Case No: JR-2021-LON-001727

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

JR-2021-LON-001727

Field House,
Breams Buildings
London, EC4A 1WR

26 June 2024

Before:
UPPER TRIBUNAL JUDGE O'CALLAGHAN

- - - - - - - - - - - - - - - - - - -

Between:

THE KING
on the application of

[redacted]

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- and -

THE INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS

Intervenor

- - - - - - - - - - - - - - - - - - -

Jamie Burton KC, Adrian Berry
(instructed by the Public Interest Law Centre), for the applicant

David Blundell KC, Julia Smyth, Jack Holborn
(instructed by the Government Legal Department) for the respondent

Thomas de la Mare KC (in writing), **Naina Patel**
(instructed by the IMA Legal Directorate) for the Intervenor

Hearing date: 18 May 2023

Post-Hearing Documents

Consequent to directions and the agreement between the parties of a timetable for exchange of post-hearing information:

Applicant's Note on Construction of EU15 of Appendix EU to the Immigration Rules, dated 22 May 2023

Respondent's Note, dated 25 May 2023

Post-hearing disclosure by the Respondent on 26 May 2023

Intervenor's Note on the Construction of EU15 of Appendix EU to the Immigration Rules, dated 31 May 2023

Intervenor's Note on the Respondent's Further Disclosure, dated 31 May 2023

Applicant's Note in Reply on EU15 of Appendix EU, Immigration Enforcement Threshold and post-hearing disclosure, dated 1 June 2023

Respondent's Post-Hearing Note, dated 7 June 2023

Respondent's letter addressing the benefits' position of persons subject to the pause policy who have fewer than five years' residence, dated 7 June 2023

Applicant's Final Note in Reply on EU15 of Appendix EU, Immigration Enforcement Threshold and Post-Hearing Disclosure, dated 9 June 2023

Applicant's correspondence and filing of the First-tier Tribunal decision in EA/05978/2022, dated 26 July 2023

J U D G M E N T

Judge O'Callaghan:

A. Introduction

1. The applicant contends that the respondent's policy of pausing decision-making on certain EU Settlement Scheme ('EUSS') applications where there is a pending criminal prosecution is unlawful as it does not have any, or any proper, regard to an applicant's individual circumstances. Further, it is contended that the policy fetters discretion.

2. Additionally, the applicant challenges the delay in determining his application for settled status under the EUSS.

3. The policy, variously referenced as the "pause policy" and the "prosecution stay policy" before this Tribunal, establishes that if there is a pending prosecution which could lead to a conviction and a refusal on suitability grounds, even if it does not meet the criteria for referral to immigration enforcement in respect of any other offence, the application must be stayed until the result of prosecution is known.

4. The respondent's policy document "EU Settlement Scheme: suitability requirements" (version 6.0) was material up to the date the applicant's EUSS application was determined on 27 May 2022. It has now been updated with the publication of versions 7.0 and 8.0, the latter on 29 June 2022. The material provisions have not been significantly altered in the later versions.

5. The applicant's case as to unlawfulness is that in telling a decision maker how to consider an EUSS application where a prosecution is pending, the policy omits any instruction to consider the European Union law threshold test applicable to the case in hand before deciding to stay the prosecution where consideration of the threshold test may require a decision-maker to proceed and determine the application. Further, the policy omits any requirement to consider the application of the applicable Union principle of proportionality. The respondent therefore purports to tell his decision makers how to consider EUSS applications but does not identify relevant legal rules they are obliged to consider, leading to decision makers being provided with a misleading picture of the true legal position.

6. He contends by a second ground of claim that the policy does not contain sufficient flexibility and so fetters a decision maker's ability to exercise power to proceed to determine an EUSS application in cases where staying consideration to await the result of the criminal trial serves no public interest objective.

7. A third ground of claim is pursued in respect of the respondent's delay in considering the EUSS application. The respondent considers this challenge to be academic consequent to the issuing of a decision to refuse the application, and an attendant decision to deport on conducive to the public good grounds, on 27 May 2022. The First-tier Tribunal subsequently allowed the applicant's appeal against this decision on both EUSS and human rights (article 8 ECHR) grounds by a decision dated 20 July 2023. Judge of the First-tier Tribunal Graves concluded that the applicant had acquired permanent residence by a date in 2011 and had been continuously resident in this country for more than ten years by 11p.m. on 31 December 2020. The applicant's custodial sentence was found not to break the continuity of residence, as contended by the respondent, as it commenced after the relevant date. Upper Tribunal Judge Smith refused the respondent permission to appeal to the Upper Tribunal by an Order sealed on 18 October 2023, reasoning, *inter alia*, that Judge Graves was unarguably entitled to find that the applicant was permanently resident as asserted and that there had been a significant change in circumstances since the commission of previous offences due to the applicant addressing his risk factors.

8. The applicant is a [redacted] national who entered the United Kingdom in 2006. He applied for settlement under the EUSS on [redacted] 2020. At the time of application, he was awaiting the outcome of four charges against him in respect of conduct which took place prior to the end of the Brexit transition period at 11p.m. on 31 December 2020. The respondent paused the application pending resolution of his outstanding prosecutions on 21 September 2020. Three of the pending criminal charges were resolved with no further action being taken. On [redacted] the applicant pleaded guilty to the fourth charge, assault occasioning actual bodily harm, and on [redacted] 2022 he was sentenced to a forty-six-week custodial sentence.

9. The intervenor was granted permission by the Upper Tribunal to intervene. The Independent Monitoring Authority for the Citizens' Rights Agreements is the statutory body in the United Kingdom responsible for monitoring the implementation and application of Part Two of the Withdrawal Agreement concerned with citizens' rights.

10. At the outset I express my gratitude to the legal representatives, both solicitors and counsel, for the high quality of the oral and written submissions, as well as the careful presentation of various bundles of documents and authorities,

which has greatly assisted the Tribunal. There has been delay in this judgment. An explanation has been provided to the parties, the intervenor and their representatives.

B. The Withdrawal Agreement

11. Whilst the United Kingdom was a member of the European Union, it gave effect to Union law by means of the European Communities Act 1972. It was bound to give effect to Union law including the law governing freedom of movement for European Union nationals and their family members. The United Kingdom left the European Union on 31 January 2020 and repealed the 1972 Act with effect from that date: section 1 of European Union (Withdrawal) Act 2018.

12. The European Union (Withdrawal Agreement) Act 2020 and the 2018 Act (as amended by the 2020 Act) implement the Withdrawal Agreement in domestic law.

13. The Withdrawal Agreement concluded between the European Union and the United Kingdom establishes the terms of the United Kingdom's orderly withdrawal from the European Union, in accordance with Article 50 of the Treaty of the European Union. It entered into force on 1 February 2020, after having been agreed on 17 October 2019.

14. It is clear from the recitals and the provisions of Article 1 that the Withdrawal Agreement was intended to set out the arrangements for the withdrawal of the United Kingdom from the European Union. As part of that process, it addresses the right of residence in respect of Union citizens residing in the United Kingdom and British citizens residing in host States.

15. Article 2(a) of the Withdrawal Agreement defines Union law. Though the definitions are self-evident, they were inserted for the avoidance of doubt. Included by Article 2(a)(ii) are the general principles of the Union's law.

16. Article 126 of the Withdrawal Agreement established that there would be a transition or implementation period ending on 31 December 2020. Article 127 provided that Union law was applicable to, and in, the United Kingdom during the transition period. That was given effect in domestic law by the provisions of section 1A of the 2018 Act. As a result, the provisions of Union law governing free movement continued to have effect within the United Kingdom until 11 p.m. on 31 December 2020.

17. The 2020 Act is the primary vehicle for the implementation of Part Two of the Withdrawal Agreement in the United Kingdom, concerned with, *inter alia*,

providing that all Union citizens lawfully residing in the United Kingdom at the end of the transition period will be able to stay in this country.

i) Interpretation

18. The Withdrawal Agreement is an international treaty. It must be interpreted and applied not in accordance with Union norms but in accordance with the Vienna Convention on the Law of Treaties (1969). Article 31(1) of the Vienna Convention requires that a "treaty shall 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 its object and purpose". This Article emphasises that the intention of the parties as expressed in the text is the best guide to their common intention. The Withdrawal Agreement is therefore to be interpreted by considering its purposes, objects and context.

19. The Withdrawal Agreement provides for a transition period during which most of Union law remained applicable to and in the United Kingdom, and, after the transition period, for arrangements which maintain the application of specific elements of Union law, including those concerning citizens' rights. Article 4 aims to ensure that the legal effects of the Withdrawal Agreement and the provisions of Union law rendered applicable, as well as the methods for the interpretation of Union law to which the Withdrawal Agreement refers, are the same in the United Kingdom as in the European Union.

20. Article 4(3)-(5) of the Withdrawal Agreement lays down the rules for the interpretation of the provisions of the Agreement referring to Union law or to concepts or to provisions thereof; they have to be interpreted and applied in accordance with the methods and general principles of Union law and their interpretation must be in conformity with the relevant case law of the Court of Justice handed down before the end of the transition period. Relevant case law handed down after the transition period must receive due regard.

21. The Withdrawal Agreement is not Union law. It does not continue Union law in effect. The fact that the United Kingdom has left the European Union does not mean Union legal concepts must be ignored. Otherwise, how are Union legal concepts such as free movement to be imported into, or inferred from, the Withdrawal Agreement, except insofar as that may be necessary in order to comply with the general rule of interpretation in Article 31 of the Vienna Convention. Union law therefore provides context. However, this does not mean that general concepts such as the right of free movement must be lurking beneath the words of the Withdrawal Agreement, to be called forth even if these words would not otherwise warrant it: *R (IMA) v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin); [2023] 1 WLR 817, *per* Lane J at [131]-[132].

ii) Good faith

22. International law requires Parties to an agreement to perform in good faith: Article 26 of the Vienna Convention.

23. Article 5 of the Withdrawal Agreement translates this principle into both a positive and a negative obligation by requiring the Parties to the Agreement to "take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations" arising and to "refrain from any measures which could jeopardise the attainment of [its] objective".

iii) Rights related to residence

24. Title II of Part Two of the Withdrawal Agreement deals with rights and obligations. Articles 13 and 15 deal, *inter alia*, with the right of Union nationals and their family members to reside in the United Kingdom.

25. Article 13(4) establishes that a host State may not impose any limitation or conditions for obtaining or losing residence rights on persons falling within the scope of the Article other than provided for in Title II. This Article expressly reinforces the consequences of the acquired rights-based framework. Union law lays down conditions and limitations and domestic laws and decision-making must fully respect them. A host State is explicitly precluded from adding extra conditions or imposing new limitations or restrictions other than those set out in Union law. Further, the Article ensures that competent national authorities implementing Title II can exercise discretion only if this is in favour of beneficiaries, thereby providing for the minimum level of residence rights.

26. As to rights related to residence, Article 15 provides that a Union citizen who has been living in the United Kingdom continuously and lawfully for five years at the end of the transition period will have the right to reside permanently in this country. To be considered continuously resident, individuals will generally have been lawfully residing in their host State for at least six months in any twelve-month period.

27. Those who have not yet resided continuously and lawfully for five years in the United Kingdom by the end of the transition period will also be able to stay until they have reached the five-year threshold, at which point they will qualify for the right to reside permanently. Until this five-year threshold has been met, continuity of residence will be broken by a period or periods of more than six months absence in total in any twelve-month period. One

absence lasting a maximum of twelve consecutive months for an important reason, such as pregnancy and childbirth, serious illness, study, vocational training or a posting abroad, is permitted.

28. The right established by Article 15 is subject to the right of the host State to require individuals to apply for a new residence status conferring the rights under Title II of Part Two of the Withdrawal Agreement. The procedural requirements are set out under Article 18 which provides that the United Kingdom may choose to provide for a new residence status which confers the rights guaranteed by Title II of Part Two and which is evidenced by a new residence document. The material provisions for these proceedings are the following:

> **"Article 18**
>
> **Issuance of residence documents**
>
> 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:
>
> ...
>
> (e) the host State shall ensure that any administrative procedures for applications are smooth, transparent and simple, and that any unnecessary administrative burdens are avoided;
>
> ...
>
> (o) the competent authorities of the host State shall help the applicants to prove their eligibility and to avoid any errors or omissions in their applications; they shall give the applicants the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omissions;
>
> (p) criminality and security checks may be carried out systematically on applicants, with the exclusive aim of verifying whether the restrictions set out in Article 20 of this Agreement may be applicable. For that purpose, applicants may be required to declare past criminal convictions which appear in their criminal record in accordance with the law of the State of conviction at the time of the application. The host State may, if it considers this

> essential, apply the procedure set out in Article 27(3) of Directive 2004/38/EC with respect to enquiries to other States regarding previous criminal records; ..."

iv) Conduct

29. Article 20(1) of the Withdrawal Agreement provides the relevant test for refusing residence in respect of conduct prior to the end of the transition period:

> **"Article 20**
>
> **Restrictions of the rights of residence and entry**
>
> 1. The conduct of Union citizens or United Kingdom nationals, their family members, and other persons, who exercise rights under this Title, where that conduct occurred before the end of the transition period, shall be considered in accordance with Chapter VI of Directive 2004/38/EC."

30. Under Union law, the right to move and reside freely can be restricted by a host State in several circumstances including on the grounds of public policy, public security or public health, and in the case of abuse of rights or fraud. Directive 2004/38/EC ("the Citizens' Directive") stipulates that restrictions of the right to move and reside freely are to be construed narrowly and in line with its objective, which is to ensure a high level of protection of the right of Union citizens and their family members to move and freely reside in the event of being denied leave to enter a host State or reside there: recital 25 of the Citizens' Directive. Material conditions must be met when restricting the rights, thresholds, and procedural safeguards to ensure that the action taken by national authorities is justified and fully reflects rights of the person affected.

31. Article 20(1) provides that conduct occurring before the end of the transition period is to be considered in accordance with Chapter VI of the Citizens' Directive. The notion of "conduct" is based on Article 27(2) of the Directive, as interpreted by the Court of Justice.

32. Consequently, Article 20(1) utilises the three-stage hierarchy:

- The respondent may only refuse an EUSS application on the grounds of public policy, public security or public health, or on the grounds of misuse of rights, consequent to conduct occurring before the end of the transition period: Article 27(1) of the Citizens' Directive; Regulation 24(1) of the Immigration (European Economic Area) Regulations 2016.

- Where a person holds a right of permanent residence, those grounds must be serious: Article 28(2) of the Directive; Regulation 27(3) of the 2016 Regulations.

- Where a Union citizen holds a right of permanent residence and has resided in the United Kingdom for at least ten years, the decision to refuse (and thereafter expel) may only be taken on imperative grounds of public security: Article 28(3) of the Directive; Regulation 27(3) of the 2016 Regulations.

33. Article 20(1) is to be contrasted with Article 20(2) which stipulates that conduct occurring after the end of the transition period is to be considered in accordance with national legislation, and so in the United Kingdom under the domestic deportation regime.

v) Time limits

34. There is no express requirement within the Withdrawal Agreement for the making of a decision in respect of an application for residence documents under Article 18(1). This contrasts with the position established by Article 19(2) of the Citizens' Directive, transposed into domestic law by Regulation 19(1) of the 2016 Regulations, requiring the respondent to issue an EEA national with a right of permanent residence certifying that rights "as soon as possible" upon the making of an application with relevant proof.

35. It is also in contrast to Article 18(1)(b) which requires a certificate of application for residence to be issued "immediately", and Article 14(3) which requires the issuing of entry visas for family members, where required, to be issued "as soon as possible, and on the basis of an accelerated procedure".

36. The respondent accepts that an application is to be determined within a reasonable time as this flows from domestic law, and to the extent that it does not, the contracting parties to the Withdrawal Agreement can be taken to have agreed that this should be the case.

C. <u>The EUSS</u>

37. On 30 March 2019, the United Kingdom adopted Appendix EU to the Immigration Rules setting out the arrangements for granting limited or indefinite leave to remain in the case of Union, EEA and Swiss nationals and their family members resident in the United Kingdom by 31 December 2020, thereby permitting them to obtain the immigration status required to continue to work and live in this country. It is the scheme providing for the residence

status and documentation envisaged by Article 18 of the Withdrawal Agreement.

38. As explained at paragraph EU1, the Appendix "sets out the basis on which an EEA citizen and their family members, and the family members of a qualifying British citizen, will, if they apply under it, be granted indefinite leave to remain or limited leave to enter or remain". "EEA citizen" includes Union citizens.

39. The United Kingdom was content to grant leave on physical presence. To secure settlement, an applicant is charged with demonstrating five years' lawful residence in this country and not five years' lawful residence under the 2016 Regulations. The respondent explains this is a generosity on the part of the United Kingdom.

D. The "Prosecution Stay" or "Pause" Policy

40. An application for status under the EUSS requires the respondent to assess an applicant's suitability. The assessment is conducted on a case-by-case basis and is based on an applicant's personal conduct or circumstances in the United Kingdom and overseas, including whether they have any relevant prior criminal convictions, and whether they have been open and honest in their application.

41. The respondent's policy document "EU Settlement Scheme: suitability requirements" (version 6.0), material at the date the applicant's application was determined in May 2022, makes provision for an EUSS application to be paused where there is a pending prosecution:

> **"Pending prosecutions**
>
> This section tells you how to consider an application where there is a pending prosecution against the applicant.
>
> A 'pending prosecution' is defined for the purposes of this guidance as where a person either:
>
> - has been arrested or summoned in respect of one or more criminal offences and one or more of these offences has not been disposed of either by the police or the courts
> - is the subject of a live investigation by the police for a suspected criminal offence
>
> Where an application would not fall for referral to Immigration Enforcement (IE), even if the pending prosecution present should lead to a conviction, a decision must be made on the application in light of all

> other available evidence. Where the applicant has a pending prosecution which could lead to a conviction and a refusal on suitability grounds and does not otherwise meet the criteria for referral to IE in respect of any other offence, you must pause the application until the outcome of the prosecution is known.
>
> Applications *paused for at least six months* must be progressed when all of the following conditions are met:
>
> - there is only one pending prosecution
> - the maximum potential sentence upon conviction is less than 12 months, according to the maximum category 1 sentence in line with the Sentencing Council guidelines for the alleged offence
> - there are no previous convictions
>
> Where the application is progressed before the outcome of the pending prosecution is known, this does not prevent consideration being given to deportation in the event the person is convicted."

42. The suitability policy has been updated and the latest version 8.0 was published on 29 June 2022. The material provisions have not altered, save the words in italics above have been deleted. The amendment removes the requirement for an application to be held for at least six months where there is a pending prosecution and the criteria to progress the application is otherwise met.

43. The applicant observes that the wording, save for the recent amendment, was first included in version 5.0 of the suitability policy, altering the wording of version 4.0 which provided, *inter alia*:

> "Where the applicant has a pending prosecution which could lead to a conviction and a refusal on suitability grounds and does not otherwise meet the criteria for referral to IE, in respect of any other offences, you must consider whether it is reasonable and proportionate for the application to be paused by UKVI pending the outcome of the prosecution.
>
> It will not be appropriate to pause the application in all cases, for example, of the offence would not be material to whether or not the application ought to be refused or if the proceedings are likely to take a significant period of time and it would be unreasonable in the circumstances to pause the application. It might in some case be more appropriate to consider the application and then consider whether to deport the individual in the event that they are convicted."

44. The applicant contends that version 4.0 explicitly incorporated proportionality and materiality into the policy and both have been omitted from version 5.0 onwards.

45. The threshold for referral to Immigration Enforcement ('the IE threshold') has remained the same from the time of version 4.0 of the policy document onwards:

- the applicant has, in the last five years, received a conviction which resulted in their imprisonment;
- the applicant has, at any time, received a conviction which resulted in their imprisonment for twelve months or more as a result of a single offence (it must not be an aggregate sentence or consecutive sentences);
- the applicant has, in the last three years, received three or more convictions (including convictions that resulted in non-custodial sentences) unless they have lived in the United Kingdom for five years or more. At least one of these convictions must have taken place in the last twelve months and, where the applicant is resident in the United Kingdom, at least one of these convictions must be in the United Kingdom;
- the case is of interest to Criminal Casework in respect of deportation or exclusion, for example where the applicant is in prison and the case is awaiting deportation considered;
- the applicant has entered, attempted to enter or assisted another person to enter or attempt to enter into a sham marriage, sham civil partnership or durable partnership or convenience (or IE is pursuing action because of this conduct);
- the applicant has fraudulently obtained, attempted to obtain or assisted another person to obtain or attempt to obtain a right to reside in the United Kingdom under the EEA Regulations 2016 (or IE is pursuing action because of this conduct);
- the applicant has participated in conduct that has resulted in them being deprived of British citizenship.

E. <u>The applicant's case</u>

46. The applicant relies upon the Supreme Court's statement of the law in *R (A) v Secretary of State for the Home Department* [2021] UKSC 37; [2021] 1 WLR 3931, per Lord Sales and Lord Burnett CJ, at [46]:

> "46. In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others: (i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (i.e. the type of case under consideration in Gillick); (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position. In a case of the type described by Rose LJ, where a Secretary of State issues guidance to his or her own staff explaining the legal framework in which they perform their functions, the context is likely to be such as to bring it within category (iii). The audience for the policy would be expected to take direction about the performance of their functions on behalf of their department from the Secretary of State at the head of the department, rather than seeking independent advice of their own. So, read objectively, and depending on the content and form of the policy, it may more readily be interpreted as a comprehensive statement of the relevant legal position and its lawfulness will be assessed on that basis. In the present case, however, the police are independent of the Secretary of State and are well aware (and are reminded by the Guidance) that they have legal duties with which they must comply before making a disclosure and about which, if necessary, they should take legal advice."

47. The applicant's primary submission on his unlawfulness ground relies upon the United Kingdom, in giving effect to its obligations under the Withdrawal Agreement, being bound to give effect to the obligations concerning the Citizens' Directive consequent to section 7A of the 2018 Act (as amended by the 2020 Act). Section 7A(1)-(3):

> "7A General implementation of remainder of withdrawal agreement
>
> (1) Subsection (2) applies to

(a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and

(b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement,

as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.

(2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be

(a) recognised and available in domestic law, and

(b) enforced, allowed and followed accordingly.

(3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2)."

48. Such obligations are given effect, in part, through the Immigration Rules and the respondent's guidance to his decision makers as to how to consider EUSS applications. In that context, where rights arising are in issue, and the respondent purports to tell his decision makers how to consider EUSS applications, he is obliged to identify the need to consider (1) the relevant Union law threshold tests, and (2) the Union principle of proportionality.

49. The published pause policy contains a positive statement which purports to tell decision makers what they are obliged to consider. It purports to give a full account of relevant obligations. However, the applicant submits there is an omission of material legal consideration that leads to a misleading picture of the true legal position. The decision makers are not independent of the respondent and are unable to secure their own advice. They are the respondent's staff and take decisions in his name.

50. The applicant contends that this results in the policy being unlawful. Mr Burton KC accepted that a pause policy may be sensible and serve its objective if by pausing for a pending prosecution there is a prospect of an application being refused. However, he observed the converse to be true if the resulting conviction can never lead to deportation.

51. Mr Burton contended that assessing periods of lawful residence is important in the context of EUSS applications because it is necessary to determine the applicable threshold for pausing an application on the basis that public policy/ public security requires the same. The three-stage hierarchy at [32] above must be respected as it is legal policy and the choice of the Union legislature.

52. The applicant observes that the test of imperative grounds of public security will only be satisfied where a person has been convicted of the most serious criminal offending and poses a compelling, ongoing risk to public security: *VP (Italy) v. Secretary of State for the Home Department* [2010] EWCA Civ 806; Case C-145/09 *Land Baden-Wurttenberg v. Tsakoridis* EU:C:2010:708 [2011] 2 CMLR 11. His case is that at the time of the decision to pause consideration of his application, he enjoyed imperative grounds protection and if convicted on one count of actual bodily harm such charge was not capable of meeting the relevant threshold for expulsion. At the date the pause commenced, the respondent would have known that the imperative grounds threshold could not be met.

53. The core of the applicant's concern is that the design of the pause system denies a decision maker a vital piece of information, namely the length of residence, and thereby prevents consideration of the relevant threshold. That information is vital because on the terms of the policy itself, if a decision maker does not know the length of residence so as to determine threshold, they cannot determine the question the policy asks: is there a rational connection between the impending prosecution and pausing the application? This requires a degree of forward-looking.

54. Mr Burton submitted that the respondent had all that he needed to act lawfully in version 4.0 of the policy, which required decision-makers to consider whether pausing an application was reasonable and proportionate.

55. As to the second ground, concerned with fettering, Mr Burton acknowledged that it might be thought to traverse similar but broader terrain to the ground addressed above, but confirmed that it was pleaded on a distinct basis and was sustained at the substantive hearing.

56. The applicant contends that in removing the flexibility to proceed to determine the application in the published policy, the respondent fettered his ability to exercise his power to proceed to determine EUSS applications in cases where staying consideration to await the result of a criminal trial served no public interest objective. It is said that the unlawful fetter was contrary to: (1) the common law; (2) the requirements of the Withdrawal Agreement; and (3) the general principles of Union law.

57. The unreasonable delay ground was pursued at the substantive hearing as it was said to identify the failings of the flawed policy.

F. <u>The respondent's case</u>

58. The respondent's position is that both his policy, and the individual decision taken in the applicant's case, are lawful.

59. Mr Blundell KC submitted that the respondent is entitled to operate a policy under which he pauses decision-making in certain cases pending the outcome of a criminal prosecution. Such a policy is not contrary to the Withdrawal Agreement, nor is it contrary to any principles of domestic law, neither of which require him to investigate the specific circumstances of an individual case to form a view about the merits of the case before he defers taking a decision. To be so required would undermine the compelling public interest reasons underpinning the policy's introduction.

60. There is no specific deadline in the Withdrawal Agreement for consideration of Article 18 applications. The time limit for dealing with an application therefore lies within the discretion of the United Kingdom and each of the Member States, though subject to the requirement that an application must be decided within a reasonable period.

61. The respondent identifies the crucial question to be what timescale is reasonable. In this case, given the interim protection which the EUSS enjoys, the specific context (criminality), the purpose of the policy and the manner in which it serves the public interest, the period of any delay under the pause policy will in principle be reasonable.

G. Discussion

First issue - unlawfulness

Suitability – threshold test

62. I deal firstly with a matter raised by Mr Burton at the hearing, and subsequently addressed by the parties and the intervenor in written submissions: whether paragraph EU15 establishes that the suitability threshold applies by reference to the length of 'simple residence' alone.

63. Paragraphs EU15, EU16 and EU17 of Appendix EU set out the basis on which an application under Appendix EU will or may be refused on suitability grounds.

64. Paragraph EU15(1) and (2):

> (1) An application made under this Appendix will be refused on grounds of suitability where any of the following apply at the date of decision:

(a) The applicant is subject to a deportation order or to a decision to make a deportation order; or

(b) The applicant is subject to an exclusion order or exclusion decision.

(2) An application made under this Appendix will be refused on grounds of suitability where the Secretary of State deems the applicant's presence in the UK is not conducive to the public good because of conduct committed after the specified date.

65. If one of the orders or decisions specified in paragraph EU15(1) applies in respect of the applicant at the date the decision on the application under the EUSS is made, the application must be refused. Thus, an application made under Appendix EU will be refused on grounds of suitability where the applicant is subject to a deportation order or to a decision to make a deportation order.

66. Annex 1 to Appendix EU defines a 'deportation order' as including:

"deportation order

as the case may be:

(a) an order made under section 5(1) of the Immigration Act 1971 by virtue of regulation 32(3) of the EEA Regulations; or

(b) an order made under section 5(1) of the Immigration Act 1971 by virtue of section 3(5) or section 3(6) of that Act in respect of:

(i) conduct committed after the specified date; or

(ii) conduct committed by the person before the specified date, where the Secretary of State has decided that the deportation order is justified on the grounds of public policy, public security or public health in accordance with regulation 27 of the EEA Regulations, irrespective of whether the EEA Regulations apply to the person (except that in regulation 27 for "with a right of permanent residence under regulation 15" and "has a right of permanent residence under regulation 15" read "who, but for the making of the deportation order, meets the requirements of paragraph EU11, EU11A or EU12 of Appendix EU to the Immigration Rules"; and for "an EEA decision" read "a deportation decision")."

67. Mr Burton contended that where a relevant Union citizen has been present in the United Kingdom for a continuous qualifying period of years, commencing before the end of the transition period, they are entitled to indefinite leave to remain, save that they may be refused on suitability grounds where subject to

a deportation order, or a decision to make such an order, made on grounds of public policy, public security, or public health. That Union standard is now provided for *via* Article 20 of the Withdrawal Agreement. Therefore, anyone otherwise entitled to leave to remain on that basis is at a minimum protected by the serious grounds of public policy or public security threshold. In terms of the pause policy, where the prosecution concerns conduct allegedly carried out before the end of the transition period, the respondent can determine which suitability threshold applies by reference to the length of "simple residence" alone. The respondent is not required to establish the quality of that residence in the sense of being able to determine whether an applicant was exercising Treaty rights during their period of residence in accordance with Article 15 of the Withdrawal Agreement.

68. The short answer is that this contention is not well-founded. In respect of a deportation order made under section 5(1) of the Immigration Act 1971, made by virtue of section 3(5) or 3(6) of that Act, and made in respect of conduct before the end of the transition period, the relevant question when considering which threshold to apply is length of residence, not length of residence exercising Treaty rights. This consideration concerns the impact of such a deportation order on whether an EUSS applicant meets the suitability requirements of paragraph EU15(1), not the threshold for making the deportation order.

69. Such consideration is not applicable to a deportation order made by virtue of the 2016 Regulations, as they can continue to be made after the end of the transition period by virtue of regulation 3 or 4 of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 ("the Grace Period Regulations"), where they apply. Regulations 7 and 8 then specify regulations of the 2016 Regulations that are preserved, with modifications, to enable EEA decisions to continue to be made in respect of a "relevant person", as defined under regulation 5, during the "grace period", as defined by regulation 3(5)(a), and in respect of an applicant to the EUSS during the relevant period, as defined in regulation 4(6)(b). Regulation 32 of the 2016 Regulations is specifically preserved: regulation 8(d) of the Grace Period Regulations.

70. Consequently, it will not be sufficient for the respondent to consider length of residence alone. He is required to consider whether an applicant was exercising Treaty rights before the end of the transition period. As Ms Patel succinctly noted, this is established by regulation 32(3), referring to regulation 23(6)(b), referring to regulation 27, referring to regulation 15 of the 2016 Regulations.

71. In a majority of cases concerning conduct before the end of the transition period to which the pause policy applies, the respondent will have to consider

whether the applicant was exercising Treaty rights before the end of the transition period were he required to assess the deportation threshold before applying the policy. Such an assessment is necessary to determine whether he is entitled to make a deportation order under regulation 32 of the 2016 Regulations, as saved by the Grace Period Regulations.

Interim protection

72. I turn to address the "interim protection" issue. This issue was primarily advanced by the intervenor and addressed by Mr Blundell both in writing and at the hearing. At its core the contention is that the operation of the pause policy offends the interim protection provided by Article 18(1) of the Withdrawal Agreement by introducing uncertainty.

73. Article 18(1) establishes the new constitutive scheme by which residence status under Part II is granted and residence documents are issued. To benefit from their residence rights under the Withdrawal Agreement, persons falling within the personal scope of Title I must not only make an application for a residence status by a certain deadline, but also be granted that status by a decision of competent national authorities. The constitutive residence status is formally evidenced by a residence document.

74. Until all redress procedures have been exhausted, the residence rights under Title II are deemed to apply by virtue of Article 18(3):

> "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)."

75. Article 18(3) provides interim protection to an applicant unless and until their Article 18 application is granted or rejected. An applicant may rely upon the certificate of application issued "immediately" under Article 18(1)(b) and further rely upon the Grace Period Regulations to apply for and obtain social security benefits or other advantages available to those with Union rights of residence.

76. Mr Burton, supported by Ms Patel, says that it is no answer to assert that there is no detriment to an applicant as they can still access immigration status-sensitive welfare benefits. Rather, the broader point of the constitutive system is to provide a single, authoritative domestic determination of a right to reside, thereafter enforceable against all arms of the State and so obviating, at least for those granted settled status, the need to repeatedly be required to

prove entitlement to a number of defined rights, benefits and duties. The product of the Article 18 process, and any appeals it may entail, is identifiable as establishing a single and binding decision on entitlement to reside. The object of the process is to assist those so benefiting to feel secure, certain, and safe as to their future entitlements and enable them to plan their future working and home life accordingly.

77. The submission that Article 18(3) is imbued with a requirement for certainty is not made out. The provision is clear in terms. The interim protection established is founded upon an awareness that all redress procedures may be exhausted, and an application for status refused. At such time benefits or other advantages will come to an end.

78. The certificate of application is authoritative, being supplied to anyone who has submitted a valid EUSS application and can be used to prove enjoyment of residence rights until the application has been finally determined.

Proportionality

79. I turn to the applicant's primary contention as to unlawfulness: the respondent's pause policy is unlawful insofar as by directing his decision-makers to stay determination of an EUSS application in accordance with the policy, he leads them to commit unlawful acts.

80. This contention requires a preliminary consideration as to the role, if any, of the Union principle of proportionality.

81. The pause policy establishes that if there is a pending prosecution which could lead to a conviction and a refusal on suitability grounds, even if it does not meet the criteria for referral to Immigration Enforcement in respect of any other offence, the application must be stayed until the result of the prosecution is known.

82. Article 5(4) of the Treaty on European Union establishes that under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. Proportionality covers how Member States can act when they are adopting measures that fall within the scope of Union law.

83. Mr Blundell submitted that Article 18 is not a provision caught by Article 4(3) as it introduces an entirely new constitutive process which is impermissible under Union law. Moreover, Article 18(1)(p) permits systematic criminality checks, which are impermissible under Union law. In the circumstances, the methods and general principles of Union law cannot apply when interpreting or applying the relevant provisions of Article 18 in this case.

84. The answer is that the Union principle of proportionality clearly applies by virtue of Article 4(3) read with Article 18, the latter referencing the operation of Article 20(1) which imports substantive provisions of the Citizens' Directive in relation to the applicable thresholds against which restrictions are to be assessed, and the proportionality requirement in Article 27 of the Directive. Additionally, Article 18 references the application of Article 21 of the Withdrawal Agreement, concerned with safeguards, and applies to the imposition of a stay, which in turn imports Article 15 of the Directive and through it Articles 28(1) and 31 of the Directive which provide an explicit guarantee of individual consideration on the facts and of the application of the principle of proportionality.

85. I am fortified in my conclusion that Article 18 is a provision caught by Article 4(3) by the judgment of the Court of Appeal in *Celik v. Secretary of State for the Home Department* [2023] EWCA Civ 921, [2024] 1 WLR 1946, at [56], where Lewis LJ said, at [56]:

> "56. Further, the principle of proportionality, whether as a matter of general principle, or as given express recognition in article 18(1)(r) of the Withdrawal Agreement, does not assist the appellant. Article 18(1)(r) is intended to ensure that decisions refusing the "new residence status" envisaged by article 18(1) are not disproportionate ... The principle of proportionality, in this context, is addressed to ensuring that the arrangements adopted by the United Kingdom (or a member state) do not prevent a person who has residence rights under the Withdrawal Agreement being able to enjoy those rights after the end of the transition period ..."

86. The respondent's position is that the pause policy enjoys a public interest function by protecting the integrity of the immigration system by ensuring that leave is not granted in circumstances where, by virtue of an individual's criminality, it ought not to be.

87. Mr Blundell drew attention to the judgment of the Court of Appeal in *R (X and others) v. Secretary of State for the Home Department* [2021] EWCA Civ 1480, [2021] 4 WLR 137, at [45] and [50]-[51], a matter concerned with the exercise of an implied power under the Immigration Act 1971 to delay or defer taking a decision on an application for leave to remain where the outcome of a criminal investigation was awaited. He submitted that there is a rational link between the reasons for pausing an application, namely the pending prosecution, and the grounds on which an EUSS application may be granted or refused. Underpinning this submission is rationality being founded upon the respondent abiding by his "Tameside" obligation to ask himself the right

question and seek out the relevant information he needs to make his decision: *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, at 1065.

88. I observe that the Court of Appeal in *X and Others* was not required to consider the principle of proportionality.

89. Article 18(1)(p) provides that the United Kingdom, or a host State, may carry out systematic criminality and security checks aiming to assess whether the personal conduct of an applicant may represent a threat to public policy or public security. This departs from Article 27(3) of the Citizens' Directive that allows targeted, but not systematic checks. These systematic checks must respect relevant requirements of the Citizens' Directive as expressly incorporated: Articles 15, 27, 28 and 31. Nothing in the making of the check dilutes the required Union standards, or that consideration of an application under Article 18 must be proportionate.

90. Relying upon Article 18(1)(p), the respondent's position in these proceedings was primarily built on the principle of proportionality not arising. In the alternative, it was said that if the principle is applicable, the policy is sufficient by means of its flexibility arising from its adoption of an exception requiring three cumulative conditions to be met:

    i) there must be only a single pending prosecution;

    ii) the maximum potential sentence upon conviction for that prosecution must be less than twelve months; and

    iii) the applicant has no previous convictions.

91. As a public interest policy, if the alleged conduct is sufficiently likely to result in a conviction and deportation given the relevant threshold applicable on the basis of residence, then it is reasonable and proportionate to delay determining an application until such time as a conviction enables a proper assessment of the relevant conduct to be made for the purposes of Article 20(1) and any restriction on residence. Mr Burton and Ms Patel agreed with the respondent to this extent.

92. However, the policy in its present version extends to alleged conduct that, if proven, is not sufficiently likely to result in a conviction and deportation. An example addressed by the parties at the hearing concerned an EUSS applicant, resident and working in this country for over ten years, with a previous, recent, non-custodial sentence for shoplifting, who is awaiting trial on a second shoplifting charge where the value of goods purportedly stolen has a value of over £200 and so for the purposes of criminal law is not a summary

only offence. Under section 1 of the Theft Act 1968 the maximum sentence on indictment is seven years custody. A conviction on these facts is not sufficiently likely to result in deportation, observing the imperative grounds of public security threshold. However, the applicant would fall under the pause policy and consideration of his application for status would be delayed.

93. The narrowness of the exception's three conditions when applied to factual scenarios were identified by the intervenor in its skeleton argument:

- A stay will ensue whenever a person has any prior, unspent criminal conviction, no matter how minor. A single prior criminal conviction for a motoring offence, for littering, for obstructing the highway, for being drunk and disorderly, or for breach of a local bye-law will lead to the current prosecution for an offence – no matter how minor it may be by itself – generating a stay of an application.

- A stay will ensue even if a custodial maximum sentence of a year is most unlikely on the facts; and even if such a sentence is insufficient, in and of itself, to take the case past the relevant threshold, no matter how high it is.

- A stay will ensue if the applicant is being charged with two or more offences or is asking for further offences to be taken into consideration, even if the cumulative sentence for such combined offending is likely to be trivial.

94. In respect of Article 18 of the Withdrawal Agreement the principle of proportionality ensures that the arrangements adopted by the United Kingdom do not prevent a person who has residence rights under the Withdrawal Agreement being able to enjoy those rights after the end of the transition period. The enjoyment of these rights is wider than the protection provided by Article 18(3), which by its nature is interim pending determination of the claim. Article 18 itself is ultimately concerned with status: the grant of leave to remain or settlement. Such status provides more than the ability to work, secure accommodation and, if permitted, secure access to social security benefits and to NHS services. It provides security of mind and confidence in future planning, which is absent when awaiting a decision on an application under the EUSS.

95. The design of the policy means that it is not possible to review an applicant's length of residence in the United Kingdom and so identify the applicable threshold which would apply if convicted, prior to an application being placed on hold. Consequently, the stay is enforced where the decision-maker does not engage in fact-finding and does not have relevant facts to consider

whether a stay is proportionate, takes no communicated or reasoned decision, and does not proactively invite representations from the applicant.

96. Alleged criminality will only justify a stay of consideration where the nature of the criminality, if proven, is capable of justifying a refusal of residence given the relevant threshold and the requirement that the stay be proportionate. I consider that pausing cases where this justification is not met at the outset does not maintain public confidence as these are not persons who can properly be said are likely to be removed.

97. A consequence is that a cohort of applicants are delayed from securing status they are entitled to when there is no likelihood of their application being refused once criminal proceedings have concluded.

98. Such an approach is incompatible with the Withdrawal Agreement's requirements of individual, fact-based and proportionate decision-making in a reasonable time, which are applicable to decisions made under Article 18 of the Withdrawal Agreement.

99. The pause policy in its present form is inconsistent with the requirements of Articles 18 and 21(1) of the Withdrawal Agreement. It leads to unwarranted and disproportionate delays to the processing of Article 18 Withdrawal Agreement applications.

Unlawfulness

100. It follows, for the reasons addressed below, that in promulgating the pause policy the respondent had a duty to provide decision-makers with accurate advice about the law but has failed to do so because of an omission to explain the legal position.

101. Absent from the policy is the requirement for a decision-maker to consider the application of the Union principle of proportionality, which may require them to proceed and determine the application in a given case. Further, it omits any instruction to consider the Union law threshold test applicable to the case in hand, before deciding to stay consideration. A decision-maker should properly be informed that the threshold test may require them to proceed and determine the application in a given test. I agree with Mr Burton's succinct observation that the policy is blind to one side of the legal question.

102. For the reasons addressed above, the present policy fails to require a decision-maker to consider the following before pausing an EUSS application. Firstly, to ascertain whether the applicant was exercising EU rights in the United Kingdom at 11p.m. on 31 December 2020, acquired permanent residence and

so the serious grounds threshold applies, and whether they have been lawfully resident for ten years in total, with the imperative grounds threshold applying. Having secured this knowledge, a decision-maker is also required to know whether, given the applicable threshold, the applicant could be refused leave to remain or settlement if convicted.

103. The respondent retains considerable latitude in setting domestic standards, subject to properly respecting the three-tier hierarchy framework imposed by Union law. However, a pause or prosecution stay policy must be proportionate and reasonable.

'Fettering' and 'Delay' grounds

104. Having found for the applicant on the ground above, there is no requirement to consider the remaining two grounds. The fettering challenge adds no more consequent to my decision on the primary challenge, nor does the delay challenge which has over time been reduced to an example of the unlawful nature of the policy.

H. Conclusion

105. The applicant is successful on ground 2A of his claim.

106. No decision is made on grounds 1 and 2 of the claim.

I. Further Steps

107. I invite the parties to agree an order reflecting my judgment, with attendant consequential orders if deemed necessary.

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