



Neutral Citation Number: [2017] EWHC 3298 (Admin)

Case No: CO/1440/2017, CO/2016/2017 & CO/2384/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 December 2017

Before :

MRS JUSTICE LANG DBE

Between :

	CO/1440/2017
THE QUEEN	
on the application of	
GUNARS GURECKIS	<u>Claimant</u>
- and -	
SECRETARY OF STATE FOR THE	
HOME DEPARTMENT	<u>Defendant</u>
	CO/2016/2017
THE QUEEN	
on the application of	
MARIUSZ CIELECKI	<u>Claimant</u>
- and -	
SECRETARY OF STATE FOR THE	
HOME DEPARTMENT	<u>Defendant</u>
	CO/2384/2017
THE QUEEN	
on the application of	
MARIUSZ PERLINSKI	<u>Claimant</u>
- and -	

**SECRETARY OF STATE FOR THE
HOME DEPARTMENT**

Defendant

Marie Demetriou QC, Stephen Knight, Shanthi Sivakumaran and Natalie Csengeri
(instructed by **Public Interest Law Unit / Lambeth Law Centre**) for the **Claimants**
James Eadie QC and Julie Anderson (instructed by the **Government Legal Department**) for
the **Defendants**

Written submissions were made by **Brian Kennelly QC** (instructed by **Deighton Pierce
Glynn**) on behalf of the **Advice on Individual Rights in Europe ('AIRE')** Centre.

Hearing dates: 21, 22 & 23 November 2017

Approved Judgment

Mrs Justice Lang :

1. These three linked claims for judicial review have been selected as test cases in which to consider the lawfulness of the Defendant's policy, and its application, to EEA (European Economic Area) nationals found sleeping rough in the United Kingdom ("UK"). The version of the policy challenged in these claims was contained in the Defendant's guidance to immigration officers entitled 'European Economic Area (EEA) administrative removal', version 3.0, published 1 February 2017. The guidance set out the circumstances in which rough sleeping would be treated as an abuse of EU Treaty rights, rendering an EEA national liable to removal, if proportionate to do so.
2. The Claimants and the AIRE Centre submitted that the policy was unlawful because rough sleeping could not constitute an "abuse of rights" under article 35 of Directive 2004/38/EC 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 Directive"), as implemented by regulation 26 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). Furthermore, the policy discriminated unlawfully against EEA nationals and rough sleepers and the application of the policy involved unlawful systematic verification.
3. Permission to apply for judicial review was initially refused on the papers, Ouseley J. granted permission to apply for judicial review at an oral hearing on 12 July 2017. Other similar claims have been stayed pending the outcome in the test cases. The outcome of the test cases will also be relevant to pending tribunal appeals against decisions to remove.
4. The AIRE Centre was given permission to make written, but not oral, representations as an intervenor. I gave careful consideration to Mr Kennelly QC's well-crafted written submissions.

The facts in the Claimants' individual cases

5. It was common ground that permission to apply for judicial review had been granted to determine the lawfulness of the policy and its application on the basis of generic issues of principle, not on the varied facts of the individual test cases. I was asked not to make findings on the disputed facts. Therefore the individual facts are dealt with in outline only.

Mr Gureckis

6. Mr Gureckis was a national of Latvia. He had been living in the UK since 2009, either working or seeking work. In 2015/2016 he left the UK on several occasions to visit his family in Latvia and he also travelled to other European countries. He had a long history of intermittent rough sleeping, interspersed with periods where he did have accommodation.
7. On the night of 23 February 2017, he was found sleeping rough by Home Office Immigration, Compliance and Enforcement ("ICE") officers who were deployed on a

joint operation with police and outreach workers targeting EEA rough sleepers. He was interviewed about his personal circumstances by an immigration officer.

8. The Immigration Officer's witness statement said:

“Subject was not aware that he was not allowed to sleep rough as a breach of EEA regulations, stating that he sleeps on the street all the time. I explained to him that rough sleeping constitutes [*sic*] Misuse of the right to reside in the UK under EEA Regulation 23(6)(c) 2016.”

“Subject has been rough sleeping and according to EEA Regulations 23(6)(c) 2016 he is misusing the right to reside in the UK and is therefore liable to removal.”

9. At the end of the interview he was served with IS.151A(EEA) ‘Notice to a person liable to removal’ which stated:

“Specific Statement of Reasons

You are specifically considered a person who has misused a right to reside in the UK under Regulation 23(6)(c) of [the 2016 Regulations] because:

You were referred to Immigration Enforcement by the Metropolitan Police and found to be rough sleeping at...John Trundle Court...on the...23/02/2017”

10. On 2 March 2017, Mr Gureckis lodged an appeal with the First-tier Tribunal (“FTT”) against the decision to remove him. The effect of the appeal was to suspend the operation of the removal directions. The appeal has not yet been heard.

Mr Perlinski

11. Mr Perlinski was a national of Poland. He had lived in the UK since 2011. His mother, sisters and step-father were living in the UK. He was divorced and his wife and son were living in Poland. He was living with his family and friends until he became homeless at the end of November 2016 and began sleeping rough. He was alcohol dependant and in poor health.

12. In the afternoon of 15 March 2017, an immigration officer acting on intelligence that the Claimant was rough sleeping in a public toilet, visited the toilets and questioned the Claimant. He was taken to the police station for interview. The “IO Minutes of 15 March 2017” stated that he told them in interview that he had not worked for the past four years and so he was not exercising his EEA Treaty rights. In his evidence to the Court, the Claimant denied this, and he gave a history of his work in the UK. He accepted it had petered out once he became homeless. There was an issue as to the standard of his English and whether he should have been given an interpreter.

13. In the “IO Minutes of 15 March 2017” the reasons for his removal were stated as follows:

“Case was referred to CIO Greenbank who authorised service ... IS151A (EEA) and detention. It was evident that subject had demonstrated a misuse of rights under regulation 26(1) of the [2016 Regulations] given that he was sleeping rough. Rough sleeping is considered to be a misuse of rights....”

14. Mr Perlinski was served with form IS.151A(EEA) ‘Notice to a person liable to removal’ which stated:

“Specific Statement of Reasons

You are specifically considered a person who has demonstrated a misuse of rights under regulation 26(1) of [the 2016 Regulations] because you are considered to be a person who is rough sleeping in London following your encounter with Immigration Officers today. Rough sleeping is considered to be a misuse of rights. Therefore EEA nationals ... who are encountered sleeping rough and have yet to obtain a permanent right of residence are subject to administrative removal under regulation 23(6)(c) of [the 2016 Regulations]. Your personal circumstances have been considered and it has been decided that there are no exceptional circumstances which would impact on the decision to remove you from the United Kingdom and your removal is proportionate.....”

15. Mr Perlinski was detained at an immigration detention centre. He did not appeal. In a pre-action protocol letter dated 28 April 2017, solicitors instructed by him challenged the Defendant’s decision, dated 15 April 2017, to set removal directions. On 18 May 2017, following the issue of the claim for judicial review, Lewis J. granted a stay on removal. On 30 June 2017 he was granted temporary admission. He remained in the UK, living with his step father, and continued to comply with his reporting conditions.

16. In the Detailed Grounds of Defence, dated 4 October 2017, the Defendant stated, at paragraph 12:

“[I]n fact, the removal decision has been withdrawn in relation to MP as he is understood to be living with a relative.”

17. At my request, the Defendant produced a letter during the hearing, dated 21 November 2017, which confirmed that the enforcement notices had been withdrawn on 5 July 2017, and he was no longer subject to enforcement action.

Mr Cielecki

18. Mr Cielecki was a national of Poland who arrived in the UK in December 2015. In July 2016 he approached a homeless persons charity for assistance with voluntary departure from the UK. On 23 September 2016 he was encountered sleeping rough and was served with a ‘Minded to Remove’ letter. On 9 November 2016, in the course of an operation by immigration officers and the police targeting EEA rough sleepers, Mr Cielecki was found sleeping in a tent on a roundabout. He was questioned and then

detained. According to the HO Minute Sheet dated 9 November 2016, the immigration officer suspected that he was not exercising Treaty rights in the UK.

19. Mr Cielecki was served with form IS.151A(EEA) ‘Notice to a person liable to removal’ which stated:

“Specific Statement of Reasons

You are specifically considered a person [*sic*] is not exercising Treaty rights because you entered the United Kingdom 26 December 2015. You ceased working 01 September 2016. You are no fixed abode. You are not currently in employment or in a relationship with an EU national. There by virtue of regulations 19(3)(a) and 34(2) a person in respect of whom removal directions may be given in accordance with section 10 of the Immigration and Asylum Act 1999 as a person who does not have or has ceased to have a right to reside under the Immigration (European Economic Area) Regulations 2006.”

20. Mr Cielecki appealed to the FTT against the decision to remove him. His appeal was dismissed on 26 April 2017. The FTT Judge found that the work which he had been engaged upon in the UK was minimal, and that he had failed to establish his case that he was actively looking for work between 22 July 2016 (when his last registered employment ended) and 9 November 2016, when he was detained. His applications for permission to appeal were refused.

Grounds for judicial review

21. The Claimants’ case was that the Defendant’s policy provided that any rough sleeping was an abuse of EU Treaty rights rendering an EEA national liable to removal, if proportionate to do so. The policy was implemented by means of planned operations targeting EEA rough sleepers, and where considered appropriate, detaining them and/or removing them from the UK or asking them to leave the UK voluntarily.
22. The Claimants, supported by the AIRE Centre, submitted that the policy, and the systematic manner in which it was applied by the Defendant, was in breach of EU law. In summary:
- i) The policy was unlawful because rough sleeping could not constitute an “abuse of rights” within the meaning of article 35 of the Directive, as implemented by regulation 26 of the 2016 Regulations. The test for an abuse of rights in EU law was well-established and was not met here, whether the policy provided that rough sleeping *ipso facto* was treated as an abuse, as the Claimants contended, or that only certain types of rough sleeping were treated as an abuse, as the Defendant contended.
 - ii) If ground (i) was made out, the policy was discriminatory because it accorded less favourable treatment to EEA nationals who were rough sleepers, either on the ground of nationality or as people who were homeless and did not have property rights. There was no justification for the less favourable treatment.

- iii) The application of the policy was unlawful because it entailed systematic verification, which was expressly prohibited under article 14(2) of the Directive and regulation 22 of the 2016 Regulations.
23. In their challenges to the Defendant's decisions in their cases, Messrs Gureckis and Perlinski relied on all three grounds. Mr Cielecki relied on the third ground alone, since although he was initially questioned on the basis that he was a rough sleeper, the decision to remove him from the UK was made on the basis that he was not exercising Treaty rights.
24. In response, the Defendant submitted that the policy did not provide that rough sleeping *ipso facto* was an abuse of rights. Rough sleeping was an indicator that the type of conduct regarded as an abuse of rights might be present, and so it triggered an investigation of the individual circumstances of the case.
25. Abuse of rights arose as the result of deliberate and/or persistent rough sleeping which was socially and economically harmful, such as:
- i) entering the UK with the intention of rough sleeping to save money, or by not making arrangements to secure accommodation; or
 - ii) after entry to the UK, by continuing to rough sleep without taking up the options of moving into accommodation or returning to the home Member State.
- Such conduct was capable of meeting the EU test for an abuse of rights. On the other hand, it might not be appropriate to treat rough sleepers as abusing their rights if they had inadvertently fallen on hard times through no fault of their own and they intended to find accommodation or leave the UK in the near future.
26. The Defendant submitted that the policy was not discriminatory on grounds of nationality because no proper comparison could be made between those who had an unconditional right to reside in the UK and those who were exercising Treaty rights. Rough sleeping did not necessarily denote homelessness or any other protected status. If there was discrimination, it was justified because it was a proportionate response to a legitimate aim.
27. The Defendant denied that the operations undertaken amounted to unlawful systematic verification. They were a sensible and lawful approach to the practical fulfilment of immigration duties. If an EEA national came to the attention of immigration officers, he could be lawfully questioned as to the basis of his presence in the UK. If the answers to those questions raised a reasonable doubt as to whether he or she was abusing his rights by rough sleeping, more detailed investigation, amounting to verification, could be lawfully carried out.

Legal framework

Consolidated Treaty on the Functioning of the European Union (TFEU)

28. The TFEU provides:

“Article 20

(ex Article 17 TEC)

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

...

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Article 21

(ex Article 18 TEC)

1. Every citizen of the Union 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.

...”

Consolidated Treaty on European Union (TEU)

29. The TEU provides:

“Article 3

(ex Article 2 TEU)

1. The Union’s aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced

economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

...”

Directive 2004/38/EC

30. Article 6 provides for an initial right to reside for a period of up to three months:

“1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.”

31. Article 6 must be read in conjunction with Article 14 which provides:

“1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

...

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.”

32. Article 7 provides for an extended right of residence for more than three months if an EU citizen satisfies one of the following requirements:

“1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and

have comprehensive sickness insurance cover in the host Member State; or

(c) — are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

— have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4.”

33. Article 14 provides:

“Retention of the right of residence

1. Union citizens and their family members shall have the right of residence provided for in Articles 6, as long as they do not

become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.”

34. Article 16 provides that Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there, without any requirement to work or be self-sufficient. They must show that they have met the requirements for lawful residence during the extended period. The right of permanent residence may only be lost through absence of more than two years; temporary absences as specified in Article 16.3 do not affect the right.
35. Article 27 provides that Member States may restrict freedom of movement and residence on grounds of public policy, public security or public health.
36. Procedural safeguards are contained in Article 30, which requires notification of decisions taken, and Article 31 grants a right of appeal or review.
37. Article 35 concerns the abuse of rights:

“Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and

subject to the procedural safeguards provided for in Articles 30 and 31.”

Immigration (EEA) Regulations 2016

38. With effect from 1 February 2017, the 2016 Regulations replaced the Immigration (European Economic Area) Regulations 2006. Although Mr Cielecki was stopped and detained in November 2016, under the 2006 Regulations, it was agreed that there was no material difference between the two sets of regulations.
39. Regulation 13(1) provides for the initial right of residence:
- “An EEA national is entitled to reside in the United Kingdom for a period not exceeding three monthsprovided the EEA national holds a valid identity card or passport issued by an EEA State.”
40. Regulation 14 provides for an extended right of residence for qualified persons, for as long as that person remains a qualified person.
41. Regulation 6 defines a “qualified person” as follows:

“Qualified person

6.(1) In these Regulations—

“jobseeker” means an EEA national who satisfies conditions A, B and, where relevant, C;

“qualified person” means a person who is an EEA national and in the United Kingdom as—

- (a) a jobseeker;
- (b) a worker;
- (c) a self-employed person;
- (d) a self-sufficient person; or
- (e) a student;

“relevant period” means—

(a) in the case of a person retaining worker status under paragraph (2)(b), a continuous period of six months;

(b) in the case of a jobseeker, 91 days, minus the cumulative total of any days during which the person concerned previously enjoyed a right to reside as a jobseeker, not including any days prior to a continuous absence from the United Kingdom of at least 12 months.

(2) A person who is no longer working must continue to be treated as a worker provided that the person—

(a) is temporarily unable to work as the result of an illness or accident;

(b) is in duly recorded involuntary unemployment after having been employed in the United Kingdom for at least one year, provided the person—

(i) has registered as a jobseeker with the relevant employment office; and

(ii) satisfies conditions A and B;

(c) is in duly recorded involuntary unemployment after having been employed in the United Kingdom for less than one year, provided the person—

(i) has registered as a jobseeker with the relevant employment office; and

(ii) satisfies conditions A and B;

(d) is involuntarily unemployed and has embarked on vocational training; or

(e) has voluntarily ceased working and has embarked on vocational training that is related to the person's previous employment.

(3) A person to whom paragraph (2)(c) applies may only retain worker status for a maximum of six months.

(4) A person who is no longer in self-employment continues to be treated as a self-employed person if that person is temporarily unable to engage in activities as a self-employed person as the result of an illness or accident.

(5) Condition A is that the person—

(a) entered the United Kingdom in order to seek employment; or

(b) is present in the United Kingdom seeking employment, immediately after enjoying a right to reside under subparagraphs (b) to (e) of the definition of qualified person in paragraph (1) (disregarding any period during which worker status was retained pursuant to paragraph (2)(b) or (c)).

(6) Condition B is that the person provides evidence of seeking employment and having a genuine chance of being engaged.

(7) A person may not retain the status of—

(a) a worker under paragraph (2)(b); or

(b) a jobseeker;

for longer than the relevant period without providing compelling evidence of continuing to seek employment and having a genuine chance of being engaged.

(8) Condition C applies where the person concerned has, previously, enjoyed a right to reside under this Regulation as a result of satisfying conditions A and B—

(a) in the case of a person to whom paragraph (2)(b) or (c) applied, for at least six months; or

(b) in the case of a jobseeker, for at least 91 days in total,

unless the person concerned has, since enjoying the above right to reside, been continuously absent from the United Kingdom for at least 12 months.

(9) Condition C is that the person has had a period of absence from the United Kingdom.

(10) Where condition C applies—

(a) paragraph (7) does not apply; and

(b) condition B has effect as if “compelling” were inserted before “evidence”.

42. Regulation 4 defines the different categories of qualified persons:

““Worker”, “self-employed person”, “self-sufficient person” and “student”

4.(1) In these Regulations—

(a) “worker” means a worker within the meaning of Article 45 of the Treaty on the Functioning of the European Union(1);

(b) “self-employed person” means a person who is established in the United Kingdom in order to pursue activity as a self-employed person in accordance with Article 49 of the Treaty on the Functioning of the European Union(2);

(c) “self-sufficient person” means a person who has—

(i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during the person's period of residence; and

(ii) comprehensive sickness insurance cover in the United Kingdom;

(d) "student" means a person who—

(i) is enrolled, for the principal purpose of following a course of study (including vocational training), at a public or private establishment which is—

(aa) financed from public funds; or

(bb) otherwise recognised by the Secretary of State as an establishment which has been accredited for the purpose of providing such courses or training within the law or administrative practice of the part of the United Kingdom in which the establishment is located;

(ii) has comprehensive sickness insurance cover in the United Kingdom; and

(iii) has assured the Secretary of State, by means of a declaration, or by such equivalent means as the person may choose, that the person has sufficient resources not to become a burden on the social assistance system of the United Kingdom during the person's intended period of residence.

(2) For the purposes of paragraphs (3) and (4) below, "relevant family member" means a family member of a self-sufficient person or student who is residing in the United Kingdom and whose right to reside is dependent upon being the family member of that student or self-sufficient person.

(3) In sub-paragraphs (1)(c) and (d)—

(a) the requirement for the self-sufficient person or student to have sufficient resources not to become a burden on the social assistance system of the United Kingdom during the intended period of residence is only satisfied if the resources available to the student or self-sufficient person and any of their relevant family members are sufficient to avoid the self-sufficient person or student and all their relevant family members from becoming such a burden; and

(b) the requirement for the student or self-sufficient person to have comprehensive sickness insurance cover in the United Kingdom is only satisfied if such cover extends to cover both the

student or self-sufficient person and all their relevant family members.

(4) In paragraph (1)(c) and (d) and paragraph (3), the resources of the student or self-sufficient person and, where applicable, any of their relevant family members, are to be regarded as sufficient if—

(a) they exceed the maximum level of resources which a British citizen (including the resources of the British citizen's family members) may possess if the British citizen is to become eligible for social assistance under the United Kingdom benefit system; or

(b) paragraph (a) does not apply but, taking into account the personal circumstances of the person concerned and, where applicable, all their relevant family members, it appears to the decision maker that the resources of the person or persons concerned should be regarded as sufficient.

(5) For the purposes of Regulation 16(2) (criteria for having a derivative right to reside), references in this Regulation to "family members" includes a "primary carer" as defined in Regulation 16(8)."

43. Regulation 5 provides for a worker or self-employed person who has ceased activity:

“Worker or self-employed person who has ceased activity”

5.(1) In these Regulations, "worker or self-employed person who has ceased activity" means an EEA national who satisfies a condition in paragraph (2), (3), (4) or (5).

(2) The condition in this paragraph is that the person—

(a) terminates activity as a worker or self-employed person and—

(i) had reached the age of entitlement to a state pension on terminating that activity; or

(ii) in the case of a worker, ceases working to take early retirement;

(b) pursued activity as a worker or self-employed person in the United Kingdom for at least 12 months prior to the termination; and

(c) resided in the United Kingdom continuously for more than three years prior to the termination.

(3) The condition in this paragraph is that the person terminates activity in the United Kingdom as a worker or self-employed person as a result of permanent incapacity to work; and—

(a) had resided in the United Kingdom continuously for more than two years prior to the termination; or

(b) the incapacity is the result of an accident at work or an occupational disease that entitles the person to a pension payable in full or in part by an institution in the United Kingdom.

(4) The condition in this paragraph is that the person—

(a) is active as a worker or self-employed person in an EEA State but retains a place of residence in the United Kingdom and returns, as a rule, to that place at least once a week; and

(b) prior to becoming so active in the EEA State, had been continuously resident and continuously active as a worker or self-employed person in the United Kingdom for at least three years.

(5) A person who satisfied the condition in paragraph (4)(a) but not the condition in paragraph (4)(b) must, for the purposes of paragraphs (2) and (3), be treated as being active and resident in the United Kingdom during any period during which that person is working or self-employed in the EEA State.

(6) The conditions in paragraphs (2) and (3) as to length of residence and activity as a worker or self-employed person do not apply in relation to a person whose spouse or civil partner is a British citizen.

(7) Subject to Regulation 6(2), periods of—

(a) inactivity for reasons not of the person's own making;

(b) inactivity due to illness or accident; and

(c) in the case of a worker, involuntary unemployment duly recorded by the relevant employment office, must be treated as periods of activity as a worker or self-employed person, as the case may be.”

44. Regulation 15 provides for permanent residence on the following conditions:

“Right of permanent residence

15.(1) The following persons acquire the right to reside in the United Kingdom permanently—

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b)...

(c) a worker or self-employed person who has ceased activity;

(d) ...

(2) Residence in the United Kingdom as a result of a derivative right to reside does not constitute residence for the purpose of this Regulation.

(3) The right of permanent residence under this Regulation is lost through absence from the United Kingdom for a period exceeding two years.

(4) A person who satisfies the criteria in this Regulation is not entitled to a right to permanent residence in the United Kingdom where the Secretary of State or an immigration officer has made a decision under Regulation 23(6)(b), 24(1), 25(1), 26(3) or 31(1), unless that decision is set aside or otherwise no longer has effect.”

45. Regulation 23 provides for exclusion and removal. The provisions in relation to removal state:

“Exclusion and removal from the United Kingdom

23.

.....

(6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if—

(a) that person does not have or ceases to have a right to reside under these Regulations;

(b) the Secretary of State has decided that the person’s removal is justified on grounds of public policy, public security or public health in accordance with Regulation 27; or

(c) the Secretary of State has decided that the person’s removal is justified on grounds of misuse of rights under Regulation 26(3).

(7) A person must not be removed under paragraph (6)—

(a) as the automatic consequence of having recourse to the social assistance system of the United Kingdom; or

(b) if that person has leave to remain in the United Kingdom under the 1971 Act unless that person's removal is justified on the grounds of public policy, public security or public health in accordance with Regulation 27.

(8) A decision under paragraph (6)(b) must state that upon execution of any deportation order arising from that decision, the person against whom the order was made is prohibited from entering the United Kingdom—

(a) until the order is revoked; or

(b) for the period specified in the order.

(9) A decision taken under paragraph (6)(b) or (c) has the effect of terminating any right to reside otherwise enjoyed by the individual concerned.”

46. Regulation 25 provides a right of cancellation of a right to reside as follows:

“Cancellation of a right of residence

25(1) Where the conditions in paragraph (2) are met the Secretary of State may cancel a person's right to reside.

(2) The conditions in this paragraph are met where—

(a) a person has a right to reside in the United Kingdom as a result of these Regulations;

(b) the Secretary of State has decided that the cancellation of that person's right to reside in the United Kingdom is justified on the grounds of public policy, public security or public health in accordance with Regulation 27 or on grounds of misuse of rights in accordance with Regulation 26(3);

(c) the circumstances are such that the Secretary of State cannot make a decision under Regulation 24(1); and

(d) it is not possible for the Secretary of State to remove the person from the United Kingdom under Regulation 23(6)(b) or (c).”

47. Regulation 22 concerns verification of EEA rights and states as follows:

“Verification of a right of residence

22.(1) This Regulation applies where the Secretary of State—

(a) has reasonable doubt as to whether a person (“A”) has a right to reside or a derivative right to reside; or

(b) wants to verify the eligibility of a person (“A”) to apply for an EEA family permit or documentation issued under Part 3.

(2) Where this Regulation applies, the Secretary of State may invite A to—

(a) provide evidence to support the existence of a right to reside or a derivative right to reside (as the case may be), or to support an application for an EEA family permit or documentation under this Part; or

(b) attend an interview with the Secretary of State.

(3) If A purports to have a right to reside on the basis of a relationship with another person (“B”), (including, where B is a British citizen, through having lived with B in another EEA State), the Secretary of State may invite B to—

(a) provide information about their relationship or residence in another EEA State; or

(b) attend an interview with the Secretary of State.

(4) If without good reason A or B (as the case may be)—

(a) fails to provide the information requested;

(b) on at least two occasions, fails to attend an interview if so invited;

the Secretary of State may draw any factual inferences about A’s entitlement to a right to reside as appear appropriate in the circumstances.

(5) The Secretary of State may decide following the drawing of an inference under paragraph (4) that A does not have or ceases to have a right to reside.

(6) But the Secretary of State must not decide that A does not have or ceases to have a right to reside on the sole basis that A failed to comply with this Regulation.

(7) This Regulation may not be invoked systematically.”

48. Regulation 26 defines misuse of rights or fraud and states as follows:

“Misuse of a right to reside

26.(1) The misuse of a right to reside occurs where a person—

(a) observes the requirements of these Regulations in circumstances which do not achieve the purpose of these Regulations (as determined by reference to Council Directive 2004/38/EC and the EU Treaties); and

(b) intends to obtain an advantage from these Regulations by engaging in conduct which artificially creates the conditions required to satisfy the criteria set out in these Regulations.

(2) Such misuse includes attempting to enter the United Kingdom within 12 months of being removed under Regulation 23(6)(a), where the person attempting to do so is unable to provide evidence that, upon re-entry to the United Kingdom, the conditions for a right to reside, other than the initial right of residence under Regulation 13, will be met.

(3) The Secretary of State may take an EEA decision on the grounds of misuse of rights where there are reasonable grounds to suspect the misuse of a right to reside and it is proportionate to do so.

(4) Where, as a result of paragraph (2), the removal of a person under Regulation 23(6)(a) may prevent that person from returning to the United Kingdom during the 12 month period following removal, during that 12 month period the person who was removed may apply to the Secretary of State to have the effect of paragraph (2) set aside on the grounds that there has been a material change in the circumstances which justified that person's removal under Regulation 23(6)(a).

(5) An application under paragraph (4) may only be made whilst the applicant is outside the United Kingdom.

(6) This Regulation may not be invoked systematically.”

49. Regulation 27 provides:

“Decisions taken on grounds of public policy, public security and public health

27(1) In this regulation, a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989 [Treaty Series No. 44 (1992) Cmd 1976].

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person (“P”) who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

...

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the

considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

...”

50. Regulation 32 provides the following in relation to removal:

“Person subject to removal

32.(1) If there are reasonable grounds for suspecting that a person is someone who may be removed from the United Kingdom under Regulation 23(6)(b), that person may be detained under the authority of the Secretary of State pending a decision whether or not to remove the person under that Regulation, and paragraphs 17 to 18A of Schedule 2 to the 1971 Act apply in relation to the detention of such a person as those paragraphs apply in relation to a person who may be detained under paragraph 16 of that Schedule.

(2) Where a decision is taken to remove a person under Regulation 23(6)(a) or (c), the person is to be treated as if the person were a person to whom section 10(1) of the 1999 Act(1) applies, and section 10 of that Act (removal of certain persons unlawfully in the United Kingdom) is to apply accordingly.

(3) Where a decision is taken to remove a person under Regulation 23(6)(b), the person is to be treated as if the person were a person to whom section 3(5)(a) of the 1971 Act(2) (liability to deportation) applies, and section 5 of that Act(3) (procedure for deportation) and Schedule 3 to that Act(4) (supplementary provision as to deportation) are to apply accordingly.

(4) A person who enters the United Kingdom in breach of a deportation or exclusion order, or in circumstances where that person was not entitled to be admitted under Regulation 23(1) or (3), is removable as an illegal entrant under Schedule 2 to the 1971 Act and the provisions of that Schedule apply accordingly.

(5) Where a deportation order is made against a person but the person is not removed under the order during the two year period beginning on the date on which the order is made, the Secretary of State may only take action to remove the person under the order at the end of that period if, having assessed whether there has been any material change in circumstances since the deportation order was made, the Secretary of State considers that the removal continues to be justified on the grounds of public policy, public security or public health.

(6) A person to whom this Regulation applies must be allowed one month to leave the United Kingdom, beginning on the date on which the decision to remove is communicated before being removed because of that decision except—

(a) in duly substantiated cases of urgency;

(b) where the person is detained pursuant to the sentence or order of any court;

(c) where the person is a person to whom paragraph (4) applies.

(7) Paragraph (6) does not apply where a decision has been taken under Regulation 23(6) on the basis that the relevant person—

(a) has ceased to have a derivative right to reside; or

(b) is a person who would have had a derivative right to reside but for the effect of a decision to remove under Regulation 23(6)(b).”

51. Regulation 36 confers a right of appeal.

Conclusions

The Defendant’s policy

52. Mr Lamont, a senior policy adviser on the rights of European citizens, employed by the Home Office, filed a witness statement on behalf of the Defendant describing the policy and the reasons behind it. He has only been in post since February 2017.

53. He explained that the background to the policy was the increase in rough sleeping. In October 2015, a report from the Department for Communities and Local Government indicated that rough sleeping had increased by 55% nationally and 91% in Greater London, in the period between 2010 and 2015. There had been a “surge in entry to the UK by EEA nationals from less economically prosperous areas intent on rough sleeping” (paragraph 11) which had caused social problems such as littering, anti-social and unhygienic behaviour, and the building of encampments. Rough sleepers could damage the reputation of central London areas as a tourist destination; they had an adverse impact on the amenities of residents and other visitors; and public authorities incurred costs in managing the problems which they caused.

54. EEA nationals who were not fulfilling the requirements of the EEA regulations¹ were already liable to administrative removal by immigration enforcement. The Home Office was particularly concerned to address those rough sleepers who were meeting the requirements of the EEA Regulations. For example, during the initial three month period of residence, which was subject to minimal requirements, and thereafter if they

¹ The 2016 Regulations replaced the Immigration (EEA) Regulations 2006 with effect from 1 February 2017

were working but rough sleeping to save money so as to support their families in other EU countries.

55. According to Mr Lamont, the Home Office concluded that EU freedom of movement rights “were not intended to be used to facilitate socially harmful rough sleeping” (paragraph 12). They created social and economic problems for Member States which were contrary to the purposes of the Directive. This was an abuse of the right to free movement and the right to reside.
56. In paragraph 14 he considered that EEA nationals who arrived in the UK intending to save money on accommodation by sleeping rough while working, or not intending to work whilst knowing they were unable to accommodate themselves, were misusing the right of entry and residence. But in cases where a rough sleeper “may have entered the UK intending to integrate and support themselves in the normal way but, inadvertently through no fault of their own fallen on hard times that could not have been anticipated or avoided ...it may not be appropriate to consider the individuals to be abusing or misusing free movement rights if the rough sleeping is of limited duration until return home or re-entry into ... accommodation is arranged”.
57. In his summary of the policy, Mr Lamont said:

“17.the operational policy in issue is that ‘residing on the streets’ in the particular type of deliberate, socially and economically harmful rough sleeping is a misuse of the relevant EEA right of residence. Not all rough sleeping falls into this category but it is an indicator that misuse of the right of residence may be occurring. The misuse occurs where the rough sleeping is the result of deliberate conduct such as entering the UK intending to rough sleep either to save money or as a result of making no appropriate arrangements to secure accommodation. Similarly, persistently continuing to rough sleep after entry without taking up the options to cease rough sleeping through moving into accommodation or returning to the home Member State is also regarded as a misuse of the right to reside.

18. There has been no change in that essential policy position during its implementation through the enforcement Operations (Operations ‘Adoze’ and ‘Gopick’ – discussed below)..”

58. The guidance contained in ‘European Economic Area (EEA) administrative removal’, version 3.0, provided as follows:

“EEA administrative removal: powers and criteria

This page tells you about the powers and criteria for conducting a administrative removal of an EEA national....

EEA Regulation 23(6)(a): no right to reside

Regulation 23(6)(a) may be used where there is evidence that the person never had, or has ceased to have, a right to reside under the EEA Regulations”

“EEA Regulation 23(6)(c): misuse of a right to reside

Regulation 23(6)(c) may be used where there are reasonable grounds to suspect a misuse of the right to reside under the EEA Regulations.

Removals under regulation 23(6)(c) must meet **at least one** of the following criteria, they:

- have engaged in conduct which appears to be intended to circumvent the requirement to be a qualified person
- are sleeping rough
- have attempted to enter the UK within 12 months of being removed under regulation 23(6)(a), and are unable to provide evidence that upon re-entry, the conditions for any right to reside, other than the initial right of residence, are met

All 23(6)(c) removals **must** also be seen as proportionate taking into account all the circumstances of the case:...

This regulation may apply even if the EEA national has been in the UK for less than 3 months or is otherwise exercising Treaty rights.”

59. It is important to note that this section provided that “sleeping rough”, without any qualification, was a criterion upon which to find a misuse of a right to reside.
60. The guidance then considered each of the three criteria set out in the bullet points. Under the second bullet point (“sleeping rough”) it stated:

“23(6)(c): rough sleeping

Rough sleeping may be a misuse of a right to reside, therefore EEA nationals or their family members encountered sleeping rough may be subject to administrative removal under regulation 23(6)(c) where it is appropriate to do so.

A decision to administratively remove an EEA national can be made under regulation 23(6)(c) **only where it is considered proportionate.**

See also stage 1: determining suitability: maintaining proportionality on decisions, and proportionality examples: rough sleeping for more information.

Rough sleeping definition

The definition of rough sleeping is provided by both the Department for Communities and Local Government and the Combined Homelessness and Information Network (CHAIN). This sets out individuals are identified as rough sleepers where they are; sleeping, about to bed down (sitting on or in or standing next to their bedding) or actually bedded down, on the street or in other open spaces or locations not designed for habitation, such as doorways, stairwells, parks or derelict buildings.

This does **not** include people in hostels or shelters, people in campsites or other sites used for recreational purposes or organised protest, squatters or travellers.

‘Bedded down’ is taken to mean either lying down or sleeping. ‘About to bed down’ includes those who are sitting in or on or near a sleeping bag or other bedding.

Removals

You may consider the administrative removal of EEA nationals or their family members who are sleeping rough, even if they:

- have been in the UK for less than 3 months
- are otherwise exercising Treaty Rights

Individuals removed under regulation 23(6)(c) for rough sleeping will be subject to re-entry restrictions for 12 months following their removal or voluntary departure, and will attract the standard notification periods for appeal.

Standard EEA administrative removal procedures should be followed, see: Stage 1: determining suitability for administrative removal.

Individuals who provide evidence that they have ceased rough-sleeping will no longer be liable for removal as a rough sleeper under regulation 23(6)(c).

If you encounter a rough sleeper who you consider to be a threat to one of the fundamental interests of society as set out in schedule 1 to the EEA Regulations, you must consider whether it is appropriate to remove them on the grounds of public policy under regulation 27.

Examples of behaviour that could be considered to be against the fundamental interests of society includes, but is not limited to:

- a history of low-level persistent criminal offending
- anti-social behaviour such as criminal damage
- drug offences and offences committed to fund a drug or alcohol habit, or committed while under the influence of drugs or alcohol

- acquisitive crime including theft and shoplifting

For more information see: EEA guidance: decisions taken on public policy or public security grounds.

Vulnerability, suspected trafficking and children

In general, encounters with vulnerable rough sleepers should be planned and in co-operation with the local authority's outreach services.

If you encounter a vulnerable foreign national rough sleeper in the field, for example, someone who is dependent on alcohol or drugs, you must refer them to the relevant local authority before making a proportionate decision regarding removal.

In some cases the local authority will have commissioned outreach services tasked to deal with these cases and this will be the most appropriate means of ensuring the right support is provided.

It is important to note that withdrawal from long term alcohol misuse carries a level of risk which may, in some cases, require additional support whilst the individual goes through a period of rehabilitation or withdrawal. As such, if you are considering the EEA national for detention (following service of administrative removals papers), you must refer to the guidance in adults at risk in immigration detention to determine the risk level and appropriate action to take.

See also: Enforcement GI - Medical issues guidance.”

61. I note that in the first paragraph of this section, it stated that rough sleeping may be a misuse of a right to reside, implying that it also might not be. This was a change from version 2 of this guidance document, in force until February 2017 which stated “Rough sleeping is considered to be an abuse of free movement rights.....” (emphasis added). Since Mr Lamont said that the policy had not changed in content, despite revisions, it may be wrong to read too much into this difference between the two policies. The only distinctions drawn among rough sleepers as a group were (1) those who might fall to be removed on public policy grounds via the alternative route under regulation 27; or (2) those who were “vulnerable, suspected trafficking and children”. There was no reference to the distinction between deliberate, harmful rough sleepers and those who had temporarily fallen on hard times.
62. In the next section, headed “Stage 1: determining suitability”, the guidance advises that, before taking a decision to remove an EEA national, the officer must “take all reasonable steps at that time to ascertain whether the individual fits the EEA administrative removal criteria as detailed under EEA Regulation 23(6)(a): no right to reside [and] EEA Regulation 23(6)(c): misuse of a right to reside”.
63. However, this section only provided guidance on meeting the criteria for a “no right to reside” case. There was no guidance on distinguishing between different types of rough

sleepers – the deliberate, harmful rough sleepers and those who had temporarily fallen on hard times.

64. The guidance then went on to address the requirement of proportionality stating:

“Acting proportionately: EEA administrative removal decisions

Consideration must be given to ensure **actions are proportionate** when deciding to administratively remove an EEA national or the family member of an EEA national.

During the decision making process you must consider a number of factors to ensure that removal action remains proportionate in each case. You must balance any impact arising from the individual’s misuse of rights, against the impact on the individual.

To do this, each case must be assessed on its individual merits considering the:

- type of decision being taken
- level of the misuse of a right to reside
- personal circumstances of the individual including any vulnerabilities
- the implications of limiting the individual’s free movement

You must record your proportionality considerations within the decision letter, and **on CID**.

...

Type of decision being taken

The decision you take will depend upon the status of the relevant person and the proportionality of the decision. An EEA decision is defined within regulation 2 of the EEA Regulations and includes:

- decisions taken to refuse an application for, or revoke, a document issued under EEA law
- decisions to refuse admission to the UK
- making a removal decision in line with regulation 23(6)

Rough sleepers

When considering whether to take enforcement action against a rough sleeper the decision must be proportionate, and action should only be taken where it is apparent that the rough sleeper is misusing their right to reside.

Factors to consider may include:

- the length of time or the number of occasions the individual has been sleeping rough
- the reasons why the individual is sleeping rough and whether they are taking any steps to find accommodation
- whether there is evidence of anti-social or criminal behaviour

For example an EEA national who continues to sleep rough whilst working to avoid accommodation costs or who is persistently sleeping rough may be deliberately misusing their right to reside. An EEA national who is forced to sleep rough due to a sudden change in circumstances but who is taking steps to find accommodation and exercise Treaty rights would probably not be considered to be abusing free movement rights.

See also proportionality examples: rough sleeping.

Level of a misuse of a right to reside

Grounds that may be a factor in making a decision to remove under regulation 23(6)(c) could include a number of circumstances, including personal circumstances.

Personal circumstances

You must take into account personal circumstances when you consider whether a decision under regulation 23(6)(c) is proportionate. This includes regard to the relevant person's:

- age
- state of health
- family ties to the UK
- length of residence in the UK
- social and cultural integration
- economic situation
- need for any support or assistance available if the individual is considered to be vulnerable

Proportionality examples: failing to exercise Treaty rights

An example of a **disproportionate** decision to serve administrative removal papers could be where an EEA national has been living lawfully in the UK as a student for 3 years and has a child at school here, but fails to hold their required comprehensive sickness insurance.

Although there is evidence that the EEA national is not fulfilling all the requirements for the exercising Treaty rights as a student; given the length of residence here and the family situation, it would be disproportionate to serve administrative removal papers to the EEA national in these circumstances.

However, any further or more significant non-exercise of Treaty rights or misuse of rights may affect the proportionality of any decision to remove.

Proportionality examples: rough sleeping

Contrast the 2 examples below:

Example 1

An EEA national has been resident in the UK for 6 months. They are doing cash in hand jobs and are continuing to sleep rough to avoid paying accommodation costs. They have been encountered by the police on a number of occasions for anti-social behaviour. They are fit and healthy and although they are working have no other ties to the UK.

Example 2

An EEA national has been resident in the UK for 6 months. They are working full time but their circumstances became such that they did not have access to accommodation and so were sleeping on the street. This is the first time they have been encountered sleeping rough and there are no aggravating factors in relation to anti-social behaviour or criminality. They have evidence to show that they are looking for accommodation and you consider that it is likely in the circumstances that the rough-sleeper will move to accommodation without delay.

Although in both examples the EEA national is sleeping rough, it would not be proportionate to remove in the second example because, while there has been a misuse of rights, it appears unlikely it will continue.”

65. It was common ground before me that the application of the proportionality principle only arises once a misuse of rights has been established. The first four paragraphs of this section correctly stated the principle of proportionality. However, in the next part, under the heading “Rough sleepers”, the guidance confused the proportionality principle with the criteria for finding a misuse of rights, when making a distinction between the deliberate harmful rough sleeper and the rough sleeper who had temporarily fallen on hard times, who “probably would not be considered to be abusing free movement rights”. There followed a cross reference to “proportionality examples”. The examples again distinguished between the deliberate harmful rough sleeper and the rough sleeper who had temporarily fallen on hard times, but on this occasion explaining that, whilst both had abused their rights, it was not proportionate to remove in the latter case.
66. Because the guidance did not fully reflect Mr Lamont’s description of the policy, and the section on proportionality was contradictory and ambiguous, I considered how the Defendant and her officers had expressed the policy elsewhere. Although these statements mainly pre-dated the version 3 guidance, Mr Lamont expressly stated that the policy had not changed since first introduced in Operation Adoze.

67. The Interim Instructions for the initial pilot scheme, called Operation Adoze, which were distributed to staff on 2 November 2015, stated:

“Criteria and suitability for EEA administrative removal

For the purposes of this pilot, rough sleeping will be considered to be an abuse of free movement rights; therefore EEA nationals or their family members encountered sleeping rough may be subject to administrative removal.”

68. “Operation Adoze, phase 2: Tactical Plan”, which provided the basis for enforcement beyond Westminster into neighbouring local authorities from 13 December 2015, contained the same statement.

69. On 18 November 2015, Shalen Galichian, Chief Immigration Officer sent an email to St Mungo’s, the homelessness charity which worked with immigration officers, stating:

“[...] asked me to drop you a line to explain the new powers Immigration Officers will soon have in dealing with EU nationals sleeping rough. Although the new policy has not been rolled out nationally, it is envisaged that it soon will, and will consequently affect all EU nationals that your organisation encounters.

Essentially what has changed applies only to rough sleepers. Under the new rules, rough sleeping will, in itself, be classified as “abuse of treaty rights”, regardless of when the individual arrived in the UK and irrespective of their employment status. Therefore the 3-month grace period that all EU nationals enjoy after arriving in the UK before they need to start looking for work, will no longer apply to those sleeping rough. Our officers will, as result, be able to serve enforcement papers on most individuals they encounter sleeping rough, as opposed to those who fulfil certain criteria.

The rationale behind this is that free movement rights were never intended to be used facilitate rough sleeping, which remains a burden on public finances, outreach services, law enforcement and local services (street cleaning etc), whether or not there is recourse to state benefits.

The nitty gritty of the new rules are still being worked out but as a partner with whom we work extremely closely in this area, I will ensure that you are informed once the new powers are rolled out fully.”

70. Operation Gopik was the extension across the UK of Operation Adoze. After the initial pilot scheme. Operation Gopik Best Practice Guide issued in February 2017 at the same time as version 3.0 of the guidance stated:

“In most cases rough sleepers will continue to be administratively removed where appropriate under regulation 23(6)(c)...on the basis they are misusing their right to reside under regulation 26...”

71. The Home Office Policy equality statement dated 19 April 2016 stated:

“Our new policy will class rough sleeping by individuals who rely on a right to reside under EU law as an abuse of free movement rights”

72. In the training slides for operational staff, dated 22 September 2016, referred to by Mr Lamont at paragraph 27 of his witness statement, and relied upon by Mr Eadie QC, the relevant criterion for establishing abuse of free movement under regulation 19(3)(c) was stated to be “identified as rough sleeping” without any qualification. The Basic Process steps showed that assessment of vulnerability etc. came after the “Criteria for admin removal met and considered proportionate”; it was not part of the assessment whether the criteria had been met.

73. On my reading of the documentary evidence, the Claimants were correct in submitting that the policy, or at least the instructions on how the policy was to be implemented, treated rough sleeping in itself as establishing abuse of rights. The distinction described by Mr Lamont between different types of rough sleepers - the deliberate, harmful rough sleeper and the rough sleeper who had temporarily fallen on hard times – was not expressed in the extensive instructions and guidance, other than in version 3.0, in an example included in the section on proportionality, rather than criteria for abuse of rights. Regrettably, that passage confused the application of the proportionality principle, and was contradicted by another example given in the same section, which considered the circumstances of the rough sleeping as part of the proportionality exercise, following a finding of abuse of rights. Unsurprisingly, busy immigration officers implementing the policy on the ground treated rough sleeping as an abuse of rights in itself, as can be seen from the documents in the cases of Mr Gureckis (see paragraphs 8 & 9 above) and Mr Perlinski (see paragraphs 13 & 14 above).

74. I did not accept Mr Eadie QC’s submission that the Claimants were not entitled to dispute the meaning of the Defendant’s policy because it was not part of their pleaded grounds. The issue only emerged after the grant of permission, when Mr Lamont served his statement and exhibits. The Claimants were not required to amend their grounds to address it as the Court had to consider the meaning of the policy as part of the existing grounds.

Ground 1: Abuse of rights

The law

75. Regulation 26 of the 2016 Regulations sets out the test for misuse of rights as follows:

“Misuse of a right to reside

26.(1) The misuse of a right to reside occurs where a person—

(a) observes the requirements of these Regulations in circumstances which do not achieve the purpose of these Regulations (as determined by reference to Council Directive 2004/38/EC and the EU Treaties); and

(b) intends to obtain an advantage from these Regulations by engaging in conduct which artificially creates the conditions required to satisfy the criteria set out in these Regulations.”

76. The test in Regulation 26 is derived from principles of EU law, and in my view it should be interpreted and applied in accordance with EU law.

77. The leading case on abuse of rights under EU law is Case C-110/99 *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* [2000] ECR I-1569. In *Emsland-Stärke* the CJEU, having reviewed the earlier case law, propounded the following test for establishing an abuse of rights:

“52. A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved.

53. It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it. The existence of that subjective element can be established, inter alia, by evidence of collusion between the Community exporter receiving the refunds and the importer of the goods in the non-member country.”

78. The facts were that *Emsland-Stärke* was exporting potato starch to Switzerland, claiming an export refund, before immediately trucking the “exported” goods straight back to Germany. The company thus literally created the conditions required for the enjoyment of the right – the act of export – but had no intention at all of selling the goods on a foreign market. The Court found, applying the two-limb test, that this was an abuse of rights (at [59]).

79. The test in *Emsland-Stärke* has been repeatedly applied in the subsequent cases, including by the Grand Chamber in Case C-255/02 *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise* [2006] ECR I-1609 at [69] and [81]. It is now considered to represent a general principle of EU law.

80. In Case C-321/05 *Hans Markus Kofoed v Skatteministeriet* [2007] ECR I-5795, at [38], the Court formulated the principle in this way:

“... Individuals must not improperly or fraudulently take advantage of provisions of Community law. The application of Community legislation cannot be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of

wrongfully obtaining advantages provided for by Community law ...” (Emphasis added)

81. The advantage must be obtained “wrongfully”. It is to be expected that people will adjust their affairs to take advantage of rights and privileges made available to them under the law, and this is perfectly legitimate. In Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, where Danish nationals incorporating a company in the UK with the express purpose of taking advantage of less restrictive rules governing share capital were held not to have abused their rights, the Court explained, at [24] and [27]:

“24. It is true that a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law...”

“27. [...] the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.”

82. What separates legitimate advantage-seeking from an abuse of rights is, first the gaining of the right or benefit in circumstances that are contrary to – or, at the very least, outside – the objective of the measure in question; and, secondly, the deliberate employment of artificial devices to gain the right or benefit. These elements distinguish lawfully obtaining an advantage from wrongfully obtaining it.

83. The abuse of rights principle only applies where a person meets the conditions laid down for the enjoyment of the right in question. In Case C-413/01 *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] ECR I-3817, the ECJ had to consider whether a person’s application for study finance was an abuse because she had only worked for a short period in the host State before making the application. The ECJ held, at [31]:

“31. Finally, as regards the argument that the national court is under an obligation to examine whether the appellant has sought abusively to create a situation enabling her to claim the status of a worker within the meaning of Article 48 of the Treaty with the aim of acquiring advantages linked to that status, it is sufficient to state that any abusive use of the rights granted by the Community legal order under the provisions relating to freedom of movement for workers presupposes that the person concerned falls within the scope *ratione personae* of that Treaty because he satisfies the conditions for classification as a

‘worker’ within the meaning of that article. It follows that the issue of abuse of rights can have no bearing on the answer to the first question.”

84. The ECJ has held that abuse of rights will arise only where the conduct is engaged in solely for the purpose of satisfying the criteria necessary to access the benefit. In Case 39/86 *Lair v Universität Hannover* [1988] ECR 3161, the Court said at [43]:

“43. In so far as the arguments submitted by the three Member States in question are motivated by a desire to prevent certain abuses, for example where it may be established on the basis of objective evidence that a worker has entered a Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance system in that State, it should be observed that such abuses are not covered by the Community provisions in question.”

85. Recital (28) of the Directive also refers to sole purpose:

“To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures.”

86. The paradigm of an abuse of rights in the context of the Directive is a “marriage of convenience”, as identified in Article 35. Whilst married partners might formally comply with the relevant conditions in the Directive to benefit from rights of movement and residence, the compliance has been created in an artificial way by a sham marriage in order to obtain the rights conferred by the Directive. However, even in the context of a marriage of convenience, the Supreme Court emphasised in *Sadovska v Secretary of State for the Home Department* [2017] UKSC 54 that the predominant purpose of the marriage of convenience must be artificially to gain EU law rights and that this must be the purpose of both partners to the marriage.

Application of regulation 26 to rough sleeping

(i) The first limb of the test

87. The first limb of the test was whether the requirements of the Regulations had been observed in circumstances which did not achieve the purpose of the Regulations, as determined by reference to the Directive and the EU Treaties.
88. Mr Eadie QC submitted that intentional harmful rough sleeping was an abuse of rights because it did not achieve the purposes of the free movement provisions, namely (1) promotion of the internal market and the achievement of a higher level of social and economic advantages for all Member States; (2) social cohesion and integration; (3) the sensitivity of the Directive to the imposition of burdens on the host State. Those burdens were described by Mr Lamont in his witness statement – see paragraph 50 above. Mr Eadie QC also submitted that there were economic problems caused by the

presence of EEA nationals, who typically worked for longer hours for lower pay than UK residents, and sometimes not paying tax.

89. Freedom of movement for workers was one of the founding principles of the EU, now found in Article 45 TFEU. Its primary purpose was to promote the economic objective of a common market, together with the freedom of movement of goods, services and capital. This was reflected in the earlier cases relied upon by Mr Eadie QC, such as Case 53/81 *DC Levin v Secretary of State for Justice* [1982] 2 CMLR 454, at [17]. However, since the Treaty of Maastricht, which introduced the notion of EU citizenship, the concept of freedom of movement has broadened into a right to freedom of movement and residence for EU citizens, and their families, without a requirement to be economically active, provided that they do not seek social assistance from the host Member State. Articles 20 and 21 of TFEU grant EU citizens “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 Directives. These principles are reflected in Recitals (1), (2), (3), (5) and (11) to the Directive. See also Case C-413/99 *Baubast v Secretary of State for the Home Department* [2002] 3 CMLR 23 at [81] – [84].
90. In my view, Mr Eadie QC identified the purposes of the EU freedom of movement provisions too narrowly in his emphasis upon the economic and social benefits to Member states achieved by the internal market, as set out in Article 3(3) TEU, citing a sentence by Lord Clarke in *R(Nouazli) v Secretary of State for the Home Department* [2016] UKSC 16, [2016] 1 WLR 1565 at [21]. Whilst freedom of movement is indeed an essential element of the internal market (see Article 26(2) TFEU), it also has a wider purpose under the Treaties. Article 3(2) TEU sets out the objective of, “offering an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured....”. The right of an individual EU citizens to reside in another Member State is not solely for the economic and social benefit of the Member State; it is an individual right of citizenship which may be exercised even where there is no discernible economic or social benefit to the Member State from the presence of the particular individual.
91. Mr Eadie QC submitted that EEA rough sleepers did not fulfil the purpose of integration into the host state. As a matter of fact, I do not consider that rough sleeping precludes integration in other ways, for example, through work and social ties. On the issue of principle, the recital to the Directive identifies permanent residence in the host state as “a key element in promoting social cohesion, which is one of the fundamental objectives of the Union” (Recital (18)) and “a genuine vehicle for integration into the society of the host Member State” (Recital (19)). This was confirmed by the ECJ in Case C-378/12 *Onuekwere v Secretary of State for the Home Department* [2014] 1 WLR 2420, at [24]-[26], in the context of prisoners. However, there will be many EU citizens exercising their rights of free movement who do not have any intention of remaining in the host State beyond the initial period of 3 months or beyond a period of work or study which may only last a year or two. As the ECJ said in Case C-456/12 *O v Minister voor Immigratie & Ors* [2014] QB 1163, at [52]: “it should be observed that a Union citizen who exercises his rights under Article 6(1) of Directive 2004/38 does not intend to settle in the host Member State in a way which would be such as create or strengthen family life in that Member State”. I have not been able to discern any basis in the Treaties or the Directive for the submission that integration into the host State is

a required purpose of residence in the initial stage or during extended residence as a qualified person.

92. It is well-established, as confirmed by the ECJ in Case C-109/01 *Secretary of State for the Home Department v Akrich* [2004] QB 756 at [55], that:

“...the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his right to enter and reside in the territory of the latter State provided that he there pursues or wishes to pursue an effective and genuine activity (Case 53/81 *Levin* [1982] ECR 1035, paragraph 23).”

93. As to the burden on public authorities caused by rough sleeping, the Directive contains express and circumscribed provisions as to the circumstances in which burdens on the State may be taken into account for the purposes of establishing a right to reside.

94. In the initial period of three months, Recital (11) and Article 14 of the Directive provide that Union citizens should not become “an unreasonable burden on the social assistance system of the host Member State”. This provision is implemented in regulation 13(3) of the 2016 Regulations. For extended residence extending beyond three months, Article 7 of the Directive requires that Union citizens are either working, or have “sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State”. These provisions are implemented in regulation 4 of the 2016 Regulations. Regulation 23(7)(a) provides that expulsion shall not be the automatic consequence of recourse to social assistance. Article 24.2 of the Directive provides, by way of derogation from the principle of equal treatment, that the host Member State shall not be obliged to confer entitlement to social assistance. There are no such restrictions upon those with the right of permanent residence.

95. The meaning and scope of the exclusion from “social assistance” has been extensively considered in the case law. See *Pensionsversicherungsanstalt v Brey* Case C 140/12 [2014] 1 WLR 1080; *Dano & Anor v Jobcenter Leipzig* Case C-333/13 [2015] 1 WLR 2519; *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1. In *Mirga*, Lord Neuberger concluded, at [71]

“Whatever sympathy one may naturally feel for Ms Mirga and Mr Samin, their respective applications for income support and housing assistance represent precisely what was said by the Grant Chamber in *Dano*, para 75 (supported by its later reasoning in *Alimanovic*) to be the aim of the 2004 Directive, namely, to stop “economically inactive Union citizens using the host member state’s welfare system to fund their means of subsistence.”

96. Inevitably, circumstances arise where EU citizens residing in another Member State create social problems and are a burden on the host State, typically by the commission of criminal offences. However, there are stringent provisions in the Directive restricting removal of EEA nationals for such conduct. Article 27 of the Directive limits

the grounds to public policy, public security or public health and provides that these grounds “must not be invoked to serve economic ends” (27.1). Article 27.2 requires that the “personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society” (27.2). These provisions have been implemented into Regulation 27. It is clear that rough sleeping, even accompanied by low level offending such as begging, drinking in a public place and other street nuisances, would not be grounds for removal under these provisions. The Defendant’s policy appeared to circumvent the protections afforded to EU Citizens by Article 27, and to do so (in part) to serve economic ends.

97. In my view, it was not possible to identify in the Treaties or the Directive, or the case law referred to above, any wider purpose of restricting freedom of movement where it imposed social or economic burdens on the host Member State.
98. In my judgment, the first limb of the test for establishing abuse of rights was not met here because there was no proper basis for concluding that, by sleeping rough, a person who otherwise satisfied the conditions for residence, had undermined the purpose/s of the Directive. Accommodation, or the lack thereof, in the host Member State had no connection to freedom of movement rights and requirements, and was not a factor taken into account in the Treaties or Directive. It made no difference whether the Defendant’s policy was to treat rough sleeping *ipso facto* as an abuse of rights, or only to treat intentional, harmful rough sleeping as an abuse.

(ii) The second limb of the test

99. The second limb of the test was whether the EEA national intended to obtain an advantage from the Regulations by engaging in conduct which artificially created the conditions required to satisfy the criteria set out in the Regulations.
100. The only qualification for the initial three month right of residence is that the EU citizen holds a valid national identity card or passport issued by an EEA State. I do not consider that rough sleeping could ever amount to an act artificially undertaken in order to fulfil that condition as there is no connection between rough sleeping and the holding of EEA identity documents.
101. During the extended period, an EU citizen must qualify under one of a number of categories. In the test cases, the qualification claimed was that the Claimants were workers or were seeking work, and the policy envisages that many rough sleepers are residing in the UK to obtain work. The term “worker” in regulation 4 of the 2016 Regulations is defined by reference to Article 45 TFEU. It has been broadly defined in the case-law. In Case 53/81 D.M. Levin v Secretary of State for Justice, the CJEU held that it included “the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary” (at [17]). This test has been widely applied.
102. The relevant question was whether, by rough sleeping, they were engaging in an activity which artificially created the conditions required to satisfy the requirements in the Regulations. In my judgment, the answer was “no”. Rough sleeping was incapable of amounting to an artificial means of satisfying the requirement to be a worker or job

seeker because it was not an economic activity and it could not generate the conditions required to establish economic activity.

103. Moreover, where it was accepted that an EEA national was a “worker”, by definition he was engaging in “genuine” activities, and it would be inconsistent and illogical to find that he had at the same time artificially satisfied the condition of being a worker by rough sleeping.
104. As the Claimants correctly pointed out, Mr Eadie QC misstated the second limb of the test in paragraph 20(b) of his skeleton argument and in oral submissions by submitting that it was met where there was no intention to fulfill the purpose of the free movement right by integrating, economically and socially, into the host State. This confused the first and second limbs of the test.
105. It followed that the second limb of the test was not met because the rough sleepers could not be said to be engaging in an activity which artificially created the conditions required to satisfy the requirements in the Regulations. It made no difference whether the Defendant’s policy was to treat rough sleeping *ipso facto* as an abuse of rights, or only to treat intentional, harmful rough sleeping as an abuse.
106. For these reasons, the Claimants succeed on ground 1. The policy was unlawful because to treat rough sleeping as an abuse of the right to freedom of movement and residence was contrary to EU law.

Ground 2: Discrimination

107. The evidence before me demonstrated that rough sleeping was by no means a problem confined to EEA nationals. A report by Jean Demars called ‘Rough sleeping as ‘abuse/misuse’ of the right to freedom of movement’, produced for the Strategic Legal Fund in May 2017, included a table indicating the numbers of EEA rough sleepers in Greater London as a percentage of the total number seen between 2007 and 2016:

Year	Total Number of rough sleepers seen in Greater London	Percentage of Central & East European rough sleepers	Percentage of other European rough sleepers	Percentage of EEA rough sleepers
2007-08	3017	11	6	17
2008-09	3472	15	8	23
2009-10	3673	20	7	27
2010-11	3975	22	8	30
2011-12	5678	28	11	39

2012-13	6437	28	12	40
2013-14	6508	31	9	40
2014-15	7581	36	9	45
2015-16	8096	37	9	46

108. This data demonstrated that there has been a significant increase in rough sleepers of all nationalities, particularly marked from 2011/2012 onwards. Presumably this was a result of factors affecting British residents, in addition to the steady noticeable increase in the number of EU citizens from Central and Eastern Europe who were found rough sleeping.
109. Mr Mahon, who was employed by the Home Office as lead officer for rough sleeping operations carried out by ICE teams, explained that government and public concern about the increasing number of foreign national rough sleepers led to ICE teams engaging with local authorities, third sector outreach workers and local police to develop a coordinated response. He referred to the powers available to local authorities and the police. The Anti-Social Behaviour Crime and Policing Act 2014 (“the 2014 Act”) introduced a range of measures to assist the police and local authorities to tackle rough sleeping and associated street nuisance. They included dispersal directions and public spaces protection orders to control specific areas, which have been widely used. In addition, the 2014 Act introduced new extended powers to obtain orders against individuals behaving in an anti-social manner. There was evidence of operations by teams of police, immigration officers and third sector outreach workers targeting EEA rough sleepers.
110. The Defendant’s policy, and its implementation, was directed at the sub-group of EEA rough sleepers, not British resident rough sleepers. The Claimants submitted that therefore it discriminated on grounds of nationality. It is an established principle of public law that policies which are partial and unequal may be unlawful unless they can be justified: see *R (Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence* [2003] QB 1397, per Dyson LJ at [84]-[86]. Article 14 of the ECHR provides that the enjoyment of the rights and freedoms in the Convention, which include Article 5 rights not to be unlawfully arrested or detained, shall be secured without discrimination on grounds such as (*inter alia*) national or social origin, property or other status. Lord Nicholls observed in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, at [9], that discrimination undermined the rule of law because it was “the antithesis of fairness”. Like cases should be treated alike unless there was some good reason to justify different treatment.
111. The Claimants also submitted that the policy discriminated against rough sleepers on grounds of property, and their social and economic status, because they were homeless. However, I accepted the Defendant’s submission that rough sleeping could not necessarily be equated with homelessness. Some rough sleepers had access to accommodation but chose not to take it up. Nor did it fall within any other protected status.

112. I did not accept the Defendant's submission that no proper comparison could be made between British residents and EEA nationals sleeping rough because only EEA nationals were subject to immigration control. However, it was open to the Defendant to justify the less favourable treatment accorded to those who were not British residents, by reference to immigration control. The Defendant had to establish that the less favourable treatment was justified i.e. that it was a proportionate response to a legitimate aim. The aim of the policy was to prevent or reduce rough sleeping by EEA nationals, which had adverse social and economic consequences, and which was an abuse of free movement rights. Mr Eadie QC submitted that it was "an immigration policy so fulfilment of immigration duties is self-evidently the principal aim" (skeleton argument, at [63]).
113. In the light of my conclusion on ground 1, namely, that rough sleeping was not capable of amounting to an abuse of rights, and so the policy was unlawful, I concluded that the Defendant could not justify its less favourable treatment of EEA rough sleepers on the grounds that they were suspected of abusing their rights to freedom of movement and residence, in breach of the 2016 Regulations. The justification upon which the Defendant relied was unlawful.
114. For these reasons, the Claimants succeed on ground 2.

Ground 3: systematic verification

115. The Claimants submitted that the implementation of the Defendant's policy was unlawful because it entailed verification in a systematic manner contrary to EU law.
116. Article 14(2) of the Directive provides that in specific cases where there is a reasonable doubt as to whether an EU citizen satisfies the conditions for residence conferred by Article 7 (i.e. whether they are exercising Treaty rights) a Member State may verify if these conditions are fulfilled. However, verification shall not be carried out on a systematic basis. This provision is implemented by regulation 22 of the 2016 Regulations.
117. Regulation 26(6) also provides that decisions to remove EEA nationals on the ground of misuse of rights shall not be taken systematically.
118. The underlying reasons for the requirement of individualised assessment were explained in a different context in *R (McCarthy) v Home Secretary* [2015] QB 651, where the ECJ held that the UK's blanket restriction on entry to the UK solely with a residence card from another EU country (introduced to combat abuse of rights or fraud pursuant to Article 35 of the Directive) was unlawful. The Court said:

“52 It follows from the foregoing considerations that measures adopted by the national authorities, on the basis of article 35 of Directive 2004/38, in order to refuse, terminate or withdraw a right conferred by that Directive must be based on an individual examination of the particular case.

53 Thus, the member states cannot refuse family members of a Union citizen who are not nationals of a member state and who

hold a valid residence card, issued under article 10 of Directive 2004/38, the right, as provided for in article 5(2) of the Directive, to enter their territory without a visa where the competent national authorities have not carried out an individual examination of the particular case. The member states are therefore required to recognise such a residence card for the purposes of entry into their territory without a visa, unless doubt is cast on the authenticity of that card and the correctness of the data appearing on it by concrete evidence that relates to the individual case in question and justifies the conclusion that there is an abuse of rights or fraud: see, by analogy, *Dafeki v Landesversicherungsanstalt Württemberg* (Case C-336/94) [1997] ECR I-6761; [1998] All ER (EC) 452, paras 19 and 21.

54 In this connection, the court has stated that proof of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it: *Hungary v Slovakia* (Case C-364/10) [2013] All ER (EC) 666, para 58 and the case law cited, and *O v Minister voor Immigratie* [2014] QB 1163, para 58.

55 In the absence of an express provision in Directive 2004/38, the fact that a member state is faced, as the United Kingdom considers itself to be, with a high number of cases of abuse of rights or fraud committed by third-country nationals resorting to sham marriages or using falsified residence cards cannot justify the adoption of a measure, such as that at issue in the main proceedings, founded on considerations of general prevention, to the exclusion of any specific assessment of the conduct of the person concerned himself.

56 Indeed, the adoption of measures pursuing an objective of general prevention in respect of widespread cases of abuse of rights or fraud would mean, as in the case in point, that the mere fact of belonging to a particular group of persons would allow the member states to refuse to recognise a right expressly conferred by Directive 2004/38 on family members of a Union citizen who are not nationals of a member state, although they in fact fulfil the conditions laid down by that Directive. The same would be true if recognition of that right were limited to persons who are in possession of residence cards issued by certain member states, as the United Kingdom has envisaged.

57 Such measures, being automatic in nature, would allow member states to leave the provisions of Directive 2004/38 unapplied and would disregard the very substance of the primary and individual right of Union citizens to move and reside freely

within the territory of the member states and of the derived rights enjoyed by those citizens' family members who are not nationals of a member state.”

119. The meaning of systematic verification has been considered in two cases. In *Commission v UK* [2016] 1 WLR 5049, the ECJ held that the requirement that applicants for social security benefits dependent on residence provided on the claim form data about their right to reside did not constitute systematic verification contrary to Article 14(2) of the Directive. The Court held at [83] – [84]:

“83 It is apparent from the observations made by the United Kingdom at the hearing before the court that, for each of the social benefits at issue, the claimant must provide, on the claim form, a set of data which reveal whether or not there is a right to reside in the United Kingdom, those data being checked subsequently by the authorities responsible for granting the benefit concerned. It is only in specific cases that claimants are required to prove that they in fact enjoy a right to reside lawfully in United Kingdom territory, as declared by them in the claim form.

84 It is thus evident from the information available to the court that, contrary to the commission's submissions, the checking of compliance with the conditions laid down by Directive 2004/38 for existence of a right of residence is not carried out systematically and consequently is not contrary to the requirements of article 14(2) of the Directive. It is only in the event of doubt that the United Kingdom authorities effect the verification necessary to determine whether the claimant satisfies the conditions laid down by Directive 2004/38, in particular those set out in article 7, and, therefore, whether he has a right to reside lawfully in United Kingdom territory, for the purposes of the Directive.”

120. In *Centre for Advice on Individual Rights in Europe v Secretary of State for the Home Department* [2017] 4 WLR 129, the High Court rejected a challenge, based on Article 14(2) of the Directive, to a practice of asking routine questions of all foreign nationals arrested for an offence about their personal circumstances relevant to their immigration status, in addition to questioning about the alleged offence. The Judge rejected the submission that the verification was systematic, holding that the information given by an EEA arrested person in answer to the initial routine questioning was only checked or verified in cases where the responses to the routine questioning gave rise to a reasonable doubt.
121. The Defendant relied on the reasoning in *Commission v UK* and the *AIRE Centre* case in support of the submission that the initial questioning of EEA nationals found sleeping rough by police or immigration officers was not “verification”. It was only in those cases where the answers to the initial questions gave rise to a reasonable doubt that the rough sleepers were abusing their rights of residence that further questioning took place. This further questioning was “verification” but it was not systematic.

122. In my judgment, the Defendant's analysis was not supported by the evidence. Unlike the cases of *Commission v UK* and the *AIRE Centre* case, the evidence showed that the initial questioning only occurred because, under the terms of the policy, EEA nationals who were rough sleeping were presumed to be abusing their EEA rights of residence by sleeping rough. That was the reason why EEA nationals who were sleeping rough were targeted on the streets by police and immigration officers. Operations Adoze and Gopick were large scale comprehensive operations undertaken for these purposes. In my judgment, the Claimants were correct in their contention that this was a blanket policy of verification, which was systematic and therefore unlawful. Therefore the Claimants succeed on ground 3.
123. Of course, there may well be circumstances in which enforcement officers may lawfully question individual EEA nationals who are sleeping rough, if they have a reasonable doubt as to whether they are exercising Treaty rights, in particular during the extended period of residence where there may be a reasonable doubt as to whether they are economically active or economically self-sufficient if they are destitute. The unlawfulness only arises where the verification is not based upon a reasonable doubt, and is systematic. Additionally, as stated above, the 2014 Act introduced a range of measures to assist the police and local authorities to tackle rough sleeping and associated street nuisance.

Final conclusions

124. For the reasons set out above, the claims for judicial review are granted.
125. The parties asked me to give guidance on the lawfulness of the Defendant's proposed revised policy, which provided a more nuanced response to the issues. I declined to do so for the following reasons. None of the test cases before me concerned the proposed revised policy. The revised policy was at planning stage; only a summary was available, not the full text. It had not yet received ministerial approval. The summary was published shortly before this hearing, on 30 October 2017. It was only referred to briefly by Mr Lamont and by counsel. The AIRE Centre has not made representations upon it. It remained part of the proposed revised policy that rough sleeping may be an abuse of rights. In view of the conclusions in this judgment, I suggest that the better course is for the Defendant to take stock and re-consider the terms of the proposed revised policy, in the light of advice from her legal advisers.

Remedies

126. Following circulation of my draft judgment, I received written representations on remedies from the parties.
127. All parties consented to a quashing order in the following terms:

“The Defendant's guidance, “European Economic Area (EEA) administrative removal”, version 3.0, published 1 February 2017, is quashed insofar as it treats rough sleeping, whether intentional, harmful or otherwise, as an abuse of Treaty rights.”

128. I granted Mr Gureckis an order quashing the removal notices which were served upon him. The Defendant opposed a similar order in the case of Mr Cielecki. Judicial review is a discretionary remedy, and in the exercise of my discretion, I refused to grant Mr Cielecki an order quashing the removal notices served upon him. Although he was initially questioned because he was sleeping rough, the decision to issue removal notices was made on the basis that he was not exercising Treaty rights. The lawfulness of the decision to remove him on that basis was upheld by the FTT, and his applications for permission to appeal were refused. Thus, the issue of the removal notices has not caused him any injustice, and it would be futile to quash them since the Defendant could, and would, immediately re-issue them.
129. The Claimants applied for wide-ranging declarations, reflecting the grounds upon which they were successful in the claim for judicial review. The Defendant consented to the applications. However, I refused to grant the declarations sought, as I considered that they were unnecessary and inappropriate. The quashing orders provided the individual Claimants with appropriate relief for the unlawful acts committed against them. The quashing of the current guidance also provided relief for others affected by the Defendant's policy. My judgment set out in some detail the complex legal basis upon which I upheld the Claimants' grounds of challenge. I considered it was potentially misleading to elevate brief summaries of my conclusions into free-standing declarations of law.
130. The Defendant agreed to pay the reasonable costs of each Claimant and I ordered detailed assessment of the Claimants' publicly funded costs.