

Health & Social Care:

Duties to non-UK nationals

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Introduction



- Overview of health & social care available to non-UK nationals
- 3 main topics:
 - 1) NHS primary care
 - 2) NHS secondary care
 - 3) Social care – Care Act 2014 and other provisions



NHS introduction



- Starting point: s 1(3) of the NHS Act 2006
- “...free of charge” at point of delivery
- except where charges expressly provided for, incl for those not “ordinarily resident”: s 175 2006 Act
- Distinction between primary and secondary care in terms of “ordinary residence” and charging



NHS primary care: GP services



- No regulations permitting charges for GP services
- GPs contractually obliged to provide primary care services to registered and temporary patients (+ emergency / out of hours, etc) (see regs 17-19)
- pursuant to their contract with NHS England
- *National Health Service (General Medical Services Contracts) Regulations 2015/1862 (“GMS Regs”)*



NHS primary care: GP services (2)

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- Who can be a registered or temporary patient?
 - No requirement for “ordinary residence”
 - GP practice has discretion to accept anyone – **no matter what their immigration status** – as a registered patient (if list is open) (Sch 3 para 18) or temporary patient (Sch 3 para 20), **if their list is open**
 - **Registered patients:** can accept those outside GP’s practice area, but GP has discretion to refuse to register if not in area, or in outer boundary of area (Sch 3 para 21)
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NHS primary care: GP services (3)

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- **Temporary patient** – anyone who intends to stay resident in the practice area for more than 24 hours and less than 3 months;
 - Either because temporarily resident in the area and not receiving essential services elsewhere locally, or
 - Because “moving from place to place and not for the time being resident in any place” Sch 3 para 21
 - For the period of temporary residence (up to 3 months) (but can be terminated sooner: Sch 3 para 20)
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NHS primary care: GP services (4)



- Otherwise, GP can only refuse application to join practice list (when its list is open):

“if the contractor has reasonable grounds for doing so which do not relate to the applicant’s age, appearance or disability or medical condition, gender or gender reassignment, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sexual orientation or social class” (Sch 2 para 21 GMS Regs)

- must give reasons for doing so, in writing, within 14 days (Sch 3 para 21)

NHS primary care: GP services (5)



- GP services to patients not dependent on immigration status
- Charging:
 - General prohibition on GP practice charging for services to all patients: see reg 24 GMS regs;
 - except NB reg 24 (3) and (4) – where reasonable doubts about patient’s claim if not produced medical card on request, can demand a reasonable fee for the services in question
 - detailed exceptions in regulation 25 only
 - no basis to charge those not ordinarily resident in UK (no regs under s 175 NHS Act which permit this)

NHS secondary care



- *NHS (Charges to Overseas Visitors) Regulations 2015* made under s 175 2006 Act
- “overseas visitor” = person not ordinarily resident in UK
- apply to “relevant services” = services provided by an NHS foundation trust, NHS trust or a local authority exercising its public health functions under s 2B NHS Act
- i.e. hospital services mainly (not continuing care but NB DoH consultation in 2016*)
- But subject to “exempt services” and “exempt persons” – no charges can be made for either

NHS secondary care (2)



- DoH Guidance: *Guidance on implementing the overseas visitor hospital charging regulations 2015* (February 2016)
- 4 stage decision-making process:
 - 1) NHS body should determine whether P insured by another member EEA state – UK can then recover cost of treatment even if patient ordinarily resident in UK or otherwise exempt
 - 2) NHS body should determine whether ordinarily resident in UK; if is, then patient should not be charged;
 - 3) If not ordinarily resident or EEA insured, is service or person exempt?
 - 4) If not, charges should be made (whether prior payment depends on urgency of treatment & HRA issues: see Guidance §8.1-5)

NHS secondary care (3)



- Who is not “ordinarily resident”? undefined in Regs/Act; see *A v Secretary of State for Health* [2009] EWCA Civ 225
- Now: s 39 Immigration Act 2014 (6 April 2015) :
 - A person who requires leave to enter or remain in UK and does not have it;
 - A person who has leave to enter or remain in UK for a limited period.
- = not ordinarily resident
- So, a non-EEA national must have ILR to be ordinarily resident
- Asylum seekers or failed asylum seekers will not be OR
- See Guidance §3.4-3.10: criteria for ordinary residence

NHS secondary care (4): Exempt persons



- Part 4 of Regs – exempt persons (see Guidance Ch 1):
- Vulnerable patients / detainees:
 - refugees, asylum seekers, persons in receipt of asylum support, failed asylum seekers receiving s 4 support or care and support under Care Act 2014;
 - looked after children, trafficking victims (and suspected victims),
 - persons detained for compulsory treatment, prisoners and immigration detainees;
 - and overseas visitors granted leave outside rules with “exceptional humanitarian reasons” for treatment

NHS secondary care (5): Exempt persons



- EEA nationals with EHIC, PRC or S2 form or UK issued S1 form + spouses, civil partners and children
- Non EEA nationals who have paid the “immigration health charge”: reg 10 (payable with immigration application for more than 6 months visa)
- UK government employees and war pensioners
- Others covered by reciprocal health agreements

NHS secondary care (6) – exempt services



- Regulation 9 and Sch 1 – relevant services exempt from charges (see detailed list).
- In summary:
 - A&E (but not once in-patient or at an outpatient appt)
 - Family planning services
 - Diagnosis and treatment of a condition in Sch 1 (e.g. HIV, malaria, measles, TB etc)
 - Diagnosis and treatment of STIs
 - Services for conditions caused by torture, FGM, domestic or sexual violence

“provided that the overseas visitor has not travelled to the UK for the purposes of seeking that treatment”

NHS secondary care (7): refugees / trafficking



- Regulation 6:
 - If an asylum seeker received non-exempt services before making his or her application for asylum (or temporary protection or humanitarian protection), and is then granted asylum;
 - S/he is to be treated as though s/he was exempt at the time the services were received;
 - Therefore, no charges should then be made or recovered, or if already recovered, they should be repaid in accordance with regulation 5
- The same applies to trafficking victims not yet identified as such when they received services, and see reg 6A for FGM

NHS secondary care (8) – other points to note



- Duty of enquiry to establish whether exemption should apply is on NHS body: reg 3(2)
- If charge does apply, NHS body is under an obligation to make and recover charges: regulation 4 – no discretion
- Each NHS body (where more than one) must make and recover charges for the relevant services it provides: reg 3(3)
- Patient confidentiality guidance – and see *W v SS for Health* [2015] EWCA Civ 1034 (passing info to HO - SC pending)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/507694/Overseas_chargeable_patients_2016.pdf

Social care: duties to non-UK nationals

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- What access does a “person subject to immigration control” (PSIC) have to adult social care?
 - 1) Could the PSIC be entitled to a local authority service under the legislation governing that service, including any PSIC special hurdle? *If no, usually the end of the matter.*
 - 2) If PSIC is otherwise entitled, does the service fall within list of barred services and if so, is the PSIC an ineligible person under Sch 3 NIAA 2002?
 - 3) If barred, is the provision of the barred service necessary to avoid a breach of the PSIC’s ECHR or EU rights?
 - 4) If not, is the PSIC entitled to “packing up” accommodation / assistance (SI 2002/3078)?

Social care: the Care Act 2014 (1)

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- S 21 Care Act: local authority prevented from providing “care and support” to an adult PSIC or preventative services under s 2 where:
 - “needs or future needs have arisen solely (a) because the adult is destitute or (b) because of the physical effects or anticipated physical effects of being destitute”*
- Who is a PSIC? Very broadly defined
 - A non-EEA national
 - Who requires leave to enter or remain and doesn’t have it
 - Has leave to enter or remain subject to condition that he does not have recourse to public funds
 - or under a maintenance undertaking or Sch 4 para 17

Social care: the Care Act 2014 (2)



- But how far does this restrict services which can be provided?
- Duty under s 18 could not arise unless applicant satisfied eligibility criterion in regulation 2 i.e. needs only eligible if arise from “a physical or mental impairment or illness” and “as a consequence there is, or is likely to be, a significant impact on the adult’s well-being”
- So difficult to see that an eligible need would ever arise as a result of destitution in any event



Social care: the Care Act 2014 (3)



- How far does this restrict type of services which can be provided?
- Under predecessor s 21 National Assistance Act, local authorities not obliged to provide accommodation alone in any event: *SL v Westminster* [2013] UKSC 27
- Accommodation only in conjunction with care that was normally provided in a home and would be effectively useless if no home provided;
- Same approach taken so far under Care Act 2014: *R (SG) Haringey LBC* [2015] EWHC 2579 and *R (GS) v Camden* [2016] EWHC 1762 (Admin)



Social care: the statutory bar

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- Sch 3 of the NIAA 2002 creates a statutory bar preventing:
 - Local authority duties arising in relation to
 - certain classes of persons (Sch 3 paras 4 – 7A)
 - in relation to certain classes of services (Sch 3 para 1) encompassing social care services
- But, this *“does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach” of ECHR or EU treaty rights*: Sch 3 para 3
- Recent case where breach of Art 3 if no accomm provided under Localism Act 2011: *R (GS) v Camden* [2016] EWHC 1762

Social care: which provisions are covered?

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- Statutory bar:
 - Ss 17, 23C, 23CA, 24A or 24B Children Act 1989 (adults)
 - S 188(3) or 204(4) Housing Act 1996 (accommodation pending review or appeal)
 - S 2 Local Government Act 2000 (well-being)
 - S 1 Localism Act 2011 (general power)
 - Immigration and Asylum Act 1999
 - Part 1 of the Care Act 2014 (care and support)
 - Specific duties under Northern Irish, Scottish and Welsh legislation (see Sch 3 para 1)

Social care – who is subject to the bar?



- Persons (or dependents of persons) with refugee status abroad – Sch 3 para 4
- EEA nationals (or dependents of EEA nationals) (Sch 3 para 5)
- Failed asylum seekers who have failed to co-operate with removal directions (Sch 3 para 6)
- Persons in the UK in breach of immigration laws (s 50A BNA 1981), unless they are asylum seekers (Sch 3 para 7)
- Failed asylum seekers with dependent children who have been certified by the SoS as failing without reasonable excuse to take reasonable steps to leave the UK (Sch 3 para 7A)

Care Act / statutory bar– where are we?



- Local authorities have power to provide accommodation plus support under the Care Act 2014 to:
 - asylum seekers and other PSICs not covered by statutory bar
 - failed asylum seekers and others PSICs (e.g. EEA nationals) covered by the bar where it may be necessary to provide support to avoid a breach of their ECHR / EU law rights
 - IF they have an otherwise eligible need (impairment / well-being)
- And only where:
 - they need care and support normally provided in a home or that would effectively be useless if the applicant had no home
 - But not if those needs have only arisen from destitution

Overlapping cases: asylum seekers



- Asylum support under ss 95/96 Immigration Act (for asylum seekers or failed asylum seekers with dependent children: s 122), or s 4 support (for destitute failed asylum seekers):
 - residual i.e. only where the local authority not providing accommodation and support for the adult
 - Accommodation and “essential living needs” only
 - Special needs of children to be met by local authority under s 17 Children Act 1989



Other sources of support (non-asylum seekers)



- S 17 Children Act 1989 - Adults with dependent children awaiting Art 8 LTR decision (i.e. not asylum) who may be provided with accommodation and support under s 17 1989 Act
- NB if statutory bar applies, will need to demonstrate a breach of ECHR;
- See *Clue v Birmingham CC* [2010] EWCA Civ 460 – a breach if:
 - Applicant would be pushed away from UK as a result of not having their basic needs met
 - Will be incompatible with their ECHR rights if outstanding application not “manifestly hopeless”



Other sources of support: Localism Act 2011



- *GS v Camden* [2016] EWHC 1762
- Wheelchair-bound woman with mental health problems
- Court found no power under Care Act 2014 because need was for accommodation alone and not care & support (*SL /SG*)
- Statutory bar applied to s 1 Localism Act 2011 so Camden no power to provide any accommodation unless a ECHR breach
- However, Court held that failing to provide Ms GS with accommodation would give rise to a Art 3 *Limbuela* - breach because:
 - Extreme vulnerability if no accommodation
 - Impacts on physical and mental health



Children – in brief



- Unaccompanied minors = accommodation s 20 CA 1989
- After age 18, local authority support under “children leaving care” machinery up to age 21, longer if supported by LA into training /education
- Children in need + their families - s 17 Children Act 1989
- Asylum support – children of asylum seeking families / failed asylum seekers living will be accommodated under the asylum support scheme and local authority will meet any special needs the children may have under s 17 Children Act 1989
- Schedule 3 NAI statutory bar does not apply to children



References



- DoH (closed) consultation on NHS continuing healthcare and charging
- https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483870/NHS_charging_acc.pdf

