Overseas visitors, asylum seekers and others: Who is entitled to access NHS services free of charges and who is required to pay charges for NHS services?

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22. The level of NHS charges under the 2015 Regulations.
23. Who is liable to charge and pay charges under the 2015 Regulations?
24. When can or should treatment be provided without advance payment?

Index of defined terms:

The NHS Act	National Health Service Act 2006
The MHA	Mental Health Act 1983
The MCA	Mental Capacity Act 2005
IA 2014	Immigration Act 2014
2011 Directive	Directive (2011/24/EU) on the application of patients' rights in cross-border healthcare
2004 EU Regulations	Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland)
2009 EU Regulations	Regulation 2009/883 implementing the 2004 EU Regulations
2015 Regulations	National Health Service (Charges to Overseas Visitors) Regulations 2015: SI 2015/238
2017 Regulations	National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2017: SI 2017/756
The Guidance	Draft Guidance published by the Department of Health on implementing the overseas visitors charging regulations
DWP	Department of Work and Pensions
ECHR	European Convention of Human Rights
EEA	European Economic Area
EHIC	European Health Insurance Card
EU	European Union
FGM	Female Genital Mutilation

IHS	Immigration Health Charge, also known as the Immigration Health Surcharge
MSHTU	Modern Slavery Human Trafficking Unit
OVM	Overseas Visitors Manager
PRC	Provisional Replacement Certificate
Refugee Convention	United Nations Refugee Convention 1951
Torture Convention	United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
Trafficking Convention	Council of Europe Convention on Action against Trafficking in Human Beings (agreed at Warsaw on 16th May 2005)
UKVI	Home Office Visas and Immigration
WHO	World Health Organisation

1. Introduction to charges for overseas visitors.

1.1. There are few subjects that get tabloid newspapers and right-wing MPs more worked up that the perception that vast numbers of "foreigners" are descending on the UK for the sole purpose of using free NHS services and, as a result, all the shortcomings of the NHS can be put down to foreigners clogging up GPs waiting rooms, wards and clinics. However, the political focus on the use of NHS services by overseas visitors appears to be entirely out of proportion to the cost to NHS bodies of providing such services. The NHS has always relied on vast numbers of healthcare staff who were trained abroad. So the "foreigner" on the ward is far more likely to be a doctor or a nurse than an overseas visitor patient.

1.2. Nonetheless, the NHS operates in a political environment and decisions about the way it operates are made by politicians, and politics is driven by sentiment as much as it is by evidence. Thus the rules relating to overseas visitors using the NHS have been continually tightened by governments responding to public opinion, loosened in response to legal challenges and then tightened once more in response to tabloid pressure. The result is a complex set of rules where there are numerous categories of individuals who may or may not be able to access NHS care and may or may not be required to pay for the care provided to them (either up front or after the care is delivered).

1.3. Aside from anti-foreigner prejudice, there is considerable policy justification for seeking to charge overseas visitors for having the benefit of NHS services. The NHS is a taxpayer funded public service which works on a system of reciprocity. All taxpayers in the UK pay into the government's coffers by both direct and indirect taxation, and in return the same people receive NHS services. Thus those who are not UK taxpayers should not have the benefit of free NHS services. The principles were set out by the

former Minister of State, John Hutton explained the government's thinking behind a previous set of charging regulations[1] as follows:

> "The National Health Service is first and foremost for the benefit of people who live in the United Kingdom. …
>
> With the changes to the charging Regulations, and their proper enforcement, we can ensure that, as far as possible, NHS resources are being used to meet the health care needs of people who live in the UK, not those who don't."

1.4. That approach was endorsed by the Court of Appeal in *R (YA) v Secretary of State for Health* [2009] EWCA Civ 225[2] which was called upon to determine whether NHS services should be made available, free of charge, to a failed asylum seeker[3]. Ward LJ said:

> "Here the statute in need of construction is the 2006 NHS Act. As set out at [8] above, the Secretary of State's duty prescribed by section 1 is to continue the promotion in England of a comprehensive health service designed to secure improvement in the health "of the people of England". Note that it is the people *of* England, not the people *in* England, which suggests that the beneficiaries of this free health service are to be those with some link to England so as to be part and parcel of the fabric of the place. It connotes a legitimate connection with the country. The exclusion from this free service of non-residents and the right conferred by section 175 to charge such persons as are not ordinarily resident reinforces this notion of segregation between them and us. This strongly suggests that, as a rule, the benefits were not intended by Parliament to be bestowed on those who ought not to be here"

1.5. The present rules are set out in the National Health Service (Charges to Overseas Visitors) Regulations 2015[4] ("**the 2015 Regulations**"), as amended by the National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2015[5], National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2017

[1] Quoted at paragraph 16 of the judgment of the Court of Appeal in *R (YA) v Secretary of State for Health* [2009] EWCA Civ 225 at http://www.bailii.org/ew/cases/EWCA/Civ/2009/225.html.
[2] See http://www.bailii.org/ew/cases/EWCA/Civ/2009/225.html.
[3] There are now statutory provisions dealing with failed asylum seekers which are considered below at paragraph XX.
[4] SI no 2015/238.
[5] SI 2015/2025.

("**the 2017 Regulations**")[6]. The changes made to the 2015 Regulations came out of a consultation which was run by the government between December 2015 and February 2016. This was a one-way series of changes as the consultation document[7] explained at paragraph 1.5:

> "Our aim now is to further extend charging of overseas visitors and migrants who use the NHS. This consultation seeks your views on how best to do this, including exploring changes in primary care, secondary care, community healthcare and changing current residency requirements"

1.6. Hence, the consultation was not focused upon reducing the charges paid by overseas visitors but only looked at ways of increasing them. The government produced a response to that consultation in February 2017: "*Making a fair contribution: Government response to the consultation on the extension of charging overseas visitors and migrants using the NHS in England*"[8]. The decision of the government was expressed in paragraph 4.5 which said:

> "Other than for A&E and ambulance services, for which more reflection is necessary, it is therefore our intention for all NHS funded care to be chargeable to those not living here or making a financial contribution to the country, except where there are good reasons for some services to be freely available to all overseas visitors, for example because of the need to protect public health. However, in recognition of the need to ensure these major changes can be implemented effectively, we will take a phased approach to extending charging into new areas of NHS care"

1.7. That response led to the 2017 Regulations. The majority of the changes made by the 2017 Regulations came into force on 21 August 2017 but there are also changes which will come into force on 23 October 2017.

[6] SI no 2017/756 at http://www.legislation.gov.uk/uksi/2017/756/contents/made
[7] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483870/NHS_charging_acc.pdf
[8] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/590027/Cons_Response_cost_recovery.pdf

1.8. The Department of Health has also published draft Guidance[9] about the operation of the 2015 Regulations, namely the "*Draft Guidance on implementing the overseas visitors charging regulations*" ("**the Guidance**"). This Guidance has been published in draft and will take effect after 21 August 2017 (at which point it will presumably cease to be "draft" Guidance). However the Guidance only covers the making of charges for treatment at an NHS hospital. It says in the Introduction:

> "This guidance explains what should happen when an overseas visitor needs NHS treatment provided by an NHS hospital in England"

There are now charges for non-hospital based services (as explained below) but, at present, there does not appear to be any Guidance about how those rules are to be implemented.

1.9. **Primary Care Services:** The rules at present do not provide for charges to be made for primary care services. However the direction of travel for the NHS is clearly set out at paragraph 4.25 which states:

> "We will work with stakeholders including the Royal College of GPs, BMA's General Practitioners' Committee and General Dental Council to consider how best to extend the charging of overseas visitors and migrants into primary care"

Hence it appears that the policy question has been settled in that charges will be extended to overseas visitors who use primary care services. However the government has included primary care in the current regulations because it has not yet determined the best way to do so.

1.10. **The February 2017 response concerning charges for NHS community services:** The February 2017 response also indicated the government would consider extending charges to other areas. It said at paragraph 4.28:

[99] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/634855/Guidance_to_charging_regulations.pdf

"We will consider further the options listed below, where additional analysis is required to better understand the potential usage of certain services by overseas visitors and migrants and establish a robust cost/benefit case before deciding whether to pursue charging in these areas:

- If NHS continuing care and NHS-funded nursing care should become chargeable to overseas visitors
- If introducing charges to overseas visitors for NHS sight tests is implementable and cost-effective
- If individuals who provide third party support to an overseas visitor as part of their visa application should be liable for the overseas visitor's unpaid NHS bills, and work with the Home Office to do so
- If areas of care which are part-funded by charitable donations (e.g. hospice care) should become chargeable to overseas visitors"

1.11. Some of these services are now chargeable as a result of the 2017 Regulations. It therefore looks as if the government intends to continue to expand the number of NHS services for which charges will be made to overseas visitors over the coming years. It remains to be seen, of course, whether a government without a parliamentary majority will be able to achieve this.

2. The general right to free NHS services.

2.1. The vast majority of NHS services are available to everyone who lives in the UK and are free of charge at the point of use. Charges are made in England[10] to some patients for some NHS services such as prescriptions, eye tests and dental services. This chapter looks at NHS charges for individuals who have come to England from overseas. The general rule is set out in section 1 of the National Health Service Act 2006 ("**the NHS Act**") which provides:

[10] Separate rules operate for Wales, Scotland and Northern Ireland.

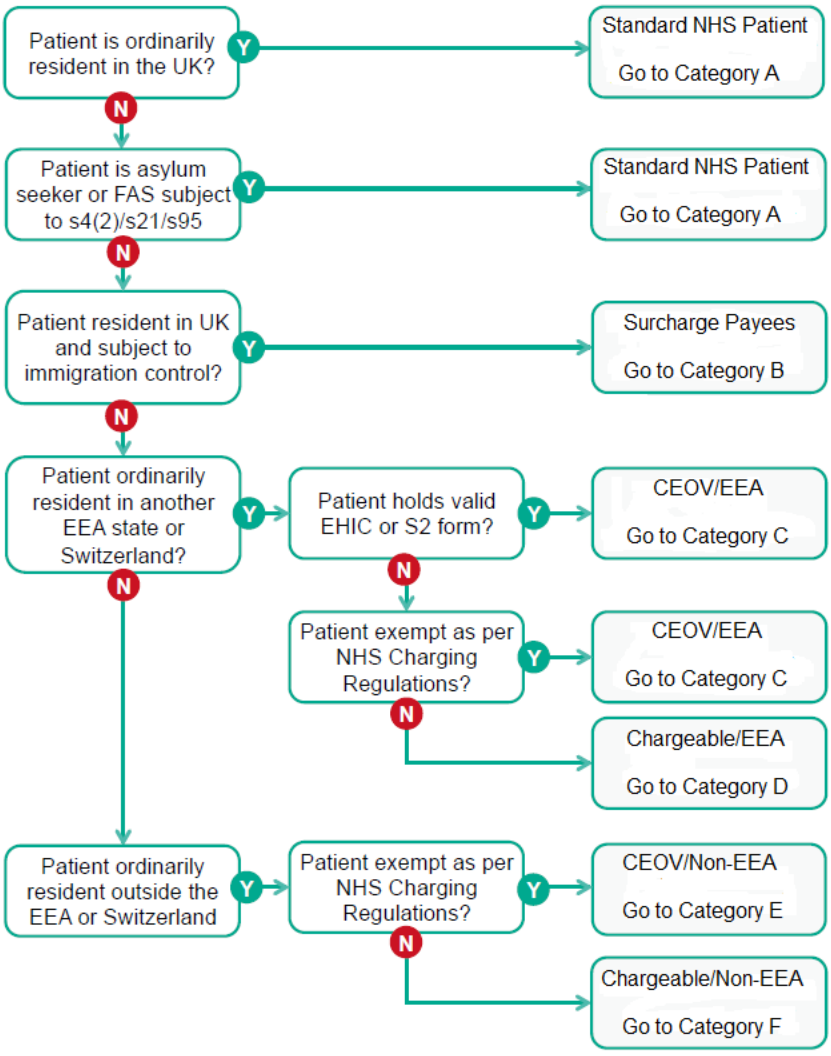
> "(4) The services provided as part of the health service in England must be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed"

2.2. Accordingly, the default position is that all NHS services must be provided to all NHS patients unless the NHS body has a specific right to impose a charge. However section 175 of the NHS Act provides:

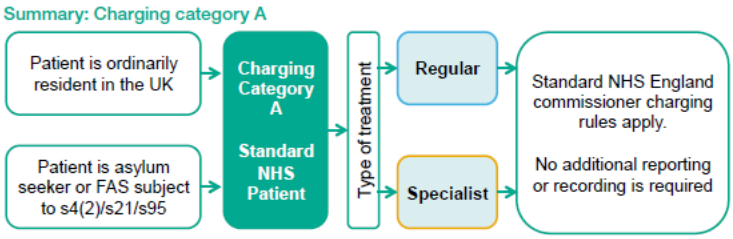
> "(1) Regulations may provide for the making and recovery, in such manner as may be prescribed, of such charges as the Secretary of State may determine in respect of the services mentioned in subsection (2).
>
> (2) The services are such services as may be prescribed which are—
>
> (a) provided under this Act, and
>
> (b) provided in respect of such persons not ordinarily resident in Great Britain as may be prescribed.
>
> (3) Regulations under this section may provide that the charges may be made only in such cases as may be determined in accordance with the regulations.
>
> (4) The Secretary of State may calculate charges under this section on any basis that he considers to be the appropriate commercial basis"

2.3. Section 175 of the NHS Act thus permits the Secretary of State to make Regulations to provide that charges shall be made for the provision of categories of NHS services for anyone who is not "*ordinarily resident in Great Britain*".

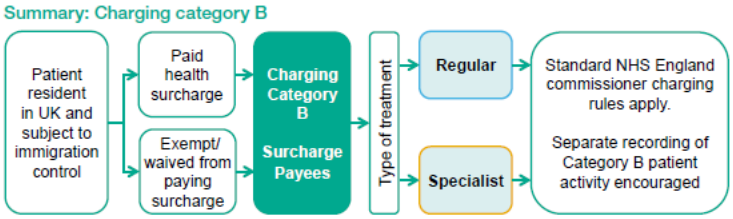
2.4. There is a useful chart at page 100 of the Guidance which summarises the way the Regulations operate as follows:



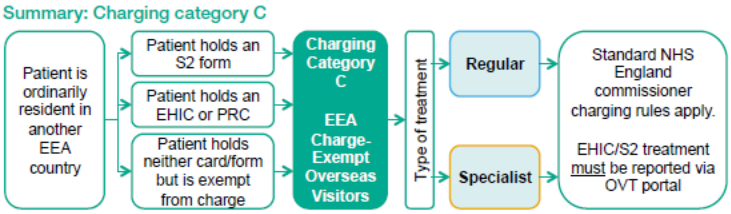
2.5. This then leads to a series of further charts which explains the approach that is to be taken to charging. These explain each "Category". The scheme for Category A is:



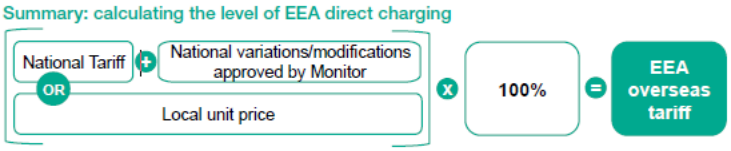
The charging scheme for Category B is:



The charging scheme for Category C is:



and …



2.6. If this seems horrendously complex – it is because it is horrendously complex. However, we shall try to make sense of the concepts in the remainder of this chapter.

3. The ordinary residence test under section 175 of the NHS Act.

3.1. There is no comprehensive statutory definition of the meaning of the term "*ordinary residence*" for the purpose of the NHS Act. It is a common law concept which has been developed by the Judges over many years. The words "ordinary residence" are used in numerous statutes to define entitlement to one or more state benefits or a liability to make taxation or other payments to a state body and the words largely define the same concept in every Act[11]. Other Acts of parliament, including the NHS Act, use the terms "residence", usual residence and habitual residence. There are clear differences in meaning between "habitual residence" and the term "ordinary residence". However the words "residence", "normally residence" and "ordinary

[11] Save that for some Acts, such as the Care Act 2014, a person can only have one place of OR whereas for other Acts a person can have multiple places of OR.

residence" generally mean the same thing. This was confirmed by Mitting J in *R (M) v London Borough of Hammersmith and Fulham & Anor* [2010] EWHC 562 (Admin)[12] who said:

> "There seems to me to be no perceptible difference between the three phrases, "resident", "ordinarily resident" and "normally resident". All three connote settled presence in a particular place other than under compulsion"

3.2. The leading case on the meaning of "ordinary residence" is *Shah v Barnet London Borough Council* [1983] 2 AC 309 which concerned the eligibility of foreign based students for UK student grants. Eligibility was based on an "ordinary residence" test and the students argued (successfully) that once they were settled in the UK, they were ordinarily resident here and so entitled to a grant. Lord Scarman relied upon the definition of "ordinary residence" in *Levene v Commissioners of Inland Revenue* [1928] 1 AC 217, a tax case, in which reference was made to the Oxford English Dictionary definition of "reside" as meaning:

> "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place"

3.3. The Court in *Levene* also said that "ordinary residence", was said to connote:

> "residence in a place with some degree of continuity and apart from accidental or temporary absences" (per Lord Viscount Cave LC, p 225)

3.4. Lord Scarman thus concluded that, unless "the statutory framework or the legal context" pointed to a different meaning, the expression "ordinarily resident" should be taken as referring to:

> "a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration." (p 343G-H)

[12] See http://www.bailii.org/ew/cases/EWHC/Admin/2010/562.html. The Judge was upheld in the Court of Appeal on slightly different grounds.

3.5. Lord Scarman decided that a place of ordinary residence had to be "voluntarily adopted" and hence a residence which was an "enforced presence by reason of kidnapping or imprisonment" did not count. However he said that the issue did not depend on the identification of a person's "real home", nor on his long term future intentions or expectations but where he lived at this point in a reasonably settled manner. Choice is not part of the ordinary test unless a person is living under compulsion. A person can be either resident or ordinarily resident in a place where he does not particularly wish to be, provided it is a place of settled residence. In *Mohammed v LBHF* [2002] 1 AC 547 Lord Slynn considered the meaning of the expression "normally resident" for the purposes of the Housing Act 1996. The Judge said:

> "So long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides ... Where he is given interim accommodation by a local housing authority even more clearly is that the place where for the time being he is normally resident." (Page 553C to D)

3.6. However, a person who is detained in a mental health institution or in a prison will not acquire an ordinary residence at that institution, and so will be deemed to continue to be ordinarily resident in the place that he was prior to being detained, even if there is nowhere for him in fact to go to live at that place: *R v Mental Health Review Tribunal, Ex p Hall* [2000] 1 WLR 1323. However in all other cases, a person cannot continue to be ordinarily resident in a place unless there is property that he could occupy at that place: see *R (Sunderland City Council) v South Tyneside Council* [2012] EWCA Civ 1232.

3.7. It is not usually relevant how long a person has been living at their place of residence before they become ordinarily resident. If someone moves house from location A to location B, thus giving up their place of residence at location A, they will instantly acquire location B as their place of ordinary residence: see *Macrae v Macrae* [1949] 2 All ER 34 where it was said:

> "From the moment he travelled to Inverness ….. it seems to me that all the evidence tends to show that he was ordinarily resident in Scotland"

3.8. **The need for the residence to be lawful:** A key feature of ordinary residence in a place is that the residence is required to be lawful. However this element of the ordinary residence test has been extended by section 39 of the Immigration Act 2014 ("**the IA 2014**") which provides that the person's residence in the UK must not be only for a limited period. It provides:

> "A reference in the NHS charging provisions to persons not ordinarily resident in Great Britain or persons not ordinarily resident in Northern Ireland includes (without prejudice to the generality of that reference) a reference to—
>
> (a) persons who require leave to enter or remain in the United Kingdom but do not have it, and
>
> (b) persons who have leave to enter or remain in the United Kingdom for a limited period"

3.9. This provision only impacts on non-EEA nationals. The practical effect of this section is explained as follows at paragraphs 3.10 and 3.12 of the Guidance, as follows:

> "It is important to note that since 6 April 2015, non-EEA[13] nationals who are subject to immigration control must have indefinite leave to remain (ILR) in the UK in order to be ordinarily resident in the UK. They must also still meet the other requirements of the test set out at paragraph 3.12; having ILR on its own is not sufficient since that person may no longer be, for example, residing in the UK on a properly settled basis, and may only be visiting.
>
> …
>
> Non-EEA nationals usually need permission to be in the UK, except in some circumstances when they are not subject to immigration control, e.g. due to their relationship to an EEA national who is resident here, or when a diplomat.

[13] A list of EEA countries is at paragraph XX.

3.10. Hence, non-EEA nationals who only have limited right to remain in the UK must be treated as individuals who are not ordinarily resident within section 175 of the NHS Act.

3.11. **The position of British Nationals who live abroad:** British Nationals who are ordinarily resident abroad and do not have a sufficiently settled residence in the UK to be ordinarily resident at an address in the UK will not be ordinarily resident in the UK for the purposes of section 175. This is explained at paragraph 3.12 of the Guidance as follows:

> "British citizens have automatic right of abode in the UK, so are always here lawfully. EEA nationals are almost always here lawfully. It is important to note that a person does not need to meet the 'right to reside test' for certain benefits, for example, in order to be considered ordinarily resident in the UK.

3.12. It follows that a British National (other than a UK pensioner who lives in the EU or EEA[14]) who lives abroad and is taken ill whilst visiting the UK on a temporary basis will not be entitled to free NHS care. Such a person will be treated as being an overseas resident in the same way as someone who does not have British nationality. This could be explicable on the reciprocity principle. A British National who lives abroad is unlikely to be a UK tax-payer and hence will not be contributing to the cost of the NHS, and thus should not be entitled to have the same benefits as someone who lives here and pays taxes. However, the Regulations do not consistently apply principle of reciprocity because foreign based workers who are here on a temporary basis and pay tax here are potentially charged for treatment.

3.13. **Having more than one place of ordinary residence:** A person can have more than one place of ordinary residence, including residences in different countries at the same time. Hence, by way of example, a university student who divides his or her time between halls of residence at University in Hull and a parental home in Cornwall will be ordinarily resident at both locations: see *Fox v Stirk* [1970] 2 QB 463 at 475E and

[14] See paragraph 7.46 below.

hence will be ordinarily resident in the UK for the purposes of section 175 NHS Act. In the same way a student who studies in France but maintains a place of residence at his parents' house in Bristol, will probably continue to be ordinarily resident in Bristol and thus be entitled to free NHS care.

3.14. **Other Guidance:** In 2013, the Department of Health has published extensive guidance about the meaning of the expression "ordinary residence" for the purposes of the Care Act 2014[15]. That Guidance was updated in 2016 to take account of the decision of the Supreme Court in *R (Cornwall Council) v Secretary of State for Health and Somerset County Council* [2015] UKSC 46. New Guidance was issued primarily to assist with the identification of the place of ordinary residence of a person who lacked capacity[16]. All of this Guidance could be useful to determine whether, on the facts on individual case, a person is or is not ordinarily resident in Great Britain. No charges can be made pursuant to the 2015 Regulations in respect of anyone who is ordinarily resident in Great Britain.

4. The NHS services that are exempt from charges for overseas visitors.

4.1. Part 3 of the 2015 Regulations sets out a list of NHS services for which no charges can be levied, even if they are provided to overseas visitors who would otherwise be liable to pay charges under the Regulations. Some NHS services do not attract charges for overseas visitors because they are not "relevant services" services for the purposes of the 2015 Regulations. Other services are relevant services but are specifically exempt from charges.

4.2. **Services that are not "relevant services":** Relevant NHS services are defined in Regulation 2 of the 2015 Regulations as follows:

[15] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252864/OR_Guidance_2013-10-01_Revised__with_new_contact_details_New_DH_template.pdf

[16] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575956/OR_update_acc.pdf

> ""relevant services" means accommodation, services or facilities which are provided, or whose provision is arranged, under the 2006 Act other than—
>
> (a) primary medical services provided under Part 4 (medical services);
>
> (b) primary dental services provided under Part 5 (dental services);
>
> (c) primary ophthalmic services provided under Part 6 (ophthalmic services); or
>
> (d) equivalent services which are provided, or whose provision is arranged, under the 2006 Act"

4.3. Accordingly, no charges under the 2015 Regulations can be levied for primary care services, primary dental services or primary ophthalmic services (or any equivalent services). That does not mean that overseas visitors will necessarily be able to access these services free of charge because, for example, other Regulations provide that charges can be made to some patients for primary dental services. However, apart from these defined NHS services (and the slightly ambiguously worded ""equivalent services which are provided, or whose provision is arranged, under the 2006 Act"), all other NHS funded services are "relevant services" for the purposes of the 2015 Regulations.

4.4. **The removal of the "Hospital Services" limitation:** Until 23 August 2017, Regulation 9(b) of the 2015 Regulations used to provide that any NHS services that were provided outside of a hospital would be exempt from charges, despite being "relevant services" for the purposes of the Regulations. The Regulation previously provided:

> "No charge may be made or recovered in respect of any of the following relevant services provided to an overseas visitor— … (b) services provided otherwise than at, or by staff employed to work at, or under the direction of, a hospital"

4.5. When that provision was in place, all NHS community services were exempt from charges for overseas visitors. Hence, for example, an overseas visitor who qualified for NHS Continuing Healthcare and was accommodated in a care home (which was not

a hospital within the meaning of section 275 of the NHS Act) received services free of charge. That part of Regulation 9 was repealed by the 2017 Regulations with effect from 23 August 2017. It follows that, as from 23 August 2017 all NHS community services (other than those deemed not to be "relevant services" within the definition under Regulation 2) are services which come within the scope of the 2015 Regulations. This is confirmed in the Q & A section of the Guidance which provides at page 32:

> "Q: I provide NHS community services, including to some overseas visitors. Should I be charging them?
>
> A: As long as the services provided are not:
>
> - primary medical services
> - primary dental services
> - primary ophthalmic services or
> - equivalent services which are provided, or whose provision is arranged, under the 2006 Act
>
> then you should charge overseas visitors for them unless an exemption category applies"

4.6. It follows that any overseas visitor who has been in receipt of a package of NHS Continuing Healthcare support, including those in a care home, may have to pay for the services after 23rd August 2017 whereas those services will have been free of charge before that date. There has been no publicity about this change and no guidance has been issued about it because the published Guidance only covers hospital based services. It also appears to contradict the government's intentions as set out in the February 2017 response (see paragraph 1.10 above).

4.7. **Relevant services which are exempt from charges.** The new form of Regulation 9 of the 2015 Regulations list those services which, from 23 October 2017, are exempt from charges for overseas visitors despite being relevant services. Regulation 9 of the 2015 Regulations provides[17]:

[17] As from 23 October 2017.

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

(a) accident and emergency services, but not including any services provided—

(i) after the overseas visitor has been accepted as an in-patient at a hospital; or

(ii) at an outpatient appointment;

(aa) services provided as part of the telephone advice line commissioned by a clinical commissioning group or the National Health Service Commissioning Board;

…

(c) family planning services;

(d) services provided for the diagnosis and treatment of a condition listed in Schedule 1;

(e) services provided for the diagnosis and treatment of sexually transmitted infections;

(f) services provided for the treatment of a condition caused by—

(i) torture;

(ii) female genital mutilation;

(iii) domestic violence; or

(iv) sexual violence,

provided that the overseas visitor has not travelled to the United Kingdom for the purpose of seeking that treatment;

(g) palliative care services provided by—

(i) a company referred to in section 26 of the Companies (Audit, Investigations and Community Enterprise) Act 2004 (community interest companies); or

(ii) a palliative care charity within the meaning given in section 33D of the Value Added Tax Act 1994 (charities to which section 33C applies)"

4.8. **Accident and Emergency Services:** The Regulations contain no definition of Accident and Emergency services. However paragraph 4.3 of the Guidance states:

"Accident and emergency (A&E) services provided at an NHS hospital8 (whether provided at an A&E department or elsewhere in the NHS hospital, e.g. urgent care centre) but not including services provided after the overseas visitor is accepted as an inpatient or at a follow-up outpatient appointment. So, where emergency treatment is given after admission to the NHS hospital, e.g. intensive care or coronary care, it is chargeable to a non-exempt overseas visitor. Note that some walk-in centres provide primary care services rather than A&E-type services and overseas visitors cannot be charged for such services either because primary care services are not within the scope of the regulations"

4.9. The Guidance also states as follows regarding ambulance services at page 32:

"Q: Can I charge for ambulance services?

A: No. Ambulance services are considered to be part of A&E care and should be provided free of charge where they are part of the patient's clinical need. However, whilst European visitors and students with valid EHICs cannot be charged directly for ambulance services, all A&E treatment costs (including ambulance services) should be recorded and reported via the Department of Work and Pensions OVT EHIC Portal (see para 9.14) portal"

4.10. The Guidance also extends "A & E Services" to patients who are treated on a Medical Assessment Unit or Clinical Decisions Unit which is attached to the A & E Department, despite the fact that the services are generally treated as being outside of A & E Services the purpose of the National Tariff[18]. The Guidance provides:

"Q: Can I charge someone for A&E services while on an observation ward?

[18] This commonly adopted approach may well be inconsistent with the wording of the National Tariff, although it is a somewhat "grey" area.

> A: No, patients kept in observation wards or similar that are attached to A&E departments are usually still under the care of the A&E consultant and should not be charged unless and until they are formally admitted to NHS hospital as an inpatient"

4.11. **Telephone Advice Services:** Services such as 111 or Out of Hours telephone advice services are exempt from charges. Further, if a call is made to the GP out of hours services resulting in a visit by GP, that is probably not a "relevant service" because it would be an "equivalent service" to primary care medical services. Thus, no charge should be levied for such a visit if the patient is an overseas visitor.

4.12. **Family planning services:** Family planning services are exempt from charges. They are defined in the Guidance as follows:

> "… services that supply contraceptive products and devices to prevent pregnancy (termination of an established pregnancy is not a method of contraception or family planning)"

Accordingly, any services associated with a proposed abortion or any other services connected to the termination of pregnancy outside the definition of family planning services.

4.13. **Schedule 1 condition services**: Schedule 1 sets out a list of medical conditions where there is a public health interest in ensuring that patients receive prompt medical treatment in order to protect others from the spread of the condition. The list of diseases in Schedule 1 is as follows:

- Acute encephalitis
- Acute poliomyelitis
- Anthrax
- Botulism
- Brucellosis
- Cholera

- Diphtheria
- Enteric fever (typhoid and paratyphoid fever)
- Food poisoning
- Haemolytic uraemic syndrome (HUS)
- Human immunodeficiency virus (HIV)
- Infectious bloody diarrhoea
- Invasive group A streptococcal disease and scarlet fever
- Invasive meningococcal disease (meningococcal meningitis, meningococcal septicaemia and other forms of invasive disease)
- Legionnaires' disease
- Leprosy
- Leptospirosis
- Malaria
- Measles
- Middle East Respiratory Syndrome (MERS)[19]
- Mumps
- Pandemic influenza (defined as the "Pandemic Phase") or influenza that might become pandemic (defined as the "Alert Phase") as defined by WHO in the World Health Organisation's ("WHO") Pandemic Influenza Risk Management Interim Guidance(1)
- Plague
- Rabies
- Rubella
- Severe Acute Respiratory Syndrome (SARS)

[19] This condition was added to the list by SI 2015/2025. Other conditions may be added at a later date, and a full list should be maintained on the NHS England website.

- Smallpox
- Tetanus
- Tuberculosis
- Typhus
- Viral haemorrhagic fever
- Viral hepatitis
- Whooping cough
- Yellow fever

4.14. Accordingly, no charges should be made for any treatment provided to an overseas visitor for or arising out of any of the Schedule 1 medical conditions. Patients may, of course, present for treatment with multiple conditions. This is addressed in the Guidance as follows:

> Q: Clinicians are treating a patient for TB. Do I charge for other conditions the patient has?
>
> A: Yes, unless treatment of the other condition is also an exempt service, or the patient is exempt from charges under another exemption, then you must charge for the treatment of the other condition, even if the other condition impacts on the treatment of the TB.
>
> Q: An overseas visitor says they have forgotten to bring their antiretroviral (ARV) therapy for their HIV. Do we provide it free of charge?
>
> A: HIV is a disease for which treatment is free on public health grounds. Guidance to the NHS advises that in such circumstances the supply of free ARVs should be limited to an amount that will last until the overseas visitor returns home or has arranged for ARVs to be sent to them. Further guidance on this can be found at HIV treatment for overseas visitors: Guidance for the NHS"

4.15. The Guidance makes it clear that this includes testing and treatment for somebody who is suspected of having a Schedule 1 condition even if it is subsequently shown that the person does not have that condition. The Guidance provides:

> "The diagnosis and treatment of the conditions specified in Schedule 1 to the Charging Regulations which is necessary to protect the wider public health. This exemption from charge will apply to the diagnosis of the condition, even if the outcome is a negative result. It will also apply to any treatment provided for a suspected specified condition, up to the point that it is negatively diagnosed. It does not apply to any secondary illness that may be present even if treatment is necessary in order to successfully treat the condition"

4.16. The Department of Health has published specific Guidance to assist NHS staff who are called upon to treat overseas visitors with HIV[20]. The Guidance makes it clear that HIV treatment is provided to overseas visitors for the benefit of other people within the UK as opposed to being provided on a philanthropic basis. It states at paragraph 2.3:

> "From 1 October 2012, an amendment to the Charging Regulations means that HIV treatment is no longer chargeable to any overseas visitors and is provided in the same way as treatment for other sexually transmitted infections for which NHS treatment is free to all. This amendment responds to the significant evidence on the benefits to public health of providing HIV treatment to all in clinical need. Left untreated, HIV presents a significant risk of transmission to people in the UK. The availability of treatment should increase the acceptance of confidential HIV testing in people from abroad living in the UK and hence contribute to reducing undiagnosed HIV"

That policy was carried forward into the 2015 Regulations. However, the Guidance also makes it clear that treatment, including prescribing of antiretroviral therapy, is available only the duration of a person's stay in the UK.

4.17. **Services provided for the diagnosis and treatment of sexually transmitted infections**: Regulation 9(e) of the 2015 Regulations provides that no charges will be made for the diagnosis and treatment of sexually transmitted infections ("STIs"). Whilst no charges

[20] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212952/DH-Guidance-HIV-and-NHS-Charging-fORMATED.pdf

should be made to the patient for the provision of STI services, the Guidance suggest that charges could still be recovered from EEA governments in respect of EEA nationals who present seeking such treatment. It provides:

> "Q: Do I need to assess patients attending sexually transmitted diseases clinics for charges?
>
> A: The diagnosis and treatment of sexually transmitted infections is free to all, so charging issues will arise less often in those settings. Regulations prevent the disclosure of any identifying disease other than to a medical practitioner (or to a person employed under the direction of a medical practitioner). This applies to information in connection with, and for the purpose of, the treatment of the patient and/or the prevention of the spread of the disease.
>
> However, this does not mean that sexually transmitted diseases clinics do not have to apply the Charging Regulations or should not allow Overseas Visitor Managers (OVMs) access to do their job. Overseas visitors being provided with treatment for sexually transmitted diseases will still be liable for charges for other types of treatment unless another exemption applies, so it can still be helpful for awareness of charging issues to be raised in these settings.
>
> Reimbursement claims can be made to other EEA countries for providing treatment for sexually transmitted infections whenever the patient has a valid EHIC/PRC/S2, so sexually transmitted diseases clinics can be encouraged to take down these details and provide OVMs with them. There would be no question of treatment being charged, or delayed, if no EHIC/ PRC/S2 was presented"

4.18. **NHS services provided to treat victims of torture**: Services provided to overseas visitors who have been victims of torture to treat conditions arising out of or related to torture are services for which no charges can be made. Torture is defined at Regulation 8(1) of the 2015 Regulations as follows:

> ""torture" has the meaning given in Article 1(1) of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (agreed in New York on 4th February 1985"

4.19. The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("the Torture Convention") was ratified by the UK on 7 January 1989. Article (1) provides:

> "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions"

4.20. Article 3(1) of the Torture Convention provides that a state which ratifies the convention shall not:

> ".. expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"

4.21. Hence, a person who has suffered torture and remains at danger of being subjected to torture cannot be extradited. Further article 14 provides:

> "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible"

4.22. The UK state thus has a duty under the Torture Convention to provide "*as full rehabilitation as possible*" to torture victims. Any requirement that torture victims should pay charges for NHS services would be a breach of article 14. Thus, any provision that NHS services should only be provided to overseas visitors who paid charges would be a breach of the government's duties under Article 14 of the Torture Convention.

4.23. Regulation 8(2)(a) provides that "treatment" for torture victims includes:

> "any subsequent or on-going treatment provided to an overseas visitor for any condition, including a chronic condition, that is directly attributable to the torture, female genital mutilation, domestic violence or sexual violence"

In practice, overseas visitors who have been tortured cannot be charged for treatment for the initial physical injuries caused by the torture and for any mental health treatment for the enduring psychological consequences suffered by torture victims.

4.24. The exemption does not apply to a torture victim has not travelled to the UK for the purpose of seeking treatment. It is unclear whether this provision applies if the victim has come to the UK for multiple purposes – i.e. escaping torture and seeking medical help for the consequences of torture. However given the terms of article 14 of the Torture Convention, it seems probable that this provision would only be relevant if the overseas visitor came to the UK for the sole reason of seeking medical treatment for the effects of torture. If the victim was also claiming asylum or came here to get away from the place where he or she was tortured, then the proviso probably does not apply. It thus seems that this limitation is only likely to apply where a torture victim is settled in another safe country and has travelled to the UK for the sole purpose of gaining NHS treatment for the medical effects of torture.

4.25. **NHS services provided to treat victims of Female Genital Mutilation:** Regulation 9(1)(f)(ii) provides that no charges shall be made to patients who are seeking treatment for a condition caused by Female Genital Mutilation ("**FGM**"). FGM is defined in Regulation 8(1) as follows:

> ""female genital mutilation" means the excision, infibulation or other mutilation (collectively referred to as mutilation) of the whole or any part of a female's labia majora, labia minora or clitoris where—
>
> (a) that mutilation constituted an offence under the Female Genital Mutilation Act 2003 ("the 2003 Act");

(b) if the mutilation was performed prior to the coming into force of the 2003 Act, that mutilation would have constituted an offence under the 2003 Act if the Act had been in force at the time the mutilation was performed;

(c) if the mutilation was performed outside the United Kingdom but did not constitute an offence under the 2003 Act, that mutilation would have constituted an offence under the 2003 Act had it been performed in the United Kingdom; or

(d) if the mutilation was performed outside the United Kingdom prior to the coming into force of the 2003 Act, that mutilation would have constituted an offence under the 2003 Act if—

(i) the mutilation had been performed in the United Kingdom; and

(ii) the 2003 Act had been in force at the time the mutilation was performed

"girl" includes woman"

4.26. The Female Genital Mutilation Act 2003 creates a series of offences around FGM. The extended definitions set out in Regulation 8 extend the protection against charges for any woman who is a victim of FGM even if the relevant act was not an offence under the Female Genital Mutilation Act 2003 because of the time the act occurred or place where it occurred. The extended causation definition in Regulation 8(2) applies to the meaning of "treatment" in this part of the Regulations (see paragraph 4.23 above). However the definition of NHS treatment for which no charges can be made is extended by Regulation 9(2(b) which provides:

"(b) in the case of female genital mutilation, any antenatal, perinatal and postpartum treatment provided to an overseas visitor the need for which is directly attributable to the mutilation"

4.27. Regulation 6A relates to services provided to victims of FGM between 6 April 2015 (when the 2015 Regulations came into force) and 31 January 2016 when the National

Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2015 (SI 2015/2025) came into force. Regulation 6A of the 2015 Regulations provides:

> "(1) This paragraph applies to an overseas visitor who received relevant services from a *relevant NHS body* [relevant body[21]] during the period beginning on 6th April 2015 and ending on 31st January 2016, where—
>
> (a) those services were provided for the treatment of a condition, which was caused by female genital mutilation in the circumstances described in paragraph (d) of the definition of "female genital mutilation" in regulation 8(1) (interpretation of this part); or
>
> (b) at the time the relevant services were provided—
>
> (i) the overseas visitor was a person in respect of whom an application to be granted temporary protection, asylum or humanitarian protection under the immigration rules had been rejected; and
>
> (ii) the overseas visitor was supported under Part 1 (care and support) of the Care Act 2014 by the provision of accommodation.
>
> (2) relevant body which, in respect of an overseas visitor to whom paragraph (1) applies, has—
>
> (a) yet to make a charge under regulation 3 (obligation to make and recover charges), must not make the charges; or
>
> (b) made charges under regulation 3 but has yet to recover the charges, must not recover the charges"

4.28. This provision was necessary because the original definition of FGM under the 2015 Regulations did not include the wording now in part (d) of the definition. When those words were added, the above provision required NHS bodies to cease enforcing payment of any charges that had been made. However it did not impose any obligation on an NHS body to refund any charges which had been paid. The proviso that charges only apply if the patient has not travelled to the UK specifically for the

[21] The change from "relevant NHS body" to "relevant body" applies from 23 October 2017 when private providers of NHS services become liable to impose charges.

purpose of securing treatment for medical problems caused by FGM also applies. This probably means that the person travelled to the UK for the sole or predominant purpose of seeking treatment as opposed to travelling to the UK for other reasons (even if the person hoped to be able to secure NHS treatment once they arrived in the UK).

4.29. **NHS services provided to treat victims of domestic violence:** Regulation 9(f)(iii) provides that no charges may be made or recovered from any person who is a victim of domestic violence. There is no definition of "domestic violence" in the Regulations but there is the following agreed cross government definition of domestic violence and abuse[22]:

> **"Domestic Violence and Abuse:**
>
> Any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality.
>
> The abuse can encompass, but is not limited to:
>
> - psychological
> - physical
> - sexual
> - financial
> - emotional
>
> **Controlling behaviour**
>
> Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.
>
> **Coercive behaviour**

[22] See https://www.gov.uk/guidance/domestic-violence-and-abuse

> Coercive behaviour is an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim"

4.30. The government website unhelpfully states that the above is not to be treated as a "legal definition". Whilst the precise meaning of that limitation is unclear, if there were to be a dispute about the meaning of the term "domestic violence", it seems highly that the Court would adopt the government's own meaning of the term, particularly given the absence of a definition of the term "domestic violence" in the 2015 Regulations.

4.31. There is no requirement in the Regulations that the domestic violence must have taken place in the United Kingdom. It follows that a person who comes to the United Kingdom with a need for NHS services arising from domestic violence which was committed overseas is entitled to free NHS services for medical conditions related to or arising out of the domestic violence. The extended causation definition in Regulation 8(2) applies to the meaning of "treatment" in this part of the Regulations (see paragraph 4.23 above). The proviso that charges only apply if the patient has not travelled to the UK specifically for the purpose of securing treatment for medical problems caused by domestic violence also applies. This probably means that the person travelled to the UK for the sole or predominant purpose of seeking treatment as opposed to travelling to the UK for other reasons (even if the person hoped to be able to secure NHS treatment once they arrived in the UK).

4.32. **NHS services provided to treat victims of sexual violence:** Regulation 9(f)(iv) provides that no charges may be made or recovered from any person who is a victim of sexual violence. The World Health Organisation ("**WHO**") has defined the term "Sexual Violence" as follows[23]:

> "Sexual violence is defined as:

[23] See http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf

any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.

Coercion can cover a whole spectrum of degrees of force. Apart from physical force, it may involve psychological intimidation, blackmail or other threats – for instance, the threat of physical harm, of being dismissed from a job or of not obtaining a job that is sought. It may also occur when the person aggressed is unable to give consent – for instance, while drunk, drugged, asleep or mentally incapable of understanding the situation.

Sexual violence includes rape, defined as physically forced or otherwise coerced penetration – even if slight – of the vulva or anus, using a penis, other body parts or an object. The attempt to do so is known as attempted rape. Rape of a person by two or more perpetrators is known as gang rape.

Sexual violence can include other forms of assault involving a sexual organ, including coerced contact between the mouth and penis, vulva or anus"

4.33. Both men and women can be victims of sexual violence. Whilst the majority of sexual violence is directed against women and services are mainly focused on women survivors of sexual violence, the problem of sexual violence against men is recognised by the WHO which says[24]:

"Sexual violence against men and boys is a significant problem. With the exception of childhood sexual abuse, though, it is one that has largely been neglected in research. Rape and other forms of sexual coercion directed against men and boys take place in a variety of settings, including in the home, the workplace, schools, on the streets, in the military and during war, as well as in prisons and police custody.

In prisons, forced sex can occur among inmates to establish hierarchies of respect and discipline. Sexual violence by prison officials, police and soldiers is also widely reported in many countries. Such violence may take the form of prisoners being forced to have sex with others as a form of ''entertainment'', or to provide sex for the officers or officials in command. Elsewhere, men who have sex with other men may be

[24] See p154 at http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf

"punished", by rape, for their behaviour which is perceived to transgress social norms"

4.34. The extended causation definition in Regulation 8(2) applies to the meaning of "treatment" in this part of the Regulations (see paragraph 4.23 above). The proviso that charges only apply if the patient has not travelled to the UK specifically for the purpose of securing treatment also applies. This probably means that the person travelled to the UK for the sole or predominant purpose of seeking treatment for medical problems caused by sexual violence, as opposed to travelling to the UK for other reasons (even if the person hoped to be able to secure NHS treatment once they arrived in the UK).

5. The categories of overseas Visitors who are exempt from charges.

5.1. Part 4 of the 2015 Regulations defines the categories of individuals who are exempt from the payment of NHS despite being classified as "overseas visitors", in the sense that they are individuals who are not ordinarily resident in the UK. There are a large number of different categories of overseas visitors who do not have to pay charges for accessing NHS services. The main categories are as follows:

a) Individuals who have paid or are exempt from paying the immigration health charge (also known as the immigration health surcharge) (see paragraph 6 below);
b) EU citizens and others with EU/EEA rights (see paragraph 7 below);
c) Asylum seekers and failed asylum seekers and their families (see paragraph 8 below);
d) Victims of Modern Slavery (see paragraph 9 below):
e) Persons granted the right to NHS treatment without charge for exceptional humanitarian reasons (see paragraph 10 below);
f) Persons detained in an NHS Hospital or subject to court ordered treatment (see paragraph 11 below);
g) Prisoners and other detainees (see paragraph 12 below);

h) Persons from countries with whom the United Kingdom has a reciprocal arrangement (see paragraph 13 below);

i) Members of the regular and reserve forces, Crown servants and others (see paragraph 14 below);

j) NATO Forces Personnel (see paragraph 15 below);

k) Turkish nationals where the need for which arose during a visit and who cannot afford payment (see paragraph 16 below);

l) Family members of overseas visitors (see paragraph 17 below).

5.2. Paragraph 18 covers the position of staff on UK registered ships who were previously entitled to NHS services without charge but are included within the charging regime albeit that the charges have to be paid by the shipowner and not the patient.

6. Overseas visitors within the scope of the Immigration Health Charge (the Immigration Health Surcharge).

6.1. Section 38 of the Immigration Act 2014 ("the IA 2014") brought in provisions to enable the Secretary of State to set an "Immigration Health Charge" (also known as the Immigration Health Surcharge or "**IHS**") to be paid by visitors who come to the United Kingdom on visitors visas. The purpose of the policy change was to collect a fixed annual fee from a category of overseas visitors as part of the visa application process and then to allow such persons to use the NHS on the same basis as UK permanent residents. Section 38 of the IA 2014 provides:

> "**38 Immigration health charge**
>
> (1) The Secretary of State may by order provide for a charge to be imposed on—
>
> (a) persons who apply for immigration permission, or
>
> (b) any description of such persons.
>
> (2) "Immigration permission" means—

(a) leave to enter or remain in the United Kingdom for a limited period,

(b) entry clearance which, by virtue of provision made under section 3A(3) of the Immigration Act 1971, has effect as leave to enter the United Kingdom for a limited period, or

(c) any other entry clearance which may be taken as evidence of a person's eligibility for entry into the United Kingdom for a limited period.

(3) An order under this section may in particular—

(a) impose a separate charge on a person in respect of each application made by that person;

(b) specify the amount of any charge (and different amounts may be specified for different purposes);

(c) make provision about when or how a charge may or must be paid to the Secretary of State;

(d) make provision about the consequences of a person failing to pay a charge (including provision for the person's application to be refused);

(e) provide for exemptions from a charge;

(f) provide for the reduction, waiver or refund of part or all of a charge (whether by conferring a discretion or otherwise).

(4) In specifying the amount of a charge under subsection (3)(b) the Secretary of State must (among other matters) have regard to the range of health services that are likely to be available free of charge to persons who have been given immigration permission.

(5) Sums paid by virtue of an order under this section must—

(a) be paid into the Consolidated Fund, or

(b) be applied in such other way as the order may specify.

(6) In this section—

"entry clearance" has the meaning given by section 33(1) of the Immigration Act 1971;

"health services" means services provided as part of the health service in England, Wales, Scotland and Northern Ireland;

and the references to applying for leave to enter or remain for a limited period include references to applying for a variation of leave to enter or remain which would result in leave to enter or remain for a limited period"

6.2. This section gave the Secretary of State power to make on Order which specified how the IHS was to operate. The Secretary of State used that power to make the Immigration (Health Charge) Order 2015 which came into effect on 6 April 2015 ("the 2015 Order"). This order was amended by the Immigration (Health Charge) (Amendment) Order 2016[25] and then further amended by the Immigration (Health Charge) (Amendment) Order 2017[26].

6.3. **Who has to pay the IHS:** Article 3 of the 2015 Order defines who is required to pay the IHC namely:

"(1) A person who applies for—

(a) entry clearance of a type mentioned in section 38(2)(b) or (c) of the 2014 Act, or

(b) leave to remain in the United Kingdom for a limited period,

must pay a charge to the Secretary of State, subject to article 7.

(2) A person is required by paragraph (1) to pay a separate charge in respect of each application made by the person"

6.4. Schedule 2 to the 2015 Order sets out the persons who are exempt from paying the charge despite falling within article 3. The general position is summarised on the

[25] SI 2016/400.
[26] SI 2017/420.

government website which explains that, for visa applications made outside the UK, applicants need to pay the IHC if:

a) the applicant is a national of a country outside the European Economic Area (EEA)[27]; and

b) the applicant is applying for a visa to work, study or to join family in the UK for more than 6 months (but is not applying to remain in the UK permanently).

6.5. There are different rules in article 3 of the 2015 Order for applicants who make immigration applications from within the UK. Such applicants need to pay the IHS if:

a) the applicant is a national of a country outside the European Economic Area (EEA); and

b) the applicant is making an immigration application for any length of time, including applications for 6 months or less (but not applying to remain in the UK permanently).

6.6. Even if an applicant comes within article is exempt from paying the IHS as a result of Schedule 2 of the 2015 Order if:

a) The applicant is applying for indefinite leave to enter or remain. However an applicant will need to pay the healthcare surcharge if he or she applies for indefinite leave to remain but are only given limited leave. The applicant will need to pay before he or she is given the leave;

[27] The EEA consists of the EU countries plus Iceland, Liechtenstein and Norway. The EU countries (until the UK leaves) are Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK.

b) The applicant is a diplomat or a member of a visiting armed forces and not subject to immigration control;

c) The applicant is a dependant of a member of the UK's armed forces;

d) The applicant is a dependant of a member of another country's armed forces who is exempt from immigration control;

e) The applicant is a family member of a European national with European Union treaty rights;

f) The applicant is applying for a visa for the Isle of Man or Channel Islands;

g) The applicant is a British Overseas Territory citizen resident in the Falkland Islands;

h) The applicant is an asylum seeker or applying for humanitarian protection (or their dependant);

i) The applicant is a domestic worker who has been identified as a victim of slavery or human trafficking;

j) The applicant is applying for discretionary leave to remain in the UK as someone who has been identified as a victim of slavery or human trafficking (or you're their dependant);

k) The Home Office's domestic violence concession[28] applies to the applicant (or their dependant); or

[28] See https://www.gov.uk/government/publications/application-for-benefits-for-visa-holder-domestic-violence

l) Being made to leave the UK would be against the applicant's rights under Article 3 of the European Convention of Human Rights (or their dependant).

6.7. A person who applies for a visitor's visa or a visa for 6 months or less from outside the UK does not need to pay the surcharge or get an IHS reference number. However such a person will have to pay charges for any NHS services that they use. Applicants who come within the terms of the 2015 Order still need to pay the IHS even if they have private medical insurance.

6.8. **How much is the IHS:** The amounts of the IHS are set out in Schedule 1 of the 2015 Order as follows:

Type of application	Annual amount
Application for entry clearance or leave to remain as a student, in accordance with the immigration rules.	£150
Application for entry clearance or leave to remain as the dependant of a student, in accordance with the immigration rules.	£150
Application for entry clearance as a Tier 5 (Youth Mobility Scheme) Temporary Migrant in accordance with the immigration rules.	£150
All other applications for entry clearance or leave to remain.	£200

6.9. **What is the consequence of paying the IHS:** With the exception of chargeable assisted conception services, the effect of the IHS on the payment of NHS charges: Article 10 of the 2015 Regulations broadly exempts anyone from NHS charges who has paid the IHS and has NHS services (which would otherwise be chargeable) provided to that person at a relevant time. This is set out in Article 10(2) which provides:

> "(2) Subject to paragraph (2A), no charge may be made or recovered under these Regulations in respect of any relevant services provided during the relevant period to an overseas visitor in respect of whom—

(a) an immigration health charge has been paid;

(b) an exemption from paying such an immigration health charge applies, unless paragraph (3) applies;

(c) a reduction or waiver from paying such an immigration health charge applies; or

(d) a refund for part, but not all, of an immigration health charge has been made,

in accordance with an order made under section 38 of the 2014 Act.

(2A) Paragraph (2) does not apply in respect of chargeable assisted conception services"

6.10. The expression "relevant period" is defined in Article 10(1) as follows:

"In this regulation "relevant period" means—

(a) where—

(i) an immigration health charge is payable;

(ii) an exemption from paying an immigration health charge applies as a consequence of any exemption provided for in an order made under section 38 (immigration health charge) of the 2014 Act;

(iii) the Secretary of State has exercised discretion to reduce or waive all or part of an immigration health charge in accordance with such an order; or

(iv) the Secretary of State has exercised discretion to refund part, but not all of an immigration health charge paid under such an order,

the period of leave to enter or remain in the United Kingdom which is granted to the overseas visitor, or has effect on their arrival in the United Kingdom, in respect of the application for entry clearance or leave to remain to which the immigration health charge, exemption, reduction or waiver relates; and

(b) in a case where the overseas visitor's leave to enter or remain in the United Kingdom is extended by virtue of—

(i) section 3C (continuation of leave pending variation decision); or

(ii) section 3D (continuation of leave following revocation),

of the 1971 Act, the period in respect of which leave is extended under those sections"

6.11. Article 10(3) provides an exception to the exemption from NHS charges for someone who is exempt from paying the IHS. Thus a person who comes within Article 10(3) is exempt from paying the IHS but nonetheless has to pay NHS charges. Article 10(3) provides[29]:

"(3) This paragraph applies where a person is exempt from payment of an immigration health charge under an order made under section 38 of the 2014 Act by virtue of having made an application—

(a) for entry clearance where, if granted in accordance with the immigration rules, the entry clearance would have effect on arrival in the United Kingdom as leave to enter for 6 months or less, or where the leave to enter which may be granted pursuant to that entry clearance would be for 6 months or less if granted in accordance with the immigration rules; or

(b) for entry clearance—

(i) before 6th April 2016, under Part 2 of the immigration rules (visitors to the UK); or

(ii) on or after 6th April 2016, under Appendix V to the immigration rules (immigration rules for visitors)"

6.12. The Guidance explains the broad effect of paying the IHS as follows at paragraph 5.2:

"Payment of the health surcharge entitles the payer to NHS-funded healthcare on a 5.2.similar basis as someone who is ordinarily resident. They are entitled to NHS

[29] As from 21 August 2017 as a result of SI 2017/756.

services free at the point of use, including NHS hospital care, with, from 21 August 2017, the exception of assisted conception services (e.g. IVF) (see paragraph 5.16). They must also pay for services for which a UK ordinary resident must also pay, such as dentistry and prescriptions in England, unless they also meet the particular exemption criteria of those services"

6.13. The Guidance also explains at paragraph 5.8:

> "An individual who pays for the health surcharge is only entitled to free treatment once their application for a visa has been granted, and not from the date when the health surcharge is paid. The exemption from NHS charges applies to the period of leave to enter or remain in the UK granted to the person. Once that leave expires or is curtailed, the person becomes liable for charges from then on, including where the person is part-way through a course of treatment"

6.14. There are special rules for overseas visitors who have made applications for entry clearance or leave to remain prior to the commencement of the immigration health charge. This is set out in Article 11(3) which provides[30]:

> "Subject to paragraph (3A), no charge may be made or recovered under these Regulations in respect of any relevant services provided to an overseas visitor during the relevant period who—
>
> (a) made an application for entry clearance or leave to remain in the United Kingdom before the relevant date and was granted leave to enter or remain in the United Kingdom or entry clearance which has effect on the overseas visitor's arrival in the United Kingdom as leave to enter or remain in the United Kingdom in respect of that application;
>
> (b) has entered, or remained in, the United Kingdom by virtue of that leave to enter or remain; and
>
> (c) had that application for entry clearance or leave to remain been made on or after the relevant date, would be—
>
> (i) liable to pay an immigration health charge; or

[30] As from 21 August 2017.

(ii) exempt from paying an immigration health charge as a consequence of an exemption provision under an order made under section 38 of the 2014 Act, unless paragraph (4) applies.

(3A) Paragraph (3) does not apply in respect of chargeable assisted conception services"

6.15. The relevant date for the purposes of Article 11 of the 2015 Order is 6 April 2015. The term "relevant period" for the purposes of Article 11 is defined at Article 11(1) as follows:

"In this regulation "relevant period" means—

(a) the period of leave to enter or remain in the United Kingdom granted to the overseas visitor in respect of the application for entry clearance or leave to remain to which paragraph (3)(a) refers; and

(b) in a case where the overseas visitor's leave to enter or remain in the United Kingdom is extended by virtue of—

(i) section 3C (continuation of leave pending variation decision); or

(ii) section 3D (continuation of leave following revocation),

of the 1971 Act, the period in respect of which leave is extended under those sections

6.16. There is a similar exemption to Article 10(3) [31]in Article 11(4) which provides that a person who satisfies the following conditions will be liable for NHS charges:

"(4) This paragraph applies where an overseas visitor—

(a) would be exempt from an immigration health charge under an order made under section 38 of the 2014 Act by virtue of having made an application of a kind described in regulation 10(3)(a) or (b) (immigration health charge); or

[31] See paragraph 6.11 above.

(b) has been granted leave to enter or remain in the United Kingdom outside the immigration rules for 6 months or less"

6.17. From 21 August 2017 there are rules to prevent most overseas visitors who have paid the IHS being entitled to free IVF services. However there are exceptions to this. This is explained in the Guidance at paragraphs 5.15 to 5.22 as follows:

"Assisted Conception Services.

5.15. Since 21 August 2017, those exempt from charge under Regulation 10 (health surcharge arrangements) or 11 (transitional arrangements) are not exempt from charge in relation to assisted conception services.

5.16. Assisted conception services are defined in the Charging Regulations as any medical, surgical or obstetric services provided for the purpose of assisting a person to carry a child. Broadly speaking, this means any medicines, surgery or procedures that are required to diagnose and treat infertility so a person can have a child. It includes procedures such as intrauterine insemination (IUI), in vitro fertilisation (IVF) and egg and sperm donation.

5.17 However, it is important to understand a number of points in relation to this exclusion. Firstly, assisted conception services do not include services that are commissioned by NHS England as follows:

- services for serving members of the armed forces and their families;
- infertility treatment for seriously injured serving members and veterans; and,
- infertility treatment: further provisions.

5.18 Therefore, dependants of a member of HM forces, or of a member of a force who is exempt from immigration control, will still be able to receive assisted conception services free of charge due to the above exclusion within the definition.

5.19 Secondly, there are some groups who, whilst they may choose to make an application for leave to remain in the UK (under a category that means they are exempt from paying the health surcharge, thereby entitling them to free NHS services except for assisted conception services), there are some overlapping exemptions within the Charging Regulations to consider. These groups are:

- people, and their dependants, who make an application for asylum, temporary protection or humanitarian protection;
- children who are looked after by a Local Authority;

- victims of modern slavery (which includes victims of trafficking or slavery, servitude and forced or compulsory labour) with a positive conclusive grounds decision; and,
- people who make applications for leave to remain under the Home Office Destitution Domestic Violence Concession (would only be entitled to free assisted conception services on the same basis as a resident, if the need to the services was as a result of domestic violence and the person had not travelled to the UK to receive treatment)

5.20 This means that when assessing if charges will apply for assisted conception services, relevant bodies must consider whether Regulations 15(b), 16 or 9(f), or any other exemption, also apply to the patient. If they do, this will mean that no charge can be made to that person for assisted conception services, despite the exclusion of those services from the ones that those covered by health surcharge arrangements alone can receive without further charge.

5.21 Thirdly, those applying for leave to remain as either:

- a person granted entry clearance or leave to remain pursuant to an EU obligation; or
- a British Overseas Territories citizen who is resident in the Falklands Islands,

remain entitled to assisted conception services without further charge if they are covered for those services under the exemption for people with rights under EU law or under the terms of a reciprocal agreement.

5.22 Finally, a person who is exempt under Regulation 10 or 11 and who has begun a course of assisted conception treatment before 21 August 2017 will be entitled to the remainder of that course of treatment free of charge. New courses of assisted conception treatment begun on or after 21 August 2017 will not be free of charge and the overseas visitor will be required to pay for that service. It is a clinical decision as to what constitutes a particular course of treatment. Where two people are seeking assisted conception services with NHS funding, and one of the two people is covered by health surcharge arrangements and the other is ordinarily resident in the UK and therefore not subject to charge, the services required by the health surcharge payer will be chargeable. Any services required by the ordinarily resident person will continue to be freely available, subject to the established local or national commissioning arrangements"

6.18. Hence, unless within the exceptions listed above, an overseas visitor who has paid the IHS will have to pay for NHS assisted conception services.

6.19. There is no general exemption from paying charges for NHS services for family members of the person who pays the IHS (or would have been liable to pay the IHS if they had arrived in the UK after the IHS came into effect). Each person who wants to come to the UK is required to apply for their own visa and will have to pay the IHS as part of that visa application process. However, there is an exemption for children born to someone who pays the IHS for the first 3 months of life. This is set out in Regulation 25(3) which provides:

> "No charge may be made or recovered in respect of any relevant services provided to an overseas visitor who is a child who—
>
> (a) is born in the United Kingdom to a parent who is exempt from charges by virtue of—
>
> (i) regulation 10 (immigration health charge); or
>
> (ii) regulation 11 (overseas visitors who have made applications for entry clearance or leave to remain prior to the commencement of the immigration health charge);
>
> (b) is aged 3 months or less; and
>
> (c) has not left the United Kingdom since birth.

6.20. Once the child reaches the age of 3 months, an application should be made for the child to have leave to remain in the UK. The IHS will have to be paid for the child as part of that application in order for the child to be able to continue to receive NHS services without incurring charges under the 2015 Regulations.

7. Overseas visitors with EU and EEA rights.

7.1. Regulation 12 of the 2015 Regulations provides that European Union ("**EU**") citizens and others with EU rights are exempt from charges. It provides:

> "No charge may be made or recovered in respect of any relevant services provided to an overseas visitor who has an entitlement to the provision of the services in question without charge under or by virtue of any of the following—
>
> (a) regulations made under Article 48 of the Treaty on the Functioning of the European Union;
>
> (b) an agreement entered into between the European Union and any other country; or
>
> (c) any other enforceable EU right"

7.2. The EU consists of the 28 member states of the EU (at least until the UK leaves the EU) which are as follows: Austria, Belgium, Bulgaria, Croatia, Cyprus (Southern), Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK. In addition, EU Regulations apply to the European Economic Area ("**EEA**") countries of Iceland, Liechtenstein and Norway and so persons who have rights to reside in those countries come within Regulation 12.

7.3. The position of residents of Switzerland is explained in the Guidance at paragraph 9.6 as follows:

> "Switzerland has a separate agreement with the EU which, in effect, applies the EU Regulations to Switzerland"

7.4. The Guidance also explains at paragraph 9.67:

> "It should be noted that:
>
> a) for the purposes of the relevant EU Regulations:
>
> - France includes the overseas departments of Guadeloupe, Martinique, Guyane (French Guiana) and Réunion;
> - Spain includes the Balearic Islands, the Canary Islands, Ceuta and Melilla;
> - Portugal includes the Azores and Madeira.

b) the territory of Denmark excludes the Faroe Islands and Greenland. However, a separate reciprocal healthcare agreement between the EU and Greenland allows Greenland nationals visiting EEA countries to receive immediately necessary treatment under state healthcare;

c) Andorra, Monaco, San Marino and Vatican City are not part of the EEA;

d) EU law is suspended in the north Cyprus. It only applies in the rest of Cyprus. Therefore, visitors from north Cyprus are not covered by the EU Regulations. Visitors who are ordinarily resident in north Cyprus and chargeable directly at the point of use for NHS services should be counted as ordinarily resident in the EEA and should therefore be charged on that basis (i.e. at 100% of tariff);

e) the UK sovereign bases in Cyprus do not count as part of the UK in this context, nor as part of the EU;

f) for the purposes of healthcare, relations between the UK and Gibraltar are governed by a bilateral healthcare agreement (Chapter 10). The EU Regulations do not apply;

g) though not covered under the EU Regulations, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro and Serbia have reciprocal agreements with the UK (see Regulation 14 and Chapter 10)"

7.5. **What NHS services are holders of EU rights entitled to access without charge:** The rights of EU residents to obtain healthcare services in another member state is an area of some complexity. There are a variety of rules which have been set up to support the single market in goods and services across the EU. The essential premise is that workers and nationals from EU states have free movement rights to enable them to travel for both business and other purposes across the EU and should not be discriminated against by individual members states. Limiting access to state provided health services would be a severe limitation on that right of free movement. However, the rules governing the operation of each member state's national health service are outside the EU's competence[32]. It follows that freedom of movement would be abused if it permitted citizens in a low tax, low public service state to cross the border every time they needed healthcare services to take advantage of the more

[32] See article 168(7) of the Treaty for the Functioning of the European Union. There is competency on public health measures but that is outside the scope of this chapter.

extensive range of services provided in a higher taxed state with better public services. Hence a system of recharges operates so that the government which funds healthcare services in members state A for residents of member state B is entitled to recoup the cost of providing those services from the government of member state B. However the right to access healthcare under the systems of other member states is not designed to allow individuals to expand the services that they can access. Hence, for example, if IVF treatment or a specific cancer drug is not available in member state A as part of state funded healthcare, a resident of that state should not be able to access that treatment by travelling to member state B where it is provided as part of the state healthcare system for member state B.

7.6. Even though the organisation of healthcare services by national governments is a matter for the individual governments, there is a "market" in the delivery of healthcare services and hence EU citizens have the right to travel across borders to access specialist health services in other countries. It follows that it would be a breach of the principles of the single European market for the national rules under which each member state purchases healthcare for their own citizens cannot unduly favour healthcare services operating in their own countries. Hence, the rules cannot provide that a person who has a contractual right under a state insurance system to have a particular medical procedure carried out can only access that service in their home country. There is thus, within certain constraints, a right for persons who are covered by healthcare rights under their home state to exercise those rights in any member state. This right is expressed in article 56 of the Treaty of the Functioning of the European Union[33] which provides:

> "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

[33] See http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT

> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union"

7.7. This article provides for rights which are directly enforceable by UK residents who seek services abroad as well as EU based residents who seek services in the UK. However, those are not absolute rights since they can be limited to the extent needed to protect the legitimate interests of a state healthcare system.

7.8. EU residents also acquired specific rights under EU Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community. The rights under Regulation 1408/71 were separate from the rights under the article 56 of the Treaty[34]. Those rights are now replaced by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland) ("**the 2004 EU Regulations**"). The 2004 EU Regulations came into force on 1 May 2010. The EU also made Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems[35] ("**the 2009 EU Regulations**") which implement the 2004 EU Regulations.

7.9. In 2011 the EU passed a Directive (2011/24/EU)[36] on the application of patients' rights in cross-border healthcare ("**the 2011 Directive**"). There had been extensive litigation in the EU Court of Justice about cross-border healthcare rights. Recital 8 provides:

> "Some issues relating to cross-border healthcare, in particular reimbursement of healthcare provided in a Member State other than that in which the recipient of the care is resident, have already been addressed by the Court of Justice. This Directive is intended to achieve a more general, and also effective, application of principles developed by the Court of Justice on a case-by-case basis"

[34] The fact that the rights under the Treaty were separate to the rights under EU Regulations was established by Munby J in *R (Watts) v Bedford Primary Care Trust & Ors* [2003] EWHC 2228 (Admin).
[35] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:284:0001:0042:en:PDF
[36] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:088:0045:0065:en:PDF

7.10. It is beyond the scope of this chapter to describe the full operation of the rules of cross border healthcare since this chapter is focused on NHS charges. However, where NHS services are provided to a person with EU rights, in order to determine which legal regime operates, the first question to ask is whether:

a) the need for medical treatment arose during the visit to the UK without the patient having travelled to the UK for the purpose of seeking medical treatment; or

b) the patient travelled to the UK for the purpose of seeking medical treatment.

7.11. **Medical treatment where the need arises whilst the EU rights holder is in the UK:** The 2004 EU Regulations draw a distinction between the NHS services that a person exercising EU rights is entitled to where that person resides in another EU country and the NHS services a person is entitled to who visits (or stays in) another EU country.

7.12. Article 17 of the 2004 EU Regulations Regulation covers the position of EU rights holders who reside in a different member state. It provides:

> "An insured person or members of his family who reside in a Member State other than the competent Member State shall receive in the Member State of residence benefits in kind provided, on behalf of the competent institution, by the institution of the place of residence, in accordance with the provisions of the legislation it applies, as though they were insured under the said legislation"

Hence, a French person who resides in the UK is entitled to the same benefits from the NHS as other people living in the UK. A person with EU rights who resides in the UK is highly likely to become "ordinarily resident" in the UK. That residence will be lawful because the EU rights holder will be able to exercise freedom of movement rights in order to be able lawfully to reside in the UK. It follows that the 2015 Regulations will not generally apply to an EU rights holder who resides here, even if the EU rights holder also maintains a residence in their home EU country. It follows

that such a person can access NHS services without having to show an EHIC or PRC card before accessing NHS services.

7.13. There is a separate set of rules in the 2004 EU Regulations for individuals who are resident in one member state and "stay" in another member state (without becoming "ordinarily resident" in the UK). The word "stay" is used on the 2004 EU Regulations to contrast with "reside". It thus suggests that the person with EU rights has a need for healthcare services in a different country to the country where he or she resides. Regulation 19 of the 2004 EU Regulations provides:

> "1. Unless otherwise provided for by paragraph 2, an insured person and the members of his family staying in a Member State other than the competent Member State shall be entitled to the benefits in kind which become necessary on medical grounds during their stay, taking into account the nature of the benefits and the expected length of the stay. These benefits shall be provided on behalf of the competent institution by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though the persons concerned were insured under the said legislation.
>
> 2. The Administrative Commission shall establish a list of benefits in kind which, in order to be provided during a stay in another Member State, require for practical reasons a prior agreement between the person concerned and the institution providing the care"

7.14. The right to healthcare for people who visit another EU state under article 19 of the 2004 EU Regulations is subject to the limitation that these services must be "*necessary on medical grounds during their stay, taking into account the nature of the benefits and the expected length of the stay*". The article 19 right is further qualified where the person has travelled for the purpose of seeking treatment (see paragraph 7.19 below).

7.15. Article 25(3) of 2009 EU Regulations, which implement the 2004 EU Regulations, provides the following definition of the benefits to which an EU rights patient is entitled to under the 2004 EU Regulation is as follows:

> "The benefits in kind referred to in Article 19(1) of the basic Regulation[37] shall refer to the benefits in kind which are provided in the Member State of stay, in accordance with its legislation, and which become necessary on medical grounds with a view to preventing an insured person from being forced to return, before the end of the planned duration of stay, to the competent Member State to obtain the necessary treatment"

7.16. The Guidance has interpreted this set of rights at paragraphs 9.16 and 9.17 as follows:

> "9.16 A person with a valid EHIC/PRC is entitled to free treatment for 'all treatment that is medically necessary before their planned date of return,' except where charges also apply to residents in England, such as prescription and dental fees. In other words, this means treatment that it is medically necessary to provide a visitor during their temporary stay in the UK, with a view to preventing them from being forced to return home for treatment before the end of their planned duration of stay. The patient does not need to have a specific leaving date or duration of stay, as long as the stay is temporary. This means the following is covered:
>
> - diagnosis of symptoms or signs occurring for the first time after the visitor's arrival in the UK;
> - any other treatment which, in the opinion of a registered medical or dental practitioner, is required promptly for a condition which:
>   - arose after the visitor's arrival; or
>   - became acutely exacerbated after their arrival; or
>   - would be likely to become acutely exacerbated without treatment; plus
> - the treatment of chronic or pre-existing conditions, including routine monitoring.
>
> 9.17 It should be noted that the above definition of 'medically necessary treatment' is different from the entitlement to free treatment that applies to visitors from reciprocal agreement countries which are not covered by EU regulations (see regulation 14 and Chapter 10)"

The Guidance also refers to maternity and dialysis services, and explains how these can be accessed. This wording gives guidance about how the NHS should strike the balance between treatment which is necessary for an EU rights overseas visitor during a temporary stay in the UK, which is covered by the article 19/ European Health

[37] This is reference to the 2004 Regulation.

Insurance Card **("EHIC")** system, and the need for more extensive medical treatment for such a patient which lies outside of the article 19/EHIC system.

7.17. Both EU residents and visitors have to prove their entitlement to NHS services under the article 19/EHIC set of rights before they can access services free of charge. Article 25 of the 2009 EU Regulations provides:

> "1. For the purposes of the application of Article 19 of the basic Regulation, the insured person shall present to the health care provider in the Member State of stay a document issued by the competent institution indicating his entitlement to benefits in kind. If the insured person does not have such a document, the institution of the place of stay, upon request or if otherwise necessary, shall contact the competent institution in order to obtain one.
>
> 2. That document shall indicate that the insured person is entitled to benefits in kind under the conditions laid down in Article 19 of the basic Regulation on the same terms as those applicable to persons insured under the legislation of the Member State of stay"

7.18. The Guidance explains how this works in practice as follows:

> **"European Health Insurance Card (EHIC)**
>
> 9.9. A valid EHIC or Provisional Replacement Certificate (PRC) for the EHIC can demonstrate that a visitor (including a student) is exempt from charge under the EU Regulations, and therefore entitled to free NHS treatment that is medically necessary during their visit until their planned date of return. This is because the other country is responsible for the healthcare costs of the visitor. The UK can reclaim back the cost of providing treatment to the patient, if the details of the EHIC or PRC are recorded on the OVM portal.
>
> 9.10. However, an arrangement between the UK and the Republic of Ireland means that visitors from the Republic of Ireland do not have to present an EHIC to obtain free NHS treatment under the EU Regulations. They only need to present evidence that they are resident in the Republic of Ireland, although a valid EHIC can be used as evidence of this. Visitors from the Republic of Ireland do need to be referred with an S2 for pre-planned treatment.

9.11. Visitors who are resident in Switzerland or the EEA (except Ireland) who do not 9 provide an EHIC/PRC must be charged for their NHS hospital treatment at 100% of the NHS tariff or equivalent, unless they are ordinarily resident in the UK or a different exemption applies to them under the Charging Regulations.

9.12. A person who has been charged because they did not provide an EHIC/PRC may be entitled to a reimbursement from their home state on their return. Alternatively, if they provide a valid EHIC/PRC covering the period of treatment within a reasonable timescale after treatment, they should be reimbursed by the relevant body.

9.13. Visitors from the EEA/Switzerland may be exempt under a different exemption category within the Charging Regulations and it is very important that this is considered before the patient is charged. EEA and Swiss nationals as well as some non-EEA nationals not subject to immigration control, who are ordinarily resident in the UK are entitled to free treatment on that basis.

9.14. However, if the visitor is able to show a valid EHIC or PRC from another EEA member state or Switzerland, the UK can claim back the cost of their treatment from that country. It is possible to be ordinarily resident in the UK and still be insured by another country. This is often the case with EEA students coming to study in the UK Consequently, if a patient from another EEA country or Switzerland presents for treatment and the treating NHS provider suspects they are ordinarily resident in the UK, the provider should still ask the patient if they have an EHIC/ PRC and report their details via the OVT web portal.

9.15. In order for the UK to make a claim to the relevant EEA state or Switzerland for treating its residents, it is imperative that the data from the EHIC/PRC is recorded and reported to the Overseas Healthcare Team at the Department for Work and Pensions (DWP) via the OVT web portal (see paragraphs 9.49-9.54 below)"

7.19. Article 20 of the 2004 EU Regulations places limits on these rights for persons who travel for the purpose of accessing healthcare services. It provides:

"1. Unless otherwise provided for by this Regulation, an insured person travelling to another Member State with the purpose of receiving benefits in kind during the stay shall seek authorisation from the competent institution.

2. An insured person who is authorised by the competent institution to go to another Member State with the purpose of receiving the treatment appropriate to his condition shall receive the benefits in kind provided, on behalf of the competent institution, by the institution of the place of stay, in accordance with the provisions of the legislation

> it applies, as though he were insured under the said legislation. The authorisation shall be accorded where the treatment in question is among the benefits provided for by the legislation in the Member State where the person concerned resides and where he cannot be given such treatment within a time-limit which is medically justifiable, taking into account his current state of health and the probable course of his illness.
>
> 3. Paragraphs 1 and 2 shall apply mutatis mutandis to the members of the family of an insured person"

7.20. The requirement to provide authorisation from the home state "*competent institution*" before EU cross border healthcare rights can be exercised only applies where a person travels "*with the purpose of receiving benefits in kind during the stay*". That can be a fact sensitive assessment because, by way of example, a person who has a long term condition which needs regular medication may travel to another EU country for a family or social event or even for a holiday, but may need healthcare during the visit. Even if it was foreseeable that the person would have a need for healthcare services during the trip, he or she will be entitled to exercise rights under the Regulation as long as the primary purpose of the trip was not to secure healthcare services in another country.

7.21. Article 35 of the 2004 EU Regulations provides that the benefits in kind provided by the institution of a Member State on behalf of the institution of another Member State under this Chapter gives rise to full reimbursement by the home member state. Hence, where the NHS provides services to a person who exercises EU rights, the NHS cannot charge the person exercising rights but the UK government can recover the costs of providing the treatment from the home EU state. Details of the procedures that NHS bodies should follow to process payment claims are set out in the Guidance.

7.22. Family members of overseas visitors who have EU/EEA rights (known as the "principal overseas visitor") will usually have their own rights to medical treatment as an EU/EEA citizen. However there can be occasions where a principal overseas visitor can assert EU/EEA rights but members of his or her family do not have their own EU/EEA rights.

In such circumstances Regulation 25(4) extends the right to be exempt from charges in a like way to a member of the family[38] of the principal overseas visitor provided:

a) The overseas visitor who is seeking the exemption from NHS charges is lawfully present in the UK;

b) The overseas visitor who is seeking the exemption from NHS charges is visiting the United Kingdom with the principal overseas visitor; and

c) The principal overseas visitor would be exempt from the relevant NHS charges for the NHS treatment in question.

7.23. Even though no charges are made against the individuals with EU rights who access NHS services, the UK government can recover the costs of providing NHS services to these individuals through the reciprocal agreements set up by the EU. The UK government also has to pay for healthcare services provided to UK residents who are treated by the health services operating other EU member states. Almost all other EU states operate under a mandatory insurance system and the rights to free NHS treatment in the UK only apply to those who are eligible for state funded healthcare services in their home state. The Guidance explains this at paragraph 9.8 as follows:

> "Only residents 'insured' under any public healthcare system of an EEA country or Switzerland are covered by the EU Regulations when they are visiting the UK. In detail, this covers:
>
> - EEA nationals, stateless persons or refugees, plus their family members and survivors (irrespective of nationality) of these groups of people, insured in each case under any public healthcare system in an EEA country (N.B. they may be 'insured' by the UK even if they are living abroad. See paragraph 9.55 onwards);
> - Swiss or EU nationals, stateless persons or refugees, plus their family members and survivors (irrespective of nationality) of these groups of people, insured in each case in Switzerland;
> - non-EEA nationals legally resident and insured in any EU country (except Denmark)"

[38] Please see paragraph 18 for the meaning of "member of a family" of an overseas visitor.

7.24. Thus bodies providing NHS services are required to assess the level of charges payable in respect of persons exercising EU and EEA rights so that the DWP can make the appropriate claim from their host healthcare service.

7.25. **EU rights holders who come to the UK for planned treatment:** The rights discussed above under article 19 of the 2004 EU Regulations do not apply where an EU rights holder comes to the UK for the specific purpose of seeking medical treatment. Entirely different considerations arise where a patient seeks to exercise EU rights to come to the UK for the specific purpose of having medical treatment. The real issue here is not securing NHS treatment from an NHS provider. NHS bodies are not allowed to discriminate on the grounds of the racial origin of place of residence of a patient (as that would be unlawful discrimination contrary to the Equality Act 2010). As Munby J noted in *R (Watts) v Bedford Primary Care Trust & Ors* [2003] EWHC 2228 (Admin) at §105:

> " …. the entire debate in relation to Article 49 is not about the right to travel abroad for treatment – for which, of course, one needs no more than a passport – but about the right to be reimbursed for the cost of treatment obtained abroad. And, moreover, it shows that in this context it matters not whether the cost of such treatment is to be reimbursed to the patient or paid direct to the foreign service provider. Nor does it matter if the reimbursement comes from a sickness fund *or from the national budget*"

7.26. There are broadly 5 routes by which holders of EU rights can come to the UK and seek treatment at an NHS hospital or other NHS provider. These are:

a) As a patient who pays NHS charges or arranged for NHS charges to be paid on the patient's behalf by an employer, an insurance company or any other third party. In such a case the patient is accessing NHS services but is doing so on a fee paying basis;

b) An EU based healthcare provider or EU member state healthcare organisation directly contracts with an NHS body to provide healthcare services to persons

covered by their state healthcare system[39]. In such an arrangement, the NHS provider bills the EU based healthcare provider or EU member state healthcare organisation in accordance with the terms of contract. This would be an entirely private law arrangement and the rights of each party would be governed by the terms of the contract. No "NHS charges" would be payable because the remuneration for the NHS Provider would be fixed by the contract (unless the contract also provided that the patient was to make a defined financial contribution);

c) By exercising the patient's rights under the 2011 Directive;

d) By the "S2" route; or

e) By the "S1" route.

Different considerations apply regarding NHS charges depending on the route chosen by the patient. However the first two do not need to be considered further here as they do not give rise to charges under the 2015 Regulations.

7.27. **The 2011 Directive**: The Secretary of State has implemented the 2011 Directive in England by the National Health Service (Cross-Border Healthcare) (England) Regulations 2013. However, these Regulations are almost entirely focused on the position of UK residents who are entitled to NHS services but wish to access services in another EU country. The Regulations do not generally assist in describing the way in which the NHS should react to patients from abroad who are EU rights holders who want to exercise their right to have treatment provided within the NHS.

7.28. Rights under the Directive can be exercised by those having rights in EU and EEA states but not those having rights in Switzerland. It applies to both planned and unplanned medical treatment. Further, the person exercising the rights is not limited to seeking

[39] Both NHS Trusts and NHS Foundation Trusts are entitled to undertake private healthcare.

treatment in NHS facilities but can seek to access healthcare from any CQC registered provider of healthcare services in the UK.

7.29. The general effect of the 2011 Directive is to allow a patient to seek healthcare in another EU country at their own cost and then to make a retrospective claim against their home state healthcare system to be reimbursed for the costs the patient has incurred. The patient meets the costs of travel and any other costs which arise as a result of the choice to seek treatment in another EU member state.

7.30. NHS bodies are obliged to charge the patient the full cost of any medical treatment provided where a patient is seeking to exercise their rights under the 2011 Directive. NHS bodies also have duties to ensure that they provide full information to any prospective patient. Article 4.2(b) of the 2011 Directive provides:

> "The Member State of treatment shall ensure that:
>
> (b) healthcare providers provide relevant information to help individual patients to make an informed choice, including on treatment options, on the availability, quality and safety of the healthcare they provide in the Member State of treatment and that they also provide clear invoices and clear information on prices, as well as on their authorisation or registration status, their insurance cover or other means of personal or collective protection with regard to professional liability. To the extent that healthcare providers already provide patients resident in the Member State of treatment with relevant information on these subjects, this Directive does not oblige healthcare providers to provide more extensive information to patients from other Member States"

7.31. NHS providers must not discriminate against EU based patients who wish to exercise their rights under the 2011 Directive. This is explained in article 4.3 of the 2011 Directive which provides:

> "3. The principle of non-discrimination with regard to nationality shall be applied to patients from other Member States.
>
> This shall be without prejudice to the possibility for the Member State of treatment, where it is justified by overriding reasons of general interest, such as planning requirements relating to the aim of ensuring sufficient and permanent access to a

balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources, to adopt measures regarding access to treatment aimed at fulfilling its fundamental responsibility to ensure sufficient and permanent access to healthcare within its territory. Such measures shall be limited to what is necessary and proportionate and may not constitute a means of arbitrary discrimination and shall be made publicly available in advance"

7.32. The Guidance suggests that this gives rise to grounds on which an NHS provider could refuse to treat an EU based patient exercising rights under the Directive on the grounds that the provider needed its facilities to treat locally based patients. It states:

"9.41. The Directive does not require providers to accept visiting patients for planned healthcare if this would be to the detriment of ensuring sufficient access for their own patients with similar health needs. It also does not require providers to prioritise visitors to the detriment of other patients, for instance by increasing waiting times. However, acute trusts or other providers would need to be able to explain and evidence the lack of capacity, demonstrate that refusal is necessary and show they were not discriminating against nationals of other states on grounds of nationality if rejecting a request for treatment.

9.42. In principle, the strongest ground for refusing a visiting patient is a lack of service capacity. However, the provider would need to consider whether the patient could be offered the option of joining the waiting list, to be treated alongside domestic patients on the basis of clinical priority. The patient may also consider the option of approaching a different provider"

7.33. Those paragraphs appear to suggest that NHS providers have a greater level of discretion to turn away patients than the limited level of discretion suggested by the wording of the 2011 Directive, particularly as any NHS body which wishes to turn away patients exercising rights under the 2011 Directive has to have publicised its position in advance in order to be acting lawfully. The wording of article 4.3 appears to suggest that the ability of NHS providers to refuse to permit EU based patients to join the queue for treatment may be more restricted than the approach set out in the Guidance.

7.34. Part of that non-discrimination involves charging the same fees as UK patients (albeit these are usually paid by an NHS commissioner and not by the patient themselves). This is set out in article 4.4 of the 2011 Directive which provides:

> "Member States shall ensure that the healthcare providers on their territory apply the same scale of fees for healthcare for patients from other Member States, as for domestic patients in a comparable medical situation, or that they charge a price calculated according to objective, non-discriminatory criteria if there is no comparable price for domestic patients"

7.35. The Guidance summarises the obligations on NHS bodies as follows:

> "OVMs [*Overseas Visitors Managers*] should be aware that healthcare providers in England who are providing 9.35.treatment to visiting patients under the provisions of the Directive need to observe some key requirements. They must:
>
> - provide patients with relevant information on treatment options, quality and safety;
> - provide clear invoices and price information;
> - apply fees in a non-discriminatory manner;
> - ensure transparent complaints procedures and procedures to obtain redress are in place;
> - apply adequate systems of professional liability insurance or similar;
> - respect privacy in the processing of personal information; and,
> - supply patients with a copy of the record of their medical treatment.

7.36. **The S2 Route (formerly the E112 route)**: Article 20 of the 2004 EU Regulation provides a route by which EU based patients can apply to their home state healthcare provider to approve the patient securing NHS treatment in advance of a visit to the UK. It provides:

> **"Travel with the purpose of receiving benefits in kind - Authorisation to receive appropriate treatment outside the Member State of residence**
>
> 1. Unless otherwise provided for by this Regulation, an insured person travelling to another Member State with the purpose of receiving benefits in kind during the stay shall seek authorisation from the competent institution.

2. An insured person who is authorised by the competent institution to go to another Member State with the purpose of receiving the treatment appropriate to his condition shall receive the benefits in kind provided, on behalf of the competent institution, by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though he were insured under the said legislation. The authorisation shall be accorded where the treatment in question is among the benefits provided for by the legislation in the Member State where the person concerned resides and where he cannot be given such treatment within a time-limit which is medically justifiable, taking into account his current state of health and the probable course of his illness.

3. Paragraphs 1 and 2 shall apply mutatis mutandis to the members of the family of an insured person"

7.37. There has been extensive litigation about when a home member state is required to give authorisation for a patient to seek healthcare in another member state. This issue was examined by the High Court in *Watts*[40] and the issues have been examined in a series of case in the European Court of Justice. The Regulation cannot be used by patients to access NHS treatment which would not be funded under their home state healthcare system and only acquire a right to have treatment funded by their home state in the healthcare system of another member state where there is a measure of failure in the home provision, usually because there are capacity problems and so treatment will be unduly delayed. The test is whether "*he cannot be given such treatment within a time-limit which is medically justifiable, taking into account his current state of health and the probable course of his illness*". However where a patient with EU rights is able to exercise rights under Article 20 of the 2004 Regulations, the "competent institution" in his or her home state will issue the patient with a form S2.

7.38. Where an EU based patient has a valid S2 form from their home competent institution, the patient has a right to seek treatment from an NHS provider. The Guidance states that such patients should join the waiting list and be treated in the

[40] See R (Watts) v Bedford Primary Care Trust & Ors [2003] EWHC 2228 (Admin) at http://www.bailii.org/ew/cases/EWHC/Admin/2003/2228.html

same way as other NHS patients. The NHS Provider then passes the information on to the Department of Work and Pensions ("DWP") who makes a claim from the home competent institution. The Guidance states at paragraphs 9.46 to 9.54 as follows:

> "9.46. To avoid the complications that may occur if a patient authorised to seek NHS treatment in the UK is inadvertently treated privately, NHS hospitals and consultants are advised to establish when accepting such referrals whether the treatment should be at the cost of the patient's relevant foreign authority or at the patient's own cost, and if they wish to be a chargeable NHS or private patient.
>
> 9.47. Where an NHS hospital has agreed to accept a patient under these arrangements, but on arrival the patient cannot produce the appropriate form, only treatment under the 'all medically necessary treatment' definition should be provided without charge (assuming they can show their EHIC or PRC). The patient can pay in advance for the planned treatment and should be charged the tariff cost or equivalent (if no national tariff exists) for the treatment. The patient may be able to claim reimbursement for this cost from their state of residence. If the relevant form is subsequently received, the charge should be refunded. If the form has not been received by the time the patient is discharged from NHS hospital they should be told to take the matter up with their social security institution.
>
> 9.48. The number of referred patients from Malta who are treated free under these arrangements is governed by a strict quota and is monitored by the Department of Health. Arrangements exist by which NHS hospitals are notified in advance of patients authorised to come under these arrangements. The Maltese High Commission in London allocates quota numbers to patients referred to the UK. When the quota is exhausted, further patients may be referred to the UK by the health authorities of Malta, but these patients should be charged for their treatment. Reclaiming the costs of treating EEA/Swiss residents under the EHIC and S2 routes
>
> 9.49. In order for the UK to make a claim to the relevant EEA country or Switzerland for the cost of treating their residents, it is imperative that the data from a valid EHIC/PRC/S2 /or Maltese quota number is recorded and reported to the Overseas Healthcare Team at DWP. Without this data, the UK cannot make a claim for reimbursement and is in effect subsidising the healthcare costs of other countries.
>
> 9.50. All treatment carried out whenever a valid EHIC/PRC/S2 is presented, including 'exempt' services such as treatment in A&E, and including when the person with an EHIC might be exempt in another way or if they are ordinarily resident, should be reported using the OVT portal, which NHS trusts and foundation trusts can access at: www.ovt.dh.nhs.uk/

> 9.51. The full cost of treatment should be recovered. To calculate the cost, relevant NHS bodies should use the latest national tariff guidance at: https://www.england.nhs.uk/nhsstandard-contract18 supplementing this with local tariffs calculated in accordance with the rules set out in the national tariff document where the treatment does not have a national tariff price.
>
> 9.52. Relevant NHS bodies should note that recording and reporting this data so that the UK can claim reimbursement from the appropriate country does not mean that relevant NHS bodies do not have to invoice the appropriate commissioner. If this commissioner is not invoiced, then the relevant NHS body will not be paid for treating the patient.
>
> 9.53. Full instructions on how to submit this data can be found in the Department of Health Finance Manual, which can be accessed via the internet at: http://www.info.doh.gov.uk/doh/finman.nsf
>
> 9.54. For advice on how to operate the web portal/submit data contact DWP Overseas Healthcare Team. Email: OHT.Overseasvisitorsteam@DWP.gsi.gov.uk"

7.39. **Patients with S1 status:** There are 3 categories of overseas visitors who have S1 status. This status enables the patient to free NHS treatment despite being ordinarily resident overseas. These are people who have a sufficient connection with the UK so that they are exempt from NHS charges even though they are overseas visitors for the purposes of the 2015 Regulations (in that they are not ordinarily resident in the UK at the time when they seek treatment. These groups are:

a) Frontier workers;
b) Posted workers and their families; and
c) UK pensioners living abroad.

7.40. **Frontier workers:** Frontier workers are defined in article 1(f) of the 2004 Regulations as follows:

> "frontier worker" means any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week"

7.41. Hence someone who works in London but returns to their family home in Northern France every weekend is a "frontier worker". Such a worker may well be able to prove that living in the UK, working in the UK and paying taxes in the UK means that the worker is ordinarily resident in the UK, possibly as well as retaining a place of ordinary residence in France. However the term "frontier worker" extends beyond those who have a sufficiently settled pattern of life that they can establish an ordinary residence in a member state because, for example, it covers workers who return to a family home in an adjoining member state every evening. This may well be the position for a significant number of workers who live in the Republic of Ireland and work in Northern Ireland. Problems can arise for frontier workers and their families who become eligible for state health benefits arising out their work even though this not the state in which the worker and his or her family primarily resides. Article 18 of the 2004 EU Regulations provides:

> "**Stay in the competent Member State when residence is in another Member State – Special rules for the members of the families of frontier workers**
>
> 1. Unless otherwise provided for by paragraph 2, the insured person and the members of his family referred to in Article 17 shall also be entitled to benefits in kind while staying in the competent Member State. The benefits in kind shall be provided by the competent institution and at its own expense, in accordance with the provisions of the legislation it applies, as though the persons concerned resided in that Member State.
>
> 2. The members of the family of a frontier worker shall be entitled to benefits in kind during their stay in the competent Member State, unless this Member State is listed in Annex III. In this event, the members of the family of a frontier worker shall be entitled to benefits in kind in the competent Member State under the conditions laid down in Article 19(1)"

7.42. Annex III lists the countries where there are restrictions on the rights of the families of Frontier Workers, namely Denmark, Spain, Ireland, Netherlands, Finland, Sweden and the United Kingdom. The effect of this restriction is explained in the Guidance as follows:

"9.55. Under the EU Regulations, some people who are resident in other EEA member countries or Switzerland (for example frontier and posted workers, and pensioners) may have their healthcare costs paid for by the UK by virtue of the UK being the 'competent country' for them and therefore responsible for their healthcare costs. These persons should have a valid UK-issued S1 registered in their EEA country of residence or Switzerland (except some posted workers, who will have a UK A1 and UK EHIC). OVMs need to be aware that there will be times when visitors from the EEA or Switzerland fall within this category.

9.56. Except for family members of frontier workers (see paragraph below), people in this category are entitled to not be charged for planned and unplanned NHS treatment, except where charges would also apply to UK residents, for example prescription and dental charges. They will need to show evidence of their entitlement and may have to make arrangements before accessing care.

Family members of frontier workers

9.57. As set out above, there is one group of persons within this category who are not entitled to all NHS treatment on the same basis as people ordinarily resident in the UK. These are family members of 'frontier workers'. 'Frontier workers' are people who are resident in one EEA country but work in the UK, with a valid UK S1 registered in their country of residence. While 'frontier workers' are entitled to full NHS treatment, as explained in the paragraph above, their family members, also resident in the other EEA country with a UK S1, are only entitled, free of charge, to treatment which becomes medically necessary during a temporary visit to England. However, they will still need to pay any charges which also apply to residents in England, such as prescription and dental charges. They do not need to show an EHIC for this, but may be asked to show a copy of their S1, failing this, OVMs should contact DWP OHT (see para 9.54 for details) to verify the status of their S1"

7.43. Frontier workers who work in the UK but are resident in another EU country should therefore be granted an S1 certificate to enable them to access NHS services free of charges under the 2015 Regulations. They are persons who are exercising EU rights and are thus entitled to claim an exemption from charges under Regulation 12 of the 2015 Regulations.

7.44. **Posted workers and their families**: Article 12 of the 2004 EU Regulations has special provisions for workers who are posted to work in another EU country for a period of less than 2 years or self-employed people who are a like position. It provides:

> "1. A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he is not sent to replace another person.
>
> 2. A person who normally pursues an activity as a self-employed person in a Member State who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed twenty-four months"

7.45. Thus a person who is "posted" continues to enjoy healthcare rights in their home country for up to 2 years. They are thus entitled to the benefits under the EHIC system for treatment to meet their immediate health needs without paying charges under article 19 of the 2004 EU Regulation as a person who is "staying" but not residing in the UK. The Guidance explains at paragraph 9.21:

> "9.21. 'Posted workers' are those sent to the UK on a time-limited posting by their employer from another EEA country or Switzerland, or the other way around, rather than those who have chosen to move to another country to take up employment or to seek work. Posted workers here for less than two years should show an EHIC and an A1 document. The details of the EHIC should be recorded on the portal. Posted workers who are in the UK for more than two years should be covered by an S1 document, but may also be classed as ordinarily resident in the UK"

7.46. **UK state pensioners living in an EU or EEA country**: The Guidance explains the position of UK state pensioners who live abroad as follows at paragraph 9.58:

> "9.58. In April 2015, there was a change in law which meant that all UK state pensioners who are living in the EEA or Switzerland and have registered an S1 form from the UK with the local authorities in their EEA country of residence are entitled to not be charged for NHS secondary healthcare, just like someone who is ordinarily resident in England. This rule also applies to any of their family members who also possess a UK-issued S1. However, they will need to pay any charges which also apply to UK residents, such as prescription and dental charges. Individuals who have registered a UK S1 in another EEA country should be asked to provide some evidence

confirming this. If they present a UK-issued EHIC, their EHIC information should not be entered into the portal for reimbursement. Regulation 13 of the Charging Regulations concerns this category of patient"

7.47. Thus a person in receipt of a UK state pension who resides in Spain is entitled to return to the UK to seek medical treatment at an NHS hospital without being classified as an overseas visitor and thus having his or her right to treatment limited under Regulation 19 of the 2004 EU Regulations to that needed for their immediate care. This objective is achieved through Regulation 13 of the 2015 Regulations which provides:

"**Overseas visitors who are treated as if entitled under the Social Security Coordination Regulation**

No charge may be made or recovered in respect of any relevant services provided to an overseas visitor who would have an entitlement to the provision of the services in question under Article 27(2) of Regulation (EC) No 883/2004 if the United Kingdom had opted in as described in that Article and was listed in Annex IV to that Regulation"

7.48. Article 27 of the 2004 EU Regulations provides:

"1. Article 19 shall apply mutatis mutandis to a person receiving a pension or pensions under the legislation of one or more Member States and entitled to benefits in kind under the legislation of one of the Member States which provide his pension(s) or to the members of his family who are staying in a Member State other than the one in which they reside.

2. Article 18(1) shall apply mutatis mutandis to the persons described in paragraph 1 when they stay in the Member State in which is situated the competent institution responsible for the cost of the benefits in kind provided to the pensioner in his Member State of residence and the said Member State has opted for this and is listed in Annex IV"

7.49. Article 18 provides for full entitlement to healthcare services for frontier workers as set out above (see paragraph 7.40ff). The United Kingdom is not listed in Annex IV as a country which has opted in to article 27(2). Hence, UK state pensioners do not have the same rights as frontier workers under article 18 as a matter of EU law. However,

the effect of Regulation 13 of the 2015 Regulations is that it gives UK state pensioners who reside in an EU or EEA country the same rights under UK domestic law as if the United Kingdom had opted into article 27(2) of the 2004 EU Regulations. The net effect is as described in the Guidance, namely that UK state pensioners who are resident in EU or EEA countries are entitled to access all NHS services in the UK free of charge. The Guidance suggests correctly states that this means that UK state pensioners cannot be charged for NHS secondary healthcare. However, the rights under article 18 of the 2004 EU Regulations extend to all aspects of healthcare and thus a UK state pensioner living in another EU or EEA country would be entitled to access all NHS services on the same basis as a UK resident, not just secondary healthcare services. UK state pensioners can establish their rights by seeking a form S1 from NHS England and then registering it with their home local authority.

7.50. Family members[41] of EU/EEA resident UK state pensioners may have their own rights to access NHS services without incurring charges under the 2015 Regulations. However, family members may also be ordinarily resident overseas and thus may not, in their own right, come within any of the categories which exempt them from charges for NHS treatment in the UK under the 2015 Regulations. In such a case, Regulation 25(4) of the 2015 Regulations extends the right to exemption from charges for NHS treatment to family members of an EU/EEA resident UK state pensioner (known as the "principal overseas visitor") where:

a) The overseas visitor (i.e. the family member) who is seeking the exemption from NHS charges is lawfully present in the UK;

b) The overseas visitor who is seeking the exemption from NHS charges is visiting the United Kingdom with the principal overseas visitor; and

c) The principal overseas visitor would be exempt from the relevant NHS charges for the NHS treatment in question.

[41] Please see paragraph 18 for the meaning of "member of a family" of an overseas visitor.

8. **The right of asylum seekers and failed asylum seekers and their families to be exempt from NHS charges**: Regulation 15 of the 2015 Regulations makes provision to exempt a series of individuals from NHS charges. It covers refugees and asylum seekers as well as looked after children. Regulation 15 of the 2015 Regulations provides[42]:

> "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;
>
> (aa) has leave to enter or remain in the United Kingdom as the dependant of a person 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 the immigration rules;
>
> (ba) is treated as a dependant of a person described in paragraph (b) for the purposes of an application described in that paragraph;
>
> (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;
> . . .
>
> (ii) . . .

[42] As from 21 August 2017.

(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

(da) is treated as the dependant of a person described in paragraph (d) for the purposes of the provision of support under that paragraph; 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)"

8.1. The UK is a signatory to the United Nations Refugee Convention 1951 ("**the Refugee Convention**"). A refugee, according to the Convention, is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. Section 94 of the Immigration and Asylum Act 1999 defines an "*asylum seeker*" and "*claim for asylum*" as follows:

> "*"asylum-seeker"* means a person who is not under 18 and has made a claim for asylum which has been recorded by the Secretary of State but which has not been determined
>
> *"claim for asylum"* means a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention, or under Article 3 of the Human Rights Convention, for the claimant to be removed from, or required to leave, the United Kingdom;"

The reference to the Human Rights Convention in section 94 is a reference to the European Convention of Human Rights ("**ECHR**"). Article 3 is the right not to be subjected to torture or to inhuman or degrading treatment or punishment.

8.2. Section 94(3) defined the date when a claim is "determined" as follows:

> "(3) For the purposes of this Part, a claim for asylum is determined at the end of such period beginning—

> (a) on the day on which the Secretary of State notifies the claimant of his decision on the claim, or
>
> (b) if the claimant has appealed against the Secretary of State decision, on the day on which the appeal is disposed of,
>
> as may be prescribed.
>
> (4) An appeal is disposed of when it is no longer pending for the purposes of the Immigration Acts or the Special Immigration Appeals Commission Act 1997"

8.3. There are 3 groups of people affected by this provision, namely:

a) Persons who have claimed asylum where a decision has been made in their favour ("**refugees**");

b) Persons who have claimed asylum, where a decision has not yet been made or the individual is appealing against an adverse decision ("**asylum seekers**"); and

c) Persons who have had their claim for asylum (and any subsequent appeal) rejected but remain resident in the United Kingdom ("**failed asylum seekers**").

8.4. A failed asylum seeker can make a "fresh claim" for asylum after an initial application has been rejected. The Guidance explains that a person who makes a fresh claim will be entitled to be treated as an asylum seeker once their fresh claim has been registered with the Home Office. It provides at paragraph 7.44:

> "A failed asylum seeker who makes a fresh application for asylum, temporary protection or humanitarian protection will become an asylum seeker again and will therefore be exempt from charges again under Regulation 15(b), until that new application, including any appeals, is determined. A person does not become an asylum seeker again at the point they make a fresh claim for asylum or the claim is received by the Home Office, but only when that claim has been 'recorded' by the Home Office. Charges will still apply during any period between the first application, including appeals, being 'rejected' and the second, fresh, application being 'recorded' by the Home Office"

8.5. **Refugees**: Anyone who is granted asylum, temporary protection or humanitarian protection under the Immigration Rules is recognised as a refugee for the purposes of the Refugee Convention and is exempt from charges for NHS services. Such a person will be lawfully permitted to live in the United Kingdom. However, if a refugee is given leave to remain in the United Kingdom for 5 years, the person will still not be treated as being "ordinarily resident" because of the provisions of section 39 of the Immigration Act 2014[43] which prevent a person having ordinary residence if they are granted leave to remain in the United Kingdom for a limited period. It follows that such a person continues to be an "overseas visitor" under the 2015 Regulations but is exempt from charges for all NHS services.

8.6. Family members of a person who has been granted asylum, temporary protection or humanitarian protection under the Immigration Rules have refugee status. It follows that anyone who has been given like status as a dependant of a refugee is exempt from paying charges for NHS services under the 2015 Regulations.

8.7. **Asylum seekers (i.e. persons applying for refugee status):** An asylum seeker, namely anyone whose application for asylum, temporary protection or humanitarian protection under the Immigration Rules has not yet been determined, is exempt from paying charges for NHS services. Asylum seekers are entitled to register with a GP practice and to receive the full range of NHS services which are appropriate to their needs in the same way as any other UK resident has access to NHS services.

8.8. A person whose claim for refugee status has been rejected by a Home Office decision maker can challenge that decision by way of an appeal to the First Tier Tribunal (and then, with permission, on appeal to the Upper Tribunal if an error of law has been made). The exemption from NHS charges for asylum seekers continues until any appeal against an adverse decision has been determined. In practice this usually means:

[43] See paragraph 3.8 above.

a) An application to the First Tier Tribunal has been rejected with any application for permission to appeal being refused, and the period for a proposed appeal to the Upper Tribunal has expired without an application for permission to appeal being made[44];

b) An application for permission to appeal to the Upper Tribunal has been refused by the Upper Tribunal (since there is no route for a further appeal against a decision to refuse permission to appeal other than a judicial review);

c) An appeal to the Upper Tribunal has been refused along with any application to for permission to appeal to the Court of Appeal, and the period for making an application to the Court of Appeal has expired[45] without any appeal being made;

d) An application for permission to appeal to the Court of Appeal is refused by the Court of Appeal; or

e) An appeal the Court of Appeal is refused and there is no pending appeal to the Supreme Court.

8.9. **Failed Asylum Seekers**: A failed asylum seeker is a person whose application for refugee status has been rejected and who has been unsuccessful in any appeal against that decision. However, many such persons are, in practice, unable to be deported by the government to their country of origin for a variety of reasons and so remain in the United Kingdom for extended periods without having a legal right to remain living in the United Kingdom. The position of such persons is explained in the Guidance as follows:

> 7.36. A person who has had their asylum/humanitarian protection application and all appeals rejected becomes a 'failed asylum seeker'. They will become liable for charges for their NHS community or secondary care at that point, unless one of the following situations applies to them.

[44] This is 14 days from the date of the decision.
[45] This is 21 days from the date of the decision.

7.37. Persons who are being supported by the Home Office under section 95 of the Immigration and Asylum Act 1999 are exempt from charges. Section 95 support is provided to asylum seekers where they would otherwise be destitute and this normally continues for those failed asylum seekers who have children under the age of 18.

7.38. Some failed asylum seekers are supported under other provisions of the 1999 Act because, whilst making reasonable efforts to leave the UK, there are genuine recognised barriers to their return home. Any failed asylum seeker receiving support from the Home Office under s4(2) of the 1999 Act, and anyone treated as their dependent in the provision of the support, is exempt from charges.

7.39. Failed asylum seekers being supported by a local authority under section 21 of the National Assistance Act 1948 or Part 1 (care and support) of the Care Act 2014 by the provision of accommodation are also exempt from charges. Such failed asylum seekers receive this support due to a need for care and attention (usually because of a disability), and are in an analogous situation to those receiving section 4(2) support, who are usually able bodied.

7.40. Failed asylum seekers in England now receive support from the Local Authority under Part 1 of the Care Act 2014 and not section 21 of the National Assistance Act 1948 Act.

7.41. An OVM might come across a failed asylum seeker who was provided with relevant services between 6 April 2015 and 31 January 2016 and who was, at that time, supported under Part 1 of the Care Act 2014 by the provision of accommodation. In this circumstance, any outstanding charges already made to such a person should be cancelled and any charges for such services not yet made, should not be made. In the event that the Department of Health becomes aware that charges have been made and recovered prior to 1 February 2016, the Department will look at the particular facts of the case and consider whether a refund of those charges can and should be made. Consideration will be undertaken on a case by case basis. Failed asylum seekers who were supported by section 21 before it was repealed will continue to be exempt from charge even though they are now supported by the provision of accommodation under the Care Act 2014.

7.42. Relevant bodies in England should note that section 21 of the National Assistance Act 1948 continues to apply in Wales and therefore eligible failed asylum seekers in Wales may receive support under the 1948 Act and then receive relevant NHS services in England.

7.43. The following should be provided as evidence of being supported by the Home Office or a local authority:

- confirmation from the Home Office that the person is being supported under section 95 of the 1999 Act, or is a failed asylum seeker supported under s4(2) of the 1999 Act; or
- Confirmation by a local authority that the person is being supported under section 21 of the NAA Act or Part 1 of the Care Act"

8.10. It follows that the question as to whether a failed asylum seeker is exempt from paying NHS charges depends on their status under the asylum support system and/or as to whether they are recognised as someone who should be provided with support by a local authority. Thus NHS organisations may need to make inquiries of other organisations in order to be able to establish whether a person is or is not exempt from paying charges for NHS treatment.

8.11. **Looked after children**: There are a significant number of unaccompanied children who come to the UK from overseas. Many of these children will be taken into the care of a local authority. Regulation 15(e) of the 2015 Regulations provides that children who are looked after by a local authority within the meaning of section 22(1) of the Children Act 1989 are exempt from charges for NHS services. The Guidance explains that this will include the following children who are accommodated by a local authority in the following circumstances:

a) children in the care of the local authority by virtue of a care order (by a court);

b) children who are unaccompanied by a parent or guardian in the UK or abandoned or for whom there is no one with parental responsibility; and

c) children who are voluntarily accommodated by a local authority (without the need for intervention by a court).

8.12. The Guidance sets out the approach that should be taken where there is a doubt about the status of a child at paragraphs 7.46ff:

"7.46. There may be occasions when a relevant body treats an overseas visitor child who is unaccompanied or abandoned, or for whom there is no one with parental responsibility, and whom the relevant body believes should be in the care of or looked after by the local authority. Where that child is subsequently taken into the care of the local authority, there will be no charge for the treatment prior to the child being taken into the care of, or becoming looked after by, the local authority.

7.47. OVMs and frontline staff should be aware that some of these children will make applications to the Home Office for leave to remain in the UK. They are exempt from paying the health surcharge, and are entitled to all their NHS healthcare free of charge on the same basis as an ordinary resident. They will have a 'Green: Paid or exempt from the health surcharge' banner on their record when viewed through the Summary Care Record application.

7.48. Confirmation from the local authority should be obtained to confirm that the child is looked after by that local authority"

9. **Victims of Modern Slavery**.

9.1. Regulation 16 of the 2015 Regulations contains specific provisions relating to overseas visitors who are victims of modern slavery. Such persons are exempt from charges for all NHS treatment under the 2015 Regulations, not just for medical treatment to respond to the immediate effects of having been a victim of modern slavery. It provides:

"(1) No charge may be made or recovered in respect of any relevant services provided to an overseas visitor, where a competent authority—

(a) has identified the overseas visitor as a victim of modern slavery; or

(b) considers that there are reasonable grounds to believe that the overseas visitor is a victim of modern slavery, and—

(i) a competent authority is required to make a conclusive determination; and

(ii) there has not been a conclusive determination by a competent authority that the overseas visitor is not a victim of modern slavery.

(2) In this regulation—

"competent authority" means a designated competent authority of the United Kingdom for the purposes of the Trafficking Convention;

"Trafficking Convention" means the Council of Europe Convention on Action against Trafficking in Human Beings (agreed at Warsaw on 16th May 2005);

"victim of modern slavery" means a victim of—

(a) trafficking in human beings, which has the same meaning as in the Trafficking Convention, as set out in article 4 of that Convention; or

(b) slavery, servitude, or forced or compulsory labour, which have the same meaning as they have for the purposes of article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms (agreed at Rome on 4th November 1950)"

9.2. The Council of Europe Convention on Action against Trafficking in Human Beings[46] ("**the Trafficking Convention**") defines "trafficking in human beings" as follows:

"For the purposes of this Convention:

a "Trafficking in human beings" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

b The consent of a victim of "trafficking in human beings" to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

[46] See https://rm.coe.int/168008371d

> c The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in human beings" even if this does not involve any of the means set forth in subparagraph (a) of this article;
>
> d "Child" shall mean any person under eighteen years of age;
>
> e "Victim" shall mean any natural person who is subject to trafficking in human beings as defined in this article"

9.3. The UK government signed the Council of Europe Convention on Action against Trafficking in Human Beings on 23 March 2007[47]. The Convention was ratified by the UK on 17 December 2008, and came into force on 1 April 2009. This led to the creation of the UK's National Referral Mechanism (NRM) in 2009. The NRM is a victim identification and support process. It is designed to make it easier for all the different agencies that could be involved in a trafficking case (for example, the police, Home Office – including Border Force, UK Visas and Immigration and Immigration Enforcement – the National Crime Agency, local authorities, and non-governmental organisations) to co-operate, share information about potential victims and facilitate their access to advice, accommodation and support.

9.4. The Convention requires that potential victims of trafficking are provided with a period of a minimum of 30 days recovery and reflection, during which they will receive support, including accommodation, subsistence and access to relevant medical and legal services, and potential eligibility for discretionary leave if they are recognised as a victim. The UK provides this support to potential victims referred to the NRM for a longer period of 45 days.

9.5. The decision as to whether a person is a victim of modern slavery or whether there are reasonable grounds to believe that a person is a victim of modern slavery is not a decision that an NHS body needs to make. It is a decision for the UK's "competent authority". The UK's two Competent Authorities are: the Modern Slavery Human

[47] See the Home Office Guidance at http://www.antislaverycommissioner.co.uk/media/1059/victims_of_modern_slavery_-_competent_authority_guidance_v3_0.pdf

Trafficking Unit ("**MSHTU**")[48], which deals with referrals from the police, local authorities, and NGOs and the Home Office Visas and Immigration ("**UKVI"**), which deals with referrals identified as part of the immigration process. The MSHTU replaced the United Kingdom Human Trafficking Centre which was previously the competent authority for the UK under the Trafficking Convention.

9.6. The Government estimates that there are between 10,000 and 13,000 potential victims of modern slavery in the UK, originating from around the world and the UK itself[49]. Once identified, many of these victims will have both immediate and longer term healthcare needs. Hence, NHS services are likely to be required in many cases where victims of modern slavery have been discovered, often by the police or other statutory agencies, and are referred for NHS treatment before any decision is made whether that person should be classified as a victim of modern slavery. The Guidance makes it clear that potential victims of modern slavery should be provided with NHS services without charges being levied prior to a decision being made as to whether a person is classified as a victim of modern slavery. It provides:

> "7.49. A "victim of modern slavery" means a victim of:
>
> - trafficking in human beings;
> - slavery;
> - servitude; or
> - forced or compulsory labour.
>
> 7.50. A person who is thought to be a victim of modern slavery can be referred to the 'competent authorities' (CA) of the UK to be identified as such. The CA are currently the UK Human Trafficking Centre (UKHTC)[50] and, where cases are linked to asylum and immigration issues, the Home Office[51]. The CA will then consider if there are reasonable grounds to consider the person to be such a victim and if so, will issue a 'reasonable grounds' decision. Individuals given a reasonable grounds decision are suspected victims of modern slavery and are exempt from charge until a final determination is given by one of the CAs (unless a final determination is not required,

[48] This Unit is led by the National Crime Agency: see http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre
[49] See summary at https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/803/803.pdf
[50] This is an error in the Guidance as it should refer to the MSHTU.
[51] This should refer to the UKVI.

which would be highly unusual). They will continue to be exempt from charge if the CA confirms them as being a victim of modern slavery with a 'conclusive grounds' decision.

7.51. Those whom the CA confirm not to be victims of modern slavery are no longer exempt from charge, other than for courses of treatment already under way, which remain free of charge until complete or until the person leaves the country.

7.52. It may be that NHS treatment is provided prior to a person being referred to the CA for identification. Charges incurred prior to a referral to the CA for assessment as a victim of modern slavery must be refunded or, if not yet paid, cancelled, when the CA provide a reasonable grounds decision. If the CA does not provide a reasonable grounds decision, these charges are not cancelled or refunded. If the CA goes on to establish that the person is not, in fact, a victim of modern slavery, no treatment provided during the time that the person was suspected as being a victim of modern slavery, or provided prior to being referred to the CA for such an assessment, will become chargeable.

7.53. The spouse/civil partner and dependent children of those exempt under this regulation are also exempt from charges in their own right, as long as they are here lawfully. They do not have to have been here with the victim of modern slavery during the entire period of their stay.

7.54. Victims of modern slavery are often in powerless situations and frontline staff may come across them before they have had a chance to escape their oppressors and seek help. They may be unwilling to disclose their situation, although frontline staff are often trusted individuals who might be best placed to identify signs of trafficking and/or slavery. A leaflet and e-learning resources are available for health professionals, to raise awareness about the issue of modern slavery and enable health professionals to identify and respond to victims more effectively. A copy of the leaflet is available at: https://www.gov.uk/government/publications/identifying-and-supporting-victims-of-human-trafficking-guidance-for-health-staff

The e-learning resources can be accessed at: http://www.e-lfh.org.uk/programmes/modern-slavery/"

7.55. Consequently, it may be that NHS staff are concerned that a person they are treating or assessing for charges is a victim of modern slavery. OVMs should speak to their safeguarding lead for advice. If the patient appears to be in danger, the relevant NHS body should contact the police.

7.56. There are also charitable 'First Responder' organisations that are trained to identify and provide support to victims, and suspected victims, that can be contacted for advice. OVMs are encouraged to engage with these organisations to ensure that victims of modern slavery who are not exempt from charges (because they are unwilling to be referred to the CA) still receive the support they need. The current list of First Responder organisations can be found here: http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism

Some victims of modern slavery go on to make applications to the Home Office for leave to remain as victims of modern slavery. They are likely to be exempt from paying the health surcharge. In the circumstance, while their visa is valid, they are entitled to all their NHS healthcare free of charge on the same basis as an ordinary resident. They will have a 'Green: Paid or exempt from the health surcharge' banner on their record when viewed through the Summary Care Record application. Victims of modern slavery may make applications for a period of discretionary leave, and may not be required to pay the health surcharge.

7.57. The following should be provided as evidence:

- a letter from the CA confirming their status as a victim (a 'conclusive grounds' decision), or suspected victim (a 'reasonable grounds' decision) for whom the recovery and reflection period has not elapsed;

- those who make an immigration application for leave to remain as a victim of modern slavery will have a 'Green: Paid or exempt from the health surcharge' banner on their NHS record, when it is viewed through the Summary Care Record application, indicating their access to NHS services on the same basis as a person who is ordinarily resident. Note that not all victims will make such an application to the Home Office, so they will not all have a green banner indicating their status.

7.58. Prior to 1 February 2016 only victims, or suspected victims, of human trafficking were exempt from charge for NHS hospital treatment. The competent authority of the UK will now also consider suspected victims of modern slavery, as well as victims of human trafficking, within this formal process"

9.7. Regulation 25 of the 2015 Regulations provides that the exemption from charges under the 2015 Regulations extends to members of the family[52] of an overseas visitor

[52] See paragraph 18 for the meaning of "members of the family" of an overseas visitor.

who is a victim of modern slavery, provided that family member is lawfully present in the United Kingdom.

10. **Persons granted the right to NHS treatment without charge for exceptional humanitarian reasons**.

10.1. Regulation 17 of the 2015 Regulations provides that the Secretary of State is entitled to designate a person has having exceptional humanitarian reasons for being provided with NHS treatment without charge. Regulation 17provides:

> "(1) Where an overseas visitor who has been granted leave to enter the United Kingdom outside the immigration rules—
>
> (a) applies (or someone applies on the overseas visitor's behalf) for exemption from charges in respect of relevant services for a course of treatment; and
>
> (b) the Secretary of State determines that exceptional humanitarian reasons justify it,
>
> no charge may be made or recovered in respect of relevant services provided to that overseas visitor for that course of treatment.
>
> (2) A determination under paragraph (1)(b) may only be made by the Secretary of State if the Secretary of State is satisfied, in the case of that overseas visitor, that—
>
> (a) the treatment specified is not available in that person's home country;
>
> (b) the necessary arrangements have been made for temporary accommodation for that person, any authorised companion and authorised child for the duration of the course of treatment; and
>
> (c) the necessary arrangements have been made for the return of that person, any authorised companion and any authorised child to their home country when the course of treatment is completed"

10.2. This is a relatively unusual basis for exempting a person from charges and the decision needs to be made on an individual basis by the Secretary of State (although in practice

it will be taken on the Secretary of State's behalf by an official). The Guidance explains the approach NHS bodies should take in such cases as follows:

> "7.59. This regulation allows the Secretary of State for Health to designate an individual as exempt from charges on exceptional humanitarian grounds, as long as certain specified criteria are met. This designation can only be made by the Secretary of State. It is envisaged that the powers will only be used very rarely, where there is a clear humanitarian imperative to do so (e.g. the UK is responsible for causing the injury needing treatment or there are humanitarian reasons for treating the person in the UK). As far as relevant bodies are concerned, their role in the context of the Charging Regulations is to establish whether such a determination has been made, not to make the determination themselves.
>
> 7.60. The following should be noted with regard to evidence:
>
> - The relevant NHS body will be advised that the appropriate determination has been made and supporting documentation will be provided (although in an emergency this may arrive after the patient).
>
> 7.61. Where such a determination is made, the person will be allowed to be accompanied by an authorised companion (which need not be their spouse/civil partner) and any authorised children, who will be exempt from charges for treatment the need for which arises while they are here, but not for other treatment"

11. Persons detained in an NHS Hospital or subject to court ordered treatment.

11.1. Regulation 18 of the 2015 Regulations exempts anyone detained in a UK hospital or who is deprived of their liberty from being charged for the NHS services that that person receives under compulsion. The Regulation provides:

> "No charge may be made or recovered in respect of relevant services provided to an overseas visitor—
>
> (a) who is liable to be detained in a hospital, received into guardianship or subject to a community treatment order under the Mental Health Act 1983;
>
> (b) who is detained in a hospital in circumstances which amount to deprivation of the overseas visitor's liberty and that deprivation of liberty is authorised under any of the following provisions of the Mental Capacity Act 2005—

(i) section 4A (restriction on deprivation of liberty);

(ii) section 4B (deprivation of liberty necessary for life-sustaining treatment etc);

(iii) section 16 (powers to make decisions and appoint deputies: general); or

(iv) Schedule A1 (hospital and care home residents: deprivation of liberty);

(c) whose detention in hospital is authorised by any other enactment authorising detention in a hospital; or

(d) who is required to submit to a specified form of treatment that is imposed by, or included in, an order of a court and paragraph (a), (b) or (c) does not apply"

11.2. This provision covers all NHS medical treatment that is provided to a person in circumstances where treatment is provided without the person being required to give their consent. That includes individuals who are detained in a hospital under the Mental Health Act 1983 ("**the MHA**"), are subject to a guardianship order or are subject to a Community Treatment Order. It also covers individuals who are cared for in circumstances where they are deprived of their liberty under a urgent or standard authorisation under schedule A1 of the Mental Capacity Act 2005 or where an order has been made authorising the deprivation of their liberty by the Court of Protection.

12. **Prisoners and other detainees**:

12.1. Regulation 19 provides that no charges for NHS services shall be made for anyone who is detained in prison or under the immigration system. It provides:

"(1) No charge may be made or recovered in respect of any relevant services provided to an overseas visitor—

(a) who is detained in prison or in a place in which a person may be detained that is provided by the Secretary of State under section 43(1) (remand centres and young offender institutions) of the Prison Act 1952; or

(b) who is detained under any of the following provisions—

(i) Schedule 2 (administrative provisions as to control on entry etc) or Schedule 3 (supplementary provisions as to deportation) to the 1971 Act;

(ii) section 62 (detention by Secretary of State) of the Nationality, Immigration and Asylum Act 2002;

(iii) section 40(7)(c) (searches: contracting out) of the Immigration, Asylum and Nationality Act 2006; or

(iv) section 2 (detention) or 36 (detention) of the UK Borders Act 2007.

(2) In this regulation, "prison" has the meaning given in section 53(1) of the Prison Act 1952"

12.2. The government has made a series of commitments that anyone who is subject to compulsory detention in prison, in custody as a young person or in an immigration removal centre ought to have access to the same level of NHS services (without any charges being levied) as a person who is not in detention. Those commitments have proved to be extremely hard to deliver in practice but the 2015 Regulations make it clear that no charges can be made for any NHS services that are provided to detained persons.

13. **Full or partial exemption from NHS charges for persons from countries with whom the United Kingdom has a reciprocal arrangement.**

13.1. The United Kingdom has a series of reciprocal arrangements with other countries under which residents of that country are entitled to NHS care without charge (either wholly or in part) and, in return, UK residents are entitled to access government paid healthcare when visiting that country. This is set out in Regulation 14 of the 2015 Regulations which provides:

> "No charge may be made or recovered in respect of any relevant services provided to an overseas visitor where those services are provided in circumstances covered by a reciprocal agreement with a country or territory specified in Schedule 2"

13.2. The countries listed in Schedule 2 with effect from 21 August 2017 are:

- Anguilla
- Australia
- Bosnia
- British Virgin Islands
- Falkland Islands
- Gibraltar
- Isle of Man
- Israel
- Jersey
- Kosovo
- Macedonia
- Montenegro
- Montserrat
- New Zealand
- Serbia
- St Helena
- Turks and Caicos Islands

13.3. This list has been amended on many occasions, usually by removing countries that were previously subject to reciprocal arrangement. Hence, by way of example, Barbados, Russia and a series of former soviet republics have been removed on dates between February 2016 and August 2017. However, patients from these countries who were receiving a course of treatment at the point Schedule 2 was amended may

be able to take advantage of the "easement clause" in Regulation 3(5) of the 2015 Regulations to complete their course of treatment without charges[53].

13.4. Residents of a country which has a reciprocal arrangement are only entitled to access NHS services without paying charges to the extent that the individual agreement between the United Kingdom and that country provides for free NHS treatment. There are 4 categories of entitlement under these arrangements, namely:

a) Level 1: A right to immediate NHS medical treatment only;

b) Level 2: A right to NHS treatment on the same basis as UK residents if the medical treatment is required promptly for a condition which arose after arrival into the UK or became *(*or but for treatment would have become*)* acutely exacerbated after such arrival. Services such as the routine monitoring of chronic/pre-existing conditions are not included and free treatment should be limited to that which is urgent in that it cannot wait until the patient can reasonably return home;

c) Level 3: A right to NHS treatment on the same basis as UK residents on the same basis as for a person insured in the other country, including services such as routine monitoring of pre-existing conditions, but not including circumstances where a person has travelled to the other country for the purpose of obtaining healthcare;

d) Level 4: A right to all NHS treatment on the same basis as UK residents including elective treatment.

13.5. The Guidance contains a table which explains which residents of which countries with reciprocal arrangements are entitled to NHS service without charges. It provides:

[53] See paragraph 19 for details of the operation of the easement clause.

Country	Level of cover	Further information
Anguilla	1*	Applies to all residents of that country. Can also refer four patients to the UK for free NHS hospital treatment.
Australia	1*	Applies to all residents of that country.
Bosnia and Herzegovina	3	Applies to all insured persons of that country.
British Virgin Islands	1*	Applies to all residents of that country. Can also refer four patients to the UK for free NHS hospital treatment.
Falkland Islands	4	Applies to all residents of that country. Can refer an unlimited number of patients to the UK for free elective treatment.
Gibraltar	3	Applies only to citizens resident in that country when that citizen is not expected to stay in the UK for more than 30 days. Can also refer an unlimited number of patients to the UK for free elective treatment (see 10.4).
Isle of Man	2	Applies to all residents of the Isle of Man for a period of stay in the UK that has not exceeded, nor is expected to exceed, three months.
Jersey	2	Applies to all residents of Jersey for a period of stay in the UK that has not exceeded, nor is expected to exceed, three months.
Kosovo	3	Applies to all insured persons of that country
Macedonia	3	Applies to all insured persons of that country.
Montenegro	3	Applies to all insured persons of that country.
Montserrat	1*	Applies to all residents of that country. Can also refer four patients per year for free NHS hospital treatment.
New Zealand	2	Applies only to citizens resident in that country.
Serbia	3	Applies to all insured persons of that country.
St Helena	1*	Applies to all residents of that country. Does not include Ascension Island or Tristan da Cunha. Can also refer four patients per year for free NHS hospital treatment.
Turks and Caicos Islands	1*	Applies to all residents of that country. Can also refer four patients per year for free NHS hospital treatment.

The * in the above table provides that for these countries, the agreement will also apply to those persons requiring treatment if they are a member of the crew, or a passenger, on

any ship, vessel or aircraft travelling to, leaving from or diverted to the UK and the need for urgent treatment has arisen during the voyage or flight.

13.6. There are particular issues about referral of patients from these countries to the NHS for elective medical treatment. The Guidance explains the approach that NHS bodies should take as follows:

> "10.3. Depending on the terms of the particular country's reciprocal healthcare agreement, the exemption also applies to those who have been referred to the UK specifically for NHS treatment. Normally the referrals can be made only when the countries do not have adequate facilities to provide the treatment needed.
>
> 10.4. Referrals from Gibraltar are commissioned by Gibraltar itself. Trusts should not bill back the Clinical Commissioning Group for treatment provided to someone referred from Gibraltar under the terms of the reciprocal healthcare agreement.
>
> 10.5. The British Overseas Territories of Anguilla, the British Virgin Islands, Montserrat, St Helena and the Turks and Caicos Islands can refer up to four patients each per year. In respect of the Falkland Islands, there is no limit on the number of referrals that can be made. Referral arrangements are made by the relevant British Overseas Territory through the DWP Overseas Healthcare Team (see Chapter 9 for their contact details). Persons hoping to be referred should contact the relevant British Overseas Territory in the first instance.
>
> 10.6. For all people who are referred for NHS treatment as per paragraphs 10.3 to 10.4 above, advance arrangements for their acceptance should be made and the patients must be given the same priority as patients living in the UK.
>
> 10.7. A number of reciprocal healthcare agreements ended on 31 December 2015 and the agreement with Barbados ended on 30 September 2016. If the overseas visitor began an ongoing course of treatment which was exempt under the reciprocal agreement on or before 31 December 2015 or 30 September 2016 respectively, there should be no charge for the remainder of that course of treatment provided after the date of termination, under the easement clause.
>
> 10.8. However, it should be noted that a change to the easement clause now means that, from 21 August 2017, should any reciprocal healthcare agreements be terminated in the future or cease to apply in respect of an overseas visitor for some other reason, charges will apply to overseas visitors that cease to be covered by the agreement for the remaining part of a course of treatment that is already underway,

as well as any new courses of treatment. The overseas visitor will remain exempt from charge if another exemption applies"

13.7. Where there are issues about the entitlement of a person to NHS care without charge from a country with a reciprocal arrangement, it may be necessary to examine the precise terms of the reciprocal arrangement agreement. Copies of the relevant documents ought to obtainable from the Visitor and Migrant NHS Cost Recovery Programme at Richmond House, 79 Whitehall, London SW1A 2NS or via email at NHScostRecovery@dh.gsi.gov.uk

14. **Members of the regular and reserve forces, Crown servants and others**.

14.1. Regulation 20 of the 2015 Regulations contains provisions to exempt members of the regular and reserve UK forces, Crown servants and others from NHS charges. It provides:

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

(a) a member of the regular or reserve forces within the meaning of the Armed Forces Act 2006;

(b) a qualifying employee who is visiting the United Kingdom in the course of the qualifying employment; or

(c) where paragraph (b) does not apply, a qualifying employee who—

(i) was ordinarily resident in the United Kingdom immediately prior to becoming a qualifying employee; or

(ii) where the qualifying employee has been employed in more than one position of qualifying employment, the qualifying employee was ordinarily resident in the United Kingdom immediately prior to taking up one of the positions of qualifying employment.

(2) An overseas visitor will be a "qualifying employee" if the overseas visitor was recruited in the United Kingdom and is—

(a) a Crown servant (other than a person falling within paragraph (1)(a)) employed by, or in the service of, the Government of the United Kingdom;

(b) an employee of the British Council or the Commonwealth War Graves Commission; or

(c) working in employment, whether or not the overseas visitor derives a salary or wage from that employment, that is financed in part by the Government of the United Kingdom in accordance with arrangements with the Government of some other country or territory or a public body in such other country or territory.

(3) In this regulation "qualifying employment" means any period of employment during which the overseas visitor was a qualifying employee""

14.2. This Regulation refers to specific categories of persons who have a strong connection to the British Government and who get access to NHS services (without charge) arising out of that connection. The operation of this exemption is explained in the Guidance as follows:

"Armed forces members, Crown servants and UK Government funded employment (Regulation 20)

Armed forces members

6.4. Members of the regular and reserve forces (collectively referred to as UK forces) are exempt from charge for all treatment. The armed forces member does not have to have been a former UK resident, but the exemption will also cover those who are serving overseas and who might not be considered ordinarily resident in the UK.

6.5. The spouse/civil partner and children under 18 of the armed forces member are also exempt from charge, even if the armed forces member is not in the UK with them at the time of treatment. The spouse/civil partner or child must be in the UK lawfully. Note that those dependants of armed forces members who apply to reside in the UK for six months or more will be entitled to free NHS healthcare by virtue of the health surcharge arrangements (they are exempt from having to pay the health surcharge – see Chapter 5 for more details).

Examples of evidence include proof that they are a serving member of the UK forces, e.g. valid UK forces ID card or confirmation from the Ministry of Defence.

Crown servants, British Council staff, Commonwealth War Graves Commission staff, and those in employment (paid or unpaid) financed in part by the UK Government (in arrangements with the government or public body of another country or territory) .

6.6. A person from any of the above groups (called a 'qualifying employee' in the regulation) is exempt from charge for all treatment, provided that they are either:

- visiting the UK in the course of the qualifying employment; or
- if visiting for leisure/other purposes, they were ordinarily resident in the UK immediately prior to being posted overseas as a qualifying employee. A qualifying employee who was not ordinarily resident in the UK immediately prior to their current post will still be exempt if they had previously held another post as a qualifying employee, and were ordinarily resident in the UK immediately prior to taking up that earlier post.

6.7. The spouse/civil partner or children under 18 of the qualifying employee are also exempt from charge, even if the qualifying employee is not in the UK with them at the time of treatment. The spouse/civil partner or child must be in the UK lawfully. However, if the qualifying employee was not previously ordinarily resident as described in the paragraph above, and is only exempt because they are visiting the UK as a requirement of their employment, their spouse/civil partner or child will only be exempt when visiting the UK with that qualifying employee.

Examples of evidence include proof of such employment, and of being ordinarily resident in the UK prior to taking up such a post. For more information about evidence of ordinary residence, see Chapter 3.

14.3. Regulation 25 of the 2015 Regulations provides that the exemption from charges under the 2015 Regulations extends to members of the family[54] of an overseas visitor who is entitled to exemption from charges for NHS treatment under Regulation 20, provided that family member is lawfully present in the United Kingdom.

15. **NATO Forces Personnel**.

[54] See paragraph 18 for the meaning of "members of the family" of an overseas visitor.

15.1. Regulation 21 of the 2015 Regulations provides that, in specified circumstances, NATO forces are entitled to receive free NHS care. Regulation 21 provides:

> "(1) No charge may be made or recovered in respect of any relevant services provided to an overseas visitor who is a person to whom Article IX(5) of the Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty (agreed in London on 19th June 1951) applies.
>
> (2) This regulation applies where the services in question cannot readily be provided by the medical services of the armed forces of—
>
> (a) the overseas visitor's own country; or
>
> (b) the United Kingdom"

15.2. The Guidance explains this provision as follows:

> **"North Atlantic Treaty Organisation (NATO) (Regulation 21)**
>
> 10.10. The eligibility of NATO personnel and attached civilians stationed in the UK is governed by the Agreement Regarding the Status of Forces of Parties to the North Atlantic Treaty. This regulation provides for free treatment to be given to a person, or the spouse/civil partner and/ or dependent children of a person, who is serving with the armed forces of a country which is part of NATO.20 The only NATO country to have bases in the UK and maintain substantial numbers of service personnel here is the USA, but members of the armed forces of the other countries may spend time on duty in the UK.
>
> 10.11. NATO personnel and their exempt family members are expected to use their own or UK armed forces hospitals, but if the services they require cannot readily be provided by the medical services of their own or the UK armed forces (e.g. because NHS services are significantly more accessible to the patient) then NHS hospital services may be provided free of charge.
>
> Example of evidence:
> - *Will be in receipt of appropriate documentation confirming NATO status"*

15.3. Regulation 25 of the 2015 Regulations provides that the exemption from charges under the 2015 Regulations extends to members of the family[55] of an overseas visitor who is entitled to exemption from charges for NHS treatment under Regulation 21 by being a member of NATO forces, provided that family member is lawfully present in the United Kingdom.

16. **War pensioners and armed forces compensation scheme payment recipients.**

16.1. Regulation 21 of the 2015 Regulations provides that overseas visitors who are war pensioners or armed forces compensation scheme payment recipients are exempt from NHS charges. Regulation 21 provides**:**

> "No charge may be made or recovered in respect of any relevant services provided to an overseas visitor who is in receipt of—
>
> (a) any pension or other benefit under a Personal Injuries Scheme or Service Pensions Instrument, which Scheme and Instrument are defined in regulation 2(1) (interpretation) of the Social Security (Overlapping Benefits) Regulations 1979; or
>
> (b) a payment made under article 15(1)(c) (description of benefits—injury) or article 29(1) (description of benefits—death) of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011"

16.2. The Guidance explains the basis of this part of the Regulations as follows:

> **"War pensioners and armed forces compensation scheme payment recipients (Regulation 22)**
>
> 6.8. People who receive UK war pensions or war widows' pensions are exempt from charges for all NHS hospital treatment, as are recipients of armed forces compensation scheme payments. This exemption extends to their spouse/civil partner and/or dependent children if they are lawfully present and visiting the UK with the exempt overseas visitor.

[55] See paragraph 18 for the meaning of "members of the family" of an overseas visitor.

6.9. Examples of evidence include proof of appropriate pension/compensation scheme payment – pension book/slip, letter from the Ministry of Defence or the Department for Work and Pensions. The relevant NHS body should contact the Departments for confirmation if necessary"

16.3. Family members[56] of war pensioners or armed forces compensation scheme payment recipients may have their own rights to access NHS services without incurring charges under the 2015 Regulations. However, family members of war pensioners or armed forces compensation scheme payment recipients may also be ordinarily resident overseas and thus may not, in their own right, come within any of the categories which exempt them from charges for NHS treatment in the UK under the 2015 Regulations. In such a case, Regulation 25(4) of the 2015 Regulations extends the right to exemption from charges for NHS treatment to family members of a war pensioner or armed forces compensation scheme payment recipient (known as the "principal overseas visitor") where:

a) The overseas visitor (i.e. the family member) who is seeking the exemption from NHS charges is lawfully present in the UK;

b) The overseas visitor who is seeking the exemption from NHS charges is visiting the United Kingdom with the principal overseas visitor; and

c) The principal overseas visitor is exempt from the relevant NHS charges under the 2015 Regulations.

17. **Treatment for Turkish nationals where the need for which arose during a visit and who cannot afford payment:**

17.1. Regulation 24 of the 2015 Regulations provides that charges should not be made for NHS treatment provided for a medical condition, the need for which arose during a visit, to nationals of states that are contracting parties to 2 treaties where that person is lawfully in the UK and is without sufficient resources to pay the charge. The treaties

[56] Please see paragraph 18 for the meaning of "member of a family" of an overseas visitor.

are the European Convention on Social and Medical Assistance (agreed in Paris on 11th December 1953) or the European Social Charter (agreed in Turin on 18th October 1961). However, these rights are (in virtually all cases) only relevant to Turkish nationals because all other nationals of contracting parties are covered by the rights of EU and EEA citizens.

17.2. Regulation 24 provides:

> "No charge may be made or recovered in respect of any relevant services, consisting of treatment the need for which arose during the visit, provided to an overseas visitor who is any of the following—
>
> (a) a national of a state which is a contracting party to the European Convention on Social and Medical Assistance (agreed in Paris on 11th December 1953) or the European Social Charter (agreed in Turin on 18th October 1961) and is—
>
> (i) lawfully present in the United Kingdom; and
>
> (ii) without sufficient resources to pay the charge;
>
> (b) an authorised child or an authorised companion"

17.3. The Guidance explains this as follows:

> "10.9. Nationals of countries that are contracting parties to the European Convention on Social and Medical Assistance or the European Social Charter are exempt from charges for treatment the need for which arises during the visit here when they are lawfully present in the UK and without sufficient resources to pay. Other reciprocal arrangements have generally superseded these arrangements, although not in the case of Turkey. The regulation will apply when lawfully present nationals from Turkey are genuinely without the resources to pay a charge for their treatment. However, since visitors from Turkey are required to have sufficient funds available to finance their stay, as well as their onward or return journey, they are unlikely to be genuinely without resources to pay, at least by instalments, or other assets, so this exemption is unlikely to apply.
>
> *Examples of evidence:*
>
> *- Proof of nationality and lawful presence in the UK, e.g. passport.*
> *- Evidence of inability to pay, e.g. they are destitute.*

18. **Family members of overseas visitors.**

18.1. Regulation 25 of the 2015 Regulations provides for like rights to be provided in some cases for family members of overseas visitors. Regulation 25 provides:

> "(1) For the purposes of this regulation, unless otherwise provided, "member of the family" means—
>
> (a) the spouse or civil partner of an overseas visitor; or
>
> (b) a child in respect of whom an overseas visitor has parental responsibility.
>
> (2) No charge may be made or recovered in respect of any relevant services provided to an overseas visitor who is a member of the family of another overseas visitor ("the principal overseas visitor") and is lawfully present if the principal overseas visitor is exempt from charges under any of the following regulations—
>
> (a) regulation 16 (victims of [modern slavery]);
>
> (b) regulation 20 (members of the regular and reserve forces, Crown servants and others);
>
> (c) regulation 21 (NATO forces).
>
> (3) No charge may be made or recovered in respect of any relevant services provided to an overseas visitor who is a child who—
>
> (a) is born in the United Kingdom to a parent who is exempt from charges by virtue of—
>
> (i) regulation 10 (immigration health charge); or
>
> (ii) regulation 11 (overseas visitors who have made applications for entry clearance or leave to remain prior to the commencement of the immigration health charge);
>
> (b) is aged 3 months or less; and
>
> (c) has not left the United Kingdom since birth.

(4) Subject to paragraphs (5) to (7) of this regulation, no charge may be made or recovered in respect of any relevant services provided to an overseas visitor who is a member of the family of a principal overseas visitor if—

(a) the overseas visitor is lawfully present in the United Kingdom;

(b) the overseas visitor is visiting the United Kingdom with the principal overseas visitor; and

(c) the principal overseas visitor is exempt from charges under—

(i) regulation 12 (EU rights);

(ii) regulation 13 (overseas visitors who are treated as if entitled under the social security coordination regulation); or

(iii) regulation 22 (war pensioners and armed forces compensation scheme payment recipients).

(5) Where the overseas visitor is a member of the family of a principal overseas visitor who is exempt from charges under—

(a) regulation 12 (EU rights); or

(b) regulation 13 (overseas visitors who are treated as if entitled under the social security coordination regulation),

the exemption in paragraph (4) only applies if both the conditions in paragraphs (6) and (7) are satisfied.

(6) The first condition is that—

(a) the overseas visitor—

(i) where paragraph (5)(a) applies, does not have an enforceable EU right of the kind described in regulation 12; or

(ii) where paragraph (5)(b) applies, would not have an enforceable EU right of the kind described in regulation 13 if the United Kingdom had opted in as described in Article 27(2) of Regulation 883/2004 and was listed in Annex IV to that Regulation; and

(b) the reason that the overseas visitor does not, or would not, have an enforceable EU right of the kind described in those regulations is because the overseas visitor is not recognised as a member of the family (within the meaning in Article 1(i) of Regulation (EC) 883/2004 or any other relevant regulations or agreements which provide for an enforceable EU right of the kind described in regulation 12 for family members) of the principal overseas visitor.

(7) The second condition is that the relevant services provided to the overseas visitor are services that the overseas visitor would be entitled to receive without charge by virtue of an enforceable EU right under regulation 12 or 13 if the overseas visitor had such a right.

(8) None of the provisions of this regulation affect any entitlement which any member of the family of an overseas visitor may have to an exemption from charges for relevant services by virtue of an enforceable EU right or any other exemption which they may be entitled to in their own right"

18.2. These are complex provisions which are considered above in relation to each category of exempt person. However in each case the term "member of the family" is limited to the spouse or civil partner of an overseas visitor and a child (that is someone under the age of 18) in respect of whom an overseas visitor has parental responsibility.

19. **The easement clause: The liability of persons who become liable to charges for NHS services during a course of medical treatment**.

19.1. Regulation 3(5) covers the liability of a person to charges for NHS treatment where that person starts a course of treatment when he or she is exempt from charges but becomes liable to pay NHS charges during a course of treatment. It provides[57] that such a person shall not pay charges for the remainder of the course of treatment. Regulation 3(5) provides[58]:

"(5) Subject to paragraph (6), where—

[57] Subject to Regulation 3(6).
[58] As from 23 October 2017.

(a) a relevant body has determined that an overseas visitor is exempt from being charged for relevant services under these Regulations, except where the overseas visitor is exempt from being charged by virtue of—

(i) regulation 10 (immigration health charge);

(ii) regulation 11 (overseas visitors who have made applications for entry clearance or leave to remain prior to the commencement of the immigration health charge);

(iii) regulation 25(3) (family members of overseas visitors—children born to a parent exempt under regulation 10 or 11); or

(iv) regulation 14 (reciprocal health care agreements);

(b) the overseas visitor has received relevant services from a relevant body as part of a course of treatment; and

(c) prior to the course of treatment being completed, a relevant body has determined that the overseas visitor is no longer exempt from being charged for relevant services under these Regulations,

a relevant body may not make and recover charges under paragraph (1) in respect of relevant services provided as part of that course of treatment during a period where the overseas visitor has remained in the United Kingdom without absence.

(6) Paragraph (5) does not apply where a relevant body has determined that a person is exempt from being charged for relevant services as a result of that body receiving fraudulent or misleading information"

19.2. This exemption is referred to in the Guidance as the "easement clause". The effect is explained in paragraph 7.46 as follows:

"7.64. Under the easement clause, any particular course of treatment under way when either:

- an asylum seeker's application, including all appeals, is rejected; or
- a person stops receiving section 95 support from the Home Office; or
- a failed asylum seeker stops receiving support from the Home Office under section 4(2) of the 1999 Act, or section 21 or Part 1 support from a local authority; or

- a person ceases to be a child looked after by a local authority; or
- a prisoner is released from prison or immigration detention; or
- a person is no longer detained in a hospital or liable to court ordered treatment; or
- a person suspected of being a victim of modern slavery by a competent authority (having issued a 'reasonable grounds' decision), who is then found by the competent authority not to be a victim of modern slavery,

will continue free of charge until that course of treatment concludes or the person leaves the country[59].

7.65. However, they must be charged for any new courses of treatment, although relevant NHS bodies are reminded that, regardless of the lack of advance payment, they must not withhold treatment that is medically considered immediately necessary or urgent in that it cannot wait until the patient can reasonably be expected to return home. They are also reminded that they have the option to write off debts and not pursue them when the person is genuinely without funds. See Chapter 8 for more details"

20. **Employees on UK registered Ships and aircrew employees**.

20.1. Until 23 August 2017, regulation 23 of the 2015 Regulations provided that overseas visitors who were employees or engaged to work on a ship that is registered in the United Kingdom were exempt from charges for NHS treatment. Regulation 23 has been repealed. The Guidance explains that from 21 August 2017, the employer of an overseas visitor working, in any capacity, on a ship registered in the UK is liable for the cost of that ship worker's treatment. The employer is the owner of the ship on which they are employed or engaged. This brings the liability for charges into line with those who are employed on ships registered outside the UK. The ship worker himself or herself is not liable for the cost of their treatment because the liability rests on the shipowner: see Regulation 4(2) of the 2015 Regulations.

[59] The Guidance document does not make it clear that the sentence starting "will continue" refers to all of the categories. However that is plainly the effect of Regulation 3(5).

20.2. Regulation 4(3) provides that where an overseas visitor is an air crew member and is present in the United Kingdom in the course of that employment, the person liable to pay charges under the 2015 Regulations is the employer of the aircrew member.

21. The legal duty to make charges for NHS treatment.

21.1. Regulation 3 of the 2015 Regulations imposes[60] a statutory duty on all providers of NHS services to make and recover charges for relevant NHS services that are provided to overseas visitors who are not exempt from the charges. From 23 October 2017, regulation 3 of the 2015 Regulations will provide:

> "(1) Where the condition specified in paragraph (2) is met, a relevant body must make and recover charges for any relevant services it provides to an overseas visitor from the person liable under regulation 4 (liability for payment of charges).
>
> (1A) Where the condition specified in paragraph (2) is met, before providing a relevant service in respect of an overseas visitor, a relevant body must secure payment for the estimated amount of charges to be made under paragraph (1) for that relevant service unless doing so would prevent or delay the provision of—
>
> (a) an immediately necessary service; or
>
> (b) an urgent service.
>
> (1B) The person from whom payment is to be secured under paragraph (1A) in respect of a relevant service is the person who it appears to the relevant body, at the time that the request for that payment is made, will be the person to whom a charge will be made under paragraph (1) in respect of that relevant service at the time that it is provided.
>
> (2) The condition is that the relevant body, having made such enquiries as it is satisfied are reasonable in all the circumstances, including in relation to the state of health of that overseas visitor, determines that the case is not one in which these Regulations provide for no charge to be made.

[60] As from 23 October 2017. Until that date the statutory duty only rests on NHS bodies who provide NHS services to overseas visitors.

(3) Where more than one relevant body is to provide relevant services to an overseas visitor, each relevant body must secure the advance payment sum in respect of each relevant service that it is to provide.

(3A) Where more than one relevant body provides relevant services to an overseas visitor, each relevant body must make and recover the actual charge in respect of each relevant service that it provides.

(4) A relevant body that makes and recovers a charge in accordance with paragraph (1) or secures payment in accordance with paragraph (1A) must give or send to the person making the payment a receipt for the amount paid.

(4A) In making and recovering an actual charge from a person in respect of a relevant service, a relevant body must—

(a) deduct any advance payment sum secured by the relevant body from that person in respect of that relevant service; and

(b) refund any amount by which an advance payment sum secured by the relevant body from that person in respect of that relevant service exceeds the amount of the actual charge that person is liable to pay.

(5) Subject to paragraph (6), where—

(a) relevant body has determined that an overseas visitor is exempt from being charged for relevant services under these Regulations, except where the overseas visitor is exempt from being charged by virtue of—

(i) regulation 10 (immigration health charge);

(ii) regulation 11 (overseas visitors who have made applications for entry clearance or leave to remain prior to the commencement of the immigration health charge); *or*

(iii) regulation 25(3) (family members of overseas visitors—children born to a parent exempt under regulation 10 or 11); or

(iv) regulation 14 (reciprocal health care agreements);

(b) the overseas visitor has received relevant services from relevant body as part of a course of treatment; and

(c) prior to the course of treatment being completed, relevant body has determined that the overseas visitor is no longer exempt from being charged for relevant services under these Regulations,

relevant body may not make and recover charges under paragraph (1) in respect of relevant services provided as part of that course of treatment during a period where the overseas visitor has remained in the United Kingdom without absence.

(6) Paragraph (5) does not apply where relevant body has determined that a person is exempt from being charged for relevant services as a result of that body receiving fraudulent or misleading information.

(7) In this regulation—

"actual charge" means a charge to be made under paragraph (1);

"advance payment sum" means a sum to be secured under paragraph (1A);

"immediately necessary service" means—

(a) antenatal services provided in respect of a person who is pregnant;

(b) intrapartum and postnatal services provided in respect of—

(i) a person who is pregnant;

(ii) a person who has recently given birth; or

(iii) a baby; and

(c) any other relevant service that the treating clinician determines the recipient needs promptly—

(i) to save the recipient's life;

(ii) to prevent a condition becoming immediately life-threatening; or

(iii) to prevent permanent serious damage to the recipient from occurring;

"urgent service" means a service that the treating clinician determines is not an immediately necessary service but which should not wait until the recipient can be reasonably expected to leave the United Kingdom"

21.2. Prior to the amendments made by the 2017 Regulations, the statutory duty to charge overseas visitors for the provision of NHS services was only placed on NHS bodies. As from 23 October 2017, the duty to make and collect charges applies to any "relevant body". This term is defined in Regulation 2 to mean:

""relevant body" means—

(a) an NHS foundation trust;

(b) an NHS trust;

(c) a local authority within the meaning of section 2B of the 2006 Act (functions of local authorities and Secretary of State as to improvement of public health) exercising public health functions (within the meaning of that Act); or

(d) any other person providing relevant services,

except in respect of regulation 6A, for which purposes a person mentioned in paragraph (d) is not a "relevant body";

21.3. The term "relevant services" is also defined in Regulation 2 to mean:

""relevant services" means accommodation, services or facilities which are provided, or whose provision is arranged, under the 2006 Act other than—

(a) primary medical services provided under Part 4 (medical services);

(b) primary dental services provided under Part 5 (dental services);

(c) primary ophthalmic services provided under Part 6 (ophthalmic services); or

(d) equivalent services which are provided, or whose provision is arranged, under the 2006 Act"

21.4. It follows that any provider of NHS services other than those defined in sub-paragraphs (a) to (d) above will be under a duty to make and collect charges in the same way as that duty lies on NHS bodies. The duty to make and collect charges only covers services under the NHS Act. It does not extend to services that are provided by way of aftercare services under section 117 of the Mental Health Act 1983. It means that, by way of example, as from 23 October 2017 a nursing home which is providing accommodation, medical and social care to an overseas visitor who is eligible for NHS Continuing Healthcare will be obliged to make and collect charges for the provision of those services.

22. **The level of NHS charges under the 2015 Regulations.**

22.1. The amount of charges to be levied on an overseas visitor for the provision of NHS services under the 2015 Regulations is defined by Regulation 7 which from 23 October 2017 will provide as follows:

> "(1) The relevant body must calculate charges made under these Regulations, including where charges are estimated for the purposes of determining an advance payment sum, in accordance with this regulation.
>
> (2) Where the overseas visitor is ordinarily resident in another EEA state or Switzerland the charge payable in respect of a relevant service provided to the overseas visitor shall be calculated in the same way as provided for by regulation 13(1) (NHS charges) of the National Health Service (Cross-Border Healthcare) Regulations 2013.
>
> (3) In any other case, the charge payable in respect of each relevant service provided to an overseas visitor shall be equal to the tariff for that relevant service multiplied by 150 per cent.
>
> (4) In this regulation "the tariff" has the meaning set out in paragraphs (5) to (8), subject to paragraphs (9) to (12).
>
> (5) Unless paragraph (6) applies, where a relevant service is specified in the national tariff under section 116(1)(a) (national tariff) of the 2012 Act, the tariff for the provision of that service to an overseas visitor is such price as is determined in accordance with the national tariff on the basis of the national price specified in the

national tariff for that service in relation to that relevant body including any applicable modification referred to in paragraph (10).

(6) Where—

(a) a relevant body provides a relevant service to an overseas visitor that is included in a bundle of services to which a pathway payment applies in accordance with the national tariff;

(b) that relevant service constitutes part, but not all, of the bundle of services; and

(c) the relevant body is unable to determine the price of that relevant service as an individual service within the bundle of services to which the pathway payment relates,

the tariff is such reasonable price for the provision of the relevant service that the relevant body determines having had regard to the matters set out in paragraph (7).

(7) The matters to which the relevant body must have regard for the purposes of determining the tariff for a relevant service under paragraph (6) are—

(a) the amount of the pathway payment which would be payable to the relevant body in accordance with the national tariff, by the commissioner with responsibility for commissioning services in respect of the overseas visitor to whom the relevant service was provided, if that overseas visitor were ordinarily resident in the United Kingdom;

(b) the relevant service that the overseas visitor received as a proportion of the bundle of services to which the pathway payment applies; and

(c) the complexity of the relevant service provided to the overseas visitor.

(8) Where a relevant service is not specified in the national tariff under section 116(1)(a) of the 2012 Act, the tariff is such price for the provision of that service as is determined in accordance with the rules provided for in the national tariff for that purpose including any applicable modification referred to in paragraph (10).

(9) The following variations to the national price of a relevant service made under the 2012 Act shall not apply to the determination of the national price for that relevant service for the purpose of paragraph (5)—

(a) a variation agreed to by the commissioner of the service and the relevant body that is providing that service in accordance with rules made under section 116(2);

(b) a variation specified in the national tariff under section 116(4)(a), except for a variation—

(i) to reflect regional cost difference; or

(ii) to reflect patient complexity.

(10) An applicable modification is any modification to the price, as determined in accordance with the national tariff, of the relevant service where that modification is—

(a) made in accordance with an agreement made under section 124(1) of the 2012 Act; or

(b) determined by Monitor under section 125(1) of the 2012 Act.

(11) For the purposes of determining the tariff for a relevant service provided to an overseas visitor—

(a) under paragraph (5) or (8) (whichever is applicable), a modification of the kind specified in paragraph (10) will apply to the relevant service only when the modification applies to the price payable to the relevant body by the commissioner with responsibility for commissioning services in respect of that overseas visitor; and

(b) under paragraph (8), an agreement between a commissioner and the relevant body made in accordance with the rules will be relevant for the determination of the tariff only when the commissioner which is party to the agreement is the commissioner with responsibility for commissioning services in respect of that overseas visitor.

(12) Where rules made under section 116(6) provide for which specification of a relevant service is to apply in a particular case or cases of any particular description, the relevant body must comply with those rules when calculating charges under this regulation for that relevant service.

(13) For the purposes of this regulation—

"the 2012 Act" means the Health and Social Care Act 2012;

> "national price" has the meaning given in section 115(1) (price payable by commissioners for NHS services) of the 2012 Act;
>
> "national tariff" is the document known as the national tariff published by Monitor under section 116(1) of the 2012 Act;
>
> "the rules" mean the rules provided for in the national tariff under section 116 and 117 (the national tariff: further provision) of the 2012 Act"

22.2. Regulation 7(1) provides that the charging scheme set out in Regulation 7 is mandatory. Accordingly both NHS bodies and private providers do not have the freedom to use any other scheme to calculate the level of charges to be made to an overseas visitor.

22.3. Regulation 7(2) provides that where the overseas visitor is ordinarily resident in another EEA state or Switzerland, the charge payable in respect of a relevant service provided to the overseas visitor shall be calculated in the same way as provided for by regulation 13(1) (NHS charges) of the National Health Service (Cross-Border Healthcare) Regulations 2013. Regulation 13 of those Regulations provides that, where a service is provided to an overseas patient:

> ".. the amount of the charge to the visiting patient for that service must not exceed the amount that the person or body responsible for providing the service, as mentioned in paragraph (2)(b), would assess as the cost of that service if it had been provided to a resident patient"

22.4. Hence, this Regulation imposes a ceiling of the cost that an NHS body would recover from the NHS commissioner for providing the relevant service. If the service is covered by the NHS national tariff, that ceiling is set at the national tariff rate. If the service is not covered by the NHS national tariff, that ceiling is set at the rate that the NHS provider would charge an NHS body for the service in question. The Guidance recommends that the NHS body charges the patient at the full rate. This is "Category D" at paragraph 13.28 of the Guidance. The Guidance suggests that the "responsible commissioner" should pay 50% of the costs of the treatment to the provider. If the

provider is successful in securing repayment of the full charge, the 50% paid by the commissioner should be returned. However, depending on the status of the patient, it may well be *ultra vires* a CCG to act in accordance with this scheme. A CCG will have power to make these payments if the overseas visitor is on the list of a GP practice in the CCG area. The CCG will also be able to make a 50% payment if the overseas visitor is "usually resident" in the CCG area (see the test in section 3(1A)(b) of the NHS Act) and is not on the list of any NHS GP practice. However if an overseas visitor is neither on the list of a local GP practice or usually resident in a CCG area, the CCG will have no *vires* to make any payment to the provider for providing non-A & E NHS medical treatment to the individual. Payments can be made for providing such a person with emergency treatment, but that treatment is exempt from charges[61].

22.5. Regulation 7(3) provides that, where the patient is not an EU/EEA resident, the charge payable in respect of each relevant service provided to an overseas visitor shall be equal to the NHS tariff price for any services provided to the patient multiplied by 150%. If the price payable for the service has been increased as a result of a Monitor approved modification under section 124 of the Health and Social Care Act 2012, the price charged to the overseas visitor shall include that increase. However if the CCG and the provider have negotiated a price below the national tariff under section 116 of the Health and Social Care Act 2012[62], the price charged to the overseas visitor shall be the national tariff price without the agreed reduction.

22.6. Where the particular service provided to the overseas visitor is unclear for any reason (such as where it is included within a block contract or a bundle of services with no price for the particular service), Regulation 7(6) provides that the tariff is such reasonable price for the provision of the relevant service that the relevant body determines having had regard to national tariff price (if it had applied), the relevant service that the overseas visitor received as a proportion of the bundle of services to

[61] See paragraph 4.7 above.
[62] There is an unresolved legal question as to whether such price reductions are lawful. This issue will be addressed elsewhere.

which the pathway payment applies and the complexity of the relevant service provided to the overseas visitor.

23. Who is liable to charge and pay charges under the 2015 Regulations?

23.1. Regulation 4 sets out who is liable to pay charges under the 2015 Regulations. It provides:

> (1) The person liable to pay charges under these Regulations is, unless paragraph (2), (3) or (4) applies, the overseas visitor in respect of whom the relevant services are provided.
>
> (2) Where—
>
> (a) an overseas visitor is employed or engaged or works in any capacity on board a ship and whose normal place of work is on board a ship; and
>
> (b) that overseas visitor is present in the United Kingdom in the course of that employment, engagement or work,
>
> the person liable to pay charges under these Regulations is the shipowner of the ship on which the overseas visitor is employed, engaged or works.
>
> (3) Where an overseas visitor is an air crew member and is present in the United Kingdom in the course of that employment, the person liable to pay charges under these Regulations is the employer of that overseas visitor.
>
> (4) Where an overseas visitor is a child, the person liable to pay charges under these Regulations is the person with parental responsibility for that child.
>
> (4A) Where, due to a change in circumstances occurring during the period in which a relevant service is provided, more than one person is liable under paragraphs (1) to (4) to pay charges under these Regulations in respect of that relevant service, each such person is liable to pay charges only in respect of relevant services provided during the period during which those paragraphs apply to that person.
>
> (5) In this regulation—

"air crew member" means any person employed or engaged in an aircraft in flight on the business of the aircraft;

"shipowner" has the meaning given in regulation 2(1) (interpretation) of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014.

23.2. Hence the primary rule is the person who is liable to pay the charges is the overseas visitor. However there are separate rules in respect of staff working on ships or aeroplanes who need NHS treatment. In those case cases the person who is liable to pay the charges is the shipowner or employer of the air crew member.

23.3. The duty to impose charges for NHS services for overseas visitors only applies to NHS treatment provided by NHS bodies. However this will change on 23 October 2017 when the duty applies to any provider (whether an NHS body or not) that provides relevant NHS services to patients.

23.4. There are provisions in Regulation 5 to provide for repayment of charges to anyone who has been wrongly charged or has been overcharged. There are also provisions in Regulations 6 and 7 for charges to be refunded to persons who subsequently prove their right to receive NHS services without charge because the person is recognised as a refugee, a victim of modern slavery or a victim of FGM.

24. When can or should treatment be provided without advance payment?

24.1. In *R (Reffell) v Hammersmith Hospitals NHS Trust*[63] the Court of Appeal decided that it was lawful for an NHS provider to treat without seeking payments in advance, but it has a discretion as to whether it should do so. Thus a provider could insist that an overseas visitor should pay for the treatment up front or provide security for the costs of the treatment by a third party guarantee before commencing any treatment. That general rule has been amended by the 2015 Regulations which provides that

[63] Unreported but noted on LexisNexis under number 2000 WL 1274140 from 26 July 2000.

treatment will be required to be provided to an overseas visitor in specific cases before any payment is made. However it will also be changed as from 23 October 2017 when, in all other cases, NHS providers will come under a statutory duty to recover the costs of treatment in advance for all but urgent or immediately necessary medical treatment.

24.2. The position prior to 23 October 2017 is explained in Guidance which explains that immediately necessary and urgent treatment should always be given to a patient even if charges can be levied, and that the recovery of charges should only arise afterwards. The Guidance provides:

> **"This chapter gives important advice on the safeguards that relevant bodies must employ to protect the lives of overseas visitors who are not exempt from charges under the Charging Regulations, and guidelines on how relevant bodies should handle such people without the resources to pay, including when to withhold treatment.**
>
> **What are the relevant bodies' responsibilities?**
>
> 8.1. Chapter 2 sets out the legal obligations under the Charging Regulations of all relevant bodies.
>
> 8.2. Relevant bodies must also ensure that treatment which is immediately necessary is provided to any person, even if they have not paid in advance. Failure to provide immediately necessary treatment may be unlawful under the Human Rights Act 1998. Urgent treatment should also always be provided to any person, even if deposits have not been secured. Non-urgent treatment should not be provided unless the estimated full charge is received in advance of treatment. See paragraph 8.3 for more important information on non-urgent treatment.
>
> **What is immediately necessary, urgent and non-urgent treatment?**
>
> 8.3. Only clinicians can make an assessment as to whether a patient's need for treatment is immediately necessary, urgent or non-urgent. In order to do this they may first need to make initial assessments based on the patient's symptoms and other factors, and conduct further investigations to make a diagnosis. These assessments and investigations will be included in any charges.
>
> 8.4. Immediately necessary treatment is that which a patient needs promptly:

- to save their life; or
- to prevent a condition from becoming immediately life-threatening; or
- to prevent permanent serious damage from occurring.

8.5. Relevant bodies must always provide treatment which is classed as immediately necessary by the treating clinician irrespective of whether or not the patient has been informed of, or agreed to pay, charges, and it must not be delayed or withheld to establish the patient's chargeable status or seek payment. It must be provided even when the patient has indicated that they cannot afford to pay.

Maternity treatment

8.6. Due to the severe health risks associated with conditions such as eclampsia and preeclampsia, and in order to protect the lives of both mother and unborn baby, all maternity services must be treated as being immediately necessary. Maternity services include all antenatal, intrapartum and postnatal services provided to a pregnant person, a person who has recently given birth or a baby. No one must ever be denied, or have delayed, maternity services due to charging issues. Although a person must be informed if charges apply to their treatment, in doing so they should not be discouraged from receiving the remainder of their maternity treatment. OVMs and clinicians should be especially careful to inform pregnant patients that further maternity healthcare will not be withheld, regardless of their ability to pay.

8.7. Urgent treatment is that which clinicians do not consider immediately necessary, but which nevertheless cannot wait until the person can be reasonably expected to leave the UK. Clinicians may base their decision on a range of factors, including the pain or disability a particular condition is causing, the risk that delay might mean a more involved or expensive medical intervention being required, or the likelihood of a substantial and potentially life-threatening deterioration occurring in the patient's condition if treatment is delayed until they return to their own country.
8.8. For urgent treatment, relevant bodies are strongly advised to make every effort, taking account of the individual's circumstances, to secure payment in the time before treatment is scheduled. However, if that proves unsuccessful, the treatment should not be delayed or withheld for the purposes of securing payment.

8.9. Treatment is not made free of charge by virtue of being provided on an immediately necessary or urgent basis. Charges found to apply cannot be waived and if payment is not obtained before treatment then every effort must be made to recover it after treatment has been provided.

8.10. Non-urgent treatment is routine elective treatment that could wait until the patient leaves the UK. Relevant bodies do not have to provide non-urgent treatment if the patient does not pay in advance and should not do so until the estimated full cost of treatment has been received (see paragraph 8.19).

8.11. The decision on whether a patient's need for treatment is immediately necessary, urgent or non-urgent is only for clinicians to make. However, in determining whether or not a required course of treatment should proceed even if payment is not obtained in advance, or if it can safely wait until the patient can return home (i.e. whether it is urgent or non-urgent), clinicians will need to know the patient's estimated return date.

8.12. It is the responsibility of OVMs to gather the information on when the patient can return home in such cases, based on the patient's ability to do so. It is also the OVM's responsibility to establish whether or not the patient is entitled to free NHS treatment in the first place"

24.3. Until 22 October 2017, NHS bodies have a discretion to decide whether to treat treatment patients who are overseas visitors who need non-urgent treatment and to seek to recover the costs later or whether to insist on pre-payment. However that discretion will be removed on 23 October 2017 when Regulation 4(1A) comes into effect. It provides:

"(1A) Where the condition specified in paragraph (2) is met, before providing a relevant service in respect of an overseas visitor, a relevant body must secure payment for the estimated amount of charges to be made under paragraph (1) for that relevant service unless doing so would prevent or delay the provision of—

(a) an immediately necessary service; or

(b) an urgent service.

(1B) The person from whom payment is to be secured under paragraph (1A) in respect of a relevant service is the person who it appears to the relevant body, at the time that the request for that payment is made, will be the person to whom a charge will be made under paragraph (1) in respect of that relevant service at the time that it is provided.

24.4. The effect of this provision is explained at paragraph 8.13 of the Guidance as follows:

> "It is very important to note that the law will change on 23 October 2017 so that it will be a legal requirement to recover in advance the estimated full cost of a course of treatment unless doing so would prevent or delay the provision of immediately necessary or urgent treatment. In practice this will mean that where a clinician has determined a patient's need for care to be non-urgent, payment from the person liable will be required upfront and in full, where no exemption category applies, before the treatment can be provided. Where services are immediately necessary or urgent, full upfront payment should be secured wherever possible, unless doing so would prevent or delay the treatment. Providers of NHS-funded community and secondary care will therefore need to prepare for how they will ensure that they meet this legal requirement"

24.5. It follows that the discretion to treat first and recovery fees later for non-urgent treatment will be removed when this Regulation comes into effect. It will, in effect, mean that NHS providers will be obliged to refuse to provide medical treatment to patients whose need for treatment is not urgent. This may, of course, mean that the underlying condition for which medical treatment is being sought progresses and the need for treatment will become urgent. This is already a serious problem for some NHS providers that, for example, provide renal dialysis. It appears that fees for routine renal dialysis will have to be paid in advance by overseas visitor patients (unless they are exempt under one of the categories set out above). However, where patients are unable to pay for routine renal dialysis, the charging rules may mean that some of these patients suffer serious renal problems and thus need emergency treatment. That emergency treatment will have to be provided. Charges will be made but, in practice, the patient has no money and so will be unable to pay the fees. However, once a renal crisis is abated, an NHS provider will not be able to provide routine dialysis unless clinicians can say that there is an "urgent" need for this treatment. It remains to be seen how this will work itself out in practice.

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