Briefing Paper 5.7

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NHS Treatment for Failed Asylum Seekers[1]

1 This issue came before the Court of Appeal in a judicial review case, ***Regina (A) v. Secretary of State for Health*** in an appeal by the Secretary of State against an adverse ruling in the High Court. A full report is on the Court of Appeal's website and a summary was published in The Times Law Report on 2 April 2009.

2 The case was brought by a failed Palestinian asylum seeker who had been undergoing treatment for a serious condition and who, it was accepted, could not be returned to his country of origin. The Court considered at some length the relevant provisions of legislation governing the National Health Service and of immigration legislation. Section 1 of the National Health Service Act 2006 imposes a duty on the Secretary of State for Health to provide health services free of charge to the people of England. (Separate legislation covers Scotland, Wales and Northern Ireland.) Regulations made under the Act impose on NHS Trusts an obligation to charge persons who are not either (1) ordinarily resident in England or (2) have lived in the United Kingdom lawfully for 12 months or more, for treatment other than that provided by accident and emergency departments or otherwise judged to be urgent. The expression "ordinarily resident" has long been established in income tax law and is also relevant in other branches of the law. Guidance issued by the Department of Health to NHS Trusts relies on a decision of the House of Lords, (***Ex parte Nilsh Shah*** [1983] 2AC 309, per Lord Scarman at pages 343-4) for a definition for Trusts to apply in deciding whether patients are to be regarded as ordinarily resident for the purposes of charging for treatment. ***Trusts are required to consider whether the patients are living lawfully in the United Kingdom voluntarily and for settled purposes as part of the regular order of their lives 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.*** In the light of this the Court had to establish the immigration status of a failed asylum seeker who could not be returned. Some asylum seekers enter the United Kingdom lawfully through regular means and apply on arrival. They are granted temporary admission, which protects them against deportation and continues for so long as their applications and any subsequent appeals against refusal are pending - a process which can take years. Applicants who enter illegally in the first place do not have temporary admission but enjoy the same protection after applying. This protection arises from Article 33.1 of the 1951 Geneva Convention on the Status of Refugees, which prohibits contracting States from removing any asylum seeker "to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

3 It should be made clear at this point that an asylum seeker whose case is still pending or who has been accepted as a refugee is entitled to exemption from charges. After consideration of all relevant authorities, the Court concluded that an asylum seeker in the position of the appellant in this case was not ordinarily resident in the United Kingdom and therefore not eligible to free treatment by the NHS as of right. The Court referred to the words of section 1 of the National Health Service Act 2006 which, as already noted, imposes on the Secretary of State a duty to provide free health services to the people ***of*** England but not to all the people ***in*** England. Any period, no matter how long, spent in the United Kingdom by a failed asylum seeker could not entitle him to be considered as ordinarily resident. To quote again from Lord Scarman in the case already mentioned, "if [the appellant's] presence in the country is unlawful, for example in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence".

4 An NHS Trust is therefore entitled to charge failed asylum seekers for treatment other than treatment in accident and emergency departments or urgent treatment, the latter meaning that it is not immediately necessary but cannot wait until the patient returns home, which in the case of a patient such as the appellant in this case may not be for many years. In the case of non-urgent treatment such as elective surgery, the Trust is entitled to charge, but also has a discretion to refuse treatment if, as will invariably be the case with failed asylum seekers, there is no prospect of the patient's ever being able to afford to pay for it. To quote paragraph 77 of the judgment of Lord Justice Ward, referring to non-urgent treatment:

> "My conclusion is that it is implicit in the Guidance [i.e. the Guidance issued to NHS Trusts] that there is a discretion to withhold treatment but there is also a discretion to allow treatment to be given when there is no prospect of paying for it. How that discretion is to be exercised may depend on how long the failed asylum seeker will remain at large and ***the plight of those who cannot return should be identified and clarified in the Guidance.***"

5 The significance of the words I have italicised is that counsel for the appellant had sought a declaration that the Guidance was unlawful. This was refused , but the Court felt that in this particular area it needed to be improved.

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NOTES

1 See also Briefing Paper 5.3 Access to the NHS