

EUSS 'PENDING PROSECUTIONS' INFORMATION SHEET

This is an explainer of the judgement in the case of *Lukasz Krzysztofik v Secretary of State for the Home Office* and the implications for those who were impacted by the unlawful 'pending prosecutions policy'

The Claim

The claim challenged the 'Pending Prosecutions' section of the Home Office's 'EU Settlement Scheme: suitability requirements' (the 'Pending Prosecutions policy'), which usually forced Home Office caseworkers to pause any application made to the EU Settlement Scheme where the applicant had a pending prosecution. Up to 20,000 people have had their application to the EU Settlement Scheme paused as a result of a pending prosecution under this policy.

PILC found the Pending Prosecutions policy was regularly causing long delays, uncertainty and hardship for those impacted. Many struggled to access benefits, housing and employment while waiting years for a decision on their application. In many cases, the pending criminal charge was minor and there was no prospect of the application being refused in the long run.

PILC's client was in this position, and decide to challenge the Pending Prosecutions policy.

The Judgement

On 26 June 2024 Upper Tribunal Judge O'Callaghan handed down judgement in *Lukasz Krzysztofik v SSHD*.

The claim was allowed on the ground that the Pending Prosecutions policy forced caseworkers to act in a manner inconsistent with applicable EU law. The policy failed to direct caseworkers to consider the relevant EU law threshold test for refusal (public policy or public security, serious grounds of public policy or public

security, or imperative grounds of public security) before deciding to pause and offended the EU law principle of proportionality.

As to whether a the Pending Prosecutions policy operating as it does is proportionate, the judge held that the policy interferes with deserving EU Citizen's residence rights, by robbing them of 'security of mind and future planning'.

The Order

As a result of the judgement, the following was ordered by the Upper Tribunal:

1. A declaration that the Pending Prosecutions policy is unlawful as contrary to the requirements of the Withdrawal Agreement
3. The Pending Prosecutions policy is quashed, with effect from 26 September 2024.

The Secretary of State agreed to publish a new Pending Prosecutions policy, which complies with the judgement and the requirements of the Withdrawal Agreement within 3 months, save special circumstances. She agreed to review all paused applications thereafter 'forthwith.'

New policy

The Home Office published a new policy on 26 September 2024 , [accessible here](#).

The policy no longer directs caseworkers to pause applications where there is a pending prosecution. Instead, applications should be progressed, considered substantively and granted if the eligibility criteria are met:

The fact that an applicant has a pending prosecution does not prevent caseworkers from progressing the application as set out above. If the applicant satisfies the eligibility criteria and suitability criteria (setting aside the allegations which are the subject of the pending prosecution) leave may be granted...If the applicant is subsequently convicted and given a custodial sentence, the case will be referred to FNO RC through the usual prison referral mechanism.

Take action for your clients

From 26 September 2024, the Pending Prosecutions policy will be quashed. This has retrospective effect and any decision to pause an application under the policy will no longer have any lawful effect.

This means that all paused applications will need to be given fresh consideration by the Home Office. The Home Office have agreed to reconsider all applications 'forthwith.' Unfortunately, in the absence of intervention, this is unlikely to mean the Home Office will progress applications immediately – there are thousands of applications paused under the policy, and it will likely take some time for the Home Office to review them all.

If you are representing someone impacted by the policy we recommend attempting to speed things along by writing to the Home Office and:

1. Highlight that the policy under which the decision to pause your client's application was made has now been quashed.
2. Highlight that the previous decision to pause your client's application was contrary to the requirements of the Withdrawal Agreement.
3. Ask that your client's application is now given substantive consideration, in line with the new policy.

We advise giving 14 days for a response or less if your client's circumstances are urgent. If the Home Office do not respond within the given time, we advise sending a pre-action letter challenging the delay.

Damages?

The judgement has found that the Pending Prosecution policy has, in some cases, breached the Withdrawal Agreement rights of those subjected to it. In some cases where a person has experienced particular hardship as a result of their application being paused, this may give rise to a claim for *Fracovich* damages. This will apply to applications which are currently paused, or those which were previously paused and have now been continued.

Contact PILC

If you would like to discuss challenging an ongoing pause, or are considering bringing a damages claim as a result of an EUSS application being subjected to the Pending Prosecution, please feel free to contact Ellen Fotheringham at the Public Interest Law Centre on 07878757834 or at ellen.fotheringham@pilc.org.uk.
