Claim No: CO/2992/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
BETWEEN:

THE QUEEN on the application of
THE AIRE CENTRE

Claimant

and

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(2) COMMISSIONER OF POLICE FOR THE METROPOLIS

Defendants

CLAIMANT'S SKELETON ARGUMENT FOR HEARING 3/4 MAY 2017

References below to "D1§x" and "D2§x" are to paragraphs in the Summary Grounds of Resistance of the Secretary of State ("*D1*") [1-49] and of the Commissioner of Police ("*D2*") [1-59]. References to "SG§x" are to paragraphs in the Claimant's Statement of Ground [1-7]. References in square brackets are to the claim bundle.

INTRODUCTION

1. The Claimant is a charity and specialist law centre which seeks to promote awareness of EU and ECHR rights, and to assist marginalised individuals and those in vulnerable situations in asserting those rights. It seeks to challenge the legality of "*Operation Nexus*" ("*ON*"), a large scale police/Home Office policy designed to gather information about the immigration status of foreign nationals, including EEA nationals, living in the UK. ON involves, inter alia, the police asking EEA nationals who they encounter questions designed to determine whether they are exercising EU Treaty rights (for example how they are supported financially, if they are working, how much they earn, whether they are in a relationship, who pays for their accommodation). That information is passed to officers of D1 who check whether the individual has a right to reside in the UK. The purpose of gathering the information is not to conduct any criminal investigation. It is to identify individuals (even if they have committed no criminal offence) who could be subject to administrative removal from the UK.

2. It was the Claimant's case when it issued proceedings that ON operated unlawfully on four grounds. They were:

Ground 1 ON involves officers of D1 and D2 systematically checking whether EEA citizens are exercising EU Treaty rights even if there is no reasonable doubt to the contrary in a specific case. That is a breach of Art 14(2) of the Citizens' Directive (2004/38/EC).

Ground 2 The Defendants had not indicated, in a clear and transparent way, the scope or nature of ON.

Ground 3 ON involved the police questioning individuals and gathering information about their immigration status where the purpose of doing so is not to discharge a police function or fulfil a police duty (i.e. keeping the peace, preventing crime, bringing offenders to justice). It is unlawful for the police, in the purported exercise of police powers, to question people for non-policing purposes.

Ground 4 The Defendants had not conducted proper impact assessments of ON to enable them to discharge the public sector equality duty contained in Equality Act 2010 s 149 (no impact assessment at all had been conducted by D1 at the time proceedings were issued, and a clearly inadequate assessment had been conducted by D2).

3. Permission was granted on all four grounds by Dove J on 9 November 2016 **[1-99]**. D1 subsequently conducted an equality impact assessment which was disclosed on 21 December 2016. On 9 February 2017 a second equality impact assessment was disclosed by D2. In addition, following the issuing of proceedings, further information has been provided by the Defendants as to the way ON operates. In the light of those developments the Claimant does not pursue Grounds 2 and Grounds 4 of the claim and they are not dealt with further below. The fact that the relevant developments occurred only after proceedings were issued, and it would appear in response to them, however, is relevant to any costs applications made in due course.

FACTUAL BACKGROUND

4. ON was launched by D1 and D2 in November 2012. It began as a joint operation between the Home Office's Immigration Enforcement Directorate and the Metropolitan Police Service, though now applies to other police forces.

5. ON has various separate strands. The strand with which the present challenge is concerned seeks "*to ensure that those who are encountered by the police and subject to immigration control, or otherwise susceptible to an immigration intervention, are considered for an immigration intervention at the earliest opportunity*" (letter from D1 of 14 December 2015: **[2-213]**). In particular the present challenge is concerned with the application of ON to EEA nationals. In this regard, as is explained in the witness statement submitted on behalf of D1 by Ms Louden §15, "*[ON] seeks to ensure that [D1's] existing immigration policy is supported and enforced by identifying individuals who have no right to be in the UK, including EEA nationals who are no longer exercising Treaty rights and who are liable for administrative removal*" **[2-314]**. References below to "*ON*" are to this strand of Operation Nexus (and not, for example, to the strand that seeks to identify "*high-harm offenders*" who can be removed from the UK on grounds of "*public policy*".)

6. In seeking to identify EEA nationals who are liable for administrative removal, all those arrested and in police custody are questioned about their immigration status and have that status checked by immigration officers. That involves police officers asking a series of questions of those arrested. These are provided by D1 to D2 and are designed to gather information on whether an EEA national is exercising EU Treaty rights. The questions include, for example, when the individual entered the UK, whether they are working or self-employed, how much they earn, how they are supported financially, who pays their rent, whether they are in a relationship, if they have children, whether they are fit and well and on medication **[4-53].** The information the individual provides is entered into a form which they, and the police officer, sign, and the individual is asked to "*certify that the … details [provided] are to the best of my knowledge correct*" **[4-54]**.

7. The reason such questions are asked is clear if one examines Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 ("*the Citizens' Directive*") which accords EEA citizens' rights to reside in other Member States. The reason it is relevant when an EEA citizens arrived in the UK is that they can reside in the UK for

up to three months without any conditions provided they do not become an unreasonable burden on the social assistance system of the host Member State (Citizens' Directive Arts 6 and 14(1)). EEA citizens are asked about whether they are working and about their resources because they can stay in the UK for more than three months if they work or are self-employed (Arts 7(1)(a) and 14(2)), or if they can show they have sufficient funds not to be a financial burden on the State (Art 7(1)(b) and 14(2)). They are asked about their family relationships because if a family member has a right of residence in the UK, so will the individual questioned (Art 7(2) and 14(2)). If an EEA national is in the UK, but is not exercising Treaty rights, they are not committing any criminal offence. They can, however, be subject to "*administrative removal*" pursuant to regulation 19 of the Immigration (EEA) Regulations 2006.

8. As is clear from Ms Louden's statement, the purpose of asking the questions referred to above is not to assist the police in any criminal investigation. The purpose is to "*assist officers in establishing whether or not an EEA national is or has been exercising Treaty rights*" **[2-318/§32]**. Given that the questioning, including of those in custody, is undertaken by police officers, no doubt many of those questioned will assume the questions are being asked as part of a criminal investigation. The individuals questioned are not, however, told that the questions are not being asked in order to investigate any criminal offence or that they have no obligation to answer to them. Nor are they given any warning that the information they provide may be used against them to facilitate their removal from the UK.

9. The information the individual provides is then passed to the Home Office to check whether the individual is exercising EU Treaty rights. As was explained to Joanna McCartney, a member of the London Assembly, checks pursuant to ON will be made by the Home Office of whether EEA nationals are exercising Treaty Rights in relation to "*all individuals … taken into custody*" who have their "*immigration status checked … automatically*" **[2-142]** (emphasis here and below added). As D2 explains in its Defence, "*under [ON], a person in custody identified as a foreign national will be referred to HOIE [Home Office Immigration Enforcement] for an assessment of their immigration status*" **[1-71/§6]**. In the first instance that is done by police custody officers contacting Home Office Central Command Unit "*for a check [of the detainee's immigration status] to be carried out*" (ibid)**.**

10. As set out above, the purpose of ON is to ensure the immigration status of those "*encountered*" by the police is checked **[2-213],** which would appear to go considerably broader than those arrested and in custody. At the time the Claimant issued proceedings, anecdotal evidence was provided of the police asking EEA citizens to demonstrate that they were exercising Treaty rights not only when they were in custody or having been arrested, but when EEA citizens were encountered by the police on the streets, for example drinking in public or sleeping rough (see **[1-16/§19]**, **[1-40/§83]**, **[2-19/§49-50]**).

11. With D1's Summary Grounds of Defence she disclosed a guidance document entitled "*EEA nationals: referring for immigration enforcement action*" **[4-47]** which was created "*to assist immigration and police officers working under the auspices of Operation Nexus*" **[1-63/§35].** The guidance confirmed that it was, indeed, intended that as part of ON police officers would check the immigration status of EEA nationals who were encountered in a variety of situations, including when they were not arrested or suspected of any criminal offence.

12. The EEA nationals guidance gives six examples of when and how the police should determine whether or not to refer EEA nationals they encounter to the Home Office. An example is given of a "*case that would not merit referral*" by the police. It is as follows **[4-50]:**

> *Mr Y is encountered after reports of a fight in a bar. Y is a Spanish national who has no prior convictions and when questioned about his status in the UK confirms he is working at a local building site. The officer has no reasons to suspect this is not true.*

In the example, Mr Y is presumably a witness or victim of crime or perhaps is simply encountered by the police investigating an offence. The police are nevertheless told to question Mr Y to determine if he is exercising Treaty rights and to consider whether he merits referral to the Home Office.

13. Another example, in which a case "*should be referred by the police for administrative removal consideration*", is as follows **[4-50]**:

> *Mr W is found begging following complaints from local businesses. PNS and PND checks reveal that he is a Romanian national who was last encountered sleeping rough just over 3 months ago. The officer asks the subject to confirm how long he has been living in the UK and what he does here. W states that he has only been in the UK for 2 months as he was in Brussels for a few days but has no evidence. He maintains himself through begging and handouts from a local charity. The evidence suggests that he is not exercising Treaty rights.*

In this example, again, there is no suggestion that Mr W is suspected of any offence or is arrested. He too is nevertheless questioned about his immigration status and asked to provide documentation to prove he is exercising Treaty rights. When he fails to do so, the police conclude he is not exercising Treaty rights and refer him to the Home Office to consider his administrative removal.

14. In Ms Louden's witness statement of 20 December 2016, she states that the "*EEA nationals: referring for immigration enforcement action*" guidance is to be withdrawn (§40) on the basis that the Claimant criticised it as "*unclear*" (§39) **[2-320]**. At no stage has the Claimant suggested the document is unclear. Indeed, it accurately reflects the Claimant's understanding of how ON operates in practice. Whether or not the relevant guidance has now been withdrawn, it appears that D2's officers continue to ask questions and request documents of EEA nationals encountered on the streets or other non-custody situations with a view to determining if they are exercising Treaty rights (see the Third Witness Statement of Mr Evans **[2-295]**).

MATERIAL EU AND DOMESTIC PROVISIONS

The Citizens' Directive

15. The Citizens' Directive is one of the key legislative provisions of the European Union. Its purpose is to protect and facilitate free movement within Union Member States of Union citizens. Its purpose is set out in the Directive's first two recitals which provide:

> *(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.*
>
> *(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.*

16. Chapter III of the Directive, which comprises Articles 6-15, sets out EU Citizens' "*right of residence*" in other Member States.

17. Article 6 sets out a "*right of residence for up to three months*." It provides:

> *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.*
>
> *2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.*

18. Article 7 sets out a "*right of residence for more than three months*." It provides:

> *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).*
>
> *2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(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. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

19. Article 12 makes provision for the "*retention of rights of residence by family members in the event of death or departure of Union citizen*." Article 13 makes provision for the "*retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership.*"

20. Article 14 makes provision on the enjoyment of the "*right of residence*". It 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.

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.

21. Member States can restrict the right of entry and the right of residence of Union citizens, pursuant to Chapter VI, "*on grounds of public policy, public security or public health*" which can apply to those convicted of serious criminal offences (Article 27). This applies irrespective of whether individuals would otherwise have Treaty rights to reside in a Member State of which they are not a citizen pursuant to Art 14.

22. Article 24 requires "*equal treatment*" between nationals of a Member State and other Union citizens residing in the Member State on the basis of the Citizens' Directive. Art 24(1) provides:

> *Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence*

23. Articles 8-11 make provision for the issuing of "*registration certificates*" and "*residence cards*" to EEA citizens if they reside in a host Member State for more than three months. Before such certificates or cards are issued the EEA citizen can be required to prove they have a right to reside and Art 8 lists the information that can be required for that purpose. Article 26 makes provision for "*checks*" of cards and certificates of rights of residence. It provides:

> *Member States may carry out checks on compliance with any requirement deriving from their national legislation for non-nationals always to carry their registration certificate or residence card, provided that the same requirement applies to their own nationals as regards their identity card. In the event of failure to comply with this requirement, Member States may impose the same sanctions as those imposed on their own nationals for failure to carry their identity card.*

Immigration (European Economic Area) Regulations 2006/1003

24. Immigration (European Economic Area) Regulations 2006/1003 ("the 2006 Regulations") Reg 19 deals with exclusion and removal of EEA citizens from the UK.

25. Reg 19(3) and (4) provides:

> *(3) Subject to paragraphs (4) and (5), 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 21; or*
>
> *(c) the Secretary of State has decided that the person's removal is justified on grounds of abuse of rights in accordance with regulation 21B(2).*
>
> *(4) A person must not be removed under paragraph (3) as the automatic consequence of having recourse to the social assistance system of the United Kingdom.*

Regulation 19(3)(a) thus allows for what is described as "*administrative removal*" of those who do not have the right to reside in the UK.

26. Regulation 20B makes provision for "*verification of a right of residence*". It provides:

> *(1) This regulation applies when the Secretary of State –*
>
> *(a) has reasonable doubt as to whether a person ("A") has a right to reside under regulation 14(1) or (2); ...*
>
> *(2) The Secretary of State may invite A to –*
>
> *(a) provide evidence to support the existence of a right to reside... or*
>
> *(b) attend an interview with the Secretary of State.*

27. Guidance on administrative removal pursuant to reg 19(3)(a) is set out in the Home Office Enforcement Instructions and Guidance (see Chapter 50, entitled "*EEA Administrative Removal*").

GROUNDS OF CHALLENGE

Ground 1: Breach of Citizens' Directive Art 14(2)

28. Art 14(2) provides:

> *Union Citizens and their family members shall have the right of residence [in other Member States if they are exercising Treaty Rights]. In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members [are exercising Treaty Rights], Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.*

Ground 1 of the claim is that ON involves the police and Home Office Immigration Enforcement ("*HOIE*") officers "*systematically … verify[ing]*" whether EEA Citizens residing in the UK are exercising EU Treaty Rights, and doing so even if there is no "*reasonable doubt*" to the contrary. That is a breach of Art 14(2).

29. The Defendants do not dispute that pursuant to ON:

(i) all those arrested are asked their nationality, and if they are EEA citizens, the police or HOIE officers will verify if they are exercising Treaty Rights (i.e. whether they are working or studying or have family members doing so etc): SG §42(i) & (ii) **[1-25]**.

(ii) the verification occurs in every case irrespective of whether there is a "*reasonable doubt*" that the individual questioned or relevant family members are exercising Treaty Rights: SG §42(iii)(b)) **[1-25]**. It will occur even if it transpires that the person questioned has not committed any criminal offence: SG §42(iii)(a).

(iii) The purpose of the verification is to decide whether to take further steps leading to the administrative removal of the individual or their family members: SG §42(iv) **[1-25]**.

30. The Claimant submits that breaches Art 14(2), and that is apparent if one considers both the ordinary language used in and the purpose of Art 14(2).

Language used in Art 14(2)

31. As to the correct interpretation of the language used in Art 14(2):

(i) The second sentence of Art 14(2) provides that "*In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members [are exercising Treaty rights], Member States may verify if these conditions are fulfilled*." Where there is no "*reasonable doubt*", Member States may not so "*verify*" (otherwise the second sentence would serve no purpose). The word "*verify*" has an ordinary meaning. It means to "*find out*" or "*make sure*" or check whether or not something is "*true or correct*".[1] There is no reason to depart from that ordinary meaning. Thus Art 14(2) prohibits Member States from seeking to find out or check if an EEA citizen is exercising Treaty rights unless they have a reasonable doubt to the contrary.

(ii) The third sentence of Art 14(2) prohibits verification being carried out "*systematically*". The ordinary meaning of the word "*systematically*" is to act "*according*" to a "*plan or system*".[2] Again there is no reason to depart from that ordinary meaning. Verification is conducted "*systematically*" if it occurs not at random or subject to some unspecified discretion accorded to individual officers, but in accordance with a "*system or plan*" to verify immigration status of some particular group of individuals.

32. There is some ambiguity as to the relationship between the second and third sentences of Art 14(2) (though as set out below it does not affect the outcome of the present case). Art 14(2) can be read in two ways:

(i) The second and third sentences can be read as imposing two separate and cumulative limitations on Member States. On this reading the first limitation is that States can only verify whether Union Citizens are exercising Treaty rights where there is a "*reasonable doubt*" to the contrary. That much is clear. What is less clear is if there is a second limitation imposed by the third sentence of Art 14(2) such that, even when there is a "*reasonable doubt*", so that verification would be permitted by the second sentence, verification nonetheless cannot be "*carried out systematically*" because of the third sentence.

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[1] See http://www.merriam-webster.com/dictionary/verify and Concise OED (2004)

[2] See http://www.merriam-webster.com/dictionary/systematic and Concise OED (2004)

(ii) A second interpretation of Art 14(2) is to read the second and third sentences together as imposing one limitation. Again it is clear that the second sentence prevents Member States verifying whether Union Citizens are exercising Treaty rights absent a "*reasonable doubt*" to the contrary. Unlike pursuant to the first interpretation, however, the third sentence of Art 14(2) could be read not as imposing a separate limitation, but as repeating the limitation in the second sentence. On this interpretation, "*systematic*" verification means the same thing as verification where there is no "*reasonable doubt*" about a "*specific*" individual. Prohibiting "*systematic*" verification is then simply another way of stating that verification must be limited to instances in which there is a specific and particular "*reasonable doubt*".

33. For present purposes it does not matter which interpretation is correct. The Defendants do not dispute that in <u>every case</u> an arrested EEA Citizen's immigration status will be checked. As set out above, all those in custody "*identified as a foreign national <u>will be referred</u> for an assessment of their immigration status. In the first instance, the custody officers <u>will contact</u> the Home Office … for a check to be carried out*" (D2 §6) **[1-71]**. It is also not disputed that immigration status is checked irrespective of "*reasonable doubt*" and that pursuant to ON "*<u>all</u> individuals … taken into custody have their immigration status checked*" **[2-142]** and that occurs "*<u>automatically</u>*" (ibid). As above, to "*verify*" means to find out or check whether or not something is "*true or correct*". On any ordinary reading of the words in Art 14(2), ON involves the police or HOIE Officers checking whether or not an individual is exercising Treaty rights. That occurs irrespective of "*reasonable doubt*" in a "*specific case*". That is a clear breach of Art 14(2).

34. In addition, if the first interpretation of Art 14(2) set out above at §32(i) is correct, and there is a further limitation on Member States imposed by the third sentence of Art 14(2), verification pursuant to ON is being conducted "*systematically*" and is also unlawful on that additional basis. As above, to do something "*systematically*" is to act "*according*" to a "*plan or system*". The purpose of ON is to have in place a plan or system to ensure "*all individuals … taken into custody have their immigration status checked*" and one of ON's benefits is said to be that it has "*clearly reduced the risk of missing a foreign national who might not [in the past] have had their immigration status checked*" **[2-181/§4.6]**. That is systematic verification.

Purpose of Art 14(2)

35. As well as being inconsistent with the wording of Art 14(2), ON operates inconsistently with its underlying purpose.

36. The purpose of Art 14(2) was set out in SG §39 **[1-23]** and has not been disputed by the Defendants. It is to support one of the key requirements of the Citizens' Directive which is to ensure that Union citizens and citizens of host member states are treated equally. That requirement is set out expressly in Art 24 of the Directive: "*all Union citizens residing … in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty.*" The purpose of Art 14(2) is, consistently with Art 24, to protect non-national EEA citizens from less favourable treatment. If non-national EEA citizens can, without any suspicion directed at them, be asked potentially intrusive questions and be required to explain to State officials where they work, their family situation, their living arrangements, their finances etc, and be subject to that information being checked by the State with a view to seeking their administrative removal from the host State - when none of that would apply to nationals of the Member States – that is a clear form of unequal treatment.

37. The purpose in Art 14(2) of requiring a "*reasonable doubt*", and of prohibiting "*systematic*" verification, is to protect non-national EEA citizens and ensure that immigration status checks cannot be carried out indiscriminately or as a form of unjustified intrusion, which would obviously disadvantage non-Member State nationals when compared to nationals. It is the purpose of Arts 14(2) and 24 of the Directive to prevent such treatment unless it can be justified by a prior reasonable doubt about the specific EEA citizen targeted. ON breaches that requirement.

38. It is even clearer that ON breaches the Citizens' Directive if one reads Arts 14(2) and 24 together with the provisions dealing with the checking of registration documentation of non-Member State EEA citizens set out in Arts 8-11 and 26. Pursuant to Art 8, a host Member State can require EEA citizens who are residing in the State for more than three months to obtain a "*registration certificate*" on proof that the EEA citizen has a right of residence. There are prescribed limits on what information may be sought from the EEA citizen which are set out in Art 8. The EEA citizen can, for example, be

asked to provide a "*confirmation of engagement from [an] employer*" (Art 8(3)) or proof of a relevant family relationship (Art 8(5)) but not other non-listed information. Arts 10 and 11 makes provision for family members of EEA citizens to be provided with a "*residence card*."

39. Pursuant to Art 26, Member States can require non-nationals to always carry their "*registration certificate*" or "*residence card*", and can carry out "*checks on compliance with [that] requirement*", but, critically, that is only "*provided the same requirement applies to their own nationals as regards their identity cards*". The police of a Member State could thus not check whether a non-national EEA citizen was complying with a requirement to carry a valid "*registration certificate*" or "*residence card*" unless the same requirement was imposed on nationals. The UK does not require its own nationals to carry identity cards and thus cannot impose a requirement on non-national EEA citizens to carry a right of residence "*certificate*" or "*card*". The effect of ON, however, is that the police and immigration officers carry out a check of whether an EEA citizen has a right of residence, in exactly the same way as if they were required to provide a registration certificate or residence card, but bypassing the non-discrimination protections of Art 26.

40. Pursuant to ON, checks are carried out on non-UK EEA citizens to determine if they have a right to reside in the same way as if they were asked to show a right of residence "*certificate*" or "*card*" (though with significantly more intrusive questions being asked than would be permitted under Art 8 of the Directive, such as how much an individual earns or whether they take medication). Pursuant to ON, however, those checks are carried out only on non-UK EEA citizens which would be prohibited by Art 26. If the UK is not permitted by Art 26 to carry out checks of whether non-UK EEA citizens have a certification document or card proving they have a right to reside, it cannot be lawful for UK police and immigration officers to ask intrusive questions of non-UK EEA citizens designed to gather exactly the same information.

Defendants' response

41. D1 submits that Art 14(2) does not prohibit "*asking any questions which might be material to … whether [a] person has a right of residence in the UK*" (D1 §24(2)) **[1-59]**, and in support of her argument D1 relies on Case C-308/14 *Commission v UK* (14 June 2016).

She contends that *Commission v UK* "*clearly establishes*" that her interpretation of Art 14(2) is correct (D1 §2(1) **[1-50]** and §25-28 **[1-59]**). That is not a good submission. ON does not simply involve asking questions which might be material to determining if individuals satisfy the conditions for residence in the Citizens Directive. It involves verifying immigration status irrespective of the answers given and in every case, and irrespective of a reasonable doubt, in order to identify those who are liable for administrative removal. That is a breach of Art 14(2). It is also quite different to the situation considered in *Commission v UK*.

42. In *Commission v UK* the European Commission sought a declaration that a requirement in the UK that applicants for child benefit or child tax credit must have a right to reside in the UK was a breach of Art 4 of Regulation EC No 883/2004. Art 4 provides that the same right to benefits must be accorded to EEA nationals as to nationals of a Member State save where differences in treatment are permitted by the Regulation. The European Court of Justice held that the UK was not in breach of Art 4. It held the UK was entitled to limit the payment of child benefit to those who had a right to reside in the UK as that requirement applied equally to UK nationals and non-UK nationals (§62-73). Unsurprisingly in those circumstances, the Court also held that the UK was entitled to ask those who were applying for child benefit to provide relevant information as to whether they had a right to reside (given that that was a lawful precondition to the receipt of benefits) (§83). The Court found no breach of Art 14(2) because the UK only went on to make checks of whether EEA nationals were exercising Treaty rights where there was a reasonable doubt to the contrary (§84).

43. The Court's conclusion on Art 14(2) was set out 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. [T]he 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.*

44. *Commission v UK* is obviously distinguishable from the present case. In *Commission v UK* everyone who applied for child benefits or child tax credits, whether a UK or other EEA national, had to establish they were entitled to the benefits, which included having a right of residence in the UK. The information, if provided by an EEA citizen, was only checked where there was a doubt about it. There was no suggestion that the UK had imposed the requirement for providing information about "*right of residence*" on benefit applicants as a way to identify those who could be removed from the UK in order to take administrative measures against them. ON is quite different. Pursuant to ON "*all*" those suspected of being foreign nationals taken into custody "*have their immigration status checked*" and this is done "*automatically*" and irrespective of reasonable doubt, and the purpose of doing so is "*identifying*" those who are "*liable for administrative removal*". That is prohibited by Art 14(2).

45. D1 also suggests that there is no breach of Art 14(2) because in "*establishing information … [on the] right to reside*" of all those arrested, ON operates as "*a form of self-selection or it is appropriately described as random*" (D2 §29) **[1-61]**. That is not a good argument.

46. Those who are arrested have not "*self-selected*" to interact with the police or Home Office staff. They have been forced to do so. Further, if targets for ON are chosen at "*random*" that would not assist the Defendants. Selecting EEA nationals at "*random*" and checking if they are exercising Treaty rights plainly involves "*verification*" where there is no "*reasonable doubt*" to the contrary, and therefore breaches Art 14(2). In any event those subject to ON are not selected at "*random*". They have been selected as they are regarded as being members of a group who the Home Office particularly wishes to remove, for example because they are sleeping rough or were drunk in public or have been arrested by the police.

47. In addition, if D1's argument were correct, the restrictions on verification in Art 14(2) would never apply. In all cases in which verification is "*systematically carried out*", a group will have been "*selected*" to be checked, and whether or not a person falls within the group could always be described as "*self-selection*" or "*random*." For example, if the

police stopped everyone travelling through Euston station at a particular time and who appeared to be a foreign national, and checked if those who were EEA citizens were exercising Treaty rights, those stopped would be a "*self-selected*" group (in the sense that they were foreign nationals who chose to pass through Euston station on the day in question), or they would, on the Home Office's analysis, be said to have been selected at "*random*" (because nothing was previously known about them). Checking whether EEA citizens passing through Euston station are exercising Treaty rights is, however, plainly a "*systematic*" verification of those about whom there is no prior "*reasonable doubt*", and is exactly the kind of conduct that Art 14(2) seeks to prohibit.

48. As far as Art 14(2) is concerned there is no material distinction between the Euston station example and a case, such as the present, where the group targeted are all those arrested and in police custody. D1 may consider those who have been arrested are likely to be individuals that she particularly wishes to find ways to remove from the UK as a matter of public policy. That, however, is not relevant for the purposes of Art 14(2). Art 14(2) prohibits systematic verification in the absence of a reasonable doubt, and that is irrespective of any public policy purpose or justification the State may consider it has for wishing to question individuals who fall within a particular group.

49. It is not surprising that questioning individuals about whether they are exercising Treaty rights, when there is no reasonable doubt to the contrary, cannot be justified simply because the group targeted is one a Member State may particularly wish to remove. The Citizens' Directive contains specific provisions dealing with "*public policy*" removals. Pursuant to Art 27(1), if the UK wishes to curtail the right of residence of EEA citizens, it may do so whether or not the individual or their family members are exercising Treaty rights under Art 14 provided there are "*grounds of public policy, public security or public health*" justifying the removal. If the UK has some "*public policy*" basis for removing an EEA citizen it should not do so by gathering information under Art 14(2) as to whether an individual is exercising Treaty rights. It can simply rely on Art 27. ON involves targeting a group who D1 may indeed wish to remove for "*public policy*" reasons, but without going through the procedures or according the protections of Art 27. Instead D1 is seeking to gather information to identify those individuals who can be subject to "*administrative removal*" because they

are not exercising Treaty rights, but where doing so involves checking the immigration status of individuals without a prior reasonable doubt. That is a breach of Art 14(2).

Reference

50. The Claimant's primary submission is that an ordinary reading of the language of Art 14(2) of the Citizens' Directive is clear. Verifying if anyone arrested who is an EEA citizen has a right to reside in the UK, irrespective of whether there is a "*reasonable doubt*" to the contrary, is a breach of the Directive. If that is not correct, however, Art 14(2) is certainly not *acte claire*. That is so, in particular, where there is no authority of which the Claimant is aware in which the European Courts have determined the meaning of "*verify*", "*systematically*" or "*reasonable doubt*" in this context. If the Claimant's primary submission is not accepted, the court is therefore invited to make a reference to the European Court of Justice.

Ground 3: D2's officers have no power to question individuals for non-policing purposes

51. The following legal and factual matters, save as set out below, are not understood to be disputed:

(i) ON involves the police questioning foreign nationals to elicit information to determine whether they have a right to reside in the UK. The type of questions asked are described above at §6. The purpose of asking such questions is not to determine if the person has committed a criminal offence. The purpose is to "*assist officers in establishing whether or not an EEA national is or has been exercising Treaty rights*" **[2-318/§32]** in order to "*identify… individuals … liable for administrative removal*" **[2-314/§15**].

(ii) The individuals questioned are not told that the questions have nothing to do with a criminal investigation, that they have no obligation to answer them or that the information they provide may be used against them to facilitate their removal from the UK.

(iii) The questions will be asked by the police, or Immigration officers, of those arrested and in police custody. At the time proceedings were issued, it was apparent from D1's guidance that police officers were also encouraged, as part of

ON, to question EEA nationals not arrested or suspected of criminal offences but encountered by the police in other circumstances with a view to establishing whether they were exercising Treaty rights, and if not, to refer them to D1 for consideration of administrative removal. It may be that the guidance has now been withdrawn, but it would appear that officers are continuing to question EEA citizens for the purpose of determining immigration status outside of custody **[2-295]**. It is not clear if it is accepted by D2 that that occurs, and, if so, whether D2 considers it to be lawful.

(iv) The police have no general statutory powers to ask questions and gather information on immigration status.[3] If police questioning pursuant to ON is lawful, the police must have a power to conduct the questioning at common law.

(v) The obligations and duties of the police at common law, and what constitutes the purposes of police powers to question members of the public, was considered by Griffiths LJ in the Divisional Court in *Steel v Goacher* [1983] R.T.R. 98, 102. Griffiths LJ held: "*The powers of the police at common law have never been precisely defined*", and he referred to the definition of police powers given by Lord Parker CJ in *Rice v Connolly* [1966] 2 QB 414, 419B–C:

> *[I]t is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice.*

(vi) ON involves the police asking questions whose purpose is to determine individuals' immigration status so that they can be considered for administrative removal. It is not for a police purpose of a kind set out in *Rice*.[4]

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[3] D1 notes that the police have some limited statutory powers concerning immigration (for example to arrest those who immigration officers have a power to detain pending removal: D1 §39). There is no suggestion that such powers are being exercised in ON. Indeed the fact that police have limited powers to assist immigration officers, requiring express statutory authority, suggests that that is not part of their ordinary policing function.

[4] The Defendants note that asking those in custody to establish their identity and nationality may be part of a criminal investigation into immigration offences or other crimes (D1 §38 & D2 §15, 17). That is not an answer to the Claimant's case. While there may, on occasions, be an overlap between questions the police will ask when investigating a crime and those that are asked pursuant to ON, it is not disputed by the Defendants that ON goes far beyond gathering information to investigate criminal offences and will involve the police asking questions purely to assist the Home Office to determine immigration status.

52. Ground 3 turns on whether the police have a common law power to ask questions and gather information where they are not doing so for the kinds of policing purposes described in *Rice*. If they do not have such a power, it is clear that ON involves the police acting unlawfully. The Defendants response to Ground 3 is to argue that the police have the power to question for non-policing purposes because they can do anything not prohibited of a member of the public (D1 §40-42 **[1-64]** & D2 §12(2) & (3), 16-19 **[1-73]**). Thus, they argue, as any member of the public can ask questions of people they encounter, so can the police. The Claimant submits that the police have no such power and that that is apparent both as matter of authority and principle.

Authority

53. Griffiths LJ held in *Steel* that the police have the power to ask questions of members of the public, even if there is no obligation to answer them, but it is clear from the judgment that that is only the case if the police are exercising police functions of the kind identified by Lord Parker in *Rice*. Griffiths LJ held at pp 102-103:

> *The police could not carry out ... duties [of keeping the peace, preventing crime, bringing offenders to justice] unless they had the power to make reasonable inquiries of members of the public and the decision in Rice v Connolly makes it clear that in making such inquiries a police officer is acting within the scope of his duties and, thus, lawfully and within the execution of his duty.*

As is apparent from Griffiths LJ's judgment, where an officer asks an individual questions and is "*acting within the scope of his duties*" of keeping the peace, preventing crime etc, he is "*thus [acting] lawfully*". The converse must also be true. If police officers are acting outside the scope of policing duties, i.e. not to keep the peace, prevent or investigate a crime or for any other policing purposes, they have no power to question members of the public.

54. The Defendants rely on *R v SSH ex p C* [2000] 1 FLR 627 (D1 §41 **[1-65]** & D2 §12(3) **[1-73]**) and *Collins v Wilcock* [1984] WLR 1172 (D2 §12(2)) **[1-73]**. Those cases do not assist them and indeed *Collins* undermines their central argument.

55. The Divisional Court in *Collins* held that a police officer who "*wish[es] to engage a man's attention, for example if he wishes to question him*" may, without arresting the man, lawfully "*lay… his hand on the man's sleeve or tap… his shoulder for that purpose*" (1178F). The officer "*may even do so more than once*" (ibid). The police officer's actions are lawful because he is "*under a duty to prevent and investigate crime, and so his seeking further, in the exercise of that duty, to engage a man's attention in order to speak to him may in the circumstances be regarded as acceptable*" (ibid). Again, the converse must also be true. If the police officer, while purporting to act as a police officer, lays his hand on a man's sleeve in order to question him, but not "*in the exercise of [the] duty… to prevent and investigate crime*", but for some other purpose, his conducted will not "*be regarded as acceptable.*"

56. As to *Ex p C*, the Court of Appeal held that Government departments could act without statutory or prerogative authority on the basis of what are sometimes described as "*common law powers*" if they are acting in a way that would not be prohibited of members of the public (in that case the Department of Health was maintaining a list of care providers not suitable to work with children). *Ex p C* does not concern police powers and is not authority for the proposition that the police can question individuals for any purpose, which would be inconsistent with *Steel* and *Collins*. In addition, *Ex p C* must be read in the light of the subsequent Court of Appeal decision in *R (Shrewsbury and Atcham BC) v SSLG* [2008] 3 All ER 548.

57. In *Shrewsbury* Carnwath LJ (as he then was) doubted that Ministers have a power to act without an identifiable statutory or prerogative basis, but held that he was bound by *Ex p C* to hold that they could act pursuant to "*common law powers*" (§44-48). Carnwath LJ made clear, however, that even if Ministers have common law powers, there are limits to those powers which would not apply to private actors. He held at §48: "*As a matter of capacity, no doubt, [a government department] has power to do whatever a private person can do. But as an organ of government, it can only exercise those powers for the public benefit, and for identifiably 'governmental' purposes within limits set by the law.*"[5]

[5] Richards LJ expressed different views in *Shrewsbury* and suggested that if a private party would not be prohibited from taking any particular action, nor would a Minister (§74). Waller LJ agreed with Carnwath LJ (§81). The issue was not part of the ratio of *Shrewsbury* as the case was decided on a different basis. The Claimant respectfully submits, in particular given Carnwath LJ's detailed examination of the question (see §43-49), that his analysis was correct.

That applies equally to the police. They cannot act for any purpose they choose simply because a member of the public would not be prohibited from so acting. As is clear from *Steel* and *Collins*, the police must act for an identifiably "*policing*" purpose, such as investigating crime, preventing a breach of the peace etc.

Principle

58. Secondly, it must also be correct, as a matter of principle, that the police cannot lawfully question members of the public for non-policing purposes while purporting to exercise police powers.

59. It is a well-established principle of public law that public bodies must exercise powers for the purposes for which those powers are conferred (see, for example, *Porter v Magill* [2002] 2 AC 357 §19). As was made clear in *Steel*, the police have the power to make "*reasonable inquiries*" of members of the public in order to gather information to determine if they are engaged in criminal activities. As with any public body, however, the police are not permitted to act for any purpose they choose. Indeed, it is of particular importance that police powers are so limited. Even if there is no legal obligation to answer police questions, if a police officer, who appears to be exercising some formal policing function, questions people, many will feel compelled to provide the information requested. That is so, *a fortiori*, where a person is a foreign national, who is in custody, who is not clearly explained that there is no obligation to answer the police's questions, where they are not told that the questions are not being asked as part of the discharge of a policing function, and where they are not warned that the answers they provide may be used against them to justify their removal from the country. It is of particular importance in those circumstances that the police do not use the inevitable coercion individuals will feel to answer questions save where questions are asked for clearly defined and properly limited policing purposes.

60. It is instructive to compare the questioning at issue in this case with examples given by the Defendants of the police "*[asking] a tourist looking with puzzlement at a map if they needed any assistance, [enquiring] of a football fan the result of a match; or … [passing] the time of day with a member of the public*" (D1 §41 **[1-65]** & D2 §19 **[1-74]**). It is suggested by the Defendants that the police would not be prohibited from such engagement with the public just because they are not acting for police purposes when asking about the

result of a football match etc, and no doubt members of the public would answer such questions as they would if asked by anyone else. It is correct that police officers asking such questions would be acting lawfully, but that is because the police in those situations are not acting *qua* police officers exercising what will appear to the public to be police powers.

61. Questioning pursuant to ON is quite different. If a member of the public stopped people in the street and asked them how much they earned, whether they were in a relationship, whether they take medication, and required them to sign a formal document certifying that the information provided is correct, they would receive short shrift. Where that information is requested by the police when encountered as part of a police operation on the street or in a bar, and even more so when individuals are questioned in custody, no doubt many people would feel compelled to respond. That is why it is critical that police powers are subject to clear and lawful limits and the police cannot simply question people for whatever purpose they choose because members of the public are not prohibited from so doing.

62. One can see why that must be right if one considers the consequences of the Defendants' arguments. On the Defendant's argument, because a member of the public can, in principle, lawfully ask anyone to stop or knock on anyone's door and ask them questions for any purpose they wish, so can the police. That means that if the police are called to the scene of a burglary, they could question the occupants of the house about whether they have proper planning permission for an extension with a view to passing the information to the relevant local authority. Or suppose that a police officer lawfully arrests someone and brings him into custody. Suppose that after the officer has finished questioning the individual about the alleged criminal offence, another officer, who believes the detainee is having an affair with his wife, questions the detainee to elicit information about the affair. On the Defendants analysis that would be lawful as anyone can ask questions of someone they suspect of having an affair. That cannot be correct. It cannot be lawful for an officer, not investigating a criminal offence, to ask questions for such a purpose. The same applies to police officers questioning an individual, in custody or in the street, to gather information unrelated to a criminal investigation, in order to see if the individual can be subject to administrative removal from the UK by the Home Office.

CONCLUSION

63. For the reasons set out above and in its Grounds, the Claimant seeks a declaration that ON operates unlawfully as it involves a breach of Art 14(2) of the Citizens' Directive and because it involves the police questioning individuals to gather information for non-policing purposes.

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