

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's briefing on proposed
amendments to the National Health
Service (Charges to Overseas Visitors)
Regulations 2015**

January 2017

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research. Liberty's policy papers are available at <http://www.liberty-human-rights.org.uk/policy/> .

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Introduction

1. In December 2016, the Department of Health invited comments on proposed changes to the National Health Service (Charges to Overseas Visitors) Regulations 2015 (“the Charging Regulations”).¹ The Charging Regulations establish the circumstances in which NHS bodies must charge for services provided to people not ordinarily resident in the UK.² The consultation invites comments on exemptions to NHS charging following legal changes set out in the Immigration Act 2016 (“the 2016 Act”).³

Current charging provision

2. Charges apply to services provided in a hospital or, where provided elsewhere, under the direction of a hospital or by hospital employees.⁴ Charges are not applied to primary care, such as GP services, unless these are provided on behalf of a hospital.⁵ Other exempt services include accident and emergency services; family planning;⁶ the diagnosis and treatment of listed communicable diseases,⁷ the diagnosis and treatment of sexually transmitted infections, treatment of conditions caused by torture, FGM, domestic violence or sexual violence;⁸ and provision of compulsory psychiatric care.⁹ The kind of services which are subject to charging include maternity services; emergency services provided after a patient has been admitted; inpatient treatment for life-threatening or life-changing physical conditions such as cancer, Parkinson’s disease, Crohn’s disease and MS; non-

¹ Department of Health, *Consultation correspondence: Amendment of the National Health Service (Charges to Overseas Visitors) Regulations 2016*, December 2016.

² Living lawfully in the UK “voluntarily for settled purposes as part of the regular order of their life for the time being.” *R v Barnet LBC ex p Shah* [1983] 2 AC 309. Section 39 of the Immigration Act 2014 provided that non EU nationals must have indefinite leave to remain (ILR) in the UK in order to qualify for ordinary residence. This had effect from 6 April 2015.

³ Not yet in force.

⁴ National Health Service (Charges to Overseas Visitors) Regulations 2015/238, Part 3, paragraph 9.

⁵ Regulations 2015/238, Part 3, Regulation 9.

⁶ Excluding abortion.

⁷ Regulations 2015/238, Schedule 1, see also Department of Health *Guidance on implementing the overseas visitor hospital charging regulations 2015*, Chapter 4, p.35-36. The exemption does not apply to any secondary illness that may be present even if treatment is necessary in order to successfully treat the underlying condition.

⁸ Unless the individual has travelled to the UK for the purposes of receiving that treatment.

⁹ E.g. those detained under the Mental Health Act 1983.

compulsory hospital treatment for mental health conditions;¹⁰ and treatment of secondary conditions which may exacerbate an underlying illness such as TB.

3. The Charging Regulations currently provide for exemptions to charges for asylum seekers with an outstanding claim and for individuals who have been granted international protection in the UK.¹¹ Asylum seekers whose claims have been unsuccessful are only exempt from NHS charges where they are in receipt of:

(i) support under section 95 of the Immigration and Asylum Act 1999 (“the 1999 Act”). This support is normally reserved for those with outstanding asylum claims, but is currently also provided to families with a dependent child;¹²

(ii) cashless subsistence support provided under section 4(2) of the 1999 Act. This is set at a lower level than section 95 support and is provided to destitute individuals in the form of accommodation and a card to purchase essential items;¹³

(iii) support provided by a local authority under Part 1 of the Care Act 2014 or sections 35-36 of the Social Services and Wellbeing (Wales) Act 2014.¹⁴ Individuals receiving this support have specific health or care needs.

Changes provided for in the 2016 Act

4. The 2016 Act includes provision, not yet in force, which would remove section 95 support from families with children once an asylum claim has been finally rejected.¹⁵ This exclusion of support follows drastic cuts in levels of support for families introduced in August 2015.¹⁶ The 2016 Act further provides for the repeal of section 4 of the 1999 Act which allows for subsistence support for destitute people. A new section 95A is created, but this is narrower than section 4(2) in that it is

¹⁰ Short of conditions which involve compulsory psychiatric care.

¹¹ Regulations 2015/238, Part 4, Regulation 15(a)-(b).

¹² Regulations 2015/238, Part 4, Regulation 15(c).

¹³ Regulations 2015/238, Part 4, Regulation 15(d).

¹⁴ Regulations 2015/238, Part 4, Regulation 15(e).

¹⁵ Schedule 11, Immigration Act 2016.

¹⁶ This saw section 95 support for a couple with two children fall from £178.44 to £147.80 and for a couple with one child from £125.48 to £110.85. Support for a single parent with two children fell from £149.86 to £110.85 and for a single parent with one child from £96.90 to £73.90.

expressly limited to those deemed to have a “*genuine obstacle to leaving the United Kingdom*”.¹⁷ Section 4(1) of the 1999 Act, which allows for support to be provided to those with Temporary Admission, those released from immigration detention and those on immigration bail, is not replicated in new provisions of the 1999 Act. However separate provision set out in the 2016 Act will give the Secretary of State the power to provide facilities for the accommodation of an individual granted bail subject to a residency requirement.¹⁸ This support can only be provided where an individual would otherwise be unable to support himself or herself at the bail address and where the Home Secretary is satisfied that “*exceptional circumstances*” exist. This provision partially replicates section 4(1)(c) of the 1999 Act, but is narrower in that it restricts provision to exceptional circumstances.¹⁹

5. The 2016 Act also creates two Regulation-making powers. The first would enable local authorities in England to support destitute families without immigration status, where the family is co-operating with arrangements to leave the UK or the authority is satisfied that support is necessary to safeguard and promote the needs of a dependent child.²⁰ The second would enable local authorities to provide support for adult care leavers where the local authority is satisfied that support needs to be provided.²¹

Proposed changes to healthcare charging

6. The Government intends to maintain an exemption from healthcare charges for asylum seekers whose claims have been refused where they are supported under provisions of the 1999 Act, including under new section 95A and temporary

¹⁷ New section 95A(3) of the Immigration and Asylum Act 1999 (not yet in force). Schedule 11, paragraph 9 of the Immigration Act 2016. Section 4(2)-(3) provision was not so limited in the legislation and accompanying regulations and guidance list “obstacles to return” as one qualifying factor, but also make clear that provision can be made available to prevent a breach of human rights. See paragraph 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005.

¹⁸ Paragraph 9 of Schedule 10, Immigration Act 2016.

¹⁹ UKVI, *Asylum support, section 4 policy and process*, see section 5.4. The Guidance restricts of section 4(1)(c) accommodation to those would otherwise be destitute, but does not include a specific requirement of exceptionality.

²⁰ Immigration Act 2016, paragraph 10 of Schedule 12. New paragraph 10A to Schedule 3 of the Nationality, Immigration and Asylum Act 2002.

²¹ Immigration Act 2016, paragraph 10 of Schedule 12. New paragraph 10B to Schedule 3 of the Nationality, Immigration and Asylum Act 2002.

support under new section 98A.²² Those in receipt of support under the 1999 Act as the dependants of asylum seekers whose claims have been refused will fall within the exemption.²³ The Government also intends to maintain an “*easement clause*” which provides for no charge to be made in relation to ongoing treatment after an individual ceases to be exempt.²⁴ Liberty welcomes the proposal to maintain these exemptions. We are concerned, however, that when provisions of the 2016 come into force, support now provided under sections 4(2) and section 95 of the 1999 Act will become less accessible as discussed above. This in turn will narrow the scope of the exemption and create barriers to healthcare for more people in need.

7. The Government is considering whether to extend an exemption to healthcare charges to those provided with support in “*exceptional circumstances*” to enable them to meet conditions of bail.²⁵ The Government intends to limit this exemption to those who have been through the asylum process. Liberty urges the Department of Health to extend the exemption in this way, but further to provide for the exemption to include all of those provided with support to meet bail conditions – including individuals who have not claimed asylum. Those released from immigration detention, many of whom are prohibited from working, face severe financial hardship comparable to individuals supported under sections 4(2)-(3) of the 1999 Act. Those leaving detention are further particularly vulnerable to serious mental health conditions caused or exacerbated by detention.²⁶ The consequences of creating barriers to treatment may be serious both for the individual and ultimately for the NHS and the public purse. Minor conditions, if left untreated, may ultimately require expensive, urgent care that the health service is rightly required to provide regardless of ability to pay.

8. The Government is further considering whether to extend an exemption to destitute families and destitute adult care leavers supported by local authorities under Regulations which may be created following the commencement of provisions

²² Provided while an application for section 95A support is being considered.

²³ Currently supported under section 4(3) of the Immigration and Asylum Act 1999.

²⁴ Regulations 2015/238, Regulation 3(5).

²⁵ Paragraph 9 of Schedule 10, Immigration Act 2016.

²⁶ Stephen Shaw, *Review into the Welfare in Detention of Vulnerable Persons*, January 2016. The Report presents the findings of Professor Mary Bosworth that detention has a negative impact on the health of detainees.

of the 2016 Act.²⁷ Liberty urges the Department of Health to extend the exemption in this way. The Regulation making provisions in the 2016 Act recognise that local authority provision will be required in cases where support is necessary to secure the welfare of a child or a young care leaver.²⁸ It is equally essential that these vulnerable people do not face insurmountable financial barriers to healthcare. Further, the Government recognises that local authorities must be in a position to ensure support for care leavers does not end abruptly.²⁹ The same argument applies, with equal or even greater force, in relation to accessible healthcare.

9. The Department of Health does not propose to extend an exemption to all “*failed asylum seekers*” or to “*irregular migrants*” more broadly. It seeks views on whether there are circumstances in which such individuals should benefit from exemptions. Liberty believes that exemptions should be extended to both of these groups. All those who have been through the asylum system - the vast majority of whom have been denied the opportunity to work in the UK - are liable to face serious barriers to healthcare where charges are imposed. Those who do access treatment, for example those requiring urgent care, are unlikely to be able to pay NHS debts.

10. Similarly, many irregular migrants who have not claimed asylum face hardship and exploitation on a daily basis. Recent legislative developments have exacerbated these issues by driving people into the hands of unscrupulous employers and unsafe, black market accommodation.³⁰ The NHS was a social evolution designed to recognise that, regardless of background or means, your life and your health are inherently and equally valuable. Liberty does not take issue with human rights compliant enforcement of immigration rules, but whilst people remain in this country they should be treated with dignity. This includes access to healthcare provision regardless of ability to pay.

²⁷ Immigration Act 2016, Schedule 12, paragraph 10.

²⁸ New paragraph 10A(7) of the Nationality, Immigration and Asylum Act 2002 (not yet in force). See Schedule 12 paragraph 10 of the Immigration Act 2016.

²⁹ Department of Health, Consultation correspondence, see final paragraph of the Annex.

³⁰ See in particular provisions of the Immigration Act 2014 and 2016 which create and develop the “right to rent” scheme requiring landlords to check the immigration status of potential tenants. See Immigration 2016, section 34 for the creation of an offence of illegal working.

Deprivation as a means of enforcement or deterrence

11. The Government argues that accessible healthcare is liable to “*incentivise a failure to co-operate with the removals process*”.³¹ Evidence shows, however, that destitution and deprivation do not facilitate removal and can discourage co-operation. The pointlessness of a policy which relies on destitution and hardship as an immigration enforcement tool was well summarised by the former Conservative Secretary of State for Work and Pensions in a 2008 report. There the Rt Hon Iain Duncan Smith argued:

If asylum is refused, asylum seekers are often left without support and usually without permission to support themselves through work... It also appears that a British government is using forced destitution as a means of encouraging people to leave voluntarily. It is a failed policy: only one in five leaves voluntarily.³²

12. When the Home Office conducted research on the impact of removing support from families in 2005, it found that people were no more likely to leave the UK when support was removed and that absconding became more of an issue.³³ Meanwhile evidence compiled by Detention Action indicates that when those without status are treated with dignity and respect, they are more likely to comply with requirements to leave the UK.³⁴ In Australia, for example, many migrants are supported in the community by Status Resolution Support Services which help people navigate the immigration system. NGO case managers help individuals to meet needs such as housing, welfare and healthcare in the community. A pilot evaluation of this scheme had a compliance rate of 93% and the programme also led to a 70% saving in

³¹ Department of Health, Consultation correspondence.

³² *Restoring Trust in the UK Asylum System*, The Centre for Social Justice: Asylum and Destitution Working Group, December 2008. Preface by Iain Duncan-Smith at page 4.

³³ *Family Asylum Policy: The Section 9 Implementation Project*, paragraph 2.2. Significantly the evaluation report also noted that, “[e]vidence suggests a significant number of the families may have absconded from accommodation because of concerns about the section 9 process”.

³⁴ Detention Action, *Alternatives to Detention in Returns Procedures*, September 2016, p. 37.

Available at: <http://detentionaction.org.uk/wordpress/wp-content/uploads/2016/09/Without-Detention.pdf>.

expenditure.³⁵ In the case of financial barriers to healthcare – as with other deprivations – the removal of support is likely to be both cruel and counter-productive.

13. The Department of Health further defends healthcare charges as a deterrent to those considering entering the UK.³⁶ Research conducted by the Home Office on trends in asylum applications reveals the fallacy in this approach. A 2002 Home Office study found that there was “*very little evidence*” that those seeking protection in this country: “*had a detailed knowledge of: UK immigration or asylum procedures; entitlements to benefits in the UK; or the availability of work in the UK.*”³⁷

14. This was confirmed by a 2011 review of the 19 main OECD recipient countries for asylum applications carried out by the Centre for Economic Policy Research.³⁸ The review concluded that tightening of welfare provision did not have any deterrent effect.³⁹ In the UK specifically, the introduction of separate and reduced support arrangements for asylum seekers in 1999 had no deterrent effect. Applications for asylum, excluding dependents, rose by 25,000 to 71,100 in 1999,⁴⁰ in 2000 applications rose by a further 13% to 80,315.⁴¹

Conclusion

15. Liberty urges the Government to rethink an approach to immigration enforcement which relies on deprivation and hostility to drive those without status out of this country. This approach is both cruel and counter-productive. To mitigate the

³⁵ *Alternatives to Detention in Returns Procedures*, p.37. As detailed in the Report, similar results have been found in Sweden, the US and the small UK based projects.

³⁶ Department of Health, Consultation correspondence e.g. Government “*do not consider it would be appropriate to encourage health tourism*”.

³⁷ V. Robinson, *Understanding the decision-making of asylum seekers*, University of Wales, July 2002, page viii.

³⁸ *Seeking Asylum Trends and Policies in the OECD*, Timothy J Hatton (University of Essex, Australian National University, and CEPR), July 2011.

³⁹ *Seeking Asylum Trends and Policies in the OECD*, see e.g. sections 8.2 and 9.3.

⁴⁰ ASYLUM STATISTICS UNITED KINGDOM 1999:

<http://webarchive.nationalarchives.gov.uk/20110218135832/http://rds.homeoffice.gov.uk/rds/pdfs/hosb1700.pdf>.

⁴¹ ASYLUM STATISTICS UNITED KINGDOM 2000:

<http://webarchive.nationalarchives.gov.uk/20110218135832/http://rds.homeoffice.gov.uk/rds/pdfs/hosb1701.pdf>.

impact of healthcare charges on the very vulnerable, Liberty urges the Department of Health to:

- Maintain an exemption from healthcare charges for asylum seekers (and their dependants) whose claims have been refused where they are supported under provisions of the 1999 Act;⁴²
- Maintain an “easement clause” which provides for no charges to be made in relation to ongoing treatment after an individual ceases to be exempt.
- Extend an exemption to healthcare charges to all those provided with support in “*exceptional circumstances*” to enable them to meet conditions of bail; and
- Extend an exemption to healthcare charges to destitute families and destitute adult care leavers supported by local authorities under Regulations which may be created following the commencement of provisions of the 2016 Act.

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⁴² As amended by the Immigration Act 2016.