

## **THE EDUCATION (ACCESS FUNDS) (SCOTLAND) DETERMINATION 2014**

The Scottish Ministers make the following determination in exercise of the powers conferred by regulations 3, 4 and 5(c) and (d) of the Education (Access Funds) (Scotland) Regulations 1990(a) and all other powers enabling them to do so.

### **Citation and Effect**

1. This Determination may be cited as the Education (Access Funds) (Scotland) Determination 2014 and has effect from 1st April 2014.

### **Making of grants**

2. The Scottish Ministers (who may pay grants under regulation 2 of the Education (Access Funds) (Scotland) Regulations 1990 for the purpose of providing financial assistance to young persons undertaking courses of education) make the determinations set out in paragraphs 3 to 5.

### **Persons eligible for education maintenance allowance**

3.—(1) Subject to sub-paragraphs (2), (3) and (4), a college of further education in Scotland (outwith the local authority areas of Orkney and Shetland) may pay an allowance to be known as an “education maintenance allowance” to any person undertaking a course of non-advanced education provided by the college who—

- (a) is deemed to have attained the age of 16 years under section 33 of the Education (Scotland) Act 1980(b) (school leaving dates);
- (b) has not, on the qualifying date (as defined in Part 1 of the Schedule), attained the age of 20 years; and
- (c) is described in one or more paragraphs of Part 2 of the Schedule.

(2) To be eligible for the payment of an education maintenance allowance a person must be undertaking fundable further education (as defined in section 5 of the Further and Higher Education (Scotland) Act 2005(c).

(3) Part 3 of the Schedule informs the meaning of “ordinarily resident” for the purposes of Part 2 of the Schedule.

(4) A college of further education must not pay an education maintenance allowance to any person who attained the age of 16 years prior to 1st March 2011.

(5) In sub-paragraph (1) “course of non-advanced education” means any course which prepares a person to a standard not higher than that required for—

- (a) a qualification awarded by the Scottish Qualifications Authority; or

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(a) S.I. 1990/1534 as amended by S.I. 1993/1892 and S.S.I. 2013/80. The functions of the Secretary of State under regulations 4 and 5(c) and (d) of the 1990 Regulations were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c.46).

(b) c.44.

(c) 2005 asp 6.

- (b) a General Certificate of Education qualification of England and Wales or Northern Ireland.

#### **Amount of education maintenance allowance**

4.—(1) The amount of an education maintenance allowance may include sums in respect of maintenance of the holder of the allowance during periods of full-time study excluding vacations.

(2) The amount of an education maintenance allowance may take account of the sums, if any, which the holder of the allowance, the holder's parents and the holder's spouse or the holder's civil partner can reasonably be expected to contribute towards the holder's expenses.

(3) The amount of an education maintenance allowance may be revised at any time if a college of further education thinks fit having regard to—

- (a) the failure of the holder of the allowance to comply with the conditions of the education maintenance allowance;
- (b) all the circumstances of that holder, their parents and their spouse or civil partner; or
- (c) any error made in the computation of the amount of the allowance.

(4) In sub-paragraphs (2) and (3)—

- (a) 'holder's spouse' includes, where a college of further education considers it appropriate, the other member of a couple who are not married to each other but who are living together as husband and wife; and
- (b) 'holder's civil partner' includes, where a college of further education considers it appropriate, the other member of a couple who are not civil partners of each other but who are living together as civil partners to each other.

#### **Requirements and conditions in relation to education maintenance allowance**

5.—(1) Every education maintenance allowance is held subject to the following conditions—

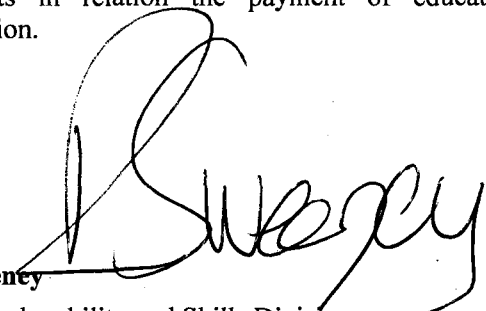
- (a) the holder of the allowance must attend in accordance with any requirements specified by the college of further education for the course of education in respect of which the allowance is awarded;
- (b) the college of further education must be satisfied as to the conduct and progress of that holder; and
- (c) that holder must provide the college of further education with such information and such documents as they may from time to time require to enable them to act in accordance with this Determination.

(2) If the conditions specified in sub-paragraph (1) are not complied with or if the holder of the education maintenance allowance receives from any other source any sum which, in the opinion of the college of further education, makes it unnecessary for the holder to be assisted by means of an education maintenance allowance, the college of further education may suspend payment of the allowance or terminate the allowance.

(3) It is a condition of payment of an education maintenance allowance that the applicant gives a written undertaking to pay to the college of further education any amount of which they may request repayment in the circumstances specified in sub-paragraph (4).

(4) When the college of further education is satisfied that there has been an overpayment of education maintenance allowance for any reason and request repayment of the overpayment or so much thereof as they think fit, the holder of the allowance must pay to the college of further education the amount requested.

(5) The college of further education is to have regard to the EMA (Scotland) Business Model and the EMA (Scotland) Guidance issued by the Scottish Ministers annually which set out further requirements in relation the payment of education maintenance allowances under this Determination.



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2014

## SCHEDULE

Paragraph 3

# EDUCATION MAINTENANCE ALLOWANCES

## Part 1

### Interpretation

In this Schedule –

except otherwise specified or where the context otherwise requires, any reference to a paragraph or sub-paragraph is a reference to a paragraph or sub-paragraph of the Part of this Schedule in which the reference appears;

“Directive 2004/38” means Directive 2004/38/EC of the European Parliament and of the Council<sup>(a)</sup> on the rights of citizens of the Union and their family members to move and reside freely in the territory of the member States;

“education maintenance allowance” means an allowance, being a form of financial assistance, paid or to be paid under the 1990 Regulations in accordance with this Determination;

“EEA frontier self-employed person” means an EEA national who—

- (a) is a self-employed person (within the meaning of article 7 of Directive 2004/38) in the United Kingdom; and
- (b) resides in Switzerland or the territory of an EEA state other than the United Kingdom and returns to their residence in Switzerland or that EEA state, as the case may be, daily or at least once a week;

“EEA frontier worker” means an EEA national who—

- (a) is a worker (within the meaning of article 7 of Directive 2004/38) in the United Kingdom; and
- (b) resides in Switzerland or the territory of an EEA state other than the United Kingdom and returns to their residence in Switzerland or that EEA state, as the case may be, daily or at least once a week;

“EEA migrant worker” means an EEA national in the United Kingdom who is a worker within the meaning of article 7 of Directive 2004/38 but who is not an EEA frontier worker;

“EEA national” means a national of an EEA state other than the United Kingdom;

“EEA self-employed person” means an EEA national in the United Kingdom who is a self-employed person within the meaning of article 7 of Directive 2004/38 but who is not an EEA frontier self-employed person;

“employed” means working in full-time or part-time employment which, in a normal week, involves a significant number of hours of work and references to employed include references to the holding of any office and to any occupation for gain;

“European Economic Area” means the area of the EEA states, and includes those States at any time before they became EEA states;

“family member” means, in relation to any person—

- (a) their spouse or civil partner; or
- (b) their direct descendants or those of their spouse or civil partner who are—
  - (i) under the age of 21; or
  - (ii) their dependants or those of their spouse or civil partner; or

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(a) O.J. No. L 158, 30.04.04, p.77.

(c) their dependant direct relatives in the ascending line or those of their spouse or civil partner;

“Islands” means the Channel Islands and the Isle of Man;

“non UK EU national” means a person who is a national of any member State other than the United Kingdom;

“parent” includes a step-parent, a guardian, any other person having parental responsibilities for a child and any person having care of a child, and “child” is to be construed accordingly;

“qualifying date” means the first day of the term of the course of education for which an education maintenance allowance is sought;

“refugee” means a person who is recognised by Her Majesty’s Government as a refugee within the meaning of the United Nations Convention relating to the Status of Refugees done at Geneva on 28th July 1951(a) as extended by the Protocol thereto which entered into force on 4th October 1967(b);

“Swiss employed person” means a Swiss national in the United Kingdom who is an employed person within the meaning of Annex 1 to the Switzerland Agreement, but who is not a Swiss frontier employed person;

“Swiss frontier employed person” means a Swiss national who—

- (a) is an employed person (within the meaning of Annex 1 to the Switzerland Agreement) in the United Kingdom; and
- (b) resides in Switzerland or in the territory of an EEA state other than the United Kingdom and returns to their residence in Switzerland or that EEA state, as the case may be, daily or at least once a week;

“Swiss frontier self-employed person” means a Swiss national who—

- (a) is a self-employed person (within the meaning of Annex 1 to the Switzerland Agreement) in the United Kingdom; and
- (b) resides in Switzerland or in the territory of an EEA state, other than the United Kingdom, and returns to their residence in Switzerland or that EEA state, as the case may be, daily or at least once a week;

“Swiss self-employed person” means a Swiss national in the United Kingdom who is a self-employed person within the meaning of Annex 1 to the Switzerland Agreement, but who is not a Swiss frontier self-employed person;

“Switzerland Agreement” means the Agreement between the European Community and its member States, of the one part, and the Swiss Confederation, of the other, on the Free Movement of Persons signed at Luxembourg on 21st June 1999(c) and which came into force on 1st June 2002;

“temporary protection” means limited leave to enter or remain granted pursuant to Part 11A of the Immigration Rules(d);

“Turkish worker” means a Turkish national who—

- (a) is ordinarily resident in Scotland; and
- (b) is, or has been, lawfully employed in the United Kingdom.

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(a) Cm. 9171.

(b) Cm. 3906 (Out of print: photocopies are available, free of charge, from the Student Awards Agency for Scotland, Gyleview House, 3 Redheughs Rigg, South Gyle, Edinburgh EH12 9HH).

(c) Cm. 5639.

(d) HC 395; relevant amending instrument is HC 164.

## Part 2

### Eligible Persons

#### 1. A person who—

- (a) is ordinarily resident in Scotland on the qualifying date;
- (b) has been ordinarily resident in the United Kingdom and Islands throughout the period of 3 years immediately preceding the qualifying date; and
- (c) is settled in the United Kingdom within the meaning given by section 33(2A) of the Immigration Act 1971(a) on the qualifying date.

#### 2.—(1) A person who is an EEA migrant worker who—

- (a) is—
  - (i) an EEA migrant worker or an EEA self-employed person;
  - (ii) a Swiss employed person or a Swiss self-employed person;
  - (iii) an EEA frontier worker or an EEA frontier self-employed person; or
  - (iv) a Swiss frontier employed person or a Swiss frontier self-employed person; and
- (b) has been ordinarily resident in the territory comprising the European Economic Area and Switzerland throughout the period of 3 years immediately preceding the qualifying date; and
- (c) subject to sub-paragraph (2), is ordinarily resident in Scotland on the qualifying date.

(2) Sub-paragraph (1)(c) does not apply where the person applying for support falls within paragraph (1)(a)(iii) or (iv).

#### 3.—(1) A person who—

- (a) is—
  - (i) the family member of a person mentioned in paragraph 2(1)(a); or
  - (ii) is entitled to support by virtue of Article 10 of Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union(b), as extended by the EEA agreement;
- (b) has been ordinarily resident in the territory comprising the European Economic Area and Switzerland throughout the period of 3 years immediately preceding the qualifying date; and
- (c) subject to sub-paragraph (2), is ordinarily resident in Scotland on the qualifying date.

(2) Sub-paragraph (1)(c) does not apply where the person applying for support is a family member of a person falling within paragraph 2(1)(a)(iii) or (iv).

#### 4.—(1) A person who—

- (a) is settled in the United Kingdom within the meaning given by section 33(2A) of the Immigration Act 1971 on the qualifying date;
- (b) was ordinarily resident in Scotland (and the Scottish Ministers are satisfied that such residence was not in any sense attributable to, or connected with, any period of residence in Scotland within the 3 years immediately preceding in respect of which any part of its purpose was wholly or mainly that of receiving full time education) and settled in the United Kingdom within the meaning given by section 33(2A) of the Immigration Act 1971 immediately before leaving the United Kingdom and who has utilised a right of residence;

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(a) 1971 (c.77); section 33(2A) was inserted by paragraph 7 of Schedule 4 to the British Nationality Act 1981 (c.61).

(b) OJ L 141, 27.5.2011, p.3.

- (c) has been ordinarily resident in the territory comprising the European Economic Area and Switzerland throughout the period of 3 years immediately preceding the qualifying date; and
  - (d) in the case where their ordinary residence referred to in paragraph (c) was wholly or mainly for the purpose of receiving full-time education, was ordinarily resident in the territory comprising the European Economic Area and Switzerland immediately prior to the period of residence referred to in paragraph (c).
- (2) For the purposes of this paragraph, a person has utilised a right of residence if that person—
- (a) is—
    - (i) a United Kingdom national;
    - (ii) a family member of a United Kingdom national with rights under Article 7 of Directive 2004/38 (or corresponding provisions under the EEA agreement or the Switzerland Agreement); or
    - (iii) a person who has a right of permanent residence arising under Directive 2004/38; and
  - (b) either—
    - (i) has exercised a right under Article 7 of Directive 2004/38 or any equivalent right under the EEA agreement or the Switzerland Agreement in a state other than the United Kingdom; or
    - (ii) in the case of a person who has a right of permanent residence in the United Kingdom arising under Directive 2004/38, has gone to the state within the territory comprising the European Economic Area and Switzerland of which that person is a national or of which the person in relation to whom that person is a family member is a national.

(3) Sub-paragraph (1)(a) and the requirement in sub-paragraph (1)(b) to be settled in the United Kingdom within the meaning given by section 33(2A) of the Immigration Act 1971 immediately before leaving the United Kingdom do not apply where the person applying for support is a person falling within sub-paragraph (2)(a)(ii).

**5. A person who—**

- (a) at the date the college of further education received their application for an education maintenance allowance is—
  - (i) a refugee who has been ordinarily resident in the United Kingdom and Islands at all times since that person was first recognised as a refugee; or
  - (ii) the spouse, civil partner or child of such a refugee; and
- (b) is ordinarily resident in Scotland on the qualifying date.

**6. A person who—**

- (a) (i) has applied for refugee status but has as a result of that application been informed in writing by a person acting under the authority of the Secretary of State for the Home Department that, although that person is considered not to qualify for recognition as a refugee, it is thought right to allow that person to enter or remain in the United Kingdom and that person has been granted leave to enter or remain accordingly;
- (ii) has been ordinarily resident in the United Kingdom and Islands at all times since that person was first granted such leave to enter or remain; and
- (iii) is ordinarily resident in Scotland on the qualifying date; or
- (b) is the spouse, civil partner or child of a person of the kind described in sub-paragraph (a) and who is ordinarily resident in Scotland on the qualifying date.

**7. A person who—**

- (a)
  - (i) is an Iraqi national who has been granted indefinite leave to enter the United Kingdom under the Locally Engaged Staff Assistance Scheme (Direct Entry) operated by the Home Department;
  - (ii) has been ordinarily resident in the United Kingdom and Islands at all times since that person was first granted such indefinite leave to enter the United Kingdom; and
  - (iii) is ordinarily resident in Scotland on the qualifying date; or
- (b) is the spouse, civil partner or child of a person of the kind described in sub-paragraph (a) and who is ordinarily resident in Scotland on the qualifying date.

**8. A person who—**

- (a) at the date the college of further education received that person's application for an education maintenance allowance has been granted temporary protection and has been ordinarily resident in the United Kingdom and Islands at all times since that person was first granted temporary protection;
- (b) has not attained the age of 18 years on the qualifying date; and
- (c) is ordinarily resident in Scotland on the qualifying date, provided that an education maintenance allowance paid to a person only by virtue of that person qualifying under this paragraph is not to continue beyond the end of any academic year in which that person attains the age of 18 years.

**9. —(1) A person who—**

- (a) is, on the qualifying date, a non UK EU national or the family member of such a national;
- (b) is ordinarily resident in Scotland on the qualifying date;
- (c) has been ordinarily resident in the United Kingdom and Islands throughout the period of 3 years immediately preceding the qualifying date; and
- (d) in the case where their ordinary residence referred to in paragraph (c) was wholly or mainly for the purpose of receiving full-time education, was ordinarily resident in the territory comprising the European Economic Area and Switzerland immediately prior to the period of residence referred to in paragraph (c).

(2) Where a state accedes to the EU after the qualifying date and a person is a national of that state, the requirement in sub-paragraph (1)(a) to be a non UK EU national on the qualifying date is to be treated as being satisfied.

**10. A person who—**

- (a) is the child of a Swiss national who is entitled to support in the United Kingdom by virtue of Article 3(6) of Annex 1 to the Switzerland Agreement;
- (b) has been ordinarily resident in the territory comprising the European Economic Area and Switzerland throughout the period of 3 years immediately preceding the qualifying date;
- (c) is ordinarily resident in Scotland on the qualifying date; and
- (d) in the case where their ordinary residence referred to in paragraph (b) was wholly or mainly for the purpose of receiving full-time education, was ordinarily resident in the territory comprising the European Economic Area and Switzerland immediately prior to the period of residence referred to in paragraph (b).

**11.—** (1) Subject to sub-paragraph (2), a person to whom, or in respect of whom, an education maintenance allowance has been paid by a board of management of a college of further education under section 12(2)(c) of the 1992 Act in accordance with this Determination (or the relevant provisions of any instrument which preceded this Determination) within the year immediately preceding the first day of the academic year of the course for which that person is currently seeking an education maintenance allowance, provided that the current application will not result in such a person being awarded an education maintenance allowance for more than 3 years.



(2) Sub-paragraph (1) does not preclude the payment of the monetary value of 3 years education maintenance allowance over a period of 4 years.

(3) Sub-paragraph (1) does not apply where it would result in the payment of an education maintenance allowance to a person after the end of any academic year in which that person attained the age of 18 years where that person qualified only by virtue of paragraph 8.

12. A person who—

- (a) is the child of a Turkish worker;
- (b) is ordinarily resident in Scotland on the qualifying date; and
- (c) has been ordinarily resident in the territory comprising the European Economic Area, Switzerland and Turkey throughout the period of 3 years preceding the qualifying date.

## PART 3

### Ordinary Residence

1.—(1) For the purposes of paragraph 1(a) and paragraph 9(1)(b) of Part 2 of this Schedule, a person is to be treated as being ordinarily resident in Scotland on the qualifying date if the college of further education is satisfied that that person was not so resident only because that person, or their spouse or civil partner, or either of their parents was temporarily—

- (a) employed outside Scotland; or
- (b) attending a course of study or undertaking postgraduate research outside Scotland.

(2) For the purposes of paragraph 1(a) of Part 2 of this Schedule and subject to sub-paragraph (3), a person is not to be treated as being ordinarily resident in Scotland on the qualifying date if the college of further education is satisfied that that person's residence there on that date is in any sense attributable to, or connected with, any period of residence in Scotland within 3 years immediately preceding the qualifying date as respects any part of which its purpose was wholly or mainly that of receiving full-time education.

(3) Sub-paragraph (2) does not apply to a person who has acquired settled status in the United Kingdom under the Immigration Act 1971 as a result of residence for full-time education which has led to a right of permanent residence arising under Directive 2004/38.

(4) For the purposes of paragraphs 1(a), 5(b), 6(a)(iii) and (b), 7(a)(iii) and (b) and 8(c) of Part 2 of this Schedule, a person who is ordinarily resident in Scotland as a result of having moved immediately prior to the qualifying date from a part of the United Kingdom other than Scotland for the purpose of undertaking the course of education for which an education maintenance allowance is sought is to be considered to be ordinarily resident in the part of the United Kingdom from where they moved.

2.—(1) Sub-paragraphs (2) to (5) apply in determining, for the purposes of paragraphs 1(b), 2(1)(b), 3(1)(b), 4(1)(c), 9(1)(c), 10(b) and 12(c) of Part 2 of this Schedule whether a person is to be treated as having been or not having been ordinarily resident for the period specified in those paragraphs (in this paragraph, "the specified period") in the United Kingdom and Islands, the European Economic Area or Switzerland or Turkey (in this paragraph, "the relevant area").

(2) A person is not to be treated as having been ordinarily resident in the relevant area for the specified period in paragraph 1(b) of Part 2 of this Schedule, if the college of further education is satisfied that that person was resident therein for any part of that period wholly or mainly for the purpose of receiving full-time education, unless the person has acquired settled status in the United Kingdom under the Immigration Act 1971 as a result of residence for full-time education which has led to a right of permanent residence arising under Directive 2004/38, in which case the person must have been ordinarily resident in the territory comprising the European Economic Area and Switzerland immediately prior to the start of that period of residence.

(3) A person is to be treated as having been ordinarily resident in the relevant area for the specified period if the college of further education is satisfied that the person was born and has spent the greater part of their life in the relevant area and that—

(a) their parents or either of them have been ordinarily resident in the relevant area throughout the specified period and he or she is not an independent student; or

(b) that person has been ordinarily resident in the relevant area for at least one year of the specified period and, in the case of those qualifying by virtue of paragraph 1 or 9 of Part 2 of this Schedule, no part of that period of residence was wholly or mainly for the purpose of receiving full time education.

(4) A person is to be treated as having been ordinarily resident in the relevant area for the specified period if the college of further education is satisfied that the person was not actually ordinarily resident in the relevant area for the specified period only because that person, their spouse or civil partner or either of their parents was temporarily—

(a) employed outside the relevant area; or

(b) attending a course of study or undertaking postgraduate research outside the relevant area.

3.—(1) In paragraph 2(3)(a), “an independent student” means a person who on the qualifying date—

(a) is married or in a civil partnership;

(b) has no parent or guardian living;

(c) does not reside with, has no regular contact with and receives no financial support from a parent or guardian;

(d) is a parent to whom child benefit is being paid;

(e) is in receipt of income support, universal credit or income-related employment and support allowance payable under Part 1 of the Welfare Reform Act 2007;

(f) is a person being looked after and provided with accommodation by a local authority or equivalent organisation; or

(g) is a person, formerly looked after by a local authority or equivalent organisation, who does not reside with, has no regular contact with and receives no financial support from a parent or guardian.

## EXPLANATORY NOTE

*(This note is not part of the Determination)*

This Determination is made under the Education (Access Funds) (Scotland) Regulations 1990 (S.S.I. 1990/1534, as amended by S.I. 1993/1892 and S.S.I. 2013/80) (“the 1990 Regulations”). Under the 1990 Regulations, the Scottish Ministers are empowered to pay grants for purpose of providing financial assistance for students receiving education provided by colleges of further education on such terms and conditions as the Scottish Ministers determine.

Under the Education (Access Funds) (Scottish Further and Higher Education Council) (Scotland) Direction 2014, the Scottish Ministers have directed the Scottish Further and Higher Education Council to administer sums on their behalf for the financial assistance for students receiving education provided by colleges of further education.

In paragraphs 3 to 5 and the Schedule to the Determination, the Scottish Ministers set out the eligibility criteria and the requirements for payment of education maintenance allowances to students in who are receiving non-advanced education at a college of further education.

This Determination is supplemented by the EMA (Scotland) Business Model and the EMA (Scotland) Guidance issued by Scottish Ministers annually (available at [www.emascotland.com](http://www.emascotland.com)).

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