

AT AUCKLAND

Appellants:	AH (Czech Republic)
Before:	S A Aitchison (Member)
Counsel for the Appellants:	K Stirling
Counsel for the Respondent:	No Appearance
Date of Hearing:	14 August 2017
Date of Decision:	30 August 2017

DECISION

[1] These are appeals against a decision of a refugee and protection officer, declining to grant refugee status and protected person status to the appellants, who are citizens of the Czech Republic.

INTRODUCTION

[2] The appellants are a family, comprising a mother and two of her three sons, aged three and 12 years. Because the sons are minors, the mother acted as their responsible adult at the hearing in accordance with section 375 of the Immigration Act 2009 (the Act).

[3] The mother has one other son, aged nine years, who was recognised as a refugee by the Refugee Status Branch on 20 March 2017.

[4] The central issues to be determined in this appeal are whether the appellants' fears are well-founded and, if so, whether they can seek any meaningful protection within the Czech Republic.

[5] Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

THE APPELLANTS' CASE

[6] The account which follows is a summary of the evidence given by the appellants at the appeal hearing. The mother and eldest son, AA, gave evidence at the hearing. This evidence is assessed later.

The Evidence of the Mother

Family and education background

[7] The mother, of Caucasian ethnicity, was born in the mid-1980s in Z, the Czech Republic. She is the only child born to her parents, who are now separated.

[8] The mother's mother continues to live in the Czech Republic, although she is estranged from her daughter. The mother's father travelled to New Zealand in March 2008, and has remained here on temporary visas. He has lodged a residence application, which is under assessment by Immigration New Zealand.

[9] The mother attended primary school in Y, and a vocational school in X. She obtained a qualification as a florist in 2003 and then worked briefly in a supermarket for a year.

Relationship with Roma man, BB, and commencement of a family

[10] In 2003, the mother met a Roma man, BB, and commenced a romantic relationship with him. In 2003, they began living together in W, a predominantly Roma area. The couple's first son, AA, was born in January 2005.

[11] Owing to rising racial tensions and anti-Roma marches in their neighbourhood by right-wing groups, including "skinheads," the family moved in March 2008 to another rental property in the V area of Y, a predominantly Caucasian inhabited area.

[12] In order to secure this accommodation, the mother went alone and met with the landlord. She knew that if she took her Roma partner, racial bias would prevent them from being able to grant the tenancy. However, a year later, when

the annual rental fell due for renewal, the landlord refused to renew the tenancy. The mother believed this was because of the race of her partner and son. The mother found another rental and secured it on a long-term basis. As a condition to the rental, she specified that, upon expiry of this lease, the landlord would be obligated to find her alternative accommodation.

[13] Later that year, the couple watched a television documentary on the plight of Roma children in orphanages in the country, and became motivated to adopt a Roma child. In August 2008, the couple adopted a two-month old Roma boy from an orphanage, whom they named CC.

[14] On 17 August 2013, the mother gave birth to another son, whom the couple named DD. She has not returned to work since first becoming a mother, as she has been on paid maternity leave.

[15] The mother and BB began to experience relationship difficulties and separated in late 2013, primarily due to his alcohol and drug use, and infidelity. The mother learned that the father had started a family with another woman.

[16] The mother was gained custody of all of her sons by judgment of the District Court of Y.

Estrangement from mother

[17] Owing to the mother's relationship with her Roma partner, and the birth and adoption of her Roma sons, the mother's mother cut off all contact and became estranged from her daughter.

[18] The mother considered herself to have been naïve, entering into her relationship with BB. Although she was well aware of the stereotypes and discrimination which existed against Roma, she considered that, because she was capable of falling in love with a Roma man, others close to her would also be able to accept her Roma partner and the children they came to share together.

AA's education and mistreatment at school

[19] When he was seven years of age, the mother enrolled AA at U Elementary school, a mainstream school in the T area of Y. The school comprised approximately 99 per cent Caucasian, and one per cent Roma, students. AA was the only Roma student in his classroom. Although he was permitted by his teachers to attend standard classes, he was isolated by the students, who refused

to interact with him. They regularly cursed him as “a dirty gypsy” and physically abused him by pushing, punching and kicking him. They played pranks on him, including hiding his school lunch and throwing his belongings in the waste bin. Despite loving physical education, AA was excluded from team sports, as when he attempted to join in, the students would never interact with him. Whenever he told his teachers about the bullying, physical abuse and exclusion, they simply told him that it was all his fault.

[20] AA had one friend at school. He also had a brief friendship with another boy, but upon his parents’ learning of it, they told him he could not be friends with a gypsy, and he suspended the friendship.

[21] On one occasion, AA arrived home from school bruised and beaten. He told his mother that some of the older school boys had cursed him as a gypsy and beaten him directly in front of the school grounds. When the mother complained about the matter to the school principal, he simply told her that it was not a matter of concern for the school, as the assault had taken place outside the school grounds.

[22] The mother found it heartbreaking when AA spoke to her about this sustained mistreatment by students at the school, and when he asked her why he was treated as different and called “a dirty gypsy”.

CC’s education

[23] The mother attempted to enrol CC in the same school as AA. However, the school principal declined her request, telling her that AA could not be enrolled there as he was Roma and was black. When the mother insisted that AA be enrolled at the school, the principal again refused and told her that “everyone makes choices about who father’s their children”.

[24] Despite AA having no developmental or learning difficulties, the mother could only enrol AA in a practical elementary school, which specialised in the education of children with a wide range of learning disabilities. The school was predominantly attended by Roma children.

[25] The standard of education in practical elementary schools was lower than that provided in the mainstream schools for Caucasian children. Because of this, the mother privately taught AA to read and write, then approached the school principal for support to enrol AA in a regular elementary school. However, the principal responded that AA was “too dark” to attend a regular elementary school.

The mother continued to pressure him about the issue, and he eventually wrote a letter to the principal of the U Elementary School recording that AA had average learning ability. The mother then approached the principal of that school with the letter, and sought again to enrol AA there. However, he disregarded the letter, stating that there was no option for AA to attend the school because he was Roma.

[26] The mother complained to the local social services agency about the matter, but was told that “schools know where children should go”.

Abuse of Roma family in day-to-day living

[27] The mother and her sons were regularly abused when they walked in the street and attempted to interact in the wider community. Caucasian persons would call out racist slurs on a daily basis, calling the sons “black faces” and “gypsies”. The mother would also be insulted, and called “dirty” and “a disgrace to the white race,” because of her association with her sons.

[28] The sons also regularly experienced segregation and isolation in the wider community. For example, when AA attempted to join a baseball team in the park adjacent to the family home, he was excluded by the team players, who refused to involve him in the game. Whenever the boys visited a playground, they would be cursed at, and told to leave. Alternatively, those at the playground would leave as the boys arrived.

[29] On one occasion, when the mother and sons were at the local supermarket, some men began shouting racist abuse at the family. The incident culminated in the mother being told by the cashier not to return to the supermarket, as they did not want trouble there.

Threat from skinheads

[30] One afternoon in the autumn of 2015, the mother and her sons were walking from school to their apartment with a friend and her son. The mother had her youngest son in a pushchair. She noticed two men walking towards them, who began shouting racist slurs, including “gypsies” and “white power”. She became afraid and, together with her sons, her friend and her son, fled into an adjacent apartment building and locked the door behind them. They remained in the building for several hours until dark, before venturing out and returning home.

The mother's two eldest sons told her while hiding in the building that they had seen the men swinging knives.

[31] The mother did not report the matter to the police as she knew they would not take any action. She considers that, in approximately 80 per cent of cases, Roma victims do not report abuse committed against them because of an ineffective police response. She believes that violence against Roma is an escalating problem, and that anti-Roma protests and marches have continued steadily throughout the Czech Republic.

Letters of threat

[32] In January 2016, the mother received a threatening letter in her mailbox, stating that: "All black filth needs Hitler to clean them up, but the time will come when someone even better than him will come along". The mother reported to the police at her local police station with the letter, but the police officer was not interested in even recording her complaint. She was told by the police officer that there was simply not much that the police could do.

[33] A month later, the mother received a second threatening letter in her mailbox. It stated: "Gas smells great doesn't it", and "are you looking forward to it?" The mother again returned to the police station with the letter, but the officers were indifferent to the matter. They considered it to simply be a bad joke.

Attack on family home in February 2016

[34] On the evening of 16 February 2016, the mother was at home with her sons when they heard racial taunts against gypsies being shouted in the street outside. She heard what sounded like firecrackers being thrown at the apartment, and the sound of breaking glass. She feared a Molotov cocktail attack, a well-known form of violence directed against Roma residences in the Czech Republic. She heard one of the voices shout: "Gypsies should go to the gas chambers". She and her sons fled to the bathroom, where they remained hiding all night. Later, when inspecting the exterior to the building, she observed black smoke stains on the glass and side of the building.

[35] The following day, the mother asked a friend to look after her sons while she made the necessary arrangements for her family to leave the country. On 19 February 2017, the family travelled from V, Y to Vaclav Havel airport, where they departed the country.

[36] Since this incident, the mother has had regular dreams about attacks on her family and the family home. Her son AA has had similar nightmares, and started bedwetting.

Travel to New Zealand

[37] The mother and her sons arrived in New Zealand on 21 February 2016. They have been living with the mother's father, who resides here on a work visa.

[38] Initially, the boys were afraid to venture outside, fearing for their safety, but over time their confidence has grown. The two eldest boys are attending school, and AA has recently been selected for a baseball team.

[39] The mother has been suffering from immense mental strain, and feels that she has reached breaking point. Since her arrival here, she has learned more of the extent of abuse suffered by her sons at school. On one occasion, when she overheard AA telling his grandfather of such abuse, she collapsed and spent many days in bed, unable to cope.

[40] Upon observing her state, her father recommended that she seek psychological assistance. However, the mother has felt unable to open up to anyone about how she feels, and considers that no one will understand her experience and condition. She has also feared the cost of treatment, which would include paying for interpretation services.

Fears upon return to the Czech Republic

[41] The mother fears ongoing verbal and physical abuse for her and her sons from the general Caucasian populace and extremists groups in the Czech Republic. She does not consider that it will be safe to live anywhere in the country and recalls that, when she lived in a Roma neighbourhood, skinheads would regularly intimidate Roma there. Despite moving to a predominantly Caucasian neighbourhood, she and her family were still subject to threats and an attack on their home by extremists.

[42] The mother considers that there is no distinction in the mistreatment of persons who are full Roma or mixed-race. Roma are distinguishable not only by their skin colour, but by their distinctive facial features. Through association with her sons, the mother is also treated with the same disdain as Roma.

[43] The mother also fears ongoing discrimination against her sons, particularly in the education system where, even if they are accepted into a mainstream school, they will be isolated, bullied, and physically assaulted without any intervention from the teaching staff or school principal.

[44] The mother fears the separation of her family unit, as AA has been granted refugee status in New Zealand by the Refugee Status Branch. The Refugee Status Branch found at page 24 of its decision that:

[S]hould [AA] return to the Czech Republic, his education will continue to face severe discrimination, harassment and the real possibility of serious psychological and/or physical harm. Given the impact this future discrimination would have on [AA] for the rest of his life, combined with the widespread and general discrimination faced by all Roma, it is concluded that this would amount to serious harm.

[45] The mother fears who would look after her son in New Zealand where he needs to remain for his safety. There will be no one to look after him. Although he has his grandfather here at this time, he only has temporary visa status in New Zealand.

[46] The extent of what her sons have suffered, and her inability to protect them, weighs heavy upon the mother. She feels unable to cope. She fears that she will be psychologically incapable of caring for her children if they return to the Czech Republic. She considers that she reached “breaking point” when the extremist group targeted the family home in 2016, and she fears her children will be taken into care by the state.

[47] The mother believes her psychological condition has continued to deteriorate in New Zealand, where she considers she has had a “meltdown” upon realising the full extent of damage incurred to her sons through racial abuse. She has difficulty sleeping at night and has no interest in eating. She also spends days lying in bed and feeling incapable of doing anything. With encouragement, over the past month, the mother has started attending a Salvation Army church and, although she does not believe in God, she has appreciated the care and support that she has received from the church members. In contradistinction to her own mental health, she can see that her sons’ wellbeing has substantially improved since they have been living in New Zealand. They are no longer afraid to go outside, and are fully accepted and integrated into their school and the community.

The Evidence of the Eldest Son, AA

[48] AA was born in a neighbourhood of S, the Czech Republic, in January 2005. He attended the U Elementary School. As a minority mixed-race Roma person there, he was regularly bullied by students, who called him racist, offensive names. Students would push him and throw his school belongings in the waste bin. AA had one friend at school. Another boy had initially been his friend, but his parents told him he was not allowed to be friends with a gypsy.

[49] One afternoon, AA was beaten by a group of older students after school. He was left bruised and sore. When his mother learned of the incident, she reported it to the school principal, but he stated that the matter was not his responsibility, as it had not taken place on school grounds. In reality, AA had been beaten only a metre from the stairs that led to the school grounds.

[50] The family were regularly harassed, and on one occasion, while out walking in the street, they were chased by two skinheads brandishing knives. They managed to escape them by fleeing into an open apartment building and hiding there.

[51] Just prior to the family travelling to New Zealand, AA and his family heard shouting and cursing against gypsies outside their apartment building. They could hear explosives being thrown at the window, and people laughing loudly outside. The family hid in the bathroom for the night.

[52] AA is afraid that, if he returns to the Czech Republic with his family, he will be chased by skinheads and seriously harmed. He fears ongoing bullying at school and abuse from students on account of being Roma. He is concerned about his mother being upset and crying all the time. He considers her to be very nervous.

Material and Submissions Received

[53] On 7 August 2017, counsel filed submissions with the Tribunal, and at the hearing held on 14 August 2017, counsel tendered three photographs of the mother's sons.

[54] The Tribunal also has a copy of the Refugee Status Branch file, as do the appellants. The file contains, *inter alia*, letters of support from two of the mother's friends in the Czech Republic, outlining the racial abuse they have witnessed the appellants experience at the hands of extremists and other persons. One friend

expresses concern about the clear mental strain such events have caused to the mother.

ASSESSMENT

[55] Under section 198 of the Act, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise each of the appellants as:

- (a) a refugee under the 1951 Convention Relating to the Status of Refugees (“the Refugee Convention”) (section 129); and
- (a) a protected person under the 1984 Convention Against Torture (section 130); and
- (b) a protected person under the 1966 International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[56] In determining whether the appellants are refugees or protected persons, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellants’ account.

Credibility

[57] The evidence of the mother and AA was credible. Their evidence was detailed, spontaneous, and consistent internally and with one another. Aspects of their account were also corroborated by letters from two friends of the mother, who live in the Czech Republic.

[58] Accordingly, the Tribunal accepts the appellants’ account in its entirety.

The Facts as Found

[59] The mother, a Caucasian woman in her mid-30s, and her two Roma sons, DD and AA, who are three and 12 years of age, are citizens of the Czech Republic. The mother’s son, AA, aged nine years, was recognised as a refugee in New Zealand by the Refugee Status Branch on 20 March 2017.

[60] The Tribunal accepts that AA has been subjected to sustained discrimination, harassment and abuse throughout their lives because of his Roma

ethnicity. Although too young, to fully comprehend, DD, has also been with this family when they encountered incidents of harassment and discrimination. Through her association with her sons, the mother has also been subjected to similar forms of abuse.

[61] Although AA has been able to attend a mainstream elementary school, he has been harassed, bullied and intimidated there. On occasions, he has been beaten by students, and the teaching staff have not intervened. AA and DD have also been verbally abused and segregated on a systemic basis in the wider community, including when going to the playground and the supermarket with their mother. AA has also been repeatedly excluded from playing baseball in the park adjacent to their home. On one occasion, two skinheads chased the family brandishing knives and forcing them to flee.

[62] The appellants have also been subjected to a recent campaign of racial abuse. Two letters of threat, with racial abuse, were delivered to the family home. Despite the mother reporting the matter to the police, no action has been taken. On one evening prior to the family's departure to New Zealand, an extremist group assembled outside the family home and shouted abuse and threw fireworks at the home.

[63] The family arrived in New Zealand in February 2016 and reside with the mother's father, who is a temporary visa holder here. The mother has no family with whom she maintains contact in the Czech Republic.

[64] While no formal psychological or psychiatric evidence has been provided, the Tribunal accepts the evidence of the mother and her son, AA, that the mother presents with fragile psychological health.

The Refugee Convention

[65] Section 129(1) of the Act provides that:

"A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention."

[66] Article 1A(2) of the Refugee Convention provides that a refugee is a 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[67] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellants being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claim to Refugee Status

[68] For the purposes of refugee determination, “being persecuted” requires serious harm arising from the sustained or systemic violation of internationally recognised human rights, demonstrative of a failure of state protection – see *DS (Iran)* [2016] NZIPT 800788 at [114]-[130] and [177]-[183].

[69] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008), at [57].

[70] In the context of this particular decision, it is relevant to record that human rights norms are shaped by the individual characteristics of the claimant. In *AC (Syria)* [2011] NZIPT 800035 at [102], the Tribunal stated:

“Under the ‘human rights approach’ to the interpretation of ‘being persecuted’ element of the refugee definition, Article 7 ICCPR is a mechanism to identify forms of serious harm. Issues such as the age, gender and standard of health of a claimant are thus already factored into the refugee status inquiry as such personal characteristics are relevant to assessing whether treatment amounts to a breach of Article 7 ICCPR.”

[71] In *DS (Iran)* [2016] NZIPT 800788, the Tribunal further explained:

“[172] In the context of the inquiry into serious harm, the claimant’s particular individual characteristics shape the specific objective factors of nature, intensity and duration of harm...associated emotional, physical or psychological frailty may shape the intensity factor...”

...

“[182] As to the individual characteristics of the claimant in the assessment of the seriousness of harm, it is important to take into account that the particular characteristics of the claimant may mean that breaches of human rights which would, for other claimants, not give rise to serious harm, do so in the particular context of the case.”

Objectively, on the facts as found, is there a real chance of the appellants being persecuted if returned to the Czech Republic?

[72] It is relevant to begin with an outline of relevant country information concerning the treatment of Roma in the Czech Republic, with some historical context to Roma migration to Europe and their early reception there.

A historical context of discrimination

[73] Although geographically dispersed with no central Romani state, Roma view themselves as belonging to a distinct group that shares historical, cultural and linguistic ties, which set them apart as a nation of people. The European Parliament has referred to Roma as an umbrella term, which encompasses different related groups throughout Europe, whether sedentary or not, and who include: “Roma, Travellers, Sinti, Manouches, Kalés, Romanichels, Boyash, Ashkalis, Égyptiens, Yéniches, Doms and Loms”; *European Parliament Resolution of 15 April 2015 on the Occasion of International Roma Day – Anti-Gypsyism in Europe and EU Recognition of the Memorial Day of the Roma Genocide During World War II* (2015/2615 (RSP)) (15 April 2015) (“the European Parliament Resolution”).

[74] Roma migration from Northern India into Europe began in the 11th century and continued *en mass* over the next three centuries. By the 1500s, Roma had spread all over Europe. Responses to this new and visible minority were predominantly negative, and social and political discourse immediately depicted Roma as foreign to Europe.

[75] Loveland and Popescu refer to an early Parisian document recording the reaction of the European population to this new and visible minority, which states: “The men are very dark and their hair crisp; the women the ugliest and swarthiest ever seen”; M Loveland and D Popescu “The Gypsy Threat Narrative: Explaining Anti-Roma Attitudes in the European Union” (2016) 40(3) *Humanity & Society* 329 at 333. Loveland and Popescu further expand on early attitudes at page 333:

“The early history of the Roma serves as the basis of a popular image of travelling Roma disparagingly described by antiziganist author Vekerdi...as ‘wandering and criminal tribes’ who ‘infiltrated’ Europe and pursued itinerant activities of questionable productivity...The stereotype of the ‘Gypsy’ as parasitic, opportunistic, and transient became a symbolic tool invoked to forcibly integrate the Roma and eradicate their perceived dangers to common morality. They became, and remain, a marginalized minority across Europe, relegated to a narrow and distinct socioeconomic niche.”

[76] Roma stereotyping and marginalisation has long been manifest in civil society, state policy and social commentary. Over the seven centuries of Romani presence in Eastern Europe, social marginalisation has been met with a range of state responses, including exclusion, active disenfranchisement, expulsion and forceful integration.

Contemporary attitudes

[77] Social marginalisation of Roma continues to pervade the Czech Republic. Roma constitute approximately 300,000 of the approximately 10.5 million population of the Czech Republic; United States Department of State *Country Reports on Human Rights Practices for 2016 – Czech Republic* (3 March 2017) p19 (“Department of State report”).

[78] A series of recent public opinion polls conducted in the Czech Republic reflect widespread societal prejudice against Roma. The Centre for Research of Public Opinion conducted a poll in March 2016, finding that 82 per cent of respondents considered Roma “unlikeable” or “very unlikeable”. Only three per cent had compassion for Roma and 14 per cent had neutral opinions. A European Commission poll in 2015 found that only 29 per cent of Czechs would feel comfortable or indifferent about working with Roma persons and only 11 per cent would feel comfortable or indifferent if their child fell in love with a Roma; Department of State report at pp18-19.

[79] Roma have long been targets of intolerant political discourse in the Czech Republic. In the 2013 parliamentary electoral campaign, the leader of a right-wing populist party, Dawn of Direct Democracy, appealed to anti-Roma sentiments, calling for Roma to leave the Czech Republic. The party obtained 6.88 per cent of the votes and won 14 of the 200 seats in Parliament. In the lead-up to the European Parliament elections in May 2014, the Dawn of Direct Democracy put up billboard posters of a cartoon herd of white sheep kicking a black sheep off the Czech flag. Slogans read: “Support families not inadaptables” and “Jobs for us not immigrants”; European Commission Against Racism and Intolerance *Report on the Czech Republic* (13 October 2015) (“ECRI report”) at p15.

[80] Racist expressions have also been used in speeches of mainstream parties. According to the ECRI, the Czech President reinforced deeply rooted stereotypes about Roma lifestyle in comments at an official meeting in Liberec in June 2014; ECRI report at pp15-16. The Department of State report also recorded that in 2016, the deputy prime minister and finance minister incorrectly stated that

the World War II-era Lety concentration camp for Roma was only a camp for those unwilling to work. Criticised for this, he later apologised and corrected his statement; see p19.

[81] Roma have also been a primary target of racism in the Czech Republic media. According to the ECRI report at page 17:

“[I]n 2013, a study was conducted on stereotypes in the media image of Roma in which 4094 news reports from the main daily and weekly newspapers, online news servers and public broadcasting media were analysed during the first eight months of the year. The findings showed that a large part of reporting about Roma is comprised of news of anti-Roman marches, increasing Roma criminality and the growing anti-Roma sentiment of the majority population. Most news items reviewed used the term “Roma”, although the labels “gypsy” and “inadaptable” also cropped up, usually as quotations from people interviewed.

ECRI is aware of a reality TV series called Class 8A featuring a class of 14 year olds in a school in Brno. Apart from two or three children it is an all-Roma class. According to NGOs, the series portrays an extremely negative image of Roma pupils as uneducable and having no ambition or prospects. Moreover, the show has generated heated debate on the programmes website as well as on social media; this revolves almost exclusively around whether the teachers should be stricter with the Roma “slobs”, whether the pupils belong in a “practical” school, whether they deserve any education at all, and whether they should just be sent straight to manual labour....

Furthermore, a television channel called Prima TV broadcasted a series of news items and reports that aimed to inform viewers about the issue of socially excluded localities. The programme concluded that the presence of socially excluded persons was undesirable and expressed understanding for the activism of members of the ultra-right on this issue...”

[82] There is also growing concern about hatred expressed on social media networks, and an inadequate state response to this. According to the article *Romea CZ Czech Prosecutor Agrees with Police That Threat to Burn Down ROMEA is Not a Crime* (12 June 2017) at www.romea.cz, the ROMEA organisation have filed a police report after receiving a threat last year from someone who posted the comment “burn down all of Romea” to the organisations Facebook page. The police conclusion that this was not a crime was confirmed by the Prague 1 District State Prosecutor.

[83] The European Parliament Resolution of 15 April 2015 describes such “anti-Gypsyism” as a special kind of racism directed against Roma, founded on an ideology of racial superiority. Nurtured by historical discrimination, it is a form of dehumanisation and institutional racism.

[84] Against this backdrop of entrenched historical attitudes and marginalisation of Roma, Roma in the Czech Republic have long been exposed to multiple and

intersecting discrimination on the grounds of their ethnic origin, resulting in limited access to education, employment, housing, health and other social services.

[85] There are substantial reports on these issues, and for the purposes of this decision, the Tribunal will highlight key aspects of such reports, of relevance to this decision.

Anti-Roma violence

[86] Roma are also subjected to hate speech and violence, and the state response to these violations is inadequate. Buttressed by decades of historical discrimination and racist attitudes against Roma, far-right and neo-Nazi groups have emerged and engaged in protests and violence against Roma. Throughout 2013, right-wing extremists organised a series of 26 anti-Roma demonstrations and protests country-wide. According to Habitat for Humanity *Updated Civil Society Monitoring Report on the Implementation of the National Roma Integration Strategy and Decade Action Plan in 2012 and 2013 for The Czech Republic*, at page 33:

“[T]he growing urgency of the human rights situation was shown in early 2013 by the beginning of a wave of anti-Roma riots, which spread this year over the entire country. Representatives of a platform of organisations trying to prevent racist marches counted, to date, (mid-November 2013) about 35 demonstrations with a racist background. The largest of these demonstrations had about 1,000 participants and involved major riots of protestors against police forces that tried to hinder the skinheads from reaching the Roma neighbourhoods or counter-demonstrations. Most of these demonstrations were registered by country-wide operating fascist organisations or extremist political parties. While the participation was, in some cases, limited to a small group of skinheads, in other cases the core group of violent fascists was joined by ordinary local citizens – especially large numbers of teenagers. As the Czech Republic already experienced earlier serials of racist protests that were however limited to particular regions (2008/9 in Litvnov-Janov, 2011 in Novy Bydzov and mainly the Sluknov region), experts from the NGO Konexe speak from the third wave of anti-Roma protests in the Czech Republic. From their perspective, each of these waves:

‘...significantly worsens the position of the Roma minority in the Czech Republic, increases anti-Roma attitudes, and also further shifts the borders of what is still considered to be ‘normal’. Each of these waves increases inter-ethnic tensions in the Czech Republic. Each new wave is worse and stronger than the past one and the breaks between the waves are getting shorter.’”

[87] Similar marches and demonstrations have been organised throughout 2014 and 2015. In 2015, the Regional Court in Plzeň held a hearing in a case concerning arson attacks in the Czech cities of Aš, Hodonín, Praha, Sokolov and Trutnov. Anti-Roma rallies also continued in 2016, and meetings have reportedly taken place by a newly formed coalition of far-right groups in Vitkov in April 2016, in support of convicted perpetrators of arson attacks against Roma families; see

Romea CZ *Czech Republic: Handful of Neo-Nazis Demonstrate in Vitkov to Raise Money for Racist Arsonists Who Attacked Romani Family There* (17 April 2016) at www.romea.cz; V Ramalingam *Old Threat, New Approach: Tackling the Far Right Across Europe – Guide for Policy Makers* Institute for Strategic Dialogue (2014); Council of Europe *The Situation of Roma and Travellers in the Context of Rising Extremism, Xenophobia and the Refugee Crisis in Europe* (20 October 2016).

[88] The incidence of racially-motivated crime against Roma is unknown due to a lack of specific data on hate crimes. Although the Ministry of Interior records hate crimes committed by extremists groups, they do not disaggregate these figures according to bias motivation. Under-reporting is also an ongoing problem as victims often lack trust towards police protection and investigation; The Immigration and Refugee Board of Canada report *Czech Republic: Government Response to Neo-Nazi Groups in the Country, Including Political Parties and Gangs (2014-February 2017)* (17 March 2017) (“2017 IRB report”); ECRI report at p15.

[89] The Ministry of Interior’s 2015 *Report on Extremism* recorded that there were 175 hate crimes reported that year, of which 115 persons were charged and 130 persons prosecuted. Two persons were sentenced to between one to five years imprisonment, one person was sentenced to a year’s imprisonment, 37 persons were put on probation, and nine persons were sentenced to community work; Department of State report, p19. See also Amnesty International ‘*We Ask for Justice: Europe’s Failure to Protect Roma from Racist Violence*’ (8 April 2014) at pp9-14.

[90] The Immigration and Refugee Board of Canada reported in the 2017 IRB report that a Czech Helsinki Committee representative had informed that hostility towards minorities was growing every year in the Czech Republic, and that attacks were becoming more dangerous, thought-out and organised. A representative from a local NGO working in the area of hate crime, *In Iustitia*, added that there was no political will to tackle hate crime. As noted in the Department of State report, *In Iustitia* reported that, in the first half of 2015, there were 10 ethnically motivated violent incidents recorded, and four of these were directed against Roma; Department of State report at p19.

[91] Amnesty International report several instances of serious violence against Roma in the Czech Republic in 2016. In their report, *Czech Republic: Human Rights of Roma and Refugees at Stake* (2016) at page 6, they state:

“In August 2016, a man fired shots into the air and shouted racist abuse in the vicinity of a Roma children’s camp....According to camp organizers, local police did not send officers to the scene despite the camp managers’ repeated requests for help. In September 2016, a regional police investigation dismissed the complaints by the organizers, but found that the incident had not been thoroughly investigated.

In October 2016, a Roma man died in a pizzeria....after an intervention against him by the municipal police and some guests following a conflict between the man and guests and staff of the restaurant. The Government Council for Roma Minority Affairs called on the Minister of Interior and the Police President to investigate his death. An investigation was initiated; however, in January 2017, while the investigation was still pending, the family of the victim filed a complaint against the police on the basis that the investigation was not thorough. The lawyer representing the victim’s family criticised the initial police investigation for failing to secure the crime scene and the evidence. He also expressed concern that the police inquiry had initially focused on investigating the deceased man rather than his death. In February 2017, the police discontinued the investigation and announced that the death was not the result of a crime.”

[92] It is necessary to also look at the state response, if any, to such forms of harm. Unsurprisingly, given the pervading anti-Roma political and social discourse in the country, there is a clear consensus from human rights bodies and institutions that the government and police response to extremists is inadequate. According to a Czech Helsinki Committee representative, the police forces are more visible during extremist events, but the majority are young and inexperienced and have a tendency to sympathise with extremist groups concerning the Roma population. Further, public hate speeches are tolerated by the police. According to an *In Iustitia* representative cited in the 2017 IRB report, the police do not prosecute hate speech adequately, and the judiciary is too permissive. In some 80 per cent of cases of incitement to hatred in which *In Iustitia* were involved, perpetrators were not prosecuted.

Socio-economic discrimination

[93] Concerning the question of access to education for Roma, Amnesty International reports in *Must Try Harder – Ethnic Discrimination of Romani Children in Czech Schools* (22 April 2015) that, discrimination against Roma children within the education system in the Czech Republic takes three primary forms: the over-representation of Roma students in so-called ‘practical schools’ (primary schools designed for pupils with mild mental disabilities); the segregation of Roma in mainstream schools and classes; and various other forms of differential treatment in mixed mainstream schools.

[94] Of particular concern, the practical schools offer a reduced curriculum and lower-quality education; see ECRI report page 9; European Union: European

Agency for Fundamental Rights *Second European Union Minorities and Discrimination Survey (EU-MIDIS II) Roma – Selected Findings* (November 2016); Immigration and Refugee Board of Canada *Czech Republic: Situation of Access to Education, Employment, Housing and Health Care for Roma; Government Efforts to Integrate Roma into Czech Society 2013-February 2016* (22 March 2016).

[95] The segregation of Roma children does not just take place in separate schools and buildings. Amnesty International observed that a number of schools which enrolled Roma students, and where numbers might be higher than desired by that school, attempted to make the Roma students “less visible”. Tactics varied from withdrawing Roma students from certain core classes and establishing separate classes, to changing teaching hours for preparatory classes, which primarily comprised Roma students.

[96] Amnesty International reports that parental choice is a key driver of segregated education. Non-Roma parents seek out schools with no, or low numbers, of Roma students, and remove their children from schools once they feel there are too many Roma attending.

[97] Commenting further on the entrenched divide between Roma and non-Roma in state mainstream education, Amnesty International states at page 7 of its report that:

“Discriminatory practices fuelling the creation of ethnically segregated schools and classes include the deliberate separation of pupils by schools, the refusal of school directors to enrol Romani children, the failure to tackle prejudice encountered by Romani children in mixed mainstream schools and the lack of measures by national and local government to address the problem of ethnic segregation. As a result of insufficient action by the government, the local authorities, notably in terms of monitoring and enforcing the respect for equal treatment legislation, the division between ‘Roma’ and ‘non-Roma’ schools remains entrenched.”

[98] Amnesty International also voice concern about prejudicial labelling and racial bullying in mainstream schools, and state at page 7 that:

“Romani children face a wide range of unequal treatment in mainstream schools, including the failure to adequately tackle racial bullying by fellow pupils, excessive psychological testing for mental disabilities prior to and after enrolling in school, and the prejudicial labelling of Romani pupils and their parents as lacking discipline and failing to value education. All these factors contribute to institutionalising separate and unequal education for thousands of Romani children.”

[99] Notably, owing to fundamental concerns about the lack of access to education for Roma in the Czech Republic, the European Commission has initiated infringement proceedings against the Czech state for systematic discrimination; <https://ec.europa.eu>.

[100] With regard to their living conditions, it is estimated that a third of Roma in the country live in “excluded localities” and “ghettos” with substandard housing and poor health conditions. An October 2015 report by the Ministry of Labor and Social Affairs stated that the number of ghettos in the Czech Republic have doubled to 606 since 2006 and their population grown from 80,000 to 115,000; Department of State report at pp19-20; see also The European Roma Rights Centre et al *Written Comments: Parallel Report to the United Nations Committee on the Elimination of Racial Discrimination* (2015).

[101] On the issue of access to employment, it is helpful to refer to the comprehensive report, “Analysis of Socially Excluded Roma Localities and Absorption Capacities in Their Environment,” prepared by a private research Company GAC Ivan Gabal Analysis and Consulting, commissioned by the Ministry of Labor and Social Affairs in the Czech Republic. Referring to the content of this report, L Cviklova states in “Social Closure and Discriminatory Practices Related to the Roma Minority in the Czech Republic Through the Perspective of National and European Institutions” (2011) 2(1) *Journal of Comparative Research in Anthropology and Sociology* 55 at p62 that:

“[A] basic factor of social exclusion of Roma people has been the high rate of unemployment of citizens from socially excluded localities (ghettos) and the average rate of Roma unemployment is estimated to be around 70% (while in socially excluded localities it is almost 90%), which is disproportionately high when compared to 8% the average unemployment rate in the Czech Republic. The high rate of unemployment spread across nuclear as well as broader Roma families is prone to repetition and very often spans from six months to a period of years. Some identifiable reasons for Roma unemployment are low qualifications, lack of education and bad health conditions. Other determinants contributing to Roma unemployment are inter-generationally transmitted cultural norms which are the result of family and social network which pass on to new generations, cultural messages regarding formal unemployment and participation in informal or shadow economic structures.”

Application to the Facts

The mother

[102] The mother has been the target of racist threats and abuse. She and her family have been subjected to an escalating campaign of hate-crimes including threatening letters and a recent attack on their home. The mother took immediate steps to flee before the matter escalated any further.

[103] In assessing the prospective predicament of the mother, the Tribunal has particular regard to her fragile psychological state and her diminishing emotional

and psychological resources to cope with the discrimination, harassment and violence targeted against herself and her family. Although no psychological report has been tendered, the Tribunal accepts her evidence that she has reached “breaking point”. The Tribunal was able to observe throughout the hearing the mother’s brittle fragility, and has carefully noted her self-reporting of symptoms of anxiety, an inability to sleep, eat, and to generally cope with life. The Tribunal also notes that these symptoms, stemming from experiences in the Czech Republic, continue to this day in New Zealand.

[104] As a Caucasian mother of Roma sons, the mother is operating within a highly marginalised sector of society. The risk of harm to her is exacerbated by her psychological fragility and lack of family and support system networks in the country. With the exception of a couple of friends in the Czech Republic, the mother has no other means of support in the country: she has no siblings; her mother is estranged from her; and her father is currently living in New Zealand, exploring residence options here. While she has approached the local support services office, AA’s school principal and the police, they have failed to offer any protection and support.

[105] The Tribunal finds that there is a real chance that, should the mother return to the Czech Republic, she will face ongoing threats of harm, and acts of violence from right-wing groups, including skinheads, infringing her rights under Article 7 (the right to be free from cruel, inhuman or degrading treatment or punishment) of the ICCPR. Such treatment constitutes serious harm.

[106] Having particular regard to the mother’s fragile psychological condition, the symptoms of which she has reported in New Zealand, the Tribunal also finds that the effect of cumulative threats of harm on the mother, considered together with the ongoing harassment and discrimination she faces on a day-to-day basis, either directly, or indirectly through her sons (including through ongoing discrimination, harassment and isolation in the course of their education), would reach the threshold of serious harm. It has long been accepted in New Zealand that harm need not be physical harm, and that psychological forms of harm may satisfy the standard of being persecuted; see *Refugee Appeal No 2039/93 Re MN* (12 February 1996); *DS (Iran)* [2016] NZIPT 800788 at [170].

[107] The police response to such threats of harm and violence against Roma, and those closely associated with Roma, such as the mother, is clearly inadequate. The state is unable to provide the mother with any protection which would reduce the risk of physical harm to her below the level of a real chance.

[108] For these reasons, the Tribunal finds that the mother has a well-founded fear of being persecuted and that the first principal issue is answered in the positive.

Internal Protection Alternative (IPA)

[109] The protection afforded by the Refugee Convention is not available to the appellant if meaningful protection is available to her in a part of the country. The approach to the IPA was articulated in *Refugee Appeal No 76044* (11 September 2008) where the contours of what constituted ‘meaningful’ domestic protection under an IPA analysis were mapped. The Authority stated, at [178], that the following criteria were to be applied:

- “(a) That the proposed internal protection alternative is accessible to the individual. This requires that the access be practical, safe and legal.
- (b) That in the proposed site of internal protection there is no risk of being persecuted for a Convention reason.
- (c) That in the proposed site of internal protection there are no new risks of being persecuted or of being exposed to other forms of serious harm or of *refoulement*.
- (d) That in the proposed site of internal protection basic norms of civil, political and socio-economic rights will be provided by the state. In this inquiry reference is to be made to the human rights standards suggested by the Refugee Convention itself.”

[110] The Tribunal finds that it cannot be satisfied that, in any proposed site of internal protection there is no risk of the mother being persecuted for a Convention reason.

[111] Country information establishes that harassment, discrimination and violence against Roma, and those closely associated with them, is prevalent throughout the Czech Republic (a country of a mere 400 square kilometres across at its widest). Czech authorities, in particular the police, have failed to adequately protect Roma from racist attacks, and have engaged in discriminatory practices and regularly used excessive force towards Roma. The criminal justice system has also been repeatedly criticised for denying Roma equal treatment before the law, regularly failing to adequately investigate violence or racist crimes against Roma; see D Bigo, E Guild and S Carrera *Foreigners, Refugees or Minorities? – Rethinking People in the Context of Border Controls and Visas* (Ashgate Publishing Company, Surrey, 2013) at p133.

[112] The Tribunal does not overlook that the Czech Republic is a member of the European Union. There may be, in some cases involving European Union nationals, an issue about whether they are able to reside lawfully in another European Union state. That issue need not be resolved here because the Tribunal is satisfied that, even if the appellants were about to reside elsewhere in the European Union, the mother would be compelled to return to the Czech Republic with the children because she has no meaningful recent work experience (she has not worked in the last 14 years), no family support elsewhere in the European Union, is traumatised, can speak only Czech, and has the sole care of three dependent children. Realistically, all of her family support network is in the Czech Republic and the Tribunal is satisfied that she would be forced by circumstances to return there.

The sons

[113] As minors, the sons are holders of rights set out in the ICCPR, which relevantly includes the right to be free from discrimination (Article 2), equality before the law (Article 26), to be free from arbitrary deprivation of life (Article 6(1)), and to be free from cruel, inhuman and degrading treatment or punishment (Article 7). There are also other relevant rights included in the International Covenant on Economic, Social and Cultural Rights, which include the right to non-discrimination (Article 2) and the right to education (Article 13).

[114] The sons also hold child-specific rights contained in the 1989 *Convention on the Rights of the Child* (the CRC), which relevantly include Articles 2, 6, 19(1), 27 and 28 as set out below.

[115] Article 2 of the CRC provides:

- “1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”

[116] Article 6 of the CRC provides:

- “1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.”

[117] Article 19(1) of the CRC is also relevant. This provides:

“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”

[118] Article 27 of the CRC, relevantly provides:

- “1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”

[119] Finally, Article 28 of the CRC provides:

- “1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (d) Make educational and vocational information and guidance available and accessible to all children;
 - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.”

[120] While a child-sensitive approach to the determination of the sons refugee claim is called for, not every predicament faced by a child will constitute being

persecuted; see, generally, UNHCR *Guidelines on International Protection No 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol* HCR/GIP/09/08 (22 December 2009). Further, the 'best interest of the child' principle under Article 3(1) of the CRC is not determinative of refugee status; see *DQ (Iran)* [2015] NZIPT 800868 at [41].

[121] The Tribunal is cognisant of the reality that the form of harm may be different for a child applicant than for an adult. However, the fact remains that the child claimant's predicament must qualify as 'being persecuted' under the Refugee Convention for that child to be entitled to refugee status under section 129 of the Act.

[122] Like their mother, the sons, aged three and 12 years, face a real chance of ongoing threats of harm and acts of violence, infringing their rights under Article 7 (the right to be free from cruel, inhuman or degrading treatment or punishment) of the ICCPR and 19(1) of the CRC, constituting serious harm.

[123] The Tribunal also finds that the cumulative psychological effect of harassment and discrimination against them, in myriad areas of their life, including throughout their education (where, even if accepted into mainstream education they are likely to face bullying, isolation and physical abuse), or through their day-to-day activities, such as simply walking down the street, attempting to join in sport and play in the park or playground, or go to the supermarket, also constitutes serious harm. The Tribunal makes this finding in relation to the intensity of harm in the context of their young age, the duration of such forms of harm across their lifetime, paired with the lack of any family and social support networks and a mother in a fragile psychological condition.

[124] The police response to threats of harm and violence against Roma clearly falls well short. The state response to discrimination against Roma and access to education is also, clearly, inadequate. The state is unable to provide the sons with any protection which would reduce the risk of physical or psychological harm to them below the level of a real chance.

[125] For the same reasons expounded by the Tribunal at [109] to [112] of this decision, the Tribunal finds that it cannot be satisfied that, in any proposed site of internal protection there is no risk of the sons being persecuted for a Convention reason. Accordingly, the first principal issue is answered in the affirmative.

Is there a Convention reason for the persecution?

[126] The relevant Convention reason for the sons is their ethnicity/race, and for the mother, her membership of a particular social group, namely, family, as the mother of Roma sons.

[127] The second principal issue is therefore also answered in the affirmative.

Conclusion on Claim to Refugee Status

[128] For these reasons the appellants are entitled to be recognised as refugees under section 129 of the Act.

The Convention Against Torture

[129] Section 130(1) of the Act provides that:

“A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.”

Conclusion on Claim under Convention Against Torture

[130] The appellants have been found to be refugees. The recognition of the appellants as refugees means that they cannot be deported from New Zealand to the Czech Republic; see Article 33 of the Refugee Convention and sections 129(2) and 164 of the Act. The exceptions to section 129, which are set out in section 164(3) of the Act, do not apply. Therefore, there are no substantial grounds for believing the appellants would be in danger of being subjected to torture in the Czech Republic.

The ICCPR

[131] Section 131 of the Act provides that:

“(1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

...

(6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment.”

Conclusion on Claim under ICCPR

[132] Again, because the appellants are recognised as refugees, they are entitled to the protection of New Zealand and cannot be returned to the Czech Republic. For the reasons already given in relation to the claim under section 130 of the Act, the appellants will not be deported from this country. Therefore, there are no substantial grounds for believing that the appellants are in danger of being subjected to arbitrary deprivation of life or to cruel, inhuman or degrading treatment or punishment in the Czech Republic. Accordingly, the appellants are not persons who require recognition as protected persons under the ICCPR.

CONCLUSION

[133] For the foregoing reasons, the Tribunal finds that the appellants:

- (a) are refugees within the meaning of the Refugee Convention;
- (b) are not protected persons within the meaning of the Convention Against Torture;
- (c) are not protected persons within the meaning of the Covenant on Civil and Political Rights.

[134] The appeals are allowed.

Order as to Depersonalised Research Copy

[135] Pursuant to clause 19 of Schedule 2 of the Immigration Act 2009, the Tribunal orders that, until further order, the research copy of this decision is to be depersonalised by removal of the appellants' names and any particulars likely to lead to the identification of the appellants.

Certified to be the Research
Copy released for publication.

S A Aitchison
Member

“S A Aitchison”
S A Aitchison
Member