



Recent court case on refused asylum seekers and entitlement to NHS healthcare: March 2009 Implications for maternity care

In March 2009, the Court of Appeal overturned a previous High Court judgement on entitlement to free National Health Service (NHS) health care for refused asylum seekers. Refused asylum seekers are asylum seekers who have exhausted all avenues of appeal. Prior to the March 2009 decision, most refused asylum seekers were entitled to free NHS secondary care (hospital care), including maternity care. Following the decision, refused seekers are no longer entitled to free NHS secondary care (with some exceptions). Refused asylum seekers who are unable to pay for care are entitled to receive secondary care under certain circumstances. Interim advice from the Department of Health emphasises the role of clinicians in determining access to care for those who are unable to pay.

Department of Health advice dated 1 April 2009 (which is attached) states that all maternity care is classed as immediately necessary treatment. Immediately necessary treatment must never be withheld for any reason, including inability to pay. Trusts can inform the patient of possible charges, but must not delay treatment because of them. Maternity care includes antenatal care, care during the birth and postnatal care. It also includes treatment for HIV/AIDS during this period.

The Department of Health advice states: 'While Trusts have a duty to recover charges, this will not be possible in all cases, and they should not go beyond what is reasonable in pursuing them. Trusts have the option to write off debts where it proves impossible to recover them or where it would be futile to begin to pursue them, for instance when the person is known to be without any funds.'

Does the hospital have the discretion to refuse maternity care to a refused asylum seeker?

No. All maternity care is classed as immediately necessary treatment and must not be refused for any reason.

What should a refused asylum seeker do if they are asked to pay for their maternity care and are unable to do so?

If a refused asylum seeker is unable to pay for their maternity care, they should inform the trust. Ideally, this should be done in writing. Citizens Advice Bureaux and local community organisations may be able to assist with this. The Department of Health advice states that hospital trusts have a duty to recover charges but should not go beyond what is reasonable when pursuing charges. If the trust is aggressively pursuing payment or using debt collectors, then the refused asylum seeker can make a formal complaint to the trust.

How does this court case affect entitlement to GP care?

This court case does not affect entitlement to GP care. There is no law preventing GPs from treating anyone. GPs have the discretion whether or not to register refused asylum seekers. See BMA guidance on this issue, which is available at

http://www.bma.org.uk/ethics/asylum_seekers/asylumhealthcare2008.jsp

How does this court case affect entitlement to care for other women from abroad?

The Department of Health advice applies to everyone who is subject to charging for secondary care. All maternity care is classed as immediately necessary treatment and must not be refused for any reason.

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Dear Chief Executive

**Subject: ADVICE FOR OVERSEAS VISITORS MANAGERS ON:
1a) FAILED ASYLUM SEEKERS & ORDINARY/LAWFUL RESIDENCE;
1b) WHEN TO PROVIDE TREATMENT FOR THOSE WHO ARE CHARGEABLE;
2) VICTIMS OF HUMAN TRAFFICKING**

Gateway Reference Number 11628

Richard Douglas wrote to you on 1 May last year to inform you of a High Court ruling which found that failed asylum seekers could, in certain circumstances, pass the ordinary residence test that confers an automatic right to free NHS hospital treatment or, alternatively, be exempt from charges for hospital treatment after having spent one year in the UK. The Department of Health appealed this judgment and the case was heard in November 2008. The Court of Appeal (CA) handed down its judgment on 30 March.

Failed asylum seekers and ordinary/lawful residence

The CA have found that failed asylum seekers cannot be said to be ordinarily resident in the UK, since their stay here is not 'ordinary'. The CA also found that failed asylum seekers cannot be considered exempt from charges by having resided lawfully in the UK for one year prior to treatment since they do not have the necessary 'leave to enter' in order to reside lawfully in the UK.

The opposing party has been refused immediate leave to appeal to the House of Lords on the ordinary residence and lawful residence judgements, but could still challenge this decision. However, this Court of Appeal judgment is now the law and must be followed with immediate effect by NHS Trusts, Primary Care Trusts and NHS Foundation Trusts when operating the *NHS (Charges to Overseas Visitors) Regulations 1989*, as amended.

We will continue to address the broader issue of failed asylum seekers' access to healthcare jointly with the Home Office as part of our current review of access to the NHS by foreign nationals.

What to do now

Trusts should revert to the position prior to April 11th 2008. Failed asylum seekers can no longer be considered to pass the ordinary residence test, nor can they become exempt from charges by virtue of spending one year in the UK.

The judgment is not retrospective. Trusts must not ask failed asylum seekers who they considered ordinarily resident or exempt from charges to pay for the treatment that they received between 11 April 2008 and 30 March 2009.

Furthermore, the regulations state that anyone who was exempted from charges for having spent one year prior to treatment residing lawfully in the UK, but whose status then changes, must complete the course of treatment they are receiving free of charge. Therefore, it is very important that a failed asylum seeker who is already undergoing a course of treatment does not have that treatment interrupted and is not asked to begin paying for it. It should remain free until complete or until they leave the country. It is for a clinician to decide what constitutes a particular course of treatment but it can comprise of a range of measures, adapting over time due to the changing state of the patient's condition. New courses of treatment will be chargeable.

When to provide treatment for those who are chargeable but don't pay

The CA held that Trusts have a discretion to withhold treatment pending payment and also a discretion to provide treatment when there is no prospect of paying for it. In applying these discretions Trusts should take into account the guidance document *Implementing the Overseas Visitors Hospital Charging Regulations* in relation to the terms 'immediately necessary treatment', 'urgent treatment' and 'non-urgent treatment'.

The CA examined this current guidance and found it to be unclear, and consequently unlawful, in the following ways:-

- i) in relation to immediately necessary treatment, what, if any, investigation should be made as to when the patient is likely to return to his own country so as to be able to decide what limits should be placed on the treatment;
- ii) in relation to urgent treatment, what should happen when it is not possible to provide a deposit or when a person cannot return home before the treatment becomes necessary; and
- iii) in relation to non-urgent treatment, what should be done for those who have no prospect of returning home within a medically acceptable time or whether it may be necessary to investigate the likelihood and length of any undue delay in returning home.

Impact on Funding

The treatment of chargeable overseas visitors is not reimbursed by commissioners. Providers are required to charge these patients directly and subsequently recover funds from them where possible. The CA ruling that failed asylum seekers cannot be either ordinarily resident or lawfully resident means their treatment is not now funded by PCTs, which re-establishes the position prior to the High Court judgment of April 2008.

What to do now

DH will redraft the guidance document in the autumn, taking into account NHS feedback on applying this initial advice, and consultation with other key stakeholders. However, in the meantime Trusts must be clear that, with immediate effect, and for all chargeable overseas visitors, not just failed asylum seekers:-

i) **immediately necessary treatment**, including all maternity treatment, must never be withheld for any reason. It should be limited to that which is necessary to enable the patient to return to their own country, but trusts should consider the likelihood of the person returning home when deciding what limits to place on the treatment;

ii) **urgent treatment** is that which clinicians do not consider immediately necessary, but which nevertheless cannot wait until the person can be reasonably expected to return home. This may be for conditions such as cancer. It will be necessary for an assessment to be made as to when the patient is likely to return home in order for the clinician to establish if the need is therefore urgent.

If a Trust decides that the need for treatment is urgent and it is to go ahead, it should use any intervening period ahead of treatment to secure payment, but if this is not possible, treatment should not be cancelled or delayed. In doing this, Trusts should take care not to discourage those in need of urgent treatment from receiving it. Whilst Trusts have a duty to recover charges, this will not be possible in all cases, and they should not go beyond what is reasonable in pursuing them. Trusts have the option to write off debts where it proves impossible to recover them or where it would be futile to begin to pursue them, for instance when the person is known to be without any funds.

iii) **non-urgent treatment** is routine elective treatment which could, in fact, wait until the patient returned home. Once again, an assessment of how long the patient will likely remain in the UK will be necessary for the clinician to come to this conclusion. If the patient is unlikely to return for some time, but the need for treatment remains non-urgent, then it should not be initiated until the full estimated amount has been received. If the patient's need for treatment becomes urgent, either because their condition unexpectedly increases in severity, or because their circumstances change and they are no longer able or likely to return home within a medically acceptable time, then they should be provided with the treatment even if payment cannot be secured in the meantime.

In relation to paragraphs (i), (ii) and (iii), an assessment of when a patient is likely to return home needs to take account of their plans, intentions or ability to do so.


Victims of Human Trafficking

Separately, the Council of Europe Convention on Action Against Trafficking in Human Beings came into force in the UK yesterday. The charging regulations have therefore been amended to provide a new exemption from charge category for anyone who the 'competent authorities' of the UK consider to be either a victim, or a suspected victim, of human trafficking. The competent authorities are the UK Human Trafficking Centre (UKHTC) and, where cases are linked to asylum and immigration issues, the UK Border Agency (UKBA).

As of 1 April, trusts must not charge those patients who are identified as actual or suspected victims of human trafficking by either the UKHTC or the UKBA.

Finally, whilst this note aims to be as helpful as possible, it cannot cover all eventualities and trusts are, as always, advised to seek their own legal advice on the extent of their obligations when necessary.

Yours faithfully

A handwritten signature in black ink that reads "David Flory". The signature is written in a cursive style with a period at the end.

David Flory
Director General NHS Finance, Performance & Operation

Court of Appeal Judgment – YA v Secretary of State for Health

So failed asylum seekers are no longer entitled to free hospital treatment?

Correct, except for the services which are free to all people regardless of any other factor, such as treatment given in an A&E, compulsory psychiatric treatment and treatment for certain contagious diseases.

However, Trusts may, in accordance with Guidance, need to provide urgent or immediately necessary treatment.

Do we begin to charge them for courses of treatment already underway?

Where a person was thought to be exempt from charges by virtue of having been in the UK for a year prior to treatment, the regulations state that courses of treatment already underway free of charge must remain free until complete or until they leave the country. New courses of treatment will be chargeable.

What about those we considered Ordinarily Resident, rather than exempt?

The regulations as drafted do not forbid a charge to be made for the remainder of a course of treatment for those who were thought to be ordinarily resident but who now no longer are. However, DH strongly advises NHS trusts to continue to treat these failed asylum seekers for ongoing courses of treatment, and to write off any debts as they occur.

What constitutes a course of treatment?

It is for a clinician to decide what constitutes a particular course of treatment but it can comprise of a range of measures, adapting over time due to the changing state of the patient's condition.

Does this mean that we should not treat Failed Asylum Seekers?

No. It only means that they are not entitled to treatment free of charge. Treatment should still be provided where the need for it is immediately necessary or urgent, even if they have not paid in advance, or where payment has been received in advance for non-urgent treatment.

But I have read in the press that we can choose not to treat them.

Some parts of the press have misleadingly reported the judgment. It is true that the Court of Appeal found that trusts do have the discretion to withhold treatment, pending payment, but that they also have discretion to provide treatment when there is no prospect of the patient paying for it. DH has written to NHS Chief Executives about the exercise of this discretion.

Who establishes the urgency of treatment?

Only clinicians can decide on the urgency of treatment needed, but they may need information from you on the intentions of the person to return home, in order to establish this.

Do we always have to provide immediately necessary treatment?

Yes. Immediately necessary treatment, including all maternity treatment, must never be withheld for any reason. It should be limited to that which is necessary to enable the patient to return to their own country, but in order to establish when treatment should be limited, you will need to consider the person's plans and intentions of returning home and their ability to do so.

Can we ask for payment in advance of immediately necessary treatment?

This will usually not be appropriate or even possible. You should inform patients of possible charges at the earliest appropriate point but you must not delay treatment because of it.

Do we always have to provide urgent treatment?

Yes. Urgent treatment is that which clinicians do not consider immediately necessary, but which nevertheless cannot wait until the person can be reasonably expected to return home. This may be for conditions such as cancer. It will be necessary for an assessment to be made as to when the patient is likely to return home in order for the clinician to establish if the need is therefore urgent.

Can we ask for payment in advance of urgent treatment?

Yes. As the treatment is not immediately necessary, there will be a period ahead of treatment which you should use to secure a deposit equivalent to the estimated cost of treatment or an instalment, where possible. However, some patients will clearly not be able to pay in advance so should not be pursued at this stage. If, after treatment, it is also clear that they will not be able to pay their debt, it should be written off.

What if they can't or won't pay – can we withhold treatment then?

No. Urgent treatment must be provided even if payment has not been received, for whatever reason. However, it can be limited to that which is necessary to enable the patient to return to their own country, In order to establish whether treatment should be provided or if it should be limited, you will need to consider the person's plans and intentions of returning home and their ability to do so.

Then we are being asked in effect to provide everyone with urgent treatment free of charge.

No, only if it is clear that a person does not have funds, perhaps because they are destitute, should they not be pursued for payment. For everyone else payment should be pursued in advance, or, if not, after treatment has been provided. You can consider arranging payment by instalments or using debt collection agencies where this is likely to be fruitful.

This judgment means that we are being told to treat more patients.

DH has always intended the current guidance to be interpreted in the way the Court of Appeal has found. Unfortunately, there has been inconsistent interpretation across the NHS so we are reiterating it, and making it clearer where the Court found it unlawful.

Can't we discourage people from receiving urgent treatment?

No, you should not do this. It is important that a person receives treatment which a clinician considers urgent. However, you can point out to a person who can easily return home that by doing so they will not incur the cost that they will face if they go ahead with their treatment in the UK.

Do we always have to provide non-urgent treatment?

No. Non-urgent treatment is routine elective treatment which could, in fact, wait until the patient returned home. An assessment of how long the patient will likely remain in the UK will be necessary for the clinician to come to this conclusion. If the patient is unlikely to return for some time, but the need for treatment remains non-urgent, then it should not be initiated until the full estimated amount has been received. If the patient's need for treatment becomes urgent, either because their condition unexpectedly increases in severity, or because their circumstances change and they are no longer able to return home within a medically acceptable time, then they should be provided with the treatment even if payment cannot be secured in the meantime.

Can we ask for payment in advance of non-urgent treatment?

Yes, you should not initiate treatment until a deposit equivalent to the estimated full cost of treatment has been received. However, if a person's condition changes to 'urgent' either because their condition unexpectedly increases in severity, or because their circumstances change and they are no longer able to return home within a medically acceptable time, then they should be provided with the treatment even if payment cannot be secured in the meantime.

How are we meant to decide when a patient is going to be able to return home to get their treatment there?

Ultimately, you have to make an informed decision based on the individual circumstances of the patient. Firstly, you can ask a person their plans and intentions on returning home and their ability to do so. You may also wish to consider, for example, whether the patient is a failed asylum seeker who is being supported by the State because they are unable to return home. Alternatively, the patient may be, for example, a tourist or business traveller who is able to return to their home country relatively quickly.

These factors will assist a clinician in deciding if their need for treatment is urgent because it cannot wait until they can realistically be expected to return home.

How might the application of these new guidelines impact on specific illnesses like cancer and HIV?

For all conditions, the level of urgency will depend on the state of the patient's health and the stage of their disease compared with whether they are likely to return home for the treatment within a time which is acceptable for the clinician. If the clinician does not consider that they can return soon enough for the treatment needed, and that there could be an unacceptable deterioration in the patient's condition, then it will be considered urgent, and should be provided even if it is not possible to secure advance payment. If the clinician considers that they are likely to return home before treatment is needed, or that their condition is stable and not serious, then it will be classed as non-urgent and should not be provided until advance payment is secured. However, this will then need to be assessed from time to time in case the need changes to urgent.

This principle applies equally to illnesses such as cancer and HIV/AIDS as for any other.

Who bears the cost of treating chargeable overseas visitors who don't pay?

Your PCT is not responsible for funding these patients. That is why it is important to recover the costs of treating chargeable overseas visitors from the patient themselves, who is almost always the only person liable. However, clearly it will not be possible to recover costs from people genuinely without the resources to pay, for instance because they are destitute, and so these costs should be written off as early as is thought appropriate. This means that the hospital trust will have to bear the cost.

In relation to failed asylum seekers, this Court of Appeal judgment re-establishes the position prior to the High Court judgment of April 2008.

Does this judgment have a wider bearing than failed asylum seekers?

The judgment relates to all overseas visitors where it concerns what to do when a person is in need of treatment but either cannot pay in advance or is unlikely to return home within a medically acceptable time.

When will there be more guidance?

We will redraft the guidance to make clear what should happen, taking into account the Court of Appeal's findings. This will be done in the autumn after receiving feedback on applying this interim advice. In the meantime, we will write to NHS Chief Executives this week so that trusts are formally aware of the judgment and what it means for the NHS.

Where can I find a copy of the judgment?

A transcript of the judgment can be found at:
<http://www.bailii.org/ew/cases/EWCA/Civ/2009/225.html>

Aren't you still undertaking a review of the charging regime?

Yes, this has taken longer than expected due to some very complex issues but remains ongoing.

Is this the final position on failed asylum seekers?

The opposing party has been refused immediate leave to appeal to the House of Lords on the ordinary residence and lawful residence judgements, but could still challenge this decision. However, this Court of Appeal judgment is now the law and must be followed with immediate effect.

Separately, we are continuing to consider the position of failed asylum seekers accessing primary and secondary care as part of the ongoing review.