# THE HIGH COURT

## JUDICIAL REVIEW

**[2023] IEHC 187**

**[2023 175 JR]**

**IN THE MATTER OF DIRECTIVE 2013/33/EU AND THE EU (RECEPTION CONDITIONS) REGULATIONS 2018**

**BETWEEN**

**S.Y. (A MINOR SUING BY HIS NEXT FRIEND AOIFE DARE)**

**APPLICANT**

**AND**

**THE MINISTER FOR CHILDREN, EQUALITY, DISABILITY, INTEGRATION AND YOUTH, IRELAND AND THE ATTORNEY GENERAL**

**THE CHILD AND FAMILY AGENCY**

**RESPONDENTS**

**AND**

**UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES**

**NOTICE PARTIES**

**AND**

**THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION AMICUS CURIAE**

**JUDGMENT of Mr. Justice Charles Meenan delivered on the 21st of April 2023**

**Introduction**

**1.** The application before the court is but one of many. Each of the applications concern single males of a young age who have applied for international protection in the State. It is common case that the applicant in these proceedings and other similar proceedings are entitled to "material reception conditions" under the provisions of the "European Communities (Reception Conditions) Regulations, 2018 (S.I. 230 of 2018) ("the Regulations"). It is also common case that what was provided by the first named respondent (the Minister) fell far short of what is required, in particular, lack of accommodation/shelter, the provision of food and basic conditions for hygiene.

**2.** In the course of this judgment I will identify the legal obligations which the Minister owes both to this applicant and others under domestic law and EU law.

**3.** Since these proceedings were initiated, accommodation has been provided to the applicant. The provision of accommodation ought also to cover the requirement for food and basic hygiene conditions. Despite this, the applicant seeks certain declarations.

**4.** As there have been numerous other similar applications the court decided to hear this application as a "lead case" to identify the legal issues and entitlements. It should also be noted that the court was informed that, unlike the applicant, there have been no offers of accommodation to other applicants even after a lapse of several weeks.

**The Applicant**

**5.** The applicant is an Afghan national, and he states his date of birth as being 18 January 2006. In September 2022, the applicant's father was killed by the Taliban. His eldest brother subsequently arranged for him to leave Afghanistan to seek asylum. The applicant left Afghanistan in or around 6 November 2022 with the assistance of a "people smuggler". Having travelled to Iran, Turkey, Bulgaria, Italy, France and England the applicant arrived in the State on 7 February 2023 and made an application for international protection the following day, 8 February 2023. He did not have documents to prove his age.

**6.** The applicant was interviewed by social workers on behalf of the International Protection Office ("IPO"). They told the applicant that they believed he was an adult and not a minor. The applicant was informed that there was no accommodation available and was provided with a €28 (possibly €25) voucher for Dunnes Stores to buy bedding. Other than €15 the applicant had no other financial means. The applicant was given the address of the Capuchin Day Centre, a private charity.

**7.** Between 7 February and 28 February, the applicant had to sleep rough in places such as benches, parks, and train stations. The applicant did not have any food to eat and had to resort to begging. On occasion he was provided with food by other Afghani people whom he met on the streets.

**8.** Whilst he was sleeping rough, the applicant felt constantly scared and in danger. In his grounding affidavit he states that on one occasion he was approached by a drunk man who demanded money from him. The drunk man threatened the applicant that he had a knife and forced the applicant to give him €5.

**9.** On the hygiene conditions endured by the applicant he stated in his affidavit:

> "When I attended the Irish Refugee Council, I was provided with a list of charities in Dublin which provide meals and access to toilet facilities. I did not have any bath or shower for approximately 22 to 23 days I did not change my clothes in those 22 to 23 days; I smelled bad. Sometimes, I used the toilets at the Mosque near the Spire, sometimes in shopping malls, but there were times when I was forced to relieve myself behind some offices in town. I felt ashamed, humiliated and degraded. I felt desperate and hopeless that things would get better for me. If not for the help from Afghani people and charities, I don't know how I would have survived."

**10.** Although the applicant appears to be a minor he was initially deemed an adult by the IPO and the Child and Family Agency ("CFA") (the third named respondent). Subsequently

the applicant obtained documentation from Afghanistan which indicated that the applicant is a minor. The IPO has accepted this documentation, but the matter remains with the CFA and an "age assessment" decision on review is awaited.

**Application for Judicial Review**

**11.** On 24 February 2023, the applicant was granted leave (O'Regan J.) to seek a number of reliefs by way of judicial review. These reliefs included:

1. An order of mandamus requiring the first named respondent to perform the public duty imposed on him by Regulation 4 of the Regulations and the Reception Conditions Directive by providing the applicant with "material reception conditions" to include accommodation/housing without further delay in accordance with law.
2. A Declaration that the First Named Respondent's failure to perform the public duty imposed on him by Regulation 4 of the EU (Reception Conditions) Regulations 2018 and the Reception Conditions Directive, Directive 2013/33/EU, to provide the Applicant with 'material reception conditions' including accommodation/housing since he indicated his intention to apply for international protection in the State pursuant to section 13 of the International Protection Act 2015 is and has been unlawful.
3. A Declaration that in failing to provide the Applicant with material reception conditions and knowingly leaving him living on the streets, the First Named Respondent has acted in breach of the Applicant's right to a 'dignified standard of living' as an applicant for international protection pursuant to EU law, including in particular Article 17 of the Reception Conditions Directive and Articles 1 (human dignity), 3 (integrity of the person), 4 (prohibition on

inhuman and degrading treatment) and 7 (respect for private and family life) of the Charter of Fundamental Rights of the European Union.

**12.** On 28 February 2023, as the applicant was provided with accommodation, the mandatory injunction is no longer being sought.

**Legislative framework**

**13.** Directive 2013/33/EU lays down standards for the reception of applicants for international protection. This Directive sets out a number of substantive changes to be made to Council Directive 2003/9/EC which laid down minimum standards for the reception of asylum seekers. In the recitals of the Directive the following is stated:

> "(10) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination."
>
> "(14) The reception of persons with special reception needs should be a primary concern for national authorities in order to ensure that such reception is specifically designed to meet their special reception needs."
>
> "(35) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly."

**14.** Article 17 of the Directive provides:

> "**General rules on material reception conditions and health care**
>
> 1. Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection.

2. Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health."

**15.** The Directive was transposed into Irish law by the Regulations (S.I. 230 of 2018). "Material Reception Conditions" are defined as being "provided to a recipient for the purposes of compliance with the Directive—

(a) the housing, food and associated benefits provided in kind,

(b) the daily expenses allowance, and

(c) clothing provided by way of financial allowance under section 201 of the Social Welfare Consolidation Act 2005."

Article 4 of the Regulations "provision of material reception conditions" provides:

"(1) A recipient shall, subject to these Regulations, be entitled to receive the material reception conditions where he or she does not have sufficient means to have an adequate standard of living."

"(5) The Minister may, exceptionally and subject to paragraph (6), provide the material reception conditions in a manner that is different to that provided for in these Regulations where—

(a) an assessment of a recipient's specific needs is required to be carried out, or

(b) the accommodation capacity normally available is temporarily exhausted.

(6) The provision of the material reception conditions authorised by paragraph (5) shall—

(a) be for as short a period as possible, and

(b) meet the recipient's basic needs."

**16.** "The Charter of Fundamental Rights of the European Union" (The Charter of Rights) provides:

"Article 1

**Human dignity**

Human dignity is inviolable. It must be respected and protected.

Article 3

**Right to the integrity of the person**

1. Everyone has the right to respect for his or her physical and mental integrity.

Article 4

**Prohibition of torture and inhuman or degrading treatment or punishment**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 7

**Respect for private and family life**

Everyone has the right to respect for his or her private and family life, home and communications."

**17.** Reference was made in the course of submissions to certain provisions of the European Convention on Human Rights (ECHR), in particular Article 3 which provides:

> **"Prohibition of torture and inhuman or degrading treatment or punishment**
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

**18.** However, there were no submissions concerning the provisions of the European Convention on Human Rights Act 2003. In any event, the declarations sought by the applicant appear to be limited to the provisions of the Regulations and the Charter of Rights.

**19.** It is clear that as the applicant made an application for international protection pursuant to s. 13 of the International Protection Act 2015 he was entitled to receive "material reception

conditions". The Minister did not seek to rely on the provisions of Regulation 4 (5) which refers to the "material reception conditions" which may be available where the accommodation capacity that is normally available is temporarily exhausted. In any event, even in such circumstances the Minister is obliged to "meet the recipient's basic needs" as per (6). There was no dispute between the parties but that both "material reception conditions" and "recipient's basic needs" include the provision of shelter/accommodation, food, and basic hygiene facilities.

**Response of the Minister**

**20.** Paragraph 4 of the Minister's statement of opposition states that the Minister is answerable at law for the acts and omissions of the International Protection Accommodation Service ("IPAS"). It is also admitted by the Minister that prior to 28 February 2023 (the date when accommodation was provided to the applicant) the Minister did not afford to the applicant the "material reception conditions" which included "accommodation/housing, to which he was entitled under the European Communities (Reception Conditions) Regulations 2018, S.I. 230/2018 .."

**21.** The Minister relied upon a replying affidavit sworn by Mr. Paul Fay of IPAS. Mr. Fay sets out in considerable detail the challenges and obstacles facing the Minister in providing accommodation for persons such as the applicant. He states that the number of persons seeking international protection has grown considerably in recent years. Up to March 2023 some 1,931 persons have applied for international protection. The accommodation problems have been compounded by those fleeing from the war in Ukraine.

**22.** Separate to the international protection system some 69,210 Ukrainian nationals have arrived in the State since late February 2022, of whom over 56,235 are currently being provided with accommodation by the Minister. The remainder are being housed with relatives or friends in private accommodation.

**23.** Mr. Fay states that as of 26 February 2023, 19,936 people are being accommodated by IPAS as compared with 8,555 people as of the end of January 2022.

**24.** In late September/October 2022 the overflow facilities available to IPAS through the Citywest transit hub came under extreme pressure. According to Mr. Fay this caused new admissions to this facility to be "paused" on 23 January 2023. Furthermore, a number of public order incidents occurred at this facility which required the involvement of An Garda Síochána. At present the Citywest transit hub is host to 709 international protection applicants for whom no other accommodation is currently available and, according to Mr. Fay, it is anticipated that it will not resume taking further applicants in the short term.

**25.** Mr. Fay sets out the steps that are being taken by the Minister for the procurement of other accommodation for those seeking international protection. He states that every possible effort has been made to secure accommodation including utilising offers that have come through the Association of Missionaries and Religious of Ireland, contacting various government departments seeking facilities in premises such as schools, third level institutions, unused barracks and buildings used for sporting and arts facilities. In addition, exemptions have been introduced under planning regulations for change of use of premises.

**26.** As for the provision of other elements of the "material reception conditions" Mr. Fay states:

> "… any IP (international protection) applicant that cannot be accommodated immediately will have their contact details recorded and will be provided with a food voucher and information relating to Merchants Quay Ireland and the Capuchin Day Centre.."

**27.** Finally, in his affidavit Mr. Fay outlines that there is a "system" in place to provide accommodation to persons such as the applicant. There appears to be a list system whereby accommodation, when it becomes available, is given to the next person at the top of the list. In

the case of the applicant, this took three weeks. However, as I have referred to earlier, the court was informed that there are applicants in other proceedings who have been waiting considerably longer than three weeks with no offer of accommodation.

**Issues**

**28.** Given that the applicant has now been accommodated, two issues remain to be considered:

(i) Whether this application is "moot".

(ii) The applicants entitlement, if any, to the declarations he seeks.

**29.** In the course of the submissions to the court, reference was made to preferential treatment being given to those persons arriving in the State from the war in Ukraine. It was suggested that such persons were provided with accommodation unlike persons in the applicant's position. However, there was no evidence put before the court as to whether this was or was not the case. In the absence of evidence I cannot consider this point.

**Findings**

**30.** This application was heard on affidavit evidence. Having considered the affidavits, in my view, the following can be stated:

(i) The Minister accepts that he has failed to provide "material reception conditions" to the applicant as is required by the Regulations.

(ii) The Minister explains his failure to provide "material reception conditions" because of a chronic shortage of available accommodation. This shortage has been caused and/or exacerbated by the numbers of people seeking international protection and those fleeing the war in Ukraine.

(iii) The Minister is making considerable efforts to source suitable accommodation. Meanwhile, persons such as the applicant, a young single male, are being denied the accommodation to which they are entitled.

(iv) "Material reception conditions" not only include accommodation but also the provision of food and basic hygiene facilities. In purported compliance with the Minister's legal obligation the applicant was given one voucher to the value of €28 for Dunnes Stores and directed towards private charities such as the Capuchin Day Centre. Clearly this does not come remotely close to what is required by law. Directing persons such as the applicant to private charities to receive supports which the Minister is obliged to give cannot be seen as anything other than completely unacceptable.

(v) By reason of the failure of the Minister the applicant has been forced to live and sleep rough, beg for food and has been deprived of basic hygiene conditions. In addition, the applicant has been exposed to personal attack and danger and also subjected to humiliation.

**31.** Based on these findings I will consider various legal issues.

**Mootness**

**32.** The Minister submitted to the court that this application should not be heard on grounds of mootness given that the applicant has now received accommodation. As I have stated previously, this application is but one of many. Unfortunately, it appears that some or all of the "many" have not received the accommodation to which they are entitled. As the issues in the instant case are similar to those in other applications the court directed that this case be heard as a "lead case". This was with a view to deciding these important issues in an efficient way within a short time frame. To dispose of this application on grounds of mootness would totally defeat the whole point of having a "lead case".

**33.** There are a number of leading authorities on the issue of mootness. I refer to the Supreme Court decision in *Lofinmakin v. Minister for Justice* [2013] 4 I.R. 272. McKechnie J. stated:

"[82] From the relevant authorities thus reviewed and leaving aside the issue of costs which is dealt with separately (para. 102 infra et seq.), the legal position can be summarised as follows:

(i) A case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing.

(ii) Therefore, where a legal dispute has ceased to exist, or where the issue has materially lost its character as a lis, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined.

(iii) The rationale for the rule stems from our prevailing system of law which requires an adversarial framework, involving real and definite issues in which the parties retain a legal interest in their outcome. There are other underlying reasons as well, including the issue of resources and the position of the court in the constitutional model.

(iv) …

(v) That rule is not absolute, with the court retaining a discretion to hear and determine a point, even if otherwise moot. The process therefore has a two-step analysis, with the second step involving the exercise of a discretion in deciding whether or not to intervene, even where the primary finding should be one of mootness.

(vi) In conducting this exercise, the court will be mindful that in the first instance it is involved in potentially disapplying the general practice of supporting the rule, and therefore should only do so reluctantly, even where there is an important

point of law involved. It will be guided in this regard by both the rationale for the rule and by the overriding requirements of justice.

(vii) Matters of a more particular nature which will influence this decision include:

(a) the continuing existence of any aspect of an adversarial relationship, which if found to exist may be sufficient, depending on its significance, for the case to retain its essential characteristic of a legal dispute;

(b) the form of the proceedings, the nature of the dispute, the importance of the point and frequency of its occurrence and the particular jurisdiction invoked;

(c) …

(d) …

(e) the character or status of the parties to the litigation and in particular whether such be public or private: if the former, or if exercising powers typically of the former, how and in what way any decision might impact on their functions or responsibilities;

(f) the potential benefit and utility of such decision and the application and scope of its remit, in both public and private law;

(g) …

(h) …

(i) the resource costs involved in determining such issue, as judged against the likely return on that expenditure if applied elsewhere; and

(j) the overall appropriateness of a court decision given its role in the legal and, specifically, in the constitutional framework."

**34.** The court was also referred to the Supreme Court decision in *M.C. v. the Clinical Director of the Central Mental Hospital* [2021] 2 I.R. 166. In this case the applicant was found guilty of murder and attempted murder and was committed to the Central Mental Hospital. The

applicant responded well to treatment in the hospital, and on review under the relevant legislation she was released on a conditional discharge order which included a condition that her place of residence would be determined by her treating consultant psychiatrist. The applicant applied for a variation of that condition and the notice party, the Mental Health (Criminal Law) Review Board, acceded to the application and directed the respondent (the hospital) to assess and confirm the making of certain arrangements. However, the respondent was unable to do so. The applicant sought by way of judicial review an order of certiorari of the decision of the respondent and an order of mandamus directing the respondent to make the relevant arrangements and declarations that the refusal was in breach of her rights. At the time the application came on for hearing, the applicant had been unconditionally discharged from the hospital. As a result, orders of certiorari and mandamus were no longer required but the applicant sought to maintain her application for declaratory relief. The judgment of the Supreme Court was given by Baker J. Having referred to the above passage from *Lofinmakin* Baker J. stated:

> "(48) The test for mootness is more properly whether there is or remains at the date of hearing a live, unresolved, and concrete legal dispute between the parties, or whether the action is speculative or seeks an advisory decision from the court which could be of no practical effect. .."
>
> (49) In the present case the applicant seeks to vindicate her constitutional and ECHR rights by two means: a claim for a declaration that there has been a violation or infringement of the rights; and a claim for damages for infringement. Whilst I would be reluctant to say that every claim which seeks a declaration that there has been a violation of constitutional and/or ECHR rights would pass a threshold test if an argument of mootness was raised, the present case is one where applicant seeks to assert a breach of established and fundamental rights. In particular, she seeks declarations

> regarding an alleged loss of personal and individual dignity, a breach of her right to marital and personal privacy, a breach of her rights of autonomous decision-making, and a breach of her right of self-determination. These are not abstract, vague or insubstantial claims. …"

The Supreme Court decided that the application was not moot.

**35.** Referring to the discretion identified by McKechnie J. in *Lofinmakin*, though the issue of accommodation has been resolved in the instant case, this issue and the other "material reception conditions" remain live in many other cases. It must be in the interests of the parties that the issues raised by the applicant are resolved. Further, even if the instant case were not a "lead case" I am of the view that the declarations being sought by the applicant would pass the threshold test as identified in the above passage from the judgment of Baker J. in *M.C. v. The Clinical Director of Central Mental Hospital*.

**36.** By reason of the foregoing, I am satisfied the application herein is not moot.

**Declarations: -**

**37.** The court was referred to a number of authorities on the granting of declarations. In particular the decision of the Supreme Court in *PMcD v Governor of X Prison* [2021] IESC 65. The background to these proceedings were that the appellant had been sentenced to twelve years imprisonment for serious offences. While serving his sentence the appellant was in solitary confinement by his own choice and subsequently went on a hunger strike in protest against certain changes in the conditions under which he was being detained. There were a number of issues in the proceedings but by the time the appeal came on for hearing the only issue for determination was whether the prison authorities owed the appellant a duty of care in relation to the handling of complaints made by him under the provisions of the Irish Prison Complaints Policy Document which had been introduced in June 2014. In addition to the issue of damages the High Court had made a declaration sought by the plaintiff to the effect that the

respondent had breached the terms of the said complaints policy. In his judgment Charleton J considered the discretion which a court has in granting declarations.

**38.** Charleton J stated: -

"20 --- More generally, the discretion to refuse is not fettered when it comes to granting a declaration but, as Lord Bingham stated at [1991] PL 64, courts are guided as to conduct and efficacy:

> 'The court has exercised its discretion to refuse declarations which will serve no useful purpose, [*AG v. Scott* [1905] 2 K.B. 160, 169; *Eastham v. Newcastle United Football Club Ltd.* [1964] Ch. 413, 449] or to refuse relief where the applicant has achieved the substantial result which he seeks without any order, [*R. v. Commissioner of Police of the Metropolis, ex p. Blackburn* [1968] 2 Q.B. 118] or where a public body has shown that it is doing all it honestly can to comply with its statutory duty, [*R. v. Bristol Corporation, ex p. Hendy* [1974] 1 W.L.R. 498] or where an error has been substantially cured. [*R. v. Secretary of State for Social Services, ex p. Association of Metropolitan Authorities* [1986] 1 W.L.R. 1]. This seems to me a beneficial rule. If the court is satisfied that a public body will readily perform its duty once the court tells it what its duty is, I see no reason why it should be the subject of a coercive order. The rules that the court will not compel a party to do the impossible and will not make futile or unnecessary orders seem hard to challenge.'

22. As Walsh J acknowledged in *Transport Salaried Staff Association v CIÉ* [1965] IR 1, 'while the circumstances in which a court of equity may grant a declaration have become less strict, over the century up to the date of that judgment, such a jurisdiction is exercised with circumspection'. MacMenamin J in his separate judgment rightly cites *Omega v. Barry* [2012] IEHC 23, where Clarke J identified four essential factors:

> that there be a good reason for a declaration; that there must be a more than theoretical, rather real and substantial, issue; that the contending party for such relief must have sufficient interest to raise that question; and finally, that there must be a proper contradictor. It must be born in mind that what is before the court is a matter which touches on the immediate rights and liabilities of parties and that in consequence of a declaration, the parties are considered bound by what has been declared and, in many if not all instances, are expected to act according to the legal position which the court has not only clarified but taken the step of publicly setting out in solemn form. Such has to relate to an issue touching them both and has to be one within the scope of the judicial exercise of power…"

**39.** The Minister submitted that the declarations sought by the applicant were unnecessary given the Minister's acceptance of the failure to provide accommodation and the efforts that were being made to obtain additional accommodation. This submission would have more weight if the provision of accommodation was the only failure on the part of the Minister. There has been no suggestion that in the absence of accommodation it was not possible to provide other "material reception conditions", being food and the provision of basic hygiene facilities.

**40.** In considering the authority referred to, I do so in the context of the findings which I have made set out at para. 30 above. There is nothing academic or theoretical about the rights which the applicant seeks to enforce. Being denied "material reception conditions" has a direct impact on the applicant's quality of life to the extent that it deprives him of the most basic standard of living. The four essential factors identified by Clarke J in *Omega v Barry,* referred to by Charleton J in the passage cited above are all present. There is a good reason for the declaration, the issue is real and substantial, the applicant has sufficient interest to raise the issue and there has been "a proper contradictor".

**41.** The applicant also seeks a declaration under the Charter of Fundamental Rights of the EU, in particular Article 1 which refers to human dignity and Article 3 which refers to "Right to the Integrity of the Person".

**42.** The Minister submitted that the Regulations do not refer to Article 35 of the Directive which refers to the Charter of Fundamental Rights and that the Directive does not meet with the conditions for direct effect. Contrary to this the Amicus Curiae submits that the Regulations are to be interpreted in a manner consistent with the Directive which necessarily means the court should have regard to the provisions of Article 35. It seems to me that such a submission must be correct.

**43.** There are two decisions of the ECJ which have particular relevance. Firstly, case C-233/80 *Haqbin*. This case concerned withdrawal by a Member State of reception conditions relating to housing, food and clothing where the recipients had been involved in violence. The court stated: -

> "40. With regard specifically to the requirement to ensure a dignified standard of living, it is apparent from Recital 35 of Directive 2013/33 that the Directive seeks to ensure full respect for human dignity and to promote the application, *inter alia*, of Article 1 of the Charter of Fundamental Rights and has to be implemented accordingly. In that regard, respect for human dignity within the meaning of that Article requires the person concerned not finding himself or herself in a situation of extreme material poverty that does not allow that person to meet his or her most basis needs such as a place to live, food, clothing and personal hygiene, and that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity" (see, to that effect, judgment of 19 March 2019, Jawo, C-163/17, EU:C:2019;218, para. 92 and the caselaw cited).

**44.** Case C-79/30 *Saciri* refers to the earlier Reception Conditions Directive 2003/9/EC. Three questions were referred by the Member State to the ECJ. On the first and second questions the court stated: -

> "35. In addition, the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter of Fundamental Rights of the European Union, under which human dignity must be respected and protected, preclude the asylum seeker from being deprived – even for a temporary period of time after making of the application for asylum and before being actually transferred to the responsible Member State – the protection of the minimum standards laid down by that Directive" (see *Cimade & GSTI,* para. 56).

**45.** The third question posed by the Member State is of particular relevance in this application: -

> "47. By its third question, the referring court asks, in essence, whether Directive 2003/9 is to be interpreted as precluding, where the accommodation facility specifically for asylum seekers are overloaded, the Member States from referring the asylum seekers to bodies within the general public assistance system, which are responsible for providing asylum seekers with the necessary financial aid."

In answer the court stated: -

> "48. In that regard, it is necessary to bear in mind that, if the Member States are not in a position to grant the material reception conditions in kind, Directive 2003/9 leaves them the possibility of opting to grant the material reception conditions in the form of financial allowances. These allowances must, however, be sufficient to meet the basic needs of asylum seekers, including a dignified standard of living, and must be adequate for their health."

and: -

> "50. Accordingly, the answer to the third question is that Directive 2003/9 must be interpreted as meaning that it does not preclude, where the accommodation facilities specifically for asylum seekers are overloaded, the Member States from referring the asylum seekers to bodies within the general public assistance system, provided that the system ensures that the minimum standards laid down in that Directive as regards the asylum seekers are met."

**46.** It is clear from these decisions of the ECJ on the Directive and its predecessor that even if accommodation facilities are overloaded alternative steps should be taken by the Minister which may include giving "financial allowances" or referring persons, such as the applicant, to "bodies within the general public assistance system" who will provide what the Minister does not.

**47.** In *Saciri* the ECJ envisaged the situation that has arisen in the State being lack of accommodation. Even though the Minister is making efforts to secure accommodation this does not absolve him of his obligations under the Regulations. Clearly, giving the applicant a €28 voucher for Dunnes Stores and the addresses of private charities does not come close to what is required.

**48.** Further, in both cases referred to above specific reference was made by the ECJ to the provisions of Article 1 of the Charter of Fundamental Rights which states "human dignity is inviable it must be respected and protected."

**ECHR (the Convention)**

**49.** Submissions were made by the parties concerning the application of Articles 3 and 8 of the Convention. However, neither of the declarations sought by the applicant specifically referred to these or other Articles of the Convention. In the course of submissions reference was made by the parties to a number of authorities. The applicant relied upon the decision of the House of Lords in *R.* (*Limbuela) v. Secretary of State for the Home Department* [2006] 1

AC 396. This decision indicated that even a short period of sleeping rough, in this case three days, where accommodation ought to have been provided could amount to inhuman or degrading treatment under Article 3 of the Convention.

**50.** The Minister relied on the decision of the European Court of Human Rights of *MSS v. Belgium and Greece* (application 30696/09) which concerned, *inter alia*, the provision of accommodation to asylum seekers. The Minister submitted that the applicant had not passed the threshold to invoke the provisions of Article 3 and relied on the following passage:

> "The Court reiterated that it has not excluded the 'possibility' that State responsibility (under Article 3) could arise for 'treatment' where an applicant, in circumstances wholly dependent on State support, found herself faced with *official indifference* in a situation of serious deprivation or want incompatible with human dignity." (see *Budina v Russia* (Dec) 45603/05, 18 June, 2009)".

The Minister submitted that in the instant case there was no "official indifference". I do not believe that this decision is of any great assistance to the Minister. I refer to the following passage of the judgment:

> "250. The court is of opinion, however, that what is at issue in the instant case cannot be considered in those terms. Unlike in the above cited *Muslim* case at para. 83 and 84) the obligation to provide accommodation and decent material conditions to impoverished asylum seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes community law, namely Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers in the Member State ("the Reception Directive"; see para. 84 above) what the applicant holds against the Greek authorities in this case is that, because of their deliberate actions or omissions, it has been impossible in practice for him to avail himself of these rights and provide for essential needs."

**Conclusion**

**51.** By reason of the foregoing, I have concluded that the Minister is in breach of both of his obligations under the Regulations and the Charter of Fundamental Rights of the EU, in particular Article 1 thereof. I will therefore grant the Applicant the following declarations:

(i) A Declaration that the Minister's failure to provide to the applicant the "material reception conditions" pursuant to the European Union (Reception Conditions) Regulations 2018 is unlawful;

(ii) A Declaration that the failure by the Minister to provide to the applicant the "material reception conditions" pursuant to European Union (Reception Conditions) Regulations 2018 is in breach of the applicant's rights under Article 1 of the Charter of Fundamental Rights of the European Union.

**52.** As this judgment is being delivered electronically, I will put this matter in for mention on Friday, 12 May 2023 to deal with any further orders, including costs. Should the parties wish to make any submissions, such submissions (not more than 1,000 words) should be submitted no later than Friday, 5 May 2023.