



information sheet

Access to Healthcare

12th May 2008

In 2004, the Department of Health issued guidance to National Health Service (NHS) Trusts. The guidance related to the National Health Service (Charges to Overseas Visitors) Regulations 1989 SI 1989/306 (the 1989 Regulations); and changes that had been made to those Regulations. It explained when and how the 1989 Regulations should be used to refuse NHS treatment to foreign nationals in England. The High Court has considered this guidance in *A v Secretary of State for Health* [reported as *A v Department of Health and West Middlesex University Hospital NHS Trust* [2008] EWHC 855 (Admin)]. In response to the judgment, the Department of Health has issued further guidance.

This information sheet provides information about the guidance and its consequences.

Public health services in the UK and the 1989 Regulations

Public health services are the responsibility of the respective governments for England, Northern Ireland, Scotland and Wales.

The Department of Health is the government department responsible for public health services in England. The guidance referred to in this information sheet, therefore, specifically affects people in England. Some brief consideration of Northern Ireland, Scotland and Wales is given at the end of this information sheet.

Public health services in England are generally provided by the National Health Service (NHS); and most NHS services are provided free of charge. The National Health Service Act 1977 provided two circumstances in which charges may be made for NHS services:

- the Secretary of State for Health may make regulations for certain types of health services to be charged for (e.g. it would be possible to regulate for charges for a specific drug or treatment); and
- the Secretary of State for Health may make regulations for circumstance in which people who are “not ordinarily resident in Great Britain” may be charged.

The 1989 Regulations are an example of the second of these circumstances. This means that these Regulations cannot be used to charge people who are “ordinarily resident”.

Ordinarily resident

The House of Lords decided in *Shah v Barnet London Borough Council* [1983] 2 AC 309 that this test means little more than a person must be living in the UK lawfully, voluntarily and as part of the regular order of his or her life. An asylum-seeker or refused asylum-seeker, who has been granted temporary admission pending further action (including removal) on his or her case, may therefore be ordinarily resident in the UK.

The 2004 guidance

The guidance issued in 2004 is mainly concerned with hospital treatment. It does not concern treatment from a general practitioner (GP), dentist or optician.

The guidance sets out treatment that is free of charge to everyone whether or not the person is ordinarily resident in the UK. This includes:

- treatment given in an accident and emergency department
- family planning services

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Information sheets provide general information only.

ILPA members listed in the directory at www.ilpa.org.uk provide legal advice on individual cases. ILPA does not.

- treatment for certain listed diseases (HIV is excluded from the list, so there may be charges for HIV treatment; TB is on the list, so TB treatment must be provided free of charge to anyone in the UK)

The guidance also sets out foreign nationals in the UK who are exempt from any charges, including:

- those working lawfully in the UK
- students on a full time course of study
- those with indefinite leave to remain
- those who have been living lawfully in the UK for 12 months before requiring treatment
- asylum-seekers whose asylum claim or appeal remains outstanding

Other foreign nationals in the UK may face charges for treatment (other than that referred to above).

The High Court judgment (*A v Secretary of State for Health*)

It was this guidance that was challenged in the case before the High Court. That case concerned the position of someone who had been refused asylum. The court decided that the guidance was wrong in failing to recognise that refused asylum-seekers may still be entitled to free treatment despite the 1989 Regulations. This would depend on whether the person was ordinarily resident; and it was possible that an asylum-seeker on temporary admission could meet this test.

Although the case concerned a refused asylum-seeker, the decision highlights the complexity in the law concerning whether a foreign national can or cannot be properly charged for treatment.

The 2008 guidance

The new guidance explains how the 2004 guidance should now be applied. This new guidance does not mean that all refused asylum-seekers will necessarily receive free hospital treatment. This may still depend on whether it is thought the person meets the ordinarily resident test. However, a refused asylum-seeker who has been in the UK for more than 6 months and can show a current IS96 form granting temporary admission is now likely to receive free treatment. Others may also receive free treatment.

Scotland and Wales

The changes made in 2004 in England were also made in Wales. Very similar guidance was issued in Wales to that in England. However, the Welsh Assembly Government (WAG) has decided not to follow the Department of Health in issuing further guidance following the recent High Court judgment. Instead, the WAG has decided that treatment will be available free to all refused asylum-seekers in the same way that it is available in England and Wales to asylum-seekers whose claims remain outstanding. The situation in Northern Ireland and Scotland has been very similar although changes were not made in the same way as in England and Wales in 2004. The decision by the English High Court, although not binding, may be useful in supporting a request by a refused asylum-seeker for free treatment in Northern Ireland or Scotland.

What happens next?

The High Court has given permission for the Department of Health to appeal against its decision. It may be many months before that appeal is heard and resolved. However, any decision on the appeal may cause the guidance to be changed again.

The Home Office and Department of Health intend to publish a joint consultation in Summer 2008 on access to healthcare for foreign nationals in the UK.