Case No: [2002] EWHC 1989 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 October 2002

Before :

THE HONOURABLE MR JUSTICE BURTON

- -

Between :

European Roma Rights Centre
and 6 Others

Claimants

- and -

The Immigration Officer at Prague Airport
The Secretary of State for the Home Department

Defendants

- -
- -

Lord Lester QC, Ms Dinah Rose and Mr Guy Goodwin-Gill (instructed by **Liberty)** for the Claimants
Ms Monica Carss-Frisk QC and Mr Michael Fordham (instructed by **the Treasury Solicitor**) for the Defendants

Hearing dates : 22, 23, 24 July 2002

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JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Mr Justice Burton:

1. Immigration officials are stationed at entry points in the United Kingdom to enforce the Immigration Rules, contained in HC395 as amended ("the Rules"). Apart from EEA nationals, who are subject to quite separate treatment, all those who are not British citizens are not permitted to enter the United Kingdom by virtue of s3(1)(a) of the Immigration Act ("the 1971 Act") "*unless given leave to do so in accordance with the provisions of, or made under,*" that Act, pursuant to which the Rules are made.

2. Applications for such leave fall primarily into two categories:

   i) Those who seek and obtain visas for entry. These are available in advance of travel (*entry clearance*). This applies to "*visa nationals*", who are primarily members of some 105 countries listed in Appendix 1 to the Rules, including Bosnia, Bulgaria, Croatia, Rumania, Russia, Slovakia, Turkey and Yugoslavia (see particularly paragraphs 24-30c of the Rules). If the passenger has obtained a visa in advance then he will be admitted, subject to the provisions of Rule 321, which provides for leave still to be refused on certain limited grounds, e.g. that the immigration officer is satisfied that the visa was obtained by misrepresentation, or that there has been a material change of circumstance, or that there are certain overriding grounds such as the existence of a criminal record.

   ii) Those who apply for leave to enter upon entry.

3. The grounds upon which *entry clearance* or *leave to enter* can be sought and obtained under the Rules are relatively numerous and are set out in Parts 2-8 of the Rules. They include short visits, whether for business, work, the obtaining of private medical treatment or a holiday (e.g. Rule 40-56, 95-127), and provide for proposed students or post-graduate doctors or dentists or student nurses (Rules 60-75, 82-87F) or their spouses or children (Rules 76-81), for au pairs (Rules 88-94), those with valid work permits (Rules 128-135) and Ministers of religion (Rules 169-177).

4. The Rules apply stringent conditions to each category of applicant. For example, Rule 41 sets out the requirements to be met by those seeking leave to enter the United Kingdom as a visitor, namely that he or she:

> "*(i) is genuinely seeking entry as a visitor for a limited period as stated ... not exceeding 6 months; and*
>
> *(ii) intends to leave the United Kingdom at the end of the period of the visit as stated ...; and*
>
> *(iii) does not intend to take employment in the United Kingdom;*
>
> *(iv) does not intend to produce goods or provide services within the United Kingdom; and*

(v) does not intend to study at a maintained school; and

(vi) will maintain and accommodate himself and any dependants adequately out of resources available to him without recourse to public funds or taking employment; or will, with any dependants, be maintained and accommodated adequately by relatives or friends; and

(vii) can meet the cost of the return or outward journey. "

5. By Rule 320:

"*In addition to the grounds for refusal of entry clearance or leave to enter set out in Parts 2-8 of the Rules, and subject to Paragraph 321* [to which I have referred in paragraph 2(i) above], *the following grounds for the refusal of entry clearance or leave to enter apply:*

Grounds on which entry clearance or leave to enter the United Kingdom is to be refused

(1) The fact that entry is being sought for a purpose not covered by these Rules …

(3) A failure by the person seeking entry to the United Kingdom to produce to the Immigration Officer a valid national passport or other document satisfactorily establishing his identity and nationality …

(5) Failure, in the case of a visa national, to produce to the Immigration Officer a passport or other identity document endorsed with a valid and current United Kingdom entry clearance issued for the purpose for which entry is sought.

Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused

(8) Failure by a person arriving in the United Kingdom to furnish the Immigration Officer with such information as may be required for the purpose of deciding whether he requires leave to enter and, if so, whether and on what terms leave should be given …

(19) Where from information available to the Immigration Officer, it seems right to refuse leave to enter on the ground that exclusion from the United Kingdom is conducive to the public good …"

6. There are in addition those who seek, whether before entry or after entry on one of the above bases, asylum. Such claim, if to be made before entry, is made at the point of entry and the material Rules are in particular as follows:

> "*327. Under these Rules an asylum applicant is a person who claims that it would be contrary to the United Kingdom's obligations under the United Nations Convention and Protocol Relating to the Status of Refugees* [the Geneva Convention] *for him to be removed from or required to leave the United Kingdom. All such cases are referred to in these Rules as asylum applications.*
>
> *328. All asylum applications will be determined by the Secretary of State in accordance with the United Kingdom's obligations under the* [Geneva Convention]. *Every asylum application made by a person at a port or airport in the United Kingdom will be referred by the Immigration Officer for determination by the Secretary of State in accordance with these Rules.*
>
> *329. Until an asylum application has been determined by the Secretary of State or the Secretary of State has issued a certificate ... no action will be taken to require the departure of the asylum applicant or his dependants from the United Kingdom.*
>
> *330. If the Secretary of State decides to grant asylum and the person has not yet been given leave to enter, the Immigration Officer will grant limited leave to enter.*
>
> *334. An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:*
>
> > *(i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom; and*
> >
> > *(ii) he is a refugee, as defined by the* [Geneva Convention]*; and*
> >
> > *(iii) refusing his application would result in his being required to go (whether immediately or after the time limited by an existing leave to enter or remain) in breach of the* [Geneva Convention]*, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion, or membership of a particular social group.*
>
> *336. An application which does not meet the criteria set out in paragraph 334 will be refused.*"

7. The provisions of Schedule 1 to the 1971 Act then apply and in particular:

> "*16(1) A person who may be required to submit to examination … may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter.*
>
> *21(1) A person liable to detention or detained under paragraph 16 above may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or be released from detention; but this shall not prejudice a later exercise of the power to detain him.*"

8. As appears from Rule 327, the Geneva Convention, which entered into force in April 1954, is what imposes, upon the United Kingdom and the other signatories, its obligations to consider and, where appropriate, offer asylum to refugees as defined by that Convention. Such definition is found in Article 1:

> "*(A) For the purposes of the present Convention, the term 'refugee' shall apply to any person who … owing to 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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence …, is unable, or owing to such fear, is unwilling, to return to it* [subject to the exceptions specified in subsection C]."

9. There are a number of obligations on contracting states, but the material ones for this purpose are in Articles 32 and 33:

> "***Article 32 Expulsion***
>
> *(1) The contracting states shall not expel a refugee lawfully in their territory save on grounds of national security or public order …*
>
> ***Article 33 Prohibition of expulsion or return ('refoulement')***
>
> *(1) No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."*"

10. As I have stated, those who claim asylum at the point of entry are immediately referred for investigation upon the basis of temporary admission. They cannot be simply turned away without investigation of their claim. Others have obtained *leave to enter* or *entry clearance*, upon the basis e.g. of entry as a short term visitor or as a student, and

subsequently claim asylum once they are here: clearly some or many of those will have always intended to claim asylum but not revealed such intention. Many of those who seek asylum are detained in custody or at Centres: many others are released into the community on the basis of temporary admission subject to residential and/or reporting restrictions. Out of those who seek asylum, very many are subsequently determined to have no proper claim, but meanwhile have remained in the United Kingdom, whether in detention or in the community, for months and often for years, pending such determination (and the outcome of appeals and judicial reviews): and according to published statistics a substantial number of those who are eventually refused are never in fact removed. This is the administrative, financial and indeed social burden borne as a result of failed asylum seekers.

11. One response to this problem has been an expansion of the system of *entry clearance* i.e., primarily, the requirement for visas. James Munro, Assistant Director of the United Kingdom Immigration Service, and a member of it for 31 years, has provided three witness statements in these proceedings. He explains that visa control is a way of stemming the flow of asylum seekers:

> "*17. … One of the objectives of imposing new visa regimes … is to address the questions of asylum overload. When, for example, Columbia and Ecuador were included as visa states, this was directly in response to an increase in the number of those nationals coming to the United Kingdom in order to apply for asylum. A similar aim is present in the juxtaposed controls in France, where asylum seekers are refused leave to enter. A person who is in France and wishes to make an application for asylum should properly do so to the French authorities. The United Kingdom does not accept a responsibility to allow persons to travel to this country in order to make an application for asylum …*
>
> *(20) The application for [entry] clearance is considered in accordance with the immigration rules, albeit by an entry clearance officer rather than an immigration officer … in the last ten years a total of 38 countries or territories have had a visa regime imposed by the United Kingdom. Of these, 12 were imposed to reflect the new status formed after the political changes of the former Soviet Union and a further 14 were imposed following the United Kingdom Government's agreement to participate in the European Common Visa List in 1996. The remainder were imposed in response to specific threats to the United Kingdom's immigration control.*"

12. Where visas are required, *entry clearance* is thus necessary in accordance with the Rules before a passenger can travel with a carrier, and there are sanctions on carriers who transport a passenger without a visa in such a situation (see the Immigration (Carriers' Liability) Act 1987 and R v Secretary of State for the Home Department ex parte Hoverspeed [1999] Eu LR 595).

13. There is an extra-statutory concession available in the case of one who is already a refugee, i.e. who has already left his country of origin and is now in a third country, and who effectively wishes to claim asylum in advance, without travelling to the UK. This is set out in the Asylum Policy Instructions of June 2001 as follows:

> "*Although there is no provision in the Immigration Rules for people who are overseas to be granted entry clearance to come to the UK as refugees, Entry Clearance Officers have discretion to accept, outside the Immigration Rules, an application for entry clearance for the UK when*
>
> - *a foreign national demonstrates a prima facia case that his/her circumstances meet the definition of the* [Geneva Convention]*;*
> - *s/he has close ties with the UK;*
> - *the UK is the most appropriate country of long term refuge.*
>
> *All such accepted applications must be referred by the post abroad to the ICD* [Immigration Service HQ in the United Kingdom] *for decision on whether to grant Entry Clearance as a refugee.*"

14. In addition there is, according to Mr Munro's evidence, a further exceptional extra-statutory concession available in respect of one who is still in his or her country of origin and is thus not yet a refugee. This is described in paragraphs 27-29 of his first witness statement. It is not set out in any policy document.

15. The "*asylum overload*" has led not only to an increase in visa control but also to legislation to allow United Kingdom Immigration Officers to be positioned and operate the Rules abroad. Section 3A of the 1971 Act was introduced by s1 of the Immigration Asylum Act 1999 ("the 1999 Act"). It reads as follows (in material part):

> "*3A (1) The Secretary of State may by order make further provision with respect to the giving, refusing or varying of leave to enter the United Kingdom.*
>
> *(2) An order under section (1) may, in particular, provide for –*
>
> *(a) leave to be given or refused before the person concerned arrives in the United Kingdom …* "

16. This was given effect to by Article 7 of the Immigration (Leave to Enter and Remain) Order 2000, whereby:

> "*(1) An Immigration Officer, whether or not in the United Kingdom, may give or refuse a person leave to enter the United*

> *Kingdom at any time before his departure for, or in the course of his journey to, the United Kingdom.*
>
> *(2) In order to determine whether or not to give leave to enter under this article (and, if so, for what period and subject to what conditions), an immigration officer may seek such information and the production of such documents or copy documents as an immigration officer would be entitled to obtain in any examination under … the Act.*"

17. By HC704 a new Rule 17A was introduced into the Rules whereby:

> "*Where a person is outside the United Kingdom but wishes to travel to the United Kingdom an Immigration Officer may give or refuse him leave to enter. An Immigration Officer may exercise these powers whether or not he is, himself, in the United Kingdom. However an Immigration Officer is not obliged to consider an application for leave to enter from a person outside the United Kingdom.*"

18. There is no challenge by the Claimants in this application to the validity of this primary or secondary legislation. The effect of it is to enable the Rules to be operated extra-territorially, and not simply at the point of entry to the United Kingdom.

19. As set out above, a substantial number of those who seek asylum outside of entry, or of those who seek and obtain leave to enter on a different basis and then subsequently make their application for asylum, is found not to be entitled to asylum. This is, or was, on the evidence of Mr Munro, to which I shall refer, particularly so in the case of the Czech Republic, and that was the first country in respect of which the new powers were applied (the operation at Sangatte "*juxtaposed controls*" being pursuant to the Channel Tunnel (International Arrangements) Order 1993), following an agreement negotiated to that effect with the Czech Government, as of 18 July 2001. A Home Office statement made on 7 August 2001 read as follows:

> "*Pre-clearance immigration controls in Prague have succeeded in sending a firm signal that abuse of UK asylum and immigration procedures will not be tolerated. The deterrent effect of pre-clearance has meant the number of people seeking to abuse British immigration control has now significantly reduced. The scheme was implemented from 18 July as a flexible and short term response to the high levels of passengers travelling from Prague who are subsequently found to be ineligible for entry to the UK … The number of Czech citizens seeking asylum in Britain has been a matter of concern to both governments – only a very small percentage of Czech asylum applications* [has] *ever been granted. In the three weeks before pre-clearance was introduced there were over 200 asylum claims (including dependants) at UK ports from the Czech*

> *Republic. In the subsequent period (during pre-clearance controls) our provisional figures show that there have been in the region of only 20 claims. More than 110 people were refused leave to enter the UK in Prague during the period pre-clearance has been in operation.*"

20. Mr Munro explains further in paragraph 18 of his first statement:

> "*Asylum applications received in the United Kingdom from nationals of the Czech Republic, excluding dependants, had reached some 515 per annum in the year 1998. By 2000 it had reached 1200 per annum. Of the 1800 asylum decisions made in 2000 (which will have included applications made previously) there were 10 decisions by the Secretary of State granting asylum. A further 10 cases were granted exceptional leave to remain outside the asylum rules. The success rate of asylum appeals by Czech nationals was, at the beginning of 2001, only around 6%.*"

21. The Secretary of State is aware and accepts, according to Mr Munro at paragraph 26(2) of his first statement, that the vast majority of asylum applicants from the Czech Republic is Roma. Indeed the Home Office's own Country Assessment for August 2001 records that "*there are approximately 300,000 members of the Roma ethnic group, i.e. about 3% of the country's population ... Roma may face discrimination from elements within Czech society in employment, education, housing and access to services ... Sporadic acts of violence by 'skinheads' against members of the Roma minority have continued to occur*"; although it goes on to record that "*discrimination and harassment experienced by Roma will, in most cases, not amount to persecution within the terms of the Convention. The threshold may however be passed in individual cases.*" The picture painted by the Claimants, to which I shall turn, is bleaker. However, Mr Munro continues in the same sub-paragraph of his statement, the same criterion is applied by the immigration officials in Prague to all persons, as to whether their purpose for seeking leave to enter is to travel to the United Kingdom and seek asylum, whether they be Czech nationals or from some third country and whether they be Roma or non-Roma.

22. By s19(D) of the Race Relations Act 1976 ("the 1976 Act") introduced by the Race Relations (Amendment) Act 2000, at the same time as s19(B), to which I shall refer below, the following was provided:

> "*(1) S19(B) does not make it unlawful for a relevant person to discriminate against another person on grounds of nationality or ethnic or national origins in carrying out immigration and nationality functions.*
>
> *(2) For the purposes of subsection (1), 'relevant person' means –*
>
> *(a) a Minister of the Crown acting personally; or*

> *(b) any other person acting in accordance with a relevant authorisation.*"

23. Such a *relevant authorisation* was made in April 2001. Although it contained two substantive paragraphs, paragraph 2 and 3, it is only paragraph 3 which has been addressed during the hearing, paragraph 2 only applying, as the Government explains, to acts in the United Kingdom. Paragraph 3 of the Authorisation reads as follows:

> "*Where a person falls within a category listed in the Schedule and is outside the United Kingdom but wishes to travel to the United Kingdom, an immigration officer or, as the case may be, the Secretary of State may, by reason of that person's ethnic or national origin –*
>
> *(a) decline to give or refuse the person leave to enter before he arrives in the United Kingdom …* "

24. The Schedule referred to lists persons of seven ethnic or national origins, including (a) Kurd (b) Roma (g) Afghan.

25. This authorisation has not, on the evidence of Mr Munro, who was responsible for the operation of the pre-clearance arrangements at Prague Airport, been made use of or adopted in Prague, nor was it any part of the agreement reached with the Czech Government, pursuant to which the arrangements were implemented. He explains that the system has been operated in Prague exactly as it would be in the United Kingdom. In his first statement he says as follows, in paragraph 25:

> "*(2) The Secretary of State makes clear that it is the purpose of the Prague pre-clearance controls that each case should be approached by applying the criteria in the immigration rules. I can confirm that neither the practice at Prague nor any instructions to immigration officers involve applying different criteria, or applying them other than to the merits of an individual case. Accordingly, if there is a visitor of Roma or non-Roma ethnic origin, the immigration officer will have to decide whether or not the eligibility criteria are met. Are they genuinely seeking entry as a visitor for a limited period? Do they intend to leave? Can they maintain themselves without recourse to public funds? Black or white, Roma or non-Roma, if they satisfy the criteria they would be given leave to enter. Black or white, Roma or non-Roma, if they do not, they would be refused it.*
>
> *(3) … The Secretary of State would like to make clear that the intention at Prague is that <u>any</u> passenger who does not satisfy eligibility criteria would be refused leave to enter. It must be remembered that the Prague operation is not a pre-screening which is a prelude to a subsequent reconsideration of eligibility*

> *criteria at the United Kingdom airport. Rather it takes the place of that consideration of that eligibility.*"

26. Further at paragraph 34 he says

> "*It has never been* [the Secretary of State's] *position that the Prague arrangements are a discriminatory regime in which the substantive refusal of leave, or the nature of the examination of applicants for leave, are targeted at Roma.*"

27. The pre-clearance procedure was operated from 18 July 2001, and has thereafter continued irregularly, but with a sufficient frequency that it could not be known to an intended passenger when it would and would not be in effect. Substantial numbers of those identified by the Claimants as Roma have been refused entry by the Defendants, according to the figures they have produced in respect of the period between late January and late April 2002. These are rough figures, compiled from observations by Mr Evzen Vasil, a Czech citizen of Roma ethnicity who works as a consultant for the European Roma Rights Centre ("the ERRC"), the first Claimant, which are not accepted by the Defendants to be accurate, but they were used by both sides before me as a useful working basis. These show that during that period, out of 6170 passengers recorded by Mr Vasil as Czech nationals but not Roma, only 14 were refused entry, while of 78 who were apparently Roma, 68 were refused.

28. The ERRC is an organisation established in 1996, which monitors the human rights situation of Roma in Europe. Ms Petrova, its executive director, describes and illustrates what she asserts to be the "*daily human rights abuse* [of Roma] *often motivated by, linked with or exacerbated by extreme levels of discrimination, notably in the fields of education, housing, employment and the provision of health and social services, as well as in the administration of justice, and she refers to 'high levels of racially-motivated violence' including racially-motivated violent acts by neo-Nazi skinheads, members of the wider public and even members of law enforcement agencies*". The ERRC makes complaint of the process instituted on 18 July 2001 by the Defendants upon grounds which I shall set out below. They make complaint specifically in respect of six named Claimants, who are known, for reasons of confidentiality, only by their initials, HM, RG, MZ, AKe, IB and AKu, and also by reference to what occurred in respect of five other people who are not claimants. Two of those were the subject matter of a Czech TV programme (one Czech Roma and one Czech non-Roma) and three were the subject of the ERRC's own test ("the ERRC test"), being two Czech Roma and one Czech non-Roma. The six Claimants fall into two categories:

i) Those who said they were wishing to travel to the United Kingdom as a visitor, and were refused leave to enter. There were three, HM, RG and AKe. Of those three, two, RG and AKe, have now accepted that they were in fact intending to claim asylum, and thus were not genuine visitors.

ii) Those who said that they were intending to claim asylum. This relates to the other three, MZ, IB and AKu. They were not permitted to travel, as the decision taken by the immigration officials was that they were not seeking leave to enter within the Rules.

29. As to the five others who were the subject of the TV programme and the ERRC test, all ostensibly (because their expenses had been paid, for such purpose, either by the TV station or the ERRC, although such was not disclosed) were seeking leave to enter as genuine visitors. I shall return later to what occurred. The Claimants' case is that there was differential treatment as between the Roma and non-Roma proposed passengers.

30. A letter before action dated 15 October 2001 was sent which contained (in material part) the following:

> "*In July of this year, each of the individually named applicants attempted to travel from the Czech Republic to the United Kingdom. Whilst attempting to embark at Prague Airport they (and some of their families) were subjected to discrimination and degrading treatment contrary to Article 3 of the ECHR. These people were singled out by reference to the colour of their skin and diverted into a publicly audible and visible screening process, whilst fellow Czech passport holders with fairer skins were waved through the controls. Our clients were then examined and refused leave to enter the United Kingdom. This ongoing practice appears to be founded upon a Ministerial Authorisation dated 23 April 2001 which –*
>
> - *Purports to discriminate without justification upon the grounds of race.*
>
> - *Is irrational un frustrating the United Kingdom's obligations under the* [Geneva Convention] ...
>
> *The above-mentioned authorisation is therefore ultra vires s19(D) of the Race Relations Act 1976. We are therefore writing to advise you to cease the unlawful practice at Prague Airport and to cause the withdrawal of the Ministerial Authorisation forthwith.*"

31. A response dated 24 October 2001 was sent denying the allegations of discrimination (to which I shall return below) but in particular asserting that "*pre-clearance is operated without discrimination on grounds of race. All persons subject to pre-clearance are considered under the provisions of the relevant Immigration Rules, and on their individual merits*" and in particular making clear that "*the Authorisation does not apply to pre-clearance in Prague*". This position has been further emphasised in the evidence before me, some of which I have quoted above, and, given that in those circumstances no reliance is being placed by the Defendants on the Authorisation, which is not put forward to justify or explain the operation in Prague, no attack is now

made by the Claimants upon it. As will be seen, they still assert that its existence is relevant to what has occurred, but they accept that this judicial review application is no longer, notwithstanding the fact that it was launched primarily on that basis, a challenge to the lawfulness of the Authorisation.

32. The operation in Prague is rather challenged on the Claimants' behalf by Lord Lester QC, and by Ms Dinah Rose and Professor Goodwin-Gill (in whose very capable hands Lord Lester QC was constrained to leave the further prosecution of the claim after he had launched the challenge on the first day, due to his prior commitments), as follows:

i) that it offends against the Geneva Convention.

ii) that it has contravened s19(B) of the 1976 Act.

iii) that there has been what Lord Lester QC called a '*fettering of the discretion*' in respect of asylum.

iv) finally, a new case developed by Ms Rose, that the immigration officers were acting in breach of the Rules in rejecting those who stated that they were intending to claim asylum.

33. I shall briefly set out the nature of the Claimants' case and the Defendants' answer with regard to each.

34. First Ground: The Geneva Convention.

i) The Claimants' case

As those who want to leave the Czech Republic and travel to the United Kingdom are not yet refugees, they are being prevented from going to the United Kingdom to seek asylum and this is said by the Claimants to be, if not in breach of an express term of or obligation under the Convention, yet a breach of the obligation of good faith owed by a signatory state, in that it would be preventing those seeking asylum from gaining international protection. Although on the face of it the United Kingdom's action is simply to prevent a would-be asylum applicant from going to the United Kingdom, the submission is that if all countries operated such a system of sending immigration officers abroad, then there would be no lawful method of escape from their country of origin for the intending refugee. The consequence of success for this submission would be that the Defendants would not be able to operate the system in Prague at all so as to restrict those who announce that they would be seeking asylum in the United Kingdom. The Defendants would still be entitled to operate it so as to vet the genuineness of those asserting some other purpose, such as an intention to enter

as a visitor (although this would perhaps not justify the expense of the exercise). If so operated it would no doubt have the effect that those in the position of the Claimants would not, as did RG and AKu, need to pretend that they were intending only a short-term visit when they were in fact planning to claim asylum, but they would rather openly assert an intention to claim asylum when they reached the United Kingdom, as did three of the Claimants, and then proceed to fly to the United Kingdom and do so.

ii) The Defendants' Response.

Ms Carss-Frisk QC and Mr Fordham for the Defendants ably put forward their case to the contrary. They deny that there is any obligation under the Convention on a signatory state to facilitate, or indeed not to take steps to prevent, someone, who is not yet a refugee, travelling from his country of origin to that state to make an asylum application; the obligation is simply to address, and deal, in accordance with the Convention, with an asylum application once it is made.

35. The Second Ground: Racial Discrimination

i) The Claimants' Case

S19(B) of the 1996 Act provides that it is "*unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination*". It is alleged by the Claimants that the acts of the Immigration Officers in Prague have contravened that section (no separate case under Article 3 of the European Convention on Human Rights was run, as it was agreed to be duplicative). It is conceded by the Defendants for the purpose of this application, notwithstanding a possible argument by reference to the construction of s27(1)(a) of the 1976 Act, that s19(B) has extra-territorial effect. A number of allegations has been made, and answered, in respect of the operation in Prague (including the allegation about different processing set out in the passage of the letter before action which I have quoted in paragraph 30 above, to which the answer is made that the impression gained by observers as to separate processing is fully explained by the fact that EEA passengers do not go through the system): these have not in the event been pursued by the Claimants, or it has been accepted, as Ms Rose conceded in her reply, that they could not be established on the disputed evidence. Leaving such disputed matters aside, Ms Rose in her reply rested her case simply on the following submissions:

a) Longer and more intrusive questioning in the case of Roma than non-Roma, and the treatment of the former with greater suspicion and a requirement for a higher standard of proof.

b) In the event the decision-making was such that Roma were refused while comparable non-Roma were not.

The Claimants' case was not put on the basis of indirect discrimination pursuant to s1(1)(b) of the 1976 Act, i.e. that the effect of the practice was to admit less Roma and more non-Roma, whether because it is Roma who are more likely to want to leave the Czech Republic than a non-Roma Czech citizen or otherwise. The case is put on the basis of direct discrimination pursuant to s1(1)(a), namely that on racial grounds the Defendants have treated Roma less favourably than non-Roma, in the respects set out above. The consequence of this argument succeeding would thus not be, as with the First Ground, that the operation must, at least to some degree, stop. Indeed there would be no impact upon (and no complaint under this ground in respect of) the policy operated in respect of those who, like MZ, IB and Aku, simply said they were going to claim asylum. The claim relates only to the testing of the genuineness of those claiming to be travelling for the purpose of e.g. a short visit. It would result simply in (a) a conclusion in respect of the cases where discrimination is alleged – namely HM (no such case is pursued in respect of the other five Claimants) and by reference to the Roma involved in the TV programme and the ERRC test – that, if such be established, there was discrimination (with a possible claim for damages to follow in respect of HM) and (b) directions as to how the conduct of the operation should be altered so that it ceases to offend against s19(B).

ii) The Defendants' Response

a) It is denied that there was discrimination, whether as alleged or at all, whether by reference to the individuals whose cases are complained of or by reference to any alleged practice to be inferred from such cases. The testing and probing by immigration officers of the genuineness of claims to be a visitor was in accordance with normal practice, and with the Rules as they are and would be operated whether in London or in Prague; and in particular HM and the Roma involved in the programme and the test (and the other Claimants not said to have been the subject of discrimination) were reasonably excluded.

b) In any event the Administrative Court is submitted not to be the appropriate forum for the hearing of an allegation of discrimination, and in particular damages if and insofar as to be sought in respect of HM. Reliance is placed on ss 57 and 57A of the 1976 and s65 of the 1999 Act.

36. The Third Ground: Fettering of the Discretion

i) The Claimants' Case

The Claimants allege that the operation of the pre-clearance by foreclosing the question of asylum, in that the officers decided on the basis that an intention to travel to the United Kingdom to seek asylum did not pass muster within the pre-clearance operation so as to permit travel to the United Kingdom, amounted

to a fettering of the Defendants' discretion to consider the question of asylum. The consequence of success for this submission would be that the Defendants should give such consideration. However, unless the First Ground succeeds, as there could be no consideration of asylum in Prague within the Geneva Convention, the consequence would only be for extra-statutory consideration.

ii) The Defendants' Case

The Defendants assert that there is and was already an extra-statutory discretion exercisable by the Secretary of State, which was not excluded or ousted by the operation of the consideration under the Rules by the Immigration Officers; none of the relevant Claimants (MZ, IB, AKu) asked for such discretion to be exercised, and they could now do so.

37. The Fourth Ground

Finally there was the new case put forward by Ms Rose late in her submissions, in respect of which I permitted an amendment to the claim form to be formulated, by which Ms Carss-Frisk QC did not contend that she was prejudiced, provided that she was permitted to put in submissions in writing after the close of the hearing (to which Ms Rose was to and did respond). This case applies only in respect of the three Claimants who asserted that their purpose was to seek asylum, namely MZ, IB and AKu (the 'Asylum Claimants').

i) The Asylum Claimants' Case

The three Claimants were refused leave to enter by reference to Rule 320, which I have set out in paragraph 5 above, by which leave to enter *is to be* and was *refused* where entry was *being sought for a purpose not covered by* the *Rules*. They were not seeking entry for any of the purposes set out in Parts 2 to 8 of the Rules. They were not able to seek asylum in Prague as they were not (yet) refugees, and asylum can only be claimed (and the appropriate statutory provisions set out in paragraph 7 are only triggered) in the United Kingdom. The Claimants' submission is that a person whose purpose is to claim asylum in the United Kingdom is, within the purview of Rule 320 as applied in Prague, seeking entry for a *purpose covered by the Rules*. Ms Rose therefore submits that there was also no ground to refuse leave to enter, while accepting that at that stage there was no basis upon which leave to enter could be granted, but that those asserting an intention to claim asylum in the United Kingdom should neither be refused nor granted leave to enter by the officials in Prague, but allowed through to London.

ii) The Defendants' Case

> Ms Carss-Frisk QC's case is that an intention to claim asylum in the United Kingdom is not a *purpose covered by the Rules*, and that, even if the claim were made in London, it would not lead to leave to enter being granted by the officials. Thus the immigration officers, applying the Rules in Prague in accordance with Rule 17A (quoted in paragraph 17 above) would be obliged either to grant or to refuse leave to enter, just as in London, and, absent the triggering of the asylum provisions, which only operate in London, refusal was inevitable and lawful.

38. It can be seen therefore that success for the Claimants on all the grounds would not render unlawful the continued stationing of immigration officials in Prague to operate the Rules there, rather than in London. Success on either or both of the First and Fourth Grounds would render it unlawful for officials to prevent those asserting an intention to claim asylum in the UK from boarding planes to London. Success only on the Second Ground would have no effect on that process, but would or might affect the method of interrogation of those asserting <u>some other purpose</u> in travelling to the United Kingdom.

39. I turn then to deal with the First Ground. The Claimants' case, as summarised above, is not that there is a specific contravention of an express term of the Convention, nor was it their case, as was made quite clear both by Lord Lester QC and Ms Rose, that the obligations under the Convention extended not only to refugees but also to potential refugees – i.e. those who sought or intended to seek asylum but had not yet left their countries of origin. Their case was put by reference to Articles 26 and 31(1) of the Vienna Convention on the Laws of Treaties 1969, which read as follows:

> "*26. Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*
>
> *31(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and their context and in the light of its object and purpose.*"

40. The submission can thus be represented as follows:

i) The object and purpose of the Convention is to give protection to those seeking asylum. See for example the second and third Recitals to the Convention:

> "*Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees of the widest possible exercise of these fundamental rights and freedoms.*
>
> *Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection*

> *accorded by such instruments by means of a new agreement.*"

ii) A good faith obligation, interpreted in the light of the object and purpose of the Convention, must include an obligation, not necessarily to facilitate an asylum seeker to leave his own country and/or to reach one's border, but not to take steps to prevent him from doing so (at least unless the refugee is already in a safe third country).

41. Thus, it is submitted, where, as here, such state is in practice extending its frontier out to Prague, it must not turn away an intended asylum seeker albeit that that person is not (yet) a refugee.

42. The Claimants' solicitors, it seems, wrote a letter to the Office of the Representative for the United Kingdom of the United Nations High Commissioner for Refugees ("UNHCR") inviting the UNHCR to intervene in these proceedings. In response the UNHCR recently sent a lengthy letter, dated 19 July 2002, setting out its views ("the UNHCR Letter"), which included the following passages:

> "*4. We acknowledge that the primary questions in this legal action do not turn on the text of the* [Geneva] *Convention. Rather, they turn on understanding the international protection regime as a complex of international practice and precepts drawn from refugee law, human rights law and general principles of international law. The* [Geneva] *Convention is the cornerstone of this complex. Where, as in the present case, issues arise that strictly do not fall within the Convention's textual scope, its objectives and purposes should act as a reliable guide. UNHCR's reservations to the pre-screening procedures are best understood in this light.*
>
> *8. The* [Geneva] *Convention's objects and purposes are important in ensuring that States' approach to illegal migration is consistent with their Convention obligations. UNHCR acknowledges that States have a legitimate interest in controlling illegal migration. Such controls should not, however, be introduced in a manner which makes it difficult or impossible for refugees to access international protection. The pre-clearance procedures at Prague Airport have precisely the effect of preventing persons from boarding a flight to the UK when they express an intent to seek asylum. This means that persons at risk of persecution will be prevented from gaining access to international protection.*
>
> *9. The international refugee protection regime would be significantly jeopardised if States which have agreed to provide protection for refugees were free to cut off all reasonable*

> *modalities of access to its territory for refugees* [the letter does not say 'potential refugees'] *in the name of migration control.*
>
> *13. … Although the decision to grant asylum to a particular refugee remains the prerogative of the State, there is an implicit responsibility on States to refrain from preventing asylum seekers from finding safety or from obtaining access to asylum procedures. Without such an implied responsibility the right to seek asylum might be rendered illusory.*
>
> *14. It should be noted that denial of access to asylum procedures carries with it a significant amount of risk to the safety of the individual. Clearly the potential risks are heightened where – as is the case with the procedures at Prague Airport – access to procedures is denied in co-operation with the very country from which international protection is sought.*"

However UNHCR did not seek to intervene in the proceedings.

43. I have considered the following:

i) The ambit of the Geneva Convention:

a) Lord Lester QC accepted in terms that "*under the* [Geneva] *Convention a refugee is, by definition, a person (with a well-founded fear of persecution for a Convention reason) who is already outside their country of nationality. A Czech national still in the Czech Republic cannot in law be a refugee*". It is plain that the Convention arose after the second world war, in the context of massive displacement of peoples, and this led to the "*heavy burden on certain countries*" and "*tension between states*" referred to in the fourth and fifth Recitals to the Convention. The purpose in that regard was thus to protect and place those who were already refugees.

b) The material paragraph of Immigration Law and Practice in the United Kingdom (5th Edition) edited by Ian Macdonald QC and Frances Webber ("Macdonald") reads as follows:

> "*12.35. It is fundamental to the definition of a Convention refugee that the person should be outside his or her country owing to the fear of persecution. A person sheltered in a foreign embassy in the country of persecution is outside that country's jurisdiction, but not its territory, and cannot be recognised as a Convention refugee.*"

c) I refer further to the Law of Refugee Status (1991) by James Hathaway ("Hathaway") at page 29:

> "*The first element of Convention refugee status is that the claimant must be outside her country of origin. There is nothing intuitively obvious about this requirement: many if not most of the persons forced to flee their homes in search of safety remain within the boundaries of their state. Their plight may be every bit as serious as that of individuals who cross borders, yet the Convention definition of refugee status excludes internal refugees from the scope of global protection.*"

d) The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status provides, at paragraph 88: "*It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule* [my underlining]. *International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country*".

This does not support, and rather conflicts with, the broad statements of views set out in the UNHCR Letter.

e) The case of Saad, Diriye and Osorio v Secretary of State for the Home Department [2001] EWCA Civ 2008, to which I was referred by the Claimants, does not suggest that any obligation under, or by reference to, the Convention is owed to one who is not (yet) a refugee, but rather reinforces and expounds the obligations which are owed to one who is a refugee and has entered the territory of a contracting state (in that case the United Kingdom), and has made an asylum application: such obligations were found not to be at an end, or defeasible, by virtue of the grant of Exceptional Leave to Remain, but only by virtue of the grant, or refusal, of asylum.

ii) Good Faith Obligation. Article 31(1) of the Vienna Convention not only requires an obligation to be interpreted in good faith in the light of the object and purpose of a treaty but also in accordance with its ordinary meaning. Lord Lester QC was unable to identify any obligations actually expressed within the Convention which could be read *in accordance with its ordinary meaning* but purposively, so as to create a wider obligation in the light of the Convention's object and purpose which had then to be *performed in good faith* by reference to Article 26 of the Vienna Convention. My attention was drawn to the decision of the European Court of Human Rights in Golder v United Kingdom [1975] 1 EHRR 524, in which the Court construed Article 6 of the European Convention on Human Rights, which provides that " *in the determination of his civil rights*

... everyone is entitled to a fair ... hearing", as requiring a right of access to a solicitor. But that does not seem to me to assist in spelling out any wider obligation such as is alleged by reference to Articles 32 and 33, which I have set out in paragraph 9 above, or any other obligation. Ms Rose submits that the obligation upon which she relies is implied or implicit in the Convention. Professor Goodwin-Gill drew my attention to Kahane (Successor) v Parisi and the Austrian State, a decision of the Austro-Rumanian Arbitral Tribunal of 19 March 1929 *Annual Digest* 1929-30 No 131, referred to by Lord MacNair in his Law of Treaties (1961). MacNair described this decision as an example of the requirement of a good faith obligation within a treaty, at pages 540-41 of his work, as follows:

> "*By Article 44 of the Treaty of Berlin of 1878, which formed the condition of the international recognition of the newly created Rumanian state, she agreed that the differences in religious creeds and confessions should not be the cause of exclusion or incapacity in regard to civil and political rights, admission to public employment and to professions and industries. Rumania evaded this obligation by refusing to allow Jews to acquire Rumanian nationality and thus committed an indirect or evasive breach of this obligation.*"

However it seems to me clear from the case itself that what the Tribunal had to decide was who were nationals (*ressortissants*) of Rumania such as to be entitled to compensation in respect of damage or injury inflicted upon their property pursuant to the relevant Treaty they were considering, and they concluded that Jews who had not been allowed to be Rumanian citizens nevertheless had the "*quality of Rumanian nationals (ressortissants) in the meaning of the Peace Treaty*". Neither Golder nor Kahane therefore in my judgment support the proposition that there can be spelt out from the Convention an obligation on a contracting state not to take steps to prevent a would-be or potential refugee from approaching its border in order to be in a position to claim asylum.

44. There is however support for the contrary position, namely that there is no such obligation:

i) The passage in Hathaway to which I have referred above continues at pages 30-31 as follows (I omit of course reference to the voluminous footnotes):

> "*There is a threefold historical rationale for the requirement of only persons outside their state be eligible for Convention refugee status. First, the Convention was drafted with a specific purpose in the context of limited international resources. Its intent was not to relieve the suffering of all involuntary migrants, but rather to deal 'only with the problem of legal*

> *protection and status'. Its goal was to assist a subset of involuntary migrants composed of persons who were ' outside their own countries* [and] *who lacked the protection of a government', and consequently required short-term surrogate international rights until they acquired new or renewed national protection. Internal refugee displacements, while of humanitarian note, 'were separate problems of a different character', the alleviation of which would demand a more sustained commitment of resources than was available to the international community.*
>
> *Second, there was a very practical concern that the inclusion of internal refugees in the international protection regime might prompt states to attempt to shift responsibility for the well-being of large parts of their own population to the world community. The obligation of states under the Convention would thereby be increased, as a result of which fewer states would be likely to participate in the Convention regime.*
>
> *Third and most fundamental, there was anxiety that any attempt to respond to the needs of internal refugees would constitute an infringement of the national sovereignty of the state within which the refugee resides. Refugee law, as a part of human rights law, constitutes a recent and carefully constrained exception to the long-standing rule of exclusive jurisdiction of states over their inhabitants. While it was increasingly accepted in the early 1950s the world community had a legitimate right to set standards and scrutinise the human rights record of the various countries, it was unthinkable that refugee law would intervene in the territory of the state to protect citizens from their own government. The best that could be achieved within the context of the accepted rules of international law was the sheltering of such persons as were able to liberate themselves from the territorial jurisdiction of a persecutory state.*"

This is plainly very persuasive.

ii) Ms Carss-Frisk QC also drew my attention to the decision of the United States Court of Appeal for the Second Circuit in Sale, Acting Commissioner, Immigration and Naturalisation Service v Haitian Centers Council Inc. 509 US 155 (1993). The facts in that case concerned those who were already refugees, i.e. they had left their country of origin, and were in international waters, and the Court (by a majority of 8:1) concluded that it was lawful, and not in breach of the Geneva Convention, to turn them away (and indeed return them to their

country of origin) before they reached territorial waters. At page 180 of the report, the majority opinion addressed Article 33(1) of the Geneva Convention (which I have set out at paragraph 9 above) and at 182-183 continued as follows:

> "*The text of Article 33 thus fits with Judge Edwards' understanding that ''expulsion' would refer to a 'refugee already admitted into a country' and that 'return' would refer to a 'refugee already within the territory but not yet resident there'. Thus, the Protocol was not intended to govern parties' conduct outside of their national borders.* [Haitian Refugee Center v Gracey 257 US App DC at 413, 809 F. 2nd, at 840] *... From the time of the Convention, commentators have consistently agreed with this view. The drafters of the Convention and the parties to the Protocol ... may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose uncontemplated extra-territorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read so say anything at all about a nation's action towards aliens outside its own territory, it does not prohibit such actions.*"

It may be thought that the conclusion that the action of returning those already refugees to their country of origins was not in contravention of the Convention is a fortiori to the question as to whether any obligation is owed to those who are still in their country of origin and not yet refugees.

iii) There is a further relevant passage in Macdonald at 12.38:

> "*Although refugees must first leave their own country in order to claim asylum, many of the countries from which refugees are fleeing are visa countries, i.e. their nationals require visas to enter the UK and other West European countries. While there is nothing in the* [Geneva] *Convention that would prevent a contracting state issuing a visa to enable a person to enter as a refugee, there is nothing that obliges them to do so* [my underlining]. *UK practice, set out in the* [Asylum Policy Instructions from which I have quoted in paragraph 13 above], *is that entry clearance officers have discretion to accept applications for entry clearance where applicants meet the requirements of the Convention and have close ties with the UK ... and the UK is the most appropriate country of refuge. The visa application form will be sent*

> *to the Home Office. However, the applicant is still required to be outside his or her own country. If a visa is refused or not applied for, but the asylum seeker has nevertheless reached the UK, the absence of a visa will not prevent their claims to asylum being considered. However, the corollary to the imposition of a mandatory visa requirement for most refugee-producing countries has been the enactment of measures penalising the carriers of asylum seekers.*"

iv) This last sentence is a reference to the Immigration (Carriers' Liability) Act 1987, to which I referred in paragraph 12 above. Although it has now been replaced (in substantially similar form) by ss40-42 of the 1999 Act, it was the 1987 Act which formed the basis of the decision of the Court of Appeal, to which I have again there referred in Hoverspeed. This was a challenge to the lawfulness of such scheme by such carriers. It was in that context that in the judgment of the Divisional Court given by Simon Brown LJ (with which Dyson J agreed) there are material passages upon which Ms Carss-Frisk QC relies. The first is at 599D-E:

> "*The logical necessity for carriers' liability to support a visa regime is surely self-evident. Why require visas from certain countries (and in particular those from which most bogus asylum seekers are found to come) unless visa nationals can be prevented from reaching our shores? Their very arrival here otherwise entitles them to apply for asylum and thus defeats the visa regime* [my underlining]. *Without the ICLA 1987 there would be little or no disincentive for carriers to bring them. Nor is the problem confined solely to asylum seekers. Many others seek to enter this country as illegal entrants, and the weeding out of those with no or no valid travel documents before they arrive is also crucial to the control system.*"

The other material passage in Simon Brown LJ's judgment is at 603D:

> "*Well-recognised though it is that even genuine asylum seekers may need to resort to false documents to reach this country so as to make their claim for refugee status … and that their claims (if properly made on arrival) must not on that account be rejected … no-one suggests that the respondent is under the least obligation to facilitate their arrival in the first place. Rather, as I have already sought to explain, there being no means by which the carrier can distinguish the genuine from the bogus asylum seekers, the ICLA 1987 is designed to impede their arrival … I add only that such tension as*

> *undoubtedly arises from our obligation to asylum seekers under the* [Geneva] *Convention on the one hand, and our entitlement to impede their arrival* [my underlining], *on the other, is less acute than usual in the present case: the effect of the ICLA 1987 here is merely to leave intending claimants either in France or in Belgium, both now authoritatively declared by our courts to be safe third countries.*"

45. I turn to the question of visa control, referred to in the passage from Macdonald and in Simon Brown LJ's judgment. This was a problem for the Claimants. I have set out (in paragraphs 11 above) the passages from Mr Munro's evidence in which he emphasises and explains the use of visa control to seek to solve the problem of *asylum overload*, caused by the arrival of asylum seekers at United Kingdom ports and airports resulting in their claiming asylum and, whether eventually justified or not, in their being given temporary admission. Lord Lester QC's submissions were:

i) It was acceptable for the United Kingdom and other countries to operate such a system of visa control, provided that there was a fall back arrangement for the extra-statutory consideration of the position of those who would not otherwise qualify for a visa, but wished to make an advance asylum application, such as is set out in the Asylum Policy Instructions.

ii) His complaint however was:

a) that the operation in Prague was introduced because it would have been too politically sensitive to introduce visa control in respect of the Czech Republic, and was an inappropriate way of achieving the same result by stealth.

b) that such a system, just because it was not visa controlled, was unsatisfactory because, on construction, the Asylum Policy Instructions only applied in respect of visa countries, such that there was, unlike in a true system of visa control, no available fall back arrangement for advance asylum applications.

46. Ms Carss-Frisk QC in response justified the Prague operation as simply another – and more flexible, because it could be operated sporadically or irregularly – alternative to visa control: and made clear, by reference to Mr Munro's evidence to which I have referred in paragraph 14 above, that the same extra-statutory concession in respect of consideration of advance asylum applications by those not yet refugees applied in respect of the Prague operation as would apply in respect of a visa country, in both cases not being set out in writing. Ms Carss-Frisk QC submitted, by reference to the position taken by Lord Lester QC, which had been repeated by Ms Rose in her submissions, that if there were an obligation deriving from the Geneva Convention not to prevent people

from entering a country to seek asylum, then that would apply just as much to outlaw a visa regime, to which, as set out above, no exception had been taken by the Claimants.

47. In reply Ms Rose resiled from the position which she and Lord Lester QC had previously taken, to submit that a visa system whose purpose was to prevent asylum seekers (which is of course exactly what Mr Munro had asserted at any rate in relation to the 38 most recent such countries) would also, on their construction, offend against the Convention.

48. It must, in my judgment, be right that a pre-clearance system such as here (with the same extra-statutory concession for advance asylum requests) would be no more or no less objectionable than a visa control system instituted for the same purpose. In those circumstances the approach of the Divisional Court in Hoverspeed is directly persuasive.

49. I am entirely clear as follows:

i) On the basis of the Convention, as it stands at present, there is no obligation on a signatory state not to introduce or continue a system of immigration control, whether by way of a requirement for visas or by the operation of a pre-clearance system such as is here being considered, to prevent those who are not yet refugees and are still in their countries of origin from travelling to the territory of the signatory state, or make it more difficult for them to do so.

ii) The UNHCR letter does not in fact purport to say the contrary. The UNHCR has, it seems, reservations about the pre-clearance system, but it does not explain either how in practice it is to be distinguished from a visa system, and whether that system too is to be regarded as objectionable, and if so on what basis, or how the position it takes in the Letter is consistent with its own Handbook.

iii) If such an obligation is to be imposed, it must derive from a further Convention, and not implied into the present one. No doubt any discussions in that regard would need to consider the question of how far and how much further there can be intervention within the internal affairs of countries in order to protect those who are, or allege they are, being persecuted (and whether such is to be best done by facilitating their departure from such a country): and how far indeed the UNHCR, as was canvassed in the course of the hearing, is then to be extending its responsibilities from refugees to potential or internal refugees. But whatever may occur in the future, I am satisfied that the ambit of the Convention at present does not so extend.

50. I turn to the Second Ground. Apart from s19(B), the Claimants draw specific attention to s71 of the 1976 Act, which provides for an obligation on bodies such as the Immigration Service to "*have due regard for the need to eliminate unlawful racial discrimination*". As to the authorities, there is no dispute between the parties as to what

can be drawn from them. I have been referred to King v Great Britain-China Centre [1992] ICR 516, Zafar v Glasgow City Council [1997] 1 WLR 1659, Nagarajan v London Regional Transport [2000] AC 501 and Anya v University of Oxford [2001] ICR 847. These emphasise or set out the following principles:

i) A complainant must prove his or her case on the balance of probabilities (King at 528-9 approved in Zafar at 1664f).

ii) Claims brought under the race and sex discrimination legislation present special problems of proof for complainants, since those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them (Zafar at 1664d).

iii) It is unusual to find direct evidence of racial discrimination. The outcome of the case will therefore usually depend on what inferences it is proper to draw from the facts (King at 528-529 approved in Zafar in 1664f-g).

iv) If a claimant can show that he has been less favourably treated than comparable individuals from a different racial group, the court will look to the alleged discriminator for an explanation. If no explanation is put forward or if such explanation is inadequate or unsatisfactory it will be legitimate to infer that the discrimination was on racial grounds (King at 528-9 approved in Zafar at 1664h).

51. The Claimants draw attention to the danger of stereotyping, which does not need to be deliberate, and to guidance to be obtained form Lord Nicholls in Nagarajan at 511H-512D:

> "*All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover we do not always recognise our own prejudices ... Members of racial groups need protection form conduct driven from unrecognised prejudices as much as from conscious and deliberate.*"

52. Balcombe LJ in West Midlands Passenger Transport Executive v Jaquand Singh [1988] 1 WLR 730 at 736 referred to "*a conscious or unconscious racial attitude which involves stereotyped assumptions*", and there was helpful reference to the Court of Appeal decision in Skyrail Oceanic Ltd v Coleman [1981] ICR 864 (itself cited in a recent Hong Kong case in which Lord Lester QC was involved).

53. I have set out in paragraph 35(i) above the case upon which the Claimants rest, as slimmed down and finally summarised by Ms Rose in her reply submissions. I shall deal with the periphery, before reaching the main substance:

i) Notwithstanding the non-pursuit of a number of allegations originally made, the Claimants' case remains that Roma were targeted, and that, the purpose being to remove asylum applicants, it was to Roma that the main thrust of the operation was directed.

ii) The existence of anti-Roma diatribes in the United Kingdom press does not seem to me at all probative against the Defendants. In any event, all the extracts that I was shown were from 1997 to 1998, more than three years before the matters in issue in this case.

iii) Criticism is made by the Claimants of the way the Defendants have responded to the case brought against them, namely in that no witness statements have been provided by the officers who interviewed the six Claimants, not in the event by way of complaint, but rather by way of a submission, that in the absence of evidence from such officers, it made it the more difficult for the Defendants to meet the Claimants' case. I deal with this as follows:

a) The case is made that there is an objectionably discriminatory practice in Prague. Insofar as this is made by way of general allegations, it is answered by Mr Munro, the man responsible for the operation, although not on a day-to-day basis. In any event, and in the light of that evidence, many of the allegations made are not pursued.

b) No complaint is in any event now made on grounds of discrimination in respect of five of the six Claimants. The contemporaneous documents which have in any event been produced in respect of the five more than justify the Defendants' position, had such complaint been pursued.

c) Insofar as the case of discrimination is supported by reference to individuals, this is now only HM and the additional evidence of those involved in the ERRC test and the TV programme, whom I shall call the 'non-claimants'. The Defendants are entitled to seek to meet that case, or to give their explanations, by reference to the contemporaneous documents, and to the evidence adduced by the Claimants and non-claimants. Mr Munro's case is simply that the same practice was operated as is operated in London, where immigration officials regularly test the genuineness of cases put forward that a visitor satisfies the requirements of Rule 41(i)-(vii).

iv) The Defendants make a case that this is not the appropriate forum for what they submit to be in essence a claim of discrimination against individuals – HM and the non-claimants. Ms Carss-Frisk QC points out that, by virtue of s57 of the 1976 Act, a claim that another person has committed an act of unlawful discrimination may be made the subject of civil proceedings as there specified, but such proceedings may in England and Wales only be brought in a designated

county court. Further by s57A "*no proceedings may be brought by a claimant under s57(1) in respect of an immigration claim* [i.e. that a person has committed a relevant act of discrimination against the claimant which is unlawful by virtue of s19(B)] *if the act to which the claim relates was done in the taking by an immigration authority of a relevant decision* [e.g. relating to the entitlement of the claimant to enter or remain in the United Kingdom] *and the question whether that act was unlawful by virtue of s19(B) has been or could be raised in proceedings on an appeal which is pending or could be brought under* [s65] *of the 1999 Act*": and neither HM nor any non-claimant has (yet) brought a claim under s65, which provides that "*a person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom racially discriminated against him ... may appeal to an adjudicator against that decision*". This application is therefore, the Defendants contend, an inappropriate way round the usual and indeed necessary route, and on Administrative Law principles should not be permitted. However these proceedings are not (or not primarily) put forward by the Claimants on the basis of an individual claim, whether for damages or otherwise by HM, and certainly not by the non-claimants. The evidence in relation to them is sought to establish or support a case that the Prague operation has been carried out discriminatorily.

v) Complaint is made by the Claimants that the Defendants did not keep records of the operation so as to document the ethnicity of those taking part. They point to the Code of Practice on the Duty to Promote Race Equality, published by the Commission for Racial Equality, and to recommendations in it for ethnic monitoring. They accept that the Code is not legally binding, and that the keeping of any such records is not obligatory, but they point to the general duty in s71 of the 1976 Act set out in paragraph 50 above, and to the dicta of Sedley LJ in Anya at 852b, whereby the fact that "*equal opportunities procedures were not used when they should have been may point to the possibility of conscious or unconscious racial bias having entered into the process*". The Defendants do not record ethnicity, and indeed that is relied upon as part of their case that there is no discrimination i.e. that the process of considering the grant of leave to enter is 'colour blind'; but that is characterised as an old-fashioned response by Ms Rose. I am satisfied:

a) that the absence of monitoring proves nothing either way in this case. There is, in my judgment, a difference from a recruitment situation, where the absence of proper monitoring may argue that the necessary anti-discriminatory steps have not been taken. Here the complaint is of the targeting of Roma, while the Defendants' case is of acting exactly the same way as in the United Kingdom. If there is in fact such targeting, the presence of ethnic monitoring would be no palliative or remedy.

b) In any event it is common ground between the parties that if I find discrimination, the question of whether in the future the institution of ethnic monitoring would be a palliative or a remedy would then arise. If

> however I do not find that there has been to date unlawful discrimination, there is no case put forward on the Claimants' behalf that I should, by way of *quia timet* injunction, provide against the risk of discrimination in the future.

54. Shorn of such inessentials, the case for the Claimants depends upon the following:

i) The existence of the Authorisation of April 2001, referred to in paragraph 23 above.

ii) The statistics referred to in paragraph 27 above.

iii) The evidence of what occurred in relation to the Claimants and the non-claimants.

55. The Authorisation. The Claimants assert that the existence of the Authorisation must have influenced the approach of the Immigration officials to Roma. As set out above, it was originally asserted by the Claimants that the Authorisation was in fact being applied, and declarations as to its unlawfulness were sought; but it is in any event still relied upon by them, because of Mr Munro's evidence that the existence of the Authorisation was known of by the officers, in the sense that they had learnt about it in the course of their training, and that no specific instructions were given to those officers who were sent to Prague (i.e. that the Authorisation was not to be applied). Mr Munro said at paragraph 35 of his first statement:

> "*There was therefore no question of any instruction to immigration officers that they were entitled to discriminate on racial grounds, as to whether to refuse leave to enter or for them to examine or in what way. Indeed there was no special instruction to immigration officers about how to approach their decision-making at Prague, for this simple reason. Staff are all fully qualified and experienced ... There was no need for any specific instruction as to the eligibility criteria contained in the immigration rules, nor as to asking such questions as they considered necessary in order to decide eligibility. I have discussed this point with Peter Heyes, an Inspector who has been a member of the Immigration Service for 33 years and who was an HMI on the original team for the first phase (18 July 2001 to 9 August 2001). His understanding reflects mine: that the staff engaged on the pre-clearance control was required to reach decisions to the standards and under the criteria of the immigration rules, based on the individual merits of the case.*"

56. He expanded on this in a third statement at paragraph 6 "*Had* [Prague] *been in the nature of a specific port exercise applying the Authorisation then there would have been an instruction to that effect*": and at paragraph 14:

> "*I had operational oversight of the Prague operation. I went to Prague and participated. There was nothing which I saw which suggested to me that any individual officer was under the misapprehension that the Authorisation was to be applied at Prague, and that it was appropriate to discriminate either as to questioning or decision-making.*"

57. It is difficult for the Claimants to contest this; but both sides at the end of the day assert that the proof of the pudding is in the eating – i.e. the Claimants look at the other two aspects, with which I shall now deal, statistics and individual cases, and assert that they show that the Authorisation must have informed the conduct or approach of the officials: while the Defendants look at the same evidence, and assert that there is no evidence at all to support any application of the Authorisation – and indeed contend that the contemporaneous documents give no sign of any such approach, which would have been natural, if not inevitable, if the officers had believed that it applied. It is necessary therefore to look at the rest of the picture.

58. Statistics. The Claimants rely upon the figures which I have set out in paragraph 27 above to support their case that there was differential treatment of Roma and non-Roma. As I have stated, they do not rely upon the figures to establish indirect discrimination – i.e. an inevitable result of the operation of the process – but as evidence of the existence of direct discrimination. Even allowing for the rough and ready figures, and for the fact that there is bound to have been faulty identification of Roma and non-Roma, as the classifications were all done only by observation, nevertheless 68 out of the 78 recorded as Czech-Roma were refused leave to enter, and only 14 out of 6170 of those recorded as Czech non-Roma during the relevant period.

59. I am wholly unpersuaded by these figures:

i) It is common ground, indeed Ms Rose herself expressly so stated in her submissions, that it is well known that the overwhelming majority of Czech nationals applying for asylum are Roma. On the basis of the system operated by the Defendants (of which complaint is made by way of the First and Fourth Grounds), if a passenger states that he is intending to seek asylum, he will be refused leave to enter. The result of that is bound to have been that:

   a) Any Roma so announcing will have been refused – irrespective of the nature of any questioning etc. Such is the case in respect of MZ, IB and AKu, who make no claim in respect of discrimination.

b) Any Roma intending to seek asylum, but not intending to disclose that fact, may have asserted a (non-genuine) purpose of a short visit, but been disbelieved. Such was the case of RG and AKe who make no claim of discrimination.

c) Given the "common ground" that there would be few if any applications for asylum by non-Roma Czech nationals, and that it is not known whether there were any such applicants among the 6170, there must be a substantial likelihood of there having been no or few non-Roma Czech asylum applicants in that number, and hence few or no automatic refusals within (a) above and probably similarly so in respect of (b) above.

It is not therefore surprising that there is a massive differential between the numbers of non-Roma and Roma rejected.

ii) As to the 68 out of 78 Czech Roma who were refused, there is, in the light of the evidence before me, nothing surprising about this. Leaving aside the challenge to the "no-asylum applicants" policy which is not based on discrimination, the only Claimant who complains of discrimination is HM. That case is contested, and the Defendants submit that she was rightly refused leave to enter. But making the assumption in HM's favour that she should have been allowed leave to enter, that means that, of the six Claimants, only one should have been allowed through and five were understandably (or at any rate non-discriminatorily) refused: if the Defendants' case be right, then all six Claimants were properly refused. At best therefore, on the Claimants' case, in the absence of any discrimination one out of six of these Claimants should have been allowed through, a not dissimilar ratio to the ten out of 78.

60. Given the existence of the 'no asylum applicants' policy, the statistics therefore in my judgment do not of themselves support the case for the Claimants and/or are adequately explained by the Defendants.

The Individual Cases

61. The case made by the Claimants is:

i) There was unfavourable treatment of identified individuals, HM, and, of the non-claimants, so far as concerns the parties in the TV Programme the Roma, Mr Samko, and as to those in the ERRC test the Romas, Mrs Grundzova, who was not given leave to enter, and, to a lesser extent, Ms Polakova, who was.

ii) Such unfavourable treatment is to be compared with that of a hypothetical comparable non-Roma and, in the case of the television programme, with the

comparable non-Roma Ms Novakova, and as to the ERRC test, the comparable non-Roma Ms Dedicova.

iii) It is to be deduced from this, and by reference to the statistics, that the operation in Prague was designed or targeted against Roma and was discriminatory on racial grounds.

62. HM was refused leave to enter. She gave an account as follows in her witness statement:

> "*5. For about ten minutes, one gentleman asked me questions in English, and the interpreter translated them into Czech. He asked where I was going and why. I showed him my invitation* [from her grandson-in-law], *and said I would like to see how they were getting along. He asked how much money I had with me. I told him how much and once again showed him the sponsorship declaration, saying that if it would be necessary to pay something else, my granddaughter would certainly pay it. They asked why I was travelling there alone and without my husband, so I said that he had health problems and could not travel. I added that perhaps I would be able to convince my granddaughter to return. Then they told me I should wait five minutes and they would say if I could leave or not.*
>
> *6. Instead, I had to wait about 20 minutes, and then they sent me and the interpreter to a special room. There, they told me that I had not received permission for the flight to England … When I asked them why, the interpreter said that for one I was going to visit immigrants and 'they simply can't support you', and for another I had too little money with me.*"

63. This does not suggest that the questioning was hostile or unnecessarily intrusive. The contemporaneous documents have been produced. The conclusions of the officer are recorded as follows:

> "*The* [passenger] *had limited funds available to her, and no proof that any further funds were available. She was visiting a distant relative, who although he stated he would financially support the* [passenger], *was also unemployed, without any proof of ability to support her. The fact that she appeared to be the only person who had visited* [them] *in UK, rather than closer relatives, was also somewhat unusual. In addition the timing of the visit, when she was awaiting spinal surgery and her husband was still recovering from a heart attack. In view of the foregoing, I was not satisfied* [that the passenger] *was a genuine visitor who would not be a burden on public funds.*"

64. If this were a judicial review of this refusal, I would find it difficult to accept that the decision of the officer was Wednesbury unreasonable. He was plainly addressing the requirements of Rule 41.

65. The TV programme featured a Roma, Mr Samko, and a non-Roma, Ms Novakova, both of whom who were in fact journalists. There is a transcript. Ms Novakova was given leave to enter. The interview was recorded as follows:

> "*I.O.: How long are you going for?*
>
> *NN: For a week.*
>
> *I.O.: And the purpose of your journey, please?*
>
> *NN: For a holiday, to visit a friend.*
>
> *I.O.: What is the name of your friend in Great Britain?*
>
> *NN: … if you look at the paper it is written there.*
>
> *I.O.: What is your job?*
>
> *NN: I work as a secretary for an import/export company.*
>
> *I.O.: Is this friend of yours your boyfriend?*
>
> *NN: No, just a friend. I have not seen him for two years. That's why I am going to visit him now.*
>
> *I.O.: Do you have any money?*
>
> *NN: Yes $200.*"

66. The interview with Mr Samko went as follows:

> "*I.O.: How long do you intend to stay in Britain?*
>
> *RS: Just a week or two. A week, actually. I have an air ticket valid for a week.*
>
> *I.O.: And what are you going to do there?*
>
> *RS: I'm going to see a friend.*
>
> *I.O.: And what is the friend doing there?*
>
> *RS: He is a freelancer; he does all kinds of odd jobs. I only met him recently.*
>
> *RS: Hang on, I have this thing here …*

I.O.: What's his name?

RS: Hang on … Smis, Smith.

I.O.: When did you meet him?

RS: It's been a month, yeah, he was here a month ago. Here in Prague. I. How do I earn my living? I am also a freelancer. I help out this Romany Foundation. Translate into Romany.

I.O.: Do you have an invitation from this person?

RS: No I don't. But he knows about me. We talked.

I.O.: He is married?

RS: No, no, no.

I.O.: And where does he live?

RS: In London.

I.O.: Where exactly?

RS: Jesus, there's a lot of it. He told me this.

I.O.: Do you have an address?

RS: Well I am supposed to meet him. He will be waiting for me at the airport.

I.O.: How much money are you bringing?

RS: Well about USD 200."

67. He was then invited to walk into the next room for further interview:

"*RS: Why am I here?*

I.O.: I must be satisfied enough to believe that you really intend to just visit Britain and nothing more, and, at this moment, I lack such satisfaction. Do you understand?

I.O.: So how long was this Mr Smith in Prague?

RS: A month almost. Almost a whole month.

I.O.: And what did he do here?

RS: Seeing friends, he had a group of friends and we just got together and went out to have a beer, just like that. And then I spent almost three weeks with him.

> *I.O.: Meaning, how many times did you get to see him over those three weeks that he was …*
>
> *RS: Well every second or third day. We got to see each other every third day.*
>
> *I.O.: Do you have any savings? A savings account, a bank account?*
>
> *RS: No.*"

68. Leave to enter was refused.

69. This differential treatment is complained of. It seems to me entirely clear that there is a substantial difference, and that there was justifiably both a longer and more intrusive investigation. Whereas Ms Novakova gave precise answers and identified immediately the name of the friend in Great Britain and showed a paper (which may have been the invitation, but in any event recorded his name), Mr Samko's behaviour could reasonably have been regarded as suspicious. In particular he took time to come up with a name of the friend he was said to be visiting, and, when he did, it was, hesitantly, "Smith", without a first name, and with wholly inadequate detail. In my judgment the less favourable treatment, namely the longer interrogation and the eventual refusal, in respect of the Roma as compared with the non-Roma is entirely justified. Both of them were of course 'plants', but the latter acted in a far less suspicious way and the former, surprisingly unprepared for a 'plant', was almost bound to be refused. I see no support here for a case of discrimination on racial grounds.

70. The ERRC test involved two Roma, Ms Grundzova and Ms Polakova, and one non-Roma, Ms Dedicova. All three were advanced the funding for a trip to the United Kingdom by the ERRC. None of the three of them found the interrogation a pleasant experience: in the case of Ms Dedicova, although she found it '*not as horrible as* [she] *had expected*', she was interviewed immediately by an officer '*without even smiling*'. Ms Grundzova was plainly very nervous (even before she started she had a '*sinking feeling*') and Ms Polakova received a *'frosty look*'. All three were lying, because they took steps not to reveal who had paid the expenses and costs of the trip, and Ms Grundzova seems to have been the most uncomfortable of the three about this. Ms Dedicova said that her flight had been paid for by a friend, as a result of which she said the officer looked '*a bit surprised*', but the officer seems to have gained the impression that this was the friend whom she was visiting. She explained that she was working part time for a personnel agency and studying. Ms Polakova said she was given the money by a friend, but revealed that she was chief editor of Broadcasting for the Roma Minority on Czech Radio (she even gave her 'nationality' as 'Roma'), and that she received 1900 crowns per month. Ms Grundzova said that a friend (the contemporaneous notes recorded '*boyfriend*') had paid for the flight ticket. She was "*then asked who this friend was, what work he did and if we were living in a joint household. I told her that this was a private matter and I didn't feel obliged to tell her such things.*" She was asked who had given her the funds of $150. Again this was a difficult question if she was not to reveal the funding by ERRC. She "*replied that it was*

just mine and added that really I felt this should be sufficient information for her. I felt as if I were being questioned by the Police, as if I had robbed a bank and the Police had evidence that I was guilty. Nevertheless I tried to answer all the questions. However I did not see why I should reveal any private information." She had also told the officer that whether she had any bank accounts "*was not and would not be any business of hers*". She summarised the position thus:

> "*I would like to point out that the Officer dealt with me as if she suspected me of lying from the very beginning. Her attitude to me was cold and suspicious. Her very first questions were offensive and made me feel anxious and humiliated. I had a general feeling that she hated me, that she was hostile towards me only because of my Romany origins. Nevertheless I replied in an attentive and calm manner. I endeavoured to control my anger and depression. However it was not easy at all.*"

71. The contemporaneous notes in respect of Mrs Grundzova included the following in respect of the officer's conclusions; after dealing with the question of the reason she had given for her visit to the United Kingdom, being to visit a sister, as to which the officer expressed his reservations, he continued:

> "*Asked about her circumstances in the Czech Republic, the passenger said that she lived alone with her 8 year old daughter, who was being looked after by her mother in the passenger's absence. The passenger said she was a cleaner earning* [£200-220] *per month. However she had no evidence of her employment or income. She had no savings and her boyfriend had financed the trip. However she did not know his job despite knowing him for two years. In view of the above, I considered that the passenger lived in relatively poor circumstances in the Czech Republic, particularly as she had not provided any of the funds for the trip herself. Moreover, I was not satisfied that she had relatives there, and that this was her first visit, given that her current passport was only valid for one year.*"

72. There are no contemporaneous notes in respect of Ms Polakova, who had the well-paid job described, and was let through. She stated as follows in her witness statement:

> "*14. She continued by asking me who I was going to visit – I replied my brother – she asked what he was doing there – I replied – he lives there. How did he get there? My answer "He applied for asylum three years ago". Then she asked me if my brother worked or received benefits. I replied that I did not know. I had no information in this respect, and therefore could not give an accurate answer. The officer became fidgety after this reply and I was feeling extremely annoyed at the nature and length of these enquiries. …*

> *18. The entire interview lasted an incredibly long time – in my opinion it was about half an hour – and it was conducted in an atmosphere of distrust and suspicion. The questions made me feel uncomfortable. I got the feeling that she was trying to upset me. After the interview she told me to go to a small room behind the back on the left that was already occupied by one passenger. It was a young Czech, non-Roma, who had just been refused permission to enter Britain. He started to shout and throw his luggage about. It did not help him at all. ... I saw the officer who had conducted the interview with me making a call ... It seemed to me that she wanted to make me nervous as well and to provoke me to behave like that man. She called for about fifteen minutes and then she informed me that I could fly.*"

73. All three were not telling the truth in material respects, namely in relation to their funding, which would be an important question relating to Rule 41, and although all were in fact intending a short visit to the United Kingdom and to return to the Czech Republic, all had been put up to it. There is no doubt that Ms Grundzova had a more torrid time than Ms Polakova, who herself, although she was given leave to enter, was given a longer interrogation than Ms Dedicova. It seems to me that it is not surprising that Ms Grundzova was refused leave to enter. Should Ms Dedicova have also been refused? Was Ms Polakova given a harder time because she was a Roma? Neither Ms Grundzova nor Ms Polakova are claimants in the proceedings.

74. The conclusion that is sought to be drawn is that the Prague operation was discriminatory against Roma. I am wholly unpersuaded that such a proposition is supported or furthered by the refusal of leave of entry to HM or by the TV programme. Is the apparently differential treatment of the Roma in the ERRC test enough, coupled with the statistics, to draw a conclusion that the operation was targeted against Roma and was discriminatory? I am satisfied that this is not established:

i) The ERRC test is in my judgment insufficient to draw any conclusion as to the nature of the whole operation, not least given the fact that all three were acting out a part.

ii) The evidence as to the individual Claimants cannot be ignored. I have already concluded that I do not draw support for a case for discrimination from the case of HM, and obviously the same goes for the three Claimants who simply claimed asylum and do not allege discrimination. But the evidence in respect of the other two Claimants must plainly be taken into account. RG and AKu both now admit that they lied by concealing their intentions to claim asylum, and no longer claim discrimination. The contemporaneous notes in respect of RG show his interrogation, and the carefully developing thought processes of the officer, whereby, notwithstanding the then assertion by RG of an intention of a short term visit, by reference to questioning as to the wife's cousin whom he alleged that he was to visit, and his own financial circumstances, the officer concluded that the expenditure of a trip "*was wholly out of proportion to the likely resultant*

benefits for someone of modest economic background" and that he "*could not be satisfied that the passenger and his family were genuinely seeking entry as visitors for the period stated*". When Ms Rose talks of a 'bulls eye' in relation to the ERRC test, it is in the context that none of the evidence in relation to the Claimants, or the other non-claimant, supports the case of discrimination.

iii) Mr Munro makes clear in his evidence that different officers have different techniques and different methods. Not always are the same questions asked, and certainly interrogations will vary in length, depending upon whether early answers are satisfactory or not. I am not persuaded that the evidence of Mr Munro is displaced; namely that the authorisation was neither in place nor in mind, and that the operation in Prague was to be and was carried out non-discriminatorily. Whatever might be the position if Ms Grundzova or indeed Ms Polakova were a claimant in respect of their own individual circumstances (whether in s57 proceedings, if permitted, or otherwise), I am wholly unpersuaded that, even taken with anything that could be made of the statistics, this limited evidence shows that the operation in Prague was carried out discriminatorily, or a fortiori that the six Claimants are entitled to relief in respect of discrimination, or in particular that any of the Claimants can establish, as asserted in Lord Lester's skeleton argument, that the practice of pre-clearance is being operated in a way that discriminates against Roma on racial grounds. In those circumstances I express no view either way as to the desirability of the introduction, either in the United Kingdom or in Prague, of any system of recording by immigration officials of ethnicity.

75. The third ground relates to fettering of the discretion. As foreshadowed in paragraph 36 above this can be dealt with shortly. There is an extra-statutory concession, still available to the Claimants, although (i) its ambit is restricted, as indeed is that which is publicised in the Asylum Policy Instructions and (ii) it is particularly unsatisfactory that it is not presently recorded in writing, and that should be speedily done. When MZ, IB and AKu were refused leave to enter because they were intending to seek asylum, was the Defendant's discretion fettered? Ms Rose submits that by the refusal of leave to enter, there was an implicit if not explicit representation that no route was available to seek asylum outside the United Kingdom. This however does not take account of what was in fact stated to them. MZ and AKu received a refusal in the following terms: "*You have sought entry to the United Kingdom in order to claim asylum but this is not a purpose covered by the Immigration Rules*": IB's refusal stated that "*you have sought entry to the UK in order to claim asylum but there is no provision in the Immigration Rules to apply for asylum abroad*". These representations were (subject to the Claimants' contentions in respect to the Fourth Ground below) correct, and there is no room for any such implicit representation as contended for by Ms Rose. In any event there was and is the extra-statutory concession referred to, and even if it be, as it was, the end of the road so far as the individual immigration officers were concerned, as Mr Munro has made clear in his witness statement, the route was and remains open for consideration, through the British Embassy or otherwise, by the Secretary of State of any case that can be put forward within the extra-statutory concession. Indeed, although there is no evidence that this was said to any of the relevant Claimants, the statement was made by the Home Officer in its response of 24 October 2001 to the Claimants'

letter before action referred to in paragraph 30 above that "*our advice to those who wish to pursue the matter was that they should make an application to the Embassy*".

76. The Third Ground is not made out.

77. I turn finally to Ms Rose's new case, the Fourth Ground, and this, albeit an afterthought, was well conceived and powerfully argued. It relates only to MZ, IB and AKu, "the Asylum Claimants", who were expressly claiming asylum or, as properly construed, were intending to seek asylum once in the United Kingdom, and were given the responses upon rejection which I have quoted in paragraph 74 above.

78. This submission originated as part of the First Ground, namely that Rule 7 of the 2000 Order should be construed compatibly with the Geneva Convention, but I have already concluded (and the possibility of such conclusion must have become increasingly apparent during the course of the hearing) in respect of the First Ground that the Geneva Convention imposes no relevant obligation on the Defendants, so that such argument would not avail. The self-standing new point is that, operating the Rules in Prague as in London, immigration officers were not entitled to conclude that the intention of the Asylum Claimants to seek asylum once arrived in the United Kingdom was not a "*purpose covered by the Rules*", and that they should not therefore have been refused leave to enter under Rule 320(1).

79. Ms Rose's case can be shortly summarised:

i) The intention of the operation was to apply the Rules as if at Heathrow and by 'exporting' the border procedures to Prague.

ii) If the Asylum Claimants' position were being dealt with in London they could, after temporary admission and consideration of their asylum application, be granted asylum by the Secretary of State under Rule 334 and then be given leave to enter under Rule 330.

iii) An application for asylum (in the United Kingdom) was "*covered*" by the Rules, and thus seeking entry for the purpose of applying for such asylum is a *purpose covered* by the Rules.

80. Miss Rose submits that in those circumstances the officers should neither refuse nor grant leave to enter, but allow passengers with such purpose to travel to the United Kingdom for such purpose, when the asylum processes described in paragraph 7 above would trigger in. She contends that the position is different where there is a visa system. Paragraph 12 of her supplementary written submissions read as follows:

> "*A distinction may be made between the powers of Immigration Officers at Prague Airport to grant or refuse leave to enter the*

> *United Kingdom, and the grant of entry clearance. Entry clearance means a visa or other document which is, in accordance with the Immigration Rules, to be taken as evidence of a person's eligibility for entry to the United Kingdom: see s33(1) of the 1971 Act. A person seeking entry clearance is thus seeking an advance endorsement that they are eligible to enter the United Kingdom. There is no requirement on Czech nationals (Roma and non-Roma) seeking to travel to the United Kingdom from Prague to obtain such an advance endorsement before doing so.*"

81. Ms Carss-Frisk QC responds as follows:

i) The operation at Prague is as at Heathrow, i.e. it is the putting into effect of the Rules once and for all, as there is then no repeat process at Heathrow, and at that stage in Prague neither detention (Schedule 2, para 16 of the 1971 Act) nor temporary admission (para 21, for which a liability to detention is a necessary pre-condition) is available. There is therefore no 'third way' apart from the grant or refusal of leave to enter. In any event it cannot be unlawful if the officers exercise their powers to grant or refuse leave to enter under section 3A(2) of the 1971 Act, Article 7 of the 2000 Order and Rule 17A.

ii) It is not contended by the Claimants, and is in any event not the case, that the officials can grant leave to enter for the purpose of such application.

iii) The *purposes covered by* the Rules are the purposes for which leave to enter may be granted pursuant to the Rules, i.e. those in Parts 2 to 8.

iv) The Defendants assert that the Claimants' acceptance as to what the position would be under a visa regime fatally undermines their case. The reason why, if the Czech Republic were a visa country and the person in Prague were asking an entry clearance officer for a visa, the officer would, as the Claimants accept, be acting properly in refusing a visa, and thus *entry clearance*, is because the Claimants accept that the passenger in Prague is not eligible for entry under the Rules; and by operating the *leave to enter* process in Prague rather than in London, the officials are, with statutory authority, carrying out the same exercise.

v) The Defendants hold up *in terrorem* the effect of success for this contention (or indeed what would have been the effect of success on the First Ground) in paragraph 17 of their written reply submissions:

> "*(a) To defeat the use of s3A of the 1971 Act or the 2000 Order in the context of asylum seekers, since there would be a duty not to refuse leave to enter in any case of*

> *anyone expressing a desire to travel to the UK to claim asylum.*
>
> *(b) To defeat any use of a visa regime in the context of asylum seekers, since there would be a duty not to refuse a visa (entry clearance* [this being, on the Defendants' case, the inevitable consequence of the Claimants' arguments, notwithstanding the Claimants' attempts to distinguish the position under a visa regime]
>
> *(c) To undermine Rule 334(i) of (i) of the Immigration Rules since (if the Claimants were right) any person wishing to travel to the United Kingdom to claim asylum would have to be permitted to do so and would thus automatically satisfy Rule 334(i)* [which requires that the applicant must be in the United Kingdom before he can apply]
>
> *(d) (Presumably) the carrier penalties (as considered in Hoverspeed would be unlawful.*"

82. I am persuaded by their arguments that the Defendants are right:

i) The only difference between a visa scheme and a leave to enter process is, normally, the time at which it is operated. See Rule 26:

> "*An application for entry clearance will be considered in accordance with the provisions in the Rules governing the grant or refusal of the leave to enter. Where appropriate, the term 'entry clearance officer' should be substituted for 'immigration officer'.*"

See also the preamble to Rule 320, by which the same grounds for refusal apply to refusal of *entry clearance* and refusal of *leave to enter*. Once the *leave to enter* process is lawfully exported abroad, then the operation of the two processes is identical. There is no room for the Claimants' distinction. If they be right therefore there could be no refusal of a visa to one who expressed the intention to travel to the United Kingdom to claim asylum. I am satisfied that this necessary but untenable consequence emphasises and provides the answer to this ground.

ii) In any event, the asylum processes are only triggered if the *leave to enter* processes are being carried out in the United Kingdom. If the *leave to enter* process is lawfully carried out abroad, and it cannot be challenged by reference to the Convention, then those asylum processes are not triggered so as to prevent the conclusion, by refusal, of the application for leave to enter.

iii) The intention of claiming asylum on arrival in the United Kingdom is not a *purpose covered by the Rules*, even though there is some provision in the Rules for what happens if asylum is claimed by someone, once in the United Kingdom.

83. The fourth ground therefore fails.

84. The application is therefore dismissed.