

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 133 J.R.]

BETWEEN

S. N. G.

AND

G. S. G. (INFANTS SUING BY THEIR MOTHER AND NEXT FRIEND K.G.)

APPLICANTS

AND

MAJELLA TWOMEY SITTING AS THE REFUGEE APPEALS TRIBUNAL, THE REFUGEE APPLICATIONS COMMISSIONER, THE
MINISTER FOR JUSTICE AND EQUALITY, IRELAND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 27th day of January, 2017

1. These are telescoped proceedings in which the applicants seek, *inter alia*, an order of certiorari of the decisions of the first named respondent which upheld the recommendations of the Refugee Applications Commissioner ("the Commissioner") not to declare them refugees.

Background

2. The applicants are Irish-born minors, the son and daughter respectively of K.G., their Jamaican mother. K.G. arrived in Ireland in December, 2006. On 4th December, 2006, she made a claim for asylum based on a fear of persecution on grounds of domestic violence at the hands of her ex-partner – a member of a prominent gang in Jamaica. Her claim was rejected by the Commissioner and subsequently by the Refugee Appeals Tribunal ("the Tribunal"). In the latter's decision dated 27th May, 2008, the appeal was rejected by reason of the sufficiency of state protection for K.G. in Jamaica.

3. The first named applicant was born on 6th November, 2008, and the second named applicant's date of birth is 11th September, 2010. Their respective asylum claims were lodged by their mother on 29th May, 2012.

4. The basis of the refugee claims advanced on their behalf was threefold: namely their mother's fear that they would be subject to persecution in Jamaica: (i) as children of a homosexual mother in Jamaica; (ii) as children subject to general violence in Jamaica; and (iii) as children subject to domestic violence by their mother's abusive ex-partner. Before the Commissioner, the claims were rejected on the basis that the applicants failed to establish a well-founded fear of persecution on any of the grounds.

5. As regards the first ground, the Commissioner accepted, based on country of origin information, that homosexuals may face societal problems in Jamaica but found that "despite extensive research, no information could be found on the children of homosexuals being specifically targeted and persecuted based on their parent's sexual orientation".

6. With regard to the second ground, the Commissioner found that there was no way of predicting that the minor applicants would become violent or become the victims of violence in the future, and that their mother's assertion that they would be abducted was speculation on her part. A fear of general violence in Jamaica was "not considered to qualify as persecution based on a Convention ground".

7. As regards the third ground of claim, namely the asserted fear that the applicants would be killed or harmed by the mother's ex-partner in Jamaica due to problems she had had with this individual in the past, this was also rejected on the basis that it was similar to the mother's asylum claim, which had been rejected. It was further found not to be credible that the applicants' mother's ex-partner would harm or kill the applicants in circumstances where their mother had another child residing in Jamaica with her father who had not been harmed or killed by her ex-partner.

8. A fourth ground of claim had been asserted on behalf of the second named applicant, namely her mother's fear that she would be persecuted by her mother's family because of the fact that her father was a Muslim. The Commissioner found it not credible that the second named applicant would face persecution from her mother's family on this basis given that the second named applicant was being raised as a Christian.

9. The Commissioner went on to find that the fact that K.G. waited three years and one and a half years, respectively, to make asylum applications for the minor applicants undermined the assertion that they were in need of protection.

10. Without prejudice to the findings that the applicants' mother failed to establish a well-founded fear of persecution on their behalf, the Commissioner went on to make internal relocation findings. While internal relocation was not considered appropriate in respect of the alleged fear arising from general violence in Jamaica or the fear of persecution alleged to arise on account of their mother's sexual orientation, it was considered that internal relocation was a viable option for the applicants with regard to the fear asserted on their behalf *vis-à-vis* their mother's ex-partner.

11. The Commissioner also found that State protection would be available to the applicants as there was "no reason to believe that the Jamaican law enforcement authorities would not offer assistance [to the minor applicants if they were] in danger of being harmed in Jamaica".

12. By reason of the findings that their mother did not make asylum claims on behalf of the applicants for three years and one and a half years respectively, and offered no reasonable explanation for the delay, the provisions of s. 13(6)(c) of the Refugee Act, 1996, were applied to the applications with the consequence that the applicants' appeals to the Tribunal were on the papers only.

13. Notices of appeal were filed with the Tribunal on 5th September, 2012, and further grounds of appeal and submissions were furnished on 3rd October, 2012, together with extensive country of origin information largely concerning the treatment of gays and lesbians in Jamaica.

14. The respective decisions of the Tribunal were issued on 6th February, 2013. The findings made with regard to the first named applicant were as follows:

As to the fears asserted on behalf of the first named applicant on account of his mother's sexuality, after reference to and quoting from country of origin information on the treatment of gay and lesbian persons in Jamaica, the Tribunal Member stated:-

"A large part of the Applicant's claim circles around the assertion by his mother that she is now a lesbian. The Applicant's mother has already had her asylum claim heard. A decision was granted in 2008 stating that the Applicant's mother was not a Refugee. The claims of the Applicant's mother at that point, were that she feared she would be attacked by her ex-partner, who was in a gang. It was found that there was adequate State protection in Jamaica which the Applicant's mother could access in this respect. The Applicant's mother now claims that she, herself, has more problems as she is now a lesbian. This was not the case, at her hearing, in 2008. The Tribunal is mindful that this is not the case of the Applicant's mother but that of her son. This cannot be a chance for the Applicant's mother [to] re-open her own asylum claim, with new information.

If new issues have arisen in the life of the Applicant's mother, which might amount to her being persecuted, there are avenues open to her to bring these to the attention of the Department of Justice and to make a request to have this new evidence assessed. There is no evidence before me to suggest that the Applicant's mother has made any such applications and this, in turn, creates a difficulty for this Tribunal. While the issue of the homosexuality claim was raised in the Section 13 report, no clear findings were made as to whether or not the Applicant's mother is, in fact, now a lesbian.

The Applicant's mother has submitted this new evidence, regarding her sexuality, to me, in circumstances where this is an appeal on the papers and whereby I am not in a position to question her on her claims that she is now a homosexual. Even if I could question her, it is not a matter for me to re-open a claim which has already been dealt with. This Tribunal is merely dealing with the situation of the infant Applicant, in this case. In circumstances where there is no evidence before me which would suggest that the Applicant's mother has tried to bring the new information pertaining to herself, to the authorities in order to seek protection for herself, there is no clear and convincing evidence that this woman really has a fear for her life due to her homosexual tendencies. The Applicant's mother cannot use her child's case as a forum to create a fresh case for herself, without first establishing that she, in fact, has a well-founded fear of persecution. If there is no clear evidence before me that this child's mother has established a well-founded fear of persecution based on her sexual orientation, I cannot decide that her child has a well-founded fear in circumstances where no independent efforts had been made by the Applicant's mother to substantiate her own new claim before simply using her child's application to put forward this new assertion.

The Tribunal has read the very detailed submissions the Applicant's lawyer in this case along with the large volume of country of origin information on file regarding the situation of homosexuals in Jamaica. It is clear that homosexuals face many problems in Jamaica. It is also clear according to the CVC that the authorities attitude to attacks are now improving and that a large part of the problem is that gay and lesbians do not report their fears. However, in this particular case, the only evidence I have regarding the mother's homosexuality is that this is something which occurred recently and that she has had a six month relationship which is now over. As this part of the child's claim is entirely dependent on his mother's sexuality and where there have been no endeavours by the Applicant's mother to bring this new information to the attention of the authorities regarding her own problems, there is simply nothing compelling before me to suggest that the Applicant would suffer problems in this respect, in Jamaica. Simply put, it has not been found that this Applicant's mother has a well-founded fear of persecution in Jamaica due to her sexuality. She has not made out any case for herself, in this respect. In the circumstances, I would be outpacing my own jurisdiction to find that her child would be persecuted on account of this, taking into account the utter lack of clear and compelling evidence regarding the mother's case."

15. The Tribunal Member made a similar finding in respect of the second named applicant.

16. With regard to the first named applicant's fear of persecution based on generalised violence in Jamaica, the decision-maker stated:-

"The Applicant's mother, effectively, admits that the police would assist if her son was the victim of a crime. It is important to note that [the State is] not obliged to provide perfect protection and no matter what country one lives in, the State will never be warned if a crime is going to occur. Furthermore, no State can guarantee [its] citizens that they will be safe from harm at all times."

17. She went on to state:-

"Thus, while it is clear that crime rates are high in Jamaica and that some policemen act outside of their jurisdiction and involve themselves in corruption, it is not a situation where the State is in a situation of complete breakdown. There are authorities who can detect, investigate and punish crimes and there is now the Independent Commission if one [wants] to make a report against someone in authority who is corrupt."

18. Almost identical findings were made in the second named applicant's case.

19. The Tribunal Member also found no basis for the fears asserted on the applicants' behalf in relation to their mother's ex-partner, finding that their mother feared revenge from her ex-partner "for purely criminal reasons as opposed to Convention reasons". Accordingly, a Convention nexus was not established. It was also considered relevant that the rejection of the applicants' mother's asylum claim had found that adequate State protection existed in Jamaica in relation to her fear of her ex-partner. The Tribunal Member also found no Convention nexus to the asserted fear that the applicants would fall victim to child abduction.

20. It was also concluded that the fear asserted on behalf of the second named applicant (her father's religion as a Muslim) was "extremely weak" and did not amount to persecution.

The submissions advanced on behalf of the applicants

21. Counsel submits that the Tribunal erred in law in failing to consider the applicants' application for international protection on an individual basis. In particular, the Tribunal erred in failing to properly consider their separate and distinct claims for asylum based on their membership of a particular social group as children of a homosexual parent in Jamaica who are in danger of being subjected to violence for that reason if returned to Jamaica. It is submitted that the impugned decisions repeat, on a number of occasions, the Tribunal Member's assertions that the applicants' mother was simply seeking to "re-open" her own case. Counsel contends that the Tribunal Member erred in her decision-making when she asserted that it was not a matter for her "to re-open a claim which has already been dealt with". To the contrary, the particular claim that the applicants' mother feared persecution in Jamaica as a lesbian had not been "dealt with" in her own asylum application, as it had only arisen as a new issue in her children's applications after her asylum claim had closed.

22. In particular, it was expressly pleaded in the appeal submissions that the Commissioner had failed to assess the claim being made by the applicants' mother on their behalf as a *sur place* claim in circumstances where she had only come out as a lesbian towards the end of 2011, long after her asylum application had concluded. It is of note that the Commissioner did not dispute the applicants' mother's assertion as to her sexuality; rather the Commissioner took a different slant, namely that the applicants' claims failed because they were made several years after their birth. However, in this regard, the Commissioner missed the point, as the basis of the claims only arose shortly before they were advanced on the minor applicants' behalf.

23. It is submitted that it was necessary for the Tribunal to deal with the claim of persecution being asserted on behalf of the minor applicants. In particular, the country of origin information which was before the Tribunal demonstrated that very significant problems presented for gay and lesbian people in Jamaica. The information showed that if the applicants' mother were to be openly lesbian in Jamaica, not only would she be targeted, but the content of the information was sufficiently probative to corroborate her fears that the minor applicants would also be targeted as the children of a homosexual person, given the virulent and extreme anti-gay sentiment in Jamaica, including the criminalisation of such relationships. Jamaican criminal laws provided for severe punishment for homosexual acts. The country of origin information showed that it was clear that gays and lesbians were not just discriminated against but were regularly subjected to attack. State protection was not available, and if someone were to complain to the police, they themselves may be liable to be arrested for gross indecency offences if they admitted to being gay. It is submitted that this was the backdrop to the primary claim for asylum made on behalf of the minor applicants.

24. The appeal submissions furnished to the Tribunal cited specific country of origin information including excerpts from "Human Rights Watch, Jamaica: Combat Homophobia, 18th July, 2012" and "Asylum Research Consultancy (ARC), Country of Origin Information to Support the Adjudication of Asylum Claims from Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Asylum Seekers: Jamaica, 16th July, 2012". While the country of origin information did not address the issue of the children of gay or lesbian parents being subjected to discrimination or otherwise targeted, there was information to show that gay school children in Jamaica were being targeted. Counsel submits that the absence of any specific information on the children of gay or lesbian parents cannot be determinative of the matter, given the voluminous information on the treatment of gays and lesbians in Jamaica, including anti-gay laws and virulent societal discrimination and attacks. That information, coupled with country of origin information on the treatment of gay school children, leads to it being inconceivable that the minor applicants, as the children of a lesbian mother, would not be targeted if they were to return to Jamaica.

25. It is submitted that the applicants' mother had not advanced this claim on her own behalf in the course of her asylum process in 2004 to 2008 as, during this time, she had not had a lesbian relationship and had not come out as homosexual.

26. Essentially, the claim advanced on behalf of the minor applicants was not addressed by the Tribunal Member. It was fundamentally incorrect for the decision-maker to characterise the claim as one essentially being advanced on behalf of the applicants' mother. That was not the case. The Tribunal Member failed to appreciate the fact that just because the applicants' mother had not made a claim in the course of her own application for asylum based on her fear of persecution on account of her sexuality, that did not mean that the applicants were not entitled to a fair hearing on the claim being advanced on their behalf in 2012, in circumstances where the basis of that claim arose after the determination of their mother's asylum claim.

27. Furthermore, it was not correct for the Tribunal to conclude that the applicants' mother was obliged to seek to re-enter the asylum process on her own behalf before the Tribunal Member could enter upon a consideration of the applicants' claims as children of a lesbian mother. Even if the applicants' mother had gone down the s. 17(7) route provided for in the Refugee Act, 1996, the Tribunal Member would nevertheless have been obliged to determine the claim adduced on behalf of the minor applicants.

28. Insofar as the Tribunal Member determined that she was not in a position to question the applicants' mother on the issue of her sexuality, it was open at all times to the decision-maker to write to the applicants' mother seeking further details of the claim being advanced on behalf of the applicants.

29. Alternatively, it was open to the decision-maker to remit the matter to the Commissioner for further investigation pursuant to s. 16(6) of the Refugee Act, 1996.

30. The minor applicants were left in the position where their key claim for protection was not dealt with by the Tribunal in circumstances where what was presented to the Tribunal was a refugee *sur place* application pursuant to Reg. 6(1) of the European Communities (Eligibility for Protection) Regulations 2006 which required to be considered.

31. While the Tribunal Member could have perhaps rejected the claim on credibility grounds (if there was a basis to do that), the salient issue in the present case is that the minor applicants' claims for refugee status based on their mother's sexuality was not dealt with at all.

32. It is noteworthy that, while the Commissioner did not make an express finding on the issue of the applicants' mother's sexuality (appearing to accept it), it was not stated that the Commissioner could not do so, unlike the position adopted by the Tribunal.

33. It is alternatively submitted that if the court were to find that the Tribunal Member's conclusions, in particular, that "it has not been found that [the applicants'] mother has a well-founded fear of persecution in Jamaica due to her sexuality" were, in effect, a rejection of the claims on credibility grounds, it was not open to the Tribunal Member to do so without affording the applicants' mother an opportunity to respond. In this regard, counsel relies on *S.U.N. (South Africa) v. Refugee Applications Commissioner* [2012] IEHC 338.

34. It is submitted that, in circumstances where the country of origin information was capable of supporting the claim adduced on behalf of the minor applicants, it was essential that their claim be determined, yet the Tribunal Member failed to grasp that nettle. By

failing to do so, the decision-maker erroneously avoided applying the available country of origin information to the minor applicants' circumstances.

35. Ultimately, the approach of the Tribunal Member evidences the unfair decision of the Commissioner to limit the minor applicants to an appeal on the papers only. Furthermore, the fact that there was no clear finding in the s. 13 reports as to whether or not the applicants' mother was a lesbian was not a procedural failure of the applicants' making. In any event, the Tribunal was not without resources to investigate the matter further, if it so required, as it could have requested the Commissioner to conduct further investigations.

36. It is submitted that in all of the circumstances of this case, the Tribunal Member failed to have regard to the proper standard of the consideration of a papers- only appeal which is one of "extreme care", as set out by Clark J. in *V.M. (Kenya) v. Refugee Appeals Tribunal* [2013] IEHC 24.

37. Counsel further contends that insofar as the Tribunal Member made a finding that there was no "clear and compelling evidence" of the applicants' mother's fear of persecution based on her sexuality, she erred in law as to the applicable standard of proof in asylum cases. As set out by the decision-maker herself in s. 5.5 of the impugned decisions, the standard of proof in order for a claim to succeed is that an applicant must show there is a "reasonable likelihood" that he or she will be persecuted for a Convention reason, a standard that is less than the "clear and compelling evidence" standard. Furthermore, counsel points to para. 73 of the UNHCR Guidelines on "Child Asylum Claims" which points out that "it may be necessary for an examiner to assume a greater burden of proof in children's cases".

38. While it may be the case that the Tribunal Member found that State protection was available to the minor applicants in respect of their fear of persecution on grounds of general violence in Jamaica, there was, counsel submits, no clear finding as to whether State protection would be available to gay and lesbian people in Jamaica, albeit that the Tribunal Member appears to suggest that the police can protect homosexuals in Jamaica and points to the failure of lesbians and gays who are targeted to come forward with complaints. If the Tribunal Member's findings (which in any event are not clear) amount to a finding that State protection is available for gay and homosexual people in Jamaica that is contrary to the weight of evidence in the country of origin information. In such circumstances, it would be strange if it was found to be the case that State protection was available to the children of lesbian parents in Jamaica.

The respondents' submissions

39. On behalf of the respondents, it is submitted that there is no merit to any purported challenge by the applicants to the Tribunal's findings with regard to the fear of persecution based on general violence in Jamaica or their asserted fear of their mother's ex-partner.

40. With regard to the challenge to the finding concerning the applicants' fear of persecution as children of a lesbian mother, the first thing to be observed is that the Commissioner neither accepted nor rejected this claim. Rather, the Commissioner went on to see if the children of lesbian parents would be specifically persecuted in Jamaica and found that no information could be sourced on the children of homosexual parents being specifically targeted and persecuted based on their parent's sexual orientation. Counsel submits that, as the claim advanced on behalf of the applicants was separate to any claim of their mother, the Commissioner did not have to assess their mother's claim to be a lesbian and thus made no finding on this issue.

41. On appeal, the Tribunal Member arrived at a particular conclusion, namely that she could not make a determination as to whether the applicant's mother was a lesbian. The critical issue, counsel submits, is the reason for the Tribunal Member's conclusion in this regard. The application by the Commissioner of s. 13(6) (c) to the applicants' appeal meant that there was no oral hearing before the Tribunal. While that might be problematic, the fact is that the applicants did not challenge the Commissioner's decision to restrict them to a papers-only appeal. They cannot do so in the within proceedings as is made clear in *T.E.S. (South Africa) v. Minister for Justice, Equality and Law Reform* [2012] IEHC 554. This, counsel submits, goes to the heart of the present cases. In circumstances where the infant applicants' mother was aware that the Commissioner made no decision regarding her sexuality and where she knew by virtue of the s. 13(6) (c) finding that the minor applicants would not be afforded an oral hearing, it was open to her to challenge the Commissioner's decision by way of judicial review, but she did not do so.

42. In any event, the information provided by the applicant's mother to the Commissioner was very limited. In the course of the s. 11 interview regarding the second named applicant's asylum claim, the issue was dealt with as follows:

"Q.18. You have stated that you fear your child will face problems because you are now a lesbian. Is this correct?

A. Yes.

Q.19. Can you tell me what exactly you think would happen to your child because of your own sexuality?

A. Well being a lesbian in Jamaica, the population are not just against you, but they would also be against your children. I think the general population in Jamaica would kill or torture her because of my sexuality.

Q. 20. Are you currently in a homosexual relationship?

A. I was but we broke up about a month ago. We were together for six months.

Q. 21. Was that your first lesbian relationship?

A. Yes that was my first and only lesbian relationship.

Q.22. If your child faced problems in Jamaica because of your own sexuality, could you contact the Jamaican police for help?

A. I could but there is no guarantee that she would get the help she needs. People don't give you warning that they are going to harm you so it would be too late by then to contact the police.

Q. 23. But if you did contact the police, then do you think they would offer assistance to your child?

A. I am not sure. Because some police they don't care and they contribute towards discrimination due to sexual

orientation.

Q. 24. It is difficult to accept that the Jamaican police would not offer assistance to your child if she was in danger of being tortured or killed. Would you like to comment on this?

A. It is not that I think they would refuse to help. I think that if they knew someone had harmed her they would arrest them but I think that they would not have any warning in order to prevent my child from being harmed or killed”.

43. It is submitted that the foregoing is the extent of the information on the applicants’ mother’s sexual orientation that was before the Tribunal in circumstances where the Tribunal Member had to make a de novo assessment on the issue. The decision-maker determined that she could not make a finding on the question of the applicants’ mother’s sexual orientation without evidence. This had consequences for the minor applicants in that no risk to them by reason of their mother’s sexuality could be established. As is clear from the s. 6 analysis, the Tribunal Member was in an impossible position in circumstances where the applicants’ mother herself had not made a sur place claim for asylum for herself based on her sexual orientation, or a subsidiary protection claim on this basis.

44. It is thus submitted that the Tribunal Member properly determined that she could not make a finding with regard to the applicants’ mother’s sexual orientation. While there was a lot of undisputed country of origin information regarding the treatment and targeting of homosexuals in Jamaica, in order to establish a risk to the children, the Tribunal Member would first have to deal with the question of their mother’s sexuality, which could not be done in the absence of evidence and where the only information before the decision-maker was the mother’s assertion in this regard. In those circumstances, there was a fundamental onus on the applicants to challenge the Commissioner’s s. 13(6) (c) finding, rather than to embark upon an appeal.

45. Furthermore, the fact that the Tribunal may remit matters for further investigation to the Commissioner pursuant to s. 16(6) of the Refugee Act, 1996, did not obviate the onus on the applicants to prove their case and bring forward evidence, which their mother was not in a position to do as she did not challenge the Commissioner’s finding that their appeal would be confined to a papers-only appeal.

46. By way of alternative argument, counsel submits that, in circumstances where the claim being put forward on behalf of the applicants on the sexual orientation ground was essentially that of their mother, the Tribunal Member properly and reasonably concluded that it was outside of her jurisdiction to determine it since it was the claim of a third party.

47. It is submitted that, whatever the nature of the Tribunal’s decision on the question of the minor applicants’ fear of persecution based on their mother’s homosexuality, the Tribunal Member did not engage in a credibility assessment. In effect, the decision was that there was no evidence before the Tribunal from which to determine the issue of the applicants’ mother’s sexuality.

48. Even if there was an obligation on the Tribunal to make a determination on the mother’s sexuality, the minor applicants did not put forward objective country of origin information on any risk in Jamaica to the children of gay or lesbian parents. The available information pertains only to the potential risk to gays and lesbians themselves and to children who are gay or lesbian. Thus, as far as the minor applicants are concerned, there was no evidence of risk to be assessed, even if their mother is a lesbian. In the absence of any such risk (where the onus is on the applicants to establish that State protection is not available to family members of gays and lesbians), the Tribunal Member’s finding that there was a State protection available for children in Jamaica must stand as it has not been impugned in these proceedings. On the evidence adduced, the Tribunal Member was satisfied that there exists a functioning police force in Jamaica, able to detect, investigate and punish crimes. There was no contrary evidence to suggest that this protection does not apply to the applicants, and in particular to the children of homosexuals. Therefore, the conclusion that there was a functioning police force and adequate State protection for the applicants in their country of origin is a reasonable one which applies with equal force to the applicants’ individual claims based on their individual status as the child of a homosexual parent. It is also to be noted that, in the course of her s. 11 interviews, the applicants’ mother’s concern was not that the police would not respond if her children were in danger of being harmed or killed, rather it was that they would not have any warning in order to prevent such harm. This, counsel submits, does not demonstrate a lack of effective State protection, given that such concerns could be applied to police protection worldwide.

The applicants’ response to the respondents’ submissions

49. Counsel submits that the failure of the applicants to seek judicial review of the Commissioner’s decision cannot be a basis for this court to refuse relief. The minor applicants availed of their entitlement to appeal the Commissioner’s decision, albeit they were reduced to an appeal on the papers. Effectively, the Commissioner’s finding pursuant to s. 16(6) (c) was water under the bridge. Even if there had been a challenge to the Commissioner’s decision, there was no guarantee that same would have been successful given the preponderance of High Court jurisprudence that an appeal to the Tribunal constitutes an effective remedy.

50. Any difficulties which presented for the Tribunal could have been overcome by the decision-maker reverting to the applicants’ mother by letter, or alternatively remitting to the Commissioner pursuant s. 16(6).

Considerations

51. By way of preliminary observation, the court notes the applicants’ description of the Commissioner’s decision to limit them to a papers-only appeal as unfair. While they may characterize the decision as such, I agree with the respondent that the within proceedings are not a vehicle in which to impugn the Commissioner’s decision. This is so for the reasons set out by Clark J. in *T.E.S. (South Africa)*, as relied on by the respondent in these proceedings. In that case, Clarke J. held that protection applicants to whom a finding under s. 13(6) (e) (a finding similar in effect to a s. 13(6) (c) finding) had been applied, could not “seek to attack the consequences of the s. 13(6) (e) after the Tribunal decision has been delivered” Thus, the present challenge must be confined to the decisions of the Tribunal.

52. The applicants canvass a number of challenges to these decisions. First, insofar as the applicants challenge the finding that State protection is available in Jamaica from *generalised* violence, I am satisfied that the Tribunal Member adopted the correct approach regarding the risk posed to the applicants in this regard. She acknowledged the relevant evidence submitted but concluded that, while there are high crime rates in Jamaica, in the absence of evidence that the applicants would be specifically targeted for some relevant reason, such information cannot ground a claim for refugee status. I should add that the court has approached the State protection finding made in this regard as one made in circumstances where the decision-maker effectively declined to embark on a consideration of the applicants’ fear of persecution based on their mother’s sexual orientation, a claim which, if adjudicated upon and believed, would necessitate a consideration of the availability or otherwise of effective State protection for the applicants. I will return to this issue in due course.

53. The Tribunal Member also found, on consideration of the evidence submitted, that the risk of domestic violence to the applicants

was unfounded and that no Convention nexus was established. The decision-maker determined that this fear was not well- founded given: (i) the ability of the applicants' mother to re-locate and thus avoid her ex-partner; (ii) the fact that the ex-partner would not recognise children born in Ireland; and (iii) the fact that the ex-partner had not attacked the mother's other child who still lives in Jamaica. Counsel for the applicants made some general remarks purporting to challenge this finding but nothing that was said satisfies the court that there is any basis to impugn this finding.

54. I turn now to the principal ground of challenge in the within proceedings, namely that the Tribunal Member wrongly exercised her jurisdiction in the manner in which she dealt with the applicants' fear of persecution based on being the children of a lesbian parent. The first question to be addressed is whether there is merit in the respondents' argument that the applicants are effectively precluded from advancing this ground of challenge to the Tribunal decision on the basis that they should have challenged the Commissioner's restriction of their appeal to a papers-only one. Essentially, the respondent argues that the Tribunal Member cannot be faulted for declining to embark on an assessment of the applicants' fear of persecution based on their mother's sexual orientation given the paucity of information in this regard before the decision-maker, and given that the applicants must have been aware, from the respective s.13 reports, that the Commissioner had not made a finding on their mother's sexual orientation. Counsel for the respondents argues that the onus was on the applicants to bring a challenge to the Commissioner's s. 13 (6)(c) finding so that they could thereby achieve an oral hearing before the Tribunal where matters pertaining to their mother's sexuality might be teased out. I do not find merit in the proposition canvassed by counsel for the respondent. The applicants were perfectly entitled to utilise the appeal process which, pursuant to the provisions of the Refugee Act 1996 (as confirmed by the Supreme Court in *M.A.R.A. (Nigeria) v. Minister for Justice and Equality* [2014] IESC 71) provides them with a *de novo* hearing before the Tribunal. The claim for refugee status based on a fear of persecution on account of their mother's sexual orientation constituted, *inter alia*, a principal part of the applicants' appeal. I note that in their appeal submission to the Tribunal, the applicants make the case that the Commissioner "failed to make any determination at all" in relation to their claim of persecution based on their mother's sexual orientation. Clearly, a decision on this matter was sought from the Tribunal.

55. I am satisfied that the applicants' challenge to the decisions on the ground that the Tribunal erroneously declined to adjudicate on their claim of persecution on the grounds of their mother's sexual orientation has been made out. The flaw in the decision is essentially jurisdictional. The Tribunal Member's approach, effectively, was that this ground of claim would not be assessed. In essence, the Tribunal Member is not saying that she disbelieved the applicants' mother's claim to be a lesbian, rather the decision-maker declined to embark upon a consideration of the claim made on behalf of the minor applicants because their mother had not raised it on her own behalf in a different forum i.e. by way of a s. 17(7) application to re-enter the asylum process previously conducted in respect of her asylum claim, or otherwise. This approach, to my mind, constitutes a failure to give the applicants' claims individual consideration (whatever the merits of such claims), as is required by law. Furthermore, the Tribunal Member erred in concluding that what she was being asked to do was to "re-open a claim [the applicants' mother's] which has been already dealt with." Contrary to this assertion, what the Tribunal was required to adjudicate on were the independent claims advanced on behalf of the infant applicants. Their entitlement to due adjudication was not dependent upon any claim having to be pursued by their mother or upon their mother having to re-enter the asylum process. They were entitled to due adjudication, whatever the merits of their claim to be in fear of persecution based on their mother's sexuality. It fell within the remit of the decision-maker to determine their claims based on the evidence before her. Contrary to the Tribunal Member's erroneous assumption, embarking on such an assessment would not be a re-opening of the applicants' mother's asylum claim. Even if it could be viewed as such, it was not grounds upon which to reject the applicants' claims of persecution, particularly in circumstances where the claims (whatever their merits) were being asserted on behalf of infant children.

56. It was a key requirement in the present case that a finding would be made by the Tribunal Member as to the applicants' mother's sexuality given that her lesbianism formed the basis of a fear of persecution asserted on the infant applicants' behalf. The Tribunal did not do that: that is the core deficiency in the decision and amounted, in effect, to an abdication of jurisdiction.

57. Counsel for the applicant submitted that the Commissioner's decision appears to accept the applicants' mother's claim as to her sexuality. As I have already noted, the submission made to the Tribunal in the appeal submissions was to the contrary, namely that the Commissioner failed to make any determination on this aspect of the applicants' claims. In any event, in circumstances where the court is of the view that the Commissioner, in the respective s. 13 reports, did not impugn the applicants' mother's credibility with sufficient clarity as to have put the applicants on notice that their mother was not believed as to her sexual orientation, it would not have been open to the Tribunal Member, in the context of a papers-only appeal, to make adverse credibility findings of which the applicants had not sufficient notice from the s. 13 reports. Were the Tribunal to make adverse credibility finding of which the applicants did not have notice, then it would be incumbent on the decision-maker, prior to doing so, to give the applicants an opportunity to address such concerns as the decision-maker may have prior to any findings being made. However, this court is not *per se* making a finding that the Tribunal made an adverse credibility finding on this issue. Nor is the court saying that the Tribunal Member was required to either remit the matter to the Commissioner and/or to the applicants, prior to any determination being made on the applicants' claimed fear of persecution based on their mother's sexual orientation. That would be a judgement call for the decision-maker once a substantive assessment of the claims was embarked on. The court is of the view that a more fundamental defect attaches to the decision, namely the Tribunal Member's decision to decline jurisdiction.

58. The applicants also challenge the manner in which the Tribunal Member addressed the country of origin information which was before her. I note that, while the decision-maker recites the information in the decision, she does not embark on any consideration of its potential relevance or otherwise to the claims being advanced on behalf of the applicants as children of a lesbian parent. It seems to me that, as the decision-maker declined to entertain (in any substantive regard) the applicants' claimed fear of persecution on the grounds of their mother's sexuality, any considered analysis of the country of origin information regarding the treatment of gay and lesbian people in Jamaica (and its potential relevance) fell by the wayside.

59. I note that the respondents contend that, irrespective of the applicants' mother's sexual orientation, State protection was available for the infant applicants in Jamaica. Counsel for the applicants makes the case however that it is not clear whether the Tribunal Member's finding on State protection encompasses a finding that such protection would be available to the children of lesbian or gay parents. I agree that it is not clear. I also accept the argument that the available country of origin information on the risks to the gay community in Jamaica, including children who are gay, was, on its face, sufficiently probative such that it required the Tribunal Member, if satisfied as to their mother's asserted sexuality, to assess the issue of State protection from the standpoint of children of gay/lesbian parents. The weight to be given to the country information was, of course, a matter for the decision-maker, as was any balancing of the information against the material on the availability of State protection generally in Jamaica and the evidence tendered by the applicant's mother in the course of the relevant s.11 interview. However, as I have said, this was not done because the Tribunal Member wrongly declined to adjudicate on the question of the applicants' mother's sexual orientation.

60. In summary therefore, the essential flaw in the approach of the Tribunal Member is that she derogated from her jurisdiction to decide the claim advanced by the applicants based on their mother's sexuality and, in effect, stated that if she could not decide it,

this meant a negative decision for the minor applicants.

61. In all the circumstances of this case, I am satisfied that the decisions cannot stand. For the reasons set out in this judgment, I will grant leave to the applicants. As these are telescoped proceedings, I am satisfied to make an order quashing the decisions and to remit the matters for *de novo* consideration before a different member of the Refugee Appeals Tribunal.