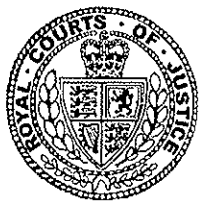

Neutral Citation Number: [2009] EWCA Civ 225

Case No: C1/2008/1081

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE MITTING
C0/8095/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 March 2009

Before:

THE RT HON LORD JUSTICE WARD
THE RT HON LORD JUSTICE LLOYD
and
THE RT HON LORD JUSTICE RIMER

- -

Between:

R on the application of YA	**Respondent**
- and -	
Secretary of State for Health	**Appellant**

- -
- -

Miss Elisabeth Laing Q.C. and Miss Holly Stout (instructed by Department of Health) for the appellant
Mr Nigel Giffin Q.C. and Mr Stephen Knafler (instructed by Pierce Glynn) for the respondent

Hearing dates: 17th and 18th November 2009

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Ward:

The troublesome questions arising on this appeal

1. This appeal concerns the entitlement of failed asylum seekers to treatment free of charge provided by the National Health Service. Are they ordinarily resident in the United Kingdom? Do they reside lawfully in the United Kingdom so as to become exempt from charges if they have so resided for at least 12 months before receiving treatment? Do the National Health Service Trusts have a discretion to withhold treatment from them if they cannot pay for it? Is the guidance given by the Secretary of State for Health to NHS Trust hospitals in England lawful?

The parlous predicament of Mr A giving rise to his claim for judicial review

2. YA is a Palestinian born in Hebron on the West Bank 35 years ago. In about 1997/8 he was diagnosed to have a liver problem but it did not at first seem to affect his daily life. His case was that he became involved in Hamas, but when asked to participate in a political assassination, he fled at first to Gaza, thence to Egypt some time in about 2002.

3. There his health deteriorated and he consulted a doctor but was told that he could not help him, apparently because the facilities in Egypt were inadequate. He decided to seek refuge in the United Kingdom and through an agent travelled to Turkey and then flew to London. He says the agent removed his passport during this flight. He claimed asylum on his arrival here on 9th July 2005.

4. He was duly granted temporary admission, initially until 10th September 2005. He was, however, refused leave to enter by the Secretary of State for the Home Department by letter dated 16th August 2005. His appeal against that decision was rejected on credibility grounds on 13th December 2005, the immigration judge finding that his main reason for leaving Egypt was not his fear of Hamas but his desire to receive medical treatment in England. He cannot return to the Middle East because he has no travel documents: the Palestinian authorities cannot issue them because Palestine is not a recognised state and Israel refuses as a matter of policy to facilitate the return of Palestinians to the occupied Palestinian territories.

5. His medical condition has steadily deteriorated. By October 2005 he was seen for the first time by a consultant at the West Middlesex University Hospital. By July 2006 his condition had worsened so much that he needed to be admitted for further tests to try to establish the underlying causes of his liver disease and for further investigations into the possibility that he was also suffering from lymphatic cancer. He was referred to the Overseas Patients' Officer who, having taken account of the Guidance to the NHS Trust Hospitals in England given by the Secretary of State for Health ("the Guidance") on Implementing the Overseas Visitors Hospital Charging Regulations, informed him that because he was a failed asylum seeker, he was not eligible for free medical treatment under the National Health Service. Because he had no means to pay for treatment, he was discharged on 3rd August 2006, the discharge summary recording that he was "not entitled to NHS care, due to failed asylum seeker status". One can easily imagine how distressing this must have been. He has since been presented with a bill for some £9,000 in respect of the treatment he has received but

being destitute and dependent on the support provided by NASS, he cannot possibly pay for the treatment he undoubtedly needs.

6. Faced with that dilemma he issued his claim for the judicial review of the decision to charge him and the refusal of the hospital to provide further healthcare. When the hospital agreed to treat him without charge - as has now happened - his claim was amended by substituting the Secretary of State for Health as defendant, the challenge now being directed to the lawfulness of the Guidance. All agreed it was fit and proper for this matter to be considered by the court because, as the evidence shows, there are a large number of failed asylum seekers, many unable to return home, who suffer severe medical problems, such as cancer and H.I.V., which, whilst perhaps not all life-threatening conditions, are, nonetheless, conditions which need urgent healthcare. Because most of those who suffer are invariably penniless and destitute and quite unable to pay for the treatment they need, their predicament has become a legitimate cause of widespread concern which has been eloquently voiced by many charitable organisations and even raised in Parliament. If, therefore, the Guidance does need correction, then it is important that the court declare sooner rather than later whether or not it is unlawful.

7. Thus the matter came before Mitting J. and on 16 April 2008 he allowed the application for judicial review and declared the Guidance to be unlawful in so far as it advised NHS Trusts to charge failed asylum seekers for NHS hospital treatment. He granted permission to appeal.

The National Health Service Scheme

8. Although the National Health Service Act 1977 was in force in England and Wales at the time when the decisions under challenge were made, it has now been repealed and replaced in substantially similar terms by the National Health Service Act 2006 ("the 2006 NHS Act") which is in force in England and the National Health Service (Wales) Act 2006 in Wales. For convenience, therefore, I shall cite the current provisions from the 2006 NHS Act. The material parts are these:

> **"Part I**
>
> **Promotion and Provision of the health service in England**
>
> **The Secretary of State and the health service in England**
>
> **1. Secretary of State's duty to promote health service**
>
> (1) The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement—
>
> (a) in the physical and mental health of the people of England, and
>
> (b) in the prevention, diagnosis and treatment of illness.
>
> (2) The Secretary of State must for that purpose provide or secure the provision of services in accordance with this Act.

(3) The services so provided 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.

General power to provide services

2 Secretary of State's general power

(1) The Secretary of State may—

(a) provide such services as he considers appropriate for the purpose of discharging any duty imposed on him by this Act, and

(b) do anything else which is calculated to facilitate, or is conducive or incidental to, the discharge of such a duty.

...

Provision of particular services

3 Secretary of State's duty as to provision of certain services

(1) The Secretary of State must provide throughout England, to such extent as he considers necessary to meet all reasonable requirements—

(a) hospital accommodation,

...

(c) medical ... services,

...

(e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service,

(f) such other services or facilities as are required for the diagnosis and treatment of illness. ..."

9. In practice, the Secretary of State discharges these duties by exercising his powers under section 7 of the Act to direct Primary Care Trusts to exercise his functions. There may then be further delegation under section 19 from the Primary Care Trust to an NHS Trust such as the West Middlesex University Hospital established under section 25.

10. Although, as we have seen, the general rule is, as expressed in section 1(3), that the services must be provided free of charge, Part 9 of the Act does allow for charges to

be made in certain circumstances, for example, charges for drugs. Relevant to this appeal is section 175 which is in these terms:

> **"175 Charges in respect of non-residents**
>
> (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. ..."

11. The regulations made pursuant thereto are the National Health Service (Charges to Overseas Visitors) Regulations 1989 (SI 1989 No. 306 as amended) ("the Regulations"). Regulation 1(2) contains various definitions including:

> ""overseas visitor" means a person not ordinarily resident in the United Kingdom;
>
> ...
>
> "refugee" means a person who is a refugee within the meaning of Article 1 of the Convention relating to the Status of Refugees 1951 ..."

12. The following regulations are material:

> **"2. Making and recovery of charges**
>
> (1) Where an Authority or NHS Trust or NHS foundation trust, or a Primary Care Trust provides an overseas visitor with services forming part of the health service, that Authority or NHS Trust or NHS foundation trust, or a Primary Care Trust, having determined, by means of such enquiries as it is satisfied are reasonable in all the circumstances, including the state of health of that overseas visitor, that the case is not one in which these Regulations provide for no charge to be made, shall make and recover from the person liable under regulation 7 charges for the provision of those services. ..."

The person liable under regulation 7 is usually the overseas visitor in respect of whom the services are provided.

13. Regulation 3 provides for a range of services provided for an overseas visitor to be exempt from charges, for example, treatment at a hospital accident and emergency department or for the treatment of infectious diseases or sexually transmitted diseases.

14. Regulation 4 gives exemption from charges to various categories of overseas visitors including:

> **"4. Overseas visitors exempt from charges**
>
> (1) No charge shall be made in respect of any services forming part of the health service provided for an overseas visitor,
>
> (a) ... or
>
> (b) who has resided lawfully in the United Kingdom for the period of not less than one year immediately preceding the time when the services are provided unless this period of residence followed the grant of leave to enter the United Kingdom for the purpose of undergoing private medical treatment or the determination under regulation 6A; or
>
> (c) who has been accepted as a refugee in the United Kingdom, or who has made a formal application for leave to stay as a refugee in the United Kingdom which has not yet been determined; or ..."

15. The scheme for the operation of the National Health Service thus seems in summary to be this. The general principle is that the services provided must be free of charge: section 1(3) of the Act. There are, however, exceptions to the general rule, the material one (pursuant to Regulation 2) being that the Trust shall make and recover charges from an overseas visitor, i.e. a person not ordinarily resident in the United Kingdom. There is a further exception to this exception provided by Regulation 4 that no charge shall be made to an overseas visitor who has lawfully resided in the United Kingdom for a period of not less than one year immediately preceding the time when the services are provided (Regulation 4(1)(b)) or a refugee or one who has made an application for leave to stay as a refugee which has not been determined: Regulation 4(1)(c).

The Guidance

16. The Guidance is non-statutory. In his foreword Mr John Hutton, the Minister of State for Health, writes that:

> "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."

The Guidance begins with this "Important Note":

> "This guidance seeks to provide as much help and advice as possible on the implementation of the ... Regulations 1989 (as amended). However, it cannot cover everything and is not intended to be a substitute for the Regulations themselves which contain the legal provisions. Trusts are advised to seek their own legal advice on the extent of their obligations when necessary."

17. Chapter 3 deals with "What Trusts Need To Do" in this way:

> "**What are your responsibilities?**
>
> 3.1 All trusts have a **legal obligation** to:
>
> - ensure that patients who are not ordinarily resident in the United Kingdom are identified;
>
> - assess liability for charges in accordance with the charging Regulations;
>
> - charge those liable to pay in accordance with the Regulations (see Chapter 8).
>
> In the context of charging overseas visitors, when to charge can be considered in terms of the urgency of the treatment needed:
>
> **immediately necessary treatment** – if the opinion of the clinicians treating the patient is that treatment is immediately necessary then it must not be delayed or withheld while the patient's chargeable status is being established. There is no exemption from charges for "emergency" treatment (other than that given in an accident and emergency department - see para 6.7(a)) but trusts should always provide immediately necessary treatment whether or not the patient has been informed of, or agreed to pay, charges. Not to do so could be in breach of the Human Rights Act 1998. While it is a matter of clinical judgement whether treatment is immediately necessary, this should not be construed simply as meaning that the treatment is clinically appropriate, as there may be some room for discretion about the extent of treatment and the time at which it is given, in some cases allowing the visitor time to return home for treatment rather than incurring NHS charges. When providing immediately necessary treatment clinicians should be asked to complete an advice from Doctors or Dentists form at Appendix 1;
>
> **urgent treatment** – where the treatment is, in a clinical opinion, not immediately necessary, but cannot wait until the patient returns home. Patients should be booked in for

> treatment, but the trust should use the intervening period to establish the patient's chargeable status. Wherever possible, if the patient is chargeable, trusts are strongly advised to seek deposits equivalent to the estimated full cost of treatment in advance of providing any treatment. Any surplus which is paid can be returned to the patient on completion of treatment. When providing urgent treatment clinicians should be asked to complete an advice from Doctors or Dentists form at Appendix 1;
>
> **non-urgent treatment** – routine elective treatment which could in fact wait until the patient returned home. The patient's chargeable status should be established as soon as possible after first referral to the hospital. Where the patient is chargeable, the trust should not initiate treatment processes, e.g. by putting the patient on a waiting list, until a deposit equivalent to the estimated full cost of treatment has been obtained. Any surplus which is paid can be returned to the patient on completion of treatment. This is not refusing to provide treatment, it is requiring payment conditions to be met in accordance with the charging Regulations before treatment can commence."

18. Chapter 4 deals with "The Baseline Questions" thus:

> "4.5 Anyone who has lived lawfully in the UK for at least 12 months immediately preceding treatment is exempt from charges, so the baseline question continues to be based on this and is:
>
> "Where have you lived for the last 12 months?"
>
> However, because the exemptions now expressly apply only to those living here lawfully, you need to follow this first question with another:
>
> "Can you show that you have the right to live here?" ..."

19. Chapter 5 deals with "The Interviews" to establish whether or not the patient is ordinarily resident in the UK. What follows is at the heart of the challenge to the lawfulness of the Guidance. It is:

> "**Ordinarily resident**
>
> 5.4 An overseas visitor is defined in the Regulations as a person not ordinarily resident in the UK. "Ordinarily resident" is not defined in the NHS Act 1977. The concept was considered by the House of Lords and although the case being considered was concerned with the meaning of ordinary residence in the context of the Education Acts the decision is generally recognised as having a wider application. The House of Lords interpretation should, therefore, be used to help decide

> if a person can be considered ordinarily resident for the purposes of the NHS Act 1977 and the overseas visitors charging Regulations.
>
> 5.5 In order to take the House of Lords judgement into account, when assessing the residence status of a person seeking free NHS services, trusts will need to consider whether they are:
>
> **living lawfully in the United Kingdom voluntarily and for settled purposes as part of the regular order of their life for the time being, whether they have an identifiable purpose for their residence here and whether that purpose has a sufficient degree of continuity to be properly described as "settled".**
>
> 5.6 Trusts need to make a judgement as to whether a patient is ordinarily resident in the light of the circumstances of that individual patient. But there are several elements which all need to be satisfied. For example, a person who has the right of abode or who has been given leave to remain and has an identifiable purpose for their visit may not meet the "settled" criterion if they are only here for a few weeks. Alternatively, someone may be here legally, for several months, but with no identifiable purpose. But it is for the trust to decide whether the criteria are met. There is no minimum period of residence that confers ordinarily resident status. In the past the Department of Health has suggested that someone who has been here for less than 6 months is less likely to meet the "settled" criterion but it is important to realise that this is only a guideline, not a deadline.
>
> 5.7 The question of ordinarily resident status is the first and most fundamental issue to resolve, because if a patient is classed as ordinarily resident then the charging Regulations do not come into play, even if the patient has only been in the UK for a few days or weeks. The Secretary of State has no powers to charge for NHS treatment someone who is ordinarily resident in the UK. ..."

Paragraph 5.13 provides that the onus is on the patient to provide whatever evidence he or she thinks is appropriate to support their claim and 5.15 provides that there may be occasions where patients produce entry clearance documents that are not familiar to Overseas Visitors Managers. In these cases the Immigration and Nationality Directorate (IND) (now the Border and Immigration Agency) have provided a general telephone helpline which may provide the trust with advice on interpreting different types of entry visas and visa stamps.

20. Chapter 6 deals with "How to Apply the Regulations?" and gives guidance on the application of regulation 4 which, as we have seen, specifies various circumstances where an overseas visitor will be exempt from paying charges. 6.22 provides:

> "Where an overseas visitor has been living in the UK for more than 12 months and is receiving a course of treatment free of charge and it is subsequently established that their residence was not lawful (eg an illegal immigrant), or was lawful but their status has changed (eg an asylum seeker whose application has finally failed, including all appeals), they cannot be charged for the course of treatment they were receiving at the time their status was determined. That remains free of charge until completed. They must, however, be charged for any new course of treatment. …
>
> **Examples of evidence**
>
> - *Proof lawfully in UK* – e.g. has right of abode, leave to enter documents issued by HO, visitors visa/work permit/student visa etc is still valid. …"

21. 6.24 deals with refugees and asylum seekers who have made a formal application with the Home Office which has not yet been determined. A refugee is someone who has been granted asylum in this country. This guidance is given:

> "6.24 The fact that the *exemption for asylum seekers only lasts until their claim is determined* means the trust should be prepared to check that the application is still on-going at intervals if treatment is being provided over a long period. *If the claim is finally rejected* (including appeals) before the patient has been in the UK for 12 months, they cannot be charged for a course of treatment they were receiving at the time their status was determined. That remains free of charge till completed. *They must, however, be charged for any new course of treatment.* If that is routine elective treatment, then payment should be handled in the same way as for anyone else seeking non-urgent treatment, i.e. payment should be obtained before treatment begins (see para 3.1). *Once they have completed 12 months residence they do not become exempt from charges.*" (The emphasis is added by me.)

22. To summarize the Guidance very broadly, advice is given as to when to charge depending on the urgency of the treatment needed, the clinician to decide whether treatment is immediately necessary or urgent or non-urgent. The hospital trusts are advised to ask whether an overseas visitor has the right to live here in order to determine whether he has lived lawfully in the United Kingdom for the previous twelve months. Although the case is not named, the test in *R v Barnet London Borough Council, ex p. Shah* [1983] 2 A.C. 309 is identified to establish ordinary residence. Even though asylum seekers are exempt from charges whilst their claims are pending, they must be charged for any new treatment after their claims have been rejected and even if they have completed twelve months' residence, they still do not become exempt from charges. Those seem to be the essential features for our purposes.

The immigration system

23. Part 1 of the Immigration Act 1971 deals with the regulation of entry into and stay in the United Kingdom and the general principles are stated in section 1 to be as follows:

> "1(1) All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act …
>
> (2) Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act …
>
> 2(1) A person is under this Act to have the right of abode in the United Kingdom if –
>
> (a) he is a British citizen; or
>
> (b) he is a Commonwealth citizen who - …"

24. Entry into the United Kingdom is governed by section 3:

> "(3)(1) Except as otherwise provided by or under this Act, where a person is not a British citizen
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of or made under this Act;
>
> (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;
>
> (c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely—
>
> (i) a condition restricting his employment or occupation in the United Kingdom;
>
> (ii) a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds;
>
> (iii) a condition requiring him to register with the police;
>
> (iv) a condition requiring him to report to an immigration officer …
>
> (v) a condition about residence.

...

> (4)(1) The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the power to give leave to remain in the United Kingdom ... shall be exercised by the Secretary of State ..."

25. Section 11 has featured in the discussion. It provides as follows:

> "11(1) A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention, under the powers conferred by Schedule 2 to this Act ..."

26. Under paragraph 2 of Schedule 2 an immigration officer is empowered to examine any persons who have arrived in the United Kingdom for the purpose of determining what leave, if any, they have to enter. The cumulative effect of paragraphs 8, 9 and 10 of Schedule 2 is that where an illegal entrant is refused leave to enter, the Secretary of State may give removal directions in respect of him. There are powers of detention. Under paragraph 16(1) any person required to submit to examination under paragraph 2 may be detained under the authority of an immigration officer pending a decision to give or refuse him leave to enter and under paragraph 16(2) if there are reasonable grounds for suspecting that a person is someone in respect of whom removal directions may be given that person may be detained pending a decision whether or not to give such directions for his removal in pursuance of such directions. Paragraph 21 is relevant and that provides:

> "21(1) A person liable to detention or detained under paragraph 16 ... may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or be released from detention, but this shall not prejudice a later exercise of the power to detain him.
>
> (2) So long as a person is at large in the United Kingdom by virtue of this paragraph, he shall be subject to such restrictions as to his residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing to an immigration officer.
>
> (2A) The provisions that may be included in restrictions as to residence imposed under sub-paragraph (2) include provisions of such a description as may be prescribed by regulations ...

> (2B) The regulations may, among other things, provide for the inclusion of provisions –
>
> (a) prohibiting residence in one or more particular areas;
>
> (b) requiring the person concerned to reside in accommodation provided under section 4 of the Immigration and Asylum Act 1999 …"

27. In the context of the case section 33(2) is also important in that it provides:

> "It is hereby declared that, except as otherwise provided in this Act, a person is not to be treated for the purposes of any provision of this Act as ordinarily resident in the United Kingdom or in any of the Islands at a time when he is there in breach of the immigration laws."

Mitting J's judgment

28. The claimant's case before him was that until removal directions are set the failed asylum-seeker is not to be charged for National Health services, save to the extent that a person ordinarily resident in the UK could be so charged; and that advice to the contrary, for example and in particular, the last sentence of para 6.24 of the Guidance (set out at [20] above) was legally wrong.

29. He concluded and made a declaration that the guidance was unlawful in so far as it advises NHS trusts (as it does in particular at paragraph 6.24) to charge for NHS hospital treatment failed asylum seekers who would otherwise be treated as ordinarily resident in the United Kingdom.

30. He reached that conclusion in summary as follows. He accepted, as was common ground, that the test for ordinary residence is to be found in the speech of Lord Scarman in *Shah* at 343G-H. He held that if a man's presence in a particular place or country is unlawful, for example in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence.

31. He drew a distinction between the asylum seeker who claims asylum at the port of entry and one who enters clandestinely without leave to enter and claims asylum after he has done so. So far as the former asylum seeker is concerned, he rejected the argument that because his residence was precarious he could not become ordinarily resident until granted leave to remain. He said:

> "25. … I can see no reason why a person lawfully in the United Kingdom, except for specific statutory purposes, should not become ordinarily resident by dint of his voluntary wish to settle, coupled with residence for a significant period. Such a person fulfills Lord Scarman's test. A person whose claim to asylum (which might carry with it a wish to return to his native territory when the threat to him has lessened or gone), has failed, but who refuses to leave voluntarily is likely to be determined to remain in the United Kingdom, if he can.

> Significant residence with that purpose is likely to provide proof of ordinary residence."

On the other hand, the asylum seeker who does not claim asylum at port of entry could not become ordinarily resident because he entered in breach of immigration law.

32. With regard to the question whether or not a failed asylum seeker is lawfully present in the United Kingdom, *Szoma v Secretary of State for Work and Pensions* [2005] UKHL 64, [2006] 1 A.C. 564 established that a person who claimed asylum at a port of entry is lawfully present in the United Kingdom. It was common ground, however, that both at-port claimants and in-country claimants must be treated in the same way. So he held:

> "21. ...if he is "lawfully present" for the purpose of the Regulations considered in *Szoma,* I can see no good or principled reason why he should not be lawfully in the United Kingdom for the purposes of determining whether or not he is ordinarily resident here."

33. There seemed, therefore, to be a conflict between *Shah* and *Szoma* which Mitting J. resolved in favour of *Szoma* on pragmatic grounds as explained by Hale LJ in *R v Wandsworth L.B.C., ex parte O* [2000] 1 WLR 2539 (at 2557C to H). Since it was impractical and unacceptable to draw a distinction between port claimants and in-country claimants for the purposes of determining liability to NHS charges, even in-country claimants should be treated as potentially ordinarily resident and to that extent the Guidance was unlawful.

34. In his view that conclusion meant that it was not necessary for him to determine whether or not there was a discretion to withhold treatment. He considered, however, that the advice in paragraph 3 of the Guidance was "clearly rigorous" but not unlawful by reason only of its terms. By providing treatment to deal with the life-threatening emergencies and situations in which serious injury may result if the patient is untreated, this State was fulfilling its minimum obligation under Article 8 and, if it still exists, under the law of common humanity. Accordingly, and but for his conclusion on the status of failed asylum seekers, he would have concluded that the guidance given was lawful.

The issues arising on the appeal and cross-appeal

35. The following questions need answers:

(1) Can a failed asylum seeker be ordinarily resident in the United Kingdom? If so, the Guidance may be unlawful.

(2) Was the appellant lawfully resident in the United Kingdom for the period of not less than one year immediately preceding the time when health services were provided to him? If so, the Guidance may again need clarification.

(3) Does a National Health Service Trust have any discretion to withhold treatment from a failed asylum seeker? If so, this may be another area where the Guidance needs to be clarified.

Discussion of the first two issues

36. In my view it is appropriate to deal with the first two issues together because they are inter-related: can a failed asylum seeker be ordinarily resident in the United Kingdom and can it be said he is lawfully resident here?

37. A number of authorities will have some bearing on these questions and it is convenient to deal with them now. It is common ground that *Shah* spells out the test for determining whether or not a person is ordinarily resident in the United Kingdom. That case concerned students who were refused a local authority grant to further their education, the local authority deciding that they were not ordinarily resident within their respective areas. Lord Scarman described their immigration status in these terms (at 336):

> "All five students are immigrants. None of them has the right of abode in the United Kingdom. None of them is a national of a member state of the European Communities. All needed leave to enter and to remain here: section 3(1), Immigration Act 1971. Four of them entered as students with limited leave; one, Nilish Shah, entered with his parents for settlement and obtained indefinite leave. The limited leave included a condition that on completion of his studies the student would depart from the country - though, of course, it would be open to him to apply for an extension, in which event the Secretary of State could grant a limited or unlimited extension or refuse the application."

38. After referring to earlier tax cases, Lord Scarman said this at p. 343-344:

> "Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers 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.
>
> There is, of course, one important exception. If a man's presence in a particular place or country is unlawful, e.g. in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence (even though in a tax case the Crown may be able to do so). ... There is, indeed, express provision to this effect in the [Immigration] Act of 1971, section 33(2). But even without this guidance I would conclude that it was wrong in principle that a man could rely on his own unlawful act to secure an advantage which could have been obtained if he had acted lawfully.

> There are two, and no more than two, respects in which the mind of the "propositus" is important in determining ordinary residence. The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is.
>
> And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."

39. There was further discussion about the immigration position of the appellant. At p. 346 Lord Scarman said:

> "It is recognised that the only relevance of the [Immigration] Act [1971] is that it established immigration control, which may give rise to relevant facts, but no more, in determining whether in truth a man is ordinarily resident in the United Kingdom."

At p. 348 he said:

> "Both courts also agreed in attaching decisive importance to what the Divisional Court called "the immigration status" of the students. "Immigration status," unless it be that of one who has no right to be here, in which event presence in the United Kingdom is unlawful, means no more than the terms of a person's leave to enter as stamped upon his passport. This may or may not be a guide to a person's intention in establishing a residence in this country: it certainly cannot be the decisive test, as in effect the courts below have treated it. Moreover, in the context with which these appeals are concerned, i.e. past residence, intention or expectations for the future are not critical: what matters is the course of living over the past three years."

He added at p. 349:

> "The terms of an immigrant student's leave to enter and remain here may or may not throw light on the question: it will, however, be of little weight when put into the balance against the fact of continued residence over the prescribed period -

> unless the residence is itself a breach of the terms of his leave, in which event his residence, being unlawful, could not be ordinary."

40. *Shah* was considered in *Mark v Mark* [2005] UKHL 42, [2006] 1 A.C. 98 where the issue was whether the English court had jurisdiction to entertain a Nigerian wife's petition for divorce based upon her allegation that she was habitually resident in England and Wales in circumstances where she had entered the United Kingdom with leave but that leave had expired with the result that she became and was at all material times an illegal over-stayer. Baroness Hale of Richmond said:

> "31. ... It is quite clear that Lord Scarman regarded the question he was answering as one of statutory construction. On the meaning of 'ordinary residence' he relied upon the earlier tax cases. Yet it is also quite clear that the legality of a person's residence is completely irrelevant for tax purposes. A person who has taxable income or assets here is liable to United Kingdom tax irrespective of his immigration status. ...
>
> 33. It is common ground that habitual residence and ordinary residence are interchangeable concepts: see *Ikimi v Ikimi* [2001] EWCA Civ 873; [2002] Fam 72. The question is whether the word 'lawfully' should be implied into section 5(2) of the [Domicile and Matrimonial Proceedings] 1973 Act. I see no reason to do so. The purpose of the 1973 Act was to provide an answer to the question "when is the connection with this country of the parties and their marriage sufficiently close to make it desirable that our courts should have jurisdiction to dissolve the marriage?" ...
>
> 36. I conclude, therefore, that residence for the purpose of section 5(2) of the 1973 Act need not be lawful residence. The question of whether the residence is habitual is a factual one which should be answered by applying the test, derived from the 1928 tax cases, laid down by Lord Scarman in *ex p. Nilish Shah* [1983] 2 AC 309. It is possible that the legality of a person's residence here might be relevant to the factual question of whether that residence is 'habitual'. A person who was on the run after a deportation order or removal directions might find it hard to establish a habitual residence here. But such cases will be rare, compared with the large numbers of people who have remained here leading perfectly ordinary lives here for long periods, despite having no permission to do so. ... There will, however, be other statutory provisions, in particular those conferring entitlement to some benefit from the state, where it would be proper to imply a requirement that the residence be lawful."

41. The next case, of some significance in Mitting J's view, is *Szoma v Secretary of State for Work and Pensions* [2005] UKHL 64, [2006] 1 A.C. 564. The single question

raised on that appeal was expressed by Lord Brown of Eaton-under-Heywood in paragraph 5 of his speech to be this:

> "Is a person temporarily admitted to the United Kingdom under the written authority of an immigration officer pursuant to paragraph 21 of Schedule 2 to the Immigration Act 1971 (the 1971 Act) "lawfully present in the United Kingdom" within the meaning of paragraph 4 of the Schedule to the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 ...?"

As he pointed out, the appeal concerned not (or at least not directly) the appellant's immigration status but rather his entitlement to a particular non-contributory benefit, income support. Lord Brown explained the appellant's position:

> "9. Whilst previously the appellant had been entitled to income support simply by virtue of his presence in the United Kingdom, the 1999 Act changed that position. Section 115(1) of the Act, under the heading "Exclusion from Benefits", provided that no one is entitled to income support and a number of other specified security benefits "while he is a person to whom this section applies." Subsection (3) provides that "This section applies to a person subject to immigration control unless he falls within such category or description, or satisfies such conditions, as may be prescribed." Subsection (9) provides:
>
> > "'A person subject to immigration control' means a person who is not a national of an EEA state and who - (a) requires leave to enter or remain in the United Kingdom but does not have it . . ."
>
> 10. The 2000 Regulations prescribe those who, pursuant to section 115 (3), are not excluded from specified benefits notwithstanding that they are subject to immigration control. The various categories are described in Part 1 of the Schedule to the Regulations and it is paragraph 4 which is critical for present purposes:
>
> > "A person who is a national of a state which has ratified the European Convention on Social and Medical Assistance (done in Paris on 11 December 1953) [ECSMA] or a state which has ratified the Council of Europe Social Charter [CESC] (signed in Turin on 18 October 1961) and who is lawfully present in the United Kingdom."'"

42. Mr Szoma was a Polish national from the Roma community who claimed asylum on arrival and was temporarily admitted and remained under successive authorisations until eventually, and after he had been refused asylum, he was granted indefinite leave to remain. His "straightforward case" was that during the years in question he had received the immigration officer's "written authority" to be "at large in the United

Kingdom" and accordingly, there being no suggestion that he had failed to comply with such restrictions as had been imposed upon him, he fully satisfied the condition that he was "lawfully present" here. As Lord Brown said at paragraph 14:

> "Undoubtedly he was present, such presence being pursuant to the written authority of an immigration officer expressly provided for by the legislation; and he had committed no breach of the law. Small wonder that the IND's Asylum Policy Instructions provide that "applicants who have been granted temporary admission ... are lawfully present in the United Kingdom, provided they adhere to the conditions attached to the grant of temporary admission"."

43. The Secretary of State advanced two counter-arguments. The main argument was that the phrase "lawfully present" in paragraph 4 of the Schedule had to be read as a whole and that lawful presence for this purpose is a status gained only by having lawfully entered the United Kingdom with leave to enter (and having subsequently remained within the terms of that leave). It was submitted that not having been granted leave to enter, the appellant accordingly lacked the required immigration status and was not entitled to be regarded as being lawfully present. The Secretary of State's fallback argument was that section 11(1) of the 1971 Act deemed him not to have entered the United Kingdom, and not having entered, he must be deemed not to be present either.

44. Dealing first with the latter argument, Lord Brown held:

> "25. ... In my opinion, however, section 11's purpose is not to safeguard the person admitted from prosecution for unlawful entry but rather to exclude him from the rights (in particular the right to seek an extension of leave) given to those granted leave to enter. Even assuming that section 11's deemed non-entry "for purposes of this Act" would otherwise be capable of affecting the construction of the 1999 Act and the 2000 Regulations (as legislation *in pari materia*), it would in my judgment be quite wrong to carry the fiction beyond its originally intended purpose so as to deem a person in fact lawfully here not to be here at all."

45. Having rejected that argument, Lord Brown returned to the first way the case was put saying:

> "26. To my mind the only way the respondent could succeed in these proceedings would be to make good his core argument, that the word "lawfully" in this context means more than merely not unlawfully; rather it should be understood to connote the requirement for some positive legal underpinning.
> ...
>
> 28. I would reject this argument. There is to my mind no possible reason why paragraph 4 should be construed as requiring more by way of positive legal authorisation for someone's presence in the United Kingdom than that they are at

> large here pursuant to the express written authority of an immigration officer provided for by statute."

46. Lord Brown went on to add, obiter, that he accepted that the benefits provided for by the 2000 regulations went further than was strictly required to meet the United Kingdom's international obligations under ECSMA and CESC, saying:

> "29. ... For one thing those treaties make a distinction (not recognised in our law) between lawful presence and lawful residence, certain benefits having to be made available only to those lawfully resident in the state."

47. *Szoma* was referred to and distinguished in *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 675, [2008] 1 W.L.R. 254. That case concerned claims for various benefits including income support, housing benefit and state pension credits payable to those habitually resident in the United Kingdom, the relevant regulations excluding persons from abroad who do not have the right to reside here. My Lord, Lloyd L.J., held:

> "19. It seems to me plain that UK law makes a distinction between a right to reside, which is conferred only on British citizens, certain Commonwealth citizens, qualified persons as defined by the Immigration (European Economic Area) Regulations 2000 and the various additional categories mentioned in the definition of "persons from abroad" such as refugees, those with indefinite leave to remain and those to whom exceptional leave to remain has been granted, on the one hand, and any lesser status, in particular that of an EEA national who is in this country having entered lawfully, has committed no breach of immigration law, but is not a qualified person and therefore does not enjoy the benefit of regulation 14 which confers a "right to reside". Logically, if an EEA national has to be a qualified person to have conferred upon him a right to reside, it is not a proper reading of a reference to "right to reside" under UK law to extend it to an EEA national who is not a qualified person.
>
> ...
>
> 25. ... it seems to me that the Appellants, though lawfully present in this country, did not have a right to reside, under UK law, at the time relevant to the present appeals, because they were not qualified persons."

Dealing with *Szoma* my Lord said:

> "38. I note that, at paragraph 29 of his speech in Szoma's case, Lord Brown spoke of the distinction made in the Convention between lawful presence and lawful residence as being a distinction "not recognised in our law". He did not have to consider the distinction between a right to reside and lawful

> presence without any such right, a distinction which plainly is made by the 2000 regulations."

Counsel's submissions on the first two issues

48. Miss Elisabeth Laing Q.C. submits on behalf of the Secretary of State, that, to summarise her argument, (1) because a failed asylum seeker is liable to removal, his presence in the United Kingdom is so legally precarious that he is incapable of having the settled purpose which *Shah* shows is necessary; (2) alternatively she submits that a positive right to reside, such as leave to enter or remain for a relevant purpose, is an essential component of ordinary residence. Those who have entered clandestinely can certainly never be said to be ordinarily resident here. (3) Lawful presence which was the matter under consideration in *Szoma* is distinct from lawful residence and the two different concepts should not be elided.

49. Mr Nigel Giffin Q.C., for the respondent YA, submits that a person who claims asylum can claim to have voluntarily adopted an abode in this country as part of the regular order of his life for the time being and is here for the settled purpose of claiming asylum. Whilst his claim is pending he can meet all the requirements of the *Shah* test for ordinary residence. He does not cease to be ordinarily resident here simply because his claim for asylum has failed. Ordinary residence will continue until he ceases to have his abode here (or at least until he is detained for the purposes of his removal); his settled purpose may continue to be to stay here as long as he can. In any event, many like the respondent simply cannot be removed for one reason or another. He submits that if an in-country asylum seeker is permitted to be at large in the United Kingdom by virtue of the official act taken under statutory authority, then it is impossible to regard that individual as falling within the public policy concerns identified by Lord Scarman in *Shah*. His presence cannot be regarded as something unlawful when it has been officially recognised and regularised in this way. The fact that, whilst the asylum claim is pending, it would be a breach of the United Kingdom's international obligations to deport that individual, merely reinforces the point. Once the in-country asylum seeker has been given temporary admission/release under paragraph 21 of Schedule 2 to the 1971 Act, his earlier entry contrary to section 3(1) of the Act in entering without leave becomes a mere historic fact.

50. Because the asylum seeker is granted temporary admission/release from detention under paragraph 21, he is permitted not only to be present but to reside here and until that permission is revoked and the power to detain him exercised, he is lawfully resident here.

Analysis

51. It is common ground *Shah* provides the test to apply. For my part I can see considerable force in Mr Giffin's submissions. Certainly in the case of the at-port claimant for asylum, he will have arrived here voluntarily and when granted temporary admission, he voluntarily takes up residence in the United Kingdom. His purpose is to gain refuge here from the persecution he alleges he has suffered or is at risk of suffering abroad. His purpose, while settled, may perforce be for a limited period for he is liable to be returned if his claim fails, just as the students in *Shah* would be liable to return home once their course of study has ended. As Lord

Scarman said (see [38] above), "All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled." The precarious nature of his stay may not matter because, again drawing on Lord Scarman's observations in the above citation, it seems to be the mind of the *propositus* which is important in determining whether he can show the necessary degree of settled purpose.

52. If he has acquired ordinary residence whilst he waits (often, as we know, for a long time) for a final decision on his claim for asylum, then I again find it difficult to disagree with Mr Giffin's next submission that rejection of the asylum claim cannot alter the state of affairs – ordinary residence – which is, after all, "ultimately a question of fact". He remains living where he was and his intention is to stay there as long as he can. If he cannot be sent back, that could be here for a long time. I can see the force of the argument that, at least until he is detained for removal, his earlier established ordinary residence (assuming it has been established) will continue after the asylum claim is rejected.

53. Whilst I am attracted by those submissions, I do not need to come to a concluded view. The crucial aspect of the *Shah* test in our case is the "important exception, namely that if his presence in the country is unlawful, for example in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence." Lord Scarman seems to me to give two reasons for this: first, the express provision to this effect in section 33(2) of the Act of 1971 (see [27] above); and secondly, the principle of public policy that the *propositus* cannot profit from his unlawful act. As the students in *Shah* were not in breach of the immigration laws, these observations are obiter, but, nonetheless in my judgment, they command the highest respect.

54. I do not overlook *Mark v Mark* where the fact that the wife was in breach of the rules for immigration control and was an illegal over-stayer did not prevent her asserting here habitual residence in this country for the purpose of establishing the divorce court's jurisdiction. As Baroness Hale emphasised, it is a matter of statutory construction and where entitlement to some benefit from the state depends on ordinary residence, then it would be proper to imply a requirement that the residence be lawful, (see [40] above).

55. 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.

56. It is, therefore, to the system for immigration control that one turns to see who should and who should not be here. Only British and Commonwealth citizens have a right of abode. Entry is forbidden without leave. Entry without leave is an offence. In-

country applicants for asylum will have committed that offence. The at-port applicant for asylum is deemed by virtue of section 11 not to have entered the United Kingdom "so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer". The in-country applicant is likewise deemed not to have entered so long as he is detained or temporarily admitted or released while liable to detention under the powers conferred by Schedule 2 to the Act. However, as *Szoma* decided (see [44] above) this fiction must not be carried beyond its originally intended purpose of excluding these persons from rights they would otherwise have had they been granted leave to enter. One simply cannot pretend that the failed asylum seekers have not been living here: where else have they been residing?

57. That leaves open, however, the status of those temporarily admitted or released while liable to detention under the powers conferred by Schedule 2. They are here under the auspices of paragraph 21 and its effect looms large in this appeal. Miss Laing gave this explanation to Lloyd-Jones J. in *R (on the application of AW) v Croydon London Borough Council* [2005] EWHC 2950 Admin, [2006] LGR 159 at [18].

> "A person arriving in the United Kingdom who claims asylum at the port of arrival is normally temporarily admitted to the United Kingdom. Accordingly, for the purposes of s. 11 of and para 7 of Sch. 3 to the 2002 Act, he is deemed not to have entered the United Kingdom, by virtue of s. 11(1) of the 1971 Act. If the application for asylum is unsuccessful, temporary admission is not discontinued at that point nor is it discontinued when removal directions are set. If the person is detained pending removal, temporary admission ceases at that point. .... Consequently, a person who claims asylum at the point of arrival in the United Kingdom, who is granted temporary admission and whose claim for asylum is later determined against him will not, at that point, without more, be in the United Kingdom in breach of the immigration laws within the meaning of para 7(a). By contrast, a person who has applied for asylum only after entering the United Kingdom is likely to be a person who is in the United Kingdom in breach of the immigration laws within the meaning of para 7(a). For example, a person who has entered the United Kingdom unlawfully and has later applied for asylum will normally be given temporary release. He will be a person in the United Kingdom in breach of the immigration laws within the meaning of para 7(a). In particular he will not be entitled to invoke the deeming provision in section 11(1) of the 1971 Act because he has otherwise entered the United Kingdom."

It is clear from that citation that the case concerned failed asylum seekers requesting support from local authorities so it is not directly relevant here.

58. There is a small difference of opinion between counsel over the way things operate in practice, but I do not wish to take too much time over it because it may not much matter. Paragraph 21 applies to a person liable to detention or detained under paragraphs 16(1), (1A) or (2). Paragraph 16(1) allows for the detention of those required to submit to examination under paragraph 2, namely those who have arrived

in the United Kingdom by ship or aircraft, the purpose of the examination being to determine their right to enter. So that clearly covers the at-port claimant. Paragraph 16(1A) is not material for our purposes. Paragraph 16(2) allows for the detention of a person if there are reasonable grounds for suspecting that he is someone in respect of whom directions may be given for his removal. That would cover the in-country applicant who skips across the border one way or another and evades all questions at the point of entry. He may be detained pending a decision whether or not to give such directions, or pending his removal in pursuance of such directions. What is not clear is whether or not he is actually detained when he presents himself and claims asylum, or whether he is (perhaps informally and technically incorrectly) treated like an at-port claimant and so treated as only being liable to detention pending questions. The experience of Mr Giffin and some of his colleagues is that temporary admission, not release from detention, is in fact granted to such an in-country applicant. As I say, this may not much matter. What is more important, indeed probably crucial, is to determine their "status" once they are temporarily admitted or released from detention.

59. Paragraph 21(2) must, therefore, be the focus of attention. The opening words are important – "so long as a person is *at large*" – he shall be subject to such restrictions as to residence etc as may be imposed by the immigration officer. So he is not free to come and go as he chooses. He may be at liberty – at large – but he is like a man on bail. In *R (Khadir) v Secretary of State for the Home Department* [2005] UKHL 39, [2006] 1 A.C. 207 Lord Brown of Eaton-under-Heywood spoke at paragraph 32 of "the *ameliorating possibility* of his temporary admission in lieu of detention [arising] under paragraph 21", my emphasis being added. That gives the flavour. Whilst he is at large he is liable to restrictions e.g. as to his residence, and he is subject to further detention. He is at liberty by virtue of an indulgence granted to him by the immigration authorities. The purpose of such mercy being shown to him is obvious: to detain him for the long time it takes to process a claim for asylum would be unconscionable.

60. That being his position, can he fairly be said to establish his ordinary residence whilst in that state of limbo? In my judgment, whether he is an at-port applicant or an in-country applicant, he cannot. In *Inland Revenue Commissioners v Lysaght* [1928] A.C. 234, 243 Viscount Sumner said:

> "I think the converse to 'ordinarily' is 'extraordinarily' and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not 'extraordinary'."

In an observation in *Shah* endorsed by Lord Scarman, Lord Denning M.R. said in the Court of Appeal that:

> "The words 'ordinarily resident' mean that the person must be habitually and normally resident here ..."

61. The words are to be given their ordinary meaning. Asylum seekers are clearly resident here but is the manner in which they have acquired and enjoy that residence ordinary or extraordinary? Normal or abnormal? Were they detained, then no-one would suggest they were ordinarily resident in the place of their detention. While they are here under sufferance pending investigation of their claim they are not, in my

judgment, ordinarily resident here. Residence by grace and favour is not ordinary. The words must take some flavour from the purpose of the statute under consideration and, as I have set out above, the purpose of the National Health Act is to provide a service for the people *of* England and that does not include those who ought not to be here. Failed asylum seekers ought not to be here. They should never have come here in the first place and after their claims have finally been dismissed they are only here until arrangements can be made to secure their return, even if, in some cases, like the unfortunate YA, that return may be a long way off.

62. Whereas exceptions affording free medical treatment are made under regulation 4(1)(c) of the Charges to Overseas Visitors Regulations for those accepted as refugees and those whose claims for asylum have not yet been finally determined, no exception is made for failed asylum seekers. The public policy considerations which inform Lord Scarman's exception militate against their being allowed to claim the benefits of a free national health service. The result may be most unfortunate for those in ill-health like YA for they may now be at the mercy of the hospitals' discretion whether to treat them or not.

The second issue: lawful residence

63. The second issue relates to the ability of a failed asylum seeker to bring himself within regulation 4(1)(b) as someone who has *lawfully resided* in the United Kingdom for a period of not less than one year immediately preceding the time when the health services are provided for him. What constitutes lawful residence?

64. We are bound by *Szoma* to accept that a person temporarily admitted under the written authority of an immigration officer pursuant to paragraph 21 is lawfully present in the United Kingdom, at least for the purposes of enjoying the benefits provided by the European Convention on Social and Medical Assistance (ECSMA). Being present pursuant to the written authority of an immigration authority, it was "small wonder that he should be treated as lawfully present": see paragraph 14 of Lord Brown's speech set out at [42] above. I respectfully agree with that but also, however, with my Lord's, Lloyd L.J.'s, view that there is a distinction between those who may be lawfully present in this country and those who have a right to reside here. As he pointed out in *Abdirahman* (see [47] above) the right to reside is conferred upon a limited number of people.

65. Miss Laing is correct to submit that the concepts of lawful presence and lawful residence should not be elided and that is the error made by Mr Giffin. One resides here lawfully when one has the right to do so. An indulgence is granted to a claimant for asylum, not a right, and in this context the word "lawful" means more than merely not unlawful but should be understood to connote the requirement of a positive legal underpinning. Being here by grace and favour does not create that necessary foundation. The underlying purpose of the Act as I have already analysed it reinforces that conclusion. "Lawful" in this context means having leave to enter. It follows that I do not regard *Szoma* and *Shah* to be in conflict: they deal with quite different concepts.

66. I fully appreciate that these conclusions preclude failed asylums seekers from seeking free medical help when many will need it. That leads to the third issue, namely the

discretion of the hospitals to treat without charge or to withhold treatment without payment for it.

The third issue: what discretion does a National Health Service Trust have to withhold treatment or to provide treatment for a failed asylum seeker?

67. Both parties appeal against the judge's declining to rule on the issue of what discretion there was to provide or to withhold treatment. The appellant seeks a declaration that a health body does have a discretion to withhold National Health Service hospital treatment from a patient not ordinarily resident in the United Kingdom who refuses or who cannot pay for it.

68. The respondent by his cross-appeal seeks declarations that the Guidance is unlawful in so far as

> "4. It fails to make clear that urgent treatment may not in any circumstances be withheld altogether by reason of a failure to pay for such treatment.
>
> 5. It suggests that NHS Trusts are in certain circumstances entitled to withhold treatment in respect of persons subject to charging who have not paid or made arrangements for payment, even where such persons are unable to pay for such treatment and are currently unable to return to their country of origin."

69. It is necessary first to examine the statutory provisions and then the Guidance. Section 1 of the 2006 NHS Act imposes a target duty. That was made clear in *R v North and East Devon Health Authority, ex parte Coughlan* [2001] Q.B. 213 where Lord Woolf M.R. analysed the Act and held in paragraphs 22-26 that section 1(1) does not place a duty on the Secretary of State to provide a comprehensive health service: his duty is "to continue to promote" such a service. His duty under section 3 is subject to the qualification that his obligation is limited to providing the services identified to the extent that he considers that they are *necessary* to meet *all reasonable requirements*. He does not automatically have to meet all the requirements and in certain circumstances he can exercise his judgment and legitimately decline to provide them. In exercising that judgment he is entitled to take into account the resources available to him and the demands on those resources.

70. Section 175 of the Act permits charges to be made as an exception to the general rule in section 1(3) that the services are to be provided free of charge. Section 175 says nothing about whether or not it is permissible to treat in circumstances where those charges will not or cannot be paid.

71. The extent of the discretion was examined in *R v Hammersmith Hospitals NHS Trust ex p. Reffell* (2001) 4 CCLR 159. The Court of Appeal held that although the Guidance (paragraph 5.4) suggested that deposits should be sought there was nothing which actually compelled the Hammersmith Hospital to seek payments in advance or seek undertakings or deposits. Waller L.J. said:

> "25. ... If the Hammersmith are required to charge and recover, it must by clear implication be within their power to

> seek deposits, as they did, prior to the treatment; and that it must be within their power to do so even during the continuation of the treatment. It follows, in my view that the Hammersmith could treat without seeking payments in advance but it has a discretion as to whether it should do so.
>
> ...
>
> 34. It may well be that if circumstances were that refusal to treat was going to lead inevitably to an emergency that the Hammersmith was going to have to meet free of charge, the Hammersmith could well in its discretion say, both on humanitarian grounds and on the basis that to seek now save expense later, that treatment should be given without insistence on the deposit or advance payment."

Simon Brown L.J. held:

> "42. ... the hospital Trust, is statutorily bound, in the light of the applicant's immigration status as an overseas visitor within the meaning of the regulations, to exercise a discretion whether or not to treat him, given that he can neither pay, nor give any realistic assurance of payment for such treatment."

72. It would seem, therefore, that under the statutory scheme the hospital is required to charge overseas visitors but it does have a discretion it can exercise: the hospital can choose to treat or it can choose not to treat those who cannot or will not pay. The Secretary of State accepts and seeks a declaration to reinforce the discretion to treat for example those in immediate need. The respondent accepts that at the extreme end of the spectrum, if the hospital is faced with a wealthy overseas visitor who has no urgent need for treatment and could at any time return home and be treated there, then it would clearly not be very sensible if (faced with a refusal to pay charges) the Trust have to provide the treatment and then to try to pursue the individual in their home jurisdiction. In that instance the hospital could legitimately conclude that it was not necessary to provide services for that particular patient. The group of failed asylum seekers here are at the other end of the spectrum, being unable to pay and not being able to return home.

73. As for the Guidance, the issue is whether this guidance is sufficiently clear and unambiguous in the advice it gives to help decide whether to treat or not to treat an individual who, although chargeable in principle, does not in fact have the resources to pay for that treatment and who reasonably requires to be treated in the United Kingdom rather than returning to his country of origin for such treatment, either because he is not currently in a position to return at all, or because there is such a sufficiently pressing need for the treatment that there would be significant detriment to his health if that treatment had to wait his travel.

74. The Guidance divides treatment into three categories. The first is "immediately necessary treatment", referred to at paragraph 3.1 but further defined in paragraph 9 which makes it clear:

> "trusts need to treat patients in need of immediately necessary care regardless of their ability to pay. This may be because their condition is life-threatening, or because if treatment is not given immediately it will become life-threatening, or because permanent serious damage will be caused by any delay ... Where immediately necessary treatment takes place and the Trust knows that payment is unlikely, treatment should be limited to that which is clinically necessary to enable the patient to return to their own country. This should not normally include routine treatment unless it is necessary to prevent a life-threatening situation. Any charge for such treatment will stand, but if it proves to be irrecoverable, then it should be written off."

This is clear enough in so far as it advises that certain treatment should be given irrespective of the ability to pay for it but it leaves unclear what, if any, investigation should be made as to when the patient is likely to return to his own country so as to be able to decide what limits should be placed on the treatment.

75. The second category is "urgent treatment" which is treatment which is not immediately necessary but cannot wait until the patient returns home. The advice that is given by the Guidance is that when the patient is chargeable the Trust should "wherever possible" seek deposits equivalent to the estimated full cost of the treatment in advance of providing any treatment. The problem here is that the Guidance is silent on what should happen when it is not possible to provide that deposit. No help is given in the case of those who cannot return home before the treatment does become necessary. What is to happen to the patient who cannot wait? In those respects the guidance is not clear and unambiguous and in so far as it purports to be dealing with a category of patients like those before us, the failed asylum seekers who cannot be returned, it is seriously misleading.

76. As for non-urgent treatment, namely "routine elective treatment which could in fact wait until the patient returned home", the advice given is that where the patient is chargeable, the Trust should not initiate treatment processes (even by putting the patient on a waiting list) until a full deposit has been obtained. The assumption has to be that the patient can return home before that routine elective treatment becomes necessary. Again, it is not clear what should be done for those who have no prospect of returning within a medically acceptable time. There is no suggestion that it may be necessary to treat in those circumstances or even that it may be necessary to investigate the likelihood and length of any undue delay. Once again the Guidance is not clear enough.

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

78. Miss Laing concedes on the Secretary of State's behalf that if the Guidance is materially unclear or misleading, then the Court should say so. I would now leave it to the parties to put further submissions to the Court in writing as to the nature of the

relief on the appeal and the cross-appeal which should follow from the conclusions to which I have been driven.

Conclusions

79. The Secretary of State's appeal will succeed on the first and second issues and, for what it may be worth, against the judge's refusal to acknowledge that there is a discretion to withhold treatment but the cross-appeal is also successful. The order will be drawn after further submissions in writing have been received from counsel.

Lord Justice Lloyd:

80. I agree.

Lord Justice Rimer:

81. I also agree.