

ILPA RESPONSE TO CONSULTATION: REFUSING ENTRY OR STAY TO NHS DEBTORS

A PUBLIC CONSULTATION AROUND PROPOSED CHANGES TO THE IMMIGRATION RULES, UKBA (February 2010)

ILPA

The Immigration Law Practitioners' Association (ILPA) is a professional association with over 900 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups and has given both written and oral evidence to many Parliamentary Committees, including the Joint Committee on Human Rights. ILPA was called on to give expert evidence to the Parliamentary Joint Committee on Human Rights inquiry into the treatment of asylum seekers which delivered its report (which included coverage of the asylum process and access to healthcare) in 2007. ILPA's members include lawyers with specialist expertise in the field of access to healthcare for migrants and their expertise has been drawn upon in the response to this consultation.

Preliminary Points

1. Lack of evidence

In the JCHR report, the committee highlighted the lack of evidence or statistical information on health tourism which would support charging of refused asylum seekers for secondary care. The committee recommended that 'The government collect evidence of the impact of 2004 Charging Regulations on patients, NHS costs and NHS staff and carry out a race equality impact assessment and a public health impact assessment of these regulations using data obtained to inform future policy decisions'. ILPA is concerned that a further consultation and proposals have been issued without that evidence having been obtained. Before changes are made to the immigration rules which will lead to additional administration for UKBA staff, additional scope for error, further delays in decision making and other implications for the decision making process, the UKBA and the Department of Health should carry out some basic systematic research in relation to NHS charges, the type of treatment involved, the patient's immigration status and reasons for non-payment. Without this information, the government has no guarantee that the public benefits will outweigh the cost of collecting and exchanging information.

'Another important set of issues relates to proportionality. Are the data collected worth collecting in terms of the rewards that will come from the successful use of them?'

Damian Green MP, Shadow Immigration Minister, *Hansard*, HC Committee, First Sitting, 9 June 2009, HC Col 41

2. Inconsistency with Scotland and Wales

Whilst the immigration rules apply throughout the UK, the devolved authorities have developed their own rules and guidance about access to NHS treatment which are less restrictive than those

ILPA Lindsey House, 40/42 Charterhouse Street London EC1M 6JN Tel: 020 7251 8383 Fax: 020 7251 8384

email: info@ilpa.org.uk website: www.ilpa.org.uk

in the UK. In Wales there are no charges for secondary treatment for any refused asylum seekers. As a result, introducing the proposed amendments will lead to further inconsistency as between the treatment of migrants in England and their treatment in Scotland and Wales.

3. The power already exists

It is already open to UKBA decision makers to take non payment of NHS charges into consideration when deciding whether to accept or refuse an application. There is no need to make it a specific provision in the immigration rules.

4. Data Protection Act/privacy considerations

Privacy and confidentiality are at the heart of the doctor/patient relationship. If a patient fears that confidential information will be shared with UKBA this may lead to patients not presenting for treatment initially (a problem which has already been documented in the HIV and maternity context), to delays in accessing treatment resulting in the need for more expensive emergency treatment in A&E departments, and in patients not feeling able to provide full information about their personal circumstances which may result in incorrect treatment being provided. There is also a risk of information being stored which is incorrect:

'The bigger the capacity to collect and share information, the greater the danger to privacy and therefore freedom'

Damian Green MP, Minister for Immigration, 9th June 2010 HC col 434

5. Inconsistency with coalition government's values

Following on from the above point, the new government's statements in the context of identity cards have consistently opposed state interference at the expense of privacy and personal freedom. The proposed changes to the immigration rules appear inconsistent with that approach.

'Conservative Members think that it is hugely important and that far too much of the relevant Home Office policy is proceeding in the wrong direction, with a dangerous tendency to collect too much information and to give the various organs of the state too much power to share it with one another without the permission of the person about whom the information was collected'

Damian Green MP, Shadow Immigration Minister, *Hansard*, HC Committee, First Sitting, 9 June 2009, HC Col 31

Changing the Immigration Rules

Q.1 Should non-payment of NHS charges be sufficient grounds for refusing entry or extension of stay to a foreign national?

First ILPA does not consider that non-payment of NHS charges of itself should be sufficient grounds for refusing entry or extension of stay. The correct mechanism for enforcing non-payment is through the civil courts. As mentioned above, UKBA decision-makers already have discretion to take non-payment into account.

However, ILPA considers that if this is put in the immigration rules as a specific reason for refusal, it must be put into the list in para 320 (8) onwards, not into para 320 (1) to (7), to allow for discretion in particular cases. The visa application form should then include a question on this, e.g. in the 'previous applications and history' section, so that people applying for visas realise that this is relevant, and do not incur expenditure on application fees if they are not able to justify the debt. If, for example, a person has negotiated payment in instalments for a large debt, and has kept up the payments as agreed, then that should not be a reason for refusal (just as still repaying off a mortgage would not be a reason for UKBA to decide that a spouse lacked adequate accommodation).

In ILPA's experience, visitors incur NHS debts for a variety of reasons, they do not expect this to happen, and may need time to pay during which they should not be barred from visiting again. For example, the case of a visiting grandmother who had heart problems and was taken into hospital, and on the day she was due to be discharged she had a fall and broke her hip, so was there for much longer and built up a much larger debt than she could have anticipated or that her family could pay straightaway. Also ILPA has experience of cases where NHS charges have been levied incorrectly and there is a dispute about liability.

Q.2 Where it is subsequently established that a holder of a long-term or multiple entry visa has evaded payments of NHS charges, is it fair to curtail or cancel their permission to travel to the UK?

ILPA repeats the points made above. If UKBA decides to introduce any such changes, it should not be done retrospectively; individuals should be warned in relation to specific debts that UKBA could be informed of the non-payment and this may have implications for their immigration status so that they have an opportunity to pay or negotiate instalments before losing the opportunity to travel to the UK. In many cases a migrant may be in a better position to repay debts if they are in the UK rather than if they are refused entry, for example if they have permission to work here or if they have access to other resources or resources from family members here.

Q.3 Should non-payment of NHS charges be sufficient grounds for delaying someone's application to become a British citizen or permanent resident?

See above. Any such decision would need to be considered on a case by case basis, and the applicant should have the opportunity to make representations about why it should not be a bar. There would need to be a new question on the application form about NHS charges and information in the guidance leaflet about how to pay before making the citizenship application. As identified in the preliminary points, all this is considerable additional administration for an issue which in ILPA's experience will only apply to a very small percentage of applicants. ILPA would again urge UKBA to carry out a more detailed and evidence-based health and equality Impact Assessment and cost benefit analysis and further research before introducing the proposal.

Q.4 Should there be a minimum level of outstanding payments owing before the new sanction is enforced?

Yes, there should be a minimal level of outstanding payments which should be set at least over £1,000. From a cost benefit analysis, as explained in the Impact Assessment, from an analysis of the potential adverse impact on patients' access to essential medical treatment, from a right to family life perspective and many other perspectives, ILPA does not consider that a refusal of entry or leave to remain in the UK can be justified for a debt of under £1,000.

Proposed system of data sharing

Q.5 Is it appropriate for the UK Border Agency to receive data on non-payers from the NHS in a more systematic manner across the UK?

We consider that the receipt of data on non payers from NHS is likely to lead to breaches of Article 8 of the European Convention on Human Rights right to privacy which are disproportionate and cannot be justified. They cannot be justified because of the lack of data on 'health tourism' or any evidence to show that immigration control will be improved by the new arrangements, combined with the minuscule amount of unpaid charges as a proportion of the whole NHS budget and the significant additional administrative costs to the NHS and the UKBA and other agencies of collecting, monitoring and exchanging the data.

Q.6 Are the proposed safeguards sufficient to protect the individual?

ILPA does not consider that the proposed safeguards are sufficient. We would propose the following additional safeguards:

- a. Information should not be exchanged without the consent of the patient or without them being given an opportunity to comment on it since liability may be disputed.
- b. There should be an annual analysis of the information and review of its usefulness including a cost benefit analysis.
- c. There should be a mechanism for complaints and independent monitoring.
- d. There should be provision that the information will not be passed on to private agencies such as debt collecting agencies or to any other agency.

Before any information is exchanged the patient should be informed and given an opportunity to comment on the liabilities of the debt or to make an arrangement to pay the debt.

Q. 7 How long should the NHS wait before it hands over data to the UK Border Agency on those who have failed to pay their NHS charges?

3 months or more because, in the experience of ILPA members, an NHS Hospital Trust as a large bureaucracy can be slow to provide information to a patient. Names and addresses may be incorrect, for example a letter may be sent to a relative rather than the patient. Migrants may have insecure addresses and so may not receive the invoice. The invoice will relate to someone who is or has been unwell and may find it more difficult to deal with their finances as a result of their illness. 3 months is the shortest period in which it is reasonable to expect an NHS demand for payment to reach the right person and that person to have an opportunity to contact the NHS department either to dispute the debt itself, or the amount of the debt, or to set up an arrangement to pay all of the debt or make payments in instalments.

Q. 8. Would you agree that information should be provided to the UK Border Agency by NHS Scotland Counter Fraud Services on non-payers as soon as it is clear that the overseas visitor will not pay?

As for question 7 above.

Coverage of data sharing

Q. 9. Is it appropriate to keep a record of previous non payments in order to assist the UK Border Agency in making informed decisions on any future immigration application? (Previous behaviour, conduct and character are matters that are pertinent to immigration decisions).

'People do not want the state keeping information on the basis that in some far-off and speculative circumstances it may be of benefit.

Damian Green, MP, Minister for Immigration, 9th June 2010 HC col 430

ILPA does not consider that it is appropriate to keep a record of previous non-payments of NHS charges on a UKBA file to enable them to take this into account in future immigration applications. There may be a number of reasons why a person has not paid a debt immediately, for example the individual may have developed an unexpected health condition whilst in the UK and for which they do not have means to pay immediately. The amount of administration required to investigate the reasons for past non-payments outweighs the small number of cases where non-payment might be relevant to any future immigration application. When any debt has been paid, or any charge has

been agreed to have been wrongly levied, the record should be removed from the UKBA file. In the absence of any statistical information, ILPA does not consider that such a measure can be justified as against for example Article 8 of the Human Rights Convention right to family life eg as in the current case of a Brazilian mother whose husband settled in the UK and new baby are in the UK; her entry clearance application appears to have been delayed pending an investigation of an NHS bill which the family are willing to pay.

Should UKBA intend to implement this proposal they would need to ensure they have a mechanism for keeping records up to date to indicate when payment is made, as a basic requirement of the Data Protection Act.

ILPA is concerned that the anecdotal case studies in the document are all one-sided. The case study in this part of the document (page 16) suggests that the businessman might have been obtaining NHS treatment by deception and therefore that a criminal charge might be appropriate so is not directly relevant to this consultation.

Q.10. In addition to the proposed safeguards, are further specific safeguards required to protect the interests of children or vulnerable individuals?

ILPA welcomes the confirmation that unaccompanied children, and people receiving s.4 and s. 95 support, are exempted from charges for secondary treatment. However we consider that all refused asylum seekers should be exempted from charges whilst they are in the UK and there is nothing to be gained from charging a refused asylum seeker who is likely to be without resources for essential secondary treatment; it simply increases NHS and UKBA administration. Subject to the Supreme Court's decision on the Secretary of State's appeal and taking into account the EC reception directive 2003/09 following *ZO (Somalia) v Secretary of State for the Home Department* (2010), refused asylum seekers who have made an unrecorded fresh claim are entitled to adequate healthcare, particularly if they are vulnerable due to being torture survivors, pregnant women, lone parents, disabled or having long-term health needs. ILPA also considers that all children of adults who have previously claimed asylum should be entitled to necessary medical treatment without the disincentive of charging whilst they are in the UK, taking into account the UKBA's 'safeguarding' duty under s.55 of the Borders, Citizenship and Immigration Act 2009 and the UK's obligations under the UN Convention on the Rights of the Child.

ILPA is concerned about the delay in considering the extension of free secondary treatment to people with HIV/Aids taking into account the recommendations of the Joint Committee on Human Rights in relation to this and would urge the Department of Health and UKBA to reach a conclusion on the HIV consultation as soon as possible.

Equality impact assessment

Q.11. Do you believe that the proposed changes to the Immigration Rules will have a disproportionate impact upon any particular group(s)? (Please tick all that apply.)

Our experience is the proposed changes will have a disproportionate impact upon disabled migrants because they are more likely to need NHS services than able bodied migrants. We do not think it is possible for the UKBA and Department of Health to carry out a full equality impact assessment without carrying out further research in relation to NHS charging and so-called health tourism because more statistical information is needed to justify any adverse impact. A consultation process is no substitute for rigorous research. ILPA believes that the proposed changes will have a disproportionate impact upon both UK citizens and migrants based on their ethnic or racial origin because a black or minority ethnic patient is more likely to be subject to closer investigation of their immigration status and eligibility than a white patient settled in the UK.

Q.12 In order to avoid unlawful discrimination, it is proposed that all patients seeking secondary care are asked the same 'baseline' questions about residence. Are you satisfied that this safeguard will assist in avoiding unlawful discrimination?

No. ILPA's experience is that migrant clients including those who are settled in the UK may be economically disadvantaged and so find it more difficult to prove their residence through documentation. As is identified in the Department of Health's consultation, older patients and mentally ill patients may have difficulty in understanding the baseline question and so provision is made for NHS staff to investigate. Patients whose first language is not English may also have more difficulties. ILPA would suggest that the amount of time taken by NHS staff to ask every patient the baseline question should be costed and cost balanced against the cost of charging and the costs taken into account when calculating the benefits to the NHS and the public purse of pursuing charges.

Information about you

- 13. Your name: Sophie Barrett-Brown, Chair of Immigration Law Practitioners' Association (ILPA)
- 14. Telephone number: 020 7251 8383
- 15. Email address: info@ilpa.org.uk
- 16. Postal address: Lindsey House, 40/42 Charterhouse Square, London EC1M 6JN
- 17. Do you work in the NHS? No
- 18. Are you responding as an individual or on behalf of an organisation? As an organisation
- 19. If you are responding as an individual, are you: A health professional No
- 20. If you are responding on behalf of an organisation, which of the following categories does it fall into?
Voluntary sector/charity x
Professional body x

Please indicate the region of the UK where the organisation is based.
England

Name of organisation: Immigration Law Practitioners' Association
Your position in the organisation: Chair

Immigration advisor/immigration law practitioner

28 June 2010