THE AIRE CENTRE
Advice on Individual Rights in Europe

ILPA

Note on EEA Applications and Comprehensive Sickness Insurance Cover

This note covers the requirement that self-sufficient EEA nationals and EEA national students have comprehensive sickness insurance cover. It discusses the conflicting UK case law on whether NHS cover is sufficient and the recent infringement proceedings that the European Commission has taken against the UK to establish that NHS cover is indeed sufficient.

Background

Under Article 7(1)(b) of Directive 2004/38, the UK is allowed to require EEA nationals exercising residence rights in the UK based on self-sufficiency to provide proof of comprehensive sickness insurance cover for themselves and their family members. The same is true for EEA nationals who are exercising a right to reside based solely on being a student (Article 7(1)(c)). This can raise issues in a variety of EEA applications:

- EEA1 applications where the EEA national is relying on being a student or self-sufficient, or being the family member of another EEA national who is a student or self-sufficient.
- VAF5 or EEA2 applications where a non-EEA national is relying on her EEA national family member being a student or self-sufficient.
- EEA3 applications where the EEA national is relying on periods when she was studying or was economically inactive.
- EEA4 applications where the non-EEA family member is relying on periods when she was studying or was economically inactive.
- BR1 applications from Bulgarian and Romanian students applying for registration certificates as students so that they can have permission to work up to twenty hours a week.

In June 2011, the UK Border Agency amended Annex A to chapter 4 of the European Casework Instructions to indicate what would be considered acceptable proof of comprehensive sickness insurance. UK Border Agency is willing to accept:

- a comprehensive private sickness insurance policy;
- a European Health Insurance from an EU Member State other than the UK; or
- in certain circumstances, S1, S2 or S3 forms (forms for reimbursement for medical treatment for certain individuals, including pensioners and those who have receive approval to get certain forms of healthcare in the UK).

There is some more detail in a memo from UK Border Agency's European Operational Policy Team, which the Immigration Law Practitioners' Association (ILPA) recently received following a Freedom of Information request and which is available to ILPA members on the ILPA website.

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Is it lawful for UK Border Agency to ask for this?

There is case law suggesting that the UK Border Agency can indeed ask EEA nationals who are relying on periods of study or self-sufficiency to show that they have or had private sickness insurance. In *Lekpo-Bozua v London Borough of Hackney* [2010] EWCA Civ 909, the Court of Appeal found that a French student who had been residing in the UK for over five years had not been residing in accordance with Article 7(1)(c) of Directive 2004/38, in part because '*she has in fact been the beneficiary of National Health Service medical care*' (paragraph 15). The case is not conclusive on the point, however, as the French student concerned was also a beneficiary of social assistance (through her British aunt who was receiving benefits), and therefore not self-sufficient, and it appears that counsel for the student and her aunt conceded that the student had not been residing in the UK in accordance with Article 7(1)(c). Furthermore, there is case law directly contradicting this, albeit from a lower jurisdiction (and the point was an obiter dictum). See *Secretary of State for Work and Pensions v SW* [2011] UKUT 508 (AAC) (15 December 2011), paragraph 20:

> *"I suspect that [the Swiss national appellant] did not work continuously for as long as five years but she would also have had a right of residence during any period when she was self-sufficient, being supported either by her late husband or from other resources and entitled to treatment under the National Health Service by virtue of satisfying the residence and presence conditions under domestic law*'"

Following complaints from ILPA and the AIRE Centre, the European Commission launched infringement proceedings against the UK on this point in April 2012. According to the Commission,

> *"Under the Free Movement Directive, EU citizens who settle in another EU country but do not work there may be required to have sufficient resources and sickness insurance. The United Kingdom, however, does not consider entitlement to treatment by the UK public healthcare scheme (NHS) as sufficient. This breaches EU law.*"[1]

The AIRE Centre believes that if the matter were considered properly, in the case of a student or self-sufficient person who did have sufficient resources to avoid becoming a burden on the UK's social assistance system, that in virtually every case the individual concerned would already be covered by comprehensive sickness insurance. There are three kinds of cases that could arise:

1. EEA nationals who are ordinarily resident in the UK.
2. EEA nationals temporarily staying in the UK who are habitually resident elsewhere in the EEA.
3. EEA nationals temporarily staying in the UK who are habitually resident outside the EEA, and not in a country that has a reciprocal healthcare agreement with the UK.

1. EEA nationals who are ordinarily resident in the UK

The European Commission noted in its own guidelines on the implementation of Directive 2004/38 that:

> *Any insurance cover, private or public, contracted in the host Member State or elsewhere, is acceptable in principle, as long as it provides* ***comprehensive coverage*** *and does not create a burden on the public finances of the host Member State. In protecting their public finances while assessing the comprehensiveness of sickness insurance cover, Member States must act in compliance with the limits imposed by Community law and in accordance with the principle of proportionality. (COM (2009) 313, paragraph 2.3.2, emphasis in the original)*

Under the National Health Service (Charges to Overseas Patients) Regulations 2011, it is unlawful to charge anyone for health services in the UK if that person is 'ordinarily resident' here. Although this excludes those who are unlawfully in the UK, like failed asylum seekers (see *YA v Secretary of State for Health* [2009]

[1] See http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/417&format=HTML&aged=0&language=EN&guiLanguage=en.

EWCA Civ 229), it does not appear that this excludes EEA nationals who are ordinarily resident here, regardless of whether they are otherwise exercising residence rights here; instead, the normal test of ordinary residence, set out by the House of Lords in *Shah v London Borough of Barnet* [1983] 2 AC 309. Furthermore, NHS care is an 'in-kind sickness benefit', meaning it is a social security benefit falling with the material scope of EU Regulation 883/04. Article 4 of Regulation 883/04 states that EEA nationals '*shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof*'. Therefore, if a British Citizen would not get charged for a particular service, the NHS cannot charge an EEA national for that service. (It is worth noting that EEA nationals who are not ordinarily resident in the UK but who are students here also cannot be charged for NHS care, under Regulation 8 of the National Health Service (Charges to Overseas Patients) Regulations 2011.)

In the AIRE Centre's view, this means that EEA nationals who are ordinarily resident in the UK are covered by comprehensive sickness insurance (the NHS) or, seen differently, do not need comprehensive sickness insurance as they are eligible for free comprehensive care on the NHS.

This is contrary to UK Border Agency's guidance and to what the Court of Appeal suggested in *Lekpo-Bozua*, but in accordance with the European Commission's view and the view of the Upper Tribunal in *SW.*.

Before taking this point forward as test litigation, or encouraging clients to get private sickness insurance, it is worth investigation whether an EEA national who is ordinarily resident in the UK may be covered through some other means. For example, pensioners, including those receiving invalidity pensions, will generally be covered for in-kind sickness benefits by the EU Member State(s) paying their pensions. See Regulation 883/04, Articles 23-25 and *SG v Tameside Metropolitan Borough Council* [2010] UKUT 243 (AAC) (15 July 2010) (paragraphs 20-28). They can receive NHS care, and the NHS can send the bill to the other EU Member State responsible for their in-kind sickness benefits.

The fact that the UK Border Agency will accept European Health Insurance Cards from other EU Member States, but not European Health Insurance Cards from the UK, as proof of comprehensive sickness insurance borders on the absurd. It means that a French person ordinarily resident in the UK will receive free, comprehensive NHS care; he will get a British European Health Insurance Card if they ask for one; if they have an accident and need emergency hospital care whilst in France on holiday, the NHS will pay for it; but they will not be recognised as exercising residence rights in the UK if they are economically inactive, even if they have sufficient resources to avoid becoming a burden on the UK's social assistance system, and even if they are studying. (Note that the NHS is not social assistance under EU law. The NHS delivers social security benefits, that is, in-kind sickness benefits.)

2. EEA nationals temporarily staying in the UK who are habitually resident elsewhere in the EEA

Such individuals will be able, under Article 19(1) of Regulation 883/04, to get in-kind sickness benefits (i.e. NHS care) in the UK '*which become necessary on medical grounds during their stay, taking into account the nature of the benefits and the expected length of the stay*'. The NHS can send the bill to the social security institution of the State where the person is habitually resident. The UK Border Agency now recognises that such individuals meet the sickness insurance requirements inasmuch as UK Border Agency will accept a European Health Insurance Card. However, it is important to note that the European Health Insurance Card is only evidence of a right; if an EEA national temporarily staying in the UK can prove that (s)he is habitually resident in another Member State and covered by that Member State's healthcare system by some other means, that too must suffice. This should also work for EEA nationals habitually resident in another country that has a reciprocal healthcare agreement with the UK (see directly below).

3. EEA nationals temporarily staying in the UK who are habitually resident outside the EEA, and not in a country that has a reciprocal healthcare agreement with the UK.

This is the only category of individuals who may not have comprehensive sickness insurance in the UK automatically, and may therefore have to show that they have private cover. For a list of those countries that have such agreements with the UK, see

http://www.dh.gov.uk/en/Healthcare/Entitlementsandcharges/OverseasVisitors/Browsable/DH_074391. So, for example, an Italian citizen who has only ever lived in the United States of America and who wants to make an extended visit to the UK, using ter savings to spend seven months on an extended visit, may need to show private comprehensive sickness cover to secure an EEA family permit and, once in the UK, a residence card for her American husband who is joining her. However, if she were studying in the UK for those seven months, then she and her husband should be exempt from charging under Regulations 8 and 24 of the National Health Service (Charges to Overseas Patients) Regulations 2011.

If you would like to discuss this note, please get in touch with Adam Weiss, aweiss@airecentre.org.

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