

Response to the amendment of the NHS (Charges to overseas visitors) Regulations 2016

About ASAP

ASAP is a small legal advice charity specialising in asylum support law. It was set up in 2003 with the aim of reducing the destitution of asylum seekers by protecting their legal rights to food and shelter. ASAP's work is threefold:- (1) running a *pro bono* representation scheme, at the First-tier Tribunal (Asylum Support) (the "Tribunal") (2) providing authoritative asylum support advice and training to frontline organisations, advice agencies and legal practitioners working with asylum seekers; (3) engaging in policy work, lobbying and strategic litigation to improve policies and procedures for asylum support.

Introduction

The draft asylum support regulations pursuant to the Immigration Act 2016 have not yet been published, and it is not known when they will be brought into force. Our understanding is that question one addresses mainly (but not exclusively) the current situation. Question two addresses the situation once they have been brought into force. Question three is a general invitation to comment on those who are not entitled to support.

We strongly believe that all those supported under the 1999 Act and by local authorities should be exempt.

Question one

The Department of Health proposes to amend regulation 15 of the Charging Regulations to exempt from charges an overseas visitor who:

- **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.**

The wording of the question is not entirely clear. It appears to be saying that if someone is a refused asylum seeker but is now receiving support under the 1999 Act, then they are exempt.

It would cover:-

-Those currently on s4(2) support. Eligibility for s4(2) support is governed by the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 and the criteria set out in reg 3(2). At least 70% of those in receipt of s4(2) support qualify under reg 3(2)(e) 'the provision of accommodation is necessary for the purpose of avoiding a breach of a person's

Convention rights' on the basis that they have lodged further submissions which are still outstanding.

-Those on s4(1)(c) support, immigration bail, who are *also* refused asylum seekers.

It would not cover:-

- The small number who are currently on s4(1)(a) and (b) support. In contrast to s4(2), there are no accompanying regulations for s4(1); it is a discretionary power to support, set out in Home Office policy¹. Section 4(1)(a) and (b) support must be distinguished from s4(1)(c) support which is for those released on immigration bail. The Home Office's policy on s4(1)(a) and (b) sets out that it should not be granted to asylum seekers or refused asylum seekers as they should apply for s95 or s4(2) support. In ASAP's experience, those who have been granted s4(1)(a) and (b) support have meritorious outstanding Article 8 applications. They tend to be either young adults or separated fathers. The young adults have been brought to the UK as children, unaware of their lack of status, who then submit applications for leave to remain after the age of 18. The separated fathers have British citizen or settled status children with whom they have an ongoing relationship. Both categories are in limbo whilst waiting for a Home Office decision.

-Those on s4(1)(c) support who were *not* refused asylum seekers.

In contrast to the Home Office's s4(1)(a) and (b) policy, there is nothing in the legislation restricting s4(1) support to non asylum seekers. Those on s4(1)(c) support include both non asylum seekers and refused asylum seekers. The consultation paper is misleading in regularly referring to s4(1) recipients as 'irregular migrants'.

It makes no sense to distinguish between those who have claimed asylum in the past (and were refused) and those who have never claimed asylum. As set out above, those currently in receipt of s4(1)(a) and (b) support have meritorious outstanding claims, and the Home Office policy requires exceptional circumstances.

It is much more logical and administratively straightforward (for the NHS) for all those in receipt of Home Office support to be exempt. What is being proposed here would mean that the NHS would first have to enquire whether the person is on s4(1) or s4(2) support (the nature of the support, and the providers, are the same). And then, if it is s4(1), find out whether the person has claimed asylum in the past.

Furthermore, migrants can switch between types of s4 support. For example, a detainee could be released onto s4(1)(c) support, but at a later period their bail is terminated, and they are granted Temporary Admission instead. Therefore eligibility for s4(1)(c) ends. However, during this period they have lodged asylum further submission and therefore become eligible for s4(2) support. It is unworkable that they should go in and out of being exempt, whilst remaining throughout on Home Office support.

¹ Asylum support, section 4 policy and process instruction para 1.1.3. This relates to s4(1)(a) and (b) not s4(1)(c)

Furthermore, putting those who are on Home Office support, but have never claimed asylum, at a disadvantage compared to others on Home Office support, could encourage claims for asylum purely to come within the exemption.

Immigration Act 2016

The following 2 categories are eligible for s4(2) support, under reg 3(2)(e), and therefore are currently exempt. Once s4 has been repealed, they will be ineligible for support, and so will also lose their exemption:-

- Refused asylum seekers with an outstanding statelessness application
- Refused asylum seekers with an outstanding Article 8 application.

Question Two

The Department of Health is 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**

Support linked to bail condition

All those on Home Office should be exempt from charging. This should include those who will be on Immigration Act 2016 Sch 10 para 9(3) support. No information has been provided as to how this power will be applied, nor whether there will be accompanying regulations. The recipients of this form of support may lodge asylum further submissions, in which case they will become eligible (in the new system) for s95 support. For the reasons given above for those currently on s4(1)(c) support, they should be exempt whilst on para 9(3) support. Switching between different types of Home Office support should not affect whether or not a person is exempt.

Destitute families

The removal of refused asylum seeking families from s95 support (under the 2016 Act) is hugely significant, and the full impact on local authorities is not yet known. The creation of

the new form of local authority support for families under Para 10A (both for refused asylum seeking families and families who have never claimed asylum) will put a very considerable extra burden on local authorities. It is wrong and unfair to add to this increased burden by making these families not exempt.

The No Recourse to Public Funds (NRPF) Network published research² on the 2011 regulations in 2014, which made the case for those supported by local authorities to be exempt from secondary healthcare charges. It demonstrated the hardship that was being caused by the fact that families being supported under the Children Act 1989 s17 were not exempt, and that the regulations were obstructing partnership work between the NHS and local authorities. Litigation against both central and local government can be anticipated in compelling cases (eg children), in which it will be disputed where the duty to fund the treatment lies.

The consultation document and accompanying annex is misleading regarding s95A support. It fails to acknowledge that there is to be a requirement to apply within the grace period for this support.³ Accordingly, s95A support will only be available for those who apply whilst on their s95 grace period support (90 days for families and 21 days for others). The 8 page consultation document was unnumbered, but inserting numbers, this omission occurred on p3 (1st bullet point), p4 (2nd bullet point) and p5 (para under 2nd bullet point). The point was also missing from the annex on p3 (2nd bullet point) and p4 (NB point and final para).

Until the regulations are published, it is not known for certain if the grace period requirement is to be made law. If it is, then the numbers on s95A will be very low. The Home Office's own data shows that of the 105 people who applied for the equivalent of what will be s95A 'genuine obstacle' support in 2015, only 6 applications were made in the grace period.⁴

The significance of eligibility for s95A support being very restricted is that, in the case of families, there will be an increased burden on local authorities. Families facing a genuine obstacle to leaving (lack of travel documents or medically unfit to travel) will be on Para 10A Condition D support, not s95A (or s98A) support. Therefore it is not logical, and serves no purpose, that they are not exempt when in receipt of local authority support but would be if on Home Office support. Furthermore it appears to be anticipated that families will switch between Para 10A and s95A support⁵ and therefore there is the possibility of going in and out of exemption.

² Report on the impact of the NHS (Charges to Overseas Visitors) Regulations 2011 on local authority supported service users, on the NRPF website

³ Home Office 'Reforming support for migrants without immigration status The new system contained in Schedules 8 and 9 to the Immigration Bill' January 2016

⁴ Response of James Brokenshire, Minister for Immigration, to written parliamentary question WP29521 tabled on 2/3/16

⁵ Families will not be eligible for Para 10A support if they are eligible for s95A support

ASAP

ASYLUM
SUPPORT
APPEALS
PROJECT

DEFENDING ASYLUM SEEKERS

LEGAL RIGHTS TO FOOD AND SHELTER

Asylum Support Appeals Project
Studios 11&12
Container City Building
48 Trinity Buoy Wharf
London
E14 0FN

Para 10A support is designed to be restrictive and time-limited. Entitlement to this support (and Para 10B support for careleavers) should go hand in hand with being exempt.

Question three

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?

Those who have an outstanding application for leave to remain (Article 8, Article 3 medical, statelessness) which does not entitle them to support, should be exempt. It is acknowledged that there the Home Office faces the practical issue of how to deal expeditiously with applications and repeat applications. However, this should not take away from the principal that it is not reasonable for those with outstanding applications to leave the UK. Concerns about health tourism could be dealt with by dealing promptly with applications for leave. It is important from the point of view of both public health and increased costs in the future, that those with health conditions are not deterred from seeking treatment.

20th January 2017