THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 148 J.R.]

[2008 No. 1029 J.R.]

BETWEEN

J. G. AND W. M. (CZECH REPUBLIC)

APPLICANTS

AND

THE REFUGEE APPLICATIONS COMMISSIONER AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 17th day of April, 2013

1. This judgment is in respect of applications on behalf of both applicants in separate proceedings relating to the same issue and the same events which, though initiated separately, were heard together as a matter of procedural convenience. The applicants are friends who both obtained refugee status in the Czech Republic and came to Ireland together on 5th February, 2007, and applied for asylum. The Refugee Applications Commissioner in both cases refused to admit the claims pursuant to s. 17(4) of the Refugee Act 1996, as amended. Both applicants challenge the first named respondent's interpretation and application of that provision.

The Case of J. G.

2. By notice of motion dated 11th February, 2009, the applicant, an Angolan national, applied for leave to apply by way of judicial review for an order of mandamus directing the respondents to examine or continue to examine the applicant's claim for asylum in the state and/or orders of *certiorari* quashing the first named respondent's decision not to carry out an assessment of the applicant's asylum application pursuant to the Refugee Act 1996, as amended, and/or an order quashing the decision of the second named respondent to make a deportation order against the applicant.

3. The applicant arrived in Ireland on 5th February, 2007. He applied for asylum on 8th February, 2007, and completed the ASY1 form and a questionnaire in furtherance of the application. He is a person who has been granted international protection by way of refugee status in the Czech Republic. In his grounding affidavit he claimed that he came to Ireland because he could no longer live in the Czech Republic because "conditions there were terrible" for him. He furnished his Geneva Convention travel documents to the respondents. However, he was never called for a s. 11 interview.

4. Instead, by letter dated 12th June, 2007, the first named respondent informed the applicant that it would not admit his application. The letter stated:-

> "On examination of the documents you have produced in relation to your status it has come to our notice that you were granted asylum in the Czech Republic.
>
> Issues raised in relation to accommodation provided by the Czech Republic as outlined in the correspondence as submitted by you are not matters for consideration by this office.
>
> In the circumstances and in accordance with s. 17(4) of the Refugee Act 1996, the Minister is precluded from giving a declaration that you are a refugee.
>
> No purpose would be served by investigating your claim, and accordingly, your application is not being admitted for processing.
>
> The file in this case is now being furnished to INIS who will be in contact with you in due course."

Extension of Time in the Case of J. G.

5. Following the receipt of the letter dated 12th June, 2007, the second named respondent issued a letter indicating a proposal to deport Mr. G. dated 3rd April, 2008. Representations were made on behalf of Mr. G. pursuant to s. 3 of the Immigration Act 1999, on 22nd April, 2008, seeking liberty to remain in the State on humanitarian grounds. A deportation order was signed by the Minister personally on 18th September, 2008, and notified to Mr. G. on 23rd September. No challenge was then initiated by way of judicial review in respect of the decision contained in the letter, the proposal to deport or the deportation order. By letter dated 26th November, 2008, Mr. G.sought the revocation of the deportation order and an undertaking that he would not be deported. It was open to Mr. G. to initiate proceedings by way of judicial review in respect of any of these decisions or orders, but he failed to do so until 23rd March, 2009. The primary relief sought is in respect of the decision contained in the letter of June, 2007 and the application is brought some twenty months after the making of the decision. This is well outside the six month period of limitation which then applied pursuant to O. 84 of the Rules of the Superior Courts for the bringing of such an application. The applicant had fourteen days from 23rd September, 2008, to challenge the deportation order pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000, with which he failed to comply. Mr. G. now seeks an extension of time for the bringing of this application but does not offer any evidence to explain the delay other than an assertion that he was given an undertaking that he would not be deported following the making of an application for the revocation of the deportation order on 26th November, 2008, which only expired on 9th February, 2009: he

refrained from instituting proceedings because they were not necessary by reason of the undertaking. He asserts that he attended with his solicitors after receiving the deportation order and wished to challenge it by whatever means possible. However, he chose to acknowledge the validity of the deportation order by making an application to revoke it under s. 3(11) of the Act. In this case no attempt has been made to excuse the delay from the time of the receipt of the letter in June, 2007 from the Refugee Applications Commissioner, apart from the foregoing.

6. The discretion to extend time in this case may only be exercised in respect of the deportation order if there is "good and sufficient reason" for doing so in accordance with s. 5 of the Illegal Immigrants (Trafficking) Act 2000. Amongst the matters to be considered are the extent of the delay by the applicant in the commencement of the proceedings, whether the applicant was in receipt of legal advice, the reason for the delay advanced, the strength of the potential claims to be brought by the applicant, the conduct of the parties and the extent to which an injustice might be perpetrated by failing to grant the extension of time.

7. In the Illegal Immigrants (Trafficking) Bill 1999 [2002] I.R. 360, the shortness of the period of fourteen days was considered by the Supreme Court which determined that the power to extend the fourteen day period was:-

> "sufficiently wide to enable persons who, having regard to all the circumstances of the case including language difficulties, communication difficulties, difficulties with regard to legal advice or otherwise, have shown reasonable diligence, to have sufficient access to the courts for the purpose of seeking judicial review in accordance with their constitutional rights."

8. Mr. G. states that he relied upon the advice of his solicitors at all times during the course of the proceedings and throughout his asylum process. He says that to the extent there was a delay, it was not caused by him. He relies upon the fact that the second respondent gave an undertaking not to enforce the deportation order during the course of the s. 3(11) application to revoke it. However, in seeking to revoke the order, there is an implied acceptance that the order was made lawfully: otherwise it could not be lawfully revoked. Clearly, the applicant on legal advice decided to seek the revocation of the deportation order rather than challenge it by way of judicial review. That was a decision he was entitled to make. He was advised by very experienced legal practitioners in the area. It is clear that the application for leave to apply for judicial review could have been made with reasonable diligence within both of the time limits applicable to the respective decisions. Indeed, there is no explanation offered in the affidavits as to the reason why the s. 17(4) decision was not challenged within the time of six months. Though the fact that the first named applicant relied upon legal advice at all times does not excuse the failure to initiate the proceedings within time (See *C.A & B.A. v. the Refugee Appeals Tribunal* [2007] IEHC 290: *M.M.F. V. the Minister for Justice, Equality and Law Reform* [2011] IEHC 166), the court has considered the principles applicable to the extension of time as set out in *de Rossa v. The Minister for Defence, Ireland and the Attorney General* [2001] 1 I.R. 190, *C.S., B.S. and N.K. v. Minister for Justice, Equality and Law Reform* [2005] 1 I.R. 344, *G.K. v. Minister for Justice* [2002] 2 I.R. 418, and is satisfied that there is no evidence to support a finding that the applicant's solicitors bore any responsibility for the delay in instituting these proceedings. The suggested reliance upon the undertakings in respect of the deportation order is, in all the circumstances, an insufficient reason for delaying the commencement of the challenge to these two decisions.

9. There remains the issue as to whether, notwithstanding the applicant's responsibility for these decisions, an injustice would be done to the applicant by failing to extend the time having regard to the merits of his case. The court must consider as part of the exercise of its discretion whether the applicants grounds are arguable (See *G.K. v. Minister for Justice* cited above) which must be taken as meaning stateable grounds in relation to the s. 17(4) decision and "substantial grounds" relating to the deportation order (*C.C.S. v. Minister for Justice* para. 66). I now turn to the merits of the first named applicant's claim but will return to this aspect of the case later in the judgment.

The Application for Asylum by Mr. G.

10. In the ASY1 form the first named applicant stated that he was born on 4th November, 1966, and left Angola on 18th January, 1991. He claimed that the government were trying to suppress a religious group of which he was a member. He also stated that:-

> "After he got his refugee status in the Czech (Republic) there was a contract that he stayed in the immigration housing for six months to one year maximum, but he ended up in the accommodation for over sixteen years because the government did not sort out further accommodation for him. He got attacked by immigration officers before he fled to Ireland for protection."

He was granted refugee status in the Czech Republic on 13th December, 1991, and now seeks asylum in Ireland because he had problems with the authorities in the Czech Republic.

11. In the questionnaire completed in February, 2007 the applicant indicated that he lived at different addresses in the Czech Republic since 1990 until his departure in 2007, a period of 17 years. He had the benefit of international protection in the Czech Republic for a period of 16 years. Prior to his departure from Angola he had been educated from the age of six to the age of seventeen years and had worked for a period of five and a half years as a welder/fitter. He had never been arrested in the Czech Republic for any offence but he had been detained in Angola by MPLA soldiers for a period of fifteen days. He had been issued with appropriate travel documentation by the Czech authorities, which had enabled him to visit Germany in the years 1992 to 2006, and Italy in 1996. He was accompanied on his departure from the Czech Republic by Mr. W. M.(the second named applicant).

12. In a six page memorandum addressed to the Refugee Applications Commissioner the applicant set out the basis of his application. He recounts how, having been granted refugee status on 13th December, 1991, he lived in various asylum centres allocated by the Czech authorities. In 1997 he was allocated accommodation where he remained until 16th May, 2006, which is the address furnished in his ASY1 form.

13. The applicant describes how he was offered accommodation in 2001 in respect of which he signed an acceptance document. He complains about his dealings with officials of the Asylum and Political Migration Division of the Czech Ministry of the Interior (SAMP MI RT) to whom he sent his original acceptance of the offer. Apparently, an issue arose as to the date of receipt of that acceptance. He was assisted in trying to resolve this issue with the authorities by a Czech official of the Asylum Integration Centre (AIC). He claims he was "excluded" from the Asylum Integration Centre on 10th November, 2001, five days after the intervention and received a letter notifying him of his eviction on 19th November, 2001.

14. The applicant described how in August, 2001 he was allegedly visited by officials of the AIC who informed him that he should leave the Czech Republic. He complained about these officials to two other officials of the Ministry of the Interior, but to no avail.

15. On 18th December, 2001, another named official of the Ministry of the Interior delivered a letter from the Ministry giving notice of

the withdrawal of his and Mr. M's refugee status from the beginning of January, 2002. They both travelled to the offices of the UNHCR in Geneva. An official of the UNHCR intervened and after negotiating with the Czech authorities urged the two applicants to return to the Czech Republic. He said they returned as advised on 8th January, 2002. They remained for a further five years before leaving for Ireland. It is not made clear in the papers submitted to the Refugee Applications Commissioner, on affidavit or to the court, what matter remained to be resolved but it is asserted that the same matter remains "unresolved" to the present day due to the alleged "intransigence" of the Czech SAMP MI RT authorities. In 2002, the applicant undertook technical training in parts manufacturing to improve his work skills which was provided by the Czech authorities.

16. The next complaint made by the applicant concerns an allegation that officials of the SAMP MI RT had the electricity supply to his apartment, and that of the second named applicant cut off, and that the electricity remained unconnected until the 16th January, 2003. In addition, hot water boilers in their apartments remained disconnected until 16th May, 2006. No background information or supporting documentation is furnished in relation to these complaints.

17. It was alleged that officials of the Ministry of the Interior which is in charge of refugee accommodation brought an action against the applicant and Mr. M. before the Civil Courts on 8th November, 2002, alleging the illegal occupation by them of AIC apartments. The matter first came before the Czech Courts on 5th February, 2003. The applicants were represented by a named lawyer who was alleged by both applicants to have turned against her clients.

18. Meanwhile, in November, 2002 it was alleged by the applicant that a senior named official of the Ministry of the Interior visited his accommodation with three ladies and threatened to chase him out of the Czech Republic. He also complained that his and his friend's allowance was reduced by 50% from July, 2001.

19. The applicant complained of two assaults. The first assault occurred on 16th May, 2006. He claimed he was assaulted in front of the mayor of his local town, a social worker and an unnamed person said to be responsible for the police in the town. He said he was attacked by a gang of eight skinheads who accompanied SAMP MI RT and other officials at his and his friend's accommodation centre. The facts provided are very limited and could not be regarded as providing adequate or full explanation of the context or background to these events. It was also alleged that while he attended hospital these officials, without warning and without awaiting the result of the judicial hearing, evicted the applicant and his friend from their accommodation rendering them homeless. He complained of the level of treatment and aftercare that he received at the local hospital following the assault. He subsequently obtained care from a doctor who was a fellow Angolan in Berlin.

20. The second assault of which he complains occurred on the night of 3rd February, 2007, when, he alleges, a group of skinheads tried to force their way into an apartment where he was staying with the second named applicant. As a result of that assault, he was advised by friends and decided to leave the Czech Republic.

21. Over the years the first named applicant wrote complaining about his treatment by state officials to senior politicians of the Czech Republic and senior officials of the United Nations and the European Parliament.

22. The applicant makes a very generalised claim on the basis of these events of racial prejudice by reason of his colour and ethnicity against the Czech authorities. Notwithstanding that fact, the first named applicant remained in the Czech Republic for a period of approximately seventeen years and was afforded international protection there. In addition, he was afforded financial support and accommodation by the Czech authorities. Despite the furnishing of a six page memorandum in relation to his experiences in the Czech Republic, the applicant has failed to provide a coherent account to the Refugee Applications Commissioner or on affidavit of the sequence of events or the issues that led to the court proceedings in which he was legally represented and in the course of which he chose to dismiss his lawyer. They appeared to have commenced on 8th November, 2002. The first hearing was on 5th February, 2003. The applicant received further notice of a second hearing for 28th May, 2003, and a further hearing date was afforded on 20th October, 2003. No information is furnished as to the ultimate order (if any) made by that Court in respect of the first named applicant.

23. A further allegation was made by the first named applicant that he was told by a named Czech official that a Mafia network hides behind legislation passed to protect that network and enable it to negotiate with owners of rental properties to ensure that the tenants of those properties are Czech. An allegation of embezzlement of funds destined for the financing of refugee accommodation is made by both applicants.

24. There is no evidence that the applicant made any complaint to the police or sought any legal advice in order to seek redress for any of the wrongs said to have been perpetrated against him by his assailants, Czech public officials, the local authority or against his lawyer.

The Application of W.M.

25. Mr. M., the applicant in the second proceedings also arrived in Ireland on 5th February, 2007, with J. G. He is a national of the Democratic Republic of Congo and applied for asylum in the state, completed an ASY1 form and also filled in a questionnaire. He also is a recognised refugee in the Czech Republic and states that he came to Ireland "because I could no longer live in the Czech Republic as the conditions there were terrible for me". He was not called for interview at which he expected to be able to provide more information about his claim. He shared many of the experiences outlined by the first named applicant and already referred to in this judgement.

26. By letter dated 12th June, 2007, the first named respondent also informed him that he would not consider his application because no purpose would be served thereby pursuant to the provisions of s. 17(4) of the Refugee Act 1996, as amended. That letter is in exactly the same terms as the one sent to Mr. G.

27. Subsequently by letter dated 3rd April, 2008, the second named respondent informed Mr. M. that it was proposed to consider the making of a deportation order against him. Submissions were made on his behalf by letter dated 23rd April, 2008, in which it was stated that he feared persecution in the Czech Republic. By letter dated 22nd August, 2008, the second named respondent informed Mr. M. that he had made a deportation order against him and enclosed the examination of file containing his considerations dated 10th July, 2008. The order was signed on 14th August, 2008.

28. Mr. M. seeks the same relief as that sought by Mr. G. in his application made by notice of motion dated 9th September, 2008.

29. Mr. M. was born on 25th December, 1968, in the Democratic Republic of Congo. He was educated there between 1972 and 1993 and obtained an engineering diploma. He was employed there as a teacher between 1984 and 1986 and again, between 1993 and 1997 and between August, 1999 and January, 2000 in a factory in the Czech Republic. He claims that he was married on 13th

October, 2006, and that his wife lived in the Congo as did his daughter and a dependent niece.

30. Mr. M. left the Democratic Republic of Congo and after spending some time in Morocco arrived in Prague on 2nd April, 1998. On 3rd April, 1998, he presented himself to the immigration police authorities where he sought international protection and was granted refugee status on 30th September, 1998. He was issued with Geneva Convention travel documentation, to which he was entitled, and which he used between 1999 and 2007. He travelled to Germany on a number of occasions for each of those years up to 2006, to Geneva to protest to the UNHCR in respect of the Czech authorities and to France in 2004. On each occasion he returned to the Czech Republic without claiming asylum in Germany, Switzerland or France.

31. Mr. M. makes a general claim that he has been discriminated against because he is black and because of his ethnicity, by the Czech authorities. As part of his application for asylum in Ireland, he also submitted a detailed statement alleging complaints against the Czech authorities which were similar to those submitted by Mr. G. in his application. He accepts that following the grant of refugee status he was assisted by the Poradna pro integraci (PPI), a Czech non-governmental body who assist those who have recently obtained refugee status with information and practical advice and assistance in their integration in Czech society. Following a meeting on 16th December, 1998, between Mr. M. and officials of the AIC, a representative of the UNHCR and PPI in Prague, he expressed a desire to pursue university studies. The PPI enrolled him in an intensive Czech language course at the Charles University in Prague and in April, 1999 accommodation was negotiated on his behalf by the PPI in a neighbourhood twelve kilometres from Prague. The applicant claimed that officials of the SAMP MI RT opposed this proposal and nothing came of it. However, he received an offer of accommodation on 5th October, 2000, in a small village on the outskirts of the town of Ostrava. He was obliged to accept this offer within seven days and he understood that if he were to reject it, he would be excluded from state support and state accommodation within six months. He believed that he had the right to choose his own accommodation. He claimed to have been discriminated against by the Czech authorities in that non-black refugees were afforded a choice of accommodation and were not offered accommodation in areas which were plainly hostile to the presence of refugees, especially those who were black.

32. On 21st May, 2001, he claimed that he was offered accommodation in the town of Ústí nad Labem. He refused to sign the relevant documents without being given a chance to read the contents. He felt in some way that he was being tricked by the Czech officials with a view to ensuring that they would be able to expel him from his accommodation after signing a lease with clauses that were unclear to non-Czech speakers. In 2001 he claimed that he was visited at night by a senior official of the Ministry of the Interior accompanied by three masked persons who threatened him and told him that he should leave the Czech Republic. This is the same incident described by Mr. G. As in the case of Mr. G., he claimed to have complained about this to two other named officials of the Ministry of the Interior who failed to act on his complaint.

33. On 18th December, 2001, an official of the PPI delivered a letter to him which indicated that his refugee status would be withdrawn in early January 2002, a letter similar to that received by Mr. G. It indicated that he would be deported to his country of origin. As a result, he and Mr. G. travelled to Geneva to the UNHCR which intervened on their behalf and advised them to return to the Czech Republic. They returned on 8th January, 2002. As in the case of Mr. G., Mr. M. claimed that the problem that gave rise to this letter was not sorted out but is said to remain "unresolved due to the intransigence of the SAMP MI RT authorities who refused to cooperate with the UNHCR representation in Prague". As is the case with Mr. G., Mr. M. did not elaborate on the nature of the unresolved matter.

34. Mr. M. was obliged to undergo head surgery and was hospitalised between 26th June, 2002, and 5th July, 2002. During that period his electricity was cut off. It was restored on 16th January, 2003, but he also remained without water boilers under 16th May, 2003. Along with Mr. G. he protested about the actions of the Czech officials to senior Czech politicians, senior officials of the United Nations, and the European Parliament.

35. He was also the subject of civil proceedings. The Ministry of the Interior terminated his lease, brought him to court and evicted him from his accommodation. The nature of the proceedings and how they arose, were processed and concluded is not set out by Mr. M. in his statement save that he alleges that the case was "barely heard" by the Court of First Instance in Ústí nad Labem and that his lawyer, who was also representing Mr. G., "turned against us to rally with the SAMP MI RT".

36. Mr. M. also complains about the attendance in November, 2002 by a senior official of the Ministry of the Interior accompanied by three ladies at his accommodation who threatened to "chase us out of the Czech Republic", an incident also described by Mr. G.

37. He also gave his account of the first attack on Mr. G. on 16th May, 2006. He did not witness the attack but confirmed that on the same day the SAMP MI RT and SUZ evicted the pair from their accommodation without awaiting the conclusion of civil proceedings.

38. He also claimed that in August, 2003 while travelling on a bus from a meeting of an association co-founded by him and Mr. G. (the Czech Refugee Association) he was beaten up. The bus driver drove straight to the bus terminal and called the police who came to the scene and filed a report. He received a number of blows and was bleeding for a time.

39. Mr. M. then gives an unusual account of his visit to France in 2004. At the time he said that he "had some problems in (his) head and was suffering from depression". He accepted an invitation from an acquaintance to visit France. While there, he states that he attended the prefecture of police in an unnamed place with this acquaintance who had taken his photograph. He said that he attended the prefecture "to finally present me at a counter with an invitation where I could read the name Nanga Jean Louis". He gave the photograph to a lady at the prefecture who took him to be fingerprinted. After this incident, a number of days later, he was pressurised by his acquaintance to have sexual intercourse, which he refused to do. He returned to the Czech Republic. He appears not to have made any attempt to claim asylum in France. He felt that he had been set up by this acquaintance and he regretted the trip.

40. During his stay in the Czech Republic he also appears to have been trained by the Czech authorities in "parts manufacturing" in order to enhance his job prospects. After the 16th May, 2006, he stayed with Mr. G. until the night of 3rd February, 2007, when a group of "skinheads" forced open the door of the apartment. He escaped through the window. He claims that he was then pressurised by friends to leave the Czech Republic for fear of his safety and travelled with Mr. G. to Ireland.

41. Mr. M. also makes allegations of corruption and embezzlement against Czech officials in respect of the funding of refugee accommodation.

42. Both applicants believed that Czech officials discriminated against them because they were black, and they wished black people to leave the Czech Republic. Both believed that their accommodation was regularly searched and stated that they stockpiled food as supplies in their accommodation "for fear of poisoning".

Extension of Time in the Case of W. M.
43. The second named applicant did not make any application for leave to apply for judicial review in respect of the s. 17(4) decision notified to him by letter of 12th June, 2007. Under O. 84 of the Rules of the Superior Courts he had six months within which to seek leave to apply for an order of *certiorari* in respect of that decision. The letter giving notice of a proposal to make a deportation against him is dated 3rd April, 2008. The examination of file was concluded on 6th August, 2008, and the order was made by the Minister on 14th August, 2008. Notification of the deportation order was given by letter of 22nd August, 2008. Application was made by notice of motion to this Court on 9th September, 2008, challenging the deportation order and the decision notified on 12th June, 2007.

44. In seeking an extension of time for the bringing of this application, the second named applicant stated that he relied upon the advice of his solicitors at all times throughout the asylum process. He claimed that any delay was not caused by him and that when the deportation order was received the file was sent to the Refugee Legal Service. Counsel's opinion was sought on the merits of an application for judicial review which was received on 8th September, 2008, following which a Legal Aid Certificate was granted to initiate the proceedings which issued on 9th September, 2008. As 22nd August, 2008, was a Friday, it was likely that the earliest this letter was received was 25th August, 2008. It seems in the circumstances that it would be wholly unjust to refuse and extension of time in respect of the deportation order when it would appear most likely that the applicant only received notice of its making on 25th August, 2008, and could only have been out of time by a day.

45. There is no reason offered as to why a delay occurred in challenging the s. 17(4) decision. All of the considerations that apply in relation to the consideration of an extension of time in respect of the case of Mr. G. apply to the consideration of the second named applicant's application to extend the time in respect of that decision. In applying the same principles to that decision, the court is not satisfied that any explanation has been proffered in the affidavit furnished by the second named applicant in that regard. The reality is that the application to quash the deportation order is dependent upon a finding that the s. 17(4) decision was unlawful because the applicant claims that the deportation must fall if the decision not to consider the application for asylum further was unlawful. As in the case of Mr. G., the court must also consider whether there is any stateable ground upon which leave to apply for judicial review might have been granted in Mr. M's case as an important element in the exercise of the discretion to extend the time.

Grounds of Relief
46. Both applicants advance five grounds upon which they seek relief. Grounds 5(i) to 5(iii) inclusive relate to the failure of the Refugee Applications Commissioner to process and consider their applications for refugee status: though they were granted that status by the Czech Republic, they both claimed to have a fear of persecution in the Czech Republic because of alleged discrimination against them by officials of that State by reason of their colour and/or race. Grounds 5(iv) and 5(v) challenge the deportation order on the grounds that it should not have been made pending the proper determination of the asylum application or because the refusal to process the asylum application itself was unlawful.

47. The factual basis for the applicants' claim of fear of persecution in the Czech Republic was outlined in the ASY1 forms and the questionnaires completed by both and submitted to the Refugee Applications Commissioner. It was contended by both applicants that each intended to elaborate upon these facts during the processing of their asylum applications. However, their respective affidavits failed to provide any additional facts or materials which might have been relied upon during such a process.

Statutory Provision
48. The applications concern the interpretation and application by the Refugee Applications Commissioner of ss. 11 and 17(4) of the Refugee Act 1996, as amended.

49. Section 2 of the Refugee Act 1996, provides that a refugee:-

> "means a person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, is unwilling to return to it…"

50. Section 8 of the Act provides that:-

> "A person who arrives in the state seeking the protection of the state against persecution or requesting not to be returned or removed to a particular country or otherwise indicating an unwillingness to leave the state for fear of persecution –
>
> (i) shall be interviewed by an immigration officer as soon as practicable after such arrival, and
>
> (ii) may apply to the Minister for a declaration."

51. Section 8(2) of the Act provides that an interview shall:-

> "Where necessary and possible, be conducted with the assistance of an interpreter and a record of the interview shall be kept by the immigration officer conducting the interview and a copy thereof shall be furnished to the person concerned, the High Commissioner (for refugees) and the Commissioner."

Under s. 8(3) the Minister for Justice and Law Reform:-

> "Shall cause an application for a declaration (of refugee status) to be referred to the Commissioner…"

52. An application under s. 8(1) must be made in writing as it was in this case by both applicants.

53. The relevant elements of s. 11 of the Act provide that where an application is referred to the Commissioner under s. 8:-

> "and unless the application is withdrawn or deemed to be withdrawn and pursuant to the provisions of s. 9 or s. 22, as the case may be, it shall be the function of the Commissioner to investigate the application for the purpose of ascertaining whether the applicant is a person in respect of whom a declaration should be given.
>
> (2) In a case to which subsection (1) or section 12(2) applies, the Commissioner shall, for the purpose of that

provision, direct an authorised officer or officers to interview the applicant concerned and the officer or officers should comply with any such direction and furnish a report in writing in relation to the application concerned to the Commissioner and the report shall refer to the matters raised by the applicant and to such other matters as the officer or officers consider appropriate and an interview under this subsection shall, where necessary and possible, be conducted with the assistance of an interpreter."

That interview never took place because the applicants were notified by letter that the Refugee Applications Commissioner would not admit their applications because no purpose would be served thereby, because of the provisions of s. 17(4) of the Act.

54. Section 17(4) of the Refugee Act 1996 provides:-

> "The Minister shall not give a declaration to a refugee who has been recognised as a refugee under the Geneva Convention by a state other than the State and who has been granted asylum in that state and whose reason for leaving or not returning to that state and for seeking a declaration in the State does not relate to a fear of persecution in that state."

55. Regulation 9(1) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) provides that:-

> (1) Acts of persecution for the purposes of section 2 of the 1996 Act must:
>
> (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in subparagraph (a).
>
> (2) Acts of persecution as qualified in paragraph (1) can, *inter alia*, take the form of—
>
> (a) acts of physical or mental violence, including acts of sexual violence;
>
> (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
>
> …
>
> (3) There must be a connection between the reasons mentioned in Regulation 10 and the acts of persecution referred to in paragraph (1)."

Regulation 10 provides that a protection decision maker must take into account when assessing the reasons for persecution, *inter alia*, the concept of race including consideration of colour or membership of a particular ethnic group.

56. Article 25 of Council Directive 2005/85/EC of 1st December, 2005, on the minimum standards on procedures in member states for granting and withdrawing refugee status provides in respect of inadmissible applications that:-

> "(1) ….Member States are not required to examine whether the applicant qualifies as a refugee in accordance with Directive 2004/83/EC where an application is considered inadmissible pursuant to this article.
>
> (2) Member States may consider an application for asylum as inadmissible pursuant to this article if:
>
> (a) another Member State has granted refugee status…"

The member states were obliged to transpose this Directive by 1st December, 2007.

The Applicants' Submissions

57. The applicants submit that the Refugee Applications Commissioner has no discretion under the provisions of the Refugee Act 1996, not to investigate a claim once an application has been received under section 11. It was submitted that the applicants were entitled to the benefit of the investigative procedures pursuant to the terms of the Act in respect of their claims in order to determine whether the subsection was applicable and to enable them to make their claim in full and in accordance with fair procedures. It was further submitted that the deportation orders were tainted by the earlier refusals to admit the applicants into the asylum process and that the orders were made unlawfully.

The Respondents' Submissions

58. The respondents submit that the Refugee Applications Commissioner cannot be precluded from relying on s. 17(4) of the Refugee Act 1996, simply by making an application for asylum which raises a potentially plausible fear of persecution in the state which has granted the applicants refugee status. It was submitted that the applicants must show that they have made efforts in the Czech Republic to seek protection against the alleged persecution and either that it was not reasonably forthcoming or that the state was not in a position to offer it. It was further submitted that the onus was on the applicants to establish that a member state of the European Union, in this instance the Czech Republic, was not affording protection against persecution. It was submitted that this Court could take judicial notice of the fact that the Czech Republic observed the rule of law under a Constitution that provides for the protection of fundamental rights by an independent judiciary and afforded remedies to individuals whose rights had been infringed. The Czech Republic is subject to the supervision of the Court of Justice of the European Union and is a signatory to the European Convention on Human Rights, and thereby subject to the jurisdiction of the European Court of Human Rights in the event of breaches of the applicants' rights under the Convention.

59. In that regard, the respondents relied upon two High Court decisions in *S.Y. & R. Y. v. The Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2009] IEHC 18 and *A.Q.S & K.I.S. v. Office of the Refugee Applications Commissioner,*

the Minister for Justice, Equality and Law Reform [2010] IEHC 421.

The Case Law

60. In *S.Y. & R.Y.* the applicant was recognised as a refugee in Italy and was subsequently lawfully admitted to Ireland on her Italian travel documents. She applied for asylum and completed the appropriate application forms. She was interviewed on the following day by an officer of the Refugee Applications Commissioner's office and stated that she had left Italy to come to Ireland because she could no longer live there because economic and social conditions were very difficult. She could not find work and had no proper home. A letter was sent to her indicating that, by reason of the grant of asylum to her in Italy and because she had not claimed a fear of persecution there, the Minister was precluded from granting a declaration that she was a refugee pursuant to the provisions of s. 17(4). The main complaint in the case was that the Refugee Applications Commissioner could not refuse to conduct an investigation mandated by the Refugee Act 1996, in a pre-emptive way by concluding that the investigation would be futile because the applicant had been granted a declaration of recognition as a refugee in Italy.

61. McMahon J., having considered arguments similar to those submitted on behalf of the applicants in this case concerning the interpretation of ss. 11 and 17 of the Act, stated:-

> "It is quite clear from the affidavits and from the evidence before the court that the applicant has not made out the case that she has any fear of persecution if she is returned to Italy. On the contrary she has clearly stated in the documentation that she has left Italy largely for economic reasons and because she has no suitable accommodation. Moreover, notwithstanding the very clear indication from the Commissioner by letter on 14th June, 2007, which pointed out to the applicant that there was no claim of a risk of persecution in Italy, she has not since put forward any factual basis which would make s. 17(4) of the Act inapplicable in her case. This an important point to bear in mind since such a finding removes any room for factual dispute in relation to the "fear of persecution" issue. If a "fear of persecution" was in issue, then the applicant's case would be much stronger. Absent this, however, the issue in s. 17(4) is a purely legal one, bearing in mind again that it is common case that the applicant has been recognised as a refugee in Italy.
>
> For this reason alone, and since the section is in no way ambiguous on the issue, the first named respondent is correct when he says to conduct an interview in those circumstances would be a futile exercise. It is important to note that s. 17(4) does not give the Minister a discretion in the matter and the Commissioner's decision is not one which usurps a ministerial discretion. If s. 17(4) gave the Minister a discretion then of course the Commissioner could not pre-empt the Minister's decision. This however is not the case here as can be clearly seen from the wording of the section."

62. Mc Mahon J. also noted that the case law established that there was no mandatory obligation on the Refugee Applications Commissioner to conduct an interview in all cases and that the obligation that arose under s. 11 was not an absolute one.

63. In the *A.Q.S & K.I.S.* case Hogan J. also considered whether the Minister for Justice, Equality and Law Reform was precluded by the terms of s. 17(4) from granting the applicants a declaration of refugee status and from summarily rejecting the applications on the grounds that they had already obtained such a status in Poland, and that the Minister had no jurisdiction in the matter. The facts indicated that the applicants, who were Azeri nationals, had a very difficult life in Poland in that they encountered poverty, unemployment and racism in their daily lives and had made two abortive attempts to seek asylum in Germany and Denmark. The reason they gave for seeking asylum in Ireland was described in the application form as being "social" in nature. They also feared that Mr. S's enemies from Azerbaijan, who were said to have been agents of the Azeri Government, had managed to locate him in Poland and that he no longer felt safe there. Hogan J. considered the question of whether the applicants could realistically claim that they had a "fear of persecution" in Poland. He noted that under s. 17(4) if the applicant did not allege a fear of persecution, the Minister had no discretion in the matter and an investigation of the case by the Refugee Applications Commissioner would be a pointless exercise. Hogan J. stated:-

> "17. The present case is, however, somewhat different from that of SY. Certainly, it would not suffice for the applicants to point to the difficulties of refugee life in Poland or that their circumstances in Ireland were more pleasant and welcoming than that which they had experienced in Poland. Unlike the applicant in SY, the applicants in the present case have, however, alleged that they had a fear of persecution in the country which afforded them refugee status in that they contended that they were being watched and beset by agents of the Azeri State.
>
> 18. This brings us to the vexed question of the extent to which the threat posed by non-State actors can constitute a "fear of persecution" in the sense conveyed by s. 17(4). Of course, the complaint of Mr. and Ms. S has never been investigated by the Office of the Refugee Applications Commissioner: that, after all, is the essence of the present case. *If* the issue solely turned on the question of whether Mr. and Ms. S had alleged that they were at risk if returned, then I think that it would have been inevitable that the impugned decision would have to be quashed, since it would have been incumbent on the Commissioner to investigate the credibility of these claims. As I have, I think, already indicated, it is just possible that the claims of the S family are well-founded and that there is lurking under the surface an otherwise invisible murky underworld of intrigue, the nature of which is difficult to evaluate by reason of our almost total unfamiliarity with Azerbaijan and its complex internal politics.
>
> 19. The matter does not, however, end there. What is striking about the entire claim made by the S family is that no attempt at all was made to inform the Polish authorities and to invoke their protection in respect of these events. No suggestion has been made anywhere in the affidavits that they ever invoked the protection of the Polish authorities.
>
> 20. Of course, I do not overlook the fact that by this stage Mr. and Ms. S were thoroughly disenchanted with life in Poland. Equally, however, I cannot pass over the fact that Poland is a member of the European Union and a party to the ECHR. Quite apart from any issues arising from the ECHR, it is incontestable that an unwillingness by Poland to investigate credible (or potentially credible) threats to the life and well being of refugees within its protection would constitute a manifest breach of its EU obligations, not least having regard to the obligations contained in the Charter of Fundamental of Rights. One can, I think, also take judicial notice of the fact that the Polish Constitution of 1997 is committed to the rule of law and the protection of fundamental rights.
>
> 21. While we of all countries are presently in no position to point to the failings of others, one must, of course, acknowledge that Poland has not succeeded in every respect and that, in particular, its prison conditions have been the subject of adverse comment…at the same time, it is clear that the rights protected by the Polish Constitution are not simply illusory and that the other branches of the Polish State are subject to ultimate supervision by the Polish Constitutional Court as well as externally by the European Court of Human Rights and, indeed, by the Court of Justice.

> 22. At all events, it is clear that it is not enough for the applicant simply to allege a fear of persecution: he or she must go further and must generally show that the state in question is either not disposed to granting reasonable protection or, perhaps, is simply not in a position to do so: see generally the reasoning of the House of Lords in *Hovrath v. Home Secretary* [2001] 1 A.C. 489. To this, of course, there may be well justified exceptions, not least where it may be inferred from the general state of affairs prevailing in the state in question in the circumstances that such would be pointless or even dangerous. One can here take obvious historical examples: thus, for example, a Jewish shopkeeper in Germany who was fearful of mob violence in the wake of Kristallnacht in November, 1938 could scarcely have been expected to wait for a police report on these incidents before deciding to flee.
>
> 23. But this historical example finds no counterpart in the modern Poland which is a modern, thriving democracy. This is really where the applicants' case in the present proceedings fails, since there has been no attempt at all to show that Poland is not in a position to provide some reasonable degree of protection, not least because they never invoked the protection of the Polish state. For this reason, Mr. and Ms. S. cannot claim that they have a fear of persecution in the particular sense understood by the 1996 Act.
>
> 24. In those circumstances, I regret that I must conclude that the refugee claims of Mr. and Ms. S. are doomed to fail *in limine*, precisely because they cannot show that Poland will not protect them. In these circumstances, I am driven to the conclusion that the Office of the Refugee Applications Commissioner was justified in refusing to investigate the complaints since in these circumstances the Minister had no jurisdiction to grant them refugee status."

64. The question to be determined in these cases is what threshold of proof must an application for asylum reach if, having been granted asylum in another country, he/she now wishes to claim asylum in Ireland on the basis of a fear of persecution in that other country. Section 17(4) provides that the Minister must refuse an asylum application to a refugee who has been recognised as such under the Geneva Convention by another state and granted asylum in that state but only if a person's reason for leaving or not returning to that state and for seeking a declaration in this State "does not relate to a fear of persecution" in that state. Clearly, if no facts are advanced upon which a "fear of persecution" might be based as in the *S.Y.* case, the issue simply does not arise and the Minister is precluded from granting asylum.

65. The applicants gave as a reason for leaving the Czech Republic and seeking a declaration of refugee status in Ireland the fact that they were the subject of discrimination based on colour or race. They advanced facts which they contended supported that proposition. It must follow from the decision in *S.Y.* that if the Minister is entitled to have regard to the reasons advanced, the reasons must be subjected to some degree of scrutiny as to whether they could possibly support a claim of fear of persecution in the host state that granted asylum. If no such scrutiny were permissible under s. 17(4), a person who is dissatisfied with the asylum granting country in which he/she lives could move to this country, make a bare allegation of "fear of persecution" in circumstances in which they have little or no evidence to support the contention and thereby become entitled to have their claim investigated and processed fully by the Refugee Applications Commissioner.

66. A number of matters must be considered by the Minister in making a decision under s. 17(4) which may be gleaned from the decisions in *S.Y.* and *A.Q.S.*

> (i) An applicant who has been granted asylum in another country is not entitled to a declaration of asylum simply on the basis of a bare assertion of "fear of persecution";
>
> (ii) If there are no facts to support a claim of fear of persecution at all, section 17(4) precludes the granting of refugee status;
>
> (iii) If the applicant has established a reasonable possibility of a risk of persecution based on the facts alleged and/or proven, if returned to the asylum granting country, it is incumbent on the Refugee Applications Commissioner to investigate the credibility of the claim;
>
> (iv) The applicant must demonstrate a reasonable possibility that "generally" the state in question is either not disposed to granting reasonable protection to a person in "fear of persecution" or is not in a position to do so;
>
> (v) The applicant must also be able to demonstrate as part of his/her claim that he or she has made an attempt to invoke the protection of the host state in an effort to procure protection and this is especially so if the asylum granting state is a member of the European Union bound by the Charter of Fundamental Rights, a signatory to the European Convention on Human Rights and Fundamental Freedoms and subject to the jurisdiction of the European Court of Justice and the European Court of Human Rights.

67. If facts are advanced that establish a reasonable possibility of "fear of persecution" in the host country, that in itself will be sufficient to require an investigation by the Refugee Applications Commissioner. However, this may not always be so because as in *A.Q.S.* there may be other factors such as a failure to invoke the protection of the host country's authorities and laws in respect of the complaints underpinning the claimed "fear of persecution". In the first instance, it is of crucial importance for the Minister and on judicial review for the court to carefully examine the facts alleged and/or proven by the applicant to determine whether they are reasonably capable of being categorised as "fear of persecution" having regard to the provisions of s. 2 of the Refugee Act 1996, as amended and the provisions of Regulation 9(1) of the European Communities (Eligibility for Protection) Regulations 2006. The court must also examine the extent to which remedies available in the host state, if any, have been invoked by the applicant in relation to the wrongs alleged or whether there is any reasonable explanation for not doing so. It is also important to exercise considerable care before excluding the applicant from the asylum process having regard to the serious consequences which may flow from such an exclusion. The court must also take into account that the decision under s. 17(4) is taken at a very early stage in the asylum process before the s. 11 interview has taken place. Therefore, it is only in the clearest cases when the Minister or the court is satisfied that the applicant has not demonstrated a reasonable possibility of "fear of persecution" on the facts adduced that the Minister should exclude the applicant from the process under s. 17(4) of the Act.

68. The court is satisfied that the history furnished by both applicants of their experience in the Czech Republic in dealing with officials of the Czech State does not support any allegation of discrimination against them on the basis of race or colour. On the contrary, the applicants arrived from their respective countries of origin and claimed international protection which was granted to them by the Czech authorities following due process, and full compliance with Czech State's international obligations. Following the granting of refugee status to the applicants they were given accommodation, of which they availed, and financial support during the course of their stay. They were provided with training opportunities and language courses in order to enhance their prospects of employment. Both were assisted by a non-government agency involved in the integration of refugees. When proceedings were

brought against them in relation to their eviction, they clearly had the right to be legally represented and were for a time until they chose to discharge their legal adviser. Proceedings taken against them were adjourned from time to time to enable them to attend court and deal with them. They availed of the opportunity to present grievances to state officials from time to time. They were given travel documentation pursuant to the Geneva Convention which they used on one occasion to travel to Geneva to obtain help from the UNHCR, which intervened on their behalf, following which they returned to the Czech Republic. On their own accounts they exercised the right to free association in that they founded an association to assist refugees and asylum seekers, and freely exercised the right to protest publicly about their grievances against the Czech authorities. They remained in the Czech Republic for many years and did not seek international protection in the form of asylum on any of their trips to Germany, Switzerland or France.

69. It is clear also, however, that the applicants allege that they were assaulted by "skinheads" and threatened by Czech officials that they should leave the country. They also ascribe their difficulties with accommodation to what they believe is racial discrimination against them. This is an assertion which they clearly believe but which, on the evidence, was never taken beyond the level of belief. There is no evidence before the Refugee Applications Commissioner or, indeed, the court, that the applicants made any attempt to take legal action against any of the state authorities or officials seeking redress in respect of racial discrimination or any other wrongs allegedly committed against them. The main emphasis in the description of events furnished by the applicants is upon accommodation problems.

70. The court is also entitled to take judicial notice of the fact that the Czech Republic is a member of the European Union and subject to the laws and treaties of the Union, the Charter of Fundamental Rights and the jurisdiction of the European Court of Justice. It is also a member of the Council of Europe, a signatory to the European Convention on Human Rights and Fundamental Freedoms and subject to the jurisdiction of the European Court of Human Rights. There is no evidence advanced to support the proposition that a reasonable degree of protection was unavailable to the applicants to secure their legal rights (including a right not to be discriminated against) under the laws of the Czech Republic, the European Union or the European Convention on Human Rights and Fundamental Freedoms. In that regard the Constitution of the Czech Republic provides for the independence of its judiciary which has the obligation to uphold fundamental rights and freedoms.

71. It is clear in this case that no real attempt has been made by the applicants to avail of state protection in the Czech Republic against the perceived wrongs they have suffered or to provide a reasonable explanation for failing to do so.

72. The court is, therefore, satisfied that the applicants in this case have failed to establish on the information furnished to the Refugee Applications Commissioner any reasonable possibility that they have a fear of persecution by the Czech authorities arising out of discrimination on the basis of colour or race. Although the assertion is made, the supportive evidence is absent or selectively proffered. For example, the history of the proceedings brought by the Czech authorities against the applicants concerning their eviction is not fully set out. There are disparaging references made in respect of the system of justice and the judiciary in the Czech Republic and an implied if not explicit allegation of bias on the basis of race without any reference to any particular event to demonstrate that proposition. There is no evidence of general discrimination against refugees on the basis of race or colour put forward by the applicants. The grievances which the applicants have in relation to their accommodation constitute the main part of their complaint against the Czech authorities. Even on the documentation furnished by the applicants there is considerable evidence to support the proposition that the Czech authorities tried to deal with this matter within the rules and regulations applicable to refugee accommodation and when this failed, resorted to court proceedings. Further, there is no evidence of any attempt to redress the alleged wrongs before the Courts of the Czech Republic or by seeking legal advice under European Law or the jurisprudence of the European Convention on Human Rights.

73. The court is satisfied that much of the evidence advanced by the applicants themselves supports the proposition that the Czech authorities have endeavoured to honour their obligations to them as refugees having sought and been granted international protection.

Conclusions
74. The court is, therefore, satisfied that:-

> (1) The facts relied upon by the applicants in their respective applications for asylum in Ireland are primarily based on grievances which they had with the Czech authorities arising out of their dissatisfaction with the accommodation provided to them as refugees following the grant of refugee status;
>
> (2) The alleged assaults upon the applicants though reprehensible appear to be carried out by "skinheads" and appear to be isolated incidents and not the result of persecution of the applicants by the Czech Republic on the basis of race or colour;
>
> (3) There is no allegation of the application of discriminatory laws against the applicants on the basis of race or colour;
>
> (4) The evidence of the applicants is that having arrived in the Czech Republic they claimed and were granted asylum by the Czech Government in conformity with its international obligations and due process. The applicants were then afforded assistance in terms of periodic social welfare payments and accommodation by the Czech authorities. Issues relating to accommodation arose between the applicants and the Czech authorities and led to court proceedings and their eviction from their accommodation. Though the applicants claim that the authorities evicted them without the completion of the court process and without a court order, the applicants have failed to provide a full account of those proceedings, the extent to which they participated in them, the dismissal of their lawyer and the result;
>
> (5) The claim of racial discrimination against the Czech Government and authorities is not supported on the evidence and materials adduced. The applicants have failed to establish a reasonable possibility that they have been discriminated against as a result of an accumulation of various acts and measures sufficient to constitute a violation of the right not to be discriminated against on the basis of race or colour;
>
> (6) There is a complete failure on the part of the applicants to demonstrate that they had taken any steps to avail of protection of the laws or courts of the Czech Republic in relation to any wrongs committed against them or to offer a reasonable explanation as to why they did not do so;
>
> (7) In the circumstances the applicants have not demonstrated a stateable ground upon which to grant leave to apply for judicial review of the decision under s. 17(4) of the Act notified by letter of the 12th June, 2007, to both of the applicants;

(8) The applicants have, therefore, also failed to establish substantial grounds in relation to the relief sought in respect of the deportation orders made against them, the lawfulness of which were challenged on the basis that the decisions under s. 17(4) in respect of the applicants were unlawful.

(9) For the reasons already set out in paras 5 – 9 and 43 – 45 of this judgment and because the court finds that there is no stateable ground upon which to grant leave to apply for judicial review in respect of the s. 17(4) decisions, and no substantial ground in respect of the deportation orders, the court is satisfied that it is not in the interests of justice necessary to extend the time for the making of the applications for leave to apply for judicial review.

(10) The court is satisfied that even if granted leave to apply for judicial review, the applicants could not succeed in establishing the grounds relied upon and would not on the evidence have been able to establish that the respondents' decisions were unlawful.

(11) The court is, therefore, satisfied that the applicants are not entitled to the relief claimed in these proceedings.