Neutral Citation: [2015] IEHC 702

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1402 J.R.]

BETWEEN

C. F. A. (A MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND C. O.)

APPLICANT

AND

DONAL A. EGAN ACTING AS THE REFUGEE APPEALS TRIBUNAL

AND THE MINISTER FOR JUSTICE AND LAW REFORM,

ATTORNEY GENERAL,

IRELAND

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 19th day of June 2015

1. This is a telescoped hearing wherein the applicant challenged the decision of the Refugee Appeals Tribunal which affirmed the recommendation of the Refugee Applications Commissioner that she not be declared a refugee.

Extension of time
The applicant sought an extension of time in which to bring the within proceedings. I am satisfied to grant the extension, having regard to the Affidavit of the applicant's solicitor, sworn on the 28th October 2010.

Background and procedural history
2. The applicant was born on the 18th February 2009 in this State to Nigerian parents. Her mother was born on the 25th December 1985 in Nigeria and she sought asylum in this State in 2008. Her application was unsuccessful.

The applicant's asylum application was commenced on the 21st June 2010 when she was aged16 months. An ASY1 Form was completed on that date by her mother and the latter underwent a section 8 interview on the applicant's behalf.

A questionnaire was completed on the 29th June 2010. The applicant's mother underwent a section 11 interview on the 16th July 2010.

The section 13 report dated the 27th July 2010 issued to the applicant on the 5th August 2010. In summary, the claim was rejected on the following grounds:-

• According to the citizenship laws of the world, a child can have citizenship of Nigeria by dissent regardless of the country of birth.

• The applicant's mother did not give a reasonable reason for the long delay in applying for asylum for her daughter. This undermined the credibility that the applicant had a genuine fear for her daughter.

• It was not considered reasonable that the applicant's mother made no mention in her section 8 interview of her fear that the applicant would face circumcision.

• The applicant's mother failed to rebut the presumption that states are capable of protecting their citizens.

• The applicant's mother's claim that girls in Nigeria "must be circumcised" was not in agreement with generally known information.

• Information from WACOL stated that they believe adult women could relocate within Nigeria and that adult women protecting their daughters could do the same.

• As the applicant's mother did not provide a reasonable explanation for the delay in making a claim for her daughter, the provisions of s. 13(6)(c) of the 1996 Act applied to the case.

Accordingly, the applicant's appeal to the second named respondent proceeded on a papers only basis.

3. The decision of the Refugee Appeals Tribunal issued on the 7th October 2010. The findings as set out therein are considered elsewhere in this judgment.

Grounds of challenge
4. 15 grounds of challenge are set out in the statement of grounds. In the course of oral submissions, these were distilled by the applicant's counsel, as follows:-

The Tribunal Member erred in law and/or breached natural and constitutional justice in:

• Failing to have sufficient regard to the fact that the applicant, a minor aged 1 ½ years at the time of application for asylum, was afforded a papers only appeal.

• Failing to conduct the "careful" inquiry which a papers only appeal necessitates.

• Failing to assess the applicant's credibility on relevant grounds

• Wrongly applying the provisions of s. 11B (d) to the applicant's circumstances.

• Rejecting the applicant's fear of FGM on the basis of her mother's failure to mention this fear in the ASY1 Form/section 8 interview, in circumstances where the applicant's mother has specifically referred to this fear on behalf of the applicant in the questionnaire and in the section 11 interview.

• Failing to assist the applicant in making her asylum application, as required by the provisions of Article 12.2(b) of the EU Procedures Directive.

• Failing to have regard to the fact that the applicant's mother herself had undergone circumcision and that circumcision was common in Nigeria, as evidenced by country of origin information before the Refugee Appeals Tribunal

• Failing to analyse the applicant's fear of persecution on that basis in light of available country of origin information, as required by Regulation 5(1) (a) of the 2006 Regulations.

• Failing to take into account the fact of the applicant's mother's circumcision as a factor in the applicant's favour for the purposes of the necessary assessment which should have been undertaken (but was not) by the Tribunal Member pursuant to Regulation 5(2) of the 2006 Regulations

• Failing to consider the issue of internal relocation in accordance with available country of origin information and/or in accordance with Regulation 7 of the 2006 Regulations and the principles set down in K.D. (Nigeria).

Consideration
A number of preliminary matters arose for consideration before the court embarked upon a consideration of the arguments advanced on the substantive issues.

Preliminary issue No. 1: The Carey Affidavit

In the course of her section 11 interview and in a response to a suggestion that she and the applicant could relocate internally in Nigeria, the applicant's mother objected on the basis that she had no family in Nigeria.

In oral submissions the applicant's counsel alerted the court to the Tribunal Member's failure, when considering the issue of internal relocation, to have regard to the fact that the applicant's mother had no family in Nigeria, as part of the reasonable analysis which was required.

In the context of that submission, the respondents' counsel subsequently referred to an affidavit sworn by Mr. Pat Carey, an official in second named respondent's Immigration and Naturalisation unit, which exhibited documentation extracted from the file of the applicant's mother and which formed part of the book of pleadings in judicial review proceedings instituted by her, challenging the deportation order made against her on the 17th June 2010. The documentation comprised the questionnaire completed by the applicant's mother in her own application for refugee status, her section 11 interview and the examination of file under s. 3 of the Immigration Act 1999. Counsel submitted that the contents of those documents conflicted with what the applicant's mother had stated during the applicant's asylum process. The mother's questionnaire, dated 18th May 2008, contained details of the applicant's mother's parents living at a named address in Imo State and there was a reference to an uncle who assisted her in 2006 and 2007 (and who died in 2007) and to an aunt who, together with the applicant's mother's parents, assisted the applicant's mother in getting out of Nigeria. This information was largely replicated in the section 11 interview which took place on the 22nd May 2008. The examination of file, dated 8th June 2010, contained the following information:-

> *"Ms [O] stated on arrival in the State that she was single. She claims that her father and three brothers are deceased while her mother continues to reside in Nigeria. In her representations under Section 3 of the Immigration Act 1999, it was submitted that Ms [O] was pregnant and due to give birth on 16/02/2009. However, no further information has been submitted to date."*

On foot of this information, the respondent's counsel contended that the factual situation in June 2010, when the applicant's mother was stating in the context of the applicant's claim for asylum that she had no family in Nigeria, was that the applicant's mother and an aunt were resident in Nigeria.

The applicant's counsel submitted that it was legally impermissible to put before the High Court in judicial review proceedings information which was not before the decision-maker. It was thus illogical to seek to justify the decision-maker's decision based on matters which the decision-maker never took account of. In this regard, counsel relied on the decision in *Efe v. The Minister for Justice* [2011] 2 I.R.798

Counsel argued that the decision of the Tribunal Member was based on the materials then before him, namely the section 8 interview, questionnaire and section 11 interview and section 13 report pertaining to the applicant's claim, and the Tribunal Member's decision was based on those materials and on what the applicant's mother was therein recorded as having stated, which may be true or untrue. The documents referred to in the respondent's affidavit were never put to the applicant's mother in the context of the applicant's asylum process. Had the respondents wished to do so, this should have been done by advising the applicant's mother in writing that the respondents proposed to take account of information provided by her in her asylum application. Thus, it was not open to the respondent to seek to challenge the applicant's mother's credibility by reference to material which was not considered by ORAC or the Tribunal. In any event, counsel argued that the documentation exhibited in the affidavit could not have any bearing on events which may have post dated the information the applicant's mother had given in her application and which may have taken place subsequent to the latest date referred to in the mother's applications. In the case of the examination of file document, submissions were made to the Minister prior to February 2009.

Counsel argued that the question of the applicant's mother's family arose in the context of whether internal relocation was a practical option. The only really relevant question in that context was whether the applicant's mother had family in Lagos who were willing to or able to support her. It was submitted that based on the answers which the applicant's mother had given in the section 11 interview pertaining to the applicant's claim, the answer to that question was in the negative. The essential question was whether

the documentation pertaining to the applicant's mother's case contradicted the mother's assertion. As this documentation predated the applicant's application, there could be no actual contradiction. Secondly, the applicant's mother, in the course of her own applications, had provided information pertaining to the deaths of various members of her family, many of whom had died by the time she made her own application for refugee status. Her father had died by the time her application for leave to remain was considered. More may or may not have died since that time. While the applicant's mother may have resided with her aunt for a period of time in Lagos that did not mean that that aunt remained alive or remained living in Lagos. Neither did it follow that she would be prepared to assist the applicant's mother. The real issue in this case was that none of the foregoing was investigated by the Tribunal Member. The fact that the respondent's counsel investigated it cannot suffice in judicial review proceedings. Counsel submitted that it was irrelevant (as well as legally impermissible) to seek to rely on the information pertaining to the applicant's mother's asylum and deportation process.

I agree with counsel for the applicant that the approach the court must adopt is set out in the dictum of Hogan J. in *Efe v. The Minister for Justice* [2011] 2 I.R.798, as follows:-

> *"In judicial review proceedings the court could not receive new evidence… If the Court acted upon new evidence, it would no longer be simply reviewing the decision already taken, but it would be acting on foot of new information of which the decision-maker never stood possessed…That the fact the court, in judicial review proceedings, could not receive new evidence was simply an incidence of the nature of the proceedings. If new evidence could be received, proceedings would cease to be in the nature of a review, but would then partake of the character of an appeal."*

The factual matrix upon which the respondent relies was not considered by the decision maker. This is not a situation where it is being argued that the Tribunal Member is alleged to have unlawfully introduced the material or failed to consider it or otherwise erroneously relied on it. Quite simply, it did not feature in the appeal in any shape or form. Accordingly, this court has no function in considering the material in question, whether with a view to assessing its relevancy or otherwise, since that exercise fell to be carried out by the decision maker, had the material now being introduced via Mr. Carey's affidavit featured in the appeal.

Preliminary Issue No. 2: The June 2013 Country of Origin Report
In the course of the first day of hearing of the within judicial review proceedings, the applicant's counsel submitted that FGM was not unlawful in Lagos. Counsel later clarified that this information was gleaned from what was set out in a 2005 decision of Clarke J. in *Immo v. Refugee Appeals Tribunal* [2005] IEHC 220 namely:- *"The evidence suggests that female genital mutilation is not unlawful in Lagos"*, albeit counsel acknowledged that that decision predated the applicant's asylum process. In the context of addressing the issue raised by the applicant's counsel, the respondent's counsel referred the court to a UK Border Agency Report dated 14th June 2013 (reissued on 3rd February 2014) which stated, inter alia, :-

> *"Currently, there is no federal law on Female Genital Mutilation in Nigeria, and advocates against the practice presently rely on section 34(1)(a) of the 1999 Constitution, which states that 'no person shall be subjected to torture or inhuman or degrading treatment.' Despite the fact that Nigeria was one of the five countries that sponsored a resolution at the forty –sixth World Health Assembly calling for eradication of Female Genital Mutilation(FGM) in all nations, the practice is still very much rampant in the country. Though some states of the federation, including Lagos, Osun, Ondo, Ogun, Ekiti, Bayelsa, Edo, Cross River and Rivers have enacted FGM laws, implementation of these laws has been a huge challenge. Just this past January a 15 year old girl died from post-circumcision haemorrhage in Bayelsa State, and her 17 year old sister ran away to not face the same fate."*

On behalf of the applicant, it was argued that this information post-dated the Tribunal decision and was thus was not relevant. Secondly, the real problem was that no analysis was carried out by the Tribunal Member as to whether there was such a law in Lagos, notwithstanding the obligations on the Tribunal Member pursuant to Regulation 5(1)(a) of the 2006 Regulations. The fact the respondents carried out such an analysis was not relevant in the context of these judicial review proceedings.

There is no basis upon which the June 2013 Report can feature in these judicial review proceedings and that is so largely for the reasons the court has given as to why it declined to embark upon a consideration of the material in the Carey Affidavit.

The substantive issues before this court

The papers only appeal
5. The applicant's counsel argued that where an oral hearing was not afforded to the applicant, it was not proper for the Tribunal Member to embark on credibility findings. If the Tribunal Member were so minded, then the process pursuant to s. 16(6) of the 1996 Act should have been utilised for ORAC to made further enquiries. The court was referred to the dicta of Cooke J. in *S.U.N v. Refugee Appeals Tribunal* [2012] IEHC 338 (High Court, 30th March 2012) and Clark J. in *V.M. (Kenya) v. Refugee Appeals Tribunal* [2013] IEHC 24. Counsel submitted, while acknowledging that the decision of the Commissioner was not under challenge in these proceedings, that the decision to deny the applicant an oral hearing was for a reason which was entirely outside of her control.

6. Insofar as it was argued on behalf of the applicant that she should not have been deprived of an oral hearing due to the s. 13(6)(c) and the reliance placed on S.U.N v. Minister for Justice Equality and Law Reform, the respondents' counsel referred the court to the dictum of Noonan J. in N.E. (a minor) v. Refugee Appeals Tribunal [2015] IEHC 8, as follows:-

> *"Dealing first with the applicant's complaint that he was not afforded an oral hearing of his appeal, it was the decision of ORAC that determined that issue, not the RAT decision challenged here. The applicant did not seek to impugn the ORAC decision in this respect and on the contrary, in making submissions to the RAT, made no reference to it. If a complaint were to be made, as in the S.U.N. case, the appropriate respondent to that complaint is ORAC, and the complaint ought to have been made before any appeal to the RAT was taken. Accordingly, it seems to me to be beyond argument that this issue cannot be raised in these proceedings."*

The court's assessment
7. Section 13 of the Refugee Act 1996 (as amended) in part provides:-

> *"(5) Where a report under subsection (1) includes a recommendation that the applicant should not be declared to be a refugee and includes among the findings of the Commissioner any of the findings specified in subsection (6), then the following shall, subject to subsection (8), apply:*
>
> *(a) the notice under paragraph (b) of subsection (4) shall, notwithstanding that subsection, state that the applicant may*

appeal to the Tribunal under section 16 against the recommendation within 10 working days from the sending of the notice, and that any such appeal will be determined without an oral hearing;

(b) notwithstanding paragraph (c) of subsection (4), where the applicant has not appealed against the recommendation within 10 working days after the sending of a notice under paragraph (b) of that subsection, the Commissioner shall, as soon as may be, furnish the report under subsection (1) to the Minister.

(6) The findings referred to in subsection (5) are—

(a) that the application showed either no basis or a minimal basis for the contention that the applicant is a refugee;

(b) that the applicant made statements or provided information in support of the application of such a false, contradictory, misleading or incomplete nature as to lead to the conclusion that the application is manifestly unfounded;

(c) that the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State;

(d) the applicant had lodged a prior application for asylum in another state party to the Geneva Convention (whether or not that application had been determined, granted or rejected); or

(e) the applicant is a national of, or has a right of residence in, a safe country of origin for the time being so designated by order under section 12(4).”

8. As pointed out by Clarke J. in S.O.M. v. Refugee Applications Commissioner & Ors [2005] IEHC 218:-

“The combined effect of s. 13(5) and 13(6) (as inserted by s. 7 of the 2003 Act) is to impose significant limitations on the extent of the appeal which will be available to an applicant to the Refugee Appeal Tribunal (‘RAT’) where, in addition to making a recommendation that the applicant concerned should not be afforded refugee status the RAC makes one of a number of specified findings [under s. 13(6)].”

9. The applicant was denied an oral hearing on the basis that the applicant’s mother had failed to provide a credible reason why she waited for over a year to apply for asylum on behalf of her child. Accordingly, the Commissioner found s. 13(6)(c) appropriate to the application.

10. In *S.U.N v. Refugee Appeals Tribunal* [2012] IEHC 338 (High Court, 30th March 2012), Cooke J. had occasion to consider circumstances which might give rise to unfairness in the context of a papers only appeal. He stated:

“18. Section 16(1) of the Act of 1996, provides that an applicant may appeal against a recommendation of the Commissioner under s. 13 to the Tribunal. Under s.l6 subs. (3), the appeal is brought by notice specifying the grounds of appeal and indicating whether the applicant wishes the Tribunal to hold an oral hearing for the purpose of the appeal. The entitlement to express a wish for an oral hearing is, however, excluded in a case to which s. 13(5) applies. That exclusion applies where the report under s. 13(1) includes a recommendation that the applicant should not be declared to be a refugee and includes among the findings of the Commissioner any one of the findings specified in subsection (6) and in that case s.13 (5) subparagraph (a) provides that the notification of the negative recommendation in the report given by the Commissioner to an applicant is required to state that “any such appeal will be determined without an oral hearing”.

11. He referred, inter alia, to the dictum of Clarke J. in *S.O.M. v. Refugee Applications Commissioner*, as follows:

“36. The potential of s. 13(5) to work an injustice where a subs. (6) finding is included in the s. 13 report was also adverted to by Clarke J. in Moyosola v. Refugee Applications Commissioner [2005] IEHC 218. In considering the arrangements under the Act of 1996 as they had been amended by the Immigration Act 2003, he noted one curious feature of the system:-

‘It would appear that where the RAT hears an appeal in a case to which s. 13(6) applies, the only options open to the Tribunal are to allow the appeal or affirm the decision of the RAC. It does not appear that the case can be referred back to the RAC. This raises difficult questions as to the jurisdiction of the RAT in a case where there is as.[sic] 13(6) finding which is based in material part on a view as to credibility. If the RAT feels, for example, that such a finding (i.e. as. 13(6) finding) was not justified but nonetheless has doubts as to the credibility of the applicant the RAT cannot, apparently, conduct an oral hearing to satisfy itself on credibility. How should it then act. I would leave a consideration of this question to a case where it directly arises.’

Clearly therefore, Clarke J. was alive to the potential problem posed by the exclusion of an oral hearing on appeal when doubts are raised as to the reliability of a finding of lack of personal credibility in a s.13 Report.

37. Clarke J. went on to consider whether that statutory scheme failed to comply with the principles of constitutional justice having regard to the particular sequence of events that occurred in that case. He held:

‘Where a report of the RAC contains a finding in relation to one of the matters specified in s.13(6) so as to deprive the applicant concerned of an oral appeal in circumstances where that finding is at least in material part influenced by a finding of lack of credibility on the part of the applicant concerned, it is necessary, in accordance with the principles of constitutional justice, that prior to the making of any such recommendation including any such finding the RAC will have afforded the applicant concerned the opportunity to deal with any matters which might influence such adverse credibility finding.’

He thus held that the scheme of the Act was not incapable of being operated in a manner consistent with the principles of constitutional justice provided that, where it is contemplated that as.[sic] 13(6) finding will be made on the basis of lack of credibility, there is an obligation to reconvene the s. 11 interview so that the applicant has an opportunity of rebutting the basis upon which the lack of credibility finding is to be made. The s. 13 reports in that case were quashed upon that basis namely, on the basis of a failure to comply with the principle audi alteram partem at first instance and not the ineffectiveness of the appeal remedy or the unfairness of the appeal procedure.”

Cooke J. went on to state:

> *"45. It follows, in the judgment of the Court, that where the Commissioner has a discretion (as has been found above) as to the inclusion or non-inclusion in the s. 13 report of a statutory finding under s. 13(6), the obligation to ensure that an applicant has access to an effective remedy by way of appeal under s. 16 to the Tribunal requires that the finding under paragraph (e) ought not to be included when the effect will be to deprive the applicant of an oral hearing in an appeal against a negative recommendation which is based exclusively or predominantly upon lack of personal credibility.*
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> *46. From the conclusion the Court has reached above in relation to Article 39 of the Procedures Directive it effectively follows that for the same reasons the second limb of the preliminary issue must also be decided in the applicant's favour. The denial of an oral hearing which is otherwise available to asylum seekers as part of a statutory appeal remedy in a case where assessment of personal credibility is the sole or central issue challenged in the s.13 report, by reason only of a factor (nationality,) which has no rational connection to role of a hearing in the appeal, renders the procedure, in the judgment of the Court, unfair to a degree which is incompatible with the guarantee in Article 40.3 of the Constitution."*

12. This court also has regard to the dictum of Clark J. in *V.M. (Kenya) v. RAT & Ors* [2013] IEHC 24, as follows:-

> *"22. It is by now very well established that when considering a documents-only appeal, the standard required is of necessity one of extreme care as the Tribunal Member has no opportunity to form a personal impression of the applicant as at an oral hearing. For instance, had this particular appeal not been blighted by extraordinary delays, the initial interview and possibly also his appeal would have been considered in the context of a child who could not even turn to his parents for protection. His mother had left and his father was an active Mungiki adherent prepared to lose his wife and daughter in pursuit of Mungiki beliefs. Instead, arising from the delays, by the time the appeal was considered the applicant was no longer a vulnerable seventeen year old asylum seeker but a 25 year old faceless adult whose claim was, quite bizarrely in the Court's view, found to have had no basis and thus confined to a paper based appeal.*
>
> *…*
>
> *25. In conclusion, the Court is satisfied that the Tribunal decision is flawed by reason of an irrational finding on the central issue of state protection, by a breach of fair procedures and a breach of statutory duty and should be quashed. The appeal will be remitted to the Tribunal for fresh consideration by a different Tribunal Member. As a postscript, the Court observes that should a Tribunal Member so desire, he / she has the power under s. 16(6) of the Refugee Act 1996, for the purposes of his / her functions under the Act, to request the Commissioner to 'make such further inquiries and to furnish the Tribunal with such further information as the Tribunal considers necessary'. The Court is unaware of any authority which prevents a Tribunal Member from seeking a re-interview of an applicant under s. 11 of the Refugee Act 1996 on specific matters not previously raised by the ORAC, in cases where a finding has been made under s. 13(6). In expressing these views, the Court is mindful of the emphasis placed on the right to be heard by the Court of Justice in its decision in MM v. The Minister (Case C-277/11, 22nd November 2012) and by Hogan J. in his recent follow-on decision in the same case (MM v. The Minister [2013] IEHC 9)."*

13. What can be gleaned from the above-cited case law is that the courts are alert to the limitations which a papers only appeal process places upon an appellant where issues of credibility require to be addressed by the appellate body. However, in the present case there was no challenge to the finding under s. 13(6)(c), imposed pursuant to the finding that the applicant's mother's credibility was impugned by reason of the delay in applying for asylum. This finding is not open to challenge in these proceedings.

14. There is no merit in the argument that a papers only appeal should require the Refugee Appeals Tribunal to make no credibility findings. At a minimum, the Refugee Appeals Tribunal had the information provided by the applicant's mother in the course of the asylum application, the findings made by the Commissioner, the arguments set out in the Notice of Appeal and the Country of Origin information which had been furnished (both by the Commissioner and the applicant's legal representative) prior to the examination of the appeal from which findings on credibility could be made.

15. The essential question here is whether the Tribunal Member's examination of the appeal was in accordance, inter alia, with the principles of constitutional and natural justice. The removal of the right to an oral hearing by the inclusion of a finding under s. 13(6) of the Act does not entitle an examination of the appeal to be considered otherwise than in accordance with these principles. The dicta in S.U.N. and VM Kenya,in particular, while upholding the concept that an effective remedy does not necessarily require an oral hearing, nevertheless underscore the principle that the appeal process must be conducted in accordance with the principles of fairness and natural and constitutional justice.

16. The findings in the present case will be analysed against the backdrop of the requirement that such findings must be arrived at having regard to the aforesaid principles and to the obligation on a Tribunal Member to consider a documents only appeal with "extreme care".

Broadly speaking, the claim before the Tribunal Member was that the applicant would be discriminated against in Nigeria on the basis of her mother's marital status and that she would be subjected to FGM in that State if she were to return there.

17. The court will firstly address the Tribunal Member's finding on the discrimination ground.

The discrimination ground
The Tribunal held as follows:

> *"In relation to the second ground on which the application is based, i.e. that she would be regarded as a bastard, that this would affect every aspect of her life (question 29) there is no supporting evidence for this contention whatsoever. It is noted that the applicant's father's name is on the applicant's birth certificate, and when it was pointed out to the applicant's mother that 'There are millions of single parents in Nigeria, and I find it hard to accept that it would be a major problem in major cities especially like Lagos', she answered 'Single parents maybe their families would support them. All I know is that my daughter's life is in danger in Nigeria. Her father did not accept her being a bastard child and neither would society as I already said.' Her answer suggests that lack of familial support is the applicant's mother's concern rather than being rejected by society."*

Counsel acknowledged that this finding may have been open to the Tribunal Member, but the applicant's mother had made it clear

that she had no familial support. Even if this was not relevant to the applicant's refugee status, lack of family support was relevant in the context of the assessment of the internal relocation option, yet the Tribunal Member did not take this factor into consideration when considering the question of internal relocation. The respondents' counsel submitted that the Tribunal Member properly considered the second aspect of the applicant's claim for asylum. There was no objective country of origin information available to the Tribunal Member to support the applicant's mother's claim in relation to the treatment in Nigeria of children born outside of marriage and no such supporting information was put before the Tribunal by the applicant's mother when submitting the Notice of Appeal and grounds of appeal.

I am satisfied that the applicant's counsel did not advance any real argument with regard to this finding and I am satisfied that there are no grounds upon which it can be impugned. The finding made by the Tribunal Member was open to him on the evidence and he was entitled to have regard to the absence of any supporting evidence furnished by the applicant or otherwise. However, it is notable that the Tribunal Member entered into a consideration of the merits of this claim, notwithstanding the earlier all embracing rejection of the applicant's mother's credibility on the grounds that she delayed in applying for asylum for the applicant. I consider this noteworthy for reasons which will become clear later in this judgment.

The claimed fear of FGM
Each of the credibility findings pertaining to the FGM claim will be considered from the perspective of the grounds of challenge and having regard to the parties' submissions and to relevant legal principles and case law.

18. The first credibility finding was expressed as follows:-

> *"The first point to be noted in relation to this claim is that the applicant was born on 18th February 2009. However, the applicant's mother did not apply for asylum for the applicant until 21/06/2010. Such a delay suggests a genuine lack of fear on the part of the mother for her daughter's safety if she were to return to Nigeria. The applicant's mother offered no reasonable explanation for this delay. In this case Section 11B(d) of the Refugee Act 1996 (as amended) applies.*

19. Counsel submitted that the fact of a delay in applying for asylum, of itself, could not be regarded as sufficient to deny the infant applicant's appeal and argued that the Tribunal Member's application of s. 11B (d) to the applicant's case was entirely misconceived as the infant applicant never arrived at the frontiers of the State having been born in a Dublin maternity hospital. Furthermore, the grounds of appeal had highlighted the Commissioner's reliance on the delay factor, yet the Tribunal Member did not address this concern. An undisputed factual matter, of importance, was that the applicant was aged 1 ½ years of age when the application for asylum was made on her behalf. Accordingly, it was not proper to fix the applicant (an infant) with a delay allocation. Moreover, the stated reason was entirely disconnected from the definition of a refugee. The court was referred to Hathaway and Foster "The Law of Refugee Status" (2nd Edition), as follows:-

> *"…some courts have inferred a lack of fear from an applicant's delay in claiming refugee status after arrival in the asylum country. The Federal Court of Canada explained that 'delay points to a lack of subjective fear of persecution, the reasoning being that someone who was truly fearful would claim refugee status at the first opportunity'. The High Court of Australia has also held that significant delays can negate a finding of subjective fearfulness. Yet it is difficult to discern how evidence of delay logically relates to the presence or absence of subjective fear. In fact, applicants who delay claiming refugee status may actually be more fearful than those who make their claim immediately. Aware of the severe consequences if status is not recognised, it seems completely plausible that genuinely fearful persons might postpone making a claim until they have learned something about the country's status determination system, retained counsel, or otherwise sought to minimize the risk of rejection. Thus, the Canadian Immigration and Refugee Board held in one case that the applicant's 'delay in claiming refugee status added to the alleged subjective fear, since the claimant feared being returned to France with the children.'"*

On behalf of the respondents, it was argued that the Tribunal Member was obliged to consider all matters in s. 11(B) of the 1996 Act and it was in that context that he assessed the applicant's mother's credibility, having regard to s. 11(B)(d) on the question of the long delay in applying for asylum for the applicant. It was a purely technical point that the applicant was born in this State. She had no legal right to be here, therefore, for the applicant to be in the State her mother had to apply for asylum.

Counsel contended that it could not be said that the applicant, a 1 ½ year old child, had a fear of FGM. It was her mother who was making that decision for her and on her behalf. Therefore, a delay on the latter's part served as an indicator that the applicant's mother had no fear of persecution for the applicant and it had to be the case that a delay of one year put in question whether there was such a fear for the applicant. Emphasising that it was the applicant's mother's fear for the applicant and not the applicant's fear, counsel referred to A.O & D.L. v. Minister for Justice [2003] 1 I.R. 1 where Hardiman J. stated, inter alia, :-

> *"I do not consider that a parent in taking a decision in relation to the welfare, education or residence of a child can realistically be described as exercising the child's choice for it. On the contrary, such parent is making his or her own decision for or on behalf of the child. This, however, is a parental decision, made in the ordinary course of the care and custody of a child and not a delegated exercise of some notional authority of the child… It is unrealistic to consider any decision made on the child's behalf as his own. It would not, I think, occur to anyone so to describe a parental decision except under the artificial constraints of a need to support a particular argument... I repeat that it is unreal to think or speak in terms of an infant aged one year having wishes or intentions. He is both practically and legally incapable of forming an intention and if a wish can rationally be posited on him, it can only be a wish to be with his parents."*

Counsel refuted that there was any substance to the applicant's counsel's argument that the applicant's mother was without legal advice when she applied for asylum for the applicant. The applicant's mother herself had gone through the asylum process and subsequent deportation proceedings, which were ongoing at the time she commenced the asylum application for the applicant and in respect of which she had legal representation. In any event, the applicant's mother did not require legal advice to enable her to express a fear of FGM on the part of the applicant at the earliest opportunity available to her. In her section 11 interview the applicant's mother could offer no reason why she delayed in excess of a year in making an asylum application for the applicant. Nor was any reason proffered in the notice of appeal.

It was argued that the applicant's counsel's reliance on Hathaway and Foster was misplaced. The applicant's mother had never stated that she was so traumatised by events that she was unable to articulate the fear of FGM claimed on behalf of the applicant.

The court's assessment
Looking at s.11B of the 1996 Act, it is clear to the court that it mandates a decision maker to have regard to a number of factors when assessing the credibility of a protection applicant. This includes the following:

"Where the application was made other than at the frontiers of the State, whether the applicant has provided a reasonable explanation to show why he or she did not claim asylum immediately on arriving at the frontiers of the State unless the application is grounded on events which have taken place since his or her arrival in the State." (S.11B(d))

With regard to the argument that the Tribunal Member erred in applying this particular provision to the applicant's circumstances, I find he erred in law in so doing. It seems to me that the manner in which the provision is framed is predicated on a protection applicant arriving at the *"frontiers of the State".* The applicant could never have made an asylum application at the frontiers of the State having been born in a Dublin maternity hospital more than a year after her mother's arrival in the State. That is not to say of course that the Tribunal Member was precluded from factoring in the delay factor in assessing credibility, I merely wish to emphasise that a specific s.11B (d) finding was not appropriate to the factual matrix by which the applicant came into the asylum process.

20. I turn now to a consideration of counsel's other arguments that the Tribunal Member erred in rejecting the credibility of the FGM fear because of the delay in applying for protection. It was submitted that the Tribunal Member failed to have any regard to the fact that the applicant's mother herself had been subject to circumcision. He emphasised that the applicant's mother, in the course of the section 11 interview, was asked *"Are you circumcised?"* to which she replied "Yes". That, counsel argued, was potentially significant for a number of reasons. Firstly, it demonstrated the distinction between mother and child in terms of a fear for the future. The applicant's mother had already been circumcised, the applicant had not. Therefore, the applicant's mother, herself being circumcised, had a fear for the applicant, namely she feared that the same thing would happen to the applicant as had already happened to her. Counsel also stated that if the applicant's mother's claim of having been circumcised was not believed by the Tribunal Member, this was something that was capable of being physically verified.

21. To my mind, the mother's claim to have been circumcised was a factor to which the Tribunal Member was obliged to have regard and weigh accordingly. While it was open to the Tribunal Member to take account of the delay factor (in general terms if not under s.11B (d)), this could not be done at the expense of other factors in the case, one of which was the mother's claim to have been circumcised. Accordingly, the Tribunal Member did not approach the situation in a balanced manner. Neither the applicant's mother's own circumstances (her claim to have been subjected to circumcision) nor the fact that FGM was common in Nigeria was referred to in the section 6 analysis in the context of the credibility assessment.

22. The *"grounds of appeal"* which attached to the Notice of Appeal stated:-

"Ground No.1:

The Office of the Refugee Applications Commissioner erred in fact and in law in failing to grant refugee status to the applicant having regard to the evidence of her mother.

Ground No. 2:

The Office of the Refugee Applications Commissioner erred in fact and in law in failing to adequately address or address at all the concerns that the applicant's mother has on the suggestion of the family relocating to another part of Nigeria.

Ground No. 3:

The Office of the Refugee Applications Commissioner erred in fact and in law in refusing to grant the minor applicant herein refugee status based on a delay on the part of her mother in applying for refugee status.

Ground No. 4:

The Office of the Refugee Applications Commissioner erred in fact and in law in failing to properly consider the evidence of the minor applicant's mother in relation to her fears of FGM. In this regard an extract from the US State Department Human Rights Report for 2009 is enclosed which highlights the continued practice of FGM and the attitude of the authorities in local government to same and the prosecution of offenders."

23. Having been specifically alerted to the claimed deficiencies in the s.13 Report, it was incumbent on the Tribunal Member to consider all the arguments put forward in aid of the appeal, particularly the applicant's mother's claim about her experience of FGM, as part of the "careful enquiry" required in a papers only appeal, as referred to by Clark J. in VM (Kenya). How this claim was to be assessed and weighed against other factors (including the delay factor) was of course entirely a matter for the decision maker but the principles of fairness and natural and constitutional justice required him to give due consideration to the arguments raised in the Notice of Appeal and the documentation relied on by the applicant. While I do not accept the argument that the mother's circumstances were such that they equated to the type of scenario contemplated in the Hathaway and Foster extract relied on by the applicant's counsel, a prudent, just and fair starting point for the decision maker would have been to keep in mind that a delay in applying for asylum did not necessarily equate to an absence of fear of persecution, particularly so when the applicant on whose behalf the protection application was made was a female child of tender years and keeping in mind the nature of the claimed fear.

24. Regulation 5(1) of the 2006 Regulations provide:-

"5. (1) The following matters shall be taken into account by a protection decision-maker for the purposes of making a protection decision:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of

the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the protection applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the protection applicant's activities since leaving his or her country of origin were engaged in for the sole or

main purpose of creating the necessary conditions for applying for protection as a refugee or a person eligible for subsidiary protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself of the

protection of another country where he or she could assert citizenship."

In this case, not only were the statements of the applicant's mother about her claimed experience of FGM and the personal circumstances of the applicant (including her gender and young age) presented to the Tribunal Member as envisaged by reg. 5(1)(b) and (c), in addition, the asylum file contained a number of reports with reference to the prevalence of FGM in Nigeria; this was a relevant fact as contemplated by reg. 5(1)(a).

25. The 2004 joint British/Danish Report on Human Rights Issues in Nigeria, which attached to the section 13 report stated inter alia:-

"According to the Nigerian women-NGO BAOBAB there is no federal law prohibiting FGM in Nigeria. However, laws in Cross River State, Edo State, Akwa Ibom State and Ondo State prohibit FGM, but in spite of these laws the custom of FGM continues."

That report made reference to the fact that "A draft bill outlawing FGM has been before the National Assembly since 2001".

26. That report also stated:-

"Individual complaints to NHRC concerning FGM are few and far between and during the last 12 months NHRC only registered one complaint. NHRC was of the opinion that the situation regarding FGM in general has improved significantly. FGM is not common in the northwestern part of Nigeria whereas it is a predominant phenomenon in the Middle Belt and in the southwest. Various forms of FGM are practiced according to the culture and tradition amongst different ethnic groups in Nigeria. In general FGM is performed on young or newborn girls. However, in some communities FGM is a precondition of entering marriage, which means that even adult women may have to undergo FGM. In those communities some women may regard not undergoing FGM as shameful in much the same way as being a victim of rape.

Women's Aid Collective (WACOL) confirmed that FGM may take place between the ages of newborn to the age of marriage and that FGM is far less prevalent in the northern, primarily Muslim part of the country than in the rest of the country. Finally, WACOL had never heard of FGM being performed in northern Nigeria on adult women (over the age of 18). WACOL estimated that in some states in the south the prevalence of FGM is more than 95% (e.g. Enugu, Imo, Plateau), but there are no statistics to show the exact figures.

According to BAOBAB the practice of FGM in Nigeria is quite diverse depending on tradition. In Edo State the law prohibits FGM during the first pregnancy of a woman, i.e. adult women. However, most women throughout Nigeria have the option to relocate to another location if they do not wish to undergo FGM. Government institutions and NGOs afford protection to these women. BAOBAB was of the opinion that FGM in itself is not a genuine reason for applying for asylum abroad."

27. Furthermore, the applicant's legal representative had submitted an extract from a 2009 Human Rights Report on Nigeria which, inter alia, stated:-

28. *"The 2008 NDHS reported that 30 percent of females in the country had been subjected to FGM. While practiced in all parts of the country, FGM was most prevalent in the southern region among the Yoruba and Igbo. Infibulation, the most severe form of FGM, was infrequently practiced in northern states but common in the south. The age at which women and girls were subjected to the practice varied from the first week of life until after a woman delivered her first child: however most women were subjected to FGM before their first birthday…The federal government publicly opposed FGM but took no legal action to curb the practice. Because of the considerable impediments that anti-FGM groups faced at the federal level, most refocused their energies on combating the practice at the state and local levels. Twelve states banned FGM. However, once a state legislature criminalized FGM, NGOs found that they had to convince the local government authorities that state laws were applicable in their districts. The Ministry of Health, women's groups, and many NGOs sponsored public awareness projects to educate communities about the health hazards of FGM; however, underfunding and logistical obstacles limited their contact with health care workers."*

29. By way of general observation, I note that the 2004 Report refers to WACOL estimating that a 95% FGM rate prevailed in some states in the south of Nigeria (e.g. Enuge, Imo, Plateau) As evident from the s.11 interview, the applicant's mother claimed to have been born in Imo state.

30. Thus, while the assessment of credibility was the sole preserve of the Tribunal Member, there was objective information before him regarding FGM in Nigeria, together with a claim by the applicant's mother to have been subjected to this practice which were factors (in addition to the applicant's personal circumstances) to be weighed in the balance, as well as the delay in applying for protection which was undoubtedly also a factor in the case. There is no evidence on the face of the decision that such a weighing exercise was entered into. It was incumbent on the Tribunal Member to engage in this exercise in circumstances where the Notice of Appeal made clear that the applicant was challenging ORAC's delay finding and where the case was also made that there had been a failure to consider the applicant's mother's evidence and country of origin reports regarding FGM.

31. In all the circumstances of this case, I am satisfied that the decision maker failed to determine the claim being advanced on behalf of the applicant in accordance with the principles of natural and constitutional justice or in accordance with the provisions of reg.5(I)(a),(b)and (c) of the 2006 Regulations.

32. Furthermore, for the reasons already set out, I find that the Tribunal Member's finding did not accord with the principles set out in I.R. v. Minister for Justice [2009] IEHC 353 and, in particular, the decision fell foul of principles 4:

" The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed. It must not be based on a perceived, correct instinct or gut feeling as to whether the truth is or is not being told.

33. The Tribunal's next credibility finding was expressed as follows:-

> *"The applicant's mother claimed asylum for the applicant on 21/06/2010. She did not on that occasion make any mention of circumcision. Her concern was (a) that her daughter could not return to Nigeria as society would not accept her, (b) that the father of the applicant did not want to have anything to do with her, and that she would be considered a bastard in Nigeria, and that she had no family left in Nigeria, and that there would be no-one to take care of the applicant. However in her interview her primary concern was her fear that her daughter would be circumcised (question21,22,23,24) In question 21 on her questionnaire the applicant's first concern was that the applicant would be treated as a bastard child and her second concern was that she would be circumcised.*
>
> *These points taken together strongly suggest that the applicant's mother has no real fear that the applicant would be subjected to female genital mutilation if she were to go to Nigeria."*

34. Counsel submitted that the Tribunal Member's approach, as outlined in the aforegoing paragraph, was a complete misapplication of the way in which the Refugee 1996 Act should be applied. While at the very initial stage FGM had not been referred to by the applicant's mother as a basis for her fear for the applicant, it was in fact referred to in the questionnaire some eight days later, and in the course of the section 11 interview. In light of this, the Tribunal Member's reliance on the failure of the applicant's mother to mention FGM at the initial stage of the asylum process could not be sustained. It should not have been held against the infant applicant that her mother took six or seven days to mention her fear of FGM. Quite apart from the fact that nothing should turn on the absence of a reference to a fear of FGM in the section 8 interview, it was not inconsistent for the applicant's mother to express more than one fear for her child.

35. It was argued that the Tribunal Member's reasoning cannot stand. Further, it was submitted that the applicant's mother did not have the benefit of legal advice when engaged in the section 8 interview or when completing her questionnaire. In circumstances where the applicant's mother could not be expected to know the ins and outs of refugee law, there was a duty on the State to assist in the processing of the claim. In this regard, counsel referred the court to the opinion of Advocate General Bot (26th April 2012) in the case of C-277/11 M. v. Minister for Justice and Law Reform, Ireland and Attorney General where reference was made to "the notion of cooperation" implying "that the two parties will work together towards a common goal" in relation to the submission and assessment of the facts and circumstances supporting an application for international protection, as provided for in Article 4(1) of the Qualifications Directive 2004/83/EC.

36. Article 4 of the Qualifications Directive, "assessment of facts and circumstances" provides that:-

> *" Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application."*

Moreover, counsel maintained that the contents of Article 12.2(b) of the Procedures Directive (2005/85/EC) underscore the assistance which a competent authority is expected to provide to a protection applicant in the course of his or her initial application for protection. In light of the foregoing, the Tribunal Member's reliance on the failure to refer to the fear of FGM at the initial stage was unlawful.

37. The respondents argued, with regard to the applicant's mother's failure once the asylum process commenced to make any reference in her ASY1/section 8 interview to a fear of FGM on behalf of the applicant, that the issue was not the number of days delay in referring to a fear of FGM *per se*, rather, the credibility concern lay in the manner in which the applicant's mother outlined her fears for her child: she had promoted the illegitimacy concern ahead of FGM/circumcision. Counsel submitted that the applicant's case was considered by the Tribunal on its own merits. The credibility findings were justified. The fact that the applicant's mother was circumcised and she did not "want [her children] go through what [she] went through because of the circumcision" made it all the more incredible that she did not mention her fear for the applicant in this regard in the course of her section 8 interview. There was therefore a cogent connection between the fact of the delay in making the application and the applicant's mother's failure to mention to a fear of FGM at the section 8 interview and the conclusions the Tribunal Member drew from this. In such circumstances, the Tribunal's approach cannot be categorised as speculation or conjecture. The Tribunal Member formed an opinion and had facts upon which to base that opinion. Counsel relied in the dictum of Clarke J. in *A.A v. Refugee Appeals Tribunal & Ors* [2009] IEHC:-

> *"An expression of opinion or the rejection of certain parts of a person's evidence does not amount to conjecture. It will only be conjecture if a Tribunal Member guessed or hazarded reasons or formed an opinion on the basis of no or very slim evidence."*

Counsel acknowledged that it was not inconsistent for the applicant's mother to have more than one fear for the applicant. In fact, she had cited three fears in her ASY1 Form and added a fourth (FGM) when completing the questionnaire.

There was no onus on the State to help or cooperate with an applicant in the making of an application for asylum in the manner argued by the applicant's counsel. The interview which an applicant underwent pursuant to s. 8 of the 1996 Act corresponded to the meeting referred to in s. 12 (2)(b) of the Procedures Directive. The s.11 interview corresponded to the personal interview referred to at Articles 12 and 13 of the Procedures Directive. It was submitted that Article 4 of the Qualifications Directive does not apply to the bifurcated system which operates in this State.

The court's assessment

I am not persuaded by the arguments advanced on the applicant's behalf as to the nature of the asylum authorities' obligations pursuant to the Directives. The law requires that an opportunity be given to a protection applicant to state his or her fear: the section 8 interview process, the questionnaire and the section 11 interview process provide that opportunity and I am satisfied that the applicant was given and availed of such opportunity. In any event, the applicant did not seek to challenge any perceived inadequacies on the part of ORAC and it is not open to her to do so in the context of these proceedings.

38. The issue to be determined here is the fairness or otherwise of the Tribunal Member's reliance the applicant's mother's failure to mention the FGM fears in the course of the s.8 interview. That interview recorded, inter alia, as follows:-

> *" Child's D.O.B. listed as departure and arrival dates as ASY1 could not be printed without filling in this field.*
>
> *Applicant's mother stated her daughter could not return to Nigeria as the society would not accept her.*

Applicant's mother stated the father of her child wants nothing to do with her and she would be considered a bastard in Nigeria.

Applicant's mother stated she has no family left living in Nigeria and there would be no-one to take care of her daughter.."

39. In the Questionnaire, in response to why she left her country of origin, the applicant's mother stated:-

" I fear for my child's life. The society will not accept her they will treat her as a bastard child. I fear because she will face circumcision if returned to Nigeria." (Q. 21)

The first point to be noted is that there was a somewhat artificial construct underlying the reply to Q.21 (the question being "*Why did you leave your country of origin?*"), since the applicant had never been to Nigeria. Presumably, when framing the question, the drafters had in mind protection applicants who arrive at the frontiers of the State. Nothing really turns on this observation since it can be taken that the purpose of the question is to elicit the reason for the protection application.

It seems that the sequencing of the applicant's mother's response to Q.21 was a contributing factor to the Tribunal Member conclusion that the FGM fear was not credible.

40. However, I note that her response to Q. 29 of the Questionnaire (as to what was feared if there was a return to the country of origin) was *"I fear for my child's life. She will face circumcision if returned to Nigeria."* To my mind, this was a straightforward, unambiguous articulation of a fear; it was not preceded or succeeded by any further statement such as might, to the Tribunal Member's way of thinking, have diluted the stated fear. Even if I were to regard as reasonable (which I do not) the Tribunal Member's reliance on the sequencing of the reply to Q.21, the response given to Q. 29 should have had the effect of negating, at least to some extent, the adverse impression which the Tribunal Member drew from the response to Q.21. There is no reference however in the decision to the response given to Q.29 of the Questionnaire.

41. In the course of the s.11 interview, the applicant's mother repeated her fear that the applicant would be circumcised if returned to Nigeria, in the following terms:

"Q13 Why do you not want your child to go to Nigeria?

A Because she will face circumcision and society will not accept her.

Q14 Who do you think will circumcise her?

A In my country, they do circumcise girls

[yes but who do you fear would circumcise her]

My village people will circumcise her

Q15 Where are you from?

A Emo (sic) State

Q16 Are you circumcised?

A Yes"

When asked by the interviewer why she had not mentioned circumcision when she first applied for asylum on behalf of the applicant she stated:-

42. *"I came in as a single lady… They said just a few things and say what else at interview"* While it is not for this court to surmise, this answer appears to make reference to what the applicant's mother claims was said to her at the time of the s.8 interview.

43. I am satisfied that there was unfairness in the emphasis which the Tribunal Member placed on the record of the section 8 interview and the applicant's mother's perceived failures, particularly so when the Guidelines which attach to the questionnaire provide that it constitutes the basis for the investigation of an asylum claim and where the applicant's mother clearly and unequivocally set out therein (Q.21 and Q.29) her claimed fear that the applicant would be subjected to FGM. As I have already stated, whether the information contained in the questionnaire or in the S.11 interview was credible or otherwise was a matter entirely for the decision maker to assess but it cannot be lawful that the fear of FGM, a claimed basis for asylum for the infant applicant, unequivocally set out in the questionnaire provided to her mother in order for her to set out the basis of the claim, was disregarded because such a fear was not expressed in the record of the s.8 interview. This is particularly so in circumstances where the latter record is not considered to be the statutory starting point for the investigation of asylum claims. Accordingly, the Tribunal Member's rejection of the applicant's claim on the basis that the FGM was not set out in the section 8 interview was unfair and irrational and it cannot be allowed to stand.

Future persecution

In written submissions, the applicant's counsel referred to the dictum of Cooke J. in *MAMA v. Refugee Appeals Tribunal* [2011] IEHC 147 and that of MacEodhaigh J. in *M.M.A. v. RAT* (13th February 2013) in support of the argument that the Tribunal Member while rejecting credibility should nevertheless have considered the possibility of exposure to future persecution.

44. The respondents' counsel submitted that the approach suggested by Cooke J. in *MAMA v. Refugee Appeals Tribunal* [2011] IEHC 147 was not one which must be rigidly applied in all cases, as explained by Cooke J.:

"This Court accepts as correct the approach to the standard of proof outlined in this case law. The sole fact that particular facts or events relied upon as evidence of past persecution have been disbelieved will not necessarily relieve the administrative decision-maker of the obligation to consider whether, nevertheless, there is a risk of future persecution of the type alleged in the event of repatriation. In practical terms, however, the precise impact of the finding of lack of credibility in that regard upon the evaluation of the risk of future persecution must necessarily depend

upon the nature and extent of the findings which reject the credibility of the first stage. This is because the obligation to consider the risk of future persecution must have a basis in some elements of the applicant's story which can be accepted as possibly being true. The obligation to consider the need for "reasonable speculation" is not an invitation or pretext for gratuitous speculation: it must have some basis in, and connection to, the apparent circumstances of the applicant."

In this regard also, counsel also referred to the dictum of Barr J. in *O.O. (an infant) v. Minister for Justice* [2014] IEHC 568, where he approved the approach adopted by MacEochaidh J. *I.B. v. Refugee Appeals Tribunal* [2013] IEHC 467:-

"Where the decision maker has come to the firm view that no past persecution happened because of political opinion and activities, there is no need to examine whether there is a risk of future persecution because of political opinions and activities. No believable part of the applicant's claim required the decision maker to consider the risk of future persecution."

The court's assessment
In my view, even if the credibility findings in this case were lawful (which they are not), the particular circumstances of the case required the Tribunal Member to give consideration to the possibility of future persecution. This is so because the Tribunal Member appears not to have rejected the applicant's mother's claim to have been subjected to FGM, and, more importantly, bearing in mind the applicant's gender and age and the country of origin information which was on file, the contents of which have already been alluded to.

The reg.5(2) argument
45. It was also argued on behalf of the applicant that while she was not subject to past persecution, and irrespective of her mother's failure to mention a fear of FGM at the initial interview, that the latter's claim to have been subjected FGM in the past should have been taken account of by the Tribunal Member, in aid of the infant applicant, pursuant to the requirements of Regulation 5(2) of the 2006 Regulations:-

"The fact that a protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, shall be regarded as a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not

be repeated, but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection."

I am not persuaded as to the applicability of this provision to the circumstances of this case. In any event, the court has already found that the Tribunal Member erred procedurally and substantively in failing to consider the mother's claim to have been subjected to FGM or the country of origin information which documented the prevalence of FGM in certain parts of Nigeria.

Internal relocation
46. The issue of internal relocation was addressed in the section 6 analysis as follows:-

"If there is a substance in the applicant's claim and for the reasons stated above I doubt very much if there is, country of origin information report on Nigeria dated 9th July 2010 states, inter alia: 'Paragraph 2432 "WACOL (Women's NGO) explained that internal relocation is possible for any adult woman irrespective of whether the case is about FGM, domestic violence or forced marriage.'

The judgment to be made in cases where relocation is an issue is whether the risk of persecution as (sic) an individual experiences in one part of the country can successfully be avoided by living in another part of the country. If it can, and if such a relocation is both possible and reasonable for that individual this has a direct bearing on decision related to the well-foundedness of the fear. In the event that there is a part of the country where it is both safe and reasonable for the asylum seeker to live the "well-founded fear" criteria may not be fulfilled. In this particular case I am satisfied that the applicant could relocate with her mother to Lagos. Lagos is a multicultural, multi-religious and multi-ethnic city of some 13 million people. It is the commercial capital of Nigeria and I have no doubt that the applicant's mother could find employment there and be responsible for the upbringing and welfare of the applicant without any fear that the applicant would be subjected to circumcision or rejection by society."

47. Counsel argued that this finding was defective on a number of grounds. Firstly, the UK Border Agency Report, cited by the Tribunal Member, alluded to internal relocation being dependent on a person's means and available familial support. Additionally, there was no information before the Tribunal Member upon which to base a finding that the applicant's mother could find employment in Lagos. Her employment prospects were not enquired into and no assessment of how she would manage was carried out. Furthermore, the question of a risk to the applicant, in the context of internal relocation to Lagos, had not been addressed. In any event, the Tribunal Member did not conduct the necessary assessment before rendering his decision on internal relocation. There was thus a failure to assess the option of internal protection in accordance with Regulation 7 of the 2006 Regulations or in accordance with established legal principles as set out in *K.D. (Nigeria) and E.I.*

48. While the Tribunal Member had quoted an extract from the UK Border Agency Report on Nigeria (9th July 2010) in the context of internal relocation, he failed to have regard to other aspects of that report, in particular the statement that "… a woman will need relatives in her new location who are ready to accommodate her..it was emphasises by BAOBAB that a woman can obtain physical protection be relocating to another area of Nigeria. Women who are economically independent, in particular , would stand a much better chance of sustaining themselves than women who are not. BAOBAB added that it is difficult to separate the question of physical protection from the social, cultural and/or humanitarian constraints involved in relocating. However, even women who have access to economic means could face difficulties in finding accommodation or a job and they are often stigmatised. BAOBAB further added that young women and/or single women, in particular, who have relocated within Nigeria, are vulnerable to unscrupulous men that may target these woman.."

49. Under *"Freedom of Movement (internal relocation)"* , the British Danish Report stated:-

"The BHC believed that internal relocation to escape any ill treatment from non-state agents was almost always an option. Some individuals may, however, face difficulties with regard to lack of acceptance by others in the new

environment as well as lack of accommodation, land etc. The situation would be considerably easier if the individual concerned has family or other ties on the new location…Momoh explained that it is possible to evade "social persecution" e.g. FGM, forced marriage, Shari'a punishment etc. by relocating inside Nigeria. Momoh saw only one obstacle for escaping FGM in the form of lack of means for a person from the rural hinterland… NHRC expressed surprise if someone actually had to leave Nigeria in order to avoid FGM instead of taking up residence elsewhere in Nigeria. NHRC added that it might be difficult for a woman residing in the southern part of Nigeria who wishes to avoid FGM to take up residence in the northern part whereas all Nigerians have the possibility to take up residence in Lagos due to the ethnic diversity and size of the city."

50. It was also argued that the selective reliance on country of origin information was unlawful and in this regard counsel referred to the dictum of Edwards J. in *DV.T.S v. Minister for Justice* [2008] 3 I.R. 476.

51. On the issue of internal relocation, the following was asserted on behalf of the respondents:

The finding on internal relocation was not a finding in the manner articulated by counsel for the applicant. It was submitted that the Tribunal Member approached the issue in the context of ascertaining whether the applicant had a well-founded fear. This was a permissible approach for the Tribunal Member to adopt and in this regard counsel referred the court to the 2003 UNHCR Guidelines on International Protection *"Internal Flight or Relocation Alternative"* where, in its introduction the following is stated:-

"Some have located the concept of internal flight or relocation alternative in the "well-founded fear of being persecuted" clause of the definition, and others in the "unwilling … or unable … to avail himself of the protection of that country" clause. These approaches are not necessarily contradictory, since the definition comprises one holistic test of interrelated elements. How these elements relate, and the importance to be accorded to one or another element, necessarily falls to be determined on the facts of each individual case."

52. In this regard, counsel also relied on the dictum of Clark J. in K.D. (Nigeria) as authority for the proposition that:-

"Internal relocation has no logical part to play in a decision if no well-founded fear of persecution is accepted or if it is found that the persecution feared has no Convention nexus;." (Principle 2)

53. Counsel also relied on the principle 3, enunciated by Clark J. as follows:-

"A large number of decisions refer to the relocation option notwithstanding a finding that there is no well-founded fear of persecution on credibility grounds. In such cases, what the decision maker really means is, 'if what you say is true, which is not accepted, you have given no credible explanation for coming to Ireland instead of moving elsewhere away from the claimed danger'. These 'even if' findings are not internal relocation alternative findings requiring adherence to Regulation 7 but are part of a general examination of whether an applicant has a well-founded fear of persecution."

54. This, counsel submitted, was the situation in the present case. While MacEochaidh J. in *E.I. v. Min. for Justice* took a different view on the question of adherence to Regulation 7 of the 2006 Regulations, other judges have adopted the approach of Clarke J. and, in this regard counsel referred to the dictum of McDermott J. in *S.S.F. v. Refugee Appeals Tribunal* [2014] IEHC 474, where he states:-

"The issue of relocation should it properly arise in an asylum application falls to be considered in accordance with the principles set out in K.D. (Nigeria) v. Refugee Appeals Tribunal [2013] IEHC 481. In that case Clark J. noted that there were a large number of cases which consider relocation, notwithstanding the absence of a finding of fact that a well founded fear of persecution existed on the part of the applicants. The learned judge noted that the decision maker is really saying "if what you say is true, which is not accepted, you have given no credible explanation for coming to Ireland instead of moving elsewhere away from the claimed danger". She considered that these findings were not, in reality, internal relocation alternative findings requiring adherence to Regulation 7 of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006): rather, they were part of a general examination of whether the applicant had a well founded fear of persecution. The applicants' claims were rejected on credibility grounds. In accordance with K.D., I am not satisfied that the findings in respect of relocation were an appropriate exploration of relocation as an alternative to refugee status. The decision in each case is that the applicants' assertions that they had a well founded fear of persecution were not credible. I am, therefore, not satisfied that the applicants have established a substantial ground to challenge these decisions on the basis of the consideration of relocation."

55. Without prejudice to the foregoing argument, counsel submitted that the Tribunal Member did identify a place or places to which the applicant could relocate. In the course of the section 11 interview, Edo, Rivers and Ogun (where circumcision is illegal) Lagos and Abuja were suggested to the applicant's mother as alternatives. She was given an opportunity to respond to such suggestions and her objections were not considered reasonable by ORAC.

The court's assessment

56. While, the respondents' counsel argued that the approach adopted to the issue of internal relocation fell within principles 2 and 3 of KD Nigeria and that, accordingly, no "full blooded" assessment was required, I do not accept that argument. Once the Tribunal Member embarked on an assessment of internal relocation and approached the issue from the perspective that there was a part of the country of origin *"where it is both safe and reasonable for the asylum seeker to live"*, he was obliged to assess the viability of internal relocation for the applicant in accordance with the established legal principles. I am of the view that the Tribunal Member's consideration did not satisfy the *"full-blooded"* assessment that was required. While it may have been open to the Tribunal Member, in the context of assessing risk, to determine that Lagos, given its size and multi-ethnic culture, was a place that the applicant could relocate to having regard to the matters put to the applicant's mother in the course of the s.11 interview (pages 3-5 thereof refers) and the apparent localised nature of the risk, a proper and prudent approach nonetheless required that the Tribunal Member, having identified Lagos as a safe place for the applicant, would assess if the laws of that place were capable of protecting the applicant from any threat of FGM that might emanate from outside sources. This is so given that the decision itself recites that it was put to the applicant's mother that she could move to *"some state in Nigeria where circumcision is illegal, such as EDO, Rivers and Ogun State..".* Thus, while the issue of whether there were laws banning FGM was something that was in the mind of the decision maker, there was no analysis as to whether Lagos had such a law. Furthermore, on the question of the *"reasonableness"* of a move to Lagos, there is no indication that the applicant's mother's claimed circumstances (that she had no relations in Abuja, Lagos or Ogun and her financial concerns -Qs.31 and 32 of the s.11 interview refers-) were weighed by the Tribunal Member in the context of the difficulties such a move might present for her and the applicant, having regard to the content of the country of origin reports, portions of which are quoted above and which were not adverted to by the Tribunal Member. Whether Lagos was a viable option in this case was, I

accept, entirely a matter for the decision maker to assess, but that assessment must be and be seen to be carried out in accordance with the necessary guidelines, and be *"commensurately careful",* as stated by Clark J. in KD Nigeria, which was not done in this case.

57. I should add that even if the finding were to be considered a facet of the assessment of the well foundedness of the applicant's mother's fear from a credibility perspective, there is no discernible means of ascertaining the weight given to it in rejecting the applicant's claim, vis a vis the credibility findings which this court has impugned for the reasons stated.Thus, the finding cannot save the decision under review.

58. As both the credibility and internal relocation findings have been impugned, no question of severability arises.

Conclusion
59. For the reasons set out in this judgment, I am satisfied therefore to grant leave in this case. This being a telescoped hearing, I will grant an order of *certiorari* quashing the decision and make an order remitting the matter to the Refugee Appeals Tribunal for a de novo hearing before a different Tribunal Member.