



Recent court case on refused (failed) asylum seekers and entitlement to NHS healthcare April 2008

In April 2008, a High Court judgment resulted in changes to entitlement to free National Health Service (NHS) healthcare for refused (or 'failed') asylum seekers. Refused asylum seekers are asylum seekers who have exhausted all avenues of appeal.

Prior to this judgment, refused asylum seekers were not entitled to free NHS secondary care (with some exceptions) and had restricted rights to register with a GP.

Following the judgment, most refused asylum seekers are now entitled to free NHS secondary care and have the right to register with a GP.

What does the judgment mean for refused asylum seekers?

Individuals are entitled to free NHS secondary care and are entitled to register with a GP if they can establish that they are 'ordinarily resident' in the UK. The meaning of 'ordinarily resident' is determined by case law rather than legislation. A person is considered 'ordinarily resident' in the UK if they are in the country lawfully and can demonstrate that they are living here 'for settled purpose as part of the regular order of their life'.

Prior to the High Court judgment refused asylum seekers could not be considered 'ordinarily resident' in the UK at all. The judgment changed this, by declaring that in order to be considered 'ordinarily resident' in the context of NHS treatment they do not need to have leave to remain in the UK, and do not need to be lawfully in the UK. They only need to show that they have been given 'temporary admission' to be in the UK. Temporary admission is given to almost all asylum seekers who are not detained, or who have been released from detention, and it continues after appeal rights are exhausted, until removal directions are made.

Refused asylum seekers still need to demonstrate that they are living here 'for settled purpose as part of the regular order of their life'. The length of time an individual has been in the country is an important part of this.

Individuals who have been in the country for fewer than twelve months may need to establish that they are here for a settled purpose. National Health Service guidelines require trusts to interview people to clarify this. The guidelines state that someone who has been resident for less than six months is unlikely to be considered 'ordinarily resident'. However, an individual who has been resident in the country for as little as 1-3 months can be ordinarily resident but will need to show evidence that they plan to stay here. An individual who has been resident in the country for over 6 months should be considered to be 'ordinarily resident'.

How do I prove that I am a refused asylum seeker?

The Department of Health and NHS have not issued instructions on what will be accepted as proof that someone is a refused asylum seeker. The IS96 form and the Asylum Registration Card (ARC) are evidence that an individual has made a claim for asylum and either should be accepted by trusts as proof that the individual is lawfully in the country.

There may be some confusion flowing from the Department of Health's letter to trusts. It says: 'A failed asylum seeker granted temporary admission or temporary release should be able to prove their status by way of written authority by an immigration officer or other UKBA official on behalf of the Secretary of State for the individual'. It is not clear what they mean by this, however the IS96 or ARC should be sufficient evidence that an individual has been granted temporary admission or temporary release.

If the NHS trust or GP practice is uncertain about the status of an individual, they can check this with the Home Office.

What do I do if I am asked to pay for NHS secondary care?

There may be some confusion amongst NHS staff about who is required to pay for care. If a refused asylum seeker is asked to pay for care, they should give the staff member the letter from the Department of Health which is attached to this form. This letter can be found on the Department of Health website at:

http://www.dh.gov.uk/en/Publicationsandstatistics/Lettersandcirculars/Dearcolleagueletters/DH_084479

If they are still asked to pay by a hospital trust, they should ask for assistance from the hospital's PALS service.

What do I do if I am refused registration or asked to pay for GP care?

There may be some confusion amongst GP practices about who is entitled to GP registration. If the refused asylum seeker is denied registration because of their immigration status, they should give the staff member the letter from the Department of Health which is attached to this form.

The letter can be found on the Department of Health website at:

http://www.dh.gov.uk/en/Publicationsandstatistics/Lettersandcirculars/Dearcolleagueletters/DH_084479

If they are still refused registration because of their immigration status, they should seek assistance from their Primary Care Trust.

Does the judgment mean that everyone can get free NHS care?

No. Some people are not entitled to free NHS care. People who entered the country illegally and have not applied for asylum are not entitled to free care. Neither are individuals whose visa has expired and who have not applied for another visa or whose application for another visa has been refused.

One group which may be entitled to free NHS care as a result of this judgment are individuals who have leave to remain in the country while a new visa application is considered.

Is it possible that the rules will change again?

The Department of Health has decided to appeal against the decision. This means that the rules may change again in the future. It is a good idea to check the rules from time to time.

Where can I find out more about this judgment?

The case is called: 'The Queen (on the application of A) v Secretary of State for Health (Defendant) & West Middlesex University Hospital NHS Trust (Interested Party) [2008] EWHC 855). The full text of the judgment is available on the Medact website at

<http://www.medact.org/content/refugees/Judicial%20review%20transcript.pdf>

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Dear Chief Executive

**Subject: FAILED ASYLUM SEEKERS AND ORDINARY RESIDENCE -
ADVICE TO OVERSEAS VISITORS MANAGERS**

As you may be aware, the High Court heard a Judicial Review case on 10/11 April which challenged the lawfulness of the Department of Health's guidance document *Implementing the Overseas Visitors Hospital Charging Regulations* ('the guidance'). Mr Justice Mitting found in favour of the claimant on the main point, that the guidance is unlawful in not stating that failed asylum seekers can be considered to be ordinarily resident in the UK. Unusually, he delivered his verdict orally on the final day of the hearing. Legal advice to the Department of Health was that we should await receipt of the written transcript of the verdict before considering, and advising the NHS of, any changes to the charging regime arising from it. The written transcript was issued on 23 April. The Department is considering options on a potential appeal, but unless and until the decision is overturned, the judge's verdict is effectively the law and must be followed with immediate effect by NHS Trusts, Primary Care Trusts and NHS Foundation Trusts when operating their charging regime.

The law and what the judgment means

Powers stemming from the *NHS Act 2006* (previously the *NHS Act 1977*) enable the Secretary of State for Health to charge anyone who is not ordinarily resident in the UK. He has no power to charge anyone who is ordinarily resident here. The *NHS (Charges to Overseas Visitors) Regulations 1989*, which define an overseas visitor as anyone not ordinarily resident in the UK, were made using these powers. However, the enabling legislation does not define ordinarily resident and, instead, the accepted definition stems from the case law of *Shah v Barnet LBC* in 1982, which the guidance paraphrases as someone:-

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

What Mr Justice Mitting's judgment does is to say that a person's status of being a failed asylum seeker does not in itself preclude him from being considered to be ordinarily resident in the UK.

Asylum seekers who claim at port are often given "temporary admission" by immigration officers. A failed asylum seeker may still have temporary admission after a decision has been taken on their case to refuse asylum. The judge has ruled that, in his view, other case law has determined that those on temporary admission are lawfully present in the UK, and that this status is sufficient to satisfy the "lawful" component of the ordinarily resident test. He says:-

I can see no reason why a person lawfully living in the United Kingdom... should not become ordinarily resident by dint of his voluntary wish to settle, coupled with residence for a significant period... A person whose claim to asylum (which might carry with it a wish to return to his native territory when the threat to him has lessened or gone), has failed, but who refuses to leave voluntarily is likely to be determined to remain in the United Kingdom if he can. Significant residence with that purpose is likely to provide proof of ordinary residence.

Asylum seekers may also be given "temporary release" if they claim asylum once they have entered the UK. Mr Justice Mitting held that it was unworkable to distinguish between asylum seekers who claimed at port and those who did not and he therefore concludes that both categories should be treated in the same way. He goes on to say "I therefore declare that insofar as the guidance, in particular the last sentence of paragraph 6.2.4 (sic) advises National Health Service Trusts to charge failed asylum-seekers who would otherwise be treated as ordinarily resident, it is unlawful".

What to do now

The judge did not say that all failed asylum seekers on temporary admission are ordinarily resident, just that in certain circumstances they may be. Therefore, trusts must consider whether each failed asylum seeker that they treat can be considered ordinarily resident in the UK, in the same way as they would do with any other patient, taking into account the judge's opinions as to what would be likely to be sufficient proof of ordinary residence. A failed asylum seeker granted temporary admission or temporary release should be able to prove this status by way of a written authority by an immigration officer or other UKBA official on behalf of the Secretary of State to the individual.

There is no time frame within the ordinarily resident test, so a person does not have to have been in the UK for a specific length of time to be considered ordinarily resident, but the judge does mention a "significant period" as being important. The Department has previously advised that a person who has been in the UK for less than six months is less likely to meet the ordinarily resident test but it is important to realise that this is only a guideline, not a deadline, and,

in itself, does not always preclude a person from being considered ordinarily resident. Each case must be assessed on its full merits.

If, for whatever reason, trusts do not consider a failed asylum seeker on temporary admission to be ordinarily resident here and therefore treat him or her as an overseas visitor, they will become exempt from charges by virtue of Regulation 4(1)(b) after being lawfully in the UK for twelve months, as discussed in paragraph 6.20 of the current guidance.

Trusts must amend copies of the guidance to delete paragraph 6.24 (previously 6.23). The judge has found the last sentence of that paragraph to be unlawful, but the ruling has implications for the whole paragraph which we will need to consider in more depth. An amended version of the guidance taking account of this will be posted on the web soon. Nothing is to change in relation to either asylum seekers whose asylum applications or appeals are pending or those who have been granted refugee status. They are still exempt from charges for all hospital treatment.

Yours faithfully

Richard Douglas

Director General for Finance and Chief Operating Officer