Northern Ireland Assembly

Committee for Health, Social Services and Public Safety

OFFICIAL REPORT (Hansard)

Provision of Health Services to Persons not Ordinarily Resident (Amendment) Regulations (Northern Ireland) 2014 and the Health and Personal Social Services (General Medical Services Contracts) (Amendment No. 1) Regulations (Northern Ireland) 2014: DHSSPS Officials

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Members present for all or part of the proceedings:
Ms Maeve McLaughlin (Chairperson)
Mr Roy Beggs
Mr Mickey Brady
Mrs Pam Cameron
Mrs Jo-Anne Dobson
Mr Gordon Dunne
Mr Fearghal McKinney

Witnesses:

Mr Stephen Galway	Department of Health, Social Services and Public Safety
Mr Robert Kirkwood	Department of Health, Social Services and Public Safety

The Chairperson: I welcome Stephen Galway and Robert Kirkwood from the Department of Health, Social Services and Public Safety (DHSSPS). I remind you that the SL1 letter should provide sufficient information for the Committee to carry out its role of informed policy scrutiny and should explain, in layperson's terms, the purpose, background and implications of the proposed legislation. It should also provide a summary of the outcome of any consultation. We view this, as any Committee would, as especially important, but in this instance, because it is a revised SL1 that has been presented following concerns raised by the Committee, we need to be absolutely certain that the concerns and those of the relevant stakeholders, as highlighted earlier, have been addressed.

Suffice it to say that we are disappointed that the SL1 letter that you sent us did not detail the engagement that you have had with any key stakeholders since the letter of 20 January 2014 and did not indicate any issues raised or whether — it is important for the Committee to know this — the key stakeholders were content with the revised proposals. We accept that you have now provided information at the Committee's request in the form of a supplementary paper. Thank you for that; it is welcome. However, we would have expected to have received all the relevant information last week, and the Committee would expect that going forward.

I ask the officials to brief the Committee on the revised proposals, after which members will ask their questions.

Mr Stephen Galway (Department of Health, Social Services and Public Safety): Thank you, Chair, for allowing us the opportunity to present to you today the draft regulations on overseas visitors and

their access to health care in Northern Ireland. By way of background, it may be useful to set out briefly the history to the regulations. You may have run over some of it in your opening comments.

Following a review of policies and legislation governing visitors' access to health care, the Department conducted a consultation on new policy proposals that broadly brought us into line with the rest of the UK. During that consultation, 37 responses were received, which were positive and welcomed the moves being made to update and clarify issues in the legislation. The majority of the proposals were either technical or for clarification purposes.

The consultation ended in April 2013, and the Department decided to introduce the provisions in line with the EU directive legislation at the end of 2013. However, while Committee members agreed to the proposed amendments in relation to the Provision of Health Services to Persons not Ordinarily Resident Regulations (Northern Ireland) 2005, it recommended that the Department review two specific proposals: the first was in relation to asylum seekers; and the second was in relation to the extension of the present exemption of charges categories for secondary care treatment into primary care. The Department agreed to undertake further consultation with key stakeholders and further examine those two specific proposals.

In the Provision of Health Services to Persons not Ordinarily Resident Regulations, secondary care services are currently available to an asylum seeker with an application pending. There is no provision for failed asylum seekers other than emergency or urgent health care, which includes emergency services at an A&E department or emergency care in a GP practice, including maternity services, sexual health services or treatment for some infectious diseases.

The draft regulations that we brought to the Committee last year introduced a specific exemption from secondary health care charges similar to that in England for failed asylum seekers who receive section 4 or section 95 support and are cooperating with the UK Border Agency (UKBA). When considering whether to extend the regulations to include the small number of people who have sought asylum and been refused to the extent that all appeal rights have been exhausted, the Department consulted the Departmental Solicitor's Office (DSO), the UK Border Agency, the Business Services Organisation, colleagues in the Departments of Health in England, Wales and Scotland and the Northern Ireland Law Centre.

Taking into account the Committee's recommendation on failed asylum seekers and having had time to consider the position in the rest of the UK and the arguments put forward by the Law Centre, the Department proposes to extend the entitlement to health care for all asylum seekers who have sought asylum up until the point at which they are served their deportation papers. The policy change has been discussed with and agreed by the Northern Ireland Law Centre, and the Department has also agreed to engage with the Law Centre when drafting the guidance to accompany the Persons not Ordinarily Resident Regulations.

Last year, the Department originally said that it considered it prudent to give the proposal on primary care and extending the exemptions a bit more in-depth thought and would look at its ramifications before implementing it. The Committee, however, recommended that we undertake some further analysis. Following the Committee's recommendation, the Department discussed the issue in detail with the Departmental Solicitor's Office, specifically on article 42 of the Health and Personal Social Services (Northern Ireland) Order 1972, which deals with the ordinarily resident principle, because, once a person has ordinary residence in Northern Ireland, he or she becomes entitled to free health services.

Everyone is currently entitled to emergency treatment in a primary care setting during a visit to Northern Ireland. The Department has had time to examine the issue fully, and, taking account of the primary aim of ensuring that everyone is treated in the right setting at the right time, it now considers that the Persons not Ordinarily Resident Regulations 2014 should be extended to cover primary care services for all categories of visitor exempt from secondary care services, apart from visitors who are entitled to those services under EU regulations or EU legislation.

After further consideration, and having taken account of the views of the Committee and the relevant stakeholders, the Department proposes that the Persons not Ordinarily Resident Regulations 2014 should be drafted to include those who have sought asylum, who will now fall within the scope of the proposed draft regulations and will therefore be entitled to access free health care, and primary care services for all categories of visitor exempt from secondary care services, apart from visitors who are entitled to services under EU legislation. The exempt categories would be entitled to register with a

GP practice during a visit, entitling them to the same provision of services as a resident in Northern Ireland would be entitled to access.

While taking account of your earlier comments about the SL1 letter, members can, hopefully, see that we have taken on board the Committee's comments and views and have amended the regulations accordingly. The Committee will, hopefully, be in a position to agree with them as now drafted. However, we are happy to take any questions that members may have on the regulations.

The Chairperson: Thank you for that, Stephen. In relation to failed asylum seekers' access to free secondary care, what you are now proposing — just so that I am clear — is that people should be able to access that up to the point at which they are served deportation papers.

Mr Galway: Yes.

The Chairperson: How long would that be? What is the timescale between someone being served deportation papers and actually leaving?

Mr Robert Kirkwood (Department of Health, Social Services and Public Safety): The regulations will be drafted in such a way as to provide primary care and secondary care for an asylum seeker who has made an application. That is all that the regulations will say. It has been agreed that primary care and secondary care will be provided up until deportation papers have been presented to the person. As you say, the time between the deportation papers being presented and the time that the person actually leaves the country could vary. The provisions on that will be set out in guidance to accompany the legislation.

The Chairperson: Does the Department not know that?

Mr Kirkwood: It differs in individual cases. In discussion with the Northern Ireland Law Centre, it was agreed that further work would be taken forward and that that aspect would be set down in guidance. It will basically mean that a failed asylum seeker's entitlement to free primary and secondary care will not stop automatically once they get their deportation papers, and it will be set out in guidance that the care will continue until the person is actually in a position to leave the country.

The Chairperson: Why, then, does the paper say that you will be able to access that care up until the point when you have been served deportation papers? That seems to be very different.

Mr Kirkwood: That will be fully covered in guidance in consultation with the Northern Ireland Law Centre.

The Chairperson: I am not clear on this, and I think that we need to be absolutely clear on it. It needs to be large and clear in the regulations, too, I suppose. Stephen, in your opening remarks, you said specifically that there would be free access until a person has been served. You are saying that there may be a considerable period of time to consider, which has implications for access to health care and, obviously, for cost, I would imagine.

Mr Galway: As Robert is quite rightly saying, the regulations will not state that specific phrase, "up until a point when they have been served their deportation papers". The guidance that follows and that supports the regulations will make it very clear in what instance that might happen. Again, that has been the agreement in discussion with the Northern Ireland Law Centre. It is content that —

The Chairperson: Maybe I will try this a different way: why could it not be stipulated in the regulations? If you are saying that this is not about the time when the papers are served but the point when the person leaves, surely that should be stipulated in the regulations.

Mr Kirkwood: Our legislation was drafted in accordance with the Welsh legislation. Basically, rather than stipulating specifics in the legislation, that is easiest because of the differences that can arise with this category of people. Because of that, if you were trying to be specific in legislation on that particular point, you would find that you would maybe have to constantly amend the regulations. So, the regulations were drafted similarly to the Welsh regulations, and they refer to the person who has made an application —

The Chairperson: Robert, with respect, that is why there is a need to get this absolutely right. Again, it was this Committee that started digging into this issue when the Department and others were saying that you have a limited time to do it and that all sorts of penalties would kick in. So, having listened to both of you, it seems to me that even that lack of clarity would highlight why it has to be stipulated in the regulations. That is because a person could be served with deportation papers and be here for a period of time.

Mr Kirkwood: Yes, and a failed asylum seeker could be served with deportation papers and go to ground. If that were the case, that person would be served with the deportation papers but their entitlement to free health care would stop.

The Chairperson: This is about getting the regulations clear and having clarity on the matter. I have heard two issues in which what happens depends on circumstances. The person will be served with the papers, and, at that point, the access stops. A few minutes later, I heard, "Oh no, it will not be when the person is served with the papers; it will be when the person leaves". So, I am asking whether the Department will consider clarifying that in the regulations. With respect to the Welsh or any other model, this is about getting our model right.

Mr Kirkwood: Yes, and I am trying to say that to be specific on that point in regulations is extremely difficult. As I say, if we said in the legislation that care was available up until the point when somebody was served their deportation papers and there was a period of, say, a couple of months until that person left the country, it would not be right for that person's entitlement to health care to stop. If it was in legislation, it would have to stop. On the other hand, if they were served with their deportation papers, causing them to go to ground and disappear because they did not want to move, the entitlement for that type of person would stop from when the deportation papers were served.

So, setting out these various scenarios in legislation really gets quite complicated, and that is why the guidance following the legislation —

The Chairperson: What will the regulations say about it?

Mr Kirkwood: Quite simply, the legislation will leave it that anybody who makes an application for asylum will be entitled to free primary and secondary health care. That will apply if they have made an application; it will not matter whether their application has been approved or turned down. So, that includes all asylum seekers. If you remember, back in 2013, it did not; it covered really only the failed asylum seekers.

The Chairperson: Does it mention deportation?

Mr Kirkwood: No. It does not mention deportation. It just says that, if they have made an application for asylum, whether or not that has been accepted, they will still have the entitlement. There has to be guidance on all the other policy issues that are being taken forward in the regulations, so the guidance covering the full set of policy changes will include the issuing of deportation papers.

The Chairperson: I think that it is important that the Committee sees the draft regulations as well.

Mr Kirkwood: The Committee will see the draft regulations. If, for example, the Committee were to be content with the policy proposals that are being taken forward today, which entitle all asylum seekers, failed or not, to free primary and secondary care and which include extending the regulations to a primary-care setting — the two issues that were a problem initially to the Health Committee — the regulations will reflect that. When the regulations are drafted, at the same time as they are laid, the Health Committee and the Examiner of Statutory Rules will get a copy of them.

The Chairperson: Is a draft not already done?

Mr Kirkwood: There is a first draft, yes.

The Chairperson: Could that be shared with the Committee?

Mr Kirkwood: It is not a finalised draft. There was no point in finalising the draft until we came to the Health Committee today and members said that they were content.

Mr Galway: The draft can be shared as soon as we have one.

The Chairperson: With respect, to allow us to fulfil our scrutiny role, we need sight of that.

Mr Galway: There is no problem. Following today, when we have a final draft, we will be happy to share it with you.

The Chairperson: OK. A final draft? Can we not get a copy of the draft as it stands? Bear in mind that this is a process that we are all engaged in.

Mr Galway: It is no problem.

The Chairperson: OK. So you will share the draft.

Mr Galway: Yes.

The Chairperson: Thank you.

Stephen, you referred to the Law Centre and the consultation, and you mentioned that it had raised a number of concerns throughout the process. Is the centre now content with the notion of a cut-off point for accessing health care? Is the centre content, effectively?

Mr Kirkwood: During discussions and consultation with the Northern Ireland Law Centre, I agreed, yes, that the centre would be fully engaged in drafting guidance. As I say, the regulations have been written in accordance with what would be acceptable to the Northern Ireland Law Centre, so the guidance will also be drafted in accordance with any comments that the centre makes.

The Chairperson: Are they content?

Mr Kirkwood: I would say that they will be content, because they will sign off the guidance.

The Chairperson: So, they will be content, but, at this point, we are not sure whether they are.

Mr Kirkwood: Not until the guidance has been drafted.

Mr Galway: On the basis of what the regulations state and of their direction, yes, the Law Centre is content.

Mr McKinney: I have two brief comments to make. Obviously, I guess that the Law Centre might be content with the process, but none of us can be content until we see the final draft. If it is appropriate, I suggest, Chair, that we reserve our view until we see the final draft so that we can then be content both with the process and the final wording.

Mr Kirkwood: Before I can finalise a draft of the regulations, the Health Committee needs to be content with the policy implementation and changes that are being taken forward. I cannot draft legislation that the Committee is not content with. We are saying here today that the legislation is providing free health care for all asylum seekers and failed asylum seekers and that that would be extended into a primary-care setting. If the Health Committee is content with those two policy proposals, as well as with the rest of the policy proposals, a draft of the legislation can be prepared and sent to the Committee.

Mr McKinney: I cannot speak for the Committee; I can speak only for myself, but I am 90% of the way there. Therefore, I would need to see the final 10%.

The Chairperson: I think that it is important to point out, Fearghal, that we received a draft of the original proposals on this very issue in October. I would expect to be able to see a draft of the revised ones now.

Mr Galway: That is not a problem, Chair. We will get you a copy.

Mr Dunne: Thank you very much, gentlemen, for your presentation. Does this mean that all asylum seekers, failed or otherwise, are now entitled to full health care in Northern Ireland?

Mr Kirkwood: Yes.

Mr Dunne: So, are they now entitled to the same privileges as citizens of Northern Ireland?

Mr Kirkwood: Correct.

Mr Dunne: Do we have any idea of the number of people who have come into Northern Ireland and had such treatment in, say, the last two years?

Mr Galway: Roughly about —

Mr Kirkwood: The figures that I have are for 2012. There were 140 asylum applications in 2012, and 52 were granted refugee status. Under the current legislation, they would have been entitled anyway. Twenty five left the jurisdiction, and 35 were refused and were in receipt of Home Office support. Under the legislation that we proposed in October, those 35 would have been entitled. Twenty eight were refused and were not in receipt of support, so under the legislation, as it is proposed to be drafted, those 28 would fall within the scope of the regulations.

Mr Dunne: Twenty eight?

Mr Kirkwood: Over a year, yes.

Mr Dunne: So, roughly 30 people.

Mr Kirkwood: Yes. It is not a big section of the public.

Mr Dunne: Is there a risk that that could increase if people came here just to get health treatment?

Mr Kirkwood: That was debated at length prior to the October proposals. In discussions with Wales, when they amended their legislation to cover all failed asylum seekers or just all asylum seekers, we found that there was not a problem with people coming across the border from England or Scotland to access health care.

Mr Dunne: There was not?

Mr Kirkwood: No.

Mr Dunne: What is the situation in England?

Mr Kirkwood: In England, all asylum seekers who have made an application are entitled, and all failed asylum seekers who are in receipt of National Asylum Support Service (NASS) support are entitled. Failed asylum seekers who are not in receipt of support have no entitlement, but the position in England is slightly different to that in Northern Ireland. To access primary care in Northern Ireland, there is the ordinarily resident test to find whether you have payment. In England, at primary-care level, there is not. In England, those failed asylum seekers could probably have access to primary care, whereas if we followed the English legislation, they would not have an entitlement here.

Mr Dunne: Yes, and they did not have, either.

Mr Kirkwood: Yes, they did not, and that is also the case with preventative measures.

Mr Dunne: What is the situation in the Republic of Ireland?

Mr Galway: In the Republic, it is not defined. It is very discretionary for asylum seekers, so there is not the same entitlement as there is here. It happens more on a discretionary basis, so, again, it is as and when it involves emergency treatment. It is not as descriptive as where we are going with blanket, open-ended care or free care for all asylum seekers; it happens on a discretionary basis.

Mr Dunne: So, the UK health service is much more accommodating.

Mr Brady: Thanks for the presentation. You have allayed Gordon's fears that we are not going to be overrun with thousands of asylum seekers. I am not normally cynical by nature until I hear about regulations and guidance. I have been dealing with the regulations coming from legislation for a long time. With guidance, the devil is in the detail, because it is often open to subjective rather than objective decisions.

That is one of the big issues with the Welfare Reform Bill. It is enabling legislation, and then you get the regulations, which you do not see, apparently, until they are in place. The guidance comes after the legislation, and that allows people in social security offices to say, "In my opinion, that guidance gives me options. I can go along with it, but it is giving me options". Therein lies the difficulty.

If you are going to make a decision that people will be entitled to health care, I think that it has to be very clearly stated and not in some sort of nebulous guidance. Maybe that is not the right word, but in many cases guidance around legislation is nebulous and lets people in certain positions think that they have the power to make those decisions, which are often subjective. So, I would have difficulty with that. If we are going to see regulations, I would like to see the Bill, and then the regulations and the guidance. That is because I do not think that we can make any kind of informed decision without being aware of all that.

Mr Kirkwood: In what way?

Mr Brady: You are going to be drafting the Bill, and the regulations will then flow from that.

Mr Kirkwood: The regulations will be drafted from the 1972 order.

Mr Brady: Right, that is OK —

Mr Kirkwood: And the —

Mr Brady: Will we then get a chance to see the guidance as well?

Mr Kirkwood: There is a certain, I suppose, importance to getting the legislation in place. The guidance will flow from the legislation.

Mr Brady: Exactly. That is my point.

Mr Kirkwood: I will certainly give you a draft copy of the legislation. There is the Persons Not Ordinarily Resident Regulations and the EU directive legislation — EC regulations 883/2004. That is all based on EU legislation. There is considerable overlap between those two pieces of legislation. There is then the primary legislation that we are talking about on the ordinarily resident test. To look at these regulations in isolation —

The Chairperson: We will fulfil that duty, as is our responsibility. We have a statutory scrutiny duty. It would be ill informed to consider that the Committee would somehow not be able to do that. We were sent the draft regulations in October, and Stephen has confirmed twice, I think, that we will get access to them. Mickey is absolutely right: it needs to be loud and clear in those regulations, and we will scrutinise them, as we did with the previous ones.

Mr Brady: It goes back to your original point, Chair. It needs to be stated very clearly in the Bill, because the guidance will flow from that. However, if you have guidance that leaves it open to interpretation and where it is not clearly stated, you will have difficulties. Unfortunately, from my experience over many years of dealing with guidance, there are so many interpretations that some of them are not always beneficial to those who should benefit. It is important to take note of that.

Mr Galway: We will take that on board. As Robert and I said, in drafting the guidance, we will liaise closely with the Northern Ireland Law Centre. Obviously, it will make sure that it is very definitive in its instructions.

Mr Beggs: Do you accept that we have a difficult balancing act to undertake here to protect public health against possible infectious diseases, meaning that we need to treat people to avoid others being infected? There is a degree of compassion for someone who is seeking asylum, but there is also a balance in acting carefully with our limited health resources and the growing waiting lists that exist in Northern Ireland.

You used the comparison with Wales. Given that our major border is with a different country — the Republic of Ireland has a completely different health system with different structures and support — do you accept that Wales may not be a good example?

Mr Galway: Possibly. The land border was one of the issues that we raised back in October last year. However, looking at the figures that Robert presented on the number of people who are actively seeking asylum and on those who are refused, we took the view that the overall scale of it was quite minimal. As you quite rightly say, where treatment is concerned, the public health element is a much more important aspect for the people of Northern Ireland. If you do not have that access to health care as an asylum seeker, you could go to ground, and it would make it more difficult for you to receive treatment, which could have a much greater impact on the overall population here.

Mr Beggs: I think that it is a difficult balancing act to try to get right. We may not be far from getting it right. However, what happens if the guesstimates are not right and a degree of health tourism arises? How would we react to such a situation?

Mr Galway: Health tourism is an issue everywhere at the moment — in England, Wales, Scotland and here.

Mr Beggs: The Republic of Ireland is where my focus is, because that is where I think we are more likely to perhaps —

Mr Galway: The Department and the board are actively aware of that. There is an access to health care team in the BSO, which was set up to look at not just the guidance and at making sure that health care service staff are fully aware of who has a right to access health care but at how they identify and manage people who are coming in who maybe do not have health care. However, the team also looks at how we identify people who are potentially accessing health care either fraudulently or illegally. The whole culture change in the health service is a bigger aspect.

Mr Beggs: My question is on asylum seekers who might come in through Dublin Airport or wherever. They might first present themselves in Belfast rather than in Dublin.

Mr Galway: That could be the case. I know that you made the point that Wales is different from us and does not have a land border with another country. People will decide whether it would be better to go to Belfast where they would have access to free health care. However, those numbers are quite low. We will be able to monitor it, and we will work closely with the UK Border Agency (UKBA). We will keep an eye on the numbers to see the impact that it is having and to see whether the overall level of people who are seeking asylum is increasing. We can monitor and manage it along with UKBA to see what impact that has.

Mr Beggs: So, if it is not right, would a separate SLR be required? How would it be adjusted if it is not right?

Mr Galway: It would depend on the overall scale. If the numbers are out by a massive amount, or if there was a huge increase in the level of people who are actively seeking asylum in Northern Ireland as opposed to the Republic because of access to health care, we would look at it. As you say, it is a balancing act. It is about trying to make sure that the scale of the increase is what we would have expected, whether there are other issues on why people are coming here or whether it is purely about health. We also have to look at the public health aspect if we did not provide free access to health care and at whether that would have a bigger impact than we would have imagined if we just restricted it to those who have applied for asylum, meaning that we would go back to the way the current legislation sits. We would not look at it on a case-by-case basis; rather, we would review the situation over one, two or three years to see the numbers who are applying for asylum.

Mr Beggs: Finally, would it subsequently require a replacement SLR, or what would be the process to make an adjustment one way or the other?

Mr Galway: As we have done with this, it would be consultation. We would go out and look at it to see the implications and proposals. If we had to develop a revised SLR, we would look at that. Again, that would only be on the basis of having identified that there was an increase that was substantial enough for us to warrant a course of action, and we would then look at it.

The Chairperson: No other member has indicated that they wish to speak. I thank you both. The Committee appreciates the response from the Department to date on this. I said in my initial comments that the Committee had raised issues about the secondary care provision and the primary, so we welcome the fact that the Department has listened and responded to that. We appreciate that. However, we need to be absolutely clear on what is in front of us now on a number of fronts, particularly in getting sight of the regulations. We need to get sight of those before we can take any more steps in that direction.

Mr Galway: OK. We will make sure that you get a copy.

The Chairperson: I appreciate that. Thank you very much.