



# information sheet

## Access to Healthcare 2

20<sup>th</sup> April 2009

This information sheet updates information given in the May 2008 “Access to Healthcare” information sheet.

In March 2009, the Court of Appeal gave judgment in *R(YA) v Secretary of State for Health* [2009] EWCA Civ 225. The court considered whether someone in England, who has been refused asylum and has no outstanding appeal against that decision (referred to here as a ‘refused asylum-seeker’), is eligible for free National Health Service (NHS) treatment. The court considered the guidance that had been issued by the Department of Health.

This information sheet provides information about the judgment and its consequences. Further background information is available from the May 2008 information sheet.

### The relevant legislation and guidance

The National Health Service Act 2006 has replaced the National Health Service Act 1977. Section 175 of the 2006 Act allows regulations to be made so that those who are not “*ordinarily resident in Great Britain*” may be charged for NHS services.

However, there are no charges for the following NHS services:

- treatment given in an accident and emergency department
- family planning services
- treatment for certain listed diseases (HIV is excluded from the list, so there may be charges for HIV treatment; TB is on the list, so TB treatment must be provided free of charge)

The relevant regulations in England are the National Health Service (Charges to Overseas Visitors) Regulations 1989/306. Since 1989, these regulations have been amended. The regulations state that charges for NHS services will not be made if someone meets any of the following criteria:

- he or she has resided lawfully in the UK for a period of at least one year (this does not apply if the person’s permission to be in the UK is for the purpose of their receiving private medical treatment)
- he or she has been recognised as a refugee in the UK
- he or she has an outstanding application for asylum

The relevant guidance is referred to in the May 2008 information sheet.

### The Court of Appeal decision in *R(YA) v Secretary of State for Health*

The court considered three questions:

- could a refused asylum-seeker be “*ordinarily resident in Great Britain*” so that he or she was exempt from the regulations altogether – and therefore exempt from NHS charges?
- could a refused asylum-seeker be lawfully resident in the UK so that, if he or she has been living here for 12 months or more, the regulations would exempt him or her from NHS charges?
- if a refused asylum-seeker was not exempt from NHS charges, what discretion did an NHS Trust have to provide treatment to him or her free of charge?

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### **Steve Symonds**

ILPA legal officer

020 7490 1553

[steve.symonds@ilpa.org.uk](mailto:steve.symonds@ilpa.org.uk)

### **Immigration Law Practitioners’ Association**

[www.ilpa.org.uk](http://www.ilpa.org.uk)

T 020 7251 8383

F 020 7251 8384

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The court decided that neither asylum-seekers, nor refused asylum-seekers, are ordinarily resident in Great Britain or lawfully resident in the UK for the purposes of these healthcare provisions (these terms may have different meanings in different areas of law). It did not matter whether the individual had made his or her asylum claim on arrival in the UK or after entering the UK. The regulations did, therefore, apply. The regulations expressly exempt those whose asylum claims (and any appeals) are outstanding from being charged for NHS treatment. However, the regulations do not make provision for refused asylum-seekers. Accordingly, a refused asylum-seeker is caught by the regulations and is not exempt from NHS charges.

The court also decided that an NHS Trust had discretion to provide a refused asylum-seeker treatment free of charge. The court indicated that a decision whether to exercise the discretion not to charge for treatment would depend on the following factors:

- whether the person can pay for the treatment (it was accepted that it was unlikely that a refused asylum-seeker would be able to pay for treatment)
- how urgent it is that the person receive the treatment
- how long the person is likely to continue to be in the UK
- the situation of those refused asylum-seekers who cannot return to their home country

It is understood that lawyers are considering whether to seek permission to appeal to the House of Lords against the court's decision. If the House of Lords do consider an appeal, it may be many months before that appeal is heard and decided.

#### **New Department of Health guidance**

On 2 April 2009, the Department of Health has written to NHS Trusts in England in light of the Court of Appeal decision. This letter makes clear:

- a refused asylum-seeker who has received treatment free of charge between 11 April 2008 and 30 March 2009 (that is between the decision of the High Court last year and this year's Court of Appeal decision) must not be now charged for that treatment
- a refused asylum-seeker who is undergoing a course of treatment should not have that treatment interrupted and should not now be asked to begin paying for it
- the factors identified by the Court of Appeal must be considered before a decision is taken to charge for NHS treatment
- these factors must be considered before any migrant, who is not exempt from NHS charges, is charged (regardless of whether he or she has ever made an asylum claim)

The letter also makes clear that someone who has been identified, by either the UK Human Trafficking Centre or UK Border Agency, as a victim or suspected victim of trafficking must not be charged for NHS treatment.

A copy of the Department of Health letter is available at:  
<http://www.bashh.org/documents/2174>

#### **GP services**

The Court of Appeal decision and the information given here does not affect entitlement to treatment from a general practitioner (GP). Nobody is excluded from GP treatment on the basis of his or her immigration status. A GP has discretion to register or refuse to register patients provided he or she does not discriminate in so doing. If a GP closes his or her list to foreign nationals, while continuing to register British citizens, this is likely to be unlawful discrimination.