Neutral Citation Number: [2026] EWHC 517 (Admin)

Case No: AC-2025-LON-000462

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 March 2026

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS

- -

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-	
(1) THE INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS **(2) THE ADVICE ON INDIVIDUAL RIGHTS IN EUROPE CENTRE**	**Interveners**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

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Jamie Burton KC & Eva Doerr (instructed by **Public Law Project**) for the **Claimant**
Sir James Eadie KC, Emma Mockford & Aarushi Sahore (instructed by **Government Legal Department**) for the **First Defendant**
Miranda Butler (instructed by **Capsticks)** for the **Second Defendant**
Clíodhna Kelleher (instructed b**y the IMA Legal Directorate)** for the **First Intervener**
Aidan O'Neill KC & Sam Fowles (instructed by **Freshfields LLP)** for the **Second Intervener**

Hearing dates: 17 & 18 December 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 10 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Heather Williams:

Introduction

1. The Claimant alleges that The National Health Service (Charges to Overseas Visitors) Regulations 2015, as amended (the "**NHS Charging Regulations**") breach the "Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community" (the "**WA**") in the way the NHS charging regime is applied to those who obtained residence status pursuant to Article 18.1 WA on the basis of an application that was submitted late but nevertheless accepted as there were reasonable grounds for missing the deadline (the "**Late Beneficiaries**"). Subject to certain exemptions, the NHS Charging Regulations require Late Beneficiaries to pay for medical treatment provided by the NHS in the period between the expiration of the application deadline and the date when they made their successful application.

2. The Claimant also contends that the "Guidance for NHS service providers on charging overseas visitors in England" dated 24 December 2024 (the "**NHS Charging Guidance**") issued by the First Defendant ("**D1**") breaches the WA. However, the NHS Charging Guidance reflects the NHS Charging Regulations and no free-standing issue arises in respect of the guidance. Accordingly, I will focus on the regulations rather than the guidance.

3. The Claimant and AK are Latvian nationals. The Claimant has resided in the United Kingdom ("**UK**") since 2014 and AK has done so since 2017. In reliance on the NHS Charging Regulations, the Second Defendant ("**D2**") imposed charges on the Claimant for medical treatment received by her daughter ("**AK**") between 25 January 2022 and 21 March 2023, a period when AK did not have residence status pursuant to Article 18.1 WA, nor a pending application to obtain this status. Her late application made on 21 March 2023 was granted on 29 June 2023.

4. As identified in her Statement of Facts and Grounds ("**SFG**") and in her skeleton argument, the Claimant's grounds rely on the way that the NHS Charging Regulations treat those who obtain residence status under the UK's EU Settlement Scheme ("**EUSS**") following a successful late application. However, at the hearing Mr Burton KC clarified that his arguments were confined to the narrower cohort of those who meet the requirements of Article 18.1 WA (residing in the territory in accordance with the conditions set out in Title II, Part 2), rather than all those who make successful late applications under the more generous terms of the EUSS.

5. There is no dispute that the Claimant falls to be charged the sum of £1,988.50 if the terms of the NHS Charging Regulations apply; the challenge is to their compatibility with the WA. The Claimant relies upon two grounds. Ground 2(i) is no longer pursued; accordingly, I will refer to what was formerly Ground 2(ii) as Ground 2. The Claimant argues that the NHS charges imposed for her daughter's treatment were unlawful because:

    i) Ground 1: Once AK was granted residence status pursuant to Article 18.1 WA, this had *ex tunc* effect starting from when the period of free movement that is to be preserved began. In AK's case this is from Implementation Period Completion Day ("**IPCD**"), when the transition period ended at 11pm on 31

December 2020. Failing to treat her new residence status conferred by Article 18.1 as having retrospective effect, so that her pre-application residence is rendered lawful, is a breach of Title II of Part 2 WA; and /or

ii) Ground 2: Charging the Claimant for AK's NHS treatment is in breach of AK's right to equal treatment with UK nationals in relation to a "sickness benefit in kind" pursuant to Title III of Part 2 WA (social security coordination) and Article 4 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems ("**Reg 883/2004**").

6. As regards Ground 1, D1 argues that the residence rights granted pursuant to Article 18.1 WA are conferred prospectively once an application is granted, because the making of a successful application is itself a condition of lawful residence under an Article 18.1 constitutive scheme. In relation to Ground 2, D1 accepts that the provisions under which the Claimant has been charged for AK's treatment give rise to a difference in treatment engaging Article 4 Reg 883/2004, but he contends that the difference in treatment is objectively justified for four reasons, primarily to promote and ensure the integrity of the constitutive scheme and to protect the limited resources of the NHS and enable planning of the healthcare system.

7. D2 has adopted a neutral position in relation to these matters, simply maintaining that the terms of the NHS Charging Regulations required the Trust to impose the charges in relation to AK's treatment.

8. Accordingly, the issues for the Court are:

i) Does residence status granted pursuant to Article 18.1 WA have retrospective (*ex tunc*) effect such that the Late Beneficiaries' pre-application residence is rendered lawful under the WA;

ii) Is the indirect discrimination under Articles 30 / 31 WA and Reg 883/2004 regarding the charging for AK's treatment objectively justified;

iii) Should the Court make a reference for a preliminary ruling from the Court of Justice of the European Union ("**CJEU**") pursuant to Article 158 WA in relation to either or both of those issues?

9. By his order of 24 June 2025, Swift J granted permission to apply for judicial review. He also ordered that the Claimant was to be referred to in these proceedings as BHO and there should be no publication of her identity as a party to these proceedings or of any matter likely to lead to her identification as a party to these proceedings. By order of 17 December 2025, I made a similar withholding order in relation to the Claimant's daughter, who has been referred to in the parties' documentation as AK.

10. By his order of 2 October 2025, Johnson J granted the First and Second Interveners permission to intervene by way of written (but not oral) submissions.

11. The First Intervener, the Independent Monitoring Authority for the Citizen's Rights Agreements (the "**IMA**"), was established by Article 159(1) WA to monitor the implementation of Part 2 of the WA. Section 15 of and Schedule 2 to the European

Union (Withdrawal Agreement) Act 2020 (the "**2020 Act**") gives the IMA the power to intervene in legal proceedings.

12. The IMA has not made specific submissions on Ground 1, as it considers that the grant of residence status to Late Beneficiaries does not operate with *ex tunc* effect for the reasons identified by D1. However, the IMA has made detailed written submissions in relation to Ground 2. It 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 D1. The written submissions also indicate that to the extent the Court considers it desirable to request a preliminary ruling from the CJEU, the IMA supports that course.

13. The Advice on Individual Rights in Europe Centre (the "**AIRE Centre**") is a charity and specialist law centre concerned with the provision of advice, litigation support and policy. Its expertise includes advising on the interaction of EU, UK and EU-retained law on questions of free movement, UK residence, benefits and social assistance. The AIRE Centre's submission addresses the Ground 1 issue from the perspective of: (i) the right to respect for human dignity provided for by Article 2 of the Treaty on European Union ("**TEU**") and Article 1 of the Charter of Fundamental Rights ("**CFR**"); (ii) the right to family union under Articles 7 and 34 CFR; and (iii) the rights of children under the European Social Charter.

14. By his order of 12 November 2025, Sweeting J refused the Claimant's application to rely upon a Reply Submission dated 30 September 2025 and related supporting evidence, as this was a late attempt to expand her grounds to include arguments based on significantly wider discriminatory effects than the challenge articulated in Ground 2 and, consequently, it was likely to prejudice the hearing date and the Defendants' preparation. By my order of 15 December 2025, I refused the Claimant's application to vary this aspect of Sweeting J's order, as it was in substance an application to reverse the effect of his order and there had been no material change of circumstances.

15. The following witness evidence was before the Court at the December 2025 hearing:

    i) Three statements made by the Claimant on 10 February, 26 February and 30 September 2025;

    ii) A statement dated 12 February 2025 made by Niamh Grahame, who was then the Claimant's solicitor at the Public Law Project;

    iii) A statement dated 30 September 2025 made by Aoife O'Reilly, the Claimant's current solicitor at the Public Law Project;

    iv) A statement made by Kezia Tobin, Head of Policy and Advocacy of the3million, dated 10 February 2025;

    v) A statement dated 17 September 2025 made by Matthew Evans, Director of the AIRE Centre; and

    vi) A statement dated 19 August 2025 made by Benjamin Haithwaite, Policy Manager at D1.

I have had regard to all of this evidence.

16. I have been greatly assisted by the written and oral submissions of all counsel, for which I am grateful.

17. The structure of this judgment is as follows:

The circumstances giving rise to the claim

18. The Claimant is a Latvian national born in September 1987. Her daughter, AK, was born in February 2010 and she is also a Latvian national.

19. The Claimant entered the UK in 2014 in the exercise of her EU free movement rights as a worker. AK joined her in the UK in 2017, also in the exercise of her free movement rights as BHO's direct "family member".

20. The Claimant applied for settled status under the EUSS, which she was granted in October 2019 under Article 16 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (the "**CRD**"), as she had been living and working in the UK for five years by this stage.

21. BHO made an in-time EUSS application for AK. A Certificate of Application was issued on 28 June 2021. The Secretary of State for the Home Department ("**SSHD**") refused this application on the basis that no birth certificate or equivalent document had been provided to prove that AK was BHO's daughter. The Claimant was informed of this by emailed letter of 13 December 2021. The letter indicated she had three routes to address the refusal: (i) appeal to the First-tier Tribunal (Immigration and Asylum Chamber); (ii) administrative review; or (iii) making a further EUSS application if the application was made in time or there were reasonable grounds for not making the further application in time. BHO does not take issue with the proposition that this letter was sent, but says the refusal of AK's application did not come to her attention until early 2023 when they were stopped at the border returning from a trip to Latvia.

22. The Claimant made a second EUSS application on behalf of AK on 21 March 2023. It was accepted that BHO had reasonable grounds for making a late application and it was this application that led to AK being granted settled status on 29 June 2023.

23. In February 2021, AK was diagnosed with leukaemia. At that stage, the Claimant was still in employment. AK underwent chemotherapy and other medical treatment between February 2021 and July 2023. She is currently in remission.

24. D2 was not aware of the Claimant's potential liability to pay for AK's treatment at the time of its provision. It appears there were some technical issues at this stage with the SSHD's Digital Status Checker interface, which was showing certain refused EUSS applications as still pending.

25. On 26 April 2024, D2 issued the Claimant with an invoice for £16,653.81 in respect of AK's treatments and appointments between the period 25 January 2022 (the date when

AK's appeal rights expired in relation to the first EUSS application) and 21 March 2023 (when the second application was made). Between early June and mid-October 2024, the Claimant corresponded with the NHS Collection team in relation to the repayment amount and she made one payment of £50. She was asked to repay £25 a month from 18 October 2024, but subsequently D2 agreed to pause recovery action whilst BHO sought legal advice in relation to the lawfulness of the charges. Following pre-action correspondence, D2 conceded that a proportion of the sum invoiced related to appointments, treatment and/or drugs that formed part of AK's "course of treatment" for her leukaemia within the meaning of regulation 3(5) of the NHS Charging Regulations (para 115 below). As a result of this, BHO's liability for the NHS charges was reduced to £1,988.50.

The legal framework

The Withdrawal Agreement

An overview

26. The WA was signed on 24 January 2020 following the result of the referendum on whether the UK should leave the European Union (the "**EU**"). I gratefully adopt Lane J's summary from his introductory section in ***R (Independent Monitoring Authority for the Citizens' Rights Agreements) v Secretary of State for the Home Department*** [2022] EWHC 3274 (Admin), [2023] 1 WLR 817 ("***Citizens' Rights***") as to the position regarding EU free movement rights after the decision was made to leave the EU:

> "2. The United Kingdom left the EU on 31 January 2020. During a transition period ending at 11 pm GMT on 31 December 2020, EU law continued to apply in the United Kingdom. This included the law of free movement under articles 21, 45 and 49 of the...[TFEU] and the...[CRD].
>
> 3. The nature and scope of EU free movement rights were incompatible with the general system of immigration control in the United Kingdom, contained in the Immigration Acts; in particular, the Immigration Act 1971("the 1971 Act"). Section 1 of the 1971 Act provides that those without the right of abode in the United Kingdom are subject to a system of control, as to which section 3 provides for the grant of leave to enter or remain for either a limited or for an indefinite period.
>
> 4. Section 7 of the Immigration Act 1988, accordingly, provided that a person who was entitled to enter or remain in the United Kingdom by reason of EU law was not subject to the requirements of the 1971 Act concerning leave to enter or remain.
>
> 5. Section 7 was repealed with effect from 31 December 2020. After that date, EU citizens cannot rely on a right of free movement to enter or remain in the United Kingdom. They are therefore subject to the 1971 Act, in the same way as anyone else who lacks the right of abode.

> 6. Importantly, however, Part Two of the WA makes provision for residence rights in respect of 'Union citizens who exercise their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter' (article 10(1)(a)). The nature of these residence rights is set out in articles 13 to 17 of the WA, whilst provision for the issuance of residence documents is made by article 18. This article confers a power on the host state (for our purposes, the United Kingdom) to require EU citizens, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in Title II of Part Two, to apply for a new residence status which confers the rights under that title and a document evidencing such status, which may be in digital form (article 18(1))."

27. I will come on to address the detail of Article 18 WA, however, it is useful to emphasise at this stage that Article 18 permits the host State to adopt a constitutive scheme under which Union citizens or United Kingdom nationals (as the case may be) are required to make an application in order to obtain the new residence status that confers the rights of residence contained in Title II of Part 2 WA. Alternatively, the host State may adopt a declaratory scheme, whereby rights of residence are acquired automatically upon satisfying the relevant criteria in Title II of Part 2 WA, without any application having to be made in order to attain that status.

28. The UK chose to adopt a constitutive scheme, the EUSS (found in Appendix EU of the immigration rules). So far as the EU Member States are concerned, 13 States have adopted a constitutive scheme (and the other 12 have declaratory schemes). Accordingly, UK citizens residing in these 13 EU States are required to make applications for the grant of residence rights, as EU citizens are required to do in the UK.

29. In general terms, EUSS applicants who had resided legally in the UK for a continuous period of five years were granted indefinite leave to remain and those with lesser periods of residence in the UK were granted limited leave to remain (five years). The EUSS is more generous than the WA, in that limited and indefinite leave to remain (pre-settled ("**PSS**") and settled status) are granted to EU citizens on the basis of residence simpliciter in the UK, rather than requiring their residence to accord with the conditions applying to the right of free movement under the CRD and Title II of Part 2 WA. The UK is permitted to operate a more generous scheme by Article 38 WA (Article 37 CRD during the transition period). However, to the extent that the EUSS benefits some individuals who did not acquire EU law rights of residence, this is purely a matter of domestic law: ***Fertre v Vale of White Horse DC*** [2025] EWCA Civ 1057, [205] H.L.R. 46 ("***Fertre***"), paras 126 – 127. As the Claimant relies upon the rights conferred by the WA, Mr Burton refined his original submissions to focus on the cohort of successful EUSS late applicants whose residence in the UK satisfies CRD residence requirements (para 4 above).

30. Section 2 of the European Communities Act 1972 (which gave effect to EU law in domestic law) was repealed by section 1 of the European Union (Withdrawal) Act 2018 (the "**2018 Act**"), which provided for a system of "retained EU law". The rights, powers, liabilities and obligations created by the WA are given direct effect in the UK

law by virtue of section 7A of the 2018 Act (***R (Ali) v Secretary of State for the Home Department*** [2024] EWCA Civ 1546 at para 31). The Explanatory Notes to the 2018 Act described this section as the "conduit pipe" by which the WA is introduced into UK domestic law.

31. Whilst I will focus on the WA in this judgment, I note the following for completeness. On 20 December 2018, the UK concluded an agreement with Iceland, Liechtenstein and Norway, the EEA EFTA Separation Agreement. Part Two of this agreement is effectively in the same terms as Part 2 WA (***Citizens' Rights***, para 12). Swiss citizens are protected under a separate but similar Swiss Citizens' Rights Agreement (***Citizens' Rights***, para 13). Similarly, whilst for present purposes I will focus on the position of EU citizens under the WA, I record for completeness that Part 2 WA also confers residence rights on family members, who may or may not be EU citizens.

Relevant provisions

32. In general terms, the WA creates a scheme of reciprocal rights for EU nationals residing in the UK and for UK nationals residing in EU Member States prior to IPCD (also referred to as the end of the transition period). The preambles to the WA include the following:

> "STRESSING that the objective of this Agreement is to ensure an orderly withdrawal of the United Kingdom from the Union and Euratom.
>
> RECOGNISING that it is necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights before a date set in this Agreement, and to ensure that their rights under this Agreement are enforceable and based on the principle of non-discrimination; recognising also that rights deriving from periods of social security insurance should be protected."

Part 1

33. Part 1 WA is headed "Common Provisions". Under the heading "Objective", Article 1 records that the WA sets out the arrangements for the withdrawal of the UK from the EU and from the European Atomic Energy Community.

34. Article 2 contains definitions. The list of what constitutes "Union law" includes: the TEU, the Treaty on the Functioning of the European Union ("**TFEU**"), the CFR, the general principles of Union Law and the international agreements to which the Union is a party. The "Member States" are listed. A "Union citizen" means any person holding the nationality of a Member State and a "United Kingdom national" is also defined. The "transition period" is defined in Article 126; it comprised the time from 31 January 2020, when the UK left the EU, to IPCD at 11pm on 31 December 2020.

35. Article 4 is headed "Methods and principles relating to the effect, the implementation and the application of this Agreement". It states:

> "1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its member states.
>
> Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
>
> 2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.
>
> 3. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.
>
> 4. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.
>
> 5. In the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period."

36. The content of Article 4 was helpfully summarised by Green LJ in ***Secretary of State for Work and Pensions v AT*** [2023] EWCA Civ 1307, [2024] KB 633 ("***AT***") at para 51 as follows:

> "Article 4 contains special rules on interpretation and application. At the risk of over-simplification these are: (i) the principle of equal legal effect of the Agreement in the UK and EU in article 4(1); (ii) the principle of direct effect also in article 4(1); (iii) that the Withdrawal Agreement takes precedence over inconsistent UK law in article 4(2); (iv) the application of the methods and general principles of Union law to 'Union law or to concepts or provisions thereof' in article 4(3); and (v) the applicability of the jurisprudence of the CJEU (prior to the expiry of the transition period) to the implementation and application of the Agreement, in article 4(4)."

Title I Part 2

37. Part 2 WA is headed "Citizens' Rights". It is divided into four sections. These include: Title 1 ("General Provisions"); Title II ("Rights and Obligations"); and Title III ("Coordination of Social Security Systems").

38. Articles 9 – 11 are in Title 1. Article 9 contains a number of additional definitions, including of "host State" and "family members". Article 10 is headed "Personal scope" and lists the individuals to whom Title II applies. This includes: "(a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter"; and "(e) family members of the person referred to in in points (a) to (d) provided they fulfil one of the following conditions". The conditions that follow include that "they reside in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter". It is accepted that as BHO comes within category (a) and AK comes within category (e), they are both within the scope of Title II.

39. Article 11 provides that continuity of residence for the purposes of Articles 9 and 10 shall not be affected by the absences referred to in Article 15(2) and that rights of permanent residence acquired under the CRD before the end of the transition period shall not be treated as lost through absence from the host State for a period specified in Article 15(3) (see para 41 below).

Title II Part 2: Articles 13, 15 and 16

40. Title II WA is divided into a number of chapters. Chapter 1 concerns "Rights Related to Residence, Residence Documents". Article 13 is headed "Residence rights" and includes the following:

> "1. Union citizens and United Kingdom nationals shall have the right to reside in the host State under the limitations and conditions as set out in Articles 21, 45 or 49 TFEU and in Article 6(1), points (a), (b) or (c) of Article 7(1), article 7(3), Article 14, Article 16(1) or Article 17(1) of Directive 2004/38/EC.
>
> 2. Family members who are either Union citizens or United Kingdom nationals shall have the right to reside in the host state as set out in Article 21 TFEU and in Article 6(1), point (d) of Article 7(1), Article 12(1) or (3), Article 13(1), Article 14, Article 16(1) or Article 17(3) and (4) of Directive 2004/38/EC, subject to the limitations and conditions set out in those provisions.
>
> 3. ...
>
> 4. The host State may not impose any limitations or conditions for obtaining, retaining or losing residence rights on the persons referred to in paragraphs 1, 2 and 3, other than those provided for in this Title. There shall be no discretion in applying the limitations and conditions provided for in this Title, other than in favour of the person concerned."

41. Article 15 addresses the "Right of permanent residence". It provides:

> "1. Union citizens and United Kingdom nationals, and their respective family members, who have resided legally in the host State in accordance with Union law for a continuous period of 5 years or for the period specified in article 17 of Directive 2004/38/EC, shall have the

> right to reside permanently in the host state under the conditions set out in articles 16, 17 and 18 of Directive 2004/38/EC. Periods of legal residence or work in accordance with Union law before and after the end of the transition period shall be included in the calculation of the qualifying period necessary for acquisition of the right of permanent residence.
>
> 2. Continuity of residence for the purposes of acquisition of the right of permanent residence shall be determined in accordance with article 16(3) and article 21 of Directive 2004/38/EC.
>
> 3. Once acquired, the right of permanent residence shall be lost only through absence from the host state for a period exceeding 5 consecutive years."

42. The effect of Article 15(2) WA is that continuity of residence will not be affected by absences not exceeding a total of six months in a year or one absence of up to 12 months for important reasons (including pregnancy, childbirth and serious illness).

43. Article 16 WA provides that Union citizens and UK nationals (and their respective family members) who had resided legally in the host State in accordance with CRD requirements for less than 5 years before IPCD, shall have the right to acquire the right to reside permanently under the conditions set out in Article 15 WA once they have completed the necessary periods of residence. Article 16 continues, "Periods of legal residence or work in accordance with Union law before and after the end of the transition period shall be included in the calculation of the qualifying period necessary for acquisition of the right of permanent residence".

44. It is convenient to briefly summarise the effect of the EU provisions referred to in Articles 13 and 15 WA at this stage. Article 21 TFEU contains the general right of free movement, namely that every Union citizen shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. Article 45 TFEU prohibits discrimination based on nationality between workers of the Member States in relation to employment, remuneration and other conditions of work. Article 49 TFEU prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State.

45. The CRD (Directive 2004/38/EC) is the principal measure that implements the general right of free movement conferred by Article 21 TFEU. Article 6 CRD gives Union citizens the right of residence in the territory of another Member State for a period of up to three months without any conditions or formalities (other than the need to hold a valid passport). This extends to family members in possession of a valid passport, who are not nationals of a Member State, but who are accompanying or joining the Union citizen. The Article 6 rights of residence are subject to Article 14, which stipulates that the Union citizen and their family members do not become an unreasonable burden on the social assistance system of the host Member State.

46. Article 7(1)(a) – (c) CRD confers the right of residence for a period of longer than three months provided the EU citizen concerned is economically active (broadly, as they are

either a worker, self-employed, have sufficient resources for them and their family members not to be become a burden on the social assistance system of the host Member State and hold comprehensive sickness insurance or they are a student with comprehensive sickness insurance and sufficient resources for the period of residence). Article 7(1)(d) confers the right on family members of a Union citizen who satisfies the conditions in 7(1)(a), (b) or (c). Article 7(3) makes provision for a person who is no longer a worker or self-employed to retain this status in certain circumstances.

47. Article 16 CRD confers the right of permanent residence upon Union citizens who have resided legally for a continuous period of five years in the host Member State. Article 17 permits the right to permanent residence to be acquired before the completion of a continuous period of five years residence in certain circumstances (retirement or permanent incapacitation).

48. Once the right of permanent residence has been acquired, it is not subject to any requirement to remain economically active.

49. It is accepted that BHO's and AK's residence in the UK was compliant with the CRD requirements, as the Claimant was in employment during the five years after she came to live in the UK.

Title II Part 2: Article 18

50. Returning to the WA, the way that Article 18.1 operates is crucial to the resolution of Ground 1 in this case. As I have already indicated, the UK has chosen to adopt a constitutive scheme pursuant to Article 18.1, rather than a declaratory scheme which is permitted by Article 18.4. Under a constitutive scheme the State in question is entitled to require that an Article 18.1 compliant application is made in order for the "new residence status" to be obtained. In ***Citizens Rights'*** (para 45) Lane J described the two kinds of scheme in the following way:

> "I have mentioned that article 18 of the WA confers a power on the host state to require Union citizens and UK nationals and their family members to apply for a new residence status conferring the rights under Title II of Part Two. This power enables the United Kingdom and member states to give effect to the citizens' rights contained in Part Two by means of a 'constitutive scheme', whereby the rights in question must be conferred by the grant of residence status. This contrasts with a 'declaratory scheme', under which the rights under Title II arise automatically upon the fulfilment of the conditions necessary for their existence. Under a declaratory scheme, documentation confirming the right may be sought and provided. Such documentation, however, is not a prerequisite to the enjoyment of the right."

51. To re-cap, the issue raised by Ground 1 is whether the grant of the new residence status under Article 18.1 "which confers the rights under this Title" has retrospective or only prospective effect.

52. As both parties rely on aspects of the wording of Article 18, I will set it out fairly fully, underlining the wording that one or other party places particular reliance on. (I have not

included Article 18.1(e) – (q), which address the administrative processes relating to an Article 18.1 application.)

> "1.The host State may require Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this Title, to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form.
>
> Applying for such a residence status shall be subject to the following conditions:
>
> (a) the purpose of the application procedure shall be to verify whether the applicant is entitled to the residence rights set out in this Title. Where that is the case, the applicant shall have a right to be granted the residence status and the document evidencing that status;
>
> (b) the deadline for submitting the application shall not be less than 6 months from the end of the transition period, for persons residing in the host State before the end of the transition period.
> For persons who have the right to commence residence after the end of the transition period in the host State in accordance with this Title, the deadline for submitting the application shall be 3 months after their arrival or the expiry of the deadline referred to in the first sub-paragraph, whichever is later.
> A certificate of application for the residence status shall be issued immediately;
>
> (c) the deadline for submitting the application referred to in point (b) shall be extended automatically by 1 year where the Union has notified the United Kingdom, or the United Kingdom has notified the Union, that technical problems prevent the host State either from registering the application or from issuing the certificate of application referred to in point (b). The host State shall publish that notification and shall provide appropriate public information for the persons concerned in good time;
>
> (d) where the deadline for submitting the application referred to in point (b) is not respected by the persons concerned, the competent authorities shall assess all the circumstances and reasons for not respecting the deadline and shall allow those persons to submit an application within a reasonable further period of time if there are reasonable grounds for the failure to respect the deadline;
> .....
> (r) the applicant shall have access to judicial and, where appropriate, administrative redress procedures in the host State against any decision refusing to grant the residence status. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed decision is

> based. Such redress procedures shall ensure that the decision is not disproportionate.
>
> 2. During the period referred to in point (b) of paragraph 1 of this article and its possible one-year extension under point (c) of that paragraph, all rights provided for in this Part shall be deemed to apply to Union citizens or United Kingdom nationals, their respective family members, and other persons residing in the host State, in accordance with the conditions and subject to the restrictions set out in Article 20.
>
> 3. Pending a final decision by the competent authorities on any application referred to in paragraph 1, and pending a final judgment handed down in case of judicial redress sought against any rejection of such application by the competent administrative authorities, all rights provided for in this Part shall be deemed to apply to the applicant, including Article 21 on safeguards and right of appeal, subject to the conditions set out in Article 20(4).
>
> 4. Where a host State has chosen not to require Union citizens or United Kingdom nationals, their family members, and other persons, residing in its territory in accordance with the conditions set out in this Title, to apply for the new residence status referred to in paragraph 1 as a condition for legal residence, those eligible for residence rights under this Title shall have the right to receive, in accordance with the conditions set out in Directive 2004/38/EC, a residence document, which may be in a digital form, that includes a statement that it has been issued in accordance with this Agreement."

53. As I have indicated, it is agreed that BHO and AK resided in the UK in the words of Article 18.1 "in accordance with the condition sets out in this Title", namely in accordance with the conditions in Article 15.1. To re-cap, BHO was granted permanent residence rights pursuant to Article 16 CRD in October 2019 after five years of living and working in the UK; and AK, her daughter, lived with her in the UK and acquired the "new residence status" referred to in Article 18.1 on 29 June 2023. The parties also agree that "the rights under this Title" which are conferred pursuant to Article 18.1 include the residence rights in Articles 13 – 16 WA that I have just described.

54. Article 18.1(b) stipulates the deadline for submitting an Article 18.1 application. For those residing in the host State before the end of the transition period, it is 6 months from IPCD. Accordingly, the applicable deadline for AK's application to be submitted was 30 June 2021 (IPCD plus six months). The power contained in Article 18.1(c) to further extend the deadline was not utilised by the parties.

55. Article 18.1(d) addresses applications that are made after the Article 18.1(b) deadline has expired. The competent authorities "shall allow those persons to submit an application within a reasonable further period of time if there are reasonable grounds for the failure to respect the deadline". Successful Article 18.1 applicants whose late applications are permitted under Article 18.1(d) are referred to as "Late Beneficiaries" in this judgment (para 1 above). The second application made on AK's behalf was accepted on this basis.

56. Article 18.2 states that during the period for submitting applications referred to in Article 18.1(b) (or any extension of that period pursuant to Article 18.1(c)), all of the rights provided for in Part 2 of Title II "shall be deemed to apply". Accordingly, all Union citizens and UK nationals (as the case may be) who were residing in a host State on IPCD had the deemed benefit of the rights in Part 2 of Title II WA for the next six months until 30 June 2021, irrespective of whether or not they made an Article 18.1 application for the new residence status during this time.

57. Article 18.3 deems all the rights provided by Part 2 of Title II WA to apply to an Article 18.1 applicant pending a final decision on their application, including during the exercise of appeal rights. This provision applies to those who make in-time applications and also to late applicants if the competent authority decides that the requirements of Article 18.1(d) are met.

58. Accordingly, where a person made a successful Article 18.1 application by the 30 June 2021 deadline, the combined effect of Articles 18.2 and 18.3 is that the rights provided by Part 2 Title II WA are deemed to apply throughout the period between IPCD and the point when their application is granted. Accordingly, for in-time applicants, there is no need to consider whether the grant of the new residence status under Article 18.1 had retrospective effect. By contrast, a person who fails to make any Article 18.1 application has no rights of residence at all after the end of the period covered by Article 18.2, even if their residence in the host State accorded with CRD requirements, as Dove J (as he was then) confirmed in ***R (Here for Good) v Secretary of State for the Home Department*** [2024] EWHC 2817 (Admin), [2025] 1 WLR 1144 ("***Here for Good***") 1144 at para 55.

59. The question of whether the new residence status conferred by Article 18.1 has retrospective effect does arise, however, in respect of a Late Beneficiary and in particular it arises in relation to the interim period between the time when the Article 18.2 deeming provision ceases to have effect (30 June 2021, if they were resident in the host State before IPCD) and the point when they make a late application meeting the requirements of Article 18.1(d) so that the deeming provision in Article 18.3 then applies. However, in AK's case, the interim period ran from 25 January 2022 (rather than 30 June 2021), because the deeming provision in Article 18.3 also applied to the first in-time application that was made on her behalf and her appeal rights from the refusal of that application expired unexercised on 25 January 2022.

60. As a convenient shorthand in this judgment, when discussing these various periods, I will refer to the Article 18.2 period when Part 2 Title II WA rights are deemed to apply as "**Period 1**" (this period is often known as the "grace period"); the interim period when a Late Beneficiary does not have the benefit of any deeming provision as "**Period 2**"; and the period when an application has been made, including a late application meeting the requirements of Article 18.1(d), so that the Article 18.3 deeming provision applies, as "**Period 3**". As I have indicated, the question of whether the grant of the new residence status pursuant to Article 18.1 WA has retrospective effect has particular importance in relation to Period 2.

Title III Part 2 and Reg 883/2004

61. Article 30 addresses the scope of Title III WA. It applies (amongst others) to the following: "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". It is agreed that both BHO and AK are within this category.

62. Article 31.1 applies Reg 883/2004 to the persons covered by Title III. Reg 883/2004 is a measure that coordinates different national social security schemes. 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. It seeks to avoid situations where a person is subject to overlapping social security systems or left without social security coverage because there is no legislation which is applicable to them: Case (C-308/14) ***Commission v United Kingdom*** [2016] 1 WLR 5049 ("***Commission v UK***") at para 32.

63. Reg 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 described in Case (C-679/16) ***A (Assistance for a disabled person)*** EU: C:2018:601, para 32 as:

> "...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."

64. A social security benefit within the meaning of Reg 883/2004 may be provided "in kind": Article 1(va). It is unnecessary to refer to this in further detail, as D1 has accepted for the purposes of this case that NHS provided healthcare constitutes a sickness benefit for the purposes of Reg 883/2004. .

65. Article 4 of Reg 883/2004 establishes a guarantee of equal treatment under different national legislative regimes. It states:

> "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 States as the nationals thereof."

Title IV Part 2

66. I turn to Title IV of the WA. I have briefly referred to Article 38 WA at para 29 above. Article 38 provides that Part 2 shall not affect any laws, regulations or administrative provisions in a host State "which would be more favourable to the persons concerned" (save that this does not apply to Title III).

67. Article 39 says that persons covered by Part 2 should enjoy "the rights provided for in the relevant Titles of this Part for their lifetime, unless they cease to meet the conditions set out in those Titles".

Reference to the CJEU

68. Article 158 appears in Part Six of the WA. Article 158.1 states that where in a case commenced at first instance within 8 years from IPCD before a court or tribunal in the UK, a question is raised concerning the interpretation of Part 2 of the WA "and where

that court or tribunal considers that a decision on that question is necessary to enable it to give judgment in that case" the court or tribunal may request the CJEU to give a preliminary ruling on that question. It is well established that a reference to the CJEU should be made where the answer to the question of interpretation is not *acte clair*, which has been defined to mean that the application of EU law is "so obvious as to leave no scope for reasonable doubt": ***Fertre***, para 135.

Interpretation of the Withdrawal Agreement

69. The parties are agreed that the text of the WA is the key interpretative source in terms of the Ground 1 issue in this case. The correct approach to interpreting the WA was described by Lane J in ***Citizens' Rights*** as follows:

> "64....The WA is an international treaty. As such, the relevant interpretative principles are those contained in the Vienna Convention on the Law of Treaties 1969; in particular, articles 31(general rule of interpretation) and 32(supplementary means of interpretation). Article 31(1) provides that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in the light of the treaty's object and purpose. That is an essentially objective exercise.
> .....
> 66. Article 32 provides that recourse may be had to supplementary means of interpretation, including the preparatory work on the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31; or to determine the meaning, when the article 31 exercise leaves that meaning ambiguous or obscure, or would lead to a result which is manifestly absurd or unreasonable...
> .....
>
> 68. Relying upon Anthony Aust, *Modern Treaty Law and Practice*, 3rd ed (2013) ch 13, Mr Blundell submits that the determination of the ordinary meaning of a treaty cannot be undertaken in the abstract but only in the context of the treaty and in the light of its object and purpose. It is plain, moreover, that "context" for the purposes of article 31 has a broader meaning than it would ordinarily bear in the context of a domestic interpretation.
>
> 69. In *Revenue and Customs Comrs v Anson* [2015] 4 All ER 288, Lord Reed JSC had this to say about articles 31and 32:
>
> > '56. Put shortly, the aim of interpretation of a treaty is therefore to establish, by objective and rational means, the common intention which can be ascribed to the parties. That intention is ascertained by considering the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose. Subsequent agreement as to the interpretation of the treaty, and subsequent practice which establishes agreement between the parties, are also to be taken into account, together with any relevant rules of international law which apply in the relations between the

> parties. Recourse may also be had to a broader range of references in order to confirm the meaning arrived at on that approach, or if that approach leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.'"

70. In a subsequent passage in his judgment at paras 131-132, Lane J addressed the relationship between EU law concepts and the interpretative principles of the Vienna Convention. Having noted that Article 4(3) WA indicated that provisions of the WA "referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law", he said that save for this, EU legal concepts such as free movement were not to be imported into, or inferred from, the WA "except insofar as that may be necessary in order to comply with the general rule of interpretation in article 31 of the Vienna Convention". He elaborated upon this as follows:

> "132....In interpreting the WA, what the parties meant may need to be considered against the relevant background, which is part of the 'context' mentioned in article 31 of the Vienna Convention. In the present case, that background is EU law, which applied to the United Kingdom whilst it was a member (and for a period thereafter). As we have seen...the right of permanent residence in article 15 of the WA has been 'borrowed' from article 16 of the Directive. This may tell us something about the nature of the right of permanent residence in the WA, when interpreting the WA in accordance with the Vienna Convention. This is, however, quite different from saying that general concepts such as the right of free movement must be lurking beneath the words of the WA, to be called forth even if these words would not otherwise warrant it."

71. The Court's interpretative task in relation to the WA was also addressed by Green LJ at para 80 in ***AT*** where he said:

> "80....No easy assumptions can be made as to what each party was negotiating for or as to which negotiating positions were compromised by either the UK or the EU in order to seal a final deal. The task of the court is narrow and technical...When article 31 of the Vienna Convention attaches weight to the 'object and purpose' of the instrument this is not an invitation to delve into the minefield of negotiating objectives as a substitute for focusing upon the 'text as a source for determining the parties' intentions': see *Al-Malki v Reyes* [2019] AC 735, para 11. The duty of this court is not therefore to work out whether, in the hurly burly of negotiations, the UK or the EU got a better or worse deal in any particular respect and then to adjust the interpretation of the Agreement accordingly. Insofar as the lodestars to construction urged upon the court...are found in the text of the Agreement itself, in inferences properly to be drawn from the language used, or in admissible external sources, then of course they are relevant, but not otherwise. "

72. As I noted earlier, the WA provisions reflect the agreement reached between the UK, the EU and the Member States as to the position that would apply reciprocally both to EU citizens resident in the UK and to British citizens resident in EU Member States. Accordingly, "[f]urther or additional measures implemented by the UK relating to the EU citizens resident in the UK could not be 'read into' the Withdrawal Agreement, because the treaty reflects the common intention of the parties which cannot be altered by one party acting alone": ***Fertre*** at para 83 (and, similarly, ***Citizens' Rights*** at para 134). Furthermore, because the WA is intended to give reciprocal protection in the EU and the UK, its provisions must "produce the same outcome in the UK and the EU member states" and "the same legal outcomes [are required] to be generated by provisions of EU law that are applied by the WA": ***AT*** at para 85.

73. At para 84 in ***Fertre***, Whipple LJ identified the key message to be drawn from the WA recitals, in terms of its object and purpose, as being that the WA was "intended to secure an orderly withdrawal of the UK from the EU, whilst at the same time protecting EU and UK nationals who had exercised their right of free movement under EU law before 31 December 2020".

Caselaw relating to Article 18.1

74. The parties were not aware of any previous domestic or European case that has considered the issue of retrospectivity that is raised by Ground 1. However, both parties relied upon aspects of Lane J's analysis of the operation of Article 18.1 WA in ***Citizens' Rights*** and the Court of Appeal's analysis of this provision in ***Fertre***. It is therefore necessary to consider these two cases in some detail.

Citizens' Rights

75. ***Citizens' Rights*** involved a challenge to what was then an aspect of the EUSS, namely that someone who was granted PSS (limited leave to remain for five years) had to make a further application before the limited leave expired, either to extend the limited leave or to obtain indefinite leave to remain. If they failed to make the second application, their underlying right of residence under Article 13 was lost with the consequence that they were unlawfully present in the UK.

76. The IMA contended that this state of affairs failed to comply with the UK's obligations under the WA. First, as the right of residence conferred by Article 13 WA, once obtained, did not expire unless it was lost pursuant to the terms of the WA. Secondly, because the right of permanent residence under Article 15 WA accrued automatically to a person who had already made a successful Article 18.1 application, once the residence conditions for obtaining it had been fulfilled by the individual concerned. Whilst the UK was permitted to have a scheme under which EU citizens must make an application for the recognition of their rights of residence, it was unlawful for the defendant to withdraw a right of residence because of the failure to make a second application. Lane J referred to these two contentions as "the first issue" and "the second issue". The resolution of the second issue is of greater relevance to the present Ground , but I will also refer more briefly to the decision he reached on the first issue.

77. Lane J summarised the submissions advanced by The European Commission (intervening in the case) as follows:

> "88. As for the effects of the United Kingdom's decision to adopt a constitutive scheme, the Commission considers that what are conferred by the new residence status in article 18(1) are all the rights granted in Title II of Part Two; namely, the rights provided for in articles 13 to 29 of the WA, which include the right of non-permanent residence and that of permanent residence. There is, therefore, only one new residence status under the WA: that of WA beneficiary, to which all the relevant rights are attached. Different rights will be relevant at different times, depending on the personal situation of the beneficiary. Although every eligible person who successfully goes through the application process will be granted WA beneficiary status, the Commission considers that one beneficiary may have a non-permanent right of residence at the moment of conferral, whilst another may have already acquired the right of permanent residence. One beneficiary may have a residence right as a student, another as a worker, and yet another as a non-economically active person. Their status under the WA, however, is the same.
>
> 89. Accordingly, the Commission considers that the difference between the declaratory and constitutive residence schemes lies merely in how access is given to WA beneficiary status. Once such status has been obtained, the rights attached to it operate in the same way, under both schemes."

Lane J accepted these submissions at para 192 of his judgment (para 84 below).

78. Mr Burton draws attention to particular aspects of the defendant's unsuccessful submissions, summarised by Lane J at paras 97-99 and 104-115. The defendant emphasised the fact that the UK had decided to give effect to the WA by way of a constitutive scheme and it was this constitutive scheme that gave rise to rights under the WA, as opposed to those rights arising automatically on the fulfilment of the relevant conditions. It was also suggested that acceptance of the IMA's case would result in a continued state of uncertainty as to whether an EU citizen enjoyed any right to reside in the UK.

79. Lane J accepted that WA rights of residence were obtained upon the grant of an Article 18.1 application (paras 135-136).

80. The IMA succeeded on the first issue. Lane J held that Article 13.4 WA prevented the imposition of limitations or conditions for obtaining or retaining the residence right other than as provided for in Title II, save where such conditions were more favourable for the person concerned. The EUSS requirement to apply for further leave after a grant of limited leave was "a condition" for retaining such rights and so precluded by Article 13.4. Furthermore, Article 39 WA provided that beneficiaries of residence rights enjoyed those rights for as long as they met the relevant conditions (paras 140-148). Rejecting the defendant's submission that the consequence for those who did not apply to extend their limited leave was simply the consequence of the UK's permissible decision to adopt a constitutive scheme, Lane J said:

> "150. The problem with this submission is that, whilst the WA permits the use of a constitutive scheme, that scheme must deliver the rights of residence in Title II of Part Two. Neither the United Kingdom nor a member state can employ a constitutive scheme which fails to do this. This is so, even where, as here, what is chosen as the delivery system is the long-standing machinery contained in the Immigration Acts."

81. Addressing the defendant's submission regarding certainty, Lane J observed that the concept of certainty was a relative one and that: "[i]n any event, the pursuit of certainty under a constitutive residence scheme cannot affect the nature of the rights of residence conferred by the WA" (para 156).

82. The IMA also succeeded on the second issue. As Lane J noted, this issue concerned what was meant in Article 18.1 WA by the words "new residence status" which confers "the rights under this Title". Addressing the defendant's submission that under a constitutive scheme the permanent right of residence (like the initial right of residence) had to be attained by separate application and grant, otherwise the scheme would become a form of hybrid with elements of a declaratory scheme, Lane J observed:

> "175. There is, however, a question left begging in this argument: what exactly is the nature of the constitutive residence scheme for which provision is made in the WA? If the drafters of the WA have, in fact, created a constitutive scheme that is, at this point, hybrid in nature, then that is the scheme which the United Kingdom and the member states must operate, even though some of them might have preferred something else."

83. Lane J concluded that the Article 18.1 new residence status was a single entity, comprising "the rights under this Title" and thus, on its face, including the rights in Articles 15 and 16 (para 176). It was highly significant that the terms of Article 18.1 made it plain that a single application was required to obtain the new residence status (para 177). Lane J also rejected the defendant's submission that it was pointless to have a constitutive scheme if the claimant's submission was right (paras 182-184), observing:

> "182. At this point, it is necessary to return to the question of whether a finding on this issue in favour of the claimant means that the time and effort respectively spent by the defendant and applicants in devising the EUSS and making applications under it were pointless. The answer is most precisely articulated in the revised written submissions of the3million Ltd. The application process contained in article 18 was meaningful. Its purpose was to ensure that individuals were significantly incentivised to apply under the EUSS. The constitutive scheme created a "bright line" between those who obtained status under the WA and those who did not. Unless and until individuals obtained such status, rights under the WA were not conferred. This allowed the government to put in place a deadline, in order to generate public "buy-in" via a major communications campaign. It ensured that all who responded would then be registered and documented."

84. At the hearing, Lane J had asked the parties and the Commission to provide information on whether the EU Member States who had opted for a constitutive scheme required a second application to be made in order for a person to enjoy the right of permanent residence in Article 15 (para 165). The material they supplied after the hearing indicated that apart from Slovenia (where the parties agreed the Government took the same view as the defendant) there was a lack of clarity or agreement as to the position (paras 172 and 188). The defendant also relied upon earlier communications with the Commission, indicating that officials in the Commission "understood and apparently accepted" the UK's intention to require a person with PSS to apply for settled status if and when they acquired five years' residence (para 188). After referring back to Article 32 of the Vienna Convention (para 189), Lane J set out his conclusions as follows:

> "191. The materials are, as I have indicated, strongly at odds with the interpretation for which the claimant and the Commission contend on the second issue. The materials do not, however, compel the conclusion that, despite the wording of article 18, an important element of "the new residence status which confers the rights under this Title" has been left out of account: namely, the right of permanent residence for those who subsequently satisfy the five years' residence requirement. Embarrassing though they may be for the Commission, the materials do not show that the construction for which the claimant and the Commission contend is manifestly absurd or unreasonable.
>
> 192. Accordingly, my conclusion is that the claimant and the Commission are correct. Properly interpreted, the WA means that the rights conferred by the grant of new residence status under article 18 to those who do not, at that point, have a right of permanent residence, includes the right to reside permanently in the United Kingdom, pursuant to article 15, once the five-year period has been satisfied (subject to the conditions mentioned in article 15(1)). I reach this conclusion by reference to article 31 of the Vienna Convention. I do not do so by importing any free-standing principles of EU free movement law because, so far as this country is concerned, there are no such free-standing principles. I confirm that there is no need for a reference to the CJEU. The matter is *acte clair*."

Fertre

85. Mr Burton argues that the Court of Appeal's analysis in ***Fertre*** is strongly supportive of his position on Ground 1. Sir James Eadie KC argues that it is neutral as the Court was dealing with a different question. I return to these competing submissions in the Analysis section of my judgment below.

86. ***Fertre*** concerned the claimant's reliance on her PSS in the context of her application to the defendant local authority as a homeless person. The duties upon a local authority under Part 7, Housing Act 1996 do not apply to a person from abroad who is ineligible for housing assistance (section 185(1)); and a person subject to immigration control is an ineligible person from abroad, save for certain exceptions (section 185(2)). Pursuant to regulations 5 and 6 of the Allocation of Housing and Homelessness (Eligibility)

(England) Regulations 2006, an applicant with settled status is eligible for assistance under Part 7, Housing Act 1996, whereas a person with PSS is only eligible if they would have been eligible prior to 31 December 2020 (in particular because they were then exercising free movement rights under the CRD).

87. The appellant was granted PSS in November 2020. As I explained, this scheme is more generous than that provided for in Articles 13 and 15 WA (para 29 above). In 2021 the respondent refused her application for assistance under Part 7, Housing Act 1996, deciding she was not eligible for assistance as she had PSS, was not in work and her visa stated she had no recourse to public funds. This decision was upheld on review and then on her appeal heard by the High Court: ***Fertre v Vale of White Horse District Council*** [2024] EWHC 1754 (KB), [2024] 1 WLR 5453 ("***Fertre HC***"). The appellant accepted she had no right to assistance under Part 7 as a matter of domestic law and that as she was not economically active she did not have a right of residence under Article 13.1 WA. However, she argued that the grant of PSS was the grant of a right of residence under Article 13.4 WA and that this was therefore a "new residence status" within Article 18.1 WA. In turn, this meant she could rely upon the Article 23.1 WA entitlement to the same treatment as UK nationals and so she was entitled to assistance under Part 7, Housing Act 1996. The Court of Appeal dismissed her appeal, Whipple LJ gave the leading judgment, with which Underhill and Newey LJJ agreed.

88. The Secretary of State for Housing, Communities and Local Government (the second intervener), in alignment with the respondent and the IMA, argued that the High Court had been right to conclude that the appellant had no rights of residence under the WA. If she was right, the effect of the WA would be to widen the class of people entitled to rely upon the Article 23 prohibition against discrimination to all those with PSS and this would mark a major shift away from the pre-WA EU law position, as the appellant would not have been entitled to housing assistance during the transition period or at any earlier time as she was not economically active. The Secretary of State also relied on a Respondent's Notice by which she challenged the High Court's conclusion that the grant of PSS involved the application of Article 13.4 WA, as opposed to it simply being a matter of domestic law.

89. Whipple LJ reviewed four cases where the CJEU had considered the meaning and scope of the CRD: Cases (C-425/10 and C-425/10) ***Ziolkowski v Land Berlin*** [2013] 3 C.M.L.R. 37 ("***Ziolkowski***"); Case (C-333/13) ***Dano v Jobcentre Leipzig*** [2015] C.M.L.R. 48 ("***Dano***"); Case (C-67/14 ***Jobcenter Berlin Neukölln v Alimanovic*** [2016] 2 WLR 208 ("***Alimanovic***"); and Case (C-709/20) ***CG v Department for Communities in Northern Ireland*** [2021] 1 WLR 5919 ("***CG***"). She summarised the relevant propositions that she drew from these authorities as follows:

> "(i) An EU citizen can claim equal treatment in respect of social assistance only if his or her residence in the host Member State complies with the terms of the CRD; the principle of non-discrimination in the TFEU is given more specific expression in Article 24 of the CRD (***Dano, CG***).
>
> (ii) A distinction is to be drawn between national rules and EU law rules of residence (***Ziolkowski, CG***).

> (iii) National rules can be more generous than the EU law system, but if a Member State introduces a national rule that is more generous, that rule remains a rule of domestic law and is not imported into EU law (***Ziolkowski, CG***).
>
> (iv) PSS is a more generous rule than the CRD requires, because the grant of PSS is not dependent on the applicant having sufficient resources to support themselves; PSS is a domestic law rules: the grant of PSS is not 'on the basis of' the CRD (***CG***).
>
> (v) Member States are entitled to refuse social benefits to economically inactive EU citizens who have exercised their right of free movement to live in that Member State, but who do not have a right of residence under Article 7 of the CRD because they are not complying with its conditions (***Dano, CG***).
>
> (vi) Such a refusal is not prohibited in EU law, even though the treatment is not equal as between EU citizens and nationals of the Member State in a similar situation (***Dano, Alimanovic, CG***).
>
> (vii) Where a Member State has implemented a more generous rule, it is obliged to respect the Charter, ensuring that the fundamental rights of those who benefit from the more generous rule are not violated by the refusal of social benefits (***CG***)."

90. Whipple LJ rejected the appellant's reliance on Article 13 for the reasons she identified at paras 90-99 of her judgment. In summary, these were as follows. Article 13.1 sets out the rule that EU citizens retain the right to reside in the host State under the limitations and conditions set out in the identified parts of the TFEU and CRD. This was consistent with the recitals in the WA indicating that continuity was intended. In short, the general rule in Article 13.1 reflected the *status quo ante*. The appellant's approach, which effectively widened Article 13.1 to include all EU citizens who came within Article 10 WA, led to a construction that was inconsistent with this general rule and which disrupted this *status quo ante*. There was nothing to indicate that this was the common intention of the parties. The appellant's approach failed to respect the distinction identified in ***CG*** and repeated in ***AT*** between EU law residence rights on the one hand (specified in the CRD) and domestic law rights on the other (including PSS). The suggested outcome offended the principle that domestic law rights cannot be incorporated into the EU legal order by one State acting unilaterally; and would or might lead to the UK carrying a greater obligation to EU citizens than a comparable UK citizen could claim from an EU host. Article 13.4 provided an administrative discretion to enable signatory States to deal with borderline cases.

91. Noting that this conclusion was sufficient to dispose of the appeal, Whipple LJ preferred to also address the submissions made in relation to Article 18 WA. The appellant argued that the UK had chosen to adopt a system in which all those who applied successfully under the EUSS were treated in the same way and, having made that decision, it could not narrow the rights conferred by the new residence status to limit it to existing rights under Article 13.1. The language of Article 18.1 indicated that the new residence status applied to all those with PSS and the Secretary of State was wrong to contend that Article 18 was merely a gateway to other rights.

92. In a passage that Mr Burton KC places particular reliance on, Whipple LJ rejected these contentions, saying:

> "103. I see the Appellant's arguments based on the language of Article 18(1), but here too I think the Appellant faces a number of hurdles. First, the title of Article 18 indicates that the provision is about the issuance of documents – which suggests that it is an administrative or operational provision rather than a provision concerned with the grant of rights. Its placement in Title II is not at odds with that characterisation, because the documents in question, and the new residence status they evidence, are indeed connected with a person's rights which are the subject of Title II.
>
> 104. Secondly, the content of Article 18 supports the conclusion that it is an administrative or operational provision. It contains a number of administrative processes for recognising rights. Article 18(1) permits a host State to require EU citizens or UK nationals to apply for the new residence status; the various conditions then listed within Article 18(1) are centred on the process of applying and the evidence required to support such an application, rather than the content of the rights conferred. The implementation of this new residence status is not compulsory, so the UK could have done nothing at all, in which case it would only be obliged to provide a residence document on request to those who are "eligible for residence rights under this Title" (see Article 18(4)). Article 18 therefore permits two options and they must be of parallel effect; the second option, under Article 18(4), quite clearly only avails those who are eligible for residence rights under Title II, which would exclude the Appellant. It is reasonable to infer that the Article 18(1) process is not intended to be of wider effect.
>
> 105. Thirdly, Article 18(4) refers to the new residence status (in Article 18(1)) as a "condition for legal residence" in the host State, which supports the proposition that the new residence status is the pre-cursor to legal residence rather than itself constituting that right of residence.
>
> 106. Fourth, the references to rights in Article 18 are invariably described as "rights *under this Title*". That must, on any sensible linguistic or purposive analysis, require regard to be had to the other provisions of this title, namely Title II of Part Two, to establish what rights are in issue. Title II includes Article 13(1), which refers to the "limitations and conditions" attaching to the rights under the TFEU or the CRD there listed; it also includes Article 15, the right of permanent residence, which is subject to the condition of continuous residence for 5 years. It is common ground that the Appellant does not have any rights of residence under the TFEU or the CRD, to which Article 13(1) refers (absent, of course, a read-in by means of Article 13(4) – addressed above), nor does she have a right of permanent residence under the conditions listed in Article 15. Yet those are the obvious places to look for the "rights under this Title". Title II does not include Article 10, which contains a reference to "Union citizens who exercised their right

> to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside thereafter" – a description which the Appellant does meet.
>
> 107. Fifth, Article 18 could have referred to Article 10 in terms if it was intended that Article 18 should encompass all those within Article 10. The absence of such cross-referencing (to Article 10) or some other language to denote the wider scope for which the Appellant argues is significant. These are all points made by the Secretary of State and the IMA and I agree with them."

93. Whipple LJ also considered that the appellant's arguments were not supported by ***Citizens' Rights***, noting in particular Lane J's acceptance of the submissions made by the Commission (summarised at paras 88-89 of that judgment; para 77 above). The case did not support the proposition that Article 18 confers rights, rather it was "strongly supportive of the Secretary of State's opposing argument that Article 18 is an administrative measure only, providing an immigration status (or gateway) to which other rights are attached" (para 111). Whipple LJ noted that counsel for the Secretary of State had indicated that the Government now considered ***Citizens' Rights*** to have been correctly decided, so Lane J's decision represented the agreed position of the UK Government, the Commission and the IMA (para 112). In a passage also relied upon by Mr Burton, Whipple LJ continued:

> "113. In my judgment, in agreement with the Secretary of State (supported by the IMA), the new residence status in Article 18 is merely a gateway to other rights. It was described as a "laissez-passer" by the judge below. In argument in this Court, Ms Smyth described it as a "badge of entitlement". These sorts of descriptions are helpful without being definitive. They show that the new residence status in Article 18 is a means by which a person can access rights which they already hold or might come to hold under the Withdrawal Agreement and preserved from EU law; it does not itself confer those rights.
>
> 114. I reject the Appellant's argument that domestic law rights under PSS were automatically elevated by operation of Article 18 into rights under the Withdrawal Agreement on 1 January 2021. The function of Article 18 is much more limited. It brings into existence the new residence status as a gateway to other rights under the Withdrawal Agreement. That new residence status was embodied in the EUSS and was a means of ensuring that EU citizens resident in the UK would 'stand up and be counted'.
>
> 115. It follows, as a matter of logic, that some individuals with PSS on 1 January 2021 would have come into possession of a right of residence, previously held as a matter of EU law and now preserved by the Withdrawal Agreement. Such rights would correctly be categorised as held 'on the basis of the Withdrawal Agreement' for Article 23 purposes...However, there was another group, into which the Appellant moved from February 2021 onwards, which comprised members with no EU right of residence and in consequence no right to reside on the

> basis of the Withdrawal Agreement; members of the latter group only have a domestic law right to remain in the UK. Thus it can be said that PSS is a single immigration status, conferring limited leave to remain in the UK, but that those with PSS will have differing rights of residence, depending on personal circumstances, and their entitlements and protections under the Withdrawal Agreement differ accordingly.
>
> 116. I conclude that the 'new residence status which *confers the rights under this Title*' in Article 18(1) means only that it is a status (or badge) which confers (in the sense of giving access to or providing a gateway to) such rights as may have accrued, or yet accrue, under Title II of Part Two. At the time of the decision under appeal, the Appellant had no rights of residence under Title II of Part Two..." (Emphasis in the original.)

94. Whipple LJ also upheld the Secretary of State's ancillary argument, agreeing that PSS is a domestic law right which is not part of the EU legal order. The UK was not relying on Article 13.4 in implementing the EUSS. To the extent the EUSS benefitted individuals who did not have EU law rights of residence, it was offering more generous terms (as it was entitled to do under Article 37 CRD and Article 38 WA) (paras 126-127).

95. After summarising her conclusions at paras 133-134, Whipple LJ indicated she was not left in any real doubt about the answer to the appeal and as the answer was *acte clair,* she would not refer the question to the CJEU (paras 135-138).

96. It is also instructive to refer to Jay J's analysis in ***Fertre HC*** regarding the way that Article 18.1 operates. His reasoning included the following:

> "70. At the first stage of the analysis, it is important to bear in mind at all material times the conceptual distinction between the 'in accordance with conditions set out in this Title' (stage 1) and the 'new residence status which confers the rights under this Title' (stage 2). The former are about the preconditions for the acquisition of the new status; the latter are about the nature and content of the rights which flow, or may flow, from the grant of that status. There must be no attempt at elision between the two, contrary to the appellant's approach.
>
> .....
>
> 72. At stage 2 the examination must be of the nature and content of the rights conferred by or under the 'new residence status'. In my judgment Lane J was correct to hold that these rights are in the nature of being conditional and not absolute (putting the matter in my language and not his) that the grant of the status is no more than the gateway or passport to the potential acquisition of a particular right at the relevant time...The 'rights conferred under Title II' depend on what a person's circumstances might happen to be at the relevant point in time.

> 73. I accept that there is a degree of tension inherent in article 18(1) which causes a modicum of head scratching. On the one hand, putting to one side what the UK has done in practice, the 'new residence status' is a one-off grant which depends on the fulfilment of certain conditions at the time of grant. However, there is nothing to suggest that the status itself could or should be lost if the preconditions for acquisition are no longer met...
>
> 74. In my judgment, the framers of article 18(1) have created an entity whose fundamental characteristics, like the quantum particle, does not allow itself easily to be pinned down. Even so, the stumbling block for the appellant's argument is that the 'new residence status' is not a 'once-and-for-all' or blanket conferment of rights, both current and future. It is and can be no more than the laissez-passer to the claiming or invoking of rights at some future date (which date may never in fact materialise); and in that particular sense alone *confers* these rights." (Emphasis in the original.)

The Charter of Fundamental Rights

97. Article 1 CFR provides: "Human dignity is inviolable. It must be respected and protected". In ***AT***, Green LJ quoted from the "Explanations", which indicate the source of the rights, freedoms and principles set out in the Charter: (***AT***, para 31). The Explanations say in relation to Article 1:

> "The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights...It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted."

98. Article 7 CFR states: "Everyone has the right to respect for his or her private and family life, home and communications". It is modelled upon the right to private and family life in Article 8(1) of the European Convention on Human Rights.

99. Article 24(2) CFR provides: "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration". The Explanations notes that the article is based on the UN Convention on the Rights of the Child ("**CRC**"), which Green LJ discussed in further detail at paras 40-42 of ***AT***.

100. As I noted earlier, the AIRE Centre relies upon these provisions of the CFR as reinforcing the retrospectivity argument on Ground 1. The Defendant does not accept that the CFR applies to the Ground 1 issue or, if it does, that these provisions are of assistance. The CFR provisions were relied upon in ***AT*** and in ***Here for Good***.

101. ***AT*** concerned the appellant's challenge to the refusal of her claim for universal credit. She had come to the UK during the transition period and had been granted PSS. After

IPCD, she and her daughter had left the home they shared with the appellant's partner because of domestic violence and they went to live in a refuge run by a charity. The appellant's claim for universal credit was refused on the ground she did not meet the condition for entitlement required by section 4(1)(c) Welfare Reform Act 2012 of being "in Great Britain", as pursuant to regulation 9(3)(c)(i) of the Universal Credit Regulations 2013, persons granted limited leave to remain in the UK under the EUSS were not treated as being in Great Britain for these purposes. Relying on the CFR, the First-tier Tribunal allowed the appellant's appeal, holding they were bound to disapply regulation 9(3)(c)(i), as without universal credit she and her daughter would not be able to live in dignified conditions. The Upper Tribunal ("**UT**") dismissed the Secretary of State's appeal and the Court of Appeal dismissed the further appeal; Green LJ gave the leading judgment; Dingemans LJ gave a short concurring judgment and King LJ agreed with both judgments.

102. Green LJ explained that the first ground of appeal gave rise to the question of whether and, if so to what extent, the CFR applied to any of the rights set out in the WA (para 16). The UT had held that the CFR applied to the right of residence in Article 13 WA, so that Article 1 CFR required that this right could be enjoyed in a dignified manner.

103. At para 43 of his judgment, Green LJ noted that Article 6(1) TEU makes clear that the CFR only applied when a Member State was implementing EU law and that, accordingly, it has no free-standing status outside of EU law.

104. In terms of the WA, Green LJ considered that the CFR applied "albeit within limits" (para 82) and that the CFR was relevant "to the construction and the application of substantive provisions of the Agreement such as article 13 and provisions referred to by cross-reference therein such as article 21 TFEU" (paras 92, and 94-95). The CFR was brought into the WA through the definition of "Union law" in Article 2(a)(i) and there was nothing in the WA that supported the Secretary of State's argument that it was only applicable during the transition period (para 82). The WA, as an international treaty concluded by the EU, is an integral part of EU law which fell to be construed by Member States in light of the CFR (para 85). As it was intended that the WA provisions would produce the same outcome in the UK and in EU Member States, when interpreting Article 13 WA, it was important to ask how it would be construed and applied in an EU court and to ensure the same applied in the UK (para 85).

105. After considering ***Dano*** and ***CG*** (para 89 above), Green LJ concluded that Article 4 WA afforded ***AT*** the right to rely upon its provisions and it imposed a duty on the competent authorities to ensure the observance of the rights in the WA in accordance with the CFR. He agreed with the UT's observation that as "both articles 10 and 13 of the WA refer to provisions or concepts of EU law, [the competent authority] was obliged by article 4(3) to comply with AT's and her child's Charter rights insofar as they were relevant to the situation" (para 91). However, he also emphasised that the CFR was not brought fully back into play in domestic law since, "[t]he Charter only applies if and insofar as it can attach to rights brought into domestic law via the implementation of the Withdrawal Agreement. This is a limited category of rights".

106. Dove J (as he was then) held that the circumstances in ***Here for Good*** were distinguishable from ***AT***. The claim in that case concerned a challenge to an amendment to the EUSS, which provided that applications made after a specified date were to be treated as invalid unless the Secretary of State was satisfied that there were reasonable

grounds for the applicant's delay in making the application and a refusal to consider a late application could only be challenged by judicial review. The claimant argued that the failure to provide a merits-based right of appeal against a decision to refuse to permit their application to be considered out of time, was a breach of Article 18, particularly Article 18.1(r) and Article 21 WA (which entitled an applicant to have access to judicial redress procedures in respect of any decision refusing to grant residence status or restricting their residence rights); and also a breach of Article 47 CFR (applicable by virtue of Article 4.3 WA), which entitled everyone whose rights and freedoms guaranteed by the law of the EU were violated to an effective remedy.

107. The claim was dismissed. In relation to late applications under Article 18 WA, Dove J held that there were two separate stages of consideration: (i) a preliminary assessment under Article 18(1)(d) as to whether there were reasonable grounds for the individual's failure to respect the deadline; and (ii) if such grounds existed, a consideration of whether the individual qualified for the new residence status. At the first stage there was no application before the competent authorities, only a submission that the application should be permitted to be made after the expiry of the deadline. Accordingly, the procedural safeguards in Articles 18(1)(r), 18(2) and 18(3) did not apply at this first stage (paras 39, 40, 42 and 49) and nor did Article 21 WA, which was predicated on the existence of an Article 18.1 application (para 49).

108. Dove J also rejected the argument based on Article 47 CFR, concluding that the CFR did not apply to the circumstances in issue in that case (para 57). After referring to the decision in ***AT***, Dove J explained his reasoning as follows:

> "55. In my view it is of significance to note the important distinction between the case of a person attempting to make an application for the new residence status under article 18 of the Withdrawal Agreement after the deadline for applications has expired and the appellants in *CG* and *AT*. As noted above the deadline under article 18(1)(b) is no less than six months from the end of the transition date (unless extended by a year under the provisions of article 18(1)(c)). During that period, within which an application for the new residence status should be made, article 18(2) makes clear that "all rights provided for in this Part shall be deemed to apply to EU Citizens or UK nationals, their respective family members, and other persons residing in the host state, in accordance with the conditions and subject to the restrictions set out in article 20". The converse of this, of course, is that outside of that period none of those rights continue for those individuals. To have a right of residence a person must apply for the new residence status and if they have failed to make that application within the period specified for doing so then they have to demonstrate reasonable grounds for not having respected the deadline.
>
> 56. By contrast both CG and AT had...made timely applications and been granted pre-settled status. Whereas CG and AT had the benefit of rights of residence under article 13 of the Withdrawal Agreement which in terms engaged with limitations and conditions prescribed by EU law, the individuals with which this claim is concerned have none. There is simply no element of EU law engaged in their circumstances which

> could come within article 4(3) of the Withdrawal Agreement and bring the Charter into play. It follows that the principles established by the cases of CG and AT are of no application in the present case. As Dingemans LJ succinctly explained, those cases were concerned with the consequences of having obtained pre-settled status under the EUSS; this case is concerned with the circumstances of a person who has no such status and who requires permission to make an application for the new residence status which is a creature of the Withdrawal Agreement under article 18 and unrelated to EU law provisions relating to the rights of citizens."

The NHS charging regime

109. Under section 1 of the National Health Service Act 2006 (the "**2006 Act**"), the Secretary of State has a duty to "continue the promotion in England of a comprehensive health service designed to secure improvement" in "the physical and mental health of the people of England" and "the prevention, diagnosis and treatment of physical and mental illness". This general duty is supported by section 1(4), which states that "services provided as part of the health service in England 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".

110. The principle that free NHS services be limited to those who are ordinarily resident in the UK was first set out in the NHS (Charges to Overseas Visitors) Regulations 1982, made under section 121 National Health Service Act 1977. The regulations introduced a framework under which individuals who were not ordinarily resident could be charged for certain NHS services.

111. The 1982 Regulations were subsequently replaced by the NHS Charing Regulations. These Regulations set out the services which are chargeable (primarily, secondary care), those who are liable to be charged and the categories of person or service that are exempt. The Explanatory Memorandum states that:

> "The overarching aim...is to improve identification and recovery from overseas visitors and migrants and to ensure that the NHS in England receives fair contribution for the cost of healthcare it provides to visitors who require treatment by the NHS."

112. Section 39 Immigration Act 2014 (the "**2014 Act**") provides that, for the purposes of NHS charging, a person will not be regarded as ordinarily resident if either: (i) they require leave to enter or remain but do not have it; or (ii) they only have limited leave to remain, unless that leave was granted under Appendix EU (i.e. the person has PSS). This is linked to section 175 of the 2006 Act, so that a person's immigration status affects whether they are eligible to access health services without charge. Where someone is not ordinarily resident because they do not have a right to enter or remain in the UK, they are regarded as an overseas visitor and liable to charge unless an exemption in the NHS Charging Regulations applies.

113. Regulation 3(1) of the NHS Charging Regulations stipulates that the relevant body (as defined by regulation 2) must recover charges for any relevant service provided to "an overseas visitor" from the person liable under regulation 4 for the payment of the charges; save where, having made such enquiries as it is satisfied are reasonable, the relevant body determines that the case is not one to which the Regulations provide for a charge to be made (regulation 3(2)). An "overseas visitor" is defined in regulation 2 as "a person not ordinarily resident in the United Kingdom".

114. Regulation 9 identifies various services that are exempt from charges. These include accident and emergency services, treatment or diagnosis of the diseases listed in Schedule 1 (for the protection of public health), family planning services and services provided for the treatment of a condition caused by domestic abuse or sexual violence. Regulations 14-25 create exceptions for various categories of people including: refugees and asylum seekers (including those with pending applications); children who are looked after by local authorities within the meaning of the Children Act 1989; victims of modern slavery (including where a reasonable grounds decision has been made and a conclusive determination is awaited); where the Secretary of State determines that exceptional humanitarian reasons justify this; those detained in hospital under the Mental Health Act 1983 or the Mental Capacity Act 2005; prisoners; and under reciprocal health agreements.

115. Regulation 3(5) allows for the continuation of "a course of treatment" without charge in relation to an overseas visitor, where the person in question was exempt from being charged when the treatment commenced but has since ceased to be exempt. What amounts to a "course of treatment" is a matter for the relevant commissioner of services or NHS Trust. The application of this provision led to D2 reducing the fees it charged the Claimant (para 25 above).

116. The NHS Charging Guidance includes reference to repayment plans, which allow a patient to pay off a debt incurred under the NHS Charging Regulations in specified instalments based on their ability to pay. The Guidance also addresses situations where the person is destitute or at imminent risk of destitution, indicating that in these circumstances the relevant body can choose not to pursue the debt for the time being.

117. Before the UK's exit from the EU and IPCD, EU citizens did not require leave to enter or remain in the UK and so did not fall foul of the "ordinary residence" requirement. However, EU citizens who resided in the UK for more than three months but had not acquired the right to permanent residence, generally had to be self-sufficient (paras 45-46 above). This included having comprehensive sickness insurance.

118. Mr Haithwaite's statement explains that the implications for the NHS charging regime of the UK adopting a constitutive scheme were outlined in a 11 November 2020 submission to Ministers, which was agreed on 19 November 2020. The submission explained that the effect of section 39 of the 2014 Act and its interaction with the NHS Charging Regulations was that EU citizens who required leave to enter or remain must have PSS or settled status in order to be capable of being ordinarily resident. The submission distinguished between those who had an unresolved application and thus were not in the UK unlawfully and those who had not made an application to the EUSS and thus were in the UK unlawfully. The submission said that a person who made a late application would be exempt from the point when the application was made, until an outcome was reached. Following agreement of the submission, the NHS Charging

Regulations were amended by the National Health Service (Charging to Overseas Visitors) (Amendment) (EU Exit) Regulations 2020.

119. The amendments included the introduction of Regulation 13A, in order to provide temporary protection and exemption from charge for those who had made a valid late application to the EUSS. This applied from the point the application was made until the conclusion of the application (including any appeal). Regulation 13A is headed "Persons who make late applications under Appendix EU to the immigration rules" and provides:

> "(1) No charge may be made or recovered in respect of relevant services provided to an overseas visitor to whom paragraph (2) or (3) applies during the period which begins with the date on which the application mentioned in paragraph (2)(b) or (3)(b), as the case may be, is made and which ends with the date on which that application is finally determined under Appendix EU to the immigration rules.
>
> (2) This paragraph applies to a person who is an overseas visitor by virtue of section 39 of the 2014 Act who –
>
> (a) is eligible to apply for leave to enter or remain in the United Kingdom under Appendix EU to the immigration rules, and
>
> (b) makes a valid application for leave to enter or remain in the United Kingdom under that Appendix to those rules after the application deadline.
>
> (3) this paragraph applies to a person who is an overseas visitor by virtue of section 39 of the 2014 Act who –
>
> (a) was granted limited leave to enter or remain in the United Kingdom under Appendix EU to the immigration rules, and
>
> (b) after the expiry of that limited leave to enter or remain, makes a valid application for indefinite leave to enter or remain in the United Kingdom under Appendix EU to the immigration rules.
>
> .....
>
> (5) Where a person has made an application mentioned in paragraph (2)(b) or (3)(b) and has received relevant services during the period specified in paragraph (1), if the relevant body-
>
> (a) has made charges for relevant services received during that period, but has not yet recovered them, it must not recover those charges;

> (b) has made and recovered charges for relevant services during that period, it must repay any sum paid in respect of those charges."

120. When Regulation 13A was originally introduced, it also included provision to retrospectively charge people who were ultimately refused EUSS status in relation to the period when their application was pending. However, this was amended in 2023 (following issues raised by the IMA) by The National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2023. The effect of this amendment is that no charges can be imposed in respect of the application period for EUSS even if the application is ultimately unsuccessful. It was accepted that this amendment was required to correctly reflect the protection provided for in Article 18.3 WA.

121. D1 highlights that the IMA published a statement in December 2024 indicating:

> "The IMA considers it is compatible with the Agreements to seek to recover charges for NHS treatment during the period between the expiry of the application deadline and the acceptance of a valid application to the EUSS. This means that following expiry of the deadline, a child or joining family member is only able to access their rights under the Agreements where they have made a valid application to the EUSS. This includes being able to use all of the NHS for free."

Justifying differences in treatment

122. As I explained earlier, the only issue between the parties in terms of Ground 2 is whether the admitted indirect discrimination can be justified. To do so, D1 must show that the discrimination is "appropriate for securing the attainment of a legitimate objective and cannot go beyond what is necessary to attain that objective": ***Commission v UK***, para 79. The difference in treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions: Lord Hope of Craighead DPSC, giving the leading judgment in ***Patmalniece v Secretary of State for Work and Pensions*** [2011] UKSC 11, [2011] 1 WLR 783 ("***Patmalniece***"). As Baroness Hale of Richmond JSC explained at paras 94-95 of ***Patmalniece***, it is the criterion or practice that gives rise to the difference in treatment that has to be justified.

123. The submissions made by the parties and by the IMA largely rely upon three authorities: ***Patmalniece, Commission v UK*** and ***A v Veselibas Ministrija*** Case (C-243/19) [2021] 2 C.M.L.R. 2 ("***Veselibas***"). I will summarise the decisions at this stage and then consider the competing submissions in the Analysis section of my judgment below.

Patmalniece

124. ***Patmalniece*** concerned the appellant's entitlement to UK state pension credit. She was a Latvian citizen who had worked in Latvia for 40 years and on her retirement had received a state retirement pension. She came to the UK in June 2000 and unsuccessfully claimed asylum. Thereafter she remained in the UK, where she never

worked. She claimed UK state pension credit (a means tested non-contributory benefit), which by section 1(2)(a) State Pension Credit Act 2002 required a claimant to be "in Great Britain". Pursuant to regulation 2(1) State Pension Credit Regulations, a person was treated as not in Great Britain if she was not habitually resident in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland (the Common Travel Area); and under regulation 2(2), a person was not to be treated as habitually resident in the Common Travel Area unless they had a right to reside there, which the claimant did not have. The Supreme Court accepted that the right to reside test constituted indirect discrimination, but found (Lord Walker of Gestingthorpe JSC dissenting) that it was justified as a proportionate means of achieving the legitimate aim of protecting the public finances of the host State.

125. Lord Hope's analysis on justification largely focused on whether the justification relied upon was independent of the nationality of the persons concerned, noting that the appellant's counsel did not seriously question the proposition that the Secretary of State's reasons were objectively justifiable (para 46). The purpose of regulation 2 was to ensure that claimants had achieved economic integration or a sufficient degree of social integration in the UK or elsewhere in the Common Travel Area as a pre-condition to entitlement to the benefit (para 46). The Secretary of State's justification lay in his wish to prevent the exploitation of welfare benefits by people who had come to the UK simply to live off benefits without working here. This was a legitimate reason for imposing the right of residence test; it was a basic principle of Community law that people who depend on social assistance will be taken care of in their own Member State (para 46).

126. Lord Hope held that the Secretary of State had provided a sufficient justification that was independent of the nationality of the persons concerned (paras 47-53). This justification was founded on the principle that those who are entitled to claim social assistance in the host Member State should have achieved a genuine economic tie with it or a sufficient degree of social integration as a pre-condition for this entitlement. If a citizen of one Member State who was lawfully present in another Member State could, without difficulty, access the social security benefits of the host State, the implications for the more prosperous Member States with more generous social security provisions were obvious (para 48). Lord Hope referred to the importance attached to combating the risks of what the Advocate General in ***Trojani v Centre public d'aide sociale de Bruxelles*** [2004] ECR-I-7573, para 18 ("***Trojani***") described as "social tourism" (para 51). The Secretary of State's purpose was to protect the resources of the UK against resort to benefit or social tourism by persons who were not economically or socially integrated with this country (para 52). The principle Lord Hope took from ***Trojani*** was that "it is open to member states to say that economical or social integration is required" (para 52).

127. Baroness Hale considered that ***Trojani*** gave "a fairly clear indication" that it was open to Member States to make social assistance benefits dependent on the right to reside in the host country even though, of necessity, such a right will be enjoyed by all nationals but only by some non-nationals (para 106).

Commission v UK

128. The CJEU's decision in ***Commission v UK*** concerned the Commission's action alleging that the UK was failing to fulfil its obligations under Reg 883/2004 by imposing a right

of residence test on persons claiming certain social security benefits. In order to claim child benefit under the Social Security Contributions and Benefits Act 1992 and child tax credit under the Tax Credits Act 2002, the individual had to have the right to reside in the UK pursuant to the CRD (so that if they were economically inactive, they had to have sufficient financial resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State). The Commission argued that the application of the right to reside requirements constituted discrimination contrary to Article 4 Reg 883/2004. The CJEU dismissed the Commission's action.

129. The CJEU observed that there was nothing to prevent, in principle, the grant of social benefits to Union citizens who are not economically active being made subject to the substantive condition that those citizens meet the necessary requirements for possessing a right to reside lawfully in the host Member State (para 75). However, as a host Member State who requires a national of another Member State to be residing in its territory lawfully for these purposes commits indirect discrimination, the question turns on justification (paras 76 and 77).

130. In terms of the legitimate aims, the CJEU noted:

> "80....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..."

131. The CJEU went on to consider proportionality, concluding that the treatment in question did not amount to discrimination prohibited under Article 4 Reg 883/2004 (paras 81-86).

Veselibas

132. ***Veselibas*** was decided by the European Court of Justice (Second Chamber). The applicant was affiliated to the Latvian healthcare system. His son, a minor, needed open-heart surgery which was only available in Latvia with the use of a blood transfusion. As the applicant was a Jehovah's Witness he refused to consent to the transfusion. The operation was available in Poland without the transfusion and he asked the Latvian health service to issue a certificate authorising his son's treatment in Poland and agreeing to reimburse him for that treatment under Article 20.2 Reg 883/2004. The Latvian health service declined to do so, as the operation could be carried out in Latvia and only a person's medical situation and physical limitations were to be taken into account when deciding whether to issue the authorisation sought. The applicant argued that this was discriminatory as the vast majority of those affiliated to the Latvian healthcare system were able to receive the healthcare at issue without having to give up their religious beliefs. The questions referred by the Latvian Supreme Court included whether in circumstances where the required treatment was available in the insured person's Member State, the discrimination caused by refusing to consider a person's religious beliefs when deciding upon an application for prior authorisation for treatment abroad was compatible with Article 20(2) Reg 883/2004, when read in conjunction with Article 21(1) CFR, which prohibited discrimination based on religion or belief.

133. The Court accepted that the refusal to grant the prior authorisation provided for in Article 20.2 Reg 883/2004 established a difference in treatment that was indirectly based on religion, so that it was necessary to examine whether this difference in treatment was based on an objective and reasonable criterion (para 43). The objectives relied upon were the protection of public health and the rights of others by maintaining an adequate, balanced and permanent supply of quality hospital care on the national territory and by protecting the financial stability of the social security system (para 44).

134. The Court recognised that the number of hospitals, their organisation, the facilities they are provided with and the medical services they are able to offer were all matters for which planning must be possible. Such planning sought to ensure there was sufficient access to a balanced range of high-quality hospital treatment; and it assisted in controlling costs and preventing, as far as possible, any wastage of financial, technical and human resources in a context where the available financial resources were not unlimited (para 46). Accordingly:

> "47...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."

135. The Court continued its analysis as follows:

> "49....in a situation where benefits in kind provided in the Member State of stay give rise to higher costs than those relating to benefits which would have been provided in the insured person's Member State of residence, the obligation to refund in full may give rise to additional costs for the Member State of residence.
>
> 50. As the referring court rightly acknowledged, such additional costs would be difficult to foresee if, in order to avoid a difference in treatment based on religion, the competent institution were obliged to take account of the insured person's religious beliefs when implementing art. 20 of Regulation 883/2004...
>
> 51. Furthermore, as the Italian Government stated in its written observations, it is possible that national health systems may face a large number of requests for authorisation to receive cross-border healthcare which are based on religious grounds rather than on the insured person's medical situation.
>
> 52. If the competent institution were obliged to take account of the insured person's religious beliefs, such additional costs could, 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, which is a legitimate objective recognised by EU law. Accordingly, a prior authorisation system which does not take account of the insured person's religious beliefs but which is based exclusively on

> medical criteria may reduce such a risk and therefore appears to be appropriate for that purpose of achieving the objective."

136. The Court then turned to the question of necessity, noting that it was for Member States to determine the level of protection they wished to afford to public health and the way in which that level is to be achieved (para 53). The Court then said:

> "54.It must, therefore, be held that the Member State of affiliation would, in the absence of a prior authorisation system based exclusively on medical criteria, face an additional financial burden which would be difficult to foresee and likely to entail a risk to the financial stability of its health insurance system.
>
> 55.In those circumstances, not to take into account the insured person's religious beliefs, in examining a request for prior authorisation...appears to be a justified measure in light of the objective mentioned at [52] above, which does not exceed what is objectively necessary for that purpose and satisfies the requirement of proportionality..."

137. Accordingly, the Court held that Article 20.2 Reg 883/2004 must be interpreted as not precluding the insured person's Member State from refusing to grant the authorisation (para 56).

Evidence

138. I have already summarised the position of BHO and her daughter at paras 18-25 above.

The Claimant's evidence relating to Ground 1

139. Ms O'Reilly's statement exhibits her correspondence with Michal Meduna, the European Union Co-chair of the Specialised Committee on Citizens' Rights, regarding her request that the European Commission confirm its position on the issue raised by Ground 1. In his email of 30 September 2025, Mr Meduna sent a link to a European Commission guidance document headed "Late Applications under Article 18(1) of the Withdrawal Agreement" available on the Commission's website on citizens' rights under the WA. He indicated that such guidance documents are intended to assist national authorities on the proper implementation of the citizens' rights part of the WA and "do not supplement or complete" the WA. He said they were prepared by staff of the Commission and "should not be interpreted as stating an official position of the Commission".

140. The text of the guidance document refers to the position of Late Beneficiaries in relation to Article 18.3 and then continues:

> "There is no indication in the Withdrawal Agreement that the rights of such Withdrawal Agreement beneficiaries should differ from those who applied in time, even though there is no explicit rule in the Withdrawal Agreement that would govern the legal nature of residence of a late applicant between the end of the

> application deadline and the decision on whether there were reasonable grounds for applying out of time.
>
> In other words, where the national authorities accept that there were indeed reasonable grounds for not applying in time, Article 18(3) of the Withdrawal Agreement applies to such Withdrawal Agreement beneficiaries in the same way as to in-time applicants.
>
> The objective of temporary protection is to ensure that there is no 'gap' during which an applicant's residence would be considered unlawful. For successful late applicants, this objective is met only if the concept that considers residence as lawful is extended to the period preceding the submission of the late application...
>
> Given the overall unique context of departure from the declaratory nature of EU law on free movement of EU citizens in constitutive schemes in which Article 18(1)(d) of the Withdrawal Agreement finds itself, the entire period of residence of late applicants should retroactively (*ex tunc*) be considered lawful if they are successful in being granted Withdrawal Agreement beneficiary status based on a late application."

141. Ms O'Reilly's statement also addresses the practice of other Member States who have adopted constitutive schemes, specifically whether those countries take the UK's approach of denying that the grant of the new residence status under Article 18.1 has *ex tunc* effect. The material reviewed by Ms O'Reilly and her colleague was obtained from the European Commission's website, which has information about the national residence schemes operated by each EU country. Their review identified three Member States who appear to treat the grant of new residence status to UK citizen Late Beneficiaries as having retrospective effect; Finland, the Netherlands and Romania. Ms O'Reilly says the available material does not indicate definitively what approach was taken by the other ten Member States who have adopted constitutive schemes, but it appears more likely than not that Denmark, Malta, Austria and Slovenia take a similar approach. She says there was no positive indication that any of the other ten countries had adopted the same position as the UK Government. D1 does not accept this analysis.

The Defendant's evidence relating to Ground 2

142. D1's case on the justification for the imposition of charges for NHS treatment on EU citizen Late Beneficiaries during Period 2 (para 60 above) is set out in Mr Haithwaite's statement. Four aims are identified, although D1 accepts that the third and fourth aims are ancillary objectives, which would not in themselves amount to sufficient justification for the treatment in question:

    i) It is consistent with the UK having chosen to implement a constitutive scheme, which requires not just that the EU citizen in question has a right to reside under the conditions set out in Articles 13 and 15 WA, but also that they have made an application to the UK authorities to obtain their new residence status ("the **Constitutive Scheme Reason**");

ii) It supports the financial and long-term sustainability of the NHS to make and recover costs from those not ordinarily resident (nor exempt from charge) and it seeks to ensure that D1 can plan for and design a healthcare service that meets the relevant duties under the 2006 Act (the "**NHS Funding and Planning Reason**");

iii) It promotes fairness in the immigration system by recognising the individual responsibility to obtain the necessary status and the consequences of not having done so. It is consistent with the way in which other overseas visitors who are not ordinarily resident in the UK are treated (which is appropriate now that free movement has ended) (the "**Fairness Reason**");

iv) It 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 (the "**Effective Framework Reason**").

143. Mr Haithwaite explains that there are three ways in which an overseas visitor is considered to contribute to their NHS healthcare costs: (i) via the immigration health surcharge ("**IHS**") introduced in the 2014 Act; (ii) under reciprocal healthcare arrangements with international partners; and (iii) by directly charging the patient under the NHS Charging Regulations. He describes the considerable pressures on the NHS budget. In 2023/24 there was an overspend of £1.4 billion for the combined NHS systems. In the period 2018/19 – 2023/24, the total income derived from these three routes was £8.2 billion, primarily via the IHS. Direct charging from chargeable overseas visitors in England accounted for £535 million, with £194 million recovered and £234 million written off.

144. Mr Haithwaite indicates that the 11 November 2020 Ministerial submission (para 118 above) identified that those who made a late application for the new residence status would be exempt from NHS charges from the point their application was made until the time when an outcome was reached. A premise of the submission, which Ministers agreed, was the need to treat EU, EEA and Swiss nationals who had no lawful right to be in the UK the same as a third-country national who had no lawful right to be in the UK. (It was recognised that there would be a difference between the treatment of the Late Beneficiaries and third-country nationals in terms of the exemption from charges that applied to the former during the application period, but it was accepted that this was required by the terms of the WA.)

145. Mr Haithwaite explains that the UK decided to adopt a constitutive scheme because it was considered necessary to provide a clear incentive for EU citizens living in the UK, at the end of the transition period, to apply promptly to secure their status in the UK and to obtain evidence of the same. In turn, taking this level of personal responsibility for their immigration status and the rights associated with this status, would help to provide certainty for employers, businesses and public services and assist EU citizens with accessing benefits and services. The UK Government made substantial efforts to publicise the EUSS and ensure that those affected understood what they needed to do to secure their status. A constitutive scheme inevitably relies upon the person in question taking the step of making an application in order to benefit from their rights under the WA. Conferring such rights when someone has not made an application would undermine the basis and premise of the constitutive regime. If the system did not

operate as D1 contends, then the incentive for people to apply (in-time) for EUSS would be lessened and the distinction between a constitutive scheme and a declaratory one would be eroded because people would have rights conferred by the scheme even if they had not applied.

146. Mr Haithwaite indicates that the number of EU citizens who have continued to live in the UK without applying to regularise their status is "unknown and unknowable", although he expects it will be relatively small given the substantial take-up of the EUSS. He says that the absence of a charging regime for such individuals would make it more difficult for the Secretary of State to plan for and promote a comprehensive health service and ensure the sustainability of the finances and resources of the NHS. The November 2020 Impact Assessment (which accompanied The National Health Service (charges to Overseas Visitors) (Amendment) (EU Exit) Regulations 2020) estimated that the charging of EU citizens could generate between £88-145 million in increased income for the NHS, albeit these figures were recognised to be subject to substantial uncertainty. Whilst these sums are small relative to the overall NHS budget, they are important as they ensure that everyone is making a fair contribution in helping to reduce the overall pressure on NHS finances.

147. In relation to the aim of providing an effective legal and administrative framework, Mr Haithwaite refers to the need for the framework to be clear to those involved in the administration of such a system and to those whom it affects.

The Claimant's evidence relating to Ground 2

148. Ms O'Reilly's statement sets out and discusses figures obtained from the Consolidated NHS Provider Accounts in relation to NHS income from overseas visitors. The documentation only contains figures in respect of overseas visitors globally (of which EU citizens who do not have leave to remain are a smaller sub-set and those who subsequently make a successful late application are a smaller still sub-sub-set). The figures for 2023/24 (the latest year for which they are available) indicate that the total income from patient care activities for the NHS was almost £120 billion and, of this, the income recognised from overseas patients was £123 million (0.1% of the total income).

149. Ms O'Reilly also refers to D2's published details of income from overseas visitors. The figures for 2023/24 indicate that income from such patients was £469,000 (0.07%) of the total income from patient care activities of almost £660 million.

150. Ms O'Reilly describes aspects of the EUSS caseworker guidance published by the Home Office, with a view to showing that a substantial cohort of those who are accepted as Late Beneficiaries (because they had reasonable grounds for applying after the deadline) are likely to have vulnerabilities. She indicates that a section of the guidance describing "some circumstances in which [caseworkers] may be satisfied that a person has reasonable grounds...for their delay" includes circumstances involving: children; applicants with physical or mental capacity and/or care support needs; applicants who have a serious medical condition or are undergoing significant medical treatment around the time of the applicable deadline; and applicants who are victims of domestic violence or abuse or are or were otherwise in a controlling relationship or situation. The NHS Charging Guidance indicates that late applications from children should be accepted as being applications that were made with reasonable grounds.

The AIRE Centre's evidence

151. Mr Evans explains that the AIRE Centre is one of the few organisations in the UK that has been granted funding from the Home Office to help vulnerable individuals apply for status under the EUSS. He indicates their records shows that the AIRE Centre has received 662 requests from individuals seeking to understand their rights in relation to late applications and the Centre was able to advise 142 of these individuals and supported 62 individuals in making late applications.

152. In terms of the overall number of Late Beneficiaries, Mr Evans refers to Home Office statistics indicating that it received over 620,000 late applications to the EUSS between 1 July 2021 and 30 June 2025, of which 226,000 applications were granted.

153. Mr Evans says that 95-98% of those for whom the AIRE Centre has submitted late applications are characterised by some kind of vulnerability which justifies their late application, for example mental or physical health issues, victims of abuse / coercive behaviour, housing instability, lack of access to technology and minors. All of the late applications they have supported have been successful.

154. Mr Evans also explains that the issue of retrospectivity in relation to Late Beneficiaries is not limited to the NHS charging regime. In terms of the 142 individuals they have advised, 40 people sought advice about their entitlement to State benefits and in 11 of these cases people reported they had lost access to such benefits or to other rights, including pension rights. Loss of social welfare support and benefits and an inability to access NHS treatment without charge are likely to impact adversely on those who have the kinds of vulnerabilities described.

Ground 1: Analysis

Common ground between the parties

155. In addressing the retrospectivity question raised by Ground 1 it is helpful to begin by re-capping some points of common ground between the parties:

    i) Article 18.1 WA permitted the UK to adopt a constitutive scheme under which EU citizens residing in the UK were required to make a successful application in order to obtain the "new residence status" referred to in that provision;

    ii) Under a constitutive scheme, an Article 18.1 application is the way to obtain the rights of residence granted in Title II, Part 2 WA. When a successful applicant obtains the new residence status under Article 18.1 WA, this status confers the rights contained in Title II Part 2 WA, including the rights of residence in Articles 13, 15 and 16;

    iii) Under a constitutive scheme there are two pre-conditions to acquiring the new residence status: (a) residence in accordance with the Title II Part 2 WA requirements in Article 13 or Articles 15 and 16 (the "**Residence Pre-condition**"); and (b) making an Article 18 compliant application for the new residence status (the "**Application Pre-condition**"). If *both* these pre-conditions are met, the new residence status must be granted;

iv) Article 18 is an administrative or operational provision. ***Fertre*** establishes that it is the gateway through which a person can access the rights which they hold or may come to hold under Title II, Part 2 WA. It does not itself constitute the right of residence;

v) As the UK adopted a constitutive scheme, EU citizens residing in the UK who did not make an Article 18.1 application for the new status have no residence rights under Title II Part 2 WA after the expiry of Period 1 (para 58 above), even if their residence in the UK meets the Residence Pre-condition;

vi) By contrast, under a declaratory scheme permitted by Article 18.4 WA, residence rights under Title II Part 2 WA arise automatically once the conditions in Articles 13, 15 or 16 (as the case may be) are met in relation to the individual's residence in the host State;

vii) Under the exercise of free movement rights prior to the WA, residence rights arose automatically upon the individual's satisfaction of the conditions prescribed by Union law;

viii) Satisfying the Residence Pre-Condition involves looking backwards and taking account of the individual's past residence in the host State that has been in accordance with the Title II Part 2 WA requirements in Articles 13, 15 and 16 (as the case may be);

ix) Insofar as the EUSS operated by the UK is more generous than Title II Part 2 WA in terms of the prescribed conditions for acquiring rights of residence, it operates only on the domestic law plain and does not impact upon the position under the WA;

x) If a successful Article 18.1 application is made within the Article 18.1(b) deadline, the problem of retrospectivity does not arise because of the combined effect of Article 18.2 (covering Period 1) and Article 18.3 (covering Period 3), deeming that the rights provided for in Part 2 WA apply;

xi) There is no express provision in the WA deeming that the rights provided for in Part 2 WA apply to Late Beneficiaries during Period 2 (the interim period between the expiry of the Article 18.1 application deadline and the time when the late application is made);

xii) There is no express provision in the WA stating that the new residence status obtained pursuant to Article 18.1 has retrospective effect;

xiii) None of the earlier authorities have addressed the issue of retrospectivity that arises in this case; and

xiv) The text of the WA is the key interpretative source in terms of resolving the Ground 1 issue.

Interpretation of Article 18.1

156. The Claimant argues that on a proper construction of the WA, once a person has been granted the residence rights under Title II Part 2 WA by a successful Article 18.1

application, their status as a beneficiary of the WA has *ex tunc* effect starting from when the period of free movement that is to be preserved began, so that the individual is deemed to have been lawfully residence under the WA from this point onwards.

157. Consistent with the principles of interpretation that I described at paras 69-72 above, my primary focus is on the text of the WA. The Court's task is to identify the common intention that can be ascribed to the parties to the WA by ascertaining the ordinary meaning of the relevant terms used, considered in their context and in light of the WA's object and purpose. As to the latter, the object and purpose of the WA was to secure an orderly withdrawal of the UK from the EU, whilst at the same time protecting EU and UK nationals who had exercised their free movement rights before IPCD (paras 32 and 73 above).

158. It is apparent from the terms of Article 18.1 that the *new* residence status (emphasis added) only comes into being if and when it is determined that the individual in question has satisfied both of the pre-conditions I referred to at para 155(iii) above. The new residence status does not exist at all prior to this point. Once, but only once, this new status comes into existence, it "confers" the rights under Title II Part 2 WA upon the individual in question. It is agreed that the Title II rights are not available for the individual to access or to exercise prior to the grant of the new status and that these rights will not become available to them to access or to exercise if the new status is not granted (whether because no application is made or because the application is unsuccessful). The focus upon this future point at which the new status is granted is reinforced by the terms of Article 18.1(b); once it is established that the applicant is entitled to the residence rights set out in Title II Part 2 WA, "the applicant shall have a right to be granted the residence status". None of this suggests that the status as a WA beneficiary is intended to date back to an earlier point.

159. Whilst Mr Burton suggests that "verify" in Article 18.1(b), indicates a process of confirming rights that are already in existence, I do not accept that the use of this word points towards a grant of status with retrospective effect. The grant of the new residence status only occurs *after* the verification process has been undertaken and the individual's satisfaction of the two pre-conditions established. An applicant may not succeed at the "verification" stage and if they fail to do so they will not attain the new residence status and in those circumstances they will have no residence rights under Title II Part 2 WA (para 155(v) above).

160. In this context, where the new residence status acquired under Article 18.1, with its consequential conferring of rights under Title II Part 2 WA, only comes into being at the time when it is accepted that the two pre-conditions are satisfied, it is significant that there is nothing explicit in Article 18 that states or even suggests that this new status was intended to have a retrospective effect conferring the rights under Title II Part 2 WA, including a status of lawful residence, from an earlier date than the point of grant. On the Claimant's case, the grant of the Article 18.1 new residence status has *ex tunc* effect dating back to when the post-transition period of residence began (usually IPCD) but there is nothing in the text of the article that indicates this.

161. Moreover, I agree with Sir James Eadie's submission that the existence of the deeming provisions in Article 18.2 (covering the period contemplated by Articles 18.1(b) and 18.1(c)) and Article 18.3 (covering the application period) support D1's interpretation. There was, as Mr Burton points out, an evident rationale for the inclusion of each of

these provisions; Article 18.2 to cover the grace period and Article 18.3 to address the position before any decision has been made on the application. However, the significance for present purposes is that the inclusion of these provisions shows that the extent to which Title II rights applied to EU citizens and UK nationals other than from the point when the new residence status was granted was actively considered and addressed by the parties to the WA. As the position of Late Beneficiaries was also being actively addressed in Article 18 (by Article 18.1(d)), it is striking that no deeming or other explicit provision was included to cover their Title II rights during the time I have referred to as Period 2 (para 60 above) in circumstances where it would have been readily apparent that Period 2 was not covered by the deeming provisions in Articles 18.2 and 18.3 (para 161 above). If it was intended that the Title II rights of Late Beneficiaries should apply during Period 2, express provision could easily have been made, but this was not done.

162. Moreover, Article 18.4 characterises an Article 18.1 constitutive scheme as one where the host State requires the individual to apply for the new residence status "as a condition for legal residence". This is an explicit indication that (save for periods covered by the deeming provisions) the individual's legal residence in the host State and the rights attached to this will be obtained *from* the grant of this new status and that legal residence for the purposes of the WA does not exist prior to this time.

163. I have not lost sight of the fact that the WA's objectives include providing reciprocal protection for EU citizens and UK nationals who have exercised free movement rights. However, it is important to bear in mind that the perceived gap in protection only arises in respect of Late Beneficiaries (paras 58-59 above) and, as I have just explained, the parties to the WA could have chosen to make explicit provision to cover their residence in the host State during the period in question, Period 2. Furthermore, all of the indications in Article 18 (as I have just examined) point in the same direction, namely that the new residence status applies prospectively rather than retrospectively. More broadly, this is also consistent with the nature of a constitutive scheme in which it is inherent that a person does not have residence rights under the WA unless and until they are recognised by their host State through the grant of the new residence status; and under which meeting the Application Condition is itself a condition of attaining lawful residence under the scheme. For the avoidance of doubt, I do not attach weight to arguments based on the alleged desirability of a constitutive scheme operating in this way (whether in the interests of certainty or for other reasons); consistent with the approach taken by Lane J in ***Citizens' Rights***, the question is what the WA says, not what one of the parties to the agreement would prefer it to say (paras 78 and 81-82 above).

The Claimant's central contentions

164. I will next explain my conclusions in relation to the main points that Mr Burton relies on in support of his submission that the new residence status has *ex tunc* effect. Although there is some overlap between these contentions, for the purposes of setting out my reasoning, I will address three central points that he advances in turn, namely: (i) a requirement that constitutive and declaratory schemes must be of parallel effect; (ii) the reasoning in ***Fertre*** affords strong support for the Claimant's position; and (iii) as the individual's past residence in the host State in accordance with the Title II Part 2 WA residence requirements determines whether the Residence Pre-Condition is met in

their case, it follows that the grant of the Article 18.1 new residence status delivers access to the Title II rights that already accrued through this period of residence.

165. Mr Burton emphasises that if the new residence status only has prospective effect from the date of its grant, the Title II rights that an individual obtains under a constitutive scheme will differ from those obtained under a declaratory scheme. This is because under a declaratory scheme, the Article 13 residence rights and the Article 15 right of permanent residence will be acquired by the individual automatically from the time when they meet the conditions specified in Articles 13.1 or 15.1 (as the case may be). Whilst I accept the correctness of this proposition, I do not consider that it mandates or points to a conclusion that the Article 18.1 new residence status has *ex tunc* effect.

166. Mr Burton submits that the Court is compelled to arrive at an interpretation which achieves equivalence between the rights obtained under a constitutive scheme and those obtained under a declaratory scheme. However, it is in any event inherent in the fact that Article 18 permits a host State to choose between adopting a constitutive scheme or a declaratory scheme that substantive Title II rights acquired under the two schemes may differ in relation to otherwise comparable periods of residence in the host States. A person who came to the UK before the end of the transition period and then lived and worked here continuously for five years thereafter will have no Title II rights to reside in the UK at all if they do not make a successful Article 18 application; whereas the same five years of residence by a UK national in a Member State that has adopted a declaratory scheme will give rise to a right of permanent residence in that host State by virtue of Article 15.1. As Sir James Eadie put it, "non-equivalence is built into the structure" of Article 18.

167. Mr Burton submits that, nonetheless, the rights conferred by the two schemes must be equivalent in terms of the status of the previous period of residence *once* the individual is within the respective scheme. I do not see why that should follow. If the adoption of a constitutive scheme may permissibly lead to the stark disparity I have just highlighted, it is difficult to see why it may not also impact on the date from which the new residence status takes effect and the Title II rights are conferred. Mr Burton relies upon para 150 of ***Citizens' Rights***, where Lane J observed that a constitutive scheme "must deliver the rights of residence in Title II of Part Two" (para 80 above). However, given the issue that the Court was addressing in that case (whether a subsequent second application could be required), this was said in relation to the Title II rights that the individual enjoyed going forward from the time *after* the new residence status had been granted. It is an unsurprising proposition that from the point of grant onwards the successful applicant under a constitutive scheme will have the benefit of the substantive Title II Part 2 WA residence rights as would an individual who met the residence requirements under a declaratory scheme; but this sheds no light on whether the Article 18.1 grant of that status operates retrospectively. In his oral submissions in Reply, Mr Burton fairly acknowledged that ***Citizens' Rights*** "begs the question" that Ground 1 poses.

168. I turn next to ***Fertre*** which Mr Burton relies on as directly helpful to his argument on retrospectivity. In short, he says that the Court of Appeal's decision establishes that Article 18.1 simply operates as a gateway to the Title II Part 2 WA rights that have already come into existence independently of Article 18.1 and which are there waiting to be accessed in full when the application is accepted and the applicant passes through the gateway. Accordingly, he argues, once the applicant has gained this access, the substantive rights they acquire include the residence rights they have already accrued

under Articles 13, 15 and 16 through their residence in the host State, so that these preserved rights are now constituted with *ex tunc* effect and their earlier CRD-compliant residence in the host State is treated as lawful residence for the purposes of the WA. In the case of a Late Beneficiary this will include their residence during Period 2 (provided it is CRD compliant), as this falls to be constituted *ex tunc*, just as the case is with the residence of an in-time applicant. Mr Burton also submits that D1's position on the Ground 1 issue is wrongly predicated on the argument that was dismissed in ***Fertre***, namely that it is the Article 18.1 new residence status that constitutes the substantive residence right that is acquired.

169. I accept that Article 18.1 provides the gateway via which substantive Title II Part 2 WA rights are acquired and that the "new residence status" referred to in Article 18.1 does not itself constitute the right of residence. This is clear from ***Fertre***, as D1 acknowledges. However, I do not agree that this precludes a conclusion that the new residence status take effect prospectively. ***Fertre*** does not directly address this issue; the question did not arise and was not considered in that case.

170. It is important to bear in mind the submission that the Court of Appeal was addressing and rejecting in ***Fertre***. This is explained in more detail at paras 86-93 above. The appellant accepted that her residence in the UK was not in accordance with the Title II Part 2 WA requirements in Article 13.1 (because she was not economically active), so she did not meet the Residence Pre-Condition in Article 18.1. However, she argued that as her application had been granted under the (more generous) EUSS, Article 18.1 conferred a new residence status upon her, which then entitled her to obtain equal treatment with UK nationals in relation to homelessness assistance by the application of Article 23. One of the planks to this far-reaching argument was the contention that the Secretary of State was wrong to say, in reliance upon ***Citizens' Rights***, that Article 18 was merely a gateway to other WA rights and not itself the grant of a substantive residence status. Thus, the appellant relied upon Article 18 as enlarging the substantive rights that she would not otherwise obtain under the WA.

171. It is unsurprising that the Court of Appeal rejected this submission for the reasons so clearly and comprehensively identified by Whipple LJ (paras 90-93 above). Her reasons included that the appellant was relying on the unilateral decision of the UK to adopt the more generous EUSS scheme and the alleged operation of Article 18 to very substantially expand the reach of rights under the WA from its explicitly drawn terms (reflecting pre-WA freedom of movement rights) to encompass all those who were granted PSS by the UK even if they had not been economically active during the relevant period of residence. Self-evidently the same argument could not apply to widen the rights obtained under a declaratory scheme. It was in this context that Whipple LJ re-emphasised that Article 18 was a gateway through which an individual accessed their rights under Title II Part 2 WA; that it was an administrative provision that did not address the *content* of the rights conferred; that Article 18.1 was not intended to be of wider effect than the rights that could be obtained under Article 18.4; and that an Article 18.1 application was a pre-cursor to legal residence rather than the grant of legal residence in itself (paras 92-93 above). Her rejection of the appellant's argument is encapsulated in the following passage from para 114 of her judgment (which is cited more fully at para 93 above):

> "I reject the Appellant's argument that domestic law rights under PSS were automatically elevated by operation of Article 18 into

> rights under the Withdrawal Agreement on 1 January 2021. The function of Article 18 is much more limited. It brings into existence the new residence status as a gateway to other rights under the Withdrawal Agreement."

172. Accordingly, I do not consider that the reasoning in ***Fertre*** precludes the conclusion that my earlier analysis has indicated, namely that the new residence status granted under Article 18.1 WA has prospective (rather than retrospective) effect. Moreover, it does not follow from Whipple LJ's reasoning, that once the applicant has gained access to Title II Part 2 WA rights via the Article 18.1 gateway, the substantive residence status they acquire will be treated as dating backwards to when their post-IPCD CRD compliant residence began (so that they are regarded as having been legally resident from that point onwards). This issue did not arise for consideration in ***Fertre*** and I regard the Court of Appeal's judgment as neutral on that question.

173. Thirdly, I turn to Mr Burton's argument that as the individual's past residence in the host State meeting the Title II Part 2 WA residence requirements in Article 13 or Articles 15 and 16 is taken into account for Article 18.1 purposes to decide whether the Residence Pre-condition is met, it follows that the grant of the Article 18.1 gateway status delivers access to the Title II rights accrued by this earlier period of residence so that the individual is treated as being lawfully resident during that period. He submits that it would be contradictory and nonsensical to (on the one hand) take this earlier period of residence into account for the purposes of deciding that the Residence Pre-condition is satisfied but (on the other hand) not to regard this earlier period as lawful residence once the Article 18.1 status is conferred.

174. I do not accept this argument. I do not agree that there is an inconsistency or a contradiction between: (a) (on the one hand) taking account of a person's past residence in the host State (including during Period 2 in the case of a Late Beneficiary) for the purposes of satisfying the Residence Pre-condition for the grant of the Article 18.1 new residence status; and (b) (on the other hand) granting the new residence status if the Residence Pre-condition and the Application Condition are met, with effect from the time of this grant. What has to be shown to meet the criteria for achieving this new status is conceptually distinct from the question of the time when the new status then takes effect once it is granted. The sheer fact that an earlier period of residence establishes that the Residence Pre-Condition is met, does not mean that once the new status is conferred it must operate retrospectively to render residence lawful during this earlier period. As Jay J said in ***Fertre HC*** in a passage I cited at para 96 above (albeit he was not considering a retrospectivity issue at the time):

> "At the first stage of the analysis, it is important to bear in mind at all material times the conceptual distinction between the 'in accordance with conditions set out in this Title' (stage 1) and the 'new residence status which confers the rights under this Title' (stage 2). The former are about the preconditions for the acquisition of the new status; the latter are about the nature and content of the rights which flow, or may flow, from the grant of that status. There must be no attempt at elision between the two..."

175. Sir James Eadie does not accept that Article 15.1 WA *requires* the Article 18.1 decision-maker to take account of residence during Period 2 in the case of a Late Beneficiary, although he acknowledges that as a matter of practice the Home Office does take account of all periods of factual residence in the UK when determining whether the Residence Pre-condition is satisfied. However, for the purposes of this case (and without conceding the point more generally) he was content to proceed on the basis that this is the effect of the WA. For the avoidance of doubt, I have therefore approached matters on this basis.

176. In addition to there being no inconsistency or contradiction, it does not follow from the sheer fact that account is taken of a person's past residence in the host State (including during Period 2 for a Late Beneficiary) for the purposes of satisfying the Residence Pre-condition for granting the new residence status, that when this residence status is then granted it has *ex tunc* effect so as to deem this earlier period as one of lawful residence. Quite simply, this is a non sequitur, or, as Sir James Eadie described it, "a jump".

State practice

177. As I have noted at para 69 above, "subsequent practice *which establishes agreement* between the parties" (emphasis added) is to be taken into account in determining the common intention that is ascribed to the parties. Although counsel addressed me on the apparent practice in various EU Member States in relation to constitutive schemes and retrospectivity, I can take this topic quite briefly as, in short, there is no material before me that comes close to establishing a consensus between the parties to treat the grant of the new residence status under Article 18.1 WA as having *ex tunc* effect. Even taking the Claimant's analysis at its highest (para 141 above), the position they have adopted is not clear in respect of six of the 13 Member States who have constitutive schemes. Furthermore, the analysis that has been provided is limited; the Court does not, for example, have the benefit of evidence from foreign law experts and, as D1's skeleton argument highlights, there are, at best, significant ambiguities in relation to the publicly available information on this point, including (although not limited to) Denmark and Austria.

The Charter

178. I will next address the AIRE Centre's arguments based on Articles 1, 7 and 24 CFR (which Mr Burton also referred to briefly in his oral submissions, although making clear that the success of his argument did not depend on these contentions).

179. Mr O'Neill KC relies on the obligation in Article 4.3 WA to interpret the WA in accordance with "the methods and general principles of Union law" and the fact that Article 2 incorporates the CFR within the definition of "Union law" (paras 34-35 above). He says that the present issue falls within the circumstances contemplated in ***AT***, where the Court of Appeal recognised that the CFR was relevant to the construction and application of the substantive provisions of the WA (paras 102-105 above). Mr O'Neill submits that Article 18 WA must be interpreted in accordance with the CFR as it refers to and governs the rights under Title II Part 2 WA, which include the rights conferred by Article 13 (the Article under consideration in ***AT***) and Article 15. Sir James Eadie disputes that the CFR applies to the interpretation question before the Court, on the basis that it concerns Article 18, rather than the meaning and effect of the substantive Title II rights.

180. I am prepared to assume, without deciding, that the CFR is relevant to the issue of interpretation that arises in this case, namely whether the new residence status under Article 18.1 has *ex tunc* effect in terms of previous CRD-compliant residence from IPCD. I can see that the present circumstances are potentially distinguishable from those in ***Here for Good***, where the claimant was trying to make a late application under the WA, had no status under the WA and no substantive Title II Part 2 WA rights (para 108 above). Although it is also right to note that the circumstances are not on all fours with those in ***AT***, where the argument was about the effect of the substantive rights in Article 13, rather than the Article 18 gateway provision.

181. Mr O'Neill submits that the Court is required to take account of the right to respect for human dignity, which has a "core" and a "peripheral" element. The core element is a freestanding and absolute right to human dignity and the Court is required to ask itself whether the State's action has "negated" the principle of human dignity. Human dignity is negated, inter alia, where a State treats a particular group substantially less favourably than other groups, by reason of some characteristic in that group, without a proper basis for doing so. The periphery of the Article 1 CFR right is breached where other rights are breached without lawful justification. Mr O'Neill argues that the failure to apply retrospective effect to Period 2 negates the human dignity of the Late Beneficiaries by treating them, without justification, less favourably than "the majority of UK society" and it follows that Article 18 WA cannot be interpreted in a way that permits this. Furthermore, it is said that D1's interpretation of Article 18.1 negates AK's and BHO's human dignity specifically; AK was a child suffering from a life-threatening illness and BHO lacked funds to pay for her treatment. The right of human dignity requires that, in any event, the decision-makers should have taken account of their particular vulnerabilities and applied an *ex tunc* interpretation in their particular case.

182. Relying on Articles 7 and 24, the AIRE Centre further submits that the *ex tunc* interpretation must at least apply to Late Beneficiaries who are children and to parents required to support those children, including financially. Mr O'Neill argues that a child such as AK would be obliged during Period 2 to leave the UK in order to obtain free healthcare, whilst their parent who already had settled status would be able to obtain free healthcare in UK and that, accordingly, D1's approach separates parent and child contrary to the family unity principle, for which there is no public policy justification. Further, there is no evidence that the Defendants considered the best interests of the child as a primary consideration.

183. I reject Mr O'Neill's submissions for a number of reasons. Firstly, it is difficult to see how Article 1 CFR could drive an interpretation of Article 18.1 whereby the grant of the new residence status has *ex tunc* effect, unless it is the case that the CFR requires Title II Part 2 WA rights, and in particular lawful residence status, to apply for the entire period of (post-IPCD) earlier residence in relation to each successful Article 18.1 applicant. The AIRE Centre's submissions and supporting evidence do not come close to establishing that a grant of the new residence status with only prospective effect would invariably negate respect for the human dignity of the Late Beneficiaries. Secondly, the authorities have set a deliberately low bar for the minimum conditions required for human dignity. Green LJ's judgment in ***AT***, including his discussion of ***CG***, makes reference in this context to the provision of support for a person's most basic needs and to there being destitution (in a context where the individual had no resources of her own, was living in temporary accommodation and was isolated having

fled a violent partner) (paras 111, 112, 170 and 171). As Green LJ noted, certain rights available under the CFR (including Article 1) are less generous than a right to equality and, rather than provide a form of levelling up, they might provide only a minimum or floor right to support (para 69). There is no clear evidence of destitution or other comparable impact negating respect for human dignity in the present case. I have earlier summarised the evidence provided by Mr Evans (paras 153-154 above) In this regard, I also note the breadth of the exemptions in the NHS Charging Regulations and the potential for taking both lack of means and destitution into account (paras 113-116 above). Thirdly, in so far as the argument is put on the basis of a briefly articulated contention of a lack of equal treatment between the Late Beneficiaries and an unclear comparator category ("the majority of UK society") the lack of specificity is itself telling. Furthermore, if accepted, this argument would have wide implications for the entitlement of EU citizens to access free healthcare and other State provided benefits in the UK, which would go substantially beyond the entitlements under pre-WA rights of free movement. Fourthly, and strikingly, neither BHO nor AK have claimed that their Article 1 CFR right to respect for their human dignity was breached in the circumstances giving rise to this claim. AK did receive the necessary medical treatment, which was at no point denied to her. Whilst undoubtedly stressful for BHO, the dispute only relates to the charging for that treatment, in respect of which the Claimant was given time to pay (para 25 above) and there is no evidence that she is destitute.

184. The family separation argument appears to me to be entirely speculative. There was no family separation in BHO's and AK's case and they do not rely upon these provisions. Other than a brief suggestion in Mr O'Neill's skeleton argument, there is no specific evidence or indication that this has been or would be a feature for Late Beneficiaries more generally if the Article 18.1 status only takes effect prospectively. The authorities cited by Mr O'Neill relate to the very different context of removals and family reunification. It is impossible to see in the circumstances how these provisions could drive a different interpretation of Article 18.1 under which the new residence status applied retrospectively in the cases of children and the parents who support them financially, but prospectively in other instances.

185. Accordingly, for the reasons I have identified above and having undertaken the exercise contemplated by Article 31 Vienna Convention, I conclude that the grant of the new residence status pursuant to Article 18.1 WA confers Title II Part 2 WA rights prospectively once an application is granted, rather than the grant having *ex tunc* effect (so that the Late Beneficiaries' pre-application residence is rendered lawful under the WA).

Supplementary materials

186. I turn to the supplementary materials that Mr Burton relies upon. To re-cap, the Court may have regard to these pursuant to Article 32 Vienna Convention only in order to confirm the meaning resulting from the application of Article 31 or to determine meaning, when the Article 31 exercise leaves the meaning ambiguous or obscure or would lead to a result which is manifestly absurd or unreasonable (para 69 above). This limited scope is well illustrated by ***Citizens' Rights*** (para 84 above).

187. In the present case, Mr Burton's supplementary materials are said to point to a different conclusion (one of retrospective effect). Accordingly, there is no question of the Court relying on them to *confirm* the meaning that I have identified as a result of having

undertaken the Article 31 exercise. Moreover, I do not consider that the conclusion I have reached from this exercise leaves the meaning of Article 18 ambiguous or obscure or that it leads to a result which is manifestly absurd or unreasonable. In these circumstances, whilst I address the supplementary materials for completeness, I will do so relatively briefly.

188. Mr Burton relies on the guidance on the European Commission's website, which I have referred to at para 140 above. He cites ***R (Ali) v Secretary of State for the Home Department*** [2024] EWCA Civ 1546, [2025] 2 WLR 1173, paras 104 – 106, for the proposition that such guidance documents, whilst having no formal status on the interpretation of the WA, are to be accorded some persuasive value.

189. However, whilst I have taken account of the guidance document relied upon by the Claimant, it does not impact upon my conclusion for the following reasons. Firstly, it is said that it was prepared by the staff of the Commission and is not to be taken as stating an official position of the Commission (para 139 above). Secondly, the passages I have reproduced at para 140 above, contain an identification of what is said to be the desirable outcome for Late Beneficiaries in relation to their pre-application period of residence; it does not engage in an analysis of the text, structure or operation of Article 18 to see if such an outcome is to be ascribed to the parties' common intention. Thirdly, it is of greater significance that the interpretation I have arrived at via the Article 31 Vienna Convention exercise is confirmed by the view of the IMA, a body which is given a specific role under the WA as the independent monitoring body in relation to Part 2 WA (paras 11-12 above).

190. In his written submissions on behalf of the AIRE Centre, Mr O'Neill relied upon two cases in which the CJEU addressed *ex tunc* effect: Case (C-221/17) ***Tjebbes & others v Minister van Buitenlanse Zaken*** EU:C:2018:572 [2019] QB 1476 ("***Tjebbes***") and Case (C-689/21) ***X v Danish Ministry of Immigration and Integration*** EU:C:2023:626 [2024] 2 C.M.L.R. 15 ("***Danish Ministry***"). Mr Burton relied upon these authorities in his oral submissions, suggesting they showed that the CJEU valued the importance of *ex tunc* effect for the preservation of rights of residence and nationality and that the Court was mindful of the draconian effect of not doing so.

191. Sir James Eadie did not accept that predicting how the CJEU might determine the issue raised by Ground 1 was a valid aid to interpretation under the applicable articles of the Vienna Convention. However, it is unnecessary for me to resolve that broader question, as it is in any event apparent that the two cases do not shed any light on the interpretation question in respect of Article 18.1 WA that arises in the present case.

192. ***Tjebbes*** concerned a Dutch law under which a person would lose their Dutch nationality if they also held a foreign nationality and, while holding both nationalities, had their principal residence for an uninterrupted period of 10 years outside the EU. The CJEU held that this law was not incompatible with the right to citizenship of the EU, provided the national authorities and courts were in a position to examine, as an ancillary issue, the consequences of the loss of nationality and, where appropriate, to allow the person to recover their nationality *ex tunc* if it had been lost. In ***Danish Ministry*** the CJEU considered a Danish law which provided for the loss of nationality at the age of 22 for citizens who had not spent time in Denmark in circumstances indicating a close attachment thereto. Amongst other conclusions, the Court indicate that Member States might require any application for the maintenance or recovery of nationality to be

submitted to the competent authorities within a reasonable period, but that this period could not run unless the authorities had informed the person concerned of their right to apply within a specified period for the retention or recovery *ex tunc* of their nationality.

193. Accordingly, it is quite clear that the Court's references to *ex tunc* effect in these two cases arose in an entirely different context to the interpretation of Article 18.1 WA, namely loss of nationality and the need, in that context, for there to be provision for an individual's circumstances to be taken into account. These cases provide no basis at all for drawing the suggested inference that the CJEU would support the Claimant's argument in the present case as to the interpretation of a particular provision in the WA.

194. Lastly, the European Social Charter, relied upon by the AIRE Centre, is an unincorporated international treaty that can have no bearing on the interpretation of the WA.

Conclusion on Ground 1

195. For the reasons I have identified, I conclude that the grant of the new residence status pursuant to Article 18.1 WA confers Title II Part 2 WA rights prospectively once an application is granted, rather than the grant having *ex tunc* effect, so that the Late Beneficiaries' pre-application residence is rendered lawful under the WA. I am in no real doubt as to this conclusion and consider the matter is *acte clair*. There is no need for a reference to the CJEU. It therefore follows that AK was not lawfully resident in the UK during the period that the NHS charges relate to (25 January 2022 – 21 March 2023) and, accordingly, she was an "overseas visitor" at this time for the purposes of the NHS Charging Regulations (paras 112-113 above).

Ground 2: Analysis

Preliminary points

196. As I indicated in the Introduction, D1 accepts that the provisions in the NHS Charging Regulations under which the Claimant has been charged for AK's treatment give rise to a difference in treatment as compared to UK nationals which engages Article 4 Reg 883/2004. It is common ground between the parties that what D1 has to justify is the application of charges under these regulations to Late Beneficiaries. The effect of the deeming provisions in Articles 18.2 and 18.3 WA is that charging will only apply for the period between the expiry of the deadline for making an Article 18.1 WA application and the time when the application satisfying Article 18.1(d) is made (paras 58-59 above). It is perhaps worth emphasising that the question for me is not (for example): whether D1 can justify charging those classed as "overseas visitors" for NHS treatment; whether D1 can justify adopting a constitutive scheme rather than a declaratory scheme under Article 18 WA; whether D1 can justify charging EU citizens who do not make a successful Article 18.1 WA application; or whether D1 can justify other benefits-related consequences of Late Beneficiaries not having lawful residence status during Period 2 – a topic on which the Court had no evidence and heard no argument.

197. As I mentioned at para 4 above, during the hearing Mr Burton narrowed his arguments, identifying Late Beneficiaries as those who had obtained residence status pursuant to Article 18.1 WA on the basis of a late application that was accepted under Article

18.1(d), rather than all those who made successful late applications under the more generous terms of the EUSS. Ms Mockford (who conducted the oral advocacy for D1 on Ground 2) drew attention to this late change in the Claimant's case, but she did not suggest it was impermissible for Mr Burton to re-formulate the case in this way or that D1 was prejudiced as a result.

The Constitutive Scheme Reason

198. D1 argues that charging Late Beneficiaries for NHS treatment provided in the period between the end of free movement in the UK and their late application is consistent with, and seeks to promote and ensure the integrity of the constitutive scheme that the UK has chosen to implement; a scheme which requires the EU citizen in question not only to meet the Residence Pre-condition but also to make an application to the relevant authorities in order to obtain their new residence status. As I have indicated, Mr Haithwaite refers to the need to provide a clear incentive for EU citizens who were living in the UK on IPCD to apply promptly to secure their status in the UK and to obtain evidence of the same. In addition to identifying the concomitant benefit of certainty, Mr Haithwaite says that conferring the benefits of residence upon someone who has not made an application in accordance with the scheme would undermine the basis and premise of the constitutive regime (para 145 above). In her oral submissions, Ms Mockford emphasised the importance of not undermining a scheme that is based on residence status being secured through satisfaction of both the Residence Pre-Condition and the Application Condition, stressing that D1's aim was broader than incentivisation.

199. For the reasons I will go on to explain, I accept that in principle this is a legitimate aim capable of justifying the imposition of NHS charges on Late Beneficiaries in the period that I have identified.

200. The Court's obligations in relation to the caselaw of the CJEU are set out in Articles 4.4 and 4.5 WA (para 35 above). However, as Ms Kelleher notes in her skeleton argument, there is no direct authority in EU law on this point, because there is no situation under EU law in which an EU citizen will be denied access to a social security benefit because they do not have a right of residence by reason of a failure to make an application. Nor is there any equivalent in EU law to the position of a Late Beneficiary. As Ms Kelleher also observes, the Court therefore has to interpret and apply the equal treatment guarantee in Reg 883/2004 in accordance with the methods and general principles of EU law and in conformity with the caselaw of the EU, notwithstanding the fact that the issue in these proceedings would not arise in EU law.

201. Ms Mockford submits that there is "a direct read across" from the Supreme Court's decision in ***Patmalniece*** (applying earlier CJEU decisions) and from ***Commission v UK***. D1 argues that these cases clearly establish that it is lawful to require EU citizens who reside in Member States other than their own to have a legal right to reside in that Member State before they can access social security or other social assistance on the same terms as nationals of that host Member State. I have summarised these cases at paras 124-131 above. Ms Mockford places particular reliance on Baroness Hale's observation in ***Patmalniece*** that it was open to Member States to make social assistance benefits dependent on the right to reside in the host country (para 127 above).

202. However, as Mr Burton submits, the Courts' acceptance that justification was established in those cases was not simply based on the proposition that it is legitimate

to provide access to social security or other social assistance on the basis of a right of legal residence test; in each instance the Courts looked to the reason for the application of the residence requirement and the proportionality of the same. In summary, in both cases the accepted justification lay in the need to protect the resources of the host Member State against the exploitation of welfare benefits by those who were not economically active in or socially integrated within the host country and the recognition that not to do so could have adverse consequences for the overall level of assistance that the State could provide (paras 125-126 and 129-130 above). An analogous rationale does not apply to those in the Late Beneficiaries cohort as, by definition, they will have been economically active in order to have met the Residence Pre-Condition.

203. Nonetheless, what these authorities do show is that the imposition of a condition of lawful residence in order to access a social security benefit *may* amount to a legitimate aim if there is sufficient reason for this, including a reason based on protecting the scheme or system that the State has adopted.

204. The terms of the WA permit the Member States and the UK to adopt constitutive schemes under which the Article 18.1 new residence status is only obtained when both the Residence Pre-Condition and the Application Pre-Condition are satisfied (para 155(iii) above). I accept that where the host State adopts a constitutive system, it follows that the system should operate effectively and in a manner that provides legal certainty for citizens, economic operators and the State. Whilst the WA's objectives include providing reciprocal protection for EU citizens and UK nationals who have exercised free movement rights, I have concluded under Ground 1 that the common intention of the parties to the WA was that this new residence status obtained under Article 18.1 would take effect prospectively, rather than having retrospective effect, including in the case of Late Beneficiaries (who, by definition, will have reasonable grounds for applying late). This intended operation of Article 18.1 WA would tend to be undermined if Late Beneficiaries were to be treated as if they were lawfully resident in the UK for the purposes of NHS charging during a time when under the terms of the WA they were not. Indeed, it appears to me that there would be an uneasy tension between, on the one hand, concluding (as I have) that it was the common intention of the parties to the WA that the Article 18.1 new residence status would take effect prospectively; and, on the other, determining that an aim of ensuring the integrity of such a constitutive system in the UK is not a legitimate objective.

205. Whilst Mr Burton emphasises that incentivising EU citizens living in the UK to apply for the Article 18.1 status cannot apply in full to Late Beneficiaries, since it is accepted that in their case they had reasonable grounds for applying late, the objective of protecting the integrity of the UK's constitutive scheme is wider than simply the aim of incentivisation, which may, in any event have a role to play with individuals who have yet to make an application.

206. Having accepted that the Constitutive Scheme Reason provides a legitimate objective for the indirect discrimination under consideration, I turn to assess whether the provisions of the NHS Charging Regulations under which Late Beneficiaries are charged for medical treatment during Period 2, do not go beyond what is necessary to attain that objective and are proportionate to the meeting of this objective (para 122 above). I have concluded that D1 has established this for the following reasons.

207. First, I note that the circumstances in which charges are imposed under the NHS Charging Regulations go no further than imposing charges on those who have yet to acquire the Article 18.1 new residence status and are not deemed to have the Title II Part 2 WA rights by virtue of Articles 18.2 and 18.3 (paras 58-59 above). In other words, the regulations go no further than what I have found to be the common intention of the parties to the WA as to how constitutive schemes would operate.

208. Secondly, although it is pointed out that the Late Beneficiaries cohort have reasonable grounds for making their Article 18.1 applications after the prescribed deadline; as I noted when considering Ground 1, the parties to the WA actively addressed this aspect by including Article 18.1(d), but they did not include any provision to cover the Late Beneficiaries' status during Period 2, in circumstances where it would have been readily apparent that this was not covered by the other Article 18 deeming provisions and this could have been done (para 161 above).

209. Thirdly, whilst the Claimant and the AIRE Centre emphasise the likely vulnerability of many Late Beneficiaries (paras 150 and 153-154 above), the NHS Charging Regulations contain multiple exemptions for various persons and types of treatment (para 114). In addition, regulation 3(5) permits the continuation of free provision for a "course of treatment" that began whilst the person was exercising free movement rights (para 115 above). I also note that the individual's means to pay and destitution are taken into account (para 116 above). It is apparent that there will be significant overlap between the categories of vulnerable persons highlighted by Ms O'Reilly and Mr Evans and these exemptions and accommodations.

The NHS Funding and Planning Reason

210. In this regard D1 relies on two interlinked objectives: supporting the long-term financial sustainability of the NHS and enabling him to plan for and promote a comprehensive health service.

211. I agree with Ms Kelleher's submission that the mere existence of a financial impact is not in itself regarded as amounting to a sufficient objective capable of justifying indirect discrimination; more is required. In ***Commission v UK***, the CJEU's identification of the legitimate aim involved not just the saving of money, but the need to protect the finances of the host Member State in circumstances where the absence of such a measure "could have consequences for the overall level of assistance which may be accorded by that State" (para 130 above). In ***Veselibas*** the Court held that the risk of "*seriously undermining* the financial balance of a social security system may constitute a legitimate objective capable of justifying a difference in treatment" (emphasis added; para 134 above).

212. In the present case the sums involved are very modest, in relative terms. I have already summarised the evidence provided by Mr Haithwaite (paras 143 above) and Ms O'Reilly (paras 148-149 above) in this regard. For the five-year period from 2018/19, overseas visitors were charged £535 million under the NHS Charging Regulations, of which £194 million has been received. These figures, of course, include all overseas visitors. There are no figures available for the smaller subset of EU citizens who did not have leave to remain at the time, or the yet smaller subset of Late Beneficiaries who were charged in respect of treatment provided in Period 2. Furthermore, as Ms O'Reilly shows, these figures are a very small proportion of the NHS's total income for patient

care activities. Mr Haithwaite's evidence does not suggest that extending the NHS Charging Regulations exemptions to Late Beneficiaries would give rise to a serious risk to the financial stability of the NHS and any such argument would be unsustainable on the figures.

213. D1's argument is not strengthened by Mr Haithwaite's reference to the NHS charging regime ensuring that everyone is making a fair contribution. As I have explained earlier, in order to meet the Residence Pre-Condition, Late Beneficiaries will have had to show that they meet the CRD requirements of being economically active in the UK. This will, in many instances, be because they have been in employment in the UK (as BHO was for more than five years) and thus they will have been making a contribution to the tax base of the UK. In fact the charging provisions in the NHS Charging Regulations do not distinguish between those who are contributing financially through work and those who are not.

214. I am also not persuaded by the second limb of this attempted justification. I note that in the four years to 30 June 2025 there were 620,000 late applications made of which 226,000 were granted (para 152 above) and I accept that the number of EU citizens living in the UK who have not yet applied to regularise their status is unknown. However, as Mr Haithwaite acknowledges, this figure will be "relatively small", given the take up of the EUSS. In terms of the numbers involved, I also note the following two points. First, the number of EU citizens in this position is likely to diminish as time moves further away from IPCD. Secondly, for some at least (depending on their circumstances) it will be harder to meet the Article 18(1)(d) test that an applicant must satisfy to be a Late Beneficiary, the greater the amount of time that has passed since the expiry of the application deadline.

215. Whilst ***Veselibas*** shows that measures which enable advanced planning for the effective deployment of resources in a healthcare system may amount to a legitimate aim, in that case the Court was both concerned that permitting requests on religious-based grounds could lead to a "large number" of additional requests for authorisations and satisfied that the unpredictability and potential scale of such applications was "likely to entail a risk to the financial stability of [the Member State's] health insurance system" (paras 135-136 above). However, I am not persuaded that the numbers involved in the circumstances under consideration are likely to be comparable in scale to the challenging situation identified in ***Veselibas*** or that the impact is likely to entail a risk to the financial stability of the NHS or to its delivery of effective healthcare provision. As to the latter, D1 has provided no evidence that supports this assertion.

216. For these reasons, D1 has not established that the difference in treatment under consideration is appropriate for securing the attainment of the NHS Funding and Planning Reason or that it does not go beyond what is necessary to attain that objective. I have highlighted the very small nature of the cohort involved and the minimal consequences that would follow in terms of the funding of and the planning for the healthcare system in the UK if Late Beneficiaries were to be eligible for free NHS care during Period 2.

The Fairness Reason

217. D1's third justification is that the charging provisions in issue promote fairness in the immigration system by recognising the individual's responsibility to obtain the

necessary status. It is said that it also achieves consistency with the way in which other overseas visitors who are not ordinarily resident in the UK are treated.

218. I will deal with this (and the fourth justification) quite briefly since they are only relied upon as supporting D1's two main justifications. I do not consider that this reason affords any significant support.

219. As the IMA's submissions point out, the WA grants EU nationals a privileged status that is not comparable with the position of non-EU immigrants. Whilst I have not accepted that the WA operates in the way alleged by the Claimant under Ground 1, in more general terms it is clear that in numerous respects EU citizens resident in the UK are in a more favourable position than non-EU immigrants. In the circumstances it is hard to see how an objective of fairness or consistency between the treatment of the two has any role to play; all the more so as the cohort I am currently concerned with is a relatively small one. Similarly, it is hard to see how the treatment of Late Beneficiaries under the NHS Charging Regulations could provide wider incentives for or meaningfully influence the behaviour of non-EU immigrants (who, in any event, will have their own incentives for regularising their status in the UK). Furthermore, as it has been accepted that Late Beneficiaries had reasonable grounds for making their application after the deadline had passed, it is difficult to see how the identified considerations of fairness arise at all.

The Effective Framework Reason

220. The fourth reason that D1 advances in support of his case on justification is that the charging provisions in issue provide for an effective legal and administrative framework, as the position is clear and unambiguous in terms of the recovery of costs from individuals who are not eligible for free NHS treatment.

221. I do not consider this reason provides any significant support for D1's two main justifications. I do not accept that attaining clarity in the distinctions drawn between different groups of people is a legitimate aim in and of itself. As Ms Kelleher observes, a rule that no EU citizen may have access to free NHS care under any circumstances would be maximally clear, unambiguous and easy to implement, but such a rule would be unlawful as it would breach the WA. Furthermore, D1's system, self-evidently, does not achieve unambiguous clarity in its terms (and leaving aside the practical problems of incorrect data that appear to have arisen in the Claimant's case amongst others) given, for example, the range of potential exemptions that may apply, the wide list of treatment that is excepted and the potential application of the regulation 3(5) "course of treatment" provision.

Conclusion on Ground 2

222. For the reasons I have indicated, D1 has justified the difference in treatment relating to the application of charges under the NHS Charging Regulations to the Late Beneficiaries by reference to the Constitutive Scheme Reason. I do not accept that the other reasons advanced by D1 provide a justification. I am in no real doubt about these matters and am satisfied that the answers are *acte clair*. Accordingly, I do not refer any question to the CJEU in relation to Ground 2.

223. As the Constitutive Scheme Reason amounts to sufficient justification in itself, D1's failure to establish the other three reasons has no impact on the outcome of this case. However, I note for completeness, that D1 (rightly) accepted that if the opposite conclusion to the one I have expressed above were reached on Ground 1, namely that the residence status granted under Article 18.1 WA has *ex tunc* effect, then his case on justification under Ground 2 put by reference to the need to protect the constitutive scheme would fall away.

Overall conclusion and outcome

224. The NHS charges imposed on the Claimant in respect of her daughter's medical treatment were not unlawful.

225. For the reasons discussed at paras 155-195 above, the "new residence status" granted to a successful applicant pursuant to Article 18.1 WA confers Title II Part 2 WA rights prospectively once the application is granted, rather than the grant having *ex tunc* effect such that the pre-application residence of a Late Beneficiary (as defined in para 1 above) is rendered lawful under the WA. It follows that AK was not lawfully resident in the UK during the period that the NHS charges cover (25 January 2022 – 21 March 2023) and, accordingly, she was an "overseas visitor" for the purposes of the NHS Charging Regulations. The Claimant's Ground 1 therefore fails.

226. D1 accepts that the provisions in the NHS Charging Regulations under which the Claimant has been charged for AK's healthcare give rise to a difference in treatment as compared to UK nationals which amounts to indirect discrimination for the purposes of Article 4 Reg 883/2004 (applicable by virtue of Articles 30 and 31 WA). However, as I have explained at paras 198-209 above, D1 has justified the imposition of NHS charges on Late Beneficiaries in respect of their pre-application period by reference to the Constitutive Scheme Reason (that this promotes and ensures the integrity of the constitutive scheme adopted by the UK under Article 18.1 WA). Accordingly, the Claimant's Ground 2 also fails.

227. I therefore dismiss this claim for judicial review.