

Briefing for Oral Questions 24 May 2022 at 2:30pm

Implications of the judgment of the Court of Justice of the European Union on comprehensive sickness insurance in case C247/20 VI

Since 2006, following the implementation of the EU free movement rights in UK law, the Home Office has required certain categories of people (those who were studying or 'self-sufficient') to have held a private health insurance policy to be considered 'lawfully resident' in the UK. This was an incorrect interpretation of the 'comprehensive sickness insurance' (CSI) requirement introduced by the EU Free Movement Directive.

In practice, the private health insurance requirement was used as a bureaucracy tickbox functioning as a retrospective denial of rights. The requirement was not communicated to EU citizens upon their arrival, and an insurance policy was never required to actually access healthcare. Both successive UK Governments and the judiciary failed to recognise that the UK's healthcare system based on general taxation was fundamentally different to most continental healthcare systems that were based on individual health insurance.

For years, many organisations argued against the UK's interpretation of the CSI requirement, campaigning on behalf of those who were being unfairly disadvantaged with often far-reaching consequences.

Now, in a binding judgement, the European Court of Justice has ruled that an EU citizen who has free access to the UK's National Health Service "*has comprehensive sickness insurance within the meaning of Article 7(1)(b)*" of the EU's Free Movement Directive. This means a potentially large number of citizens have been wronged over the past 16 years.

Importantly, people are still required to hold private health insurance when looking to benefit from heightened deportation protections, access to certain welfare benefits/services and British citizenship assessments.

Key questions to ask

- Does the Government agree that it and previous Governments have wrongly required people to have a private health insurance in order to comply with the CSI requirement?
- How does the Government intend to respond to the judgment and what legislative / guidance changes will be introduced and when?
- Does the Government accept that the requirement to hold private health insurance has forced some people to no longer be able to live in the UK? In some cases, they will have been prevented from being inside the UK before the EUSS residence deadline of 31 December 2020
- Will the Government agree to an inquiry into the UK's interpretation of the CSI requirement and its impact on those exercising freedom of movement inside the UK?
- How does the Government intend to compensate people who have incurred loss because of the UK's interpretation of the CSI requirement?

What were some of the consequences for those wronged by the UK's CSI interpretation?

Deported from the UK

A lack of private health insurance was used to deny people, charged with relatively minor offences, the protection of higher thresholds of deportation afforded by EU law.

Many have thereby been denied the opportunity to be protected by the Withdrawal Agreement.

Unnecessary expensive private insurance premiums

After Home Office refusals, many went on to buy expensive insurance policies, only to satisfy the CSI requirement. These policies were often kept in a drawer, never to be claimed against in fear of escalating premiums. They were renewed annually to satisfy the Home Office of being 'lawfully resident' in the UK.

Denied the opportunity to become British

Private health insurance gaps meant many were unable to become British citizens, because the prerequisite Permanent Residence right would be refused. As a result, some were barred from certain career options, or unable to leave the UK for more than two years. Others were unable to naturalise and retain their EU citizenship before their dual nationality routes were closed due to Brexit.

Although there is now discretion to overlook these gaps, high naturalisation fees are currently still deterring many from taking the risk.

State support denied in times of need

EU citizens who had lived in the UK for many years should have been able to access welfare benefits and homelessness support, through having the right of 'Permanent Residence' (PR). However, periods of study and self-sufficiency without private health insurance were used to deny people the right of PR and therefore state support.

Issued with removal notices

The Home Office used a lack of private health insurance against self-sufficient people to issue them with removal notices, arguing these people had no lawful basis to be in the UK.

Some of these notices were enforced, leading to people being removed from the UK, and missing out on falling within scope of the Withdrawal Agreement.

Children's British passports refused or retained

Babies, born to settled parents with a private health insurance gap, were wrongly considered not automatically British and refused a passport. Others were initially granted a passport, but were told on passport renewal that they were not, in fact, British after all, so had their old passports retained.

The cost of applying for British citizenship via registration routes instead is over £1,300.

Comprehensive Sickness Insurance - the background

- Apr 2004** The EU publishes Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.
- Article 7 states that those who are self-sufficient, or students, must have comprehensive sickness insurance (CSI) cover, and have sufficient resources not to become a burden on the social assistance system of the host Member State.
- Article 16 states that those who have lived legally in a Member State for five years obtain the right of permanent residence and no longer have to fulfil the requirements of Article 7.
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0038>
- Apr 2006** The 2004/38 Directive is implemented in UK law via the EEA Regulations 2006, and includes the requirement for students and self-sufficient people to hold private health insurance cover.
<https://www.legislation.gov.uk/ukxi/2006/1003/contents/made>
- Apr 2012** The European Commission launches infringement proceedings against the UK for failing to uphold EU citizens' rights, including *"Under the Free Movement Directive, EU citizens who settle in another EU country but do not work there may be required to have sufficient resources and sickness insurance. The United Kingdom, however, does not consider entitlement to treatment by the UK public healthcare scheme (NHS) as sufficient. This breaches EU law."*
https://ec.europa.eu/commission/presscorner/detail/en/IP_12_417
- Jun 2014** Academic paper reviewing EU law, CSI and national healthcare systems:
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2562262
- Jul 2014** In the case of *Ahmad v The Secretary of State for the Home Department*, both the Upper Tribunal and the Court of Appeal rule that *"an entitlement to free NHS treatment does not satisfy the requirement under the Regulations and the Directive for a student who is an EEA national to have Comprehensive Sickness Insurance cover"*. They state: *"The fact that the European Commission has raised a doubt is no reason for us to ignore binding authority."*
- On asking *"Should this court ask the CJEU for a preliminary ruling on the meaning of Article 7(1) (c)?"* the court concludes *"I do not consider that there is any doubt as to the meaning of the expression "compulsory sickness insurance cover" in Article 7(1) (c) of the Directive. I would not therefore refer the question of the meaning of this expression to the CJEU for a preliminary ruling."*
<https://www.bailii.org/ew/cases/EWCA/Civ/2014/988.html>
- Apr 2020** In the case of *VI v The Commissioners for Her Majesty's Revenue & Customs*, the Social Security Appeal Tribunal (Northern Ireland) refers questions related to CSI to the CJEU.
<https://www.lawcentreni.org/case-digest/nhs-constitutes-comprehensive-sickness-insurance-under-eu-free-movement-law>
- May 2020** The EU Commission opens renewed infringement proceedings against the UK for failure to comply with EU rules on free movement. This includes the issue of the UK implementation of CSI breaching EU law. Notably, the press release also explains that *"The United Kingdom's shortcomings in the implementation and transposition of EU free movement law risks therefore also affecting the implementation of the citizens' rights under the Withdrawal Agreement after the end of the transition period."*
https://ec.europa.eu/commission/presscorner/detail/en/inf_20_859
- Mar 2022** **C247/20** - The CJEU rules on the case of *VI v The Commissioners for Her Majesty's Revenue & Customs*. The court decides that the free cover provided by the NHS does in fact constitute comprehensive sickness insurance for the purpose of Article 7(1)(b) of the Free Movement Directive. Under Article 89 of the Withdrawal Agreement, this judgment is binding on the UK.
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62020CJ0247&from=EN>