JR-2024-LON-000860

# In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

In the matter of an application for Judicial Review

The King on the application of
Lukasz Zurawski

Applicant

and

First-tier Tribunal (IAC)

Respondent

and

Secretary of State for the Home Department

Interested Party

**ORDER**

**BEFORE Upper Tribunal Judge Blundell**

**HAVING** considered all documents lodged and having heard Ronan Toal of counsel, instructed by Wilsons Solicitors LLP, for the applicant and Michael Biggs of counsel, instructed by GLD, for the interested party at a hearing on 11 November 2024

**AND UPON** the respondent not attending or filing submissions,

**IT IS ORDERED THAT**:

1. The applicant's application for judicial review is dismissed.

2. The applicant is to pay the interested party's costs to be assessed if not agreed. In so far as the applicant has the benefit of cost protection under section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the amount that he is to pay shall be determined on an application by the interested party under regulation 26 of the Civil Legal Aid (Costs) Regulations 2013. Any objection by the Applicant to the amount of costs shall be dealt with on that occasion.

3. There be detailed assessment of the applicant's publicly funded costs.

4. Permission to appeal to the Court of Appeal is refused.

Signed: Mark Blundell

**Upper Tribunal Judge Blundell**

Dated: **10 January 2025**

**The date on which this order was sent is given <u>below</u>**

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**For completion by the Upper Tribunal Immigration and Asylum Chamber**

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 13/01/2025

Solicitors:
Ref No.
Home Office Ref:

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**Notification of appeal rights**

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2024-LON-000860

**IN THE UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)**

Field House,
Breams Buildings
London, EC4A 1WR

10 January 2025

**Before:**

**UPPER TRIBUNAL JUDGE BLUNDELL**

**- - - - - - - - - - - - - - - - - - - - -**

**Between:**

**THE KING**
**on the application of**
**LUKASZ ZURAWSKI**

**Applicant**

**and**

**FIRST-TIER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)**

**Respondent**

**and**

**SECRETARY OF STATE**
**FOR THE HOME DEPARTMENT**

**Interested Party**

**- - - - - - - - - - - - - - - - - - - - -**

**Ronan Toal**
(instructed by Wilsons Solicitors LLP), for the applicant

The respondent was not represented

**Michael Biggs**
(instructed by the Government Legal Department) for the interested party

Hearing date: 11 November 2024

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**J U D G M E N T**

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**JUDGE BLUNDELL:**

1. The applicant seeks judicial review of the First-tier Tribunal's decision to refuse to extend time for him to bring an appeal against the Secretary of State's decision to refuse his application for leave to remain under Appendix EU to the Immigration Rules.

## [A] - BACKGROUND

2. The applicant is a Polish national who was born on 12 April 1996. He came to the United Kingdom in 2019 and worked in the construction industry pursuant to the right of free movement which he then enjoyed.

3. As a result of the United Kingdom's withdrawal from the European Union, the applicant was required to apply for a residence document if he wished to continue living here. The primary deadline for such an application was 30 June 2021, the end of the grace period[i].

4. The applicant applied for leave to remain under Appendix EU on 26 June 2021, and therefore before the end of the grace period. The application was refused on 10 January 2022 because the Secretary of State did not accept that the applicant had provided sufficient evidence to show that he had ever resided in the UK and Islands. The notice stated that the applicant had a right of appeal to the First-tier Tribunal ("FtT") under the Immigration (Citizens' Rights Appeal)(EU Exit) Regulations 2020 and that the applicant had 14 days within which to bring that appeal if he was in the United Kingdom. He was informed that he could also seek Administrative Review of the decision.

5. The applicant did not appeal promptly to the FtT. Nor did he seek Administrative Review. He lost his job in 2023 and was convicted of an offence of theft, for which he received a sentence of one month's imprisonment. At the end of his custodial sentence, the applicant was detained under immigration powers. A Stage 1 deportation decision was made on 26 October 2023. He did not respond. A Stage 2 deportation decision was made on 28 December 2023.

6. The Secretary of State notified the applicant on 5 February 2024 that she intended to remove him to Poland and, on 8 February, she notified him that his removal was to take place on 20 February.

7. The applicant instructed his current solicitors on 15 February 2024, having attended the Detained Duty Advice Surgery in the removal centre at which he was then detained (Brook House). They issued a Letter Before Action to the Secretary of State on the same day, stating that the applicant intended to appeal out of time to the First-tier Tribunal against the refusal of leave under the residence scheme immigration rules. He was said not to have done so earlier because he suffered from mental health problems and had not understood his options. Concern was expressed that the refusal of leave to remain had been omitted from the Immigration Factual Summary ("IFS") which had been provided to the applicant in detention. A copy of the refusal decision was sought, and it

was submitted that removal should be deferred pending the applicant's appeal to the FtT.

8. The Secretary of State amended the IFS and provided a copy of the refusal decision in response to this letter, but she declined to defer removal, noting that the applicant was significantly out of time to bring an appeal. It was not a requirement, she said, for the applicant to remain in the United Kingdom whilst any appeal was being considered.

## [B] - THE APPEAL TO THE FIRST-TIER TRIBUNAL

9. The applicant's solicitors lodged an out of time appeal with the FtT on 16 February 2024 and then wrote again to the Secretary of State, on the same day, submitting that the pending appeal (against an in-time EUSS application) should be treated as a barrier to removal. That letter persuaded the Secretary of State to defer removal, and she notified the applicant's solicitors of that decision the following day. The formal response to the second Letter Before Action stated that "[a]s the Home Office have received evidence that an out of time appeal has been submitted to the first-tier tribunal, removal directions have now been cancelled."

10. The applicant's solicitors wrote to the Secretary of State's Foreign National Offender Returns Command on 1 March 2024, seeking revocation of the deportation order. It was submitted that the applicant had not had access to specialist legal advice whilst he was in prison; that the Secretary of State had failed to consider the correct legal regime in making the order; and that deportation would be in breach of Article 8 ECHR.

11. One of the First-tier Tribunal's Legal Officers refused to extend time for the applicant to bring his appeal on 21 February 2024. The applicant renewed his application to a judge. The detailed submissions which were made by the applicant's solicitors were accompanied by a witness statement in which the applicant explained why he had not appealed sooner.

12. On 4 March 2024, First-tier Tribunal Judge Veloso refused to extend time. The decision was in the following terms:

> [1] The respondent's decision is dated 10 January 2022. By virtue of Rule 19(2) of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, the appellant had 14 days from service of the notice to lodge an appeal. He lodged his appeal on 20 February 2024, over 2 years out of time.
>
> [2] I have to decide whether to extend the time for lodging the appeal. I have considered the guidance in R (on the application of Onowu) v First-tier Tribunal (Immigration and Asylum Chamber) (extension of time for appealing: principles) IJR [2016] UKUT 00185 (IAC).

[3] I find the delay to be significant and substantial.

[4] In their renewed request for an extension of time dated 1 March 2024, the appellant's representatives attached a witness statement from the appellant of the same date.

[5] In his witness statement, the appellant explains that he does not remember when he received the refusal of his EUSS application, he had made the application in order to work, he was working every day, on his days off resting and recovering from the physical work and he did not have much time to think about the decision or talk to people about it. He was working when he received the refusal and because his boss had no issues with him working, he thought the person who had advised him to get the application was wrong about it being necessary. He did not discuss the decision with anyone and did not know he could appeal it. He regretted not understanding the process in 2022. He then referred to feeling pretty depressed at the time from having broken up with his girlfriend and that he had felt that dealing with the complicated and confusing paperwork would be difficult and it was not necessary. He had given all his papers to his criminal solicitors and thought that they would be dealing with his immigration issue.

[6] I do not hold against the appellant the fact that his representatives did not include grounds with their initial IAFT-5 form on 16 February 2024 or that the appellant did not provide a witness statement until 1 March 2024.

[7] With regards to the 2-year delay prior to that, on the contents of his witness statement, the appellant seeks to explain the reasons why he chose to not read the respondent's 4-page refusal letter, which comes with clear headings, including about his appeal rights. He does not indicate a language difficulty. Whilst he mentions having felt depressed at the time, no medical evidence has been included with this application.

[8] I have regard to the strong public interest in litigation being conducted efficiently and the clear public interest in compliance with the Tribunal Procedure Rules. I also have regard to the long delay in this case, which is contrary to a fair and just disposal of an appeal.

[9] Considering all the circumstances in this case, I find that extending time to appeal would not be consistent with the Tribunal's overriding objective.

[10] I therefore refuse the appellant's application to extend the time for lodging the appeal.

13. The applicant sent pre-action correspondence to the First-tier Tribunal on 8 March 2024. It was submitted in the pre-action letter that the Secretary of State's decision had been flawed in that it had failed to set out the implications of the decision in compliance with Article 30(1) of Directive 2004/38/EC and Article 21 of the Withdrawal Agreement. It was submitted that it was the Secretary of State's unlawful conduct in that respect which had caused the applicant to misunderstand the consequences of the decision and miss the deadline for appealing to the First-tier Tribunal. Ultimately, therefore, it was submitted that the First-tier Tribunal was obliged to admit the appeal out of time, since a failure to do so would not be to act fairly and justly in compliance with the overriding objective.

14. I do not understand there to have been any response to this correspondence. The First-tier Tribunal has remained neutral throughout.

## [C] - THE APPLICATION FOR JUDICIAL REVIEW

15. The application for judicial review was issued on 29 March 2024. Mr Toal settled the two grounds. By the first of those grounds, it was submitted that Judge Veloso had failed to give adequate reasons; she had failed to engage with the core of his case, which was that he had not previously appealed because he believed that the decision had no consequence for him.

16. By the second ground, it was submitted that the judge had failed to take account of a material consideration, which was that Secretary of State's decision contained no information about the implications of the decision. It was submitted that the judge had failed to take account of the fact that the applicant had been denied an important procedural protection afforded by the Withdrawal Agreement.

17. Permission was refused on the papers by Judge Keith but granted by Judge Sheridan at a hearing on 7 June 2024. In granting permission, Judge Sheridan observed as follows:

> The interested party's decision letter of 10 January 2022 was arguably inconsistent with the EU Withdrawal Agreement because of a failure to set out the implications of the decision. The arguable necessity to set out the implications derives from article 21 of the Withdrawal Agreement which requires safeguards in Directive 2004/38/EC to apply, including article 30(1), which refers to decisions being drafted so that the recipient understands their implications. It is arguable that the respondent's decision of 4 March 2024 is unlawful because of the failure to take this into consideration when deciding whether to extend time.
>
> Mr Toal acknowledged that the argument about article 21 was not advanced in the submissions before the respondent. It may be that, as argued by Mr Biggs, this proves fatal to the

> applicant's case. In addition, as argued by Mr Biggs, it may prove fatal to the applicant's case that his evidence appears to indicate that he did not read the interested party's decision which would mean that including a paragraph on its implications would have made no material difference. However, I am still (just) persuaded that there is arguable merit and therefore that permission should be granted.

18. The submissions advanced orally and in writing may be summarised in the following way.

## [D] – SUBMISSIONS

19. For the applicant, Mr Toal submitted that the applicant had made a clear application to extend time which was supported by a detailed witness statement. Paragraphs [15]-[16] of the application were important; the applicant had been resident in the UK since 2019 and he had no full or accurate understanding of what it was to be subject to immigration controls, and he had not understood the significance of the political changes brought about by Brexit. The applicant had explained in his witness statement that he had not fully read the refusal of his application under the settlement scheme. He had taken advice from a layperson and had been able to continue to work without difficulty.

20. The Secretary of State's decision told the applicant that his application had been refused and stated, in terms, that the "rest of this letter details the reasons you have been refused". The letter told the applicant about his appeal rights and how he could make a further application. It said nothing about the implications of the refusal. It told him nothing about the fact that he would be exposed to the hostile environment and would be committing a criminal offence if he remained.

21. Mr Toal submitted that the judge had failed to come to grips with these points in her decision. The judge had failed to make any reference to the applicant not understanding the consequences of the Secretary of State's decision and to his "plausible misunderstanding" concerning Brexit. It was "important and striking", Mr Toal submitted, that [7] of the judge's decision made no reference to this point, which was the applicant's key submission. In answer to my question, Mr Toal did not accept that the words "and it was not necessary" in [5] of the judge's decision were sufficient; she was obliged in his submission to return to the point in her analysis.

22. As to ground two, Mr Toal submitted that the Secretary of State's decision had been defective. It had been accepted by Mr Biggs that the "implications duty" applied in a case such as the present. Article 30(1) required that a person in the applicant's position was notified of such a decision in writing, and in a way which enabled them to understand the content of the decision and the implications for them. The Secretary of State's decision could not be faulted in the former respect. Nor could there be any complaint that the Secretary of State had failed to comply with Article 30(3). But there was no compliance with the implications

duty in this case, or in any decision taken before October 2023. A redacted letter in the bundle showed that the Secretary of State's approach had changed, and she now included hostile environment rubric which was also found in other immigration and asylum decisions.

23. The Secretary of State said that these implications did not need to be spelt out because they were obvious. Those matters were not obvious for a person such as the applicant, however. There was a failure to discharge the implications duty and that failure was of particular moment in this case.

24. Mr Toal noted that Mr Biggs was to submit that the Secretary of State's failure to comply with the implications duty was not raised in the submissions to the FtT, and that this was not an obvious matter which the judge was obliged to take into account. But the applicant had set out his entire factual case in those representations and the judge was a specialist judge who was required to determine the application for an extension of time in accordance with the law: SSHD v AH (Sudan) [2007] UKHL 49; [2008] 1 AC 678, at [30], and AA (Nigeria) v SSHD [2020] EWCA Civ 1296; [2020] 4 WLR 145, at [34]. She had been required, therefore, to consider the point of her own volition, since it went to the question of whether it was fair and just to extend time. The Secretary of State's failure was an egregious one which the judge was obliged to take into account. It could not be assumed that she had taken account of such a point if she had not mentioned it: PMS International Group PLC v Magmatic Ltd [ 2016] UKSC 12; [2016] 4 All ER 1027, at [39].

25. Mr Toal submitted that the judge's decision fell to be quashed even if she had not been required to identify and deal with the Secretary of State's failure to comply with the implications duty. Dicta from Elias and Sedley LJJ at [67]-[69] and [124] of Miskovic v SSWP [2011] EWCA Civ 16; [2011] 2 CMLR 20 showed that the court might consider itself duty bound to entertain new points of law which had not previously been taken where justice required that course. There was no practical difference in this connection between an appeal on a point of law and an application for judicial review: E & R v SSHD [2004] EWCA Civ 49; [2004] QB 1044, at [40]-[42].

26. Mr Toal submitted that this analysis was also supported by the decisions of the Court of Appeal in AA (Afghanistan) v SSHD [2007] EWCA Civ 12 and UB (Sri Lanka) [2017] EWCA Civ 85, both of which concerned failures on the part of the Secretary of State to draw relevant policies to the attention of the Tribunal. Here, the Secretary of State had failed to discharge her obligations to the applicant and had effectively misrepresented her decision as being a lawful one. The judge had therefore been misled by the Secretary of State into thinking that the decision was a compliant one, and the constitutional principles which underpinned this body of jurisprudence from the Court of Appeal required the Upper Tribunal to intervene.

27. For the Secretary of State, Mr Biggs accepted that the implications duty applied to decisions to refuse leave to remain under the EU Settlement Scheme. There was scant authority on the scope of that duty. Some

assistance was to be found in Petrea v Ypourgos Esoterikon kai Dioikitikis Anasygrotisis (Case C-184/16); [2018] 1 CMLR 42, which might be thought to apply the test from Adoui & Anor v Belgian State and City of Liège (Cases C 115 and 116/81); [1982] 3 CMLR 631, despite the adoption of Directive 2004/38/EC.

28. Mr Biggs submitted that the reasons given by the First-tier Tribunal were amply sufficient. The test was well known, and was helpfully summarised in MK (duty to give reasons) Pakistan [2013] UKUT 641, at [7]-[12]. It was to be recalled, in accordance with those principles, that the particularity of reasons required must depend on the circumstances of the case and the nature of the decision being made. Judge Veloso's decision had been made on the papers and did not follow lengthy argument. She had cited R (Onowu) v FtT (IAC) [2016] UKUT 185 (IAC); [2016] Imm AR 822 and had then applied the three stage test in Denton v White [2014] EWCA Civ 906; [2014] 1 WLR 3926. When read as a whole, her reasoning clearly engaged with all material considerations and was legally adequate. Considering what was said about judicial restraint in SSHD v HA (Iraq) [2022] UKSC 22; [2022] 1 WLR 3784 and MS (Malaysia) v SSHD [2019] EWCA Civ 580; [2019] INLR 438, there was no proper reason to interfere with the judge's decision. There was accordingly no merit in the first ground.

29. In addressing ground two, Mr Biggs submitted that it was important to recall the nature of the challenge, which was of a procedural Wednesbury kind. Viewed through that lens, the unassailable difficulty for the applicant was that nothing had been said in the representations to the FtT about the Secretary of State's supposed failure to comply with the implications duty. That point did not fall within any of the categories of relevant considerations examined by the Supreme Court in R (Friends of the Earth Ltd) v Heathrow Airport [2020] UKSC 52; [2021] PTSR 19, and the judge was not obliged to take it into account. It had not been unreasonable in the Wednesbury sense for the FtT not to take the point of its own volition: London Borough of Newham v Khatun & Ors [2004] EWCA Civ 55; [2004] 3 WLR 417.

30. Mr Biggs submitted that Mr Toal's reliance on Miskovic was misconceived, dealing as it did with the flexibility which the Court of Appeal wished to retain in respect of new points. A better analogy was to be found in Lata (FtT: principal controversial issues) [2023] UKUT 163 (IAC). For the Upper Tribunal to intervene, there had to be a public law error on the part of the FtT in this case. Mr Toal did not attempt to raise an error of law on the part of the FtT; he submitted that there was a failure to take account of a relevant matter. The analysis necessarily returned, therefore, to the question of whether it was Wednesbury unreasonable for the FtT not to take the point of its own volition. Ground two was therefore unmeritorious and no further analysis was necessary or desirable.

31. It was the applicant's own case that he would not have read anything which the Secretary of State might have said in compliance with the implications duty. The Secretary of State was not required to spell out the implications of the decision on the first page and the applicant had

not progressed beyond that. It was in any event obvious that the Secretary of State's decision was a significant matter, and the guidance to which the applicant had access online made it clear that he was required to obtain leave to remain under the settlement scheme if he wished to continue living in the UK.

32. I asked Mr Biggs whether the application form which the applicant had completed was available, since it did not appear in the trial bundle. Enquiries were made during the short adjournment and, at my request, after the hearing. The Government Legal Department confirmed in an email dated 15 November 2024 that there had been no application form as such; the application had been online and had been considered online by the decision maker. (Nothing turns on this, but I must record some surprise at this answer, for two reasons. Firstly, I have seen countless examples of applications for leave to remain under the EUSS in statutory appeals. Whilst the format in which those applications have been produced often leaves much to be desired, it is possible to discern the questions asked and the answers given by an applicant. Secondly, it would obviously be a problem of a rather fundamental nature if decision makers (judges or administrative reviewers) were unable to consider the questions asked of and the answers given by an applicant under that scheme.)

33. Mr Biggs returned to the scope of the implications duty. He accepted that both Petrea and Adoui were expressed at a high level of generality; the critical question was whether the affected party was given enough information to defend his interests. What was required was that the decision made clear that the individual had been refused the status sought and the reasons for that refusal. The duty was not hard-edged and might vary from state to state and individual to individual. It was also imperative to recall that each state had a degree of procedural autonomy, as made clear in Petrea, and that autonomy applied just as much to procedures adopted as it did to legislation enacted. Enough had been done by the Secretary of State to comply with the duty in this case.

34. Mr Toal turned in his reply to the content of the implications duty. He submitted that the Secretary of State was obliged to set out the specific implications of the decision for the individual concerned; neither standard rubric nor reference to guidance on the internet sufficed. A decision such as that written by the Secretary of State in this case had to spell out the implications in a "tailored" and "particularised" way. To do so did not present the Secretary of State with an unreasonable burden.

35. I asked Mr Toal whether the Secretary of State's current practice complied with the implications duty when it was framed in this way. He was inclined to submit that it did not, since the standard form of wording concerning the hostile environment was insufficiently tailored to the circumstances of the individual.

36. Replying to the submission that compliance with the implications duty would have made no difference to the applicant, Mr Toal submitted that he had been wrongfooted by the wording at the start of the letter. There had been nothing to cause the applicant to read further. Had the

Secretary of State set out to comply with her duty under Article 30(1), she would not have stated that the "rest of this letter details the reasons you have been refused".

37. Mr Toal submitted that Mr Biggs had approached the question posed by Friends of the Earth wrongly. If the Article 30(1) point had been raised before the judge, it would obviously have been material to her decision, and the point therefore fell clearly within the third category described at [116]-[119] of that decision.

38. Mr Toal maintained that AA (Afghanistan) and UB (Sri Lanka) were of real assistance, whereas Lata was not. That decision was about the reformed processes of the FtT(IAC).

39. Finally, as to the adequacy of reasons, Mr Toal agreed with Mr Biggs that context was all important. The context here was that the applicant was denied access to judicial redress, which was a very important right: SSHD v Saleem [2000] EWCA Civ 186; [2001] 1 WLR 443. The judge had failed to address the case which was put to her and her reasons could not be adequate in the circumstances.

40. I reserved judgment after hearing these submissions.

## [E] - LEGAL FRAMEWORK

41. It is accepted by the Secretary of State that Article 30 of Directive 2004/38/EC ("the Citizens Directive") applied to the decision which was made on the applicant's application for leave to remain under Appendix EU of the Immigration Rules. Given that the point is not contentious, I do not propose to lengthen this judgment by setting out in full the provisions which prompted that acceptance. The following outline of Mr Biggs' position will suffice.

42. The applicant's application for leave to remain was an application for a "new residence status" under the constitutive scheme[ii] adopted by the United Kingdom under Article 18 of the Withdrawal Agreement ("WA"). The safeguards set out in Article 15 and Chapter VI of the Citizens Directive applied to a decision made on such an application. By Article 15 of the Citizens Directive, the procedures provided for by Articles 30 and 31 applied by analogy to all decisions restricting free movement of Union Citizens on grounds other than public policy (etc).

43. Article 30 of the Citizens Directive provides as follows:

*Article 30 - Notification of decisions*

1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the

decision taken in their case is based, unless this is contrary to the interests of State security.

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

44. References throughout this judgment to the 'implications duty' are to the duty imposed by Article 30(1), to notify a person of a relevant decision in writing, in such a way that they are able to understand the content of the decision *and the implications for them*.

45. The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 SI 2604 provide by rule 20 for the making of an application to extend time for appealing. Rule 20(4) says that such an application must be decided as a preliminary issue and the tribunal 'may do so without a hearing'. The tribunal's case management powers referred to in rule 4 include that the tribunal 'may – extend or shorten the time for complying with any rule, practice direction or direction'. The tribunal's powers must be exercised in accordance with the overriding objective of the rules which is provided by rule 2(1) as being 'to enable the Tribunal to deal with cases fairly and justly'.

46. A decision not to extend time is an excluded decision against which no appeal may be brought to the Upper Tribunal: s11(1) and (5) of the Tribunals, Courts and Enforcement Act 2007 and Article 3(m) of The Appeals (Excluded Decisions) Order 2009.

## [F] – ANALYSIS

47. I will consider the two grounds in turn, starting with Mr Toal's submission that the judge gave inadequate reasons for refusing to extend time.

### Ground One

48. The starting point must be that the judge evidently understood the staged test which she was to apply. She cited R (Onowu) v FtT(IAC), in which the Upper Tribunal stated that judges in the Immigration and Asylum Chambers of the First-tier and Upper Tribunals should apply the tripartite approach commended by the Court of Appeal in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 WLR 795, Denton v White and R (Hysaj) v SSHD [2014] EWCA Civ 1633; [2015] 1 WLR 2472.

49. Having cited Onowu, the judge then embarked on the three-stage analysis required of her. I have set out her decision in full at [12] above. The first stage was to consider whether the delay was serious or significant. The judge's answer to that question was at [3] of her decision. The second stage was to consider why the default occurred,

and whether there was a good reason for the delay. The judge considered that question at [4]-[8]. The third stage was to consider all the circumstances of the case, which the judge did at [8]-[9] of her decision.

50. Mr Toal focuses on the adequacy of the judge's consideration of the second question; the reasons for the default and whether there was a good reason for it. He was initially minded to submit that there was no reference in the judge's decision to the central point made by the applicant and his solicitors in the application to extend time. It was said in the application that the applicant had not thought it necessary to appeal because he had not previously been subject to immigration control and had not appreciated the gravity of his situation. I suggested to Mr Toal that that submission might be difficult to sustain when set against the judge's [5], in which she had made express reference to the applicant's witness statement and to his claim that he had thought that it was 'not necessary' to appeal.

51. Mr Toal recognised the difficulty with the submission as originally framed and shifted his focus. He submitted that the real difficulty with the judge's decision was that she had failed to return to the applicant's contention that an appeal was not necessary when she came to the second part of her analysis, at [7].

52. I do not consider that to have been necessary. The judge plainly had in mind everything that was said by the applicant when she reached her conclusions at [7]. Whilst she did not state in terms that she did not consider there to be a good reason for the two year delay, that was clearly her conclusion. Her reasoning is unassailable, particularly when it is recalled that being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules: Hysaj v SSHD, at [44], as endorsed at [18] of Barton v Wright Hassall LLP [2018] UKSC 12; [2018] 1 WLR 1119. The judge noted that the applicant had 'chosen' not to read the letter which he had been sent by the Secretary of State, and she was plainly unpersuaded by what was said in his witness statement about his circumstances at the time of the decision.

53. Mr Toal submits that more was required but I do not accept his submission in that respect. The litmus test for the adequacy of reasons is whether the reasons given by the decision maker enable the unsuccessful party to understand why it is that the judge reached an adverse decision: English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605; [2002] 1 WLR 2409, at [118], per Lord Phillips MR. Anyone, including the applicant, who read the judge's decision, would understand that she considered that the applicant's reasons for failing to appeal for two years were not good reasons.

54. There was some disagreement between Mr Toal and Mr Biggs about the extent of the reasons which a judge is required to give in this context. Whilst they rightly agreed that the detail required depended on the context[iii], they did not agree on the application of that principle to this particular context. Mr Biggs submitted that only brief reasons were

required because the judge's decision was made on the papers and did not follow lengthy submissions or oral evidence. Mr Toal submitted that more was required, given that the consequence of the judge's decision was that the applicant was denied access to judicial redress.

55. I do not consider this to be the occasion to undertake a detailed consideration of those competing submissions. In my judgment, the reasons given by the judge were plainly adequate on either approach. Had I been required to decide the point, however, I would have concluded that the proper approach lies between that advocated by Mr Toal and Mr Biggs, but considerably nearer to the latter. Applications for extensions of time are part of the ordinary diet of judges in courts and tribunals across England and Wales and the overriding objective of dealing with cases fairly and justly would not be furthered by requiring judges to produce lengthy decisions on such matters. A concise decision such as that which was produced by the judge in this case, identifying the relevant principles and applying them to the facts, is what is required.

56. Mr Toal sought to support his argument that more was indeed required with reference to something said by Hale LJ (as she then was) at 458A of SSHD v Saleem:

> In this day and age a right of access to a tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the ordinary courts.

57. That is undoubtedly correct, with respect, and possibly even more so than when it was first said, given the range of matters now adjudicated upon in tribunals including the FtT(IAC). But the context in which it was said – which concerned the vires of a procedure rule which prevented the Immigration Appeal Tribunal from extending time for an appeal from an adjudicator – was entirely different. There is no such provision in the current rules, and access to the tribunal is not automatically denied to a late appellant. An extension of time can be sought and any such application is considered by a judge in accordance with the principles I have already mentioned. With respect to Mr Toal, I do not consider that the statement of principle in SSHD v Saleem really sheds any light on the particularity of the reasons which a judge is required to give in resolving such an application.

58. In my judgment, the reasons given by the judge for refusing to extend time were amply sufficient. She demonstrably applied the three-part test and she took account of the representations made by the applicant. Having done so, she declined to extend time by two years. Her reasoning enabled the applicant to understand why she had reached that decision. Ground one must therefore fail.

**Ground Two**

59. Mr Toal submits by this ground that the judge failed to take account of a material matter in deciding not to extend time. The material matter in

question is the Secretary of State's asserted failure to comply with the implications duty in Article 30(1). There are three reasons why this ground must fail.

(i) Firstly, the point was not raised by the applicant or his solicitors and it was not an obvious matter which the judge was obliged to consider.

(ii) Secondly, on the applicant's own evidence, any such failure on the part of the Secretary of State was immaterial to his failure to appeal in time.

(iii) Thirdly, and in any event, the Secretary of State's decision complied with the implications duty in Article 30(1).

60. I will now expand on each of those reasons.

*(i) FtT not obliged to consider Article 30(1)*

61. In considering the first of those points, it is necessary to recall the public law ground on which Mr Toal relies, which is that the judge failed to take a material matter into account. It is not that she misdirected herself in law, or that she reached an irrational decision. In order to establish that the FtT failed to take a material matter into account, it is incumbent on Mr Toal to refer to a legal principle which compelled (not merely empowered) the decision maker to have regard to the matter or matters in question: R (Samuel Smith Old Brewery & Anor) v North Yorks CC [2020] UKSC 3; [2020] PTSR 221, at [30].

62. The first question is whether the judge was under any legislative obligation to consider the point. She was required to have regard to the over-riding objective in deciding the application to extend time but there was nothing in primary or secondary legislation which obliged her - in terms or by inference - to have regard to the Secretary of State's asserted failure to comply with the implications duty.

63. Nor is the applicant able to submit that the point was raised by his solicitors but not considered by the Secretary of State. It is common ground that the applicant's solicitors made no reference in their representations to the First-tier Tribunal to Article 30(1) of the Citizens Directive, or to the implications duty therein, or to the Secretary of State's asserted failure to comply with that duty in the decision which was made on 10 January 2022.

64. If Mr Toal is to establish that the judge failed to take a material matter into account, therefore, he must establish that the Secretary of State's asserted failure to comply with the implications duty was an obviously material matter to which the FtT was bound to have regard. That is because of the line of authority which culminated in the decision of the Supreme Court in R (Friends of the Earth Ltd & Anor) v Secretary of State for Transport [2020] UKSC 52; [2021] PTSR 190. In their joint judgment in that appeal, Lord Hodge and Lord Sales (with whom the other Justices agreed) reviewed the law on relevant and irrelevant considerations.

They adopted as a 'useful summation of the law' what had been said by Simon Brown LJ in R v Somerset CC, ex parte Fewings [1995] 1 WLR 1037. Simon Brown LJ (as he then was) stated that there were three categories of consideration:

> First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so.

65. As Lord Hodge and Lord Sales went on to explain, the third category of consideration also includes matters which are 'so obviously material' to a decision that they must be taken into account: [117]-[118]. In deciding whether a consideration is so obviously material that it must be taken into account, the test is the familiar Wednesbury irrationality test: [119]. At [120], they emphasised that there is "no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take".

66. Mr Toal submits that the Article 30(1) point falls into the third category. He suggested that I should consider the position if the point had been canvassed before the judge. Had it been raised, he submits that it would obviously have had an important or decisive impact on the judge's decision, as a result of which it must satisfy the test to which I have referred immediately above.

67. I do not accept that submission, for two reasons. The first is that the point is an obscure one which the judge cannot have been expected to identify for herself. In reaching that conclusion, I obviously take full account of the specialist nature of the Tribunal and the expertise of its judges, as recognised in the authorities to which I was taken by both counsel: [24] and [28] above refer. But the applicant was represented by the most expert immigration solicitors and nothing was said in the letter of representation about any fault in the Secretary of State's decision. I do not consider that it was incumbent on the judge, of her own volition, to comb through the provisions of the Withdrawal Agreement and the Citizens Directive in order to ascertain whether the decision was compliant with all the duties contained therein, notwithstanding the absence of a submission to the contrary. To conclude otherwise would be to fix judges of the FtT with an extraordinary task which would go well beyond the obligation to deal with cases fairly and justly.

68. Mr Toal attempts to escape the difficulty presented by the lack of reference to Article 30(1) in the application to extend time with two additional arguments, the first of which concerns the Court of Appeal's decision in Miskovic v SSWP, in which the Court of Appeal held that it had jurisdiction to hear appeals on points of law which had not been argued below: [69] and [134], per Elias and Moore-Bick LJJ respectively, both of whom agreed with Sedley LJ. Since Mr Toal placed some reliance on [124] of Sedley LJ's judgment, I reproduce that paragraph in full:

> [124] None of these cases sets out a golden rule for the admission of new issues on appeal, but all proceed on the assumption that there is no jurisdictional bar to their being entertained in proper cases. It is an assumption which in my judgment can be made good on a simple constitutional basis. The Court of Appeal exists, like every court, to do justice according to law. If justice both requires a new point of law to be entertained and permits this to be done without unfairness, the court can and should entertain it unless forbidden to do so by statute.

69. Mr Toal accepts, obviously, that these dicta arose in the context of an appeal, and concerned the availability of a discretion in the Court of Appeal to permit new points to be entertained on appeal, as confirmed by Lewison LJ, with whom Birrs LJ and Sir Christopher Floyd agreed, at [41] of HMRC v Ampleward Ltd [2021] EWCA Civ 1459; [2021] STC 2260. Mr Toal submits, however, that these principles can be read across into a judicial review context, and cites something said by Carnwath LJ, giving the judgment of the court, in E & R v SSHD. At [40]-[42], Carnwath LJ analysed the similarities and differences between an appeal on a point of law and an application for judicial review. Having undertaken a review of the recent history, he concluded that the "various procedures have evolved to the point where it has become a generally safe working rule that the substantive grounds for intervention are identical."

70. I do not consider these principles to be of assistance to the applicant before me. Mr Toal's reliance upon them overlooks the fundamental difference between a statutory appeal and an application for judicial review. Whilst it might be the case that the substantive grounds for intervention in the two types of proceedings are identical, it is necessary to consider the origin of the proceedings. In Miskovic, as in E&R, the proceedings before the Court of Appeal began with an administrative decision against which an appeal was brought and pursued to the Court of Appeal. The proceedings before me did not begin with the decision of the Secretary of State; they began with the decision of the First-tier Tribunal, against which an application for judicial review was brought. In the former category of case, an appellate court or tribunal may, in the exercise of its discretion, consider a point of law which was not raised at a lower level. In the latter category of case, however, it is only the decision of the FtT which is under review, and the Upper Tribunal is not tasked with considering the lawfulness of the Secretary of State's decision. The Upper Tribunal's jurisdiction is the supervisory one of judicial review, in respect of the decision of the FtT, and not an appellate jurisdiction in respect of the decision of the Secretary of State. It has no warrant, in other words, to look as far back as a court or tribunal in an appeal.

71. There is nothing in the authorities which carries the Miskovic principle from appellate proceedings into judicial review. Notably, the learned authors of *De Smith's Judicial Review*, *Supperstone, Goudie and Walker on Judicial Review* or *Judicial Remedies in Public Law* chose to make no reference to Miskovic in the current editions of those texts, and I do not consider there to be any basis for the importation which Mr Toal

suggests. Were he correct in his submission, the litigation in Friends of the Earth and other such cases would have been unnecessary, since the court in question would have been entitled to take account of the matter in question "to do justice according to law", whether or not the point was an obvious one which it was unreasonable in the Wednesbury sense not to take into account.

72. Nor do I consider Mr Toal to derive any assistance from the line of authority which culminated in UB (Sri Lanka) v SSHD [2017] EWCA Civ 85. That case – and the others cited by Irwin LJ at [15]-[22] of his judgment, with which Munby and David Richards LJJ agreed – related to the Secretary of State's obligation to draw the Tribunal's attention to relevant policy material in an appeal. Mr Toal submitted that the Secretary of State had effectively misrepresented the lawfulness of her own decision. If I understood the submission correctly, it was that the Secretary of State asserted implicitly before the judge that her decision was a lawful one, whereas it was actually not a decision which complied with Article 30(1). I do not accept that submission.

73. I agree with Mr Biggs that the UB (Sri Lanka) principle has no bearing in the present context. There was no appeal hearing, and there were no representations from the Secretary of State before the judge, who reached her decision on the papers after considering the applicant's submissions. No question was raised about the lawfulness of the Secretary of State's decision before Judge Veloso, and the submissions she was asked to consider were focused in a more conventional Mitchell v News Group manner. There was no relevant policy to which the Secretary of State could have referred the judge, even if there had been a hearing. In any event, as I will explain below, I do not consider that the Secretary of State's decision was flawed for failing to comply with the obligation in Article 30(1).

74. As Mr Biggs submitted, therefore, Mr Toal's attempts to escape the difficulty caused by the lack of reference to Article 30(1) in the representations to the First-tier Tribunal come to nought. For the reasons I have given above, it was not a matter to which the FtT was required to have regard, and the judge did not err in failing to consider it.

75. Secondly, and for the reasons set out below, I do not accept that the point would have had the impact which Mr Toal suggests if the judge had taken it into account. On the facts of this case, it would have made no difference to the judge's decision.

*(ii) Article 30(1) immaterial on the facts*

76. I also agree with Mr Biggs' submission that any failure on the part of the Secretary of State to comply with the implications duty in Article 30(1) was immaterial on the facts of this case. In order to explain why, it is necessary to examine in a little more detail what was said by the applicant in the witness statement which was adduced before Judge Veloso.

77. The applicant signed the statement on 1 March 2024. He stated that he remembered receiving the Secretary of State's decision in 2022 but he could not remember when or how: [1]. He had not 'fully read the letter' but he noted that the application had been refused. He did not obtain legal advice and did not consider it to be a 'big deal': [2]. He had made the application online, on the advice of another Polish man who had said that he had to do it on order to continue his work: [3]. His job was the most important thing to him. When he received the refusal, he was in full time employment and he did not think that the decision was important: [4]. Nor had he had much time to think about the decision or to talk to people about it: [5].

78. The applicant stated that he had been informed by his current solicitor that the application had been refused because he had not submitted enough evidence: [6]. He thought he had sent utility bills but could not remember exactly. He changed his number once or twice a year. He could not remember getting any calls about the application. He did not check his emails regularly and he would have opted for communication by post. If he had received a request for more evidence by post, he would have provided more.

79. The applicant said that he had not thought it possible that his application would be refused. The person who had suggested that he should make the application had left the area before he received the refusal. His boss had no difficulty with him continuing to work and he thought that the person who had initially advised him had been wrong: [7]-[8]. He did not know that he could appeal the decision: [9]. He regretted not understanding the process in 2022. He had broken up with his girlfriend and was feeling depressed at the time, so he just focused on his work: [10]. He could see that he had been struggling with his mental health.

80. The remainder of the statement deals with the reasons that the applicant had not responded to the Stage 1 deportation decision of 26 October 2023: [11]-[21].

81. The salient features of this statement are that the applicant had not read the letter beyond noting that the application had been refused; that he had not considered it necessary to take any action because he was still able to work; and that he had not known that he could appeal. The applicant accepts, therefore, that he did not read the letter beyond the first few lines. He did not know until he was told by his current solicitor that it had been refused for a lack of evidence. And he did not know that he could appeal, despite that having been made clear on the third page of the letter, underneath an emboldened and underlined sub-heading of "Appeal rights".

82. Mr Biggs submits, therefore, that any failure on the part of the Secretary of State to comply with the implications duty was immaterial, because the applicant would not have read that part of the letter and would not conceivably have been spurred into action by anything said by the Secretary of State about his exposure to the "hostile environment". For his part, Mr Toal submits that I cannot be certain of that, and that the

applicant might well have chosen to take prompt action if he had been warned of the serious consequences of refusal.

83. I do not consider that Mr Toal's submission has any proper basis in the evidence. It is quite clear on the applicant's own evidence that he did not read beyond the first paragraph of the letter. If the Secretary of State had given a more fulsome account of the hostile environment to which the applicant was exposed as a result of refusal, he would not have seen it and would not have taken any action. Mr Toal hypothesised that the applicant might have been prompted to read further if there were clear words at the top of the letter which indicated that the applicant's predicament had fundamentally altered as a result of the refusal, bringing to mind the red hand of Lord Denning from Spurling v Bradshaw [1956] 1 WLR 461.

84. As Mr Biggs submitted, however, there is nothing in the applicant's statement to support such a view, and the picture presented by that statement is not, with respect, of a man with an enquiring mind who was keen to understand his situation and the steps he might take to address the refusal. In any event, whatever I might conclude about the scope of the implications duty, Article 30(1) clearly imposes no obligation on the Secretary of State to structure and format decisions such as these in the way suggested by Mr Toal. The Secretary of State's current approach, as I will shortly examine, is to include a standard form of words near the end of the letter, setting out the potential problems which might be encountered by a person without leave to remain in the United Kingdom. In my judgment, there is nothing objectionable about the placement of that rubric at the end of the letter. Had the applicant's letter contained such rubric, he would certainly not have read it, in the same way that he did not read the clearly labelled section about appeal rights.

85. I therefore conclude that the applicant would not have appealed any sooner if the Secretary of State had spelt out in greater detail the consequences of the refusal. If there was a failure on the Secretary of State's part to comply with Article 30(1), and if that was a material matter which the FtT was bound to take into account, therefore, it would not have made any material difference to the conclusion reached by the judge.

*(iii) Decision compliant with Article 30(1) in any event*

86. I emphasise and have already recorded Mr Biggs' submission that I need not consider this issue in the event that I was with him on the matters I have set out above. In case this judgment is not the final stage in the litigation, however, I think it is necessary to state my view, albeit with the caveat that what follows is necessarily obiter.

87. There is very little jurisprudence on the meaning of the obligation in Article 30(1) to notify a person in writing of a decision "in such a way that they are able to comprehend its content and the implications for them".

88. I am grateful to Mr Biggs for locating the decision of the Court of Justice of the European Union in Petrea. The applicant in that case was a

Romanian national who had been convicted of robbery whilst residing in Greece. In 2011, he was sentenced to eight months' imprisonment, suspended for three years. Later that year, the Greek authorities decided that he should be removed to Romania as he presented a serious threat to public policy and public security. He was sent an information booklet (seemingly in Romanian) which contained information about his rights and avenues of redress. He was also informed that he was able to request a written or oral translation of the return order. In November 2011, however, he waived all legal remedies and confirmed that he wished to return to Romania, which was effected by the Greek authorities four days later.

89. A little less than two years later, Mr Petrea returned to Greece and applied for a certificate of registration, which was promptly granted. The authorities subsequently discovered that he was subject to a return order, however, and decided to withdraw the certificate and order his return to Romania. He then brought an action in which he contended that he had not been notified of the 2011 exclusion order in a language which he understood and, in any event, that he did not present a danger to the fundamental interests of society. The Greek court referred five questions to the CJEU, the fourth and fifth of which raised the extent of the Greek authorities' compliance with the procedural safeguards in the Directive.

90. Two parts of the judgment are relevant for present purposes. The first, on which Mr Biggs placed reliance, is the CJEU's reference to Member States retaining some procedural autonomy, at [53]:

> [53] Determining the competent authorities for adopting the various measures provided for by Directive 2004/38 is a matter for the procedural autonomy of the Member States, since that directive contains no provisions in that regard.

91. The second, on which Mr Biggs also relied, is at [70] of the judgment. The terms of that paragraph inform the final paragraph of the *dispositif.* Paragraph [70] is as follows:

> [70] Next, it follows from the preparatory works to Directive 2004/38 , in particular from the proposal for a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [COM(2001) 257 final], that Article 30(1) of Directive 2004/38 does not mean that the removal order is to be translated into the language of the person concerned, but requires by contrast that the Member States take the necessary measures to ensure that the latter understands the content and implications of that decision, in accordance with the Court's findings in the judgment of 18 May 1982, Adoui and Cornuaille (115/81 and 116/81, EU:C:1982:183, paragraph 13).

92. The reference to the linked cases in Adoui and Cornuaille at the end of that paragraph caused me to suggest during the hearing that further

assistance might be gained from the ECJ's decision in those cases. Copies were therefore obtained and considered by counsel. Paragraph [13] of the judgment in those linked cases is in the following terms:

> [13] Article 6 of Directive no 64/221 provides that the person concerned is to be informed of the grounds of public policy, public security or public health upon which the decision taken in his case is based unless this is contrary to the interests of the security of the state . It is clear from the purpose of the Directive that the notification of the grounds must be sufficiently detailed and precise to enable the person concerned to defend his interests. As regards the language to be used , it appears from the file on the case that the plaintiffs in the main proceedings are of French nationality and that the decisions affecting them were drawn up in French , so that the relevance of the question is not clear . It is sufficient in any event if the notification is made in such a way as to enable the person concerned to comprehend the content and effect thereof.

93. The critical question, it seems to me, is the meaning of the word 'implications' in the Directive. I note that the French version of the Directive uses the word 'effets' (effects) although nothing really turns on the difference between 'effects' and 'implications'.

94. Mr Toal submits that the Secretary of State was obliged by Article 30(1) to spell out the consequences of the hostile environment as it applied to the applicant. He notes that the Secretary of State changed the standard wording of Appendix EU refusal letters in around October 2023. That assertion is made in evidence which was filed with the permission of UTJ Kebede, including a witness statement by Kezia Tobin, the Head of Policy and Advocacy at the3million, which she describes as "the UK's leading grassroots advocacy organisation dedicated to protecting the rights of EU citizens who have remained in the UK post-Brexit." Ms Tobin's organisation retains, amongst other things, copies of decisions reached on individual applications made under the UK's post-Brexit residence scheme. From her analysis of those letters, she confirms at [6] of her statement that the Secretary of State's standard practice before October 2023 was not to "include any reference to the consequences of the refusal on the individual applicant's right to remain in the UK, nor of the consequences of failing to take further action.."

95. Ms Tobin helpfully goes on to confirm, at [17], that the Secretary of State's current practice appears to be to include a section containing the following text[iv] after the section setting out information regarding appeals and repeat applications:

> Consequences of staying in the UK unlawfully
> If you stay in the UK without permission to do so:
> ● you can be detained
> ● you can be prosecuted, fined and imprisoned
> ● you can be removed and banned from returning to the UK
> ● you will not be allowed to work

> ● if you do work illegally, your earnings may be seized, and assets confiscated
> ● you will not be able to rent a home
> ● you may not be able to claim any benefits and you may be prosecuted if you try to
> ● you can be charged by the NHS for medical treatment and if you fail to pay, this may prevent you from remaining in or re-entering the UK
> ● you can be denied access to a bank account
> ● your existing bank account may be closed or frozen and any balance withheld unless you leave
> ● Driver and Vehicle Licensing Agency can prevent you from driving by taking away your UK driving licence.

96. Appended to Ms Tobin's statement are three specimen letters, suitably redacted, showing this text and its placement between the 'Next steps' and 'Help and advice on leaving the UK' sections of the letters. Mr Biggs does not contest this evidence. It is implicitly accepted by the Secretary of State, therefore, that her practice changed in October 2023 so as to include the wording above.

97. I had initially understood it to be Mr Toal's case that the post October 2023 letters complied with the implications duty in Article 30(1), and that the change in practice indicated an acceptance on the part of the Secretary of State that letters which did not contain that rubric were non-compliant. During argument, however, he adopted a rather different position, contending that even the new wording did not suffice because it was boilerplate wording which was insufficiently 'tailored' to the circumstances of the individual applicant. Ultimately, therefore, the submission which was made was that the Secretary of State has not, to date, issued a single refusal letter under the EUSS which complies with the duty in Article 30(1).

98. There is nothing before me to confirm that the Secretary of State changed her approach in October 2023 *because* she accepted that the letters issued before that date did not comply with Article 30(1) or, for that matter, that those letters did not comply with any other obligation on the Secretary of State. I note that the statement made by the applicant's solicitor, Ms Townley, records (amongst other things) that the 'hostile environment' rubric in the post-October 2023 EUSS refusal letters mirrors that which has appeared in asylum refusal letters for some time.

99. I do not consider that Article 30(1) requires the Secretary of State to include either the standard 'hostile environment' rubric above, or the more 'tailored' advice suggested by Mr Toal in a refusal under the EU Settlement Scheme. The refusal letter received by the applicant showed that his application under the scheme had been refused. That is the 'content' of the decision for the purposes of Article 30(1). The 'implications' of the decision were equally clear from what was said about exercising the right to an appeal or an administrative review. The applicant was informed that he would be entitled to continue to rely upon his Certificate of Application as evidence of his residence rights in two circumstances:

> Should you appeal against this decision within the relevant timeframe for making an appeal, you can continue to rely on your Certificate of Application as evidence of your residence rights under the Withdrawal Agreement, the EEA EFTA Separation Agreement, or the Swiss Citizens' Rights Agreement until your appeal is finally determined.
>
> […]
>
> If you apply for an administrative review and do not appeal now you can continue to rely on your Certificate of Application as evidence of your residence rights until either:
>
> The time limit for appealing after you receive your administrative review decision has passed; or
>
> If you appeal following the administrative review decision, until the appeal is finally determined.

100. The implications of the decision were sufficiently clear from this rubric. The applicant was being informed that he did not have a right to reside in the UK, but that he could continue to rely on his Certificate of Application as evidence of a right of residence whilst any appeal or administrative review was in process.

101. As Mr Biggs submitted, it is also imperative to set the refusal letter in context. The applicant (like many others in his position) had not previously applied for immigration status but he had decided to apply for leave to remain under the EU(SS) shortly before the end of the Grace Period. He made the application online. In order to do so, he had to navigate through the Home Office website to a page titled "Apply to the EU Settlement Scheme (settled and pre-settled status)". There is a helpful hyperlink to the relevant archived version of that page at footnote 2 of Mr Biggs' skeleton argument. The first sentence on that page explains that a person from the EU "might be able to apply to the EU Settlement Scheme to continue living in the UK". The applicant therefore made an application to enable him to continue living in the UK post-Brexit. When that application was refused, it was obviously the case that he was no longer entitled to continue living in the UK post-Brexit. I accept the submission made at [44] of Mr Biggs' skeleton argument that it was not necessary for the Secretary of State to 'spell out the obvious' in order to comply with the duty in Article 30(1).

102. The implications of the decision were clear from the decision, and were all the more clear when the context of the decision was recalled. Had the applicant read the letter properly and in full, he would have understood that his application had been refused, and that he needed to take action if he wished to remain living in the United Kingdom. That sufficed to comply with Article 30(1). I do not consider that it was necessary for the Secretary of State to introduce the 'hostile environment' rubric into decision letters in order to comply with the implications duty, and I do not accept that the change of approach in

October 2023 assists the applicant in establishing that the earlier letters were not in compliance with Article 30(1). The fact that the Secretary of State has now decided to spell out the consequences of refusal in greater detail does not illustrate that the previous practice was insufficient to comply with the implications duty, as construed in light of the European authorities to which I have already referred. The Secretary of State's decision provided the applicant with sufficiently detailed information to defend his interests and a more detailed or tailored account of the implications of the decision was not required to comply with Article 30(1).

## [G] - CONCLUSION

103. In the circumstances, I do not consider either of the grounds for judicial review to be made out. The application will be dismissed accordingly. I invite counsel to agree the form of the order.

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## POSTSCRIPT

104. The judgment above was sent to the parties in draft on 2 January 2025. I am grateful to counsel for the typographical corrections which they agreed, all but one of which are reflected in this finalised version.

105. Mr Toal sought permission to appeal to the Court of Appeal. The grounds of appeal relate entirely to my resolution of his second ground. I agree with the submissions made by the Secretary of State in response to his application, however. Nothing in the grounds begins to establish an arguable error of law in the conclusions articulated at [59] et seq above. Permission to appeal is therefore refused.
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[i] The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 refer
[ii] R (Independent Monitoring Authority for the Citizens' Rights Agreements) v SSHD [2022] EWHC 3274 (Admin); [2023] 1 WLR 817
[iii] South Bucks District Council & Anor v Porter [2004] UKHL 33; [2004] 1 WLR 1953, at [36]: “Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision.”
[iv]