Neutral Citation: [2015] IEHC 779

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 1058 J.R.]

BETWEEN

A.D.

R. D. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND A. D.) AND E. D. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND A. D.)

APPLICANTS

AND

REFUGEE APPEALS TRIBUNAL,

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 24th day of November 2015,

1. This is a telescoped hearing seeking *certiorari* of the decision of the Refugee Appeals Tribunal which affirmed the decision of the Refugee Applications Commissioner that the applicants not be declared refugees.

2. The first named applicant (hereinafter "the applicant") is a Nigerian national who arrived in Ireland on a visitor's visa for the purpose of visiting her sister. She arrived in the state on 29th April, 2007 and had permission to remain until 29th July, 2007. Her intention was to return to Nigeria following her visit. The first named applicant suffers from Bi-polar Affective Disorder. She had a relapse while in Ireland resulting in treatment in this state in or about July or August 2007.

3. The second and third named applicants (hereinafter "the minor applicants") were born respectively on 20th May, 2008 and 25th May, 2010 in this state. According to the applicant, the last contact she had with the minor applicants' father was in or about 2009.

4. In November 2008, the applicant applied via her then solicitor seeking a renewal of her "permission to stay in the state beyond the period already granted to her". In the course of the said application, the Minister was advised of the applicant's mental health needs and of the birth of the elder of the minor applicants.

5. In April 2009, the Irish Naturalisation and Immigration Service informed the applicant, inter alia, that her application had been refused and that her permission to remain in the state had expired. Deportation orders were made in respect of the applicants in June 2011.

6. An application for asylum in respect of the applicant commenced on 18th August, 2011. The minor applicants were included in the application. The ASY1 form records the s. 8 interview with the applicant and noted:

> *"Applicant states she arrived in 2007 to Ireland on a visit visa. Applicant states her sister supported her and that she lived with her sister. Applicant states that she made some money selling Avon products door to door.*
>
> *Applicant states she is seeking asylum because she suffers from a mental disorder which causes her to have seizures. Applicant states a number of times in Nigeria when walking around she suffered these seizures and was raped. Applicant states she fears if she returns to Nigeria she will have a seizure and be raped again. Applicant states that since she arrived in Ireland she has had only one seizure and none since taking medication she receives here. Applicant states the medication in Nigeria is no good for her and she responds better to the medication she receives in Ireland."*

7. The applicant completed a questionnaire on 20th August, 2011. In the course of her s.11 interview she stated that she was first diagnosed with Bi-polar Affective Disorder in 1998 and that she regularly attended a named psychiatric hospital in Nigeria. She recounted that when incapacitated by the seizures she was raped *"about four to five times"* and on one occasion sustained a beating when sister brought her to a church for prayers. She did not report the rapes or assault to the police and explained:-

> *"they wouldn't even consider Bi-polar as a medical issue. They see me on the road and they know me. They will say there is the mad lady….All in my mind is that it is a shame to let people know you have been raped. They will treat you as an outcast…... They will relegate you to the background they don't want to associate with you….Even in the hospital I was tied to the bed with chains….They treat you as an outcast when you have been raped or when you have this bi-polar disorder. They don't count this as a medical condition, they see it as possessive as if somebody has a demon."*

The applicant expressed her fears for the future in the following terms:-

> *"I don't want to be tortured and be raped any more. I am scared of having AIDS If someone rapes me like that and they have HIV and transfer it to me that could mean death to me and my children will suffer….If I have seizures, I would not have contact for them [her children] while I am in hospital."*

and

> *"I just don't want to be killed and die young……My children, they won't have a mother anymore if such a thing happens to me now. They are still very young"*

With respect to the possibility of procuring medication in Nigeria, the applicant stated: *"You have to be very rich to be treated in Nigeria and the side effects were just unbearable."*

8. The commissioner's report, dated 8th September, 2011 issued on 30th September, 2011.

9. In summary, they key findings were as follows:-

> • The Commissioner noted that the applicant had legal representation since at least November 2008 and that her sister with whom she lived for the majority of her four years in Ireland had applied for asylum in the state several years ago. In the circumstances, it was not accepted that the applicant was unaware of or could not find out about her option to claim asylum during the four years she was in the state and she thus failed to provide a reasonable explanation for the lengthy delay in applying for asylum;
>
> • Despite the applicant's sense of interaction with the psychiatric services in Lagos for almost a decade, she claimed to be unable to furnish ORAC with any medical documents from Nigeria;
>
> • The applicant's claimed education, work experience and engagement with the Nigerian state in terms of her youth service "cast doubts in relation to the severity of her state of discrimination due to her medical condition";
>
> • The applicant's subjective fears were based on her not receiving the correct medical care in Nigeria;
>
> • The authorities in Nigeria were not an opportunity to respond to the alleged problems and thus the applicant had not proven a lack of state protection in Nigeria;
>
> • As there appeared to be 35 psychiatric hospitals in Nigeria, it was asserted that internal relocation was an option for the applicant and that she could relocate in Nigeria and seek employment to support her and her children, particularly given her level of education and work experience;
>
> • The Commissioner found that "an applicant must demonstrate a fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. The applicant's claim is primarily based on her medical condition and the fear of crime i.e. rape. Therefore there is no nexus to s. 2 grounds in this case".

10. The s. 13 report concluded with a finding that s. 13 (6) (c) of the Refugee Act, 1996, as amended applied to the application; "that the applicant without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the state."

11. A Form 2 Notice of Appeal was submitted on 5th October, 2011. The grounds of appeal asserted that the applicant had a well founded fear of persecution on grounds of "membership of a particular social group" and it was asserted that the Commissioner erred in the assessment of internal relocation and in finding that state protection was available for the applicant. With regard to the latter, it was asserted that country of origin information demonstrated that state protection was *"woefully inadequate"*. It was further asserted that the Commissioner erred in failing to properly assess available country of origin information on persons with mental health issues in Nigeria and the appeal grounds alleged human rights violations in Nigeria in respect of persons suffering from mental illness and that there were only restricted medical facilities in Nigeria. Additionally, issue was taken with the finding in respect of the delay in applying for asylum.

12. As a consequence of the s. 13 (6) (c) finding, the applicant's appeal before the Tribunal was a papers only appeal.

13. The Tribunal's key findings (which largely mirrored the s. 13 findings) were as follows:

> • It was accepted that the applicant has Bi-polar Affective Disorder;
>
> • It was difficult to understand why the applicant did not seek asylum as soon as practicable after entering the state. Her failure to do so undermined the well foundedness and credibility of her stated fear;
>
> • The applicants education, work experience and her completion of national service ran counter to her assertion that she was discriminated against due to her medical condition;
>
> • While the applicant stated she attended a named psychiatric hospital in Lagos since 1998, she had not furnished any medical documents in relation to her treatment in Nigeria.
>
> • Having regard to the foregoing findings, the applicant could not be given the benefit of the doubt;
>
> • The applicant availed of medical treatment when in Nigeria and information on file indicated that same would be available to her were she to return to Nigeria;
>
> • While the applicant "may suffer some stigmatisation were she to reveal her medical condition upon her return to Nigeria, it would not be sufficiently serious to amount to persecution".
>
> • There was no evidence that the applicant would be treated differently from any other Nigerian in the same situation;
>
> • The fact that a different level of healthcare was available in Nigeria did not constitute persecution for a Convention reason;
>
> • The applicant's subjective fear of criminality did not bring her claim within the Convention.

14. The decision then addressed the circumstances of the minor applicants, stating:

> *"The applicant's children were born in Ireland. Her fear for her children is based on her own asylum application…….. As*

the dependant applicants claims are based on Applicants (sic) asylum claim, the dependant applicants (sic) claims cannot be deemed well founded."

In coming to her conclusion on this issue, the Tribunal Member relied on the dictum of Clarke J. in *Imoh v. RAT* [2005] IEHC 220.

The challenge to the decision

15. Counsel for the applicants submitted that the starting point for a papers- only appeal is that the Tribunal must adhere to a standard of extreme care , as set out in *Sun (South Africa) v. Refugee Applications Commission and others* [2012] IEHC 338, *VM (Kenya) v. Refugee Appeals Tribunal and others* [2013] IEHC 24, *BY (Nigeria) v. Refugee Appeals Tribunal* [2015] IEHC 60, *SK v. Refugee Appeals Tribunal* [2015] IEHC 154 and *NTP (Vietnam) v. Refugee Applications Commissioner* [2015] IEHC 234. The court accepts that it is against the backdrop of this jurisprudence that the decision must be reviewed.

16. Counsel submitted that in the particular circumstances where the applicant was a woman with a known psychiatric condition and a claimed history flowing directly from the psychiatric condition, and was the sole carer of children, the "extreme care" requirement was paramount.

17. The Tribunal Member failed to state any reason for the rejection of the explanations given by the applicant as to why she had not sought asylum earlier. In particular the decision-maker failed to have regard to the fact that it was the applicant's present solicitor who informed her of the possibility of seeking asylum. It was further submitted that the delay in applying for asylum did not go to the core of the applicant's fear of being returned to Nigeria.

18. While the findings in relation to the applicant's level of education, work experience and the lack of medical documents from Nigeria appeared to be credibility findings, there was no indication as to whether or not the applicant's core claim was accepted, namely that she was exposed to persecution by reason to her inability to protect herself when suffering significant psychiatric episodes and which is clearly stated to be based on her diagnosed mental condition and her claim of past persecution. Given the centrality of said issues, clear, unequivocal and unambiguous findings were essential. In this regard, counsel referred to *BOB v. Refugee Appeals Tribunal* [2013] IEHC 187 and *TU (Nigeria) v. Refugee Appeals Tribunal* [2015] IEHC 61.

19. The findings in respect of the previous availing of medical treatment in Nigeria; that treatment was available in that state; and that stigmatisation did not amount to persecution all failed the "extreme care" test which a papers only appeal required.

20. The Tribunal wholly failed have regard to the actual evidence given by the applicant in respect of the medical treatment she had received in Nigeria. Moreover, the Tribunal erred in finding that treatment was available in Nigeria by referring only to one country of information report, without reference to the country reports attached to the Notice of Appeal.

21. The finding that the stigmatisation that the applicant "may" suffer did not amount to persecution was lacking a rational basis. The finding that there was no evidence that the applicant would be treated differently from any other Nigerian in the same situation was superfluous as it was never her case that by reason of her psychiatric disorder she would be treated in an unlike manner to persons similarly situated.

22. The two findings in respect of a lack of a Convention nexus were misconceived. The Convention ground relied on was membership of a particular social group. The standard of "extreme care" required consideration of whether the applicant was a member of a social group in light of what country of origin information reports said about females who experienced rape, and in light of the applicant's evidence that she would be regarded as "mad". Furthermore, consideration should have been given to whether the minor applicants' particular and unique family circumstances, namely children in the sole care of a mother with a known psychiatric condition and a claimed history flowing directly from that psychiatric condition, constituted a particular social group. This type of consideration did not take place, rendering the *"nexus"* findings unsafe.

23. The Tribunal Member failed to consider whether the past persecution suffered by the first named applicant was indicative of likely future persecution or was sufficient on its own to warrant a grant of refugee status.

24. The Tribunal Member had unequivocally accepted that the applicant suffered from Bi-polar Affective Disorder. However, her story went further than that. She had recounted how she was raped and beaten during seizures. She was perceived as "possessed". Furthermore, while she had attended hospital in Nigeria and received treatment there, that treatment was not effective, unlike the treatment afforded her in Ireland. The final leg of the applicant's claim was that she would be stigmatised in Nigeria and she had pointed to this via her appeal submissions and the country of origin information which attached thereto.

25. A perusal of the s. 5 analysis showed that the Tribunal Member essentially rejected the applicant's claim on three grounds namely, delay in claiming asylum, the fact that she received treatment in Nigeria and on finding that her fear of rape was a subjective fear of criminality.

26. While the decision made reference to the Convention on the Rights of the Child, it was difficult to reconcile the summary dismissal of the minor applicants' claims in the absence of any consideration, let alone a primary consideration, of their best interests.

27. The decision-maker had been presented with a situation where the minor applicants were aged three and one years of age at the time of the appeal consideration.

28. Furthermore, the minor applicants' claims were rejected on the ground that they were based on their mother's claim, which was not deemed well-founded. However, the present case was one where the Tribunal Member was required to look at the claims of the minor applicants independently, as the situation which presented concerned two very young children whose mother/protector suffered from a psychiatric illness which, while controlled in Ireland, would not be controlled if the applicant were to be returned to Nigeria. It could not be the case that because the applicant's claim was rejected, that the minor applicants claims were to be similarly treated. The Tribunal Member was required to consider whether minor applicants' situation might conceivably be different to that of their mother. In those circumstances, the Tribunal Member should have remitted the matter back to ORAC for the necessary risk assessment.

29. In the course of her consideration of the minor applicants claims, the Tribunal Member cited the dictum of Clarke J. in *Imoh v. RAT and others* [2005] IEHC 220, namely that where a decision maker came to a justified decision that the well-founded fear did not exist in respect of a parent, that finding would equally apply in relation to any minor whose claims were based upon precisely the same grounds. However, the decision-maker had omitted to refer to the concluding remarks made by the learned judge on the issue, namely the acceptance that *"there may … be cases where these considerations that would be applicable to an application by a minor would*

be different to those applicable to an adult parent or guardian (even though the surrounding circumstances may be similar)". Counsel submitted that in the present case, while the surrounding circumstances were similar, a fair-minded and reasonable decision maker, given the accepted facts, would have considered the question of a potential risk to the minor applicants and would thus have remitted the matter back to ORAC for assessment of that risk.

30. In the course of her s. 11 interview, the applicant had made the case that she wished to be considered because she *"would not want something bad to happen to [her children]".* This, counsel submitted, was confirmation of the stability of her circumstances in Ireland, in contrast to what the applicant perceived as the risk for the minor applicants if they returned to Nigeria.

31. A further issue of significance was that while the decision-maker made reference to paragraph 213 of the UNHCR Handbook (which deals with unaccompanied minors), she failed to have regard to paragraphs 206- 212 which provide guidance on the Procedure for the Determination of Refugee Status for "mentally disturbed persons".

32. The decision cited article 3(1) of the Convention on the Rights of the Child which provides:

> *"In all actions concerning children, whether undertaking by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".*

33. Giving that the Tribunal Member perceived this as a material consideration in the context of her role as an administrative authority, it was, counsel submitted, almost inescapable that she should have determined that the minor applicants' situation merited investigation. While the Tribunal Member stated that she had regard, inter alia, to the Convention on the Rights of the Child and the fears held by the applicant for her children, in view of the applicant's vulnerability it was nonetheless a matter for ORAC to investigate the children's situation, in accordance with the "extreme care" standard which the Tribunal Member was obliged to afford a papers only appeal.

34. The fact that the issue of an independent risk for the minor applicants was not raised in the Notice of Appeal was not of any importance given that the Tribunal Member herself was alert to the question of an independent risk to the minor applicants.

The submissions advanced on behalf of the respondents
35. Counsel submitted that the present case was one where the Tribunal Member was entitled to adopt the same approach as was adopted by Clarke J. in *Imoh v. RAT*, namely that's where the applicant's fear of persecution was not well founded, that decision applied likewise to the minor applicants in the absence of any independent ground having been advanced on their behalf, which was the case here, counsel argued. No independent claim was advanced, either before the Commissioner or on appeal. In Imoh v. RAT, Clarke. J addressed a somewhat similar situation in the following terms:

> *"Under this heading it is contended that the determination of the RAT is legally flawed by virtue of the fact that it does not, it is said, address at all, a contention put forward on behalf of the applicant as to her fear of forced marriage. The factual position would appear to be as follows. The first named applicant filled in the usual questionnaire as part of the initiation of her application for refugee status. In the course of that questionnaire she mentioned a fear of forced marriage as been (sic) one of the matters which she contended for as justifying her entitlement to refugee status. The report of the authorised officer of the RAC under s. 13 of the Refugee Act, 1996 ("The 1996 Act") does not appear to make any specific mention of this matter. When the first named applicant came to appeal to the RAT no ground of appeal was put forward on the basis of any failure on the part of the RAC to deal with the forced marriage issue. In those circumstances it does not seem to me that it can properly be said that the forced marriage issue was, in any real sense, before the RAT. In those circumstances it is hardly surprising that it did not come up as an issue at the hearing before the RAT and was not, therefore, dealt with in the decision of the RAT. I find it hard to see how any appropriate criticism can be made of the RAT under this heading. Where, as here, the applicant chooses not to raise the issue in the notice of appeal or to refer to the matter at the appeal hearing I do not believe that there is any basis for suggesting that there was any inappropriate failure on the part of the RAT to deal with the matter in the course of its determination."*

Furthermore, counsel relied on the decision of the Supreme Court in *M.A.R.A. v. Minister for Justice and others (unreported)* 12th December 2014, in light of the failure to raise any issue regarding the minor applicants on appeal to the Tribunal.

36. In any event, there was no merit to the argument that there were considerations applicable to the minor applicants that were different to those applicable to the applicant (even though the surrounding circumstances were similar), as the Tribunal Member found that the minor applicants' claims were derivative of the applicant's claim. Given the state of the evidence before her, she could have made no other finding. No attempt was made by the applicant to make a new case on behalf of the minor applicants before the Tribunal. In fact the applicants' counsel's submissions in these proceedings did not make the case the minor applicants had a claim for refugee status separate to that of the applicant and, in any event, it was too late to advance such an argument at the judicial review stage. All that was being suggested was that the Tribunal Member should have sent the matter back to ORAC.

37. Although the applicants' counsel did not articulate a basis for refugee status for the minor applicants which was independent of the applicant's claim, what can be surmised from the arguments advanced is that such a claim is premised on the applicant's fear of the harm that might befall the minor applicants upon a return to Nigeria. However, that feared harm is not one that comes within the Convention definition, although it might be an issue for consideration in the context of a subsidiary protection assessment. While the applicants' plight on return to Nigeria might merit sympathy, that was not a ground to challenge the Tribunal decision.

38. It was not suggested that the minor applicants would be persecuted or discriminated against because they are children of someone with a mental illness. Apart form the fact of their being children of the applicant, no independent grounds for refugee status were advanced on their behalf. In this regard, counsel cited the dictum of Clarke J. in Imoh:

> *"if the decision of the RAT that the first named applicant does not have a well founded fear of persecution is sustained, then, on the facts of this case, that decision applies to the minor applicants. I am not, therefore, satisfied that there is any independent ground for challenging the decision of the RAT in respect of the minor applicants."*

39. Neither did the Tribunal Member's reference to Article 3 of the Convention on the Rights of the Child mean that the minor applicants become refugees because they are children and it was not the case that they acquire an independent basis from that of the applicant for refugee status because they are children.

40. It was submitted that the applicants' counsel's reliance on para. 212 of the UNHCR Handbook was misplaced and quoted out of

context. Paras. 206-212 are applicable where a protection applicant with a mental illness may be unable to advance their refugee claim or give the facts of their case to the decision-maker. Thus, there is an obligation on the decision-maker to ensure that they are afforded the opportunity to do so and there may be in, such circumstances, a need for a greater benefit of the doubt to be afforded where there is inability to advance a claim based on mental illness. However, this was not the situation in the present case, as the applicant was on treatment for her disorder in this state since 2007

41. The position was that the applicant had arrived in the state on a visitor's visa in 2007 which was not renewed. She then sought an extension in November 2008 and ultimately only sought asylum in 2011 when it was proposed to deport her. The Commissioner made a number of reasonable and rational findings with regard to delay and the applicant's level of education and work experience in Nigeria despite her medical disorder, her fears of being ostracised by Nigerian society, the fact that she received treatment in Nigeria and that she had intended to return to Nigeria, most of which were upheld by the Tribunal Member.

42. While the applicants' counsel, in the course of written and oral submissions, made much of the requirement for "extreme care" in relation to a papers-only appeal, such appeals were usually ones with the weakest grounds for refugee status and, moreover, the Oireachtas has mandated such papers-only appeals in certain circumstances. Moreover, the requirement for "extreme care" did not mean that some different standard of proof applies in papers-only appeals.

43. In the present case, there were no new matters considered by the Tribunal Member which would have required her to provide the applicant with an opportunity to respond prior to rendering the decision. The appeal was rejected on the same grounds as the Commissioner. Therefore, the legal authorities relied upon by the applicants cannot benefit the applicants in these proceedings.

44. A decision-maker is mandated to have regard to a number of factors as set out in s. 11B of the Refugee Act, 1996. One such factor is delay in applying for asylum. The s. 11B factors cannot be ignored by the decision-maker, as recognised by Clarke J. in Imoh. The Tribunal Member duly found that the applicant's credibility was undermined by the four-year delay in applying for asylum, after duly considering her explanation and the reasons for the rejection were set out in the decision. The Tribunal Member upheld what was found by the Commissioner in this regard.

45. Contrary to the applicants' counsel's submissions, the Tribunal Member's findings were not unclear. The decision sets out two alternative bases upon which the claims were rejected. Firstly, the Tribunal Member upheld the Commissioner's credibility findings, which were rational and reasonable, and she did so in circumstances where there was no further information in relation to these matters provided in the Notice of Appeal. Thus, the Tribunal Member was entitled to and indeed under a duty to come to the same conclusion. Secondly, she found that no Convention nexus was established, as the evidence provided by the applicant did not establish that the alleged stigma amounted to persecution, a finding also made by the Commissioner. Neither of the aforementioned findings, as initially made by the Commissioner, was challenged in the Notice of Appeal. Consequently, the applicants can have no grounds for complaint.

46. As a matter of principle, in circumstances where neither credibility findings nor, in particular, the nexus point, was appealed, the proceedings before the Tribunal were effectively rendered a moot as regardless of the outcome on the matters actually appealed, the applicant could not succeed in her asylum application.

Considerations

47. By and large, in the course of oral argument before this court, counsel for the applicants focused on two discrete issues, namely the Tribunal Member's failure to have regard to the provisions of paras. 206-212 of the UNHCR Handbook and her treatment of the claims advanced on behalf of the minor applicants.

48. The first issue to be determined is whether the decision is vitiated by procedural unfairness by reason of the Tribunal Member's failure to have regard to the provisions of paras. 206-212 of the UNHCR Handbook when assessing the applicant's asylum claim. The said Guidelines provide:

> *"206. It has been seen that in determining refugee status the subjective element of fear and the objective element of its well-foundedness need to be established.*
>
> *207. It frequently happens that an examiner is confronted with an applicant having mental or emotional disturbances that impede a normal examination of his case. A mentally disturbed person may, however, be a refugee, and while his claim cannot therefore be disregarded, it will call for different techniques of examination.*
>
> *208. The examiner should, in such cases, whenever possible, obtain expert medical advice. The medical report should provide information on the nature and degree of mental illness and should assess the applicant's ability to fulfil the requirements normally expected of an applicant in presenting his case... The conclusions of the medical report will determine the examiner's further approach.*
>
> *209. This approach has to vary according to the degree of the applicant's affliction and no rigid rules can be laid down. The nature and degree of the applicant's "fear" must also be taken into consideration, since some degree of mental disturbance is frequently found in persons who have been exposed to severe persecution. Where there are indications that the fear expressed by the applicant may not be based on actual experience or may be an exaggerated fear, it may be necessary, in arriving at a decision, to lay greater emphasis on the objective circumstances, rather than on the statements made by the applicant.*
>
> *210. It will, in any event, be necessary to lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere, e.g. from friends, relatives and other persons closely acquainted with the applicant, or from his guardian, if one has been appointed. It may also be necessary to draw certain conclusions from the surrounding circumstances. If, for instance, the applicant belongs to and is in the company of a group of refugees, there is a presumption that he shares their fate and qualifies in the same manner as they do.*
>
> *211. In examining his application, therefore, it may not be possible to attach the same importance as is normally attached to the subjective element of "fear", which may be less reliable, and it may be necessary to place greater emphasis on the objective situation.*
>
> *212. In view of the above considerations, investigation into the refugee status of a mentally disturbed person will, as a rule, have to be more searching than in a "normal" case and will call for a close examination of the applicant's past*

history and background, using whatever outside sources of information may be available."

49. It was argued on behalf of the applicant that paragraph 212 was particularly important in circumstances where the applicant was someone who is mentally disturbed, and while functioning well in this State, will not function as well in Nigeria. The case was made that her circumstances and the consequences for the minor applicants, were they to return to Nigeria, merited the "searching" investigation recommended in paragraph 212. It was argued that the "searching" inquiry which should have been done by the Tribunal Member was by remittal of the matter to ORAC for further inquiry pursuant to section 16(6) of the 1996 Act, as amended, and then for ORAC to furnish such information as the Tribunal Member considered necessary

50. In his reply to the respondents' submission that paragraph 212 of the UNHCR Handbook was not applicable to the applicant's situation, the applicants' counsel submitted that one should not take an overly literate interpretation of the provisions of paras. 206-212 and that regard had to be had to the purpose of the provisions, which was to protect vulnerable people. He argued that the relevant Guidelines could not be said only to apply only to mentally disturbed persons where illness is impeding the examination of their claim; that was too narrow an interpretation. The matter under consideration by the decision-maker here were the circumstances of a mentally disturbed person, albeit that her illness is controlled by drugs, who is a mother to two infant children. While the minor applicants did not fall into the mentally disturbed category, their claims were combined with that of the applicant. The court was urged to adopt a purposive approach to the UNHCR Guidelines.

51. Counsel argued that para. 212 was particularly important vis-à-vis the circumstances of the applicant and her children and contended that this was all the more imperative in circumstances where the Tribunal Member herself had referred to Article 3 of the Convention on the Rights on the Child. Counsel contended that the combination of the provisions of the UNHCR Guidelines and Article 3 of the Convention on the Rights of the Child should have led the decision-maker to say that if they were to be returned to Nigeria, the minor applicants' circumstances merited further investigation. While counsel agreed that, to a degree, no separate claim was being made in respect of the minor applicants, he argued that nonetheless a fair-minded decision- maker would have said that the matter required the searching investigation advocated by para.212

52. As is clear from para.206 of the Guidelines, and indeed para.212 upon which the applicant relies, their purpose is to alert an examiner that in particular circumstances, as outlined at paras.206-212, a protection applicant may be at a disadvantage in relaying his or her claim, and that such a situation calls for particular techniques to be employed. Paras. 206-212 indicate to a decision-maker that where someone is mentally disturbed, particular care is necessary in processing the claim. Para.208, in particular, alerts the decision-maker to direct his or her attention to a protection applicant's *ability* to present their case. The question which arises in this case is whether the factual matrix which presented to the Tribunal Member should have put her on enquiry that the applicant fell into the category of protection applicant for which paras.206-212 cater.

53. I am not persuaded however that that was the case. There is nothing in the record to suggest that the applicant in the course of her asylum application was unable, by reason of mental illness, to articulate her case, either orally or in writing. I note that the applicant was able to complete her questionnaire, albeit she stated that she had legal assistance. The fact that she was legally assisted would not of itself be sufficient to put a decision-maker on inquiry that the procedure provided for para. 212 was required. The information provided by the applicant in the questionnaire and in the course of the s.11 interview was that she was in receipt of medical treatment in this state, which was effective, and which kept her seizures at bay. On the applicant's own account, she had one seizure in this state in 2007, which was treated, and she recounted that she was on medication and apparently seizure- free since that time. There is no hint or suggestion from the record of her s.11 interview that her illness prevented her from articulating her fears, either or her own behalf or on behalf of her children, or that she was unable to advance her claim before the Commissioner by reason of mental disorder or disturbance. Moreover, I note that while the Notice of Appeal grounds took issue with the Commissioner's substantive response to the applicant's claim and referred, inter alia, to the situation in Nigeria which, it was claimed, the applicant would be confronted with if returned, it was not argued that the type of situation addressed by paras. 206-212 of the UNCHR Handbook arose in the course of the applicant's asylum process .Additionally, there was no suggestion in the appeal grounds that the applicant was unable to articulate her fears to her legal representatives which might have put the Tribunal Member on inquiry (given the shared duty in relation to fact-finding) that a remittal under s.16(6) of the Refugee Act, 1996, as amended, was warranted.

54. In all the circumstances, I am not persuaded that there was anything in the applicant's circumstances which should have led the Tribunal Member to conclude that the examiner/Commissioner in her case was "confronted with an applicant having mental or emotional disturbances that impede a normal examination of [the] case" (para. 207), or that the applicant was otherwise impeded or restricted by reason of illness from presenting her case or the case made by her on behalf of the minor applicants. I do not find that the Tribunal Member breached the standard of extreme care which a papers only appeal requires. The challenge on this particular ground has not been made out

55. Before turning to the second issue upon which counsel for the applicant focused attention in the course of oral argument, I will address other matters set out in the applicants' written submissions.

56. The written submissions include, inter alia, the argument that that the Tribunal Member erred in rejecting the applicant's claim on grounds of credibility and that she failed to address the applicant's core claim

57. In response to the applicants' challenge to the credibility findings, counsel for the respondents argued that the applicants did not appeal the credibility findings made by the Commissioner to the Tribunal and contended that the mere affirmation by the Tribunal of the Commissioner's view on the applicant's credibility could not overturn the legal characterisation which the Supreme Court in *M.A.R.A. v. Minister for Justice and others* (unreported) 12th December 2014, has declared arises in relation to the requirements for an appeal of the Commissioner's recommendation. Counsel referred to the dictum of Charlton J.:

> *"……the function of the Refugee Appeals Tribunal is to examine afresh such aspects of the decision of the Refugee Applications Commissioner as are appealed. Initiating of an appeal, under subsection 3, is by notice in writing. This must specify the grounds of appeal.*
>
> *………*
>
> *"some relevant findings of fact or of law may not be disputed on the appeal. Such findings remain undisturbed notwithstanding the appeal as, under the legislation, there must be particularisation as to what grounds of the decision of the refugee applications commissioner are disputed."*

58. While I note counsel for the respondents reliance on M.A.R.A., the Tribunal Member in the present case went on to make

credibility findings in her own right and accordingly I view the challenge set out in the statement of grounds and in the written submissions as addressing those particular findings. However, that being said, I am not persuaded that substantial grounds have been made out by the applicants that the Tribunal Member erred in relation to the credibility assessment. Addressing the delay in seeking asylum, she noted that the applicant was able to engage with this state on a number of matters between 2008 -2010, that she was relatively well-educated and spoke English, that she had a sister in this state who had gone through the asylum process and that she had legal representation since at least 2010. The Tribunal Member's conclusion on the issue of delay was rational and reasonable in all the circumstances and it is not for this court to substitute its judgment for that of the decision-maker. . While the issue of delay, on itself, may not be determinative of the applicant's claim, it was a factor which the Tribunal Member was entitled (and indeed mandated) to consider in the round. Similarly, the Tribunal Member was within jurisdiction in addressing the applicant's claim from the perspective of what she was able to achieve in Nigeria notwithstanding her claimed fears, matters which the Tribunal Member found went to the applicant's credibility. Likewise, I do not find that there was a failure to address the applicant's core claim or that the findings made were unclear and I find nothing in the written or oral submissions to persuade me to the contrary.

59. Separate to the credibility findings, the Tribunal Member found that *"the applicant's subjective fear of criminality does not bring her claim within the Convention."* A similar conclusion was reached by the Commissioner.

60. Counsel for the respondents argued that while the applicant alluded in her grounds of appeal to the Tribunal to mistreatment of persons with mental illness which occurs in Nigeria, there was no challenge to the Commissioner's finding that there was no nexus between the Convention and the mistreatment the applicant claimed to fear on a return to Nigeria. In advancing this argument, counsel again relied on the dictum of Charlton J. in M.A.R.A. However, in his written submissions, counsel for the respondent concedes that the Tribunal Member appears to have given a generous interpretation to Ground 3 of the Notice of Appeal and considered it in the context of whether it amounted to an assertion of a Convention nexus by way of a particular social group. As with the issue of credibility, the Tribunal Member made a specific finding on the question of the Convention nexus and, again, I am not persuaded that counsel for the respondents' reliance on *M.A.R.A.* is particularly apt, since it is difficult to see, if a discrete finding is made by the decision- maker, how that finding would not be capable of challenge by the addressee of the decision.

61. The Tribunal Member's finding with regard to the absence of a Convention nexus vis a vis the applicant was not challenged with any degree of particularity in the statement of grounds.

62. While the applicants' written submissions alluded to the Tribunal Member not adhering to the standard of "extreme care" by reason of the failure to consider whether the applicant was a member of a particular social group in light of what country of origin information said about women who were raped, and the perception in Nigeria of those who suffer from psychiatric illness, this issue was not as greatly pursued in the oral argument. Rather, the second principal focus of the present challenge was the Tribunal Member's treatment of the minor applicants' claims.

63. In this regard, the statement of grounds plead, *inter alia,* that "[t]he decisions of the Tribunal in respect of the Applicants are lacking in cogency, and the claims of the minor Applicants were prejudged by reason of the wrongful reliance on the findings in respect of their mother."

64. I turn now to this second leg of the challenge to the decision.

65. In rejecting the claims of the minor applicants as derivative of the applicant's claim, which she determined was not well-founded, the decision- maker cited the dictum of Clarke J. in *Imoh v. RAT.*

> *'In Moyosola v. Refugee Appeals Commissioner and others (unreported, High Court, Judgment of Clarke J., 23 June, 2005) I indicated that while there may be cases where it is necessary for decision makers in the refugee process to give significant independent consideration to the position of minor applicants (that is to say consideration independent of their parents and guardians) each case depended on its own facts. In this regard the facts of Moyosola are similar to the facts in this case. The basis upon which the first named applicant claims to fear persecution is that she fears, she says, that her daughters will be subjected to female genital mutilation (FGM). For the reasons which I addressed in Moyosola it is clear that if she has a well founded fear in that regard (and in the absence of any of the other normal considerations which would, nonetheless, exclude her from refugee status) then such a well founded fear would necessarily give rise to both her and her children being properly regarded as refugees. Equally, as I pointed out in Moyosola, if a decision maker within the refugee process comes to a justified decision (that is to say a decision which is not subject to being quashed on review) to the effect that such a well founded fear did not exist then that finding will equally apply in relation to the position of any minor whose claims were based upon precisely the same grounds'.*

66. The issue for this court is whether the Tribunal Member correctly concluded that because no well-founded fear existed in respect of the applicant, she was entitled to reach a similar conclusion in respect of the minor applicants.

67. The challenge advanced on behalf of the minor applicants is to the effect that before a conclusion could be reached on the claim for refugee status made on their behalf, the Tribunal Member was required to consider whether their situation might conceivably be different to that of their mother, and that in the exercise of her function in this regard, the Tribunal Member should have remitted the matter back to ORAC for the necessary risk assessment. One aspect of this challenge has been already addressed by the court's ruling on the UNHCR Guidelines issue insofar as that challenge argued that the minor applicants circumstances were combined with that of their mother, albeit that the minor applicants did not fall into the category of persons for which paras.206-212 of the UNHCR Guidelines provide.

68. One of the criticisms counsel for the applicants levelled at the decision-maker was that she was selective in her reliance on the dictum of Clarke J. in Imoh v. RAT. It was argued that in Imoh, Clarke J. had acknowledged that *"there may … be cases where the considerations that would be applicable to an application by a minor would be different to those applicable to an adult parent or guardian (even though the surrounding circumstances may be similar)".*

69. In the first instance, I am satisfied that the Tribunal Member was alert to the necessity to give independent consideration to the position of the minor applicants, since she quoted the dictum of Clarke J. which makes specific reference to such requirement. I do not find that anything particularly turns on the Tribunal Member's omission of the above quoted statement. The salient issue for the court is whether the decision-maker gave independent consideration to the claims advanced on behalf of the minor applicants, as she was required to do by law. The nature and extent of the necessary independent consideration in any particular case will depend on the nature of the claim being advanced on behalf of a minor applicant.

70. What falls to be considered therefore is the factual matrix which was presented by the applicant with regard to her two children.

In the course of her s. 11 interview, when asked if there was anything she would like to add in relation to her or her children's asylum claims, the applicant stated:

> *"I just want to be considered because I love my children so much and I wouldn't want something bad to happen to them. I am a young lady although I didn't plan for this to happen, my ill health. I would really like to be considered and I would really love to work and counsel people that have the same issue. I am rally (sic) stabilised here from the treatment I am getting here, rather than in Nigeria."*

71. Although the applicant's concern for her two young children is perfectly understandable, I am not persuaded by the argument effectively advanced by her counsel that her sentiments could reasonably or rationally be understood by the decision-maker as amounting to a concern that her children would be refugees in their own right, i.e. on a distinct ground to that which was advanced by the applicant

72. The s. 13 report documented the applicant's claim, as advanced on her behalf and on behalf of her children, as follows:

> *"The applicant states she fears being raped in Nigeria if she were to suffer a seizure there because of medication she may receive in Nigeria and states that she fears she could contract HIV if this were to happen. The applicant maintains she fears that if she were to have seizures her children would be without her while she was hospitalised and if she were to contract HIV they may suffer because of her illness. This however, is a subjective fear based on the applicant's assertions. These asserted fears are, according to the applicant's statements, based upon her not receiving the correct medical care in Nigeria."*

73. Apart from the fact that they were her children and her concern for them was expressed to the s. 11 interviewer, no independent grounds for refugee status were advanced on their behalf by the applicant in the questionnaire or at the s.11 interview. As already stated, the ground upon which the fear of persecution was claimed on appeal was identified in the applicant's Notice of Appeal as "Membership of a particular social group" without any further elaboration, although as I have already stated, the Tribunal Member went on to deal with the issue in the context of whether the applicant had established a nexus to the Convention, which was found not to be established. Significantly, the grounds of appeal did not assert a distinct basis for refugee status for the minor applicants. It was not suggested that they would be persecuted or discriminated against in Nigeria because they are children of someone with a mental illness. It seems to me that it is against this backdrop that the applicants' counsel's argument that the Tribunal Member should have remitted the matter to ORAC for further investigation has to be addressed. As regards the present case, I find myself in agreement with counsel for the respondents, whose submission was, effectively, that there was nothing in the claim advanced by the applicant on appeal that should have put the Tribunal Member on inquiry that an independent basis for refugee status might exist for the minor applicants and which required further investigation.

74. That being the case, I am not persuaded that the Tribunal Member erred in failing to remit the issue of the minor applicants' circumstances to ORAC in the absence of a more compelling case having been put to the decision-maker. Accordingly, I do not find that that there was any procedural deficit on the part of the Tribunal Member in this regard, or that her conclusion that the minor applicants' claims were based on their mother's claim was in any way unreasonable or irrational.

Summary
75. While the applicants' circumstances on a return to Nigeria might be a matter for consideration in some other process (and that is not a matter for this court), with regard to the challenge to the Tribunal's upholding of the Refugee Applications Commissioner's recommendation that the applicants not be declared refugees, for the reasons set out in the judgment, I am not satisfied that substantial grounds have been made out in this case to warrant the granting of leave. Accordingly, the relief sought in the Notice of Motion is denied.