

SL(6)320 – The National Health Service (Charges to Overseas Visitors) (Amendment) (Wales) Regulations 2023

Background and Purpose

These Regulations amend the National Health Service (Charges to Overseas Visitors) Regulations 1989 (“the Principal Regulations”), which provide for the making and recovery of charges for relevant services provided under the National Health Service (Wales) Act 2006 to overseas visitors.

Regulation 2 amends regulation 4D of the Principal Regulations, which is concerned with charges for the provision of healthcare services to individuals who have made a late application for leave to enter or remain in the United Kingdom under the European Union Settlement Scheme (“EUSS”). The amendments provide that individuals who have made such an application, but have not been granted EUSS pre-settled or settled status, must not be charged for relevant healthcare services provided to them whilst their application is under consideration, and that any charges for such services:

- If already made, must not be recovered;
- If already paid, must be repaid.

Procedure

Negative.

The Regulations were made by the Welsh Ministers before they were laid before the Senedd. The Senedd can annul the Regulations within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date they were laid before the Senedd.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

The following 3 points are identified for reporting under Standing Order 21.3 in respect of this instrument.

- 1. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.**

We note the breach of the 21-day convention (i.e. the convention that 21 days should pass between the date a “made negative” instrument is laid before the Senedd and the date the



instrument comes into force), and the explanation for the breach provided by Eluned Morgan MS, Minister for Health and Social Services, in a [letter](#) to the Llywydd dated 31 January 2023.

In particular, we note the following part of the letter:

"Regulation 4D(1) of the Principal Regulations provides that a person who makes a late application to the EU Settled Scheme ("EUSS") will not be charged for relevant services which are provided while their application is being determined. However, regulation 4D(4) of the Principal Regulations further provides that if the application is unsuccessful then they will be charged for the provision of those relevant services that were received during the period that their application was made and the date on which the application was finally determined.

Having reviewed the policy on charging of late EUSS applicants, I am of the view that the charging for treatment under Regulation 4D(4) of the Principal Regulations, of late EUSS applicants whose application is subsequently rejected, does not reflect the provisions of Article 18 of the Withdrawal Agreement ("WA") and Article 17 of the EEA EFTA Separation Agreement ("SA").

The 2023 Regulations remove the requirement to charge unsuccessful late applicants to the EUSS for NHS treatment received during the period that their application was under consideration and require that any charges for such services: if made, must not be recovered; or if paid, must be repaid.

Though discussions with the Local Health Boards indicate that no individuals in Wales have been charged or are due to be charged for treatment in this regard, the 2023 Regulations have been made urgently in order to ensure that no unnecessary charges are made (in the event that it transpires that charges are payable), and also to ensure that the Principal Regulations reflect the WA and SA."

2. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

Even though the Regulations apply prospectively, in practice they contain an element of retrospectivity.

This is because any charges which were made for NHS treatment provided to late applicants before these Regulations came into force, whose application for EUSS pre-settled or settled status is subsequently unsuccessful, cannot now be recovered as a result of the amendments made to the Principal Regulations by these Regulations. Likewise, any charges recovered for NHS treatment from applicants before these Regulations came into force must be repaid.

The following in the Explanatory Memorandum is specified as the policy justification for this retrospectivity:

"The Regulations will ensure that the Principal Regulations reflect the provisions of Article 18 of the WA [Withdrawal Agreement] and Article 17 of the SA [EEA EFTA Separation



Agreement] with regard to charging for treatment of late EUSS applicants, and to ensure that unsuccessful late applicants are afforded equal treatment to those applicants who submitted their application to the EUSS within time.”

Regardless, the following line is noted in a [letter](#) from Eluned Morgan MS, Minister for Health and Social Services, to the Llywydd dated 31 January 2023:

“...discussions with the Local Health Boards indicate that no individuals in Wales have been charged or are due to be charged for treatment in this regard...”

3. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

We note there has been no formal consultation on these Regulations. In particular, we note the following paragraph in the Explanatory Memorandum:

“There is no statutory duty to consult [...]. It is considered that the proposed amendments do not require consultation as they are implementing UK international agreements which apply to the UK as a whole and thereby Wales is obliged to implement and observe them.”

Welsh Government response

A Welsh Government response is not required.

Legal Advisers

Legislation, Justice and Constitution Committee

3 February 2023

