

**NHS Charging and Eligibility: The Position of Overseas Visitors**

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**Introduction**

1. The NHS charging regime, as it applies to overseas visitors, is complex. It requires relevant NHS bodies to evaluate the residency status of individuals in their care. This in turn frequently raises issues of immigration status which those bodies may not be well placed to evaluate. This paper examines the legal framework for charging overseas visitors, the categories of treatment and individual which are exempt and, finally, some particular issues and difficulties in this field.

**Statutory Framework**

**(1) General**

2. Legislation permitting persons who are not ordinarily resident in the UK to be charged for NHS services dates back to 1977: see section 121 of the National Health Service Act 1977, which was in force until 1 March 2007. Subsequent regulations, first introduced in 1982, imposed a charging regime in respect of hospital treatment for overseas visitors.
3. The current statutory framework is set by the provisions of the National Health Service Act 2006 (the “2006 Act”). Section 1 of the 2006 Act provides, so far as relevant, that:
  - “(1) The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement –
    - (a) in the physical and mental health of the people of England, and
    - (b) in the prevention, diagnosis and treatment of physical and mental illness.
  - (2) ...
  - (3) ...
  - (4) The services provided as part of the health service in England must be free of charge except in so far as the making and recovering of charges is expressly provided for by or under any enactment, whenever passed.”
4. Part 9 of the 2006 Act deals with charging. Section 175 in Part 9 is entitled “Charges in respect of non-residents” and provides that:
  - “(1) Regulations may provide for the making and recovery, in such manner as may be prescribed, of such charges as the Secretary of State may determine in respect of the services mentioned in subsection (2).
  - (2) The services are such services as may be prescribed which are –

- (a) provided under this Act, and  
(b) provided in respect of such persons not ordinarily resident in Great Britain as may be prescribed.
- (3) Regulations under this section may provide that the charges may be made only in such cases as may be determined in accordance with the regulations.
- (4) The Secretary of State may calculate charges under this section on any basis that he considers to be the appropriate commercial basis.”
5. Provision for the recovery of charges is made in sections 191-193, including the issuing of penalty notices for unpaid charges. Section 194 creates criminal offences relating to the use and making of false statements and documents in attempting to evade the payment of charges.
6. The current regulations made under section 175 and providing for the charging of overseas visitors are the National Health Service (Charges to Overseas Visitors) Regulations 2011 (the “2011 Regulations”). The 2011 Regulations amend and consolidate earlier regulations dating from 1989 (the National Health Service (Charges to Overseas Visitors) Regulations 1989). The 2011 Regulations introduced some of the changes proposed by a review of access to the NHS by foreign nationals undertaken jointly by the Department of Health and the Home Office, which concluded in July 2009.
7. The primary duty to make and recover charges for the provision of relevant services to overseas visitors is set out in regulation 3, which provides, so far as is relevant, that:
- “(1) A relevant NHS body must make and recover charges from the person liable under regulation 4 where it provides an overseas visitor with relevant services and the condition specified in paragraph (2) applies.  
(2) The condition specified in this paragraph is that the relevant NHS body having made such enquiries as it is satisfied are reasonable in all the circumstances, including in relation to the state of health of that overseas visitor, determines that the case is not one in which these Regulations provide for no charge to be made.  
...”
8. By regulation 4(1), unless subparagraphs (2), (3) or (4) applies, the person liable to pay charges under the 2011 Regulations is the overseas visitor in respect of whom the relevant services are provided. Subparagraphs (2) and (3) provide exceptions for overseas visitors working on and for the purposes of a ship or vessel or aircraft, respectively, in which case the person liable is the owner of the ship or vessel or the employer of the person working on the aircraft. Subparagraph (4) provides that the parent or legal guardian is liable in the case of a non-exempt child.

9. Regulation 2 contains the two following, important definitions relating to the general duty in regulation 3:

““overseas visitor” means a person not ordinarily resident in the United Kingdom;

...

“relevant services” means (except in regulation 8(2)(c)) accommodation, services or facilities which are provided, or whose provision is arranged, under section 2A, 2B, 3, 3A or 3B of the Act, other than primary dental services, primary medical services or primary ophthalmic services”

10. In this way, the 2011 Regulations operate so as to impose a primary obligation upon a relevant NHS body to “make and recover charges” on a liable person for the provision of relevant services to an overseas visitor. This is subject to an important qualification in regulation 4(2), namely that the NHS body concerned is required to make “such enquiries as it is satisfied are reasonable in all the circumstances” to determine that the case is not one in which the overseas visitor is not liable to be charged. That places an important investigative duty on a charging NHS body to inquire into the particular circumstances of an individual case.
11. The 2011 Regulations thus involve a two-stage analysis. The first stage is to determine whether a recipient of relevant services is an overseas visitor. That involves determining whether the person is “ordinarily resident” in the UK. As the cases discussed below demonstrate, that is a heavily fact-sensitive question. If he or she is an overseas visitor, then the second stage, applying the regulation 4(2) investigative obligation, is to determine whether an exemption applies.
12. “Ordinary residence” is thus the core concept in the charging scheme under Part 9 of the 2006 Act and the 2011 Regulations. Helpful guidance on the operation and application of the 2011 Regulations generally is provided in the Department of Health’s *Guidance on Implementing the Overseas Visitors Hospital Charging Regulations* (the “Guidance”). As regards ordinary residence, the Guidance provides as follows:
- “1.2 **‘Ordinary residence’** means, broadly, living in the UK on a lawful, voluntary and properly settled basis for the time being. It is defined in detail at paragraphs 3.4 to 3.16. A person who is not ordinarily resident in this country at the time of treatment is not automatically entitled to NHS hospital treatment free of charge. A person who is ordinarily resident is not subjected to this charging regime.
- 1.3 A person does not become ordinarily resident in the UK simply by: having British nationality; holding a British passport; being registered with a GP; having an NHS number; owning property in the UK, or having paid (or currently paying) National Insurance

contributions and taxes in this country. Whether a person is ordinarily resident is a question of fact, for which a number of factors are taken into account.”

13. Although dealing with education legislation, rather than NHS charging, the decision of the House of Lords in *R v. Barnet LBC, ex parte Shah* [1983] 2 AC 309 is generally accepted as providing important guidance on the meaning of “ordinarily resident”.

Paragraph 3.4 of the Guidance provides that:

“... although the case being considered was concerned with the meaning of ordinary residence in the context of the Education Acts, the decision is generally recognised as having a wider application. Therefore, the House of Lords interpretation should be used to help decide if a person can be considered ordinarily resident for the purposes of the NHS Act 2006 and the Charging Regulations.”

14. *Per* Lord Scarman in *Shah*, at 343G-344D:

“Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that “ordinarily resident” refers to a man’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.

There is, of course, one important exception. If a man’s presence in a particular place or country is unlawful, e.g. in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence ... There is, indeed, express provision to this effect in the Act of 1971, section 33(2). But even without this guidance I would conclude that it was wrong in principle that a man could rely on his own unlawful act to secure an advantage which could have been obtained if he had acted lawfully.

There are two, and no more than two, respects in which the mind of the “propositus” is important in determining ordinary residence. The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity for escape, may be so overwhelming a factor as to negative the will to be where one is.

And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the “propositus” intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.”

15. Lord Scarman continued, at 346C:

“It is recognised that the only relevance of the [Immigration Act 1971] is that it established immigration control, which may give rise to relevant facts, but no more, in determining whether in truth a man is ordinarily resident in the United Kingdom.”

16. Thus, there are three aspects to the test of ordinary residence, namely that the applicant must have adopted his place of residence:

- (1) Voluntarily;
- (2) For settled purposes; and
- (3) Lawfully.

17. *Ex parte Shah* was considered by the House of Lords in the later case of *Mark v. Mark* [2005] UKHL 42, [2006] 1 AC 98. In that case, Baroness Hale held that, for the purposes of the particular statutory provision under examination (section 5(2) of the Domicile and Matrimonial Proceedings Act 1973), it was not essential that residence was lawful: at [33]. However, at [36], she recognised that other statutory contexts could be different:

“It is possible that the legality of a person’s residence here might be relevant to the factual question of whether the residence is ‘habitual’. A person who was on the run after a deportation order or removal directions might find it hard to establish a habitual residence here. But such cases will be rare, compared with the large numbers of people who have remained here leading perfectly ordinary lives here for long periods, despite having no permission to do so. ... There will, however, be other statutory provisions, in particular those conferring entitlement to some benefit from the state, where it would be proper to imply a requirement that the residence be lawful.”

18. Any tension between *Shah* and *Mark v. Mark* was resolved in the important case (for NHS charging purposes) of *R (A) v. Secretary of State for Health* [2009] EWCA Civ 225, [2010] 1 WLR 279. The case is significant because it examined the question whether failed asylum-seekers were ordinarily resident and whether they became so if they resided in the UK for more than 12 months with temporary admission. Schedule 2 to the Immigration Act 1971 empowers the Secretary of State to grant temporary admission to an immigrant who was otherwise liable to be detained. *Per* Ward LJ, with whom Lloyd and Rimer LJ agreed:

“55. Here the statute in need of construction is the 2006 NHS Act. As set out at [8] above, the Secretary of State’s duty prescribed by section 1 is to continue the promotion in England of a comprehensive health service designed to secure improvement in the health “of the people of England”. Note that it is the people *of* England, not the people *in* England, which suggests that the beneficiaries of this free health service are to be those with some link to England so as to be part and parcel of the fabric of the place. It connotes a legitimate connection with the country. The exclusion from this free service of non-residents and the right conferred by section 175 to charge such persons as are not ordinarily resident reinforces this notion of segregation between them and us. This strongly suggests that, as a rule, the benefits were not intended by Parliament to be bestowed on those who ought not to be here.

56. It is, therefore, to the system for immigration control that one turns to see who should and who should not be here. ... One simply cannot pretend that the failed asylum seekers have not been living here: where else have they been residing?

...

60. That being his position, can [a person liable to detention under Schedule 2] be said to establish his ordinary residence whilst in that state of limbo? In my judgment, whether he is an at-port applicant or an in-country applicant, he cannot. In *Inland Revenue v. Lysaght* [1928] AC 234, 243, Viscount Sumner said:

“I think the converse to ‘ordinarily’ is ‘extraordinarily’ and that part of the regular order of a man’s life, adopted voluntarily and for settled purposes, is not ‘extraordinary’.”

In an observation in *Shah* endorsed by Lord Scarman, Lord Denning MR said in the Court of Appeal that:

“The words ‘ordinarily resident’ mean that the person must be habitually and normally resident here ...”

61. The words are to be given their ordinary meaning. Asylum seekers are clearly resident here but is the manner in which they have acquired and enjoy that residence ordinary or extraordinary? Normal or abnormal? Were they detained, then no-one would suggest they were ordinarily resident in the place of their detention. While they are here under sufferance pending investigation of their claim they are not, in my judgment, ordinarily resident here. Residence by grace and favour is not ordinary. The words must take some flavour from the purpose of the statute under consideration and, as I have set out above, the purpose of the National Health Act is to provide a service for the people of England and that does not include those who ought not to be here. Failed asylum seekers ought not to be here. They should never have come here in the first place and after their claims have finally been dismissed they are only here until arrangements can be made to secure their return, even if, in some cases, like the unfortunate YA, that return may be a long way off.

62. Whereas exceptions affording free medical treatment are made under regulation 4(1)(c) of the Charges to Overseas Visitors Regulations for those accepted as refugees and those whose claims for asylum have not yet been finally determined, no exception is made for failed asylum seekers. The public policy considerations which inform Lord Scarman’s exception militate against their being allowed to claim the benefits of a free national health service. The result may be most unfortunate for those in ill-health like YA for they may now be at the mercy of the hospitals’ discretion whether to treat them or not.”

19. The Court of Appeal also considered the impact of 12 months’ residence with the benefit of temporary admission: was this sufficient to bring the failed asylum-seeker within the scope of the exemption in regulation 4(1)(b) of the 1989 Regulations? A related issue arose in *Szoma v. Secretary of State for Work and Pensions* [2005] UKHL 64, [2006] 1 AC 564. *Per* Ward LJ:

“65. Miss Laing is correct to submit that the concepts of lawful presence and lawful residence should not be elided and that is the error made by Mr Griffin. One resides here lawfully when one has the right to do so. An indulgence is granted to a claimant for asylum, not a right, and in this context the words “lawful” means more than merely not unlawful but should be understood to not create that necessary foundation. The underlying purpose of the Act as I have already analysed it reinforces that conclusion. “Lawful” in this context means having leave to enter. It follows that I do not regard *Szoma* and *Shah* to be in conflict: they deal with quite different concepts.

66. I fully appreciate that these conclusions preclude failed asylum seekers from seeking free medical help when many will need it. ...”

20. Thus, the *Shah* approach to lawfulness applies in the context of NHS charging. The provisions of the 2006 Act mean that residence must be lawful in order to amount to ordinary residence. The Guidance distils from the *Shah* case the following test, at paragraph 3.5:

“In order to take the House of Lords judgment into account, when assessing the residence status of a person seeking free NHS services, a relevant NHS body will need to consider whether they are:

living lawfully in the United Kingdom voluntarily and for settled purposes as part of the regular order of their life for the time being, whether they have an identifiable purpose for their residence here and whether that purpose has a sufficient degree of continuity to be properly described as “settled”.”

21. The Guidance goes on to stress that ordinary residence is a question of fact in all the circumstances: paragraph 3.9. It can be of long or short duration: paragraph 3.6. At 3.13:

“A person here lawfully, but with no particularly identifiable purpose for their residence here, will not pass the ordinary residence test. If they remain here a year they will become exempt from charge under Regulation 7. A person here unlawfully will never be able to acquire ordinary residence.”

## **(2) Exemptions**

22. If a person is not ordinarily resident, the 2011 Regulations and their charging scheme will, in principle, apply to them. However, that is not the end of the story. They may still be able to rely on an exemption and thus avoid being charged for relevant services. Exemptions are dealt with in Part 3 of the 2011 Regulations<sup>1</sup>.

23. Part 3 takes up the bulk of the 2011 Regulations and sets out a series of exemptions from the charging obligation in regulation 3. The exemptions can be split into two sorts. First, an exemption for certain services; secondly, a set of exemptions for particular classes of overseas visitors.

24. The services exemption is set out in regulation 6, which provides, so far as is relevant, that:

“No charge may be made or recovered in respect of any relevant services provided to an overseas visitor which fall within the following paragraphs –

(a) accident and emergency services, whether provided at a hospital accident and emergency department, a minor injuries unit, a walk-in centre or elsewhere, but not including any services provided-

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<sup>1</sup> An important provision in Part 2 is regulation 3(4), the “easement clause”, which provides that an overseas visitor who was initially assessed as being exempt but who is later, during a course of treatment, found to be no longer exempt, may not be charged if present in the UK without absence in that time. There is an exemption where misleading or fraudulent information has been provided: regulation 3(5).

- (i) after the overseas visitor has been accepted as an in-patient; or
- (ii) at an outpatient appointment;
- (b) services otherwise than at, or by staff employed to work at, or under the direction of, a hospital;
- (c) family planning services;
- (d) treatment in respect of a disease listed in Schedule 1;
- (e) treatment for sexually transmitted infections;
- (f) services provided to an overseas visitor who is liable to be detained in a hospital or, received into guardianship under the Mental Health Act 1983 (“the 1983 Act”) or any other enactment authorising detention in a hospital by reason of mental disorder, or subject to a community treatment order under the 1983 Act;
- (g) treatment which is provided in circumstances where –
  - (i) a requirement to submit to the form of treatment concerned is imposed by, or included in, an order of a court; and
  - (ii) paragraph (f) does not apply.”

25. Perhaps the most important exemptions are in subparagraphs (a) and (b). Subparagraph (b) exempts non-hospital related services. Thus community services are chargeable only if provided by staff employed by or on behalf of an NHS hospital: see further the Guidance, paragraph 3.26g. Sub-paragraph (a) exempts further from the scope of ordinarily chargeable hospital-related services, accident and emergency services, save for those received as an in-patient or at an out-patient appointment. “Hospital” for these purposes is defined in section 275(1) of the 2006 Act as follows:

““hospital” means –

- (a) any institution for the reception and treatment of persons suffering from illness,
  - (b) any maternity home, and
  - (c) any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation,
- and includes clinics, dispensaries and out-patient departments maintained in connection with any such home or institution, and “hospital accommodation” must be construed accordingly”

26. The exception to the exemption for services provided after acceptance as an in-patient is explained in the Guidance. At para 3.26a it is stated that:

“So, where emergency treatment is given after admission to the hospital e.g. intensive care or coronary care, it is chargeable to a non-exempt overseas visitor.”

[Underlining in original]

27. The exemption for the diseases listed in Schedule 1 is described in the Guidance as “necessary to protect the wider public health”: paragraph 3.26c. The Guidance continues:

“This exemption from charge will apply to the diagnosis even if the outcome is a negative result. It will also apply to the treatment necessary for the suspected disease up to the point that it is negatively diagnosed. It does not apply to any secondary illness that may be present even if treatment is necessary in order to successfully treat the exempted disease.”

28. The exempt categories of overseas visitors are set out in regulations 7-23. These regulations cover a wide-range of exempt categories of person. They are:
- (1) 12 months' prior lawful residence (regulation 7);
  - (2) Presence for work, self-employment, volunteering, full-time study or settlement (regulation 8);
  - (3) Persons entitled to services pursuant to certain EU rights (regulation 9);
  - (4) Reciprocal arrangements with other countries (regulation 10);
  - (5) Refugees, asylum-seekers and children in care (regulation 11);
  - (6) Victims or suspected victims of human trafficking (regulation 12);
  - (7) Exceptional humanitarian reasons (regulation 13);
  - (8) Diplomats (regulation 14);
  - (9) NATO forces (regulation 15);
  - (10) Long-term visits by UK pensioners (regulation 16);
  - (11) War pensioners and armed forces compensation scheme payment recipients (regulation 17);
  - (12) HM UK forces, Crown servants and other related categories (regulation 18);
  - (13) Former residents working overseas (regulation 19);
  - (14) Missionaries (regulation 20);
  - (15) Prisoners and detainees (regulation 21);
  - (16) Employees on ships (regulation 22); and
  - (17) Persons with a need for treatment which arose during the course of the visit (regulation 23).
29. Three categories of particular interest are the exemptions for those with 12 months' prior lawful residence, refugees and asylum-seekers and persons with a need for treatment which arose during the course of a visit.
30. The 12 months' lawful residence category is covered in regulation 7. It provides, so far as is relevant, that:
- “(1) No charge may be made or recovered in respect of any relevant services provided to an overseas visitor who has resided lawfully in the United Kingdom for a period of not less than 12 months immediately preceding the time when such services are provided.
  - (2) Paragraph (1) does not apply to a person who has leave to enter the United Kingdom for the purpose of undergoing private medical treatment, or a person in relation to whom a determination under regulation 13 has been made.

(3) Where a person meets the residence qualification in paragraph (1) on a date during a course of treatment for which charges could have been made prior to that date, no charge may be made in respect of services subsequently received.”

31. The Guidance further explains that:

“3.29 A person who has spent up to 182 days of the previous twelve months outside the UK can still benefit from this exemption, but only if they were lawfully entitled to be in the UK during the whole of the 12 months. See “Calculating the period of residence” in regulation 2(2). A person who has spent 182 days or more outside the UK in the last twelve months cannot benefit from this exemption. They may benefit from others or, depending on their circumstances, still be considered ordinarily living in the UK.

3.30 Where an overseas visitor living lawfully in the UK has been paying for treatment being received, those charges should cease once they have completed 12 months of lawful residence.”

32. Refugees, asylum-seekers and failed asylum-seekers are covered by regulation 11(a)-(c).

The precise wording of the regulation is as follows:

“No charge may be made or recovered in respect of any relevant services provided to an overseas visitor who –

- (a) has been granted temporary protection, asylum or humanitarian protection under the immigration rules made under section 3(2) (general provisions for regulation and control) of the Immigration Act 1971;
- (b) has made an application, which has not yet been determined, to be granted temporary protection, asylum or humanitarian protection under those rules;
- (c) is currently supported under section 4 or 95 of the Immigration and Asylum Act 1999;
- (d) ...”

33. A refugee is a person who is recognised as being outside their country of origin and unable or unwilling to avail themselves of its protection, because of a well-founded fear of persecution based on reasons of race, religion, nationality, political opinion or membership of a particular social group: see Article 1A of the United Nations Convention on the Status of Refugees and its New York Protocol. This is often a very difficult determination to make but NHS bodies are spared this task by two aspects of the 2011 Regulations. First, the fact that both asylum-seekers (i.e. those seeking to be recognised as refugees) and recognised refugees are covered by the exemption; secondly, the reference to the granting of status to a refugee, which is the task of the Home Office. Therefore, NHS bodies only need to be satisfied that a person has been recognised as a refugee or has made an application for asylum.

34. Temporary protection status is a mechanism for granting protection to mass influxes of displaced persons from third countries, which they have had to leave or from which they

have been evacuated, and to which they cannot return in a safe and durable manner. It was introduced by Directive 2001/55/EC (the “TP Directive”). It is regulated by Part 11A of the Immigration Rules, which require it to be granted in accordance with the TP Directive. The aim of granting such status is to avoid the asylum systems of EU Member States from being overwhelmed in situations of mass migration in crisis situations. Protection is granted for one year and may be extended in six monthly periods up to a further one year.

35. Humanitarian protection and discretionary leave were introduced with effect from 1 April 2003 to replace former grants of exceptional leave to remain (“ELR”). Humanitarian protection reflects the subsidiary protection provisions of Directive 2004/83/EC (the “Qualification Directive”), Articles 15-19. Humanitarian protection is granted in circumstances where a person can show that they would face a real risk of “serious harm” as defined in Article 15 of the Qualification Directive. Broadly, this equates to treatment contrary to Articles 2 and 3 of the European Convention on Human Rights (the “ECHR”) and Article 15(c) of the Qualification Directive.
36. Many applications are on the basis of, or are accompanied by, claims relating to Article 8 ECHR, relating to private and family life. Such claims do not fall within the scope of either the Refugee Convention or humanitarian protection. They have, since 9 July 2013, be dealt with under the Immigration Rules. They would thus not fall within the scope of the any of the exemptions in the 2011 Regulations. Someone with Article 8 leave would, however, be ordinarily resident and thus not an overseas visitor within the scope of the charging provisions.
37. Once a person has been recognised as a refugee or qualifying for humanitarian protection, their position, in terms of charging under the 2011 Regulations, is relatively straightforward. The more difficult question relates to the position of asylum-seekers. There are three main issues:
  - (1) When is a person to be classed as an asylum-seeker?
  - (2) What is the position of a failed asylum-seeker?
  - (3) Can that position change?
38. The Guidance explains when a person is an asylum-seeker, at paragraph 3.61:

“Anyone who has made a formal application with the Home Office to be granted temporary protection, asylum or humanitarian protection which has not yet been determined is also exempt. Formal applications are those made under the 1951 Convention and its 1967 Protocol and also any other request for humanitarian protection, such as some claims made on protection from serious harm grounds under Article 3 of the European Convention on Human Rights. Relevant NHS bodies should seek their own legal advice if it is not clear under what circumstances a person is making such a claim. ...”

39. Thus a formal application for asylum, temporary protection or humanitarian protection is necessary in order to benefit from the asylum-seeker exemption in Article 11(b).
40. The 2011 Regulations do not explicitly say when the exemption comes to an end. Clearly, if the application is successful, refugee status (or temporary protection or humanitarian protection) will be granted and the exemption will continue in a different form. But what if the application is rejected? Does the exemption come to an end with the Secretary of State’s decision-letter giving reasons for refusal? Or does it continue until all appeal avenues have been exhausted?
41. The Guidance (and a cross-reference to regulation 11(d)) provides the answer:
- “3.62 A person who has had their asylum / humanitarian protection application and all appeals rejected becomes a ‘failed asylum-seeker’. They will be become liable for charges for their NHS hospital treatment at that point, even if they have been here for more than one year, unless one of the following situations applies to them.”
42. Thus, where an asylum-seeker’s application has been rejected by the Secretary of State but he appeals, he will continue to benefit from the exemption. That is in line with the further exemption given in regulation 11(d) to those supported under sections 4 and 95 of the Immigration and Asylum Act 1999 (the “1999 Act”). Support under section 95 covers asylum-seekers. By section 94(1) of the 1999 Act, an “asylum-seeker” is defined, *inter alia*, as someone who has made a claim for asylum whose claim has not been determined. By section 94(3) a claim for asylum shall be treated as determined on the date on which the Secretary of State notifies the person of her decision on the claim or, if the asylum claimant appeals, the date on which the appeal is disposed of. By section 94(4) an appeal is disposed of if it is no longer “pending” for the purposes of the Immigration Acts. By section 61(2)(f) of the UK Borders Act 2007, the “Immigration Acts” includes the Nationality, Immigration and Asylum Act 2002 (the “2002 Act”). By section 104(1)(b) an appeal is pending until it is finally determined, withdrawn or abandoned. By section 104(2) an appeal is not finally determined for the purposes of

section 104(1)(b) while an application for permission to appeal could be made or is awaiting determination, or while an appeal is awaiting determination or an appeal has been remitted and is awaiting determination. Thus an asylum applicant who has appealed an adverse decision is still entitled to the exemption under regulation 11(b).

43. The exemption relating to section 95 also extends to certain failed asylum-seekers with no pending appeal where their household includes a child aged under 18. That is because of the extended definition of “asylum-seeker” in section 94(3A) of the 1999 Act. Section 4 support, often termed “hard cases support”, is granted to failed asylum-seekers who face temporary obstacles to leaving the UK. They too benefit from an exemption under regulation 11(c): see further the Guidance at paragraph 3.63.

44. A common situation for those who are refused asylum but, for whatever reason, do not leave the UK, is that further representations are submitted which are said to amount to a fresh claim on asylum or human rights grounds. They will be examined by the Secretary of State under the rubric of paragraph 353 of the Immigration Rules and will only be accepted as a fresh claim if they are significantly different from the original claim. That will only be the case if they have not already been considered and, taken with the previous material, create a realistic prospect of success. Does the submission of such material re-engage the regulation 11(b) exemption? The Guidance, at paragraph 3.64, advises that it does:

“A failed asylum seeker who makes a fresh application for asylum, temporary protection or humanitarian protection will become an asylum seeker again and will therefore be exempt from charge again until that new application is considered. Charges will still apply during any period between the first application, including appeals, being rejected and the second, fresh application being lodged with the Home Office.”

45. The Guidance also provides relevant advice on the operation of the easement clause in the case of asylum seekers, at paragraph 3.65:

“Under the easement clause ... any particular course of treatment underway when an asylum seeker’s application, including all appeals, is rejected, or when a failed asylum seeker stops receiving Home Office section 4 or 95 support, will continue free of charge until that treatment concludes or the person leaves the country. However, they must be charged for any new courses of treatment, although relevant NHS bodies are reminded that, regardless of the lack of advance payment, they must not withhold treatment that is medically considered immediately necessary or urgent in that it cannot wait until the patient can reasonably return home. They are also reminded that they have the option to write off debts when the person is genuinely without funds. See Chapter 4.”

46. At first sight, the heading of regulation 23 – “Overseas visitors exempt from charges for treatment the need for which arose during the visit only” – would appear to be of broad compass. However, closer inspection of the wording of the regulation reveals that it applies only to the following four limited categories of visitor:
- (1) UK state pensioners who have lived lawfully in the UK or been employed by the UK government for 10 continuous years at some point, regardless of where they are now residing, how long each year they reside there or if they have registered as a resident there;
  - (2) Former UK residents with 10 years’ continuous lawful residence in the UK in the past, but who now live in an EEA state or Switzerland, or a non-EEA state with which the UK has a reciprocal arrangement, with the exception of Israel (the UK can claim a reimbursement for those visitors in this category from the EEA or Switzerland: see the Guidance, at paragraph 3.103);
  - (3) Nationals of countries that are contracting parties to the European Convention on Social and Medical Assistance 1954 and the European Social Charter 1961 where those persons are without sufficient resources to pay (other reciprocal arrangements have now generally superseded this exemption, except for nationals from Turkey – but they have to demonstrate sufficiency of funds for their stay and return when they apply for leave to enter); and
  - (4) An authorised child or an authorised companion accompanying someone deemed exempt under regulation 13 (see the relevant definitions in regulation 2).
47. In all these cases, the regulation 23 exception applies to “treatment the need for which arose during the visit”. That phrase is defined in regulation 2 to mean:
- “(a) diagnosis of symptoms or signs occurring for the first time after the visitor’s arrival in the United Kingdom; or
  - (b) treatment which, in the opinion of a medical or dental practitioner employed by or providing services to, the relevant NHS body, is required promptly for a condition which -
    - (i) arose after the visitor’s arrival in the United Kingdom;
    - (ii) became acutely exacerbated after the visitor’s arrival; or
    - (iii) but for the treatment would be likely to become acutely exacerbated after the visitor’s arrival.”
48. The position of family members of overseas visitors, who are themselves overseas visitors, is covered by regulation 24. A family member, for these purposes, means a spouse or civil partner of the overseas visitor, or a child in respect of whom the overseas visitor is a parent or legal guardian. Broadly, the exemptions apply to family members in

three different ways. As regards an overseas visitors who is exempt under regulations 12 (human trafficking), 15 (NATO forces), 18 (HM UK forces, Crown servants and others) and 20 (missionaries), no charge may be made or recovered in relation to the family member if they are lawfully present in the UK. As regards regulations 7, 8, 9, 11, 14, 16, 17, 19, 21 and 22, the family member must be “lawfully present on a permanent basis”: regulation 24(2). No charge may be made or recovered in respect of relevant services consisting of treatment, the need for which arose during the course of the visit, provided to an overseas visitor who is the family member of an overseas visitor if he was lawfully present on a permanent basis with that overseas visitor while that visitor was residing in or visiting the UK, if that visitor is exempt under regulation 10 or 23(1)(a) or (b).

### **Particular Issues**

#### **(1) British citizens resident abroad**

49. British citizenship, by itself, is not a definitive indicator of ordinary residence. Thus, subject to any relevant exemptions, a British citizen resident abroad is liable to charging if he or she cannot satisfy the ordinary residence test. The Guidance is clear on this point on a number of occasions. Thus, at paragraph 1.3:

“A person does not become ordinarily resident in the UK simply by: having British nationality; holding a British passport; being registered with a GP; having an NHS number; owning property in the UK, or having paid (or currently paying) National Insurance contributions and taxes in this country. ...”

50. Further, at paragraph 3.18, the Guidance confirms that “overseas visitor” means “*any person of any nationality not ordinarily resident in the United Kingdom*”. The most relevant potential exemptions are likely to be those in regulations 16, 18 and 19.

#### **(2) EU rights and when they arise**

51. Regulation 9 provides a specific exemption for overseas visitors with rights arising under certain EU social security Regulations. The Guidance provides detailed advice on applying this exemption at paragraphs 3.47-3.48 and in chapter 7.

52. However, there will also be individuals from other EU states who, because of their long residence in the UK, will be ordinarily resident here: see, for example, the right of permanent residence in regulation 15 of the Immigration (European Economic Area) Regulations 2006 (the “2006 Regulations”), for EEA nationals present in the UK for

more than 5 years. In addition, certain third-country nationals with British relatives who are dependent on them may benefit from rights arising under Case C-34/09 *Zambrano v. Office National de l'Emploi* [2012] QB 265 (and see now regulation 15A of the 2006 Regulations). Such individuals will be ordinarily resident in the UK. But a difficult issue can arise regarding the point at which such rights arise.

53. There is a long line of case-law of the Court of Justice of the European Union (“CJEU”) and the European Court of Justice (“ECJ”) which establishes that the grant of, for example, a domestic residence permit is of declaratory effect only. In Case 48/75 *Procureur du Roi v. Royer* [1976] 2 CMLR 619, the ECJ confirmed that:

“31. [...] the right of nationals of a member-State to enter the territory of another member-State and reside there for the purposes intended by the treaty [...] is a right conferred directly by the Treaty, or, as the case may be, by the provisions adopted for its implementation.

32. It must therefore be concluded that this right is acquired independently of the issue of a residence permit by the competent authority of a member-State.

33. The grant of this permit is therefore to be regarded not as a measure giving rise to rights but as a measure by a member-State serving to prove the individual position of a national of another member-State with regard to provisions of Community law.

[...]

50. [T]he right of nationals of one member-State to enter the territory of another member-State and to reside there is conferred directly, on any person falling within the scope of Community law, by the Treaty, especially Articles 48, 52 and 59 or, as the case may be, by its implementing provisions independently of any residence permit issued by the host State.”

54. More recently, the point was considered by the CJEU in Case C-325/09 *Secretary of State for Work and Pensions v. Dias* [2011] 3 CMLR 40. The case concerned entitlement to Income Support. This depended on whether Ms Dias was “habitually resident” in the UK which, in turn, depended on whether she had a right to reside there. She claimed a right to reside under EU law. In so doing, she argued that her possession of a five-year residence permit showed she had a right to reside for the duration of that period, even though she did not satisfy the conditions for its grant during the whole of that period. The Secretary of State argued that a residence permit was only of declaratory effect. The CJEU rejected Ms Dias’ arguments on this point. It held, so far as is relevant, as follows:

“48. As the Court has held on numerous occasions, the right of nationals of a Member State to enter the territory of another Member State and to reside there for the purposes intended by the EC Treaty is a right conferred directly by the Treaty, or, as the case may be, by the provisions adopted for its implementation. The grant of a residence permit to a national of a Member State is to be regarded, not as a measure giving rise to rights, but as a measure by a Member State serving to prove the individual position of a national of another Member State

with regard to provisions of European Union law (see Case C-408/03 *Commission v Belgium* [2006] ECR I-2647, paragraphs 62 and 63 and case-law cited).

49. Such a declaratory, as opposed to a constitutive, character of residence permits, in regard to rights, has been acknowledged by the Court independently of the fact that the permit in question was issued pursuant to the provisions of Directive 68/360 or Directive 90/364 (see, to that effect, *Commission v Belgium*, paragraph 65).

[...]

54. However, as has been pointed out in paragraphs 48 to 52 of the present judgment, the declaratory character of residence permits means that those permits merely certify that a right already exists. Consequently, just as such a declaratory character means that a citizen's residence may not be regarded as illegal, within the meaning of European Union law, solely on the ground that he does not hold a residence permit, it precludes a Union citizen's residence from being regarded as legal, within the meaning of European Union law, solely on the ground that such a permit was validly issued to him.”

[Emphasis added]

55. The same point was recognised by Advocate General Sharpston in her Opinion in *Zambrano*: see paragraph 39.

56. The significance of this principle for the purposes of the NHS charging regime is that it may be argued, on the facts of individual cases, that an EU right of residence has arisen before the provision of treatment. The fact that it has not been recognised by the Secretary of State for the Home Department is irrelevant to the question whether the person actually benefits from the right in question, where that right is said to arise from the provisions of the Treaty or of subsidiary EU legislation (for example, the Qualification Directive). Thus, it is possible for a beneficiary of such an EU law right to argue that, even though they had no official documentation, they were, at the time of receipt of the chargeable services, ordinarily resident. This is a particular issue with certain beneficiaries of the *Zambrano* judgment, who may have been present in the UK without leave for many years before forming relationships with British nationals and having children with British nationality.

### **(3) Who decides on ordinary residence?**

57. The decision on ordinary residence is one for the NHS body in question. As the Guidance states, at paragraph 1.10:

“A relevant NHS body in England may seek help and advice from the Department of Health, by contacting the Overseas Visitors Policy Team ... about any aspect of the Charging Regulations and this guidance .... Ultimately, however, the decision as to whether a particular patient is liable for charges legally rests with the relevant NHS body providing treatment. In some cases, perhaps where a patient's circumstances are unclear or appear not to be provided

for in the Charging Regulations or guidance, relevant NHS bodies may need to take their own legal advice.”

58. The decision on ordinary residence may involve having regard to the immigration status of a particular individual. In the case of certain EU rights as highlighted above, relevant NHS bodies may be faced with arguments about EU rights of residence which have allegedly already arisen but without formal recognition by the Secretary of State. In those circumstances, whilst the NHS body may be able to seek advice on an individual’s immigration status from the Home Office (see paragraphs 5.37-5.44 of the Guidance in this respect) the decision remains that of the NHS body.

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