

Scenario

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Note. This analysis must not be treated as formal legal advice, not least because its authors are not insured to give such advice. Anyone seeking such advice should consult a solicitor.

Background

This scenario should be read alongside the more detailed legal analysis in the paper *Kidney dialysis patients seeking care in selected EU Member States following Brexit: the expected legal position under the Withdrawal Agreement and 'No Deal'*.

We wrote this scenario in the hope that it will help patients to gain a better understanding of the complex consequences of two different forms of Brexit and the impact Brexit will have on the entitlements for dialysis patients to access treatment abroad in EU MS. We designed the scenario after reading various patients' blog posts published on the Kidney Care UK Website, so as to gain an understanding of life as a dialysis patient.¹ These blog posts show dialysis patients as, on the one hand, extraordinarily resilient and courageous people, and, on the other hand, as people with the same ordinary hopes and dreams as everyone else. As dialysis patients are unable to ever take a break from treatment,² any form of travel, for any of the reasons that other people travel: to be with family, to celebrate significant life events, or just for a change from the mundane, represents a significant challenge. As things currently stand, UK-based kidney dialysis patients are able to travel abroad to the EU MS, relying on long-standing EU law and structures which support them.³

The character at the centre of this scenario (Amanda) is not a real dialysis patient. Rather, she is a composite of many real patients' experiences.

Before 31st October 2019

Dialysis patient Amanda, who lives in England, has a trip booked to Positano in Italy on the 15th October 2019 for one week. She has booked three haemodialysis treatments at institutions found on the Kidney

¹ For example, Nicola Hawkins, '(BLOG) Please Don't Take Away My EHIC Card' (*Kidney Care UK*, 2019) <<https://www.kidneycareuk.org/news-and-campaigns/news/please-dont-take-away-my-ehic-card/>>; <https://www.kidneycareuk.org/get-support/your-stories/beths-story/> accessed 17 June 2019

² Kidney Care UK, 'Briefing Paper: Dialysis Patients And Access To Free Health Care: A Special Case' (*Nhsconfed.org*) <<https://www.nhsconfed.org/-/media/Confederation/Files/public-access/European-Office/Kidney-Care-EHIC-Fact-Sheet.pdf?la=en&hash=24EA47EB08182D84E8BFB360168B3ACB98A4E468>> accessed 19 June 2019

³ Stephen Dodwell, 'Losing The Right To Access Dialysis Abroad Would Be A Kick In The Teeth' (*Nhsconfed.org*) <<https://www.nhsconfed.org/blog/2017/10/losing-the-right-to-access-dialysis-abroad-would-be-a-kick-in-the-teeth>> accessed 19 June 2019.

Care UK dialysis freedom website, recommended by other patients on the Kidney Care UK Facebook group. Britain's exit day is currently scheduled for 31st October 2019 at the latest and Amanda is worried her EHIC will no longer allow her to access Italy's health service for her planned treatments.

As things currently stand, the UK will not leave the EU until 31st October 2019. This may change, and if it does, the situation for Amanda will be as outlined below. Up until the UK actually leaves the EU, there is no doubt that reciprocal healthcare rights provided for in the EU legal framework can still be relied on. Amanda, therefore, will be able to receive her dialysis treatments through her EHIC as she does now.

After the UK has left the EU (currently 31st October 2019): patient already in EU on Exit Day, UK-EU Withdrawal Agreement agreed and in force

Amanda decides to extend her trip to Italy until 10th November 2019. She has 13 haemodialysis treatments scheduled during her trip, 4 of which fall after the UK are scheduled to have exited from the EU. She is concerned her treatments scheduled during November 2019 will not be provided for through her EHIC because it will no longer be valid after 31st October 2019.

If the UK and the EU agree the draft Withdrawal Agreement, any trips which begin before the UK's exit and extend past 31st October 2019 will continue to be covered. This is because the Withdrawal Agreement takes existing EU law and applies it to situations within the Withdrawal Agreement. Medical treatment during a trip which began before Exit Day is covered, until the person(s) return to their place of residence.⁴ This means Amanda's treatments scheduled in November 2019, and any treatments up to 31 December 2020, will be covered by her rights under the WA, which are the same as those she currently enjoys through her EHIC prior to Brexit.

After the UK has left the EU (currently 31st October 2019): patient already in Italy on Exit Day, 'No Deal' Brexit

If the Withdrawal Agreement is not ratified, Amanda's rights in Italy will be based on Italian law. Italy's 'No Deal Decree' provides for the continuation of reciprocal healthcare for all persons covered under the EU reciprocal healthcare agreement, until 31st December 2020. The 'No Deal Decree' is conditional on the UK reciprocating. If Italy recognises the provisions the UK has put in place for Italian nationals as sufficient reciprocation under the terms of the 'No Deal Decree', Amanda would be able to rely on the domestic law adopted by Italy to receive dialysis treatment in Italy during her trip, as she has done prior to Brexit.

After the UK has left the EU (currently 31st October 2019): patient goes to Spain after Exit Day, 'No Deal' Brexit

⁴ Article 31 WA translating Articles 20 and 27 of Regulation 883/2004/EC.

Amanda's sister, Gloria, resides in Alicante. Gloria's birthday is on the 17th January 2020 and Amanda would like to surprise her by coming to visit. She would like to stay for a week, therefore, would need 3 haemodialysis treatments. She is concerned that as her sister's birthday is after Britain's scheduled exit from the EU, she will be unable to receive treatment through her EHIC and therefore, be unable to go.

In a No Deal Brexit situation, Amanda's rights to dialysis in Spain will be based on Spanish law. Spanish Royal Decree-Law 5/2019 extends the right of British nationals to access state healthcare as previously enjoyed as EU citizens. Like the Italian No Deal law, it is conditional on the UK reciprocating. 17th January 2020 falls within the 21-month time limit set out in the Royal Decree. Therefore, if Spain recognises the provisions the UK has put in place for Spanish nations as sufficient reciprocation under the terms of the Decree Law, Amanda would be able to receive treatment in Alicante in January 2020. She would be able to enjoy reciprocal healthcare rights until July 2021 under current domestic legislation. Amanda is entitled to the same right to healthcare as she had using her EHIC prior to Brexit. However, the Spanish decree requires the UK to issue a document which certifies that health coverage is payable by the UK, which UK citizens can show the relevant Spanish institutions. The UK would, therefore, need to adopt a measure which meets this criterion in order for Amanda to enjoy the right to dialysis treatment as currently enjoyed prior to Brexit through the Royal Decree-Law 5/2019. The UK has not yet done so.

It is now February 2022 and Amanda's daughter is graduating from a university in Barcelona. Amanda is concerned she will not be able to attend because she will no longer be able to receive haemodialysis treatment in Spain after the UK's exit from the EU. If the UK leaves the EU by the 31st October 2019 with no deal, Amanda will only be able to enjoy the reciprocal healthcare rights extended from the UK's membership to the EU by the Royal Decree-Law 5/2019 until 30th January 2022. As things currently stand, Amanda will therefore, be unable to access her dialysis treatment through Spain's national healthcare any time after 1st February 2022 under the Royal Decree-Law.

The Royal Decree-Law 5/2019 gives the UK a 'transition period' in which to secure further and more long-standing deals with MS including Spain. By 2022, the UK may have ratified a new agreement with Spain which extends these rights. The existing Spanish legislation is a promising start and although currently has a short-time frame in which the rights can be enjoyed, indicates Spain's willingness to continue the healthcare arrangements it has with the UK. Presently however, any trip scheduled after 30th January 2022 will fall outside the timeframe provided for currently by Spanish domestic law and patients would be unable to receive dialysis treatment on the same basis as prior to Brexit.

After the UK has left the EU (currently 31st October 2019): patient goes to France after Exit Day, 'No Deal' Brexit

Amanda is planning on booking a trip to Paris to celebrate her 25th wedding anniversary on 15th March 2020. She will need one hemodialysis treatment whilst away. She is concerned that, in the case of a No Deal Brexit, she will not be able to receive the treatment through her EHIC. Unfortunately, as no domestic legislation is currently adopted in France providing for healthcare for UK nationals temporarily visiting France, Amanda will be unable to access France's medical services through her EHIC.

After the UK has left the EU (currently 31st October 2019): patient goes to Greece after Exit Day, ‘No Deal’ Brexit

It is now November 2019 and Amanda has booked a holiday to Corfu for her and her family for two weeks. She will, therefore, need a number of haemodialysis treatments whilst abroad. She is concerned after a No Deal Brexit she will no longer have the right to cross-border healthcare. Due to Law 4604/2019 adopted in Greece, UK visitors will be able to access healthcare until the end of 2019. Amanda will, therefore, be able to continue to access Greece’s healthcare service through her EHIC to have the necessary treatment for her kidney dialysis during her stay.

Amanda and her family want to take full advantage of Greece’s warmer climate so decide instead to take their holiday in July 2020. Amanda is now concerned that her treatment will no longer be covered. Unfortunately, as the holiday falls outside of the period of time awarded by Greece for the continuation of the current reciprocal healthcare agreements, extended until 31st December 2019, as things currently stand, Amanda will be unable to use her EHIC to access any treatment. The Greek Healthcare minister has the power to extend that date, so things may change.

After the UK has left the EU (currently 31st October 2019): patient goes to Ireland after Exit Day, ‘No Deal’ Brexit

Amanda wants to book a long weekend trip to Dublin. She will need one haemodialysis treatment during her stay. The trip is scheduled for 12th November until 16th November 2020. Amanda is concerned her EHIC will no longer cover her for the treatment because the UK is scheduled to have left the EU the previous month. Although the UK and Ireland have a reciprocal healthcare agreement through their membership of the EU, the UK and Ireland also have mutual arrangements which extend the right to both Irish and British citizens residing in either country for treatment during temporary visits through the Common Travel Area and the Belfast Agreement. Amanda will therefore still be able to have her treatment through the Irish health service through proof of her English residency.

After the UK has left the EU (currently 31st October 2019): patient goes to EU after Exit Day, UK-EU Withdrawal Agreement agreed and in force

If the UK and the EU agree the draft Withdrawal Agreement, the application of all EU law would continue until 31st December 2020 (although this date can be extended once).⁵

Amanda would like to meet her daughter, Clare, after her trip interrailing around Europe in Sofia, Bulgaria. Clare finishes her trip in August 2020. Amanda would need two haemodialysis treatments during her stay. If the UK ratifies the Withdrawal Agreement, Amanda would be able to receive her treatments as she does now up until the end of any trip beginning before 31st December 2020 in any EU MS. EU law would be encompassed under the Withdrawal Agreement therefore, all rules on data

⁵ An institution comprising representatives of the EU and UK, established by the WA, Article 164.

transfer and privacy will apply as they do now. Data will continue to be transferred between MS through the EESSI as well as payment for the treatment, as is currently the practice through EU membership.

Longer term if the Withdrawal Agreement is agreed, or longer term after a No Deal Brexit

After 31 December 2020, or later if the transition period is extended, under the Withdrawal Agreement, Amanda's rights will be based only on domestic law in the state Amanda wishes to visit, and on whatever future relationship(s) are negotiated between the UK and the EU, or its individual Member States.

The UK government have expressed their wishes to maintain current reciprocal healthcare agreements with EU MS enjoyed through EU membership.⁶ However, the EU's negotiating principles (which are legally binding on its negotiating team) state that a non-member "that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member".⁷ It is unclear whether the UK government will be successful in its wishes to continue the rights currently enjoyed through the reciprocal healthcare agreements in place prior to Brexit. It is also unclear whether individual EU MS will be able to negotiate reciprocal healthcare agreements with the UK, or whether the EU will negotiate these as a bloc.

⁶ Select Committee on EU, 'How Brexit Will Affects Patients In The UK - UK In A Changing Europe' (*UK in a changing Europe*, 2018) <<https://ukandeu.ac.uk/how-brexit-will-affects-patients-in-the-uk/>> accessed 13 June 2019.

⁷ Preben Aamann, 'European Council (Art. 50) Guidelines For Brexit Negotiations – Consilium' (*Consilium.europa.eu*, 2017) <<https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/>> accessed 22 June 2019.