 3 applies must pay to the Scottish Ministers the fees specified in regulation 4.

Regulation 3(2) sets out the circumstances in which regulation 3 applies, including consignments or parts of consignments of certain plants, plant products and other objects (regulation 3(2)(a)) which are landed in Scotland from a "third country" (regulation 3(2)(b)(i)) – i.e. landed in Scotland from anywhere other than elsewhere in the United Kingdom or from the Channel Islands or the Isle of Man.

The term also appears in schedule 1. In some cases fees for commodities in schedule 1 apply in the same way to imports from 'any third country' (eg the 'Plants for planting' fees in row 1) . But in other cases there is differentiation. So for example the 'Seeds' fees in row 9 distinguish between particular countries or territories. There is a fee which applies generally to 'any third country' but subject to exceptions, in that case the exceptions being Argentina, Australia, Bolivia, Brazil, Chile, New Zealand or Uruguay in relation to which different fees apply. There are others similar examples of fees applying to 'any third country' but subject to exceptions, reflecting a differentiated approach. The term 'third country' together with named exceptions is therefore used as a drafting tool to set out a differentiated approach to fees where relevant.

No corrective action is proposed.

St Mary's Music School (Aided Places) (Scotland) Amendment Regulations 2022 (SSI 2022/173)

On 26 May 2022, the Committee asked the Scottish Government:

1. Regulation 2(2)(a) of the instrument substitutes paragraph 2(1)(b) with paragraph 2(1)(b), (ba) and (bb) in Schedule 1 of the St Mary's Music School (Aided Places) (Scotland) Regulations 2015 in relation to residence as a condition of the eligibility of a child.

New paragraph 2(1)(ba) as inserted by regulation 2(2)(a) provides that one of the conditions of eligibility is that a child must "be a child who is resident in the British Islands on the relevant date and whose parent [emphasis added] is a national of an EEA State who satisfies the requirements in head (b)".

New head (b) as inserted by regulation 2(2)(a) of the instrument provides that the child must be a national of an EEA State who meets the cumulative provisions in head (b)(i)(aa) and (bb) and "(ii) whose parent [emphasis added] was immediately before IP completion day entitled to a remission of fees by virtue of Article 7(2) or (3) or Article 10 of the Council Regulation (EU) No 492/2011 on freedom of movement for workers within the Union."

(a) Is the combined effect of heads (ba) and (b)(ii) that for a child in head (ba) be eligible for the scheme they must have a grandparent who was immediately before IP completion day entitled to a remission of fees by virtue of Article 7(2) or (3) or Article 10 of the Council Regulation (EU) No 492/2011?

(b) If not, please explain whether the contrary intention is otherwise sufficiently clear.

(c) Is any corrective action is proposed, and if so, what action and when?

On 31 May 2022, the Scottish Government responded:

Regulation 2(2)(a) of SSI 2022/173 inserts a new residency criterion into paragraph 2(1) of schedule 1 of the St Mary's Music School (Aided Places) (Scotland) Regulations 2015 ("the 2015 Regulations"). Regulation 2(1)(ba) provides that a child meets the residency criteria if he or she is resident in the British Islands on the relevant date and his or her parent is a national of an EEA State who satisfies the requirements in head (b). The intention behind the criterion in head (ba) is that a child of an EEA national who cannot meet the requirements in head (b)(i) can nevertheless be eligible under that head if (a) their parent meets the requirements in head (b)(i) (is resident in the British Islands and has been resident in the British Islands since before IP completion day and was resident in the British Islands or the European Economic Area throughout the year immediately preceding IP completion day); and (b) their parent was immediately before IP completion day entitled to a remission of fees by virtue of Article 7(2) or (3) or Article 10 of the Council Regulation (EU) No. 492/2011 on freedom of movement for workers within the Union. The intention behind the drafting was not that the child must have a grandparent who was entitled to remission of fees under Regulation No. 492/2011.

While we accept that some ambiguity could result from the drafting, we consider that the most sensible interpretation is the one that is intended and we think that in the

context of the 2015 Regulations it is sufficiently clear what is intended. A child who is an EEA national must comply with head (b)(i) and (ii) in order to be eligible, which means that their parent must be eligible for remission of fees. In order for a child to meet the criterion in head (ba), the parent of the child must themselves satisfy head (b)(i) and (ii). We agree that a literal reading of head (b) in the context of head (ba) would provide that the child's parent must have a parent who is eligible for remission of fees. But we consider that the context of the 2015 Regulations does not favour such a reading because only those parents with school aged children would be eligible for a remission of fees relating to attendance at St Mary's Music School. A grandparent would not be entitled to a remission of fees for school attendance in relation to their adult child (i.e. in relation to the adult parent of the child in question) and cannot be entitled to remission of fees in relation to a grandchild so the criterion at head (ba) would under a literal reading be redundant.

In order to avoid the unintended and unworkable result whereby parents of eligible children themselves require to have a parent who is eligible for remission of fees in relation to them, we consider that a purposive approach should be taken to the construction of the provisions. The purpose of this amendment is to protect the rights of EEA nationals who were in the British Islands before IP completion day. A purposive interpretation of the eligibility criterion in head (ba) could give full effect to the policy intention by, for example, the requirements in head (b)(ii) being read as if the words "whose parents" were omitted.

The regulations are specific to a scheme operated by St Mary's Music School in respect of some of its pupils, and so have a limited audience. The School is aware of the intention behind this new criterion. We consider that the 2015 Regulations can continue to operate effectively and we will assist the School in the interpretation of this new criterion as needed.

In conclusion, we consider that new paragraph 2(1)(ba) of schedule 1 is capable of being read in the way it was intended to ensure that a child is eligible for the scheme where their parent has been in the British Islands since prior to IP completion day and has exercised their freedom of movement. Accordingly, we do not intend to amend the provision at this time. However, we are grateful to the Committee for pointing out this ambiguity and we intend to clarify the drafting of head (ba) at the next available opportunity and, in any event, in time for the following school year.