

Explanatory Memorandum to the Education (Student Fees, Awards and Support) (Wales) Regulations 2011

This Explanatory Memorandum has been prepared by the Higher Education Division of the Department for Education and Skills and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Education (Student Fees, Awards and Support) (Wales) Regulations 2011. I am satisfied that the benefits outweigh the costs.

Jane Hutt
Minister for Finance and Leader of the House

Date:9 August 2011

Explanatory Memorandum to the Education (Student Fees, Awards and Support) (Wales) Regulations 2011

Description

1. The Education (Student Fees, Awards and Support) (Wales) Regulations 2011 will extend the definition of “person with leave or enter to remain” to include those persons who have been granted discretionary leave other than as a result of a failed asylum application in the following Regulations:
 - Education (Fees and Awards) (Wales) Regulations 2007;
 - Assembly Learning Grants (European University Institute) Regulations 2009;
 - Student Fees (Qualifying Courses and Persons) (Wales) Regulations 2011;
 - Assembly Learning Grants and Loans (Higher Education) (Wales) Regulations 2011;
 - Assembly Learning Grants and Loans (Higher Education) (Wales) (No.2) Regulations 2011;
 - Assembly Learning Grants (European Institutions) (Wales) Regulations 2011;
 - The Education (Student Loans) (Repayment) Regulations 2009; and
 - The Cancellation of Student Loans for Living Costs Liability (Wales) Regulations 2011.

2. The Regulations also amend the definition of “family member” in the Education (Fees and Awards) and the Assembly Learning Grants (European University Institute) Regulations 2009.

Matters of special interest to the Constitutional and Legislative Affairs Committee

3. No matters of special interest to the Constitutional and Legislative Affairs Committee.

Legislative Background

4. The relevant enabling powers for this instrument are as follows:

(1) Section 22 of the Teaching and Higher Education Act 1998: This is the statutory basis for the Assembly Learning Grants (European University Institute) (Wales) Regulations 2009; the Assembly Learning Grants (European Institutions) (Wales) Regulations 2011 and the main HE student support regulations for academic years 2011/12 and 2012/13. The student support regulations make provision for the payment of grants and loans to eligible students in connection with their undertaking designated higher education courses. The Welsh Ministers have a concurrent power with the Secretary of State under section 22(2)(a) of the 1998 Act to make regulations which determine whether a person is an eligible student in relation to any grant or loan available under section 22 (section 44 of the

Higher Education Act 2004 and Schedule 11 to the Government of Wales Act 2006 provide the basis for the devolution of functions under the 1998 Act from the Secretary of State to the Welsh Ministers).

(2) Sections 1 and 2 of the Education (Fees and Awards) Act 1983: The Welsh Ministers may rely upon functions in those sections to amend the Education (Fees and Awards) (Wales) Regulations 2007. Those regulations provide for lawful discrimination in relation to fees charged for higher education courses. The Secretary of State's functions under that 1983 Act transferred to the Welsh Ministers under transfer of functions orders made in 1999 (SI 1999/672); and 2006 (SI 2006/1458) and Schedule 11 to the Government of Wales Act 2006; and

(3) Section 28(6) of the Higher Education Act 2004: Functions of the National Assembly for Wales transferred to Welsh Ministers under Schedule 11 to the Government of Wales Act 2006.

5. These Regulations follow the negative resolution procedure.

Purpose and intended effect of the legislation

6. The purpose of these Regulations is to extend the definition of "person with leave or enter to remain" to include those persons who have been granted discretionary leave other than as a result of a failed asylum application in the suite of regulations that relate to student support and higher education tuition fees as listed above.
7. The current definition is considered to disadvantage a small group of students, as in addition to persons with humanitarian protection, it covers only persons granted discretionary leave following a failed asylum application (or their family members). As such, only this limited class of person with discretionary leave can be classed as 'qualifying persons' for the purposes of the new tuition fee regime, or classed as eligible students for the purposes of student support or 'home' fees status. Other persons who may have been granted exactly the same immigration status by the Home Office but who did not complete an asylum application are excluded, as are their family members. The current definition is perceived to disadvantage those persons granted discretionary leave other than following a failed asylum application.
8. The European Convention on Human Rights prevents the UK from sending a failed asylum seeker back to a country where there is a real risk that the person will be exposed to torture, or inhuman or degrading treatment / punishment. If a person does not qualify for recognition as a refugee but there are humanitarian reasons why the UK Government should let the person stay in the UK, temporary permission to stay may be granted by the UK Government, namely humanitarian protection. Humanitarian protection permits a person to stay in the UK for an initial period of 5 years. Separately, if a person does not satisfy the criteria for refugee status or for humanitarian protection, the UK Government may

provide another type of temporary permission to stay in the UK, namely discretionary leave. With discretionary leave the length of time that a person is allowed to stay in the UK will depend on the person's circumstances. A failed asylum application is not a prerequisite to a grant of discretionary leave: in certain circumstances the UK Government may grant discretionary leave to a person who has not applied for asylum.

9. The extended definition will cover those persons granted humanitarian protection, as is the case at present, and all persons granted discretionary leave (whether or not those persons have been the subject of a failed asylum application).
10. The Department for Businesses and Skills (DBIS) took the decision in January 2011 to remove eligibility for home fee status and student support and to remove qualifying student status (for the purposes of the new tuition fee regime) within higher education for all holders of discretionary leave, whether or not the discretionary leave was awarded following a failed asylum application. These changes were implemented by the Secretary of State via the Education (Student Fees, Awards and Support) (Amendment) Regulations 2011. These Regulations amended England's student support and fees regulations by replacing the definition of "person with leave to enter or remain" with a new definition of "person granted humanitarian protection". By omitting all persons with discretionary leave, the new definition created a narrower class of eligible person, covering only those people who have been granted humanitarian protection, their spouses and children.
11. The Regulations also amend the definition of "family member" in the Education (Fees and Awards) and the Assembly Learning Grants (European University Institute) Regulations 2009. Making these changes aligns the text of those regulations with the current higher education student support regulations in force in Wales. The change also aligns the definition of a family member for EEA workers / self-employed persons with the definition of a family member in Article 2 of EU Directive 2004/38.
12. The rationale for this amendment is set out more fully in the Regulatory Impact Assessment (RIA).

Implementation

13. The Regulations need to be in force for the start of the 2011/12 academic year to enable support to be available to eligible students ordinarily resident in Wales studying at institutions anywhere in the UK and for students to be classed as 'home students' from the start of the academic year. The changes will apply to new and continuing students.
14. This legislation updates the current student support system for new and continuing students in the 2011/12 and 2012/13 academic years. Bringing these regulations into force by 31 August 2011 will enable the Welsh Government's delivery partners (the Student Loans Company and the

Local Authorities in Wales) to implement changes to their delivery systems in time for the application cycles for both academic years.

Consultation

15. There is no statutory requirement to consult on the Regulations. No individual student will be disadvantaged by these amendments.

Regulatory Impact Assessment

Option Appraisal

16. An assessment of the impact of the options below on students and the higher education sector in Wales is included in the option appraisal.

Option 1 - Do nothing

17. Persons with certain temporary awards of leave to enter or remain in the UK, as a result of a claim for asylum, have historically been eligible to receive tuition fee support and maintenance support and home fee status. It is considered that the current definition of “person with leave or enter to remain” disadvantages those persons granted discretionary otherwise than as result of a failed asylum application.
18. Doing nothing will prolong the disadvantage between those persons granted discretionary leave following an asylum application and those persons granted discretionary through some other route. The latter category of persons granted discretionary leave are disadvantaged as they currently do not qualify for student support or home fee status.

Option 2 – Mirror the changes introduced in England

19. The Welsh Government could follow the approach adopted by DBIS and narrow the definition of a “person with leave to enter or remain” to cover only those people who have been granted humanitarian protection, thereby restricting eligibility for student support, regulated tuition fees and home fee status.
20. This approach would potentially reduce the number of students who are eligible for student support, resulting in a small saving in the student support budget. Higher education institutions in Wales would be permitted to charge fees at the ‘overseas’ fee rate to students who have been granted discretionary leave to remain but not humanitarian protection.
21. A small group of prospective students who would otherwise be eligible for student support, home fee status and regulated fees would be excluded in the future. This step would not be in line with the Welsh Government’s policy for further education where eligibility for student support has recently been extended. For the 2011/12 academic year, persons with humanitarian protection or discretionary leave (howsoever obtained) and their family members are eligible for further education support (the Education

Maintenance Allowance and the Assembly Learning Grant (FE) schemes refer). This option would be likely to attract criticism from prospective students who would be negatively impacted by this change and the groups supporting their interests.

Option 3- Extend the definition of “person with leave to enter or to remain”

22. Extend the definition of “person with leave or enter to remain” to include those persons who have been granted discretionary leave other than as a result of a failed asylum application. As such, the definition would cover those persons granted humanitarian protection, as is the case at present, and all persons granted discretionary leave (whether or not those persons have been the subject of a failed asylum application).
23. This approach would be in line with Welsh Government’s policy for further education support. No individual will be impacted negatively by this amendment and a small group of students may benefit by this change.
24. This approach would increase eligibility for student support and would potentially have implications for the student support budget. Data is not available on the number of students who have been refused student support because they have been granted discretionary leave other than as a result of a failed asylum application. However, this number is likely to be very small.
25. The added costs in making these changes are minimal and would have little impact on the finances provided to the student support system.

Competition Assessment

28. The making of the Regulations has no impact on business, charities or the voluntary sector.

Post implementation review

29. These Regulations and those mentioned at paragraph 2 will undergo an annual review to ensure that the original intent and policy requirements remain, that the funding provided represents value for money and that they continue to observe EU/Welsh Government legislative requirements. The main higher education and fee setting Regulations governing the student support system / fee regime are made annually and are continually subject to detailed review, both by policy officials and by the delivery partners in their practical implementation of the Regulations.

Summary

30. Making the Regulations will extend the definition of “person with leave or enter to remain” to include those persons who have been granted discretionary leave other than as a result of a failed asylum application.

This change will have a positive impact on a small number of students who were previously not eligible for student support, home fee status or regulated fees. They also amend the definition of “family member” in the Education (Fees and Awards) (Wales) 2007 and the Assembly Learning Grants (European University Institute) Regulations 2009.