

ILPA Response to the Department of Health Consultation on Amendment of the National Health Service (Charges to Overseas Visitors) Regulations 2016

The Immigration Law Practitioners' Association (ILPA)

The Immigration Law Practitioners' Association (ILPA) is a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, nongovernmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence based research and opinion. ILPA is represented on numerous Government, including Home Office, and other consultative and advisory groups.

Q1: Continued exemption for those who have made an application for temporary protection, asylum or humanitarian protection which has been refused and who are supported under the Immigration and Asylum Act 1999.

ILPA agrees that people who have made an application for temporary protection, asylum or humanitarian protection that has been refused and who are supported under the Immigration and Asylum Act 1999 should continue to be exempt from health care charges. The regulation proposed, however, excludes failed asylum seekers who should benefit from an exemption as well as other migrants supported under the Immigration and Asylum Act 1999. Provision should therefore also be made for these groups. ILPA proposes that there should be a further exemption for those who would be on immigration bail as defined under Schedule 10 of the Immigration Act 2016 when this comes into force. The regulations also need to make clear that dependants are included within its ambit.

Failed asylum-seekers

ILPA supports the conclusion of the Joint Committee on Human Rights which recommended that primary healthcare be provided free to those who have claimed asylum, including those whose claim has been refused, pending their voluntary return or removal¹.

Support is currently provided under section 4(2) of the Immigration and Asylum Act 1999 to applicants at the end of the asylum process who are destitute and are either complying with reasonable steps to leave the UK; are unable to leave the UK due to a medical reason or because there is no viable route of return; have made or been granted permission to proceed with, an application for judicial review with regards to their protection claim; or have made further submissions with regard to a protection claim which have not yet been considered². We agree that it is appropriate that such people, who are destitute, unable to work and who face legal or practical barriers to leaving the UK should continue to be exempt from charging for health care services.

¹ Joint Committee on Human Rights (2007) *The Treatment of Asylum Seekers*, at: <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/81i.pdf> (accessed 02 March 2016), para 158

² Home Office, *Asylum support: section 4 policy and guidance*, 04 April 2016, at: <https://www.gov.uk/government/publications/asylum-support-section-4-policy-and-process>

We also agree that applicants supported under section 98A and section 95A of the Immigration and Asylum Act 1999 should benefit from an exemption from charging. These make provision for failed asylum seekers who are destitute and who face a genuine obstacle to leaving the UK. As the scope of those who will be supported under these provisions remains unclear, because this will only be set out in regulations, there is a risk of failed asylum seekers who are destitute and unable to leave the UK due to legal, practical or medical barriers being excluded from free health care provision. During the passage of the Bill that became the Immigration Act 2016, the Government indicated an intention to make regulations limiting access to support to those applying within a restrictive time frame after their asylum claim had been determined, giving rise to a risk of individuals unable to leave the UK for legal, practical or medical barriers being unable to access support under the Immigration and Asylum Act 1999 and left destitute.

Many failed asylum seekers, who are in contact with the Home Office and face the same legal, medical or practical barriers to leaving the UK as those supported under section 4(2) of the Immigration and Asylum Act 1999 are housed and supported by a member of their family or their community rather than by the Home Office. People able to access support from family or community members will not qualify for support and accommodation under section 4 or under section 95A of the Immigration and Asylum Act 1999. There is no legal distinction between their circumstances and those of failed asylum seekers accessing section 4 support and those supported by family or community members, and their circumstances may be equally, if not more, impoverished. They should also benefit from an exemption from health care charges.

Limiting exemptions to those supported under the Immigration and Asylum Act 1999 also fails to take into account the poor quality of Home Office decision-making with regards to asylum support applications. Statistics from the Asylum Support Tribunal indicate that in the year between September 2014 and August 2015, the Asylum Support Tribunal received 2067 applications for appeals against a Home Office refusal of asylum support. Of these appeal applications, 62 per cent had a successful outcome, either through being allowed by the Tribunal (in 44 per cent of cases), through the case being remitted to the Home Office to make a new decision, or through the decision being withdrawn by the Home Office³. The situation is likely to worsen as it is anticipated that refusals of asylum support will increase once the ability of the Asylum Support Tribunal to scrutinize Home Office decisions is reduced after the relevant provisions of the Immigration Act 2016 come into force. There will be no right of appeal to the Tribunal where a person continues to be supported under section 4 of the Immigration and Asylum Act 1999 under transitional provisions and the Home Office makes an incorrect decision to terminate that support. Similarly, there will be no right of appeal against incorrect decisions to refuse or withdraw support under section 95A of the Immigration and Asylum Act 1999 making provision for failed asylum seekers, including families with children, who face a genuine obstacle to leaving the UK. Applicants wrongly refused support under the Immigration and Asylum Act 1999 would be unable to access health care without risking charges they would be unable to pay.

ILPA proposes that a further exemption from charging should be introduced to make provision for those who would be on immigration bail under Schedule 10 of the Immigration Act 2016 when it comes into force. Immigration bail will be a single category replacing the existing categories of temporary admission, temporary release and existing bail. It is a condition of immigration bail, as well as those categories it will replace, for the person to live at a known address and remain in contact with the authorities. This proposed exemption from charging for health care services

³ Analysis of statistics received from the Asylum Support Tribunal, Asylum Support Appeals Project, 1 February 2016

would encompass the persons we have identified above and would facilitate the evidencing of eligibility.

People supported under section 4(1) of the Immigration and Asylum Act 1999

The proposed exemption only makes provision for failed asylum seekers accessing support under the Immigration and Asylum Act 1999 and would not cover those supported under section 4(1) of the Immigration and Asylum Act 1999 which ensures support to a person who has not made a previous asylum application but is similarly unable to return to their country of origin due to legal, practical or medical barriers. This includes:

- Stateless persons who have never claimed asylum but are making an application under the Immigration Rules for to remain as a stateless person. The rights of stateless persons are protected by the 1954 UN Convention relating to the Status of Stateless Persons.
- Those who have never claimed asylum but who are attempting to return to their country of origin or former habitual residence and either their country will not admit them, they cannot be documented or there are delays in documenting them. It may also become apparent where such efforts are unsuccessful that the person is stateless and lead to an application for recognition as such.
- Those who have never claimed asylum but are unable to travel and leave the UK due to a medical reason preventing them from doing so.
- Persons who have never claimed asylum but have a claim pending before the Home Office to regularize their status, such as people brought to the UK as children who are found to have no lawful status or people applying to remain in the UK under Article 8 of the ECHR protecting the right to private and family life.

In all of these cases, the individual will be destitute, prohibited from working and have no means of paying for health care. The exemption should therefore cover all those accessing support under the Immigration and Asylum Act 1999, without this being limited to failed asylum seekers. This would include those accessing support under section 4(1) of the Immigration and Asylum Act 1999 and whose support will continue under this provision after the Immigration Act 2016 comes into force following transitional measures in that Act.

Q2a Proposed exemption for those supported by the Home Office under the Immigration Act 2016 to meet a condition of immigration bail.

ILPA agrees that there should be an exemption for those supported by the Home Office under the Immigration Act 2016 to meet a condition of immigration bail but considers that this may not be sufficient to ensure that all those who should be able to access health care without charges will be able to do so.

The Secretary of State has a power under paragraph 9(2) of Schedule 10 to the Immigration Act 2016 to provide support to meet a condition of immigration bail in exceptional circumstances. There is only limited information at this stage as to how this power might be used by the Home Office to provide support and accommodation as this is not set out in the statute and will require guidance.

The power is relevant to those applying for release from immigration detention who would require support and accommodation to be provided in order for them to be able to comply with

bail conditions, such as the requirement to live at a known address and remain in contact with the Home Office. Failure to provide such support would lead to a breach of Article 5 of the European Convention on Human Rights guaranteeing the right to liberty as a person would be unable to be released from detention without this provision. Similarly, without specific provision exempting those supported by the Home Office to meet conditions of immigration bail, there is a risk that immigration detainees may not be released from detention because they will not receive treatment when released. There could be concerns that, for example, a person with poor mental health will fail to keep in touch with the Home Office because they will not in practice have the medication or other support they require to manage their condition. In these circumstances, there is a risk that Article 5 of the European Convention on Human Rights protecting the right to liberty would be breached. An exemption is therefore required for those supported by the Home Office to meet conditions of immigration bail.

It is unclear at this stage whether those groups of people currently supported under section 4(1) of the Immigration and Asylum Act 1999 may be able to access support under this provision. As identified above, such persons would be destitute, face legal, practical or medical barriers to leaving the UK and be in contact with the authorities. Such persons should also be exempt from health care charging. This could be achieved through providing an exemption for those who would be on immigration bail under Schedule 10 of the Immigration Act 2016 when this comes into force.

Q2b Proposed exemption for those supported by a local authority under powers in the Immigration Act 2016 to support destitute families and young people leaving care.

ILPA agrees that there should be further exemptions for those who will be supported by local authorities when Schedule 12 to the Immigration Act 2016 comes into force, however we consider that the exemption should extend to all those supported under these provisions and not solely to those who are failed asylum seekers.

Families with children

Local authorities will have powers to provide support to other families with children under new paragraph 10A of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 provided they meet certain conditions. This will include families with children whose asylum application has failed who would previously have been supported under section 95 of the Immigration and Asylum Act 1999. The exemption from health care charging should therefore be maintained.

ILPA considers that this exemption should also be applied to families with children supported by local authorities under paragraph 10A of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 and under section 17 of the Children Act 1989. Families with children are normally only able to access support provision where they are destitute and they have an outstanding application for leave to remain or there is another legal, practical or medical barrier to being able to leave the UK.

Families in these circumstances will be unable to pay for health care themselves and should be exempt from charging. The provisions in the immigration rules, allowing applications for leave to remain under Appendix FM to be refused where a person has a debt of £500 or more, are not mandatory and the Home Office has a discretion as to whether these are applied. The provision of an exemption for this category of people who are destitute and therefore who are known not

to be able to pay for health care would therefore not cut across existing Home Office policy. Failing to provide an exemption for families with children in this position would simply have the effect of deterring people from accessing health care for fear of their immigration status being affected by their inability to pay. ILPA is already aware of people who do not access the healthcare they need because of fears of the impact this may have on their immigration application and their ability to remain in the UK, as the examples below illustrate. Health care costs will inevitably fall to local authorities who have a duty to safeguard and promote the welfare of children under section 17 of the Children Act 1989.

ILPA is concerned that the process for supporting families with children established under Schedules 11 – 12 to the Immigration Act 2016 relies on families understanding the complexities and criteria of three different systems of support, how to access these and on their having the ability, confidence and English language skills to advocate effectively for themselves. Families risk falling through the gaps between the three different systems of support: s 95 provision, section 95A support and support under para 10A of Schedule 3 to the NIAA 2002 which itself has different sets of eligibility criteria under its different paragraphs. It will be important that families in these circumstances are able to access health care provision. A further exemption for those who would be on immigration bail after Schedule 10 to the Immigration Act 2016 comes into force would provide protection against this.

Young people leaving care

Local authorities have continuing responsibilities under the Children Act 1989 for young people who leave their care. Under the Immigration Act 2016, access to this support would be limited to young people who have leave to enter or remain, a pending asylum claim or a pending immigration application that is their first application to remain. Local authorities will have powers to support care leavers who fall outside these criteria under paragraph 10B of the Nationality, Immigration and Asylum Act 2002 provided they meet certain conditions.

The charging regulations should make provision for exempting care leavers under both sets of provisions. Young people who leave local authority care are recognised as a particularly vulnerable group through the specific provision made for them by child welfare legislation⁴. Under the leadership of Edward Timpson MP, now Minister of State for Children and Families, the Government launched a major cross-departmental Leaving Care Strategy in 2013⁵ and reiterated its commitment to this strategy in July 2015, the Minister stating that it was time to do more for “highly vulnerable” young people leaving care⁶.

Statutory guidance stresses the risks faced by unaccompanied young people during the transition to adulthood and leaving care:

⁴ Department for Education (2015) *The Children Act 1989 Guidance and Regulations Volume 3: planning transition to adulthood for care leavers*, at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397649/CA1989_Transitions_guidance.pdf at 3.1-3.3.

⁵ HM Government (2013) *Care Leaver Strategy*, at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266484/Care_Leaver_Strategy.pdf

⁶ Edward Timpson, Children and Families Minister (2015) *Speech: Our mission to give vulnerable children a better start in life, 10 July 2015* at: <https://www.gov.uk/government/speeches/our-mission-to-give-vulnerable-children-a-better-start-in-life>

Unaccompanied children and children trafficked from overseas can be at particular risk of becoming isolated on leaving care. When planning for transition, the local authority must ensure that language or cultural factors are taken into account to reduce this risk. A trafficked child may still be at risk of exploitation from their traffickers on leaving care. This risk should be considered, particularly with regard to arranging accommodation⁷.

These vulnerabilities apply whether the young person initially made an asylum application or made an immigration application on other grounds, for example, on the basis of their right to private and family life under Article 8 of the European Convention on Human Rights. The regulations should therefore ensure that young people are not prevented from being able to access to health care and ensure exemptions for care leavers supported by local authorities under paragraph 10B of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 as well as for those supported under the mainstream leaving care provisions of the Children Act 1989⁸.

Q3 Other considerations and exemptions

The UK has legal obligations under international and domestic human rights law to ensure that all persons, regardless of immigration status, are able to access healthcare without discrimination

Health care and human rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) requires States Parties to recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health⁹, take steps to achieve the full realisation of this right¹⁰ and guarantee this right without discrimination, including discrimination on the ground of national or social origin¹¹. This duty is interpreted by the UN Committee on Economic, Social and Cultural Rights as requiring States to refrain from denying or limiting equal access to preventative, curative and palliative health services for all persons, including asylum seekers and 'illegal migrants'¹². The Committee's most recent General Comment No.20 (2013)¹³ on non-discrimination in economic, social and cultural rights reflects this position. The UN Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health has criticised Sweden on the basis that failure to make health care available to undocumented migrants including rejected asylum seekers constitutes discrimination under international human rights law.¹⁴

⁷ Department for Education (2014) *Care of Unaccompanied and Trafficked Children: Statutory guidance for local authorities on the care of unaccompanied and trafficked children*, at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330787/Care_of_unaccompanied_and_trafficked_children.pdf

⁸ Sections 23C, 23CA, 23CZA, 23D, 24A and 24B of the Children Act 1989

⁹ Article 12(1)

¹⁰ Article 2(1)

¹¹ Article 2(2)

¹² Committee on Economic, Social and Cultural Rights (2000) *General Comment No.4 (2000): The right to the highest attainable standard of health*, E/C.12/2000/4, para 34 at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G00/439/34/PDF/G0043934.pdf?OpenElement>; this position is also reflected in the Committee's *General Comment No. 20 (2009): Non-discrimination in economic, social and cultural rights*, E/C.12/GC/20 at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en (accessed 02 March 2016)

¹³ *Ibid.*

¹⁴ See for example A/HRC/4/28/Add.2 28 February 2007 (*Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled 'Human Rights Council', Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standards of physical and mental health, Paul Hunt, Addendum, Mission to Sweden*), at: <http://www.ohchr.org/EN/Issues/Health/Pages/SRRightHealthIndex.aspx> (accessed 02 March 2016)

The UN Committee on Economic, Social and Cultural Rights has specifically expressed concern about access to health care in the UK for migrants and recommended that it ensures health care services are accessible to everyone without discrimination in accordance with the UK's obligations under the UN Convention on Economic, Social and Cultural Rights:

Access to health

55. The Committee is concerned that refugees, asylum seekers and refused asylum seekers, as well as Roma, Gypsies and Travellers, continue to face discrimination in accessing health-care services. The Committee notes that the Immigration Act 2014 has further restricted access to health services by temporary migrants and undocumented migrants (art.12).

56. The Committee recommends that the State party take steps to ensure that temporary migrants and undocumented migrants, asylum seekers, refused asylum seekers, refugees and Roma, Gypsies and Travellers have access to all necessary health-care services and reminds the State party that health facilities, goods and services should be accessible to everyone without discrimination, in line with article 12 of the Covenant. The Committee draws the State party's attention to its general comment No. 14 (2000) on the right to the highest attainable standard of health.¹⁵

Restrictions that have the effect of denying access to health care will also engage Articles 2, 3 and 8 of the European Convention on Human Rights.

Early access to treatment and intervention

ILPA is already aware of migrants who do not obtain healthcare for fear of the cost of treatment and being unable to pay for prescriptions:

Case example

A woman with poorly controlled type II diabetes was admitted to hospital. She was charged over £800 for treatment but could not afford to pay as she and her four children were being supported by social services under The Children Act 1989.

She would not visit her GP because she was afraid that he would send her to hospital for tests and treatment she could not afford and because she could not afford her medication. She was barely able to feed her children and was not eating regular meals herself to give the children more, which was exacerbating her diabetes.

The woman has since been granted limited leave to remain in the UK and may now access free NHS healthcare.

There is a risk that migrants avoid accessing healthcare services as a result of fears of charging being imposed. As in the above example, where migrants are unable to pay for prescribed treatment or diagnostic testing, this will deter them from accessing from GP services that are free, with consequences both for the individual and for public health in general.

¹⁵ Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6, 14 July 2016 at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GBR/CO/6&Lang=En

ILPA is aware that charges deter migrants from accessing healthcare services even if these charges may never be recovered in practice:

Case example

A refused asylum seeker was charged for secondary care and received numerous threatening letters demanding payment. He is destitute and prohibited from working and earning the money to pay the charge. He became frightened when he receive a latter saying that the Home Office would be informed and any future applications would be affected by outstanding charges as he wants to make an application to regularise his stay.

Restricted and delayed access to health care can also lead to delayed diagnosis and risk of further transmission of chronic or infectious diseases¹⁶ with risks to both public health and increased costs where more expensive treatment is required at a later stage.

Identifying health need and vulnerable persons

Health care providers play an important role in identifying vulnerable persons which are undermined where people are deterred from accessing services for fear of being charged for treatment.

Research examining contact of NHS secondary healthcare services with victims of trafficking (undertaken before the more restrictive charging regime for secondary care was implemented in April 2015) indicated that many victims of human trafficking come into contact with NHS services during the time they are trafficked, or after their escape and that up to one in eight NHS professionals reported coming into contact with a patient they suspected may have been trafficked¹⁷. Reported contact with victims of trafficking was highest among professionals working in maternity services, mental health, paediatrics and emergency medicine¹⁸. An identified limitation of the research was that professionals working in dentistry, sexual health and termination of pregnancy services were under-represented in the study¹⁹ and these are also likely to be important settings for the identification of victims of trafficking. A quarter of those who reported contact with victims identified that their knowledge or suspicions arose because of disclosure by another professional involved in their care²⁰, highlighting the potential role of clinical staff in primary healthcare settings in identifying victims of trafficking that fell outside the scope of the research. The research concludes that healthcare providers can play a critical role in identifying and referring potential victims of human trafficking and by providing clinical care²¹.

Complexity of immigration provisions and assessing eligibility

The Department of Health must take into account the difficulty that healthcare providers will encounter in correctly assessing immigration status and the costs of supporting and training providers to do so.

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¹⁷ Ross C, Dimitrova S, Howard LM, et al. *Human trafficking and health: a cross-sectional survey of NHS professionals' contact with victims of human trafficking*. *BMJ Open* 2015;5:e008682. doi:10.1136/bmjopen-2015-008682

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ *Ibid*

²¹ *Ibid*

It remains common for individuals to be refused registration with a GP for not having a passport or document confirming leave to remain in the UK, despite being eligible for registration regardless of immigration status and despite definitive NHS England guidance confirming that inability by a patient to provide identification or proof of address are not reasonable grounds to register a patient with a GP²².

Case example

A family was not permitted to register with a GP on the basis that they could not provide evidence of their leave to remain in the UK even though this is not a requirement in order to register with a GP. The family's documents were still with the Home Office, having been submitted to the Home Office six months previously in relation to another application that was still pending consideration.

ILPA members regularly see clients who have received invoices for NHS treatment when they are eligible for NHS secondary care and clients who have incorrectly received penalty charge notices for prescription charges.

A person's immigration status is also likely to change over time. Home Office checking services cannot be relied upon to provide accurate advice to providers on an individual's immigration status. ILPA has numerous examples of incorrect advice given by the Home Office to employers using its Employers' Checking Service to verify immigration status in order to legally employ an individual, including with the effect that the individuals involved have lost their jobs as a result.

Case example

The employer of a woman who had an appeal against a Home Office decision to refuse her further leave to remain was informed, when he checked her status with the Employer Checking Service, that 'this person does not have the right to work in the UK' because 'an application for leave in the UK has been submitted by this person but it has been subsequently been rejected.' The woman's attempts to contact the Home Office were met with no response until her solicitors sent a pre-action protocol letter threatening judicial review proceedings. The Home Office finally confirmed that her in-time appeal meant that she had continuing leave under section 3C of the Immigration Act 1971 and so retained her entitlement to work. However this came too late for her to be able to retain her job.

The problems of inaccurate records held by the Home Office and its incorrect advice on immigration status are likely to be replicated, where these are used to determine an individual's access to NHS healthcare, with even more serious consequences.

We identify a risk of litigation, actions for damages against General Practitioners and/or others who get the decision wrong as to whether a person is eligible for treatment and against practitioners who get the decision wrong as to whether a person is in need of immediate necessary or urgent treatment.

²² NHS England, *Patient Registration: Standard Operating Principles for Primary Care (General Practice)*, November 2015 at: <https://www.england.nhs.uk/commissioning/wp-content/uploads/sites/12/2015/11/pat-reg-sop-pmc-gp.pdf> (accessed 02 March 2016)