# Working with Migrant Children: Community Care Law for Immigration Lawyers

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## Overview

This booklet is intended to give immigration lawyers and others an understanding of the community care system for children and the welfare provisions that are available to them. It provides an introduction to the legal policy and framework and then a more detailed look at the welfare provisions for children in the asylum and care system, and how their immigration status may be relevant to some of the support they are entitled to receive.

### The Children Act 1989

The key piece of legislation that affects children in this area is the Children Act 1989 (CA 1989). The main points relevant to immigration practitioners that can be derived from the Act are as follows:

1) *Local authorities have a duty to assess children who are in need*

Under section 17 of the Children Act 1989 local authorities have duties to safeguard and promote the welfare of children in their area who are in need. When read in conjunction with the power to assess under paragraph 3 of schedule 2 to the Children Act 1989 and the statutory guidance, a duty to assess a child in need arises.

2) *Local authorities have a duty to investigate when they are informed of a child who is likely to suffer significant harm*

Under section 47 of the Children Act 1989 local authorities (through their social services departments) have a duty to make enquiries where they have reasonable cause to suspect that a child is suffering, or is likely to suffer, significant harm, in order to enable them to decide whether or not to take action. Harm can include exploitation, detention in an immigration removal centre or enforced removal to face persecution or breaches of rights under the European Convention on Human Rights.

3) *Local authorities have the power to provide assistance to families with children*

Section 17 of the Children Act 1989 empowers local authorities to provide assistance to 'children in need' and their families. Such assistance is most likely to be by way of accommodation and/or financial support, but it could extend to any other assistance that is necessary for the child's welfare.

4) *Local authorities must look after minors who cannot be appropriately looked after by someone else*

Section 20 of the Children Act 1989 obliges local authorities to 'look after' children with no parents, or children whose parents (or other adults with parental responsibility) are unable to care for them. The local authority can do this in many different ways, most commonly by arranging foster care placements. When looking after a child under s20 of the Children Act 1989 the local authority is acting as that child's 'corporate parent' which means that the local authority is stepping into the shoes of the child's parent. The concept of being 'looked after' is distinct from being placed in care by order of a court under s.31 Children Act 1989. Details about the law and procedure under s.31 Children Act 1989 are outside the scope of this document.

5) *Once a young person who was looked after by a local authority for 13 weeks or more turns 18, local authority social services departments must remain in touch with them. The local authority continues to have a duty to provide them with assistance until they are 21, or beyond that age (up to 25) if they remain in a programme of full-time education.*

Sections 23C–E of the Children Act 1989 deal with care leavers (18 and over). 'Care leavers' are 'former relevant children' as defined by s.23C of the Children Act 1989, those young people aged 18 to 21 who were eligible or relevant children. 'Eligible children' are those aged 16 to 17 who have been looked after by the local authority for at least 13 weeks after the age of 14 and who continue to be looked after. 'Relevant children' are similar to eligible children but are no longer looked after. Applying the concept of local authorities acting as corporate parents, those local authorities are obliged by ss23C-E of Children Act 1989 to remain in touch, plan the transition and provide support through the critical first few years of adulthood; the aim is to improve these young people's life chances.

6) *There is an over-arching duty to place children's welfare at the forefront of individual and general decision-making and an obligation to act in co-operation with other state bodies*

Every time a decision is made that impacts on a child (even if the immediate impact is on the parent, with the child suffering as a consequence) advisers should bear in mind ss 10 and 11 of the Children Act 2004, which place public authorities under an obligation to act in a manner which safeguards and promotes the welfare of children. This could provide the basis for an additional or free-standing legal challenge to try to obtain types of services or accommodation necessary to meet a child's specific needs. The duties under ss 10 and 11 of the Children Act 2004 strengthen the obligation on local authorities to co-operate with partner agencies in the safeguarding of children's welfare. A child's immigration status, or lack of it, does not affect this over-arching duty.

## The correlation between immigration and community care/social welfare rights

Practitioners will know that working with children can involve some of the most challenging, but also the most rewarding, casework, irrespective of the child's immigration status and family circumstances. The law in this area is fast-changing, and has been the subject of much litigation over the past few years, at both the international and domestic levels.

This section covers some of the key issues, mapping how immigration status impacts upon children's entitlement to community care services, as well as housing and welfare. In this section, the question is, 'Who is entitled to what?'

### Distinguishing between an unaccompanied child and a child who is a family member of a person seeking asylum

The treatment of children differs depending on whether they are in the UK alone or with family members.

### Separated Children

Some children will arrive unaccompanied in the UK having been separated from their families. Some of these might be seeking asylum. The term 'separated child' is a wider definition which encompasses unaccompanied asylum seeking children and those lone children who are separated from their family but who have not come to the UK to seek asylum, e.g. trafficked children.

Paragraph 4.2 of the UK Border Agency's 'Asylum Process Guidance on processing asylum applications from a child' [1] states that:

> *An unaccompanied asylum seeking child is a child who is:*
> *applying for asylum in their own right; and*

[1] Available at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/

*is separated from both parents and is not being cared for by an adult who by law has responsibility to do so*

Under Regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005 (SI 2005/07) the Secretary of State is obliged to endeavour to trace family members of an unaccompanied child as soon as possible after s/he makes a claim for asylum. The Regulations state that:

> *(1) So as to protect an unaccompanied minor's best interests, the Secretary of State shall endeavour to trace the members of a minor's family as soon as possible after the minor makes his claim for asylum.*
> *(2) In cases where there may be a threat to the life or integrity of the minor or minor's close family, the Secretary of State shall take care to ensure that the collection, processing and circulation of information concerning the minor or his close family is undertaken on a confidential basis so as not to jeopardise his or her safety.*

The importance of this tracing duty was highlighted by the Court of Appeal in *R (KA) (Afghanistan) v SSHD* [2012] EWCA Civ 1014. The tracing duty goes to establishing whether, if returned, a separated child would suffer prejudice as a result of inadequate reception conditions. The failure by the Secretary of State to make enquiries about reception conditions on return, when dealing with separated children's claims for asylum might lead to the asylum claim being unfairly determined. If a separated child attains majority but the tracing duty has not been discharged then the tracing duty continues, meaning that 'there is no temporal bright line where the risks to, and the needs of, the child suddenly disappear.'[2] This continuing tracing duty may also reinforce arguments about the local authority's need to support the young person in challenging the flawed decision.

Trafficked children are also separated children, and will need care by the state. They may apply for asylum or they may apply to be recognised as victims of trafficking but the same care entitlements apply to them and they may also be age-disputed like unaccompanied asylum seeking children. Social services may also have more complex duties to discharge as these children can be

[2] See Maurice Kay LJ at paras 7 and 18 of the judgment in *KA (Afghanistan)* [2012] EWCA Civ 1014

criminalised, when for example they were being used in the growing of cannabis, as a result of not being recognised as victims of trafficking.[3]

## Children as part of a Family Unit

When a child forms part of a family for purposes of a grant of leave or for removal and deportation, paras 3.1 - 3.3 of the Asylum Process Guidance *(Processing an asylum application from a child)* state:

> *3.1 Family members of principal applicants:*
> *i.e. their spouse and/or minor children, will normally be considered as their dependants. A dependent child who reaches the age of 18 prior to the decision on the principal applicant's application must continue to be treated as a dependant for the purposes of the application. At this point they can also make an application for asylum in their own right if they wish to do so.*
>
> *3.2 Where a dependent child lodges a separate claim*
> *A dependent child can also lodge a claim for asylum in their own right but where the child has previously been served with a one-stop notice as a dependant, and failed to raise asylum in a statement of additional grounds, consideration should be given to issuing a certificate under section 96 of the 2002 Act, after exploring all possible legitimate reasons for not doing so.*
>
> *Parents of a child applying for asylum cannot be considered as dependent on their child's claim.*
>
> *3.3 A child as the dependant of another child*
> *For the purposes of claiming asylum, a child cannot normally be regarded as the dependant in a sibling's claim. They would need to make their own claim and their files should be blue-taped together to ensure that the files travel together until the action or decision required has been completed and the cases concluded. Siblings may provide useful evidence relating to each others claims in some cases and it may be*

[3] Trafficking issues are discussed in more detail in Heaven Crawley, *Working with children and young people subject to immigration control: guidelines for best practice*, ILPA, 2nd edition, 2012

*appropriate, in keeping with the Immigration Rules and section 55 duty, to ensure case owners proactively seek to consider this issue in their decision making.*

*The only circumstances in which a child may be treated as a dependant on another child's application is where they are married to each other, in a civil partnership or in a same sex or unmarried relationship which has subsisted for two years or more, or where the principal applicant is the parent of the younger (dependent) child. Evidence of the relationship, e.g. a valid and genuine marriage certificate or birth certificate, is required. Other documentary evidence can be submitted and should be considered on a case-by-case basis, taking into account all the circumstances of the case including conditions in the child's country of origin.*

## Welfare and accommodation of asylum seeking children

When unaccompanied children apply for asylum and are not already known to a local authority, the UK Border Agency should refer them to a local authority for an assessment of their needs and the provision of accommodation and support (see section 6.4 of the UK Border Agency Asylum Process Guidance, *Processing asylum applications from a child*).[4]

If the UK Border Agency doubts the age of a person, the following procedures apply.[5]

If the UK Border Agency considers that the young person's physical appearance/demeanour very strongly suggests that they are significantly over 18 years of age then they will be treated as an adult. Before such a determination is made a Chief Immigration Officer or Higher Executive Officer must also determine the applicant's age and countersign the decision to treat someone as an adult in circumstances where they are asserting to be a child. Formal notice of such a decision must be given by form IS97M.

All other applicants should be given the benefit of the doubt and their asylum applications should be processed as children's applications pending a final determination of their age. Such an approach is designed to safeguard the welfare of children embodied in the Secretary of State for the Home Department's duty under s55 of the Borders, Citizenship and Immigration Act 2009.

This section imposes an important duty on the Secretary of State: a mandatory consideration for the way in which she discharges her immigration functions towards children. The duty under s55 of the Borders, Citizenship and Immigration Act 2009 is in part a reflection of the obligations of the state under the United Nations Convention on the Rights of the Child (UNCRC). In the important decision of *ZH (Tanzania) v SSHD* [2011] UKSC 4, the Supreme

[4] UK Border Agency's Asylum Process Guidance: processing an asylum application from a child, at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/processingasylumapplication1.pdf?view=Binary

[5] *Ibid.* http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/assessing-age?view=Binary

Court referred to Article 3(1) of the UN Convention on the Rights of the Child, which states that:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

Baroness Hale held that 'this is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law.' She went on to hold that:

> *this duty applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be 'in accordance with the law' for the purpose of article 8(2).*

The reference to Article 8(2) refers to Article 8 of the European Convention on Human Rights ('ECHR') which is given effect in the UK domestic context by the Human Rights Act 1998.

Although it is an unincorporated international human rights treaty, the CRC cannot be interpreted in a vacuum and must be read in harmony with the general principles of international law,[6] which include the European Convention on Human Rights.

The UK common law system also relies on caselaw precedent. The substance of the ruling by the Supreme Court in *ZH (Tanzania)* binds all lower courts.

If children are wrongly assumed to be adults this could lead to their being detained, or their cases decided within the fast track system, with adults. The very tight time limits and lack of available legal representation means that they could be deprived of an adequate opportunity to present their claim or appeal against any refusal.

They may also have their claim for asylum rejected because the doubt about their age has damaged their overall credibility, and if they are relying on having

[6] *Neulinger v Switzerland* (2010) 28 BHRC 706, para 131

been subjected to child-specific forms of persecution, then their applications may be undermined.[7]

Age is also a central part of a child's identity and a failure to believe that a person is a child could lead to their losing all confidence in the decision-making system and failing to disclose further and necessary details about their past persecution and future fears. If considered to be adults, they will also be refused accommodation under s20 of the Children Act 1989 and will be dispersed to asylum support accommodation as adults.

Because of the additional care needs and rights that a child in the asylum process has over an adult, it is important to challenge an assessment that a claimant is over the age of 18 where there is a basis to do so. There has consequently been considerable litigation around disputed age assessments of young asylum seekers.

## The duty to assess

Under the Framework for the Assessment of Children in Need and their Families[8] (read in conjunction with Working Together to Safeguard Children Guidance) local authorities must conduct an initial assessment within 10 working days of receiving a referral of a potential child in need. That initial assessment will determine whether the child is in need, the nature of any services required, from which authority and within what timescales, and whether a further, more detailed core assessment should be undertaken.

The core assessment is an in-depth assessment which addresses the central or most important aspects of the needs of a child and the capacity of his or her parents or care givers to respond appropriately to these needs within the wider family and community context. It should also, of course, set out how those needs are to be met. The local authority has 35 working days to

[7] See AA (Afghanistan) v SSHD [2007] EWCA Civ 12

[8] Working Together to Safeguard Children Guidance; March 2010, chapter 5, at https://www.education.gov.uk/publications/standard/publicationdetail/page1/DCSF-00305-2010 (DCSF) and the Framework document, at: https://www.education.gov.uk/publications/eOrderingDownload/Framework%20for%20the%20assessment%20of%20children%20in%20need%20and%20their%20families.pdf (Department of Health, 4 April 2000)

complete the core assessment, running from completion of the initial assessment.

## Who must assess and provide services?

For services under the Children Act 1989 the initial duty to assess lies on the authority in whose area the child is physically present (see s20 of the Children Act 1989). If local authority A considers that a different local authority is responsible for supporting the child then local authority A must still assess and provide services to the child, and dispute with local authority B without affecting the provision of services to the child.[9] The Secretary of State for Education ultimately decides which authority is responsible, after a statutory dispute resolution procedure,[10] but that dispute cannot lawfully delay the provision of services to the child or his or her family.

[9] See Department of Health Circular 93(7)
[10] See s30 of the Children Act 1989

## Age disputes

There is now a large body of caselaw in relation to age disputes. Age, whether a person is or is not under 18, is a vital determinant both of how a person's asylum or immigration claim will be considered, and of the services to which he or she may be entitled. The main cases to be aware of are *R (B) v Merton LBC* [2003] 1689 (Admin), *R (A) v Croydon LBC* [2009] UKSC 8, *R (FZ) v Croydon LBC* [2011] EWCA Civ 59 and *R (CJ) v Cardiff CC* [2011] EWCA Civ 1590. This guide will only touch briefly on the main points about age disputes.[11]

Determining someone's age is an extremely difficult exercise and it is not possible to be completely accurate. This means that local authorities often have to make assessments of children's ages based on a wide range of factors which can be complex.

*Any* age-related evidence is therefore highly relevant to the assessment, so before seeking to challenge an age assessment it is important to obtain any evidence available as to a person's age. Attempts should therefore be made to verify any documentation the child may have with them or can obtain, in the form of passports, national or school identity cards, family records or similar. Schools, doctors, hospitals, local officials, non-government organisations in the field and other objective sources of data about their age will need to be followed up. Statements and affidavits from family and community members, if available to ask, should also be sought.

### Documents

The provision of documentary evidence as to the child's age is often not sufficient to satisfy a local authority. For example, a child may arrive with a passport or birth certificate or ID card but these may have been procured in a false name to facilitate the child's entry to the UK and be unreliable.

The child may come from a country where birthdays are not celebrated and births are not regularly registered and so have no documentary evidence at all. Such a child may not know his or her actual age.

[11] *When is a child not a child? Asylum, age disputes and the process of age assessment,* Heaven Crawley, ILPA, 2007, and *The fact of age: review of case law and local authority practice since the Supreme Court judgment in R (A) v Croydon LBC [2009],* Children's Commissioner, 2012, discuss this in more depth.

Further, the UK Border Agency and local authorities are often suspicious about any documentation emanating from certain countries, and are also often suspicious of individuals from certain countries claiming to be a particular age. For example, some young people from Afghanistan rely on an identity document called a *Tazkira* but there is evidence that such documents can be easy to obtain through unofficial channels. The context and provenance of the documents have to be carefully considered. Caution should also be taken even where an expert's report has been obtained to authenticate an identity document. In the High Court in *R (CJ) v Cardiff* there was little if any weight placed on the claimant's expert's report on his identity documents.[12]

The High Court in *CJ v Cardiff* referred to the importance of the decision in *Tanveer Ahmed v SSHD* [2002] UKIAT 439, with which many immigration practitioners will be familiar. That decision held that the burden was on the person seeking to rely on a document to show that it can be relied upon. However, this is not easily reconciled with the Court of Appeal decision in *CJ*'s appeal. It decided that when determining a person's age the court exercises an inquisitorial function[13] and therefore the concept of a legal burden of proof is inappropriate.

## Expert evidence

For several years it was standard practice for either immigration or community care practitioners to obtain a paediatric expert's report as to the client's age, and base a challenge to the age assessment on the report and any procedural defects in the assessment process. In the last couple of years, however, the courts too have accepted that paediatricians cannot reliably determine a young person's age. Moreover, the methodology used by the main paediatricians instructed by practitioners has been found to be unreliable.[14] The courts have consequently become reluctant to give too much weight to such assessments until the problems identified in the methodology are properly addressed

Independent social workers' reports were also used in age assessment cases for some time. The independent social workers (there ought to be two of

[12] See Ouseley J, at paras 103-114
[13] See paras 21 and 22
[14] See *R (R) v LB of Croydon* [2011] EWHC 1473 (Admin)

them)[15] assess the claimant and reach their own assessment of the claimant's age, whilst also highlighting any concerns that they have about the adequacy of the local authority assessment. However, the courts have cast doubt on the value of such evidence,[16] so it is questionable whether it is worth relying on until the criticisms made by the courts are addressed.

## Relevant caselaw, and the changing role of the courts

Like many community care cases, challenges to age assessments are by way of judicial review of the local authority's assessment. Until 2009 that created a familiar problem for practitioners: the decision was a factual one, but the factual conclusions could not be challenged by way of judicial review, so an assessment could only be challenged on public law grounds (for example, if the assessment process was defective). The Administrative Court was reluctant to interfere with factual findings, and confined itself to giving guidance as to the requirements of a lawful assessment.

The lead case in this area was *R (B) v Merton London Borough Council* [2003] 1689 (Admin) which gave rise to the phrase 'Merton compliance', which is used to refer to assessments complying with this and other judicial guidance.[17] In this case the court ruled that:

> *…except in clear cases, the decision maker cannot determine age solely on the basis of the appearance of the applicant. In general, the decision maker must seek to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years. Ethnic and cultural information may also be important. If there is reason to doubt the applicant's statement as to his age, the decision maker will have to make an assessment of his credibility, and he will have to ask questions designed to test his credibility*. (Stanley Burnton J, para 37)

[15] See Stanley Burnton J in R(B) v Merton LBC [2003], para 33

[16] See *R (on the application of AM) v Solihull Metropolitan Borough Council* (AAJR) [2012] UKUT 00118 (IAC)

[17] A useful case which summarises the requirements of a lawful age assessment is HHJ Thornton's decision in *R (AS) v London Borough of Croydon* [2011] EWHC 2091 (Admin), paragraph 19.

The appeal before the Supreme Court in *R (A) v Croydon London Borough Council* [2009] UKSC 8 fundamentally changed the way in which the Court dealt with age assessment judicial review cases. Baroness Hale delivered the lead judgement and found that the question of whether a person was a 'child' was a question to which there was a right or a wrong answer. It might be difficult to determine what that answer was, and decision-makers had to do their best on the basis of less than perfect or conclusive evidence, but that was true of many questions of fact which regularly came before the courts; it did not prevent them from being questions for the courts rather than for other kinds of decision-maker.

The result was that if issues remained about the age of a person seeking accommodation under s20(1) of the Children Act 1989, then the court would have to determine where the truth lay on the evidence available. It was not clear how this would translate into practice, as the Administrative Court was not a forum in which factual issues were generally adjudicated upon.

The matter therefore came before the Court of Appeal, in *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59, in which the Court sought to set out appropriate guidance on procedural aspects of the age assessment process and the correct test for granting judicial review. The court emphasised that following the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 (SI 2010/2655) the usual forum for age assessment cases would be the Upper Tribunal exercising its judicial review functions (as opposed to its appellate function of the FTT) after permission had been considered by the High Court. The Court in *FZ* held that:

> *an applicant should be given a fair and proper opportunity, at a stage when a possible adverse decision is no more than provisional, to deal with important points adverse to his age case which may weigh against him* (para 21)
>
> *the appellant should have had the opportunity to have an appropriate adult present* (para 23)
>
> *..the court should ask whether the material before it raises a factual case which, taken at its highest, could not properly succeed in a contested factual hearing.* (para 26)

A further judgment to note is *R (PM) v Hertfordshire County Council* [2010] EWHC 2056 (Admin), which established that the High Court, when considering a claim for judicial review relating to an age assessment made by a local authority, is not bound by a decision reached by an immigration judge. The judge in that case said:

> *… I do not consider that a local authority charged with obligations to children under sections 17 and 20 of the 1989 Act is bound by a simple finding of fact by the FTT as to the age of an applicant for support, that finding not being a judgment* in rem *or otherwise binding in law on the local authority, or on other strangers to the asylum and immigration appeal. After such a finding has been made, in an appropriate case, it is for the authority to reassess the age of the section 20 applicant. In doing so, they must take into account any new evidence (including evidence before the tribunal that was not previously been before them), and give due respect to the basis and reasoning of tribunal's finding, whilst taking account of the fact that they may have different evidence available to them.* (Hickinbottom J, para 88)

This means that whilst a determination on age by an immigration judge of the First-tier Tribunal does not bind a local authority, if that local authority does not agree with the First-tier Tribunal's determination it must give reasons for not attaching sufficient weight to that determination. A decision on age by the First-tier Tribunal does, however, bind the Secretary of State for the Home Department.

Following the introduction of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 (SI 2010/2655) the Upper Tribunal when exercising judicial review functions can deal with age assessment cases. As stated above, the Court of Appeal in *FZ* encouraged the Administrative Court to transfer such cases to the Upper Tribunal if permission is granted, and that is what generally now happens in practice.

It is important for immigration practitioners to consider the tactical points in deciding whether to push on with an asylum appeal for an unaccompanied asylum seeking minor rather than apply to adjourn pending an age determination by the High Court/Upper Tribunal. For example, the asylum claim may not rest on age-related issues as to the risk on return and it may be better for the client to get on with the asylum appeal. Where age is an issue, the standard of proof in asylum cases in the First-Tier Tribunal is lower than

that in the High Court and it may be, on the basis of the evidence available, easier to secure a determination of a client's minority in the First-tier Tribunal.

## Age-disputed minors in detention

Some practitioners may encounter young people in detention who have been assessed to be adults by a local authority. They will be treated as adults by the UK Border Agency on the basis of the age assessment. It is important to consider whether the power to detain is being exercised unlawfully because of a failure to follow relevant policy and the duty under s55 of the Borders, Citizenship and Immigration Act 2009.

Children should not normally be detained but there will be circumstances where defective evidence of majority is relied upon by the UK Border Agency to justify detaining an age-disputed minor. Social services still have a duty to safeguard the welfare of children who are detained and although they cannot physically accommodate a child whilst he or she is in detention, a duty to assess and/or instigate a s.47 Children Act 1989 assessment still exists, where the local authority believes the person is a child.

Where an unlawful age assessment is relied upon to justify detention the initial focus should be to get the age disputed minor out of detention to the care of the local authority so that his or her age can be properly determined either whether by the local authority by way of a reassessment or by the Court.

## What services can separated children granted discretionary leave to remain access?

Many separated children are granted discretionary leave to remain until the age of 17½. If the child applies to extend that leave to remain before it expires, the leave will continue on the same terms and conditions whilst that application, and any appeal against a refusal, is pending.[18] If the application to extend is made after the leave to remain has expired then that leave will not be extended during the period of any appeal and will lapse. It is therefore vital to try to ensure that that the application to extend/vary the leave to remain is made before the expiry of discretionary leave to remain.

As long as the child/young person has leave to remain they will be entitled to social security, housing, education, health and social care in the same way as anyone else. However, whilst the child is under 18 the primary responsibility for accommodating and supporting the child will rest with the local authority, which is obliged to assist under the Children Act 1989. Such support should be provided under s20 of the Act.

## Section 20 (not Section 17) of the Children Act 1989 for separated children

Until 2009 local authorities, aware of the financial implications of providing support under s20, had a tendency to insist that unaccompanied asylum seeking children be accommodated under s17 instead, but the House of Lords decision in *R (G) v Southwark LBC* [2009] UKHL 26 made it absolutely clear that a separated child seeking support under the Children Act 1989 should normally be supported under s20 of that Act.

Baroness Hale stated at paragraph 28 of this judgment that

> *Section 20(1) entails a series of judgments, helpfully set out by Ward LJ in* R (A) v Croydon London Borough Council *[2008] EWCA Civ 1445, at para 75. I take that list and apply it to this case.*
> *(1) Is the applicant a child? .....*
> *(2) Is the applicant a child in need? This will often require careful assessment. In this case it is common ground that A is a child in need,*

[18] Under s3C Immigration Act 1971

*essentially because he is homeless.*
*(3) Is he within the local authority's area?*
*(4) Does he appear to the local authority to require accommodation?*
*(5) Is that need the result of:*
*(a) there being no person who has parental responsibility for him; for example, where his parents were unmarried, his father does not have parental responsibility, and his mother had died without appointing a guardian for him;*
*(b) his being lost or having been abandoned; or*
*(c) the person who has been caring for him being prevented from providing him with suitable accommodation or care.*
*(6) What are the child's wishes and feelings regarding the provision of accommodation for him? … It follows, therefore, that every item in the list had been assessed in A's favour, that the duty had arisen, and that the authority were not entitled to 'side-step' that duty by giving the accommodation a different label.*

The government issued statutory guidance following the court's decision in *G v Southwark* called *Provision of Accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation*[19] which again made the position clear by stating that:

> 2.23 *There can be no doubt that where a young person requires accommodation as a result of one of the factors set out in section 20(1)(a) to (c) or section 20(3) then that young person will be in need and must be provided with accommodation. As a result of being accommodated the young person will become* looked after *and the local authority will owe them the duties that are owed to all looked after children, set out in sections 22 and 23 and once they cease to be looked after, the duties that are owed to care leavers under that Act.*

[19] *Provision of Accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation: Guidance to children's services authorities and local housing authorities about their duties under Part 3 of the Children Act 1989 and Part 7 of the Housing Act 1996 to secure or provide accommodation for homeless 16 and 17 year old young people*. Issued: April 2010 (DCSF), at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/8260/Provision_20of_20accommodation.pdf

## What services can migrant young people access after turning 18?

As stated above, where a child is looked after by a local authority under s20 of the Children Act 1989 for over 13 weeks whilst under 18 they become a 'former relevant child' and after turning 18 are owed duties as a 'care leaver'[20] under ss23A-E of the Act.

The services that a migrant former relevant child can receive after turning 18 can be affected by their immigration status.

**Does the child/young person have leave to remain in the UK?**

If the care leaver has been granted asylum, when they will have been given limited leave to remain for an initial five-year period, or if they have discretionary leave, or leave on the same terms and conditions as discretionary leave to remain (having applied to extend it before its expiry, see above) then they remain entitled to all forms of mainstream social welfare and housing.

***Social Security***

Young people can claim jobseeker's allowance or income support or employment support allowance, housing benefit, disability living allowance, etc. They ought to be referred for welfare benefits advice to check that they are receiving the correct welfare benefits.

***Housing***

Young people can also secure accommodation from the local authority under the homelessness legislation (Part VII of the Housing Act 1996) because, as care leavers under the age of 21, they are considered to be in priority need of accommodation (Article 4 of the Homelessness (Priority Need for Accommodation) (England) Order 2002, SI 2002/2051).

They will also be eligible for allocations of permanent accommodation under Part VI of the Housing Act 1996, through the housing register. Although there are often long waiting lists, it is worth bearing in mind that many local authorities have schemes by which care leavers are given priority or even directly allocated secure tenancies, pursuant to a quota agreed between the housing and social services departments. Some local authorities do not refer migrant care leavers for accommodation under these schemes unless they

[20] See page 2 above.

have indefinite leave to remain in the UK, or do so on the basis of the length of time that the young person spent in care. Such policies may well be challengeable as they may unlawfully discriminate against migrant care leavers.

## Leaving Care Act support

As long as the young person was supported by the local authority under s20 of the Children Act 1989 for at least 13 weeks prior to their 18th birthday, they will also be entitled to support under ss23C-E and 24-24D of the Children Act 1989 (the provisions inserted into the Act by the Children (Leaving Care) Act 2000) once they turn 18.

Broadly speaking, this means that the local authority is obliged to provide the young person with a personal adviser (who is not their social worker), and prepare a Pathway Plan setting out the young person's needs during their transition to adulthood (at least the age of 21), how those needs are to be met and planning for contingencies in the event those plans are unsuccessful. The list of matters to be covered in the Pathway Plan is set out in secondary legislation (from 1 April 2011 the Care Leavers (England) Regulations 2010 (SI 2010/2571)).

These obligations remain binding on the local authority until the young person turns 21, but if the young person is pursuing a programme of full-time education that extends beyond their 21st birthday then the obligations continue to bite until the young person's 25th birthday (s23 of the Children Act 1989). Many local authorities consider that this only applies to university education, not other forms of education. That is incorrect. Neither s.24B Children Act 1989 nor the Children Act Guidance and Regulations Volume 3: *Planning Transition to Adulthood for Care Leavers* (Ch.5) make any restrictions on the level of education available to care leavers.

It is also arguable that such support to a young person as a care leaver includes providing practical assistance in securing appropriate immigration advice and representation. This is something that rarely happens in practice but ought to be done, applying the concept of the local authority's corporate parenting duty.

## If the young person does not have discretionary leave, do they still have a pending asylum claim or appeal?

If the young person did not apply to extend discretionary leave before it expired but has a pending asylum claim or appeal, then (so long as the asylum claim has been formally recorded by the Home Office as an asylum claim or accepted as a fresh claim) they will be entitled to accommodation and support under s95 of the Immigration and Asylum Act 1999 (formerly known as 'NASS' support). This will consist of accommodation anywhere in the country (so the young person could be dispersed to a different town) and basic subsistence in the form of a card redeemable at certain shops, amounting to a subsistence level of support. If the young person can somehow arrange their own accommodation but is destitute they can secure subsistence-only support (the card for food and essentials). However a migrant care leaver who is owed a duty for ongoing support by the local authority should rarely be supported under s95, unless the migrant care leaver chooses to do so for reasons set out below.

## Section 95 support v Leaving Care support

What if the young person is also entitled to leaving care support (as above)? The Court of Appeal dealt with this issue, in *R (SO) v Barking & Dagenham LBC* [2010] EWCA Civ 1101, with LJ Tomlinson deciding that:

> *since the powers under s.95 (and s.4 ) of the Immigration and Asylum Act 1999 are residual, and cannot be exercised if the asylum seeker (or failed asylum seeker) is entitled to accommodation under some other provision, a local authority is not entitled, when considering whether a former relevant child's welfare requires that he be accommodated by it, to take into account the possibility of support from NASS.* (para 40)

So responsibility will fall on the local authority notwithstanding entitlement to asylum support from the Home Office. Local authorities are not entitled to refuse leaving care support on the basis that the migrant care leaver is entitled to s.95 support.

## If the young person does not have a pending asylum claim or appeal, have they submitted a fresh claim for asylum or leave to remain on human rights grounds which remains pending?

If so, and the claim has not been recorded as a claim for asylum, then the young person could be entitled to accommodation and support under s4 of the Immigration and Asylum Act 1999 so long as they meet the criteria set out at Regulation 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005, SI 2005/930. The common thread in the criteria is that the young person is unable to return to his/her country of origin for reasons beyond his/her control. Regulation 3(2) (e) *('the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights within the meaning of the Human Rights Act 1998')* is the most common criterion that is relied upon, and applies if the young person has submitted a fresh claim for asylum or leave to remain on human rights grounds which has not yet been determined or recorded and which is not manifestly unfounded.

## Section 4 support v Leaving Care support

The Court of Appeal's judgment in *SO v LB Barking & Dagenham* [2010] EWCA Civ 1101 above applies to s4 support just as it does to s95 support. Therefore, if a young person is entitled to support as a care leaver the responsibility for accommodating and supporting him or her them will fall on the local authority, rather than the Home Office. This will, however, be subject to s54 read with Schedule 3 of the Nationality, Immigration and Asylum Act 2002, and also the assessment by the local authority of whether support is required to avoid a breach of a migrant care leaver's rights under the European Convention on Human Rights. However, given that the court in *SO* ruled that local authorities are not entitled to look to s95 and s4 of the Immigration and Asylum Act 1999 support as alternatives to leaving care support, it is quite a narrow category of care leaver who will be excluded from leaving care support because of Schedule 3; usually someone who has no outstanding claim for leave and refuses to co-operate in leaving the UK.

Section 54 of the Nationality, Immigration and Asylum Act 2002 gives effect to Schedule 3 to that Act, which provides that certain forms of support given by local authorities (including most forms of Children Act support) need not be given to people who fall within certain specified categories, which include

people who are unlawfully in the UK (which will cover most overstayers and refused asylum seekers) unless, and to the extent that, such support is required to avoid a breach of their rights under the European Convention on Human Rights or European Treaty rights.

This does not apply to children (so support provided under s20 of the Children Act 1989 is not included) and services provided under s2 of the Chronically Sick and Disabled Persons Act 1970 are also not included. It does, however, apply to the leaving care provisions.

In assessing whether or not a young person is eligible for leaving care support it is necessary first of all to assess whether or not they fall into one of the classes of people referred to in paragraphs 4-7A of Schedule 3. Most of the paragraphs are fairly self-explanatory: they are (i) refugee status abroad (ii) citizen of other EEA State (iii) failed asylum-seeker (iv) person unlawfully in United Kingdom.

Not all failed asylum seekers will necessarily be caught by these restrictions. That will depend first on whether removal directions have been set with which they have failed to comply (i.e. the Secretary of State identified a time, date and flight on which they should leave and they failed to show up for this). If this is not the case, then it will depend on whether or not they are unlawfully in the UK.

This in turn will depend on whether or not they applied for asylum at port of entry to the UK. The authority for this is the part of the judgment of Mr Justice Lloyd-Jones in *R (AW & others) v Croydon LBC & others* [2005] EWHC 2950 (Admin) which was not appealed against:

> *A failed asylum-seeker who is not to be regarded as in the United Kingdom in breach of the immigration laws is not, without more, rendered ineligible following the determination of his claim for asylum. He is placed in a more advantageous position than a failed asylum-seeker who is present in breach of the immigration laws. For the reasons stated above, this would, in general, have the effect of distinguishing between those who claim asylum at their port of entry and those who claim it later and would result in the more generous treatment of the former*. (para 20)

Therefore if the young person claimed asylum at port of entry to the UK then they are not caught by Schedule 3 and remain entitled to leaving care support until such time as they refuse to co-operate with their removal from the UK.

If the young person did not claim at port of entry or has failed to comply with removal directions, then no support under the Children Act 1989 as it relates to adults (e.g. 23C CA 1989) can be provided unless it is necessary to prevent a breach of the young person's rights under the European Convention on Human Rights.

When can a young person argue that a failure to provide support would breach their human rights? When they cannot reasonably be expected to return to their country of origin voluntarily, most commonly because they have submitted a fresh claim for asylum or an application for leave to remain on human rights grounds, which remains pending and which is not 'manifestly unfounded' (i.e. obviously hopeless). The relevant case on this point is *R (Binomugisha) v Southwark LBC* [2006] EWHC 2254 (Admin), in which the Court held that:

> *In the present case, it is the essence of the Claimant's application to the Home Office that there is an impediment to him returning to Uganda (namely the effect that such a move would have on his mental health). For the reasons which I have just given, I consider that the local authority could only dismiss this objection to returning to Uganda if it decided that the Article 8 claim was manifestly unfounded*. (para 55)

So the local authority cannot take the place of the Home Office and determine whether or not the young person's immigration application will succeed or not. If an immigration claim which raises asylum or human rights grounds is outstanding and if the alternative is street homelessness and destitution, then the local authority will be obliged to accommodate and support to avoid a breach of the young person's rights under the European Convention on Human Rights, even though such support is otherwise excluded under Schedule 3.

## What if the young person has no outstanding claim for leave to remain?

In these circumstances it is unlikely that the local authority will have any obligation to support the young person, unless the young person can demonstrate that, for reasons beyond their control, they are unable to return to their country of origin for the foreseeable future. However, even then they are likely to have to demonstrate that they have done what they can to return (e.g. applying to Refugee Action's Choices project or direct to the International Organization for Migration for assistance with a voluntary return).

In cases of failed asylum seekers who are care leavers seeking support, whether they have or do not have outstanding applications, the local authority will conduct a 'human rights assessment.' There is no requirement to conduct this as a separate assessment; human rights considerations can be properly dealt with in the context of the Pathway Planning process which is essentially an assessment of need and consequent service provision. The Guidance for local authorities on making Pathway Plans states at para 6.22 that in respect of pathway plans for children and young adults, local authorities should adopt a dual or triple planning approach to take account of the possibility of leave being granted or refused or a return to the country of origin.

In the case of a failed asylum seeker care leaver with no outstanding application, the local authority should be aware that the failure to support would lead to destitution and a breach of Article 3 of the European Convention on Human Rights, the prohibition on torture, and inhuman or degrading treatment. It is arguable that support can reasonably be provided for a short period of time until, for example, steps are taken to return or a fresh claim is submitted. It is only where a failed asylum seeker migrant care leaver with no outstanding claim for leave is refusing to co-operate in leaving the UK that support can be refused. Any resulting Article 3 breach caused by destitution will be considered to be a result of their own actions rather than of those of the State.

## Help to leave the UK

Sometimes a young adult migrant care leaver will make an informed decision, after taking legal advice, to leave the UK, in which case they can approach the Choices Project at Refugee Action to discuss their options.[21] They may have reached the end of the immigration line, with no prospect of any further immigration applications, and face street homelessness and destitution. In these circumstances, under Regulation 3 of the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 SI 2002/3078, local authorities have the power to arrange travel back to the person's country of origin and to accommodate them in the meantime. But this duty only applies to people with dependent children who have not failed to comply with removal directions in the past, to EEA nationals and to people granted refugee status in another (non-EEA) state.

## Dependent Children

The social welfare entitlements of accompanied children are very different from those of unaccompanied asylum seeking children, but again, the first step to assessing entitlement is to determine the parent's (and the child's) immigration status.

***Has at least one parent, or the family as a whole, been granted refugee status?***

If the family's asylum claim was successful they ought to have been recognised as refugees and granted leave to remain in the UK for an initial period of five years. They will therefore be entitled to mainstream social security (income support, jobseeker's allowance, employment support allowance, child benefit, child tax credit, working tax credit etc.) on the same basis as others living in the UK.

They will also be entitled to mainstream housing assistance under Parts VI (allocation of permanent accommodation through the housing register) and VII (homelessness assistance) of the Housing Act 1996. A family with dependent children will be deemed in priority need, but there is an important exception.

[21] For details see http://www.refugee-action.org.uk/ourwork/choices/default.aspx

If the children are 'persons subject to immigration control' in benefits terminology, s185(4) of the Housing Act 1996 provides that the children will not be taken into consideration and will not therefore confer priority need on the parents/guardians. That provision has been declared to be incompatible with the UK's obligations under the European Convention on Human Rights (see *R (Morris) v Westminster CC* [2005] EWCA Civ 1184), which has led to an alternative mechanism by which such families will be given accommodation in the private sector instead (s193 (7AA) of the Housing Act 1996). Before s193 (7AA) HA 1996 came into force a local authority decided to provide private sector accommodation to a family in this situation, and the family challenged that decision, eventually ending up in Strasbourg (*Bah v UK* Applic. No. 56328/07). The European Court of Human Rights decided, for reasons not relevant here, that the local authority's decision was not discriminatory, but left the door open for challenges to the legality of s193 (7AA).

***Is at least one parent British?***

If one parent is British then the first port of call should be the British Nationality Act 1981, under which it may be established that the child is a British citizen. If the child is a British citizen then that child is also a European Union citizen and has rights to enjoy such citizenship under Article 20 of the Treaty on the Functioning of the European Union (C-83/54) (TFEU).

In *Ruiz Zambrano v ONEm*, C-34/09, the Court of Justice held that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children. It also precludes the state from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen (para 45).

The point has been successfully argued in the Court of Appeal in *Pryce v Southwark LBC,* **[2012] EWCA Civ** [2012] EWCA Civ 1572, which applied the *Ruiz Zambrano* judgment in a domestic context. Although that judgment concerned homelessness assistance, it is nonetheless relevant to entitlement to community care services.

It is important to appreciate that where a right to reside is given in recognition of Article 20 TFEU rights then Schedule 3 does not apply. However, secondary

legislation introduced on 8 November 2012[22] has excluded a parent with a right of residence derived directly from the TFEU in this way from Housing Act 1996 assistance and from claiming welfare benefits. The rights to reside and to work are, however, recognised in the Regulations[23]. The extent to which the regulations give effect to the decision of the Court of Justice in *Ruiz Zambrano* is questionable and likely to be the subject of litigation.

***Is at least one parent an asylum seeker, and is the child named as a dependent on the claim?***

If so, then for as long as the family is destitute it will be entitled to subsistence support from the Home Office under s95 of the Immigration and Asylum Act 1999 and to accommodation under the same provision if homeless.

***What if the family's asylum claim has been refused and all appeal rights have been exhausted?***

As long as the children were dependent on the asylum claim while it was pending then the family will continue to receive s95 support even if the claim has been refused and any appeals have been unsuccessful (s94(5) of the Immigration and Asylum Act 1999).

[22]The Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012, SI 2012/2588 and the Social Security (Habitual Residence) (Amendment) Regulations 2012, SI 2012/2587.

[23] The Immigration (European Economic Area) (Amendment) (No 2) Regulations 2012, SI 2012/2560

## Section 95 support v Children Act support

The local authority has the power to provide accommodation and support to a family under s17 of the Children Act 1989 if (due to destitution, for example) the children of the family are considered to be 'children in need.' That power is affected by Schedule 3 to the Nationality, Immigration and Asylum Act 2002 (see below) but also by s122 of the Immigration and Asylum Act 1999, which provides that local authorities cannot provide support to children and their families if the families can avail themselves of s95 support and if such support meets the essential living needs of the child.

The provisions of s122 of the Immigration and Asylum Act 1999 do not absolve the local authority of its duty to assess. If it is determined that s95 support does not meet all the essential living needs of a child then support under s17 of the Children Act 1989 can be provided to 'top up' (but not to replace) the s95 support. This might be useful, for example, where the children of asylum seeking parents have special needs or where the children are infants requiring special infant food, nappies etc. There is also provision at s.122 of the Immigration and Asylum Act 1999 for the Secretary of State to request assistance from a local authority to meet her obligations to families with children.

***What if the family is not entitled to s95 support?***

It is not unusual for a child to be born in a situation where at least one parent's claim for asylum has already been refused, or visa has expired. In these circumstances the family might be entitled to accommodation and support under s17 of the Children Act 1989, subject to Schedule 3 to the Nationality, Immigration and Asylum Act 2002. The family would need to demonstrate that they are taking steps to return or to make, or be in the process of making, a further claim for leave to remain of some kind to overcome Schedule 3.

The issue was considered by the Court of Appeal in *R (Clue) v Birmingham City Council* [2010] EWCA Civ 460, with Lord Justice Dyson remarking that:

> *I find it difficult to conceive of circumstances in which a local authority could properly justify a refusal to provide assistance where to do so would deny to the claimant the right to pursue an arguable application for leave to remain on Convention grounds*. (para 62)

He concluded that the correct approach was that adopted by the High Court in *Binomugisha* (see page 25 above):

> *I conclude, therefore, that when applying Schedule 3, a local authority should not consider the merits of an outstanding application for leave to remain. It is required to be satisfied that the application is not 'obviously hopeless or abusive' to use the words of Maurice Kay LJ. Such an application would, for example, be one which is not an application for leave to remain at all, or which is merely a repetition of an application which has already been rejected. But obviously hopeless or abusive cases apart, in my judgment a local authority which is faced with an application for assistance pending the determination of an arguable application for leave to remain on Convention grounds, should not refuse assistance if that would have the effect of requiring the person to leave the UK thereby forfeiting his claim. (para 66, Clue)*

A local authority will not be entitled to refuse support under s17 of the Children Act 1989 on the basis that s4 Immigration and Asylum Act 1999 support is available unless such s4 support meets all the welfare needs of the children. Due to the basic level of support under s.4 this would be a rare case indeed. In the case of *R (VC & Ors) v Newcastle City Council* [2011] EWHC 2673 (Admin) Munby J gave useful guidance on the purpose of support under s17 of the Children Act 1989.

> *First, there is the contrast not merely between the level of support available under section 17 and section 4 but also between the very different purposes of the two statutory schemes. Ms Rhee accurately describes section 4 as providing 'an austere regime, effectively of last resort, which is made available to failed asylum seekers to provide a minimum level of humanitarian support.' Section 17 in contrast is capable of providing a significantly more advantageous source of support, its purpose being to promote the welfare and best interests of children in need. As she says, section 4 support is intended to provide the minimum support necessary to avoid breach of a person's Convention rights; section 17 support is to be provided by reference to the assessed needs of the child. In short, as she puts it, section 4 and section 17 establish two discrete regimes established for different purposes. (para 87)*

That case concerned the interaction between s4 support and support under s17 of the Children Act 1989 but the important point is that the court held that support under s17 is to promote the welfare and best interests of children in need and is to be provided by reference to the assessed needs of a child. It is not (unlike s4 'NASS' support) an austere regime of last resort to provide a minimum level of humanitarian support.

## Entitlement to Healthcare

Many migrants, including children and young people, face problems accessing healthcare in the UK, but this can often be a result of misunderstandings of the law in this area. Entitlement to GP treatment is underpinned by a different legal framework from hospital treatment. There are no special rules for children, other than for separated children who are in local authority care.

### GP treatment

There are no laws or rules that restrict entitlement to primary health care or to registering with a general practitioner based on immigration status. The Department of Health has confirmed in its *Guidance on implementing the overseas visitors hospital charging regulations* that GPs are entitled to register any patients.[24] Despite this, there is a widespread misconception, amongst NHS staff and policy makers as well as the Home Office, that some migrants are not entitled to primary care, and many people, even those granted refugee status, and even children, are refused GP registration because of an inability to provide certain immigration documents or a passport. This is discriminatory and therefore unlawful, and can be challenged.

### Hospital treatment

Some hospital treatment can be charged for, and some hospital treatment can be withheld, if the patient is not 'ordinarily resident' in the UK and cannot pay for the treatment in advance. This applies equally to children. Ordinary residence is discussed at paras 3.4 to 3.16 of the Guidance,[25] and was defined by Lord Scarman in the case of *R v Barnet LBC ex parte Shah,* 1983 2 AC 309 HL as meaning

> *living lawfully in the United Kingdom voluntarily and for settled purposes as part of the regular order of their life for the time being, whether they have an identifiable purpose for their residence here and whether that*

[24] The latest revision of the guidance, in May 2012, is at: http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_134418.pdf paras 5.11-5.13.

[25] *ibid*

*purpose has a sufficient degree of continuity to be properly described as "settled."*

The relevant legislation is found at s1 of the National Health Service Act 2006, which provides that NHS treatment is free of charge unless otherwise legislated, and at s175 of the National Health Service Act 2006, which empowers the Secretary of State to make regulations providing for charges to be raised in respect of treatment provided to patients who are not ordinarily resident in the UK. The only regulations made pursuant to that power are the National Health Service (Charges to Overseas Visitors) Regulations 2011 (SI 2011/1556), which apply only to hospital treatment.

There are many other exemptions from charging set out in the 2011 regulations for different types of treatment and different types of patient, e.g. separated children in local authority care, or refused asylum seekers in receipt of s4 support.

It is important to remember that ordinary residence determines whether a patient is charged for treatment, and not whether or not the patient should receive treatment. Some treatment must be provided even if it can be charged for and the patient cannot pay. This is not just restricted to emergency, or life-saving, treatment. Hospitals have been directed by the Department of Health guidance[26] to provide treatment that is deemed by a clinician (rather than an administrator) to be 'immediately necessary' or 'urgent.' This covers treatment that, if not provided by the time the patient can return to their country of origin, would result in permanent serious damage. Hospitals often get this wrong, so it is worth scrutinising such decisions carefully and taking them up with the hospital concerned.

[26] *ibid*

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