

BETWEEN:

THE KING
(ON THE APPLICATION OF BHO)

Claimant

-and-

(1) SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE
(2) NORTH WEST ANGLIA NHS TRUST

Defendants

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Interested Party

(1) THE INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS'
RIGHTS AGREEMENTS
(2) THE ADVICE ON INDIVIDUAL RIGHTS IN EUROPE CENTRE

Intervenors

SKELETON ARGUMENT OF THE INDEPENDENT MONITORING AUTHORITY
FOR THE CITIZENS' RIGHTS AGREEMENTS

I. INTRODUCTION AND SUMMARY

1. This is the skeleton argument of the Independent Monitoring Authority for the Citizens' Rights Agreements (the "IMA"). The IMA was granted permission to intervene in the proceedings by way of written submissions by order of Mr Justice Johnson dated 2 October 2025.
2. Article 159(1) WA provides that "*the implementation and application of Part Two of the Withdrawal Agreement shall be monitored by an independent authority*" within the UK, with powers "*equivalent to those of the European Commission*" to *inter alia* receive complaints, conduct inquiries and bring legal action on behalf of EU citizens and their family members. The IMA was established to satisfy these obligations by section 15 and Schedule 2 of the European Union (Withdrawal Agreement) Act 2020 ("EU(WA)A 2020"). The IMA is impartial and operationally independent of government.
3. This skeleton argument is structured as follows:

- a. In **section II** the IMA sets out its position on Grounds 1 and 2(i) of the claim;
- b. In **section III** the IMA sets out the legal background to Ground 2(ii); and
- c. In **section IV** the IMA addresses the justifications articulated by the First Defendant (the “**Secretary of State**”) for the difference in treatment at issue in the proceedings.

II. THE IMA’S POSITION ON GROUNDS 1 AND 2(i)

- 4. The IMA does not seek to augment the parties’ positions on Ground 1 and 2(i). However, in the interests of transparency, its view is that:
 - a. **Ground 1**: a grant of status to Late Beneficiaries does not operate with *ex tunc* effect for the reasons given by the Secretary of State in paragraphs 30 – 32 of his Detailed Grounds of Resistance dated 19 August 2025 (“**DGR**”).
 - b. **Ground 2(i)**: the IMA has not to date taken the position that a person in the Claimant’s position retains her status as a worker, but it does not consider that it can add materially to the dispute between the parties on the issue.

III. GROUND 2(ii): LEGAL FRAMEWORK

(i) Relevant provisions of the WA and of EU law

- 5. Article 31 WA provides (in relevant part):

“1. The rules and objectives set out in Article 48 TFEU, Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council shall apply to the persons covered by this Title.

...

2. By way of derogation from Article 9 of this Agreement, for the purposes of this Title, the definitions in Article 1 of Regulation (EC) No 883/2004 shall apply.

....”

- 6. The personal scope of Title III is set out in Article 30 WA and is separate to and differs from the personal scope of Title II (residence rights). Article 30 WA provides:

“Article 30 Persons covered

1. This Title shall apply to the following persons:

(a) Union citizens who are subject to the legislation of the United Kingdom at the end of the transition period, as well as their family members and survivors;

...”

7. Regulation 883/2004 does not set up a common scheme of social security. Instead, it is a measure that co-ordinates different national social security schemes (e.g., C-140/12 *Pensionsversicherungsanhalt v Brey* [2014] 1 WLR 1080, “**Brey**”, paragraph 43). It aims to prevent the potential negative consequences that the free movement of workers might have on their and their families’ access to social security benefits. In particular, it seeks to avoid problems that could arise if a person were subject to overlapping social security systems or left “...without social security coverage because there is no legislation which is applicable to them” (*Brey*, paragraph 40; C-308/14 *Commission v United Kingdom* [2016] 1 WLR 5049 (“**Commission v UK**”), paragraph 32).
8. Regulation 883/2004 applies to certain branches of “social security”. Social security is a term of art in EU law and refers to a subset of benefits that are (C-679/16, *A (Assistance for a disabled person)* EU:C:2018:601, paragraph 32):

“...granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it relates to one of the risks expressly listed in Article 3(1) of Regulation No 883/2004.”
9. The Secretary of State has reserved his position on whether publicly funded healthcare constitutes a sickness benefit for the purposes of Regulation 883/2004 (DGR, fn 7). The IMA does not see any reasonable argument to the contrary:
 - a. A social security benefit within the meaning of Regulation 883/2004 may be provided “*in kind*”: Article 1(va) of Regulation 883/2004;
 - b. A benefit is provided “*in kind*” in relation to *inter alia* sickness benefits where it is “*intended to supply, make available, pay directly or reimburse the cost of medical care...*” (Article 1(va) of Regulation 883/2004);
 - c. The aim of “*sickness benefits*” is the patient’s recovery by securing the care which his or her condition requires and thus they cover the risk connected to ill health (C-502/01 and C-31/02 *Gaumain-Cerri and Barth*, paragraph 21; C-503/09 *Stewart*, paragraph 37);
 - d. Publicly funded healthcare is a “*benefit in kind*” that relates to the “*risk*” of “*sickness*”: Article 1(a) Regulation 883/2004. It is conferred without any individual and discretionary assessment of personal needs, as it is free of charge unless specific provision is made by law for the recovery of charges: section 1(4) of the NHS Act 2006 (the “**2006 Act**”); and

- e. Publicly funded healthcare is conferred on a legally defined basis in the UK, namely, pursuant to section 1 of the 2006 Act.
10. As the Secretary of State notes, the CJEU has recognised that the provision of publicly funded healthcare is a sickness benefit in kind: C-535/19 *A v Latvijas Republikas Veselibas ministrija* [2022] 1 CMLR 25 (“*Veselības I*”), paragraphs 35 – 38. The Court is obliged to have due regard to that judgment: Article 4(5) WA. Moreover, the importance of that general obligation is particularly pronounced in relation to the social security provisions of the WA. Article 36 WA makes clear that these provisions are intended to remain dynamically aligned with EU law, such that references to Regulation 883/2004 and its implementing regulation must be understood as referring to those instruments as amended by the EU after the conclusion of the WA. It would be inconsistent with the parties’ intention to maintain dynamic alignment for the UK to adopt an interpretation of these provisions that diverges from that of the CJEU.

(ii) **The difference in treatment requiring justification**

11. Article 4 of Regulation 883/2004 establishes a guarantee of equality of treatment under different national legislative regimes:

“Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof”.

12. The imposition of a charge on EU citizens who have not regularised their status in the UK gives rise to a difference in treatment between British nationals and non-British nationals. A host state which requires nationals of other Member States to demonstrate lawful residence for social benefits will commit indirect discrimination: *Commission v UK*, paragraphs 76 – 77. The difference in treatment in this case arises because a British citizen has an automatic right of abode in the UK by virtue of his/her nationality, but a non-UK national is required, for the most part,¹ to obtain a right to reside in the UK. The non-UK national is, accordingly, subject to an additional requirement in order to obtain access to sickness benefits in the UK.
13. However, the discrimination is indirect rather than direct because not all UK nationals will have access to free sickness benefits in the UK. This is because not all UK nationals

¹ For example, Irish citizens do not require leave to enter or remain in the UK: section 3ZA of the Immigration Act 1971.

will be able to establish ordinary residence in the UK (*R (Patmalniece) v Secretary of State for Work and Pensions* [2011] 1 WLR 783, paragraphs 28, 33, and 92).

IV. GROUND 2(ii): JUSTIFICATION

14. The Secretary of State accepts that the NHS charging regime gives rise to indirect discrimination against AK, the Claimant's daughter. It follows that it is incumbent on the Secretary of State to establish that the discrimination is justified.

15. The test for justification in this context was restated by the CJEU in *Commission v UK* as follows (paragraph 79):

“In order to be justified, such indirect discrimination must be appropriate for securing the attainment of a legitimate objective and cannot go beyond what is necessary to attain that objective”

16. Four justifications are advanced in the DGR (paragraph 61) and accompanying witness evidence for the difference in treatment at issue in this claim:

- a. It is consistent with and seeks to promote and ensure the integrity of the constitutive system.
- b. It promotes fairness of the immigration system by recognising the individual responsibility to obtain relevant and necessary status, and the consequences for not doing so.
- c. It supports the financial and long-term sustainability of the NHS to make and recover costs from those not ordinarily resident or exempt from charge.
- d. It provides for an effective legal and administrative framework which is clear and unambiguous for the purpose of recovery of costs from those who are ineligible for free NHS treatment.

(i) Promote and ensure integrity of the constitutive scheme

17. The Secretary of State argues that charging Late Beneficiaries for NHS treatment provided between the end of free movement in the UK and the late application is consistent with, and seeks to promote and ensure the integrity of, the constitutive scheme that the UK has chosen to implement, which requires the EU citizen in question to obtain their new status through an application to the relevant authorities (DGR, paragraph 61(a), Haithwaite 1, paragraph 49).

18. On balance, the IMA accepts that the promotion of, and protection of the integrity of the EUSS is, in principle, a legitimate aim that is capable of justifying a difference in treatment. However, this issue is far from straightforward, and there is no direct

authority in EU law on this point. This is because, under EU law, there is no situation in which an EU citizen will be denied access to social security because they do not have a right of residence by reason of a failure to make an application.² Nor is there any equivalent in EU law to the position of a Late Beneficiary, i.e., a person who makes the same application late. The Court is accordingly tasked with interpreting the equal treatment guarantee in Regulation 883/2004 in accordance with the methods and general principles of EU law and in conformity with the relevant case law of the CJEU,³ notwithstanding the fact that the issue in these proceedings would not arise in EU law.

19. The closest analogy in the case law is to the position of an EU citizen who lives in another Member State but does not have a right to reside there under EU law because they do not comply with the conditions for obtaining a right to reside in EU law (e.g., because they are not compliant with the conditions of Directive 2004/38 (the Citizens Rights Directive, or “**CRD**”)⁴ that give rise to a right of residence, such as being a worker, self-employed, or self-sufficient, referred to hereafter as being “**economically active**”). A person who is not economically active may be refused social security benefits in EU law, notwithstanding the fact that they are in scope of Article 11 of Regulation 883/2004. The leading authority on this point is *Commission v UK*.
20. In *Commission v UK* the legislation at issue required that an applicant be “*in Great Britain*” in order to make a claim for the relevant benefit.⁵ Pursuant to secondary legislation, a person was not to be treated as being in Great Britain if he did not have a right to reside in the UK.⁶ As EU law (in broad terms) confers a right to reside in another Member State on those who are economically active, the effect of the eligibility criteria was to preclude claims from EU citizens who were not economically active in the UK. By Article 11(3)(e) of Regulation 883/2004, an economically inactive person is subject to the legislation of the Member State in which they are habitually resident (the term having an autonomous meaning in EU law: Article 1(j)). Accordingly, the UK rule precluded claims from EU citizens who were not economically active in the UK

² Although Member States may require EU citizens who reside in their area for more than three months to register with the relevant authorities, documents produced pursuant to registration are declaratory, and not constitutive of rights in EU law and merely serve to attest existing rights conferred directly under EU law: CRD, Article 8(1) – (2), Case C-215/03 *Oulane* [2005] ECR-I-1215, [17] – [18].

³ Article 4(3) – (4) WA.

⁴ Articles 6 – 7 CRD.

⁵ Section 146 of the 1992 Act (child benefit); section 3(3) of the Tax Credits Act 2002 (tax credit).

⁶ Regulation 23(4) of the Child Benefit (General) Regulations 2006 (child benefit); regulation 3(4) of the Tax Credits (Residence) Regulations 2003 (tax credit).

notwithstanding the fact that under Regulation 883/2004 that cohort was subject to the social security rules of the UK.

21. The CJEU agreed that the provision gave rise to unequal treatment between UK nationals and nationals of other Member States, as UK nationals were more likely to satisfy a requirement that they be habitually resident in the UK than nationals of other Member States (paragraph 78). Accordingly, the measure required justification.
22. The CJEU concluded that the measure was justified on the basis of the need to protect public finances in light of the consequences of a grant of a social benefit for the overall level of assistance accorded by the state:

“In that regard, it is clear from the Court’s case-law that the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active, as such grant could have consequences for the overall level of assistance which may be accorded by that State ...”

23. As a matter of principle, the IMA accepts that the aim of promoting and ensuring the integrity of the EUSS is capable of constituting a legitimate aim of a discriminatory measure. This is for two principal reasons.
24. **First**, the UK is entitled to require an application to the EUSS as a condition for the conferral of rights under Part Two, Title II of the WA (subject to the terms of the WA). Where the host state elects to adopt such a system, it follows that the system should operate effectively and in a manner that provides legal certainty for citizens, economic operators and the state. The significance of maintaining the integrity of such a system cannot be underestimated, especially in a context where there are (in the UK) approximately 6 million holders of such a residence document who rely on its effectiveness and legal protections it provides.
25. **Second**, just as the rights granted by Regulation 883/2004 are intended to facilitate and protect the exercise of free movement rights by EU citizens, it can be inferred that the purpose of Part Two, Title III WA is to facilitate and protect the exercise by Union citizens of their rights under Part 2 of the WA. The consequence of the relationship between Regulation 883/2004 and rights of free movement were described by AG Cruz Villalón in *Commission v UK* in the following terms:

“70. ... the purpose of Regulation No 883/2004 is very closely connected with the fundamental right to free movement enjoyed by Union citizens ... Consequently, the rights granted by Regulation No 883/2004 are intended to

guarantee freedom of movement and residence for Union citizens, subject to the legal conditions on which that freedom is granted.

...

73. ... the EU legal order could hardly consist of a multiplicity of entirely separate compartments. This is particularly true in the case of two rules of EU law as closely linked as those at issue in this case. If, as I have just indicated, EU law subjects the exercise of freedom of movement and residence to certain limitations and conditions, embodied in particular in Directive 2004/38, it seems clear that the provisions of Regulation No 883/2004 cannot be interpreted in such a way as to neutralise the conditions and limitations accompanying the grant and proclamation of that freedom. In a word, an interpretation has to be sought that will, to the greatest possible extent, promote Union citizenship and Union citizens' freedom of movement and residence, while at the same time having regard to the objectives purposed by both those legal acts and the provisions thereof."

26. The CJEU has made a similar point in the context of healthcare, namely, that it is a condition of EU law that economically inactive citizens wishing to reside in another Member State must have comprehensive sickness insurance, and that this condition for lawful residence would be rendered redundant if the host Member State were obliged by Regulation 883/2004 to affiliate the economically inactive EU citizen to its healthcare system free of charge (*Veselibas I*, paragraphs 55 – 56).
27. By analogy, an interpretation of Regulation 883/2004, as made applicable by Title III WA, must be sought that is consistent with, and promotes the rights guaranteed by Part 2 WA, subject to the provisions of Part 2 WA. The rights in Part 2, Title II WA can be made subject (and in the UK, have been made subject) to a requirement that an individual makes an application in order to avail of them. Accordingly, in the context of the justification of discrimination under the equal treatment provisions of Title III, ensuring the integrity of the EUSS scheme may be considered a legitimate objective of a measure that gives rise to a difference in treatment between those who have made an application, and those who have not.
28. However, IMA retains some reservations in this respect. It is correct that the UK is entitled to require an application under the WA and ensuring the integrity of that system contributes to the aim of the WA to provide legal certainty to citizens.⁷ This must be balanced against the clear objectives of the WA and the shared intention of the contracting parties to ensure reciprocal protection for EU citizens who had chosen to

⁷ Preamble to the WA, paragraph 7.

make their lives in the UK, and for UK citizens who had done likewise in the EU, prior to Brexit. This objective underpins the provisions of the WA; while the UK may require individuals to make an application under the WA, that requirement remains subject to the terms and limitations of the WA itself. In particular, Article 18(1)(d) WA obliges host states that operate a constitutive system to accept late applications where there are reasonable grounds for the delay. Article 18(1)(o) requires the host state to help applicants to establish their eligibility and to avoid any errors or omissions in their applications. Accordingly, the objective of protecting the integrity of the EUSS must be understood in light of the UK's obligations under the WA, including to accept late applications in defined circumstances, and to assist applicants to establish their status under the WA. That too forms part of the scheme that must be respected and upheld.

29. Further, the IMA has reservations as to whether the measure goes no further than is necessary to achieve the legitimate aim it pursues, i.e., whether it is proportionate. The consequences for those affected, particularly Late Beneficiaries, of being liable for NHS charges may be severe. By definition, Late Beneficiaries will each have had good reason for submitting a late application. In such circumstances, the outcome may be the imposition of a substantial healthcare bill. It is also readily conceivable that individuals who were unaware of the need to apply, or who were unable to do so within the prescribed time, did not appreciate the consequences of accessing NHS care before submitting their late application.
30. In the context of articulating these reservations, the IMA is cognisant that it has previously expressed the view that the recovery of NHS charges from late applicants in respect of the period between the expiry of the grace period and the making of an application to the EUSS was compatible with the WA (Haithwaite 1, paragraph 37 – 44). It is accurate that this was the IMA's position at the time of the correspondence and of the statement referred to and exhibited by Mr Haithwaite. The IMA has reflected further on the point in light of these proceedings and, in particular, Article 31 and the provisions of Regulation 883/2004 made applicable by Part 2, Title III WA (as opposed to its previous consideration of the point, which was focused on the question of whether the grant of status to a Late Beneficiary operates with *ex tunc* effect: the IMA's position remains that it does not). The reservations set out above reflect the IMA's view having considered how the equal treatment obligation made applicable by Article 31 applies to the facts of this, and similar cases. The IMA's organisational values reflect its

independence, transparency in its decision-making and the impartiality of its decision-making. These principles are reflected in a readiness to review and, where appropriate, reconsider previous positions in light of new evidence or information.

On balance, the IMA considers that the discrimination may be justified as a means of promoting and maintaining the integrity of the EUSS, though this is a finely balanced judgment. The UK was entitled to adopt a constitutive scheme under the WA, and the IMA accepts that allowing individuals who have not applied to the scheme to access free NHS treatment could undermine its integrity. At the same time, this approach means that certain individuals who have valid reasons for applying late will be liable for NHS charges for the period before their application was submitted, and the consequences for those individuals could be significant. While the measure serves to emphasise the importance of submitting applications promptly, including for those yet to make a late application, the justification for these impacts must be weighed carefully against the potential hardship imposed on EU citizens. On this basis, the IMA considers that the measure may be justified by the need to protect the integrity of the UK's constitutive scheme, while emphasising that the matter is finely balanced and a different conclusion could reasonably be reached.

(ii) **To ensure fairness in the immigration system**

31. The Defendant's second justification for the indirect discrimination is to ensure fairness in the immigration system and to promote individual responsibility for regularising immigration status (DGR, paragraphs 61(b); Haithwaite 1, paragraph 51(c)).
32. The IMA is not aware of CJEU authority to the effect that the aim of promoting fairness in the immigration system and encouraging immigrants to regularise their status is, in itself, a legitimate aim capable of justifying a discriminatory measure in EU law. That is not surprising: in the law of free movement EU nationals are not subject to regular immigration control or work control systems that apply to third country nationals. Member States cannot impose ordinary visa obligations on the nationals of other Member States. Even where a Member State seeks to impose domestic immigration law to the position of a third-country national, domestic immigration law must give way to

EU law where the rights of an EU national require it.⁸ Accordingly, it is difficult to imagine as a matter of EU law that the rights of EU law nationals could be subordinated to the objective of encouraging non-EU nationals to regularise their immigration status.

33. It could be contended that one of the objectives of the WA was to allow the UK to assert control over its immigration system, and that this objective may be inferred from the WA, notwithstanding that it would not constitute a legitimate aim under the law of free movement. However, similar to EU law, the WA grants certain EU nationals a privileged status, and one of its principal objectives is to protect that status. It is therefore somewhat at odds with the WA to suggest that EU citizens could be used instrumentally to create wider incentives for other immigrants.

34. It is, in any event, questionable whether the measure is suitable to achieve this objective, or whether it can be regarded as proportionate, given:

- a. for a person who is unlawfully present in the UK, the primary incentive to regularise their status is the personal consequences of lacking lawful status, rather than the impact on other migrants of being in the same position. Accordingly, the extent to which the treatment of EU nationals could meaningfully influence the behaviour of non-EU migrants is doubtful; and
- b. the severity of the consequences for individual EU citizens: see paragraph 29.

35. Having regard to the above, the IMA is not persuaded that the justification adequately supports the identified discrimination.

(iii) **Financial and long-term sustainability of the NHS and to enable the planning of a comprehensive healthcare system**

36. The next category of justifications advanced by the Secretary of State for the difference in treatment concerns the operation of the healthcare system. The first argument in this category is that the difference in treatment supports the financial and long-term sustainability of the NHS to make and recover costs from those not ordinarily resident, nor exempt from charge (DGR, paragraph 61; Haithwaite 1, paragraph 51(b)).

⁸ See e.g., 370/90 *Surinder Singh*, by which the CJEU held that the UK was obliged to grant leave to enter and remain to the third-country national spouse of a British national who exercised free movement rights and subsequently returned to the UK, notwithstanding domestic immigration laws to the contrary.

37. Although it is correct that financial considerations have been found to be relevant to justifying a difference in treatment, the mere protection of a state's finances is not, of itself, a legitimate aim capable of justifying discrimination. The standard articulated by the CJEU imposes a higher threshold:

- a. In *Commission v UK* the Court articulated the legitimate aim of the measure as “... *the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active, as such grant could have consequences for the overall level of assistance which may be accorded by that State.*” (paragraph 80).
- b. In *C-243/19 A v Veselibas Ministrija* [2021] 2 CMLR 2 (“*Veselibas II*”) (discussed further, below) the Court determined that “...*the possible risk of seriously undermining the financial balance of a social security system may constitute a legitimate objective capable of justifying a difference in treatment*” (paragraph 47) (emphasis added).

38. Accordingly, while financial considerations may be relevant in assessing justification, the mere existence of a financial impact, or the desirability of reducing expenditure, cannot on its own constitute a legitimate aim capable of justifying differential treatment. This is for good reason: extending access to benefits will naturally entail additional cost to the host state. Something more substantial is required to justify discrimination.

39. In this case, on any view, the cohort of potential additional beneficiaries would be “*relatively small*” (Haithwaite 1, paragraph 51(a)). There is no suggestion that providing free NHS care to either (i) those who have failed to regularise their status, or (ii) Late Beneficiaries (as a subset of the cohort) would give rise to a serious risk to the financial sustainability of the NHS. Even taking the midpoint of the range proposed by the Secretary of State (which relates to all EU citizens who have failed to regularise their status, and which Mr Haithwaite accepts is “*subject to substantial uncertainty*”) the cost of providing free NHS treatment to ineligible EU nationals would amount to 0.06% of the total DHSC budget for 2023/24.⁹ There is no suggestion by the Secretary of State that this would give rise to a serious risk to the financial sustainability of the NHS, and any such argument would not be sustainable on the figures.

⁹ <https://www.gov.uk/government/publications/dhsc-annual-report-and-accounts-2023-to-2024>.

40. Although Mr Haithwaite refers to the idea that NHS charging ensures that “*everyone is making a fair contribution*” to the NHS, the measure does not, in fact, distinguish between those who make a contribution (i.e., through taxation) and those who are required to pay NHS charges. If BHO were in full-time employment,¹⁰ but the facts of the case were otherwise the same, she would nonetheless be charged for AK’s NHS treatment, notwithstanding the fact that she was making contributions to the tax base of the UK. The measure as implemented does not distinguish between families who are contributing through work and those who are not. As such, the measure is inapt to meet the objective of ensuring that everyone contributes to the NHS.
41. For those reasons, the IMA does not regard the discrimination as justifiable on the grounds of protecting the long-term sustainability of the NHS.
42. The Secretary of State’s alternative argument under this heading is that charging EU citizens without status under the EUSS serves to enable planning and design of the healthcare service in accordance with the Secretary of State’s duties under the NHS Act (DGR, paragraph 61; Haithwaite 1, paragraph 51(a)). In short, although the cohort of EU citizens who have “*failed to regularise their status*” is expected to be small, it is an unknown and unknowable cohort, unless those people are charged for NHS care, it is said that it would “*become more difficult*” for the Secretary of State to plan for and promote a comprehensive health service (Haithwaite 1, paragraph 51(a)).
43. The Secretary of State places reliance on *Veselibas II* for the proposition that that the maintenance of a balanced medical and hospital service open to all is a further legitimate aim capable of justifying a difference in treatment. In *Veselibas II* the CJEU considered whether a refusal by the Latvian authorities to provide a certificate authorising and reimbursing the treatment of a Latvian national’s son in Poland under Article 20 of Regulation 883/2004 was lawful. The Latvian authorities had declined to authorise the treatment because equivalent treatment was available in Latvia, albeit on terms that were against the Latvian national’s religious beliefs.
44. The CJEU determined that the risks of seriously undermining the financial balance of a social security system, and the objective of maintaining a balanced medical and hospital

¹⁰ For example, if BHO had been in employment prior to the end of the transition period and remained in that job since, as employers in the UK were not responsible for ensuring that their EU national employees had applied to the EUSS, and were not obliged to undertake retrospective right to work checks on individuals employed prior to 30 June 2021: Home Office guidance “*Right to work checks: employing EU, EEA and Swiss citizens*”, 10 June 2021; last updated 6 August 2021.

service open to all could constitute legitimate objectives capable of justifying discrimination:

“47. Consequently, it cannot be excluded that the possible risk of seriously undermining the financial balance of a social security system may constitute a legitimate objective capable of justifying a difference in treatment based on religion. The objective of maintaining a balanced medical and hospital service open to all may also fall within the derogations on grounds of public health in so far as it contributes to the attainment of a high level of health protection (see, by analogy, in the area of freedom to provide services, judgment of 5 October 2010, Elchinov, C-173/09, EU:C:2010:581, paragraph 42 and the case-law cited.”

45. The CJEU noted submissions to the effect that national health systems may have a large number of requests for authorisation to receive cross-border healthcare that is based on religious belief rather than on “*the insured person’s medical situation*” (i.e., strict medical necessity) (paragraph 51). The CJEU accepted that a requirement to take the insured person’s religious beliefs into account in deciding whether to authorise and reimburse cross-border care would (paragraph 52) “*...given their unpredictability and potential scale, be capable of entailing a risk in relation to the need to protect the financial stability of the health insurance system*” (paragraph 52) and the resulting financial burden would be “*difficult to foresee and likely to entail a risk to the financial stability of the health insurance system*” (paragraph 54).
46. Other than establishing the legitimate aim relied on by the Secretary of State, the IMA does not consider that *Veselibas II* assists in the Secretary of State in these proceedings.
47. **First**, although the number of EU nationals who have failed to regularise their position is, to some extent, “*unknowable*”, it is unlikely to be comparable in scale to the challenge that would face Member States if required to accommodate claims for cross-border treatment on the basis that domestic treatment conflicts with the religious beliefs of the claimant. For this reason, *Veselibas II* is remote from the facts of this case.
48. **Second**, the UK Government’s aim was for all those eligible to apply and secure their status. Given that objective, the sensible approach was to plan on the assumption that all eligible EU citizens (some of whom would be Late Beneficiaries) would apply and successfully obtain status under the EUSS.
49. For that reason, while the desire to plan for and provide a balanced medical and hospital service may constitute a legitimate aim of a difference in treatment, the impact of the discrimination is not proportionate to that aim in this case given (i) the very small nature

of the cohort and so, the minimal consequences for the planning of the healthcare system in the UK if this cohort are eligible for free care, (ii) the relatively modest sums at stake, and (iii) the significant impact on individuals who may be charged for NHS treatment.

50. Accordingly, the IMA takes the view that this proposed justification is insufficient to justify the discrimination at issue.

(iv) **An effective legal and administrative framework which is clear and unambiguous for charge recovery**

51. The final justification advanced by the Secretary of State is that the measure provides for an effective legal and administrative framework which is clear and unambiguous for the purpose of recovery of costs from individuals who are not eligible for NHS treatment without charge (Haithwaite 1, paragraph 51(d)).

52. This is not a persuasive justification. A legal and administrative framework will be clearest and so, in a sense, be most effective if it makes bold distinctions between different groups of people. But the true question is whether the distinctions the framework makes are lawful or not. A rule that no EU citizen may have access to free NHS care would be maximally clear, unambiguous and easy to implement. But such a rule would not be lawful, because it would breach the WA.

V. **CONCLUSION**

53. For the reasons set out above, the IMA considers that the indirect discrimination that arises in this case may be justified by reference to the legitimate aim of promoting and ensuring the integrity of the constitutive scheme implemented by the UK, but not by reference to the alternative justifications advanced by the Secretary of State.

54. However, the IMA recognises the difficulties in applying CJEU case law to the position in these proceedings, particularly by reference to the first justification advanced by the Secretary of State in relation to the need to promote and ensure the integrity of the constitutive scheme. Accordingly, to the extent that the Court considered it desirable to request a preliminary ruling from the CJEU, the IMA would support the making of a reference.

CLÍODHNA KELLEHER

Monckton Chambers

5 November 2025