



Department
of Health

*From the Rt Hon Jeremy Hunt MP
Secretary of State for Health*

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London
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13 DEC 2016

Dear Colleague,

AMENDMENT OF THE NATIONAL HEALTH SERVICE (CHARGES TO OVERSEAS VISITORS) REGULATIONS 2016

Introduction

The purpose of this correspondence is to set out the Department of Health's intention to amend the National Health Service (Charges to Overseas Visitors) Regulations 2015 ("the Charging Regulations") in light of upcoming changes to the powers that the Home Office and local authorities have to support asylum seekers and failed asylum seekers. In this letter we ask for your views as stakeholders on the proposed amendments to the Charging Regulations, and we also are taking this opportunity to seek views on issues where we do not currently consider that any change to create an exemption would be appropriate.

Overview

If NHS services are provided to a person who is not ordinarily resident in the UK (an overseas visitor), a charge for those services may apply under the Charging Regulations. The Charging Regulations set out when NHS bodies must make and recover charges in respect of services provided to overseas visitors. The Charging Regulations also exempt certain services and certain categories of overseas visitors from these charges.

Currently, all asylum seekers are exempt from charge regardless of whether they are supported by public funds. Failed asylum seekers, however, are only exempt under the Charging Regulations if they are provided with certain types of support by the Home Office or a local authority.

The Immigration Act 2016 ("the 2016 Act") will, once the relevant provisions are brought into force, make a number of changes to the ways in which support is given to failed asylum seekers. The Department of Health has considered these changes and in the light of these:

- we propose to amend our exemption to reflect both the current law and anticipate the future changes to be made when the 2016 Act changes come into force.
- We are also considering whether the exemption should apply to failed asylum seekers receiving Government support in other circumstances (e.g. where there is not a genuine obstacle preventing the person leaving the UK). We welcome the views of stakeholders on both our proposal and this further question.
- Lastly, we set out why we propose to maintain our current policy of not providing an exemption in respect of failed asylum seekers generally and other irregular migrants receiving government support. We invite stakeholders to let us know if they disagree with our proposed approach.

We will carefully consider views put forward by stakeholders in response to this engagement and make any appropriate amendments to our policy and the Charging Regulations. We therefore encourage stakeholders to provide their comments and views on any matters discussed in this consultation.

A more detailed description of the current position and the legislative changes is set out in the annex to this letter. The annex also provides an explanation of some of the terms that we have used.

The current rules and upcoming changes

Under the Charging Regulations, NHS services that are provided to either overseas visitors who have been granted protection or to asylum seekers are exempt from charge. However, unless another type of exemption applies (e.g. the failed asylum seeker is a victim of modern slavery), NHS services provided to failed asylum seekers are only exempt if:

- Support is provided by the Home Office under section 95 of the 1999 Act;
- Support in the form of accommodation is provided by the Home Office under section 4(2) of the Immigration and Asylum Act 1999 (“the 1999 Act”);
- Support in the form of accommodation provided by a local authority under Part 1 of the Care Act 2014 or sections 35 or 36 of the Social Services and Well-being (Wales) Act 2014.

Support is provided by the Home Office under section 95 of the 1999 Act

Current Rules

Section 95 support is available to eligible asylum seekers and their dependants who would otherwise be destitute. Under the current rules, if a destitute failed asylum



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seeker has a dependant child in his household, he may be eligible for support under section 95. This is because in the context of whether support should be provided, the failed asylum seeker may be treated as an asylum seeker.

Changes made by the 2016 Act

Changes made by the 2016 Act mean that, when the relevant provisions come into force, failed asylum seekers with a dependant child in their household will not be treated as asylum seekers. This means that section 95 support will not be available to failed asylum seekers and where support is to be provided, it will be given under other powers.

Support in the form of accommodation is provided by the Home Office under section 4(2) of the 1999 Act

Current Rules

Section 4(2) support may be given to destitute failed asylum seekers who are making reasonable efforts to leave the UK but for whom there are genuine recognised barriers to their return home, or where accommodation must be provided to avoid a breach of human rights.

Changes made by the 2016 Act

The 2016 Act repeals section 4 of the 1999 Act. When the provisions are brought into force, support for destitute failed asylum seekers may be provided by the Home Office under two new powers:

- Section 95A which provides a power to support destitute failed asylum seekers who are unable to leave the UK; and
- Section 98A which provides a power to provide temporary support to destitute failed asylum seekers who are unable to leave the UK. This temporary support may only be provided until it is determined whether support should be provided under section 95A.

Support in the form of accommodation provided by a local authority under Part 1 of the Care Act 2014 or sections 35 or 36 of the Social Services and Well-being (Wales) Act 2014

Current Rules

Support may also be provided to failed asylum seekers under provisions in Part 1 of the Care Act 2014 or sections 35 or 36 of the Social Services and Well-being (Wales) Act 2014. Failed asylum seekers receiving this support are usually in an analogous situation to failed asylum seekers receiving support from the Home Office, however, due to a need for healthcare and attention (usually because of a disability), support is provided by a local authority.

This position is included for completeness, no change to the provision of such support has been made and the existing exemption in the Charging Regulations is to be maintained.

Other powers to provide support in the 2016 Act

The 2016 Act provides other powers for the Home Office and the local authority to provide support to failed asylum seekers and other people without immigration status, such as:

- A power to provide support to allow a person to meet immigration bail conditions. This power allows the Home Office to, in exceptional circumstances, help a person who is required to live at a particular address as a condition of their bail to meet that condition if they would otherwise be unable to do so.
- A power to make regulations to allow local authorities in England to support destitute families without immigration status if certain conditions are met. Failed asylum seekers may be supported under this provision if they are not eligible for support under s95A of the 1999 Act, however, destitute failed asylum seekers who face a genuine obstacle to departure at the point their appeal rights are exhausted will be supported by the Home Office under provisions in the 1999 Act.
- A power to make regulations to allow local authorities in England to provide support to destitute adult migrant care leavers if certain criteria are met. Failed asylum seekers may be supported under this provision if, for example, there is no genuine obstacle to their departure from the UK but the local authority is satisfied that support needs to be provided.

Amendments to the Charging Regulations

Planned changes

As mentioned above, destitute failed asylum seekers who face a genuine obstacle to leaving the UK currently may be supported by the Home Office under sections 4(2) or 95 of the Immigration and Asylum Act 1999. When relevant changes made by the



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Immigration Act 2016 are brought into force, any such support will be provided under new provisions in the 1999 Act.

We propose to amend regulation 15 of the Charging Regulations at the earliest opportunity so that the exemption from charges for failed asylum seekers refers to failed asylum seekers receiving support under the 1999 Act generally, rather than referring specifically to sections 4(2) or 95.

Please note that it is our intention that overseas visitors who are in receipt of support under the 1999 Act as dependants of failed asylum seekers will also be included within the exemption.

This amendment will ensure that services provided in respect of failed asylum seekers and their dependents supported by the Home Office under sections 4 and 95 or under the new sections, 95A and 98A (once in force), will be exempt from charge.

The proposed amendment is in-line with the Department's existing policy that an exemption is appropriate where support is provided to destitute failed asylum seekers who are cooperating with the Home Office with regard to leaving the UK.

For the avoidance of doubt, please note that we intend to maintain the current exemption set out in regulation 15(d) for failed asylum seekers supported under the Care Act 2014 and the Social Services and Wellbeing (Wales) Act 2014. We also intend to maintain the "easement clause" currently set out in the Charging Regulations, which provides for an exemption to continue to apply in respect of any on-going courses of treatment even after the overseas visitor ceases to be exempt. The easement clause applies for any remaining NHS services provided as part of that course of treatment unless the overseas visitor leaves the UK or was previously exempt under excluded provisions.

Q- We propose to amend regulation 15 of the Charging Regulations at the earliest opportunity so that the exemption applies where an overseas visitor—

- **has made an application to be granted temporary protection, asylum or humanitarian protection under the immigration rules, which has been refused, and**
- **is supported by the Home Office under the 1999 Act.**

Do you have any comments on this proposal?

Potential further changes

We are currently considering whether it is appropriate to extend the existing exemption to include failed asylum seekers who are:

- provided with support by the Home Office to enable them to meet a residence condition of immigration bail under a new power in the 2016 Act (this power is not yet in force);
- provided with support by a local authority under new powers to support destitute families without immigration status and destitute adult migrant care leavers (these powers are not yet in force and are dependant on regulations being made).

As set out above, destitute failed asylum seekers who face a genuine obstacle to leaving the UK would be supported by the Home Office under the 1999 Act, which means that our proposed exemption set out above would apply.

Although we recognise that failed asylum seekers receiving the type of support outlined above are unlikely to be in a position to pay NHS charges, we consider an appropriate balance must be struck to ensure that the provision of free NHS treatment does not incentivise health tourism or act as a deterrent to persons leaving the UK on a voluntary basis. We welcome the views of stakeholders as to whether there are good reasons to depart from our existing position that an exemption should only be provided where failed asylum seekers are cooperating with removal processes and to include an exemption in respect of failed asylum seekers receiving support of the types outlined above.

Q- We are considering whether to provide an exemption that applies where an overseas visitor—

- **is provided with support by the Home Office to enable them to meet a residence condition of immigration bail; or**
- **is provided with support by a local authority under new powers to support destitute families without immigration status and destitute adult migrant care leavers.**

Do you have any comments relevant to this consideration?

Matters in respect of which no amendments are proposed

We do not propose to amend the Charging Regulations to provide an exemption for failed asylum seekers in receipt of other types of support not currently provided for or not referred to above.



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We also do not propose to provide an exemption in respect of failed asylum seekers more generally.

Claimants in a recent challenge to the Charging Regulations have raised criticisms of the consultation process undertaken before the Charging Regulations were made in 2015, specifically about the change made to remove the exemption then in place for destitute illegal migrants receiving Home Office support. This change was made to correct an inadvertent error in regulation 11 of the Charging Regulations 2011, which meant that illegal migrants receiving s 4(1) support were within the exemption despite the clear policy intention (as set out in the Department's 2010 consultation – *“review of access to the NHS by foreign nationals”*) being that the exemption should only apply to failed asylum seekers (i.e. those on s 4(2) support).

We dispute this challenge but the Department is keen to ensure that all stakeholders can make the representations they wish to make on this issue now and equally that the Department has the benefit of stakeholders' views in reviewing policy on this issue going forward. We, therefore, welcome the opportunity to set out our current policy and invite comments on this as part of this wider consultation process.

Our current view remains that the exemption should only apply in respect of failed asylum seekers and not illegal migrants. We therefore propose to continue *not* to provide an exemption in respect of:

- irregular migrants who are not failed asylum seekers but who are provided with support by the Home Office under the 1999 Act (including under section 4(1));
- irregular migrants who are not failed asylum seekers provided with support by the Home Office or a local authority under other powers; and
- failed asylum seekers who are not provided with Home Office or local authority support of the types outlined above.

Although we recognise that many failed asylum seekers have limited resources, meaning that debts to the NHS may not be recovered and that some untreated non-urgent conditions may lead to subsequent more costly urgent services needing to be provided, which may also be unrecoverable, we do not consider that it is appropriate to provide an exemption for the vast majority of persons here unlawfully. This is because we do not consider it would be appropriate to encourage health tourism or incentivise a failure to cooperate with the removals process. Further, we do not consider that it would be appropriate to provide an exemption in respect of people who have no lawful basis to be in the UK unless there are exceptional circumstances. As you may be aware, under provisions in the immigration rules people who have NHS debts of more than £500 that are outstanding for two months or more are likely

to be refused leave to enter or remain in the future. The provision of an exemption on the basis that a person is unlikely to be able to pay would conflict with the existing policy in this regard.

Q – Do you have any comments you would like us to consider in respect of this proposed position? Do you consider that there are any circumstances in which irregular migrants who are not failed asylum seekers, or irregular migrants who are failed asylum seekers but who are not receiving support, should be provided with an exemption?

Further information

Finally, please note that this letter is not intended to provide a full or exhaustive description of changes to the 1999 Act by the 2016 Act. Further information on the Immigration Act 2016 may be found on the GOV.UK website (<https://www.gov.uk/government/collections/immigration-bill-2015-16>).

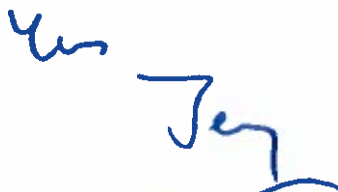
Further information in respect of the current Home Office policy in relation to applications for support under section 4(2) is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/513619/Asylum_Support_Section_4_Policy_and_Process.pdf

Further information on the Charging Regulations is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/496951/Overseas_visitor_hospital_charging_accs.pdf

How to respond to this engagement

Should you wish to make any representations or comments on the Department's proposal that you think that we should consider, please respond by **20th January 2017**. Please write to:

Department of Health
Visitor and Migrant NHS Cost Recovery Programme
Department of Health
2N22, Quarry House
Leeds, LS1 7UE
E-mail NHSCostRecovery@dh.gsi.gov.uk


JEREMY HUNT



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Annex

This annex provides an explanation of terms used in this letter and also further detail on the changes that will be made when relevant provisions in the Immigration Act 2016 are brought into force.

Explanation of terms used in this letter

In this correspondence and annex we refer to:

asylum seekers	we mean overseas visitors who have made an application, which has not yet been determined, to be granted temporary protection, asylum or humanitarian protection under the immigration rules (in other limited circumstances, e.g. where there is an outstanding appeal or a fresh claim for asylum has been made, other people may fall within this definition rather than being classed as a failed asylum seeker);
failed asylum seekers	we mean people who have made an application to be granted temporary protection, asylum or humanitarian protection under the immigration rules, which has been rejected;
overseas visitors granted protection	we mean overseas visitors granted temporary protection, asylum or humanitarian protection under the immigration rules;
the Charging Regulations	we mean the NHS (Charges to Overseas Visitors) Regulations 2015;
the Charging Regulations 2011	we mean the NHS (Charges to Overseas Visitors) Regulations 2011
the 1999 Act	we mean the Immigration and Asylum Act 1999;
the 2002 Act	we mean the Nationality, Immigration and Asylum Act 2002;
the 2016 Act	we mean the Immigration Act 2016.

Background

Support for failed asylum seekers under the 1999 Act

The 1999 Act currently contains powers to support destitute asylum seekers under section 95 of that Act. Failed asylum seekers and their dependants may also be supported under section 95 (if certain conditions are satisfied) or under section 4(2) of the 1999 Act. Certain other categories of migrants may be supported under section 4(1) of the 1999 Act.

The exemption in the Charging Regulations

In 2010, the Department of Health launched a consultation exercise on charges for NHS services provided to overseas visitors which considered, among other things, an exemption from charge for failed asylum seekers receiving support from the Home Office under section 4 or section 95 of the 1999 Act.

Following that consultation, the NHS (Charges to Overseas Visitors) Regulations 2011 (“the 2011 Charging Regulations”) introduced an exemption for overseas visitors supported under sections 4 or 95 of the 1999 Act. This exemption was broader than intended as it also provided an exemption for irregular migrants who were not failed asylum seekers but who were in receipt of Home Office support under section 4.

As the policy remained unchanged (i.e. that only failed asylum seekers receiving support should be exempt), when the 2011 Charging Regulations were replaced by the current Charging Regulations, the exemption was amended to better reflect the policy and apply only to failed asylum seekers receiving support under section 4(2). At that time, the exemption was also amended to include certain types of failed asylum seekers receiving support from a local authority. The exemption was maintained for overseas visitors receiving support under section 95 of the 1999 Act. Regulation 15 of the Charging Regulations currently states:

“15. Refugees, asylum seekers, supported individuals and looked after children

No charge may be made or recovered in respect of any relevant services provided to an overseas visitor who—

- (a) has been granted temporary protection, asylum or humanitarian protection under the immigration rules;
- (b) has made an application, which has not yet been determined, to be granted temporary protection, asylum or humanitarian protection under those rules;



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(c) is currently supported under section 95 (persons for whom support may be provided) of the Immigration and Asylum Act 1999 (“the 1999 Act”);

(d) has made an application to be granted temporary protection, asylum or humanitarian protection under the immigration rules which was rejected and who is supported under—

(i) section 4(2) (facilities for the accommodation of a person) of the 1999 Act; ...

(iii) Part 1 (care and support) of the Care Act 2014 or section 35 or 36 of the Social Services and Well-being (Wales) Act 2014, by the provision of accommodation; or

(e) is a child who is looked after by a local authority within the meaning of section 22(1) (general duty of local authority in relation to children looked after by them) of the Children Act 1989 or, as the case may be, section 74(1) of the Social Services and Well-being (Wales) Act 2014 (child or young person looked after by a local authority).”

Provisions in the 2016 Act

Schedule 11 to the 2016 Act sets out provisions in relation to support for certain categories of migrant. You may wish to note in particular that:

- section 4 of the 1999 Act is to be repealed (paragraph 1 of schedule 11 to the 2016 Act);
- a new provision, section 95A, is to be inserted into the 1999 Act. Section 95A relates to support for failed asylum seekers who are unable to leave the UK (paragraph 9 of schedule 11 to the 2016 Act); and
- a new provision, section 98A, is to be inserted into the 1999 Act. Section 98A relates to temporary support for failed asylum seekers (paragraph 13 of schedule 11 to the 2016 Act).

In addition, amendments to the 1999 Act under schedule 11 to the 2016 Act will amend who may be eligible for support under section 95 of the 1999 Act. For example:

- failed asylum seekers with a dependant in their household under the age of 18 will no longer be treated as asylum seekers;
- failed asylum seekers with outstanding further submissions may be eligible for section 95 support;

- failed asylum seekers who are challenging a rejection of their further submissions by way of judicial review may be eligible for section 95 support if permission to proceed with the judicial review challenge has been granted;

Paragraph 9 of schedule 10 to the 2016 Act sets out powers of the Secretary of State to enable persons to meet bail conditions in exceptional circumstances. This paragraph is free-standing and is not an amendment to the 1999 Act.

Further, schedule 12 to the 2016 Act, when brought into force, will amend schedule 3 to the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”). Among other things, when brought into force, those amendments will amend the 2002 Act as follows:

- Paragraph 10 of schedule 12 to the 2016 Act inserts a new paragraph 10A into Schedule 3 to the 2002 Act. Regulations may be made under this new provision that enable local authorities in England to provide support for destitute families without immigration status (including failed asylum seekers who are not, or could not, receive support under new section 95A of the 1999 Act). The circumstances in which this support may be provided are where:
 - the family has an outstanding specified immigration application or appeal;
 - the family has exhausted all appeal rights and has not failed to cooperate with arrangements to leave the UK; or
 - the local authority is satisfied that the provision of support is necessary
 - to safeguard and promote the welfare of a dependent child.

N.B. destitute asylum seekers and destitute failed asylum seekers who face a genuine obstacle to departure at the point their appeal rights are exhausted will be supported by the Home Office under the 1999 Act.

- Paragraph 10 also inserts a new paragraph 10B in Schedule 3 to the 2002 Act under which regulations may be made by the Secretary of State to enable local authorities in England to provide for the support of adult migrant care leavers who have:
 - an outstanding specified immigration application or appeal and are destitute; or
 - exhausted their appeal rights and do not qualify for Home Office support under the new section 95A of the 1999 Act because there is no genuine obstacle to their departure from the UK, but the local authority is satisfied that support needs to be provided. (This will enable the local authority to ensure that support does not end abruptly and there can be a managed process of encouraging and enabling departure from the UK).



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The provisions of the 2016 Act set out above are not yet in force and will be commenced on a future date to be appointed.

