Neutral Citation: [2013] IEHC 586

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 182 J.R.]

[2010 No. 313 J.R.]

[2011 No. 277 J.R.]

BETWEEN

O.E.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND MARGARET LEVEY (SITTING AS THE REFUGEE APPEALS TRIBUNAL)

RESPONDENTS

P.E.E.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

F.E. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND O.E.)

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND LAW REFORM, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on 19th day of December, 2013

1. These three applications come before the court in three separate sets of proceedings. O.E., the first named applicant, (Record No. 2009 182 J.R.) is married to P.E.E., the second named applicant (Record No. 2010 313 J.R.) and are the parents of F.E., the third named applicant (Record No. 2010 277 J.R.).

2. O.E. and P.E.E. are Nigerian nationals, who were married on 23rd December, 1999. Prior to their arrival in Ireland they had two daughters, P.B., born on 20th July, 2000, and P.P., born on 31st January, 2004. They left Nigeria on 30th January, 2008, and arrived in Ireland the following day. O.E. made an application for a declaration of refugee status on her own behalf and on behalf of her daughters and P.E.E. made a separate application on his own behalf. On 28th June, 2008, O.E. gave birth to their third daughter, F.E., on whose behalf an application for refugee status was submitted on 15th November, 2009, by her mother.

Procedural History

3. O.E. completed a questionnaire on her own behalf and on behalf of P.B. and P.P. on 12th February, 2008. She then attended for interview on 18th February, 2008, under s. 11 of the Refugee Act 1996. A decision of the Refugee Applications Commissioner recommended that the applicant should not be declared a refugee on 19th February, 2008. This decision was appealed to the Refugee Appeals Tribunal and the appeal was rejected on 22nd January, 2009, following an oral hearing held on 26th May, 2008. Notice of the decision was furnished by letter dated 30th January, 2009, and received by the applicant on 2nd February, 2010.

4. Following the birth of F.E., O.E. made an application on the child's behalf for a declaration of refugee status and completed an ASY1 form on 15th November, 2009. O.E. then attended for interview in respect of this application on 27th November. The Commissioner recommended that F.E. not be granted refugee status for the same reasons as the previous decision in respect of the mother and her two sisters. This was appealed to the Refugee Appeals Tribunal and following a further hearing on 11th August, 2010, the Tribunal rejected the appeal on 7th March, 2011. This was notified by letter dated 15th March, received on or about 18th March.

5. P.E.E., having applied on his own behalf for refugee status on 31st January, 2008, completed a questionnaire on 11th February, 2008. He subsequently attended for a s. 11 interview on 14th February. The Refugee Applications Commissioner recommended that he not be granted refugee status on 21st February. The applicant appealed this decision to the Refugee Appeals Tribunal by notice of appeal dated 20th March, 2008. The Refugee Appeals Tribunal rejected the appeal on 22nd January, 2009, following a hearing which also took place on 26th May, 2008. It should be noted that the same tribunal member, Ms. Margaret Levey B.L., determined each of these appeals.

6. P.E.E. following receipt of the three options letter made an application for subsidiary protection on 30th March, 2009. This application was refused on 15th February, 2010. In the meantime he made application for humanitarian leave to remain under s. 3 of the Immigration Act 1999. An examination of file was carried out under s. 3 of the Act, and completed on 8th February, 2010, following which the Minister made an order for his deportation on 16th February.

7. It is clear that the factual basis for the claims for asylum made on behalf of the children P.B. and P.P. were entirely dependent on the accounts of their parents given in the course of their respective applications as was the application made on behalf of F.E., who

has never been to Nigeria. In that regard, the court notes that O.E. acknowledged that she and her husband completed the questionnaires together.

Judicial Review Proceedings
8. Following the refusal of her appeal by the Tribunal, O.E. commenced judicial review proceedings by notice of motion dated 19th February, 2009, whereby she sought to quash the decision of the Tribunal of 22nd January and various other declarations related to the making of that decision. However, the court is satisfied that the substantive relief that is relevant in this case is the application for an order of *certiorari*. A short extension of time was thought to be required because the proceedings were issued three days after the fourteen day period required under s. 5 of the Illegal Immigrants (Trafficking) Act 2000. No extension of time is required, however, in the light of the decision of Cross J. in *B.M., J.L. & Ors v. Minister for Justice and Equality, Attorney General and Ireland* [2012] IEHC 74 in which he held that the period of fourteen days was inapplicable to the case by reason of the decision of Hogan J. in *T.D. v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 25th January, 2011), but that the appropriate period to consider was that normally applicable under O. 84, r. 21 of the Rules of the Superior Courts – six months at the time of the initiation of these proceedings. This case was heard on 11th February, 2013, and was the subject of a telescoped hearing whereby the parties agreed that, should the court determine that grounds exist upon which to grant leave to apply for judicial review, the hearing could be treated as the substantive hearing and a draft notice of opposition furnished by the respondents could be adopted as a notice of opposition for the purposes of the substantive hearing. The court directed that the other two cases be given early hearing dates so that the three cases could be processed together.

9. P.E.E. and F.E. were represented by different solicitors and counsel. An application for leave to apply for judicial review in respect of F.E.'s case was issued on 1st April, 2011, seeking an order of *certiorari* and a declaration that the provisions of the Refugee Act 1996 were incompatible with European Union law and, in particular, that the application of the limitation period contained in s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, was incompatible with European Union legal principles of equivalence and effectiveness. An order of *certiorari* was also sought quashing the decision made pursuant to s. 12(1) of the Refugee Act 1996, to give priority to applications for asylum from persons who are nationals of Nigeria. A declaration was also sought that this direction was incompatible with Article 23 of Council Directive 2005/85/EC. Additional declarations were also sought that the Refugee Act 1996, as amended, was incompatible with Article 39 of Council Directive 2005/85/EC and that the respondents failed to provide the applicant with an effective remedy before a court or tribunal within the meaning of Article 39. A further declaration was sought that the common law rules governing the remedy of judicial review were contrary to Articles 34(1), 34(3), and 43(1) and 43(2) of the Constitution. A declaration was also sought that the time limits imposed by Article 84, including O. 84A(4) of the Rules of the Superior Courts in circumstances in which European Union rights were asserted were not in compliance with Directive 89/665. However, the challenge to the Refugee Appeals Tribunal decision is on the evidence available made within the fourteen day period required under section 5.

10. Leave to apply for judicial review by P.E.E. was initiated by notice of motion of 18th March, 2010. The applicant seeks an order of *certiorari* quashing the decision of the Minister for Justice, Equality and Law Reform refusing to grant the applicant refugee status. He also seeks an order of *certiorari* quashing the direction that gave priority to applications for asylum from persons who are nationals of Nigeria. In addition, various declarations were sought that s. 12(1) of the Refugee Act 1996, as amended, was incompatible with Article 23 of Council Directive 2005/85/EC and that the Act was also incompatible with Article 39 of the same Directive. A further declaration was sought that no effective remedy had been provided before a court or tribunal within the meaning of Article 39 of the Directive. Orders of *certiorari* were also sought quashing the Minister's refusal of subsidiary protection and the decision to make a deportation order in respect of the applicant. The applicant seeks an extension of time for the purposes of making these applications. The decision of the Tribunal was made on 22nd January, 2009. The three options letter was dated 27th February, 2009. The applications seeking leave to apply for an order of *certiorari* of the Tribunal decision is brought in excess of twelve months after the refusal. It is, therefore, well outside the fourteen day limitation period provided by s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and the normal time period applicable at that time under O. 84 of the Rules of the Superior Courts as discussed in *B.M.G.L.* earlier in the judgment. No reason is furnished as to why time should be extended in this case. The subsidiary protection decision was made on 15th February, 2010, and the deportation order on 16th February. The subsidiary protection decision was notified to the applicant on 15th February and the deportation order was notified on 23rd February, 2010. He failed to obtain an injunction restraining his deportation and was deported to Nigeria on 12th March, 2013.

11. The parties are also agreed that the applications for leave to apply for judicial review on behalf of F.E. and P.E.E. may also be the subject of a telescoped hearing and in that regard, the respondents have furnished a draft notice of opposition in each case which may be adopted by the court as a formal notice of opposition should the court grant leave to apply in respect of any of the grounds asserted.

The Claim for Refugee Status
12. O.E. and P.E.E. claimed that the husband's family wished to have both daughters circumcised. In November, 2005 it was claimed that P.E.E. was attacked and badly injured by a group of youths and the Chief Priest of the village in which they lived as a result of his refusal to allow the circumcisions to take place. Both applicants complained that on reporting the matter to the police they were informed that the police could not do anything about the matter as it was a community issue. O.E. claimed that she had previously been circumcised which had given rise to complications during the birth of their first child. P.E.E. suffered injuries as a result of the alleged assault which were described in a medical report later furnished in the course of the application for subsidiary protection. He bore scars which he claimed to have sustained when cut with a machete on his shoulder and stab wounds to his face and head from broken bottles. Following this attack the family moved to an address in Bayelsa State where they remained for a period of two years and one month. They suffered no further approaches or trouble in respect of the circumcision issue during that period.

13. O.E. expressed a fear in the questionnaire, completed with her husband, that she and her children were being persecuted by her husband's Chief Priest and her husband's family who sought to circumcise her daughters. This was repeated in her s. 11 interview and in evidence to the Tribunal on 26th May, 2008. The same story was told by her husband in the course of his interview and in the course of the evidence he gave to the Tribunal on the same date. However, in the course of O.E.'s s. 11 interview on 27th November, 2009, in respect of F.E.'s application for asylum, she stated by way of clarification that her two elder daughters had suffered Female Genital Mutilation (FGM) and that nobody, including the police, offered her any assistance at that time. Subsequently, in evidence to the Tribunal on 11th August, 2010, the applicant stated that her two elder daughters had not had FGM carried out upon them, but could offer no explanation for her pervious contention that they had. It is to be noted that both parents contended, in their respective applications, that the elder daughters had not been subjected to circumcision prior to the family's departure to Bayelsa State in November, 2005.

14. The second element of the parents case arose out of an alleged fear of persecution because of their involvement in an organisation known as the "Movement for the Emancipation of the Niger Delta (MEND)" with which P.E.E. allegedly became involved in Bayelsa State. P.E.E. claimed that he had been persuaded to join the movement in March, 2007. He hoped that the movement would

bring him employment opportunities in that he would be given contracts to build and repairs members' houses. He joined this group because he was dissatisfied with the rate of pay which he earned in his then employment. His friend promised him a better job if he joined MEND. He was then offered a job and told that if he refused to take it his family would be seized and his previous employers would be contacted and that he would lose his job.

15. P.E.E. complained that problems arose on 15th January, 2008. He learned about a plan to attack an oil field which was to take place on 13th December, 2007. He claimed that he heard about this attack on 10th December and secretly travelled on a speedboat to the Shell Petroleum Development Company in his working overalls. He went to the gate hoping to get in, but the security man refused to him entry. He waited until he met a white man in order to tell him about the planned attack on 13th December. He finally met a white man and told him that he belonged to MEND and of the planned attack, which involved the kidnapping of a white man and the blowing up of pipes with dynamite. Just before the attack the security forces arrived, as a result of which there was an exchange of fire in which a number of people were killed. MEND found out about his role as an informer. He presumed one of the security men at the gate was a MEND member and must have told them that he had seen a man wearing overalls bearing the logo of the company for which he worked. On being questioned at gunpoint by his friend on 18th December, 2007, he admitted his role as an informer. The evidence given by P.E.E. to the Tribunal was summarised in the Tribunal's decision at para. 3:-

> "He joined MEND in March, 2007. He knew they were freedom fighters. He understood it to mean that they attacked oil pipelines and took hostages. They were a kind of terrorist organisation. Bunkering involves stealing oil from pipes. He had an agreement with the leaders of the group. He had to swear an oath and he refused. They said his family would be kidnapped and they would not give him the job he wanted. He decided to join but wanted no part in any violence. He just concentrated on his work and did not canvass support on their behalf."

16. The Tribunal noted that in the questionnaire he had given the following account:-

> "I was forcefully initiated to be an active member of the struggle and fight of the Niger Delta for the emancipation. After much persuasion, (I was) the only builder they invited into their camp to build their shelters in the camp and their personal houses."

He then stated that he was:-

> "…threatened if I refused to join them they would withdraw the privileges of me building their shelters and then ask the owner of where I worked to eliminate my job appointment, also threatening to hold my family hostage…To be a full member in the Creeks (a section of the MEND movement) I agreed to join on a condition that the society agenda and tactics be outlined by changing their way of operation to peaceful mass protests because I am released on bail conditionally since 2003 governorship election in Edo State. They agreed and promised to abide by the new plan. The people present during this discussion are leaders of the society, my co-activist comrades PI the leader of Ijali Youth Council and MENDS Commander, Major General GT and AT the leader of the Niger Delta Vigilante Movement (NDVM)…I was given the role in the society to recruit and campaign to our youth in the region for the struggle to come and fight for their right…I never supported or participated in…kidnapping, bunkering and blowing up of oil pipelines. I have never been comfortable with the acts."

P.E.E. also stated that he had been initiated into the society and was made to swear an oath that he would not quit till death or the government and oil companies accepted the movement's demands.

17. Because of his alleged betrayal of the movement, the applicant claims that his house was blown up and his nephew murdered on 15th January, 2008. He claimed that he and his family discovered this on their way home from market and drove to a friend's house. His friend visited his home and confirmed that MEND members had carried out the attack. He fled with the family to Lagos, to his uncle. His friend was subsequently murdered on 20th January in Bayelsa to which he had returned in order to obtain money for the family's travel arrangements. The applicant was informed that his friend had been tortured but would not reveal information about the applicant or his family.

18. O.E. claimed not to have any information concerning her husband's involvement in MEND and knew little about it. She was able to describe the attack on the house and returning from market to see smoke coming from her home. She later learned that MEND had carried out the attack. She and her husband fear that if returned to Nigeria they will be in danger from members of MEND. They also claimed that their daughter, F.E., would be in danger from MEND members who had a countrywide presence. The claim made on behalf of F.E. and her daughters was also based on the information summarised above and more extensively set out in the questionnaires, interviews and decisions exhibited in these proceedings.

The Tribunal Decision in the Case of O.E. and P.E.E.

19. The tribunal member did not accept the credibility of O.E.'s claim which was based on her husband's involvement in MEND and her fear for herself and her children which arose out of his activities. It was noted that O.E. stated that she knew nothing about her husband's involvement with MEND until the incident when their house was firebombed. The Tribunal did not accept that O.E. could have remained for a number of years in ignorance as to what her husband was doing or what employment his friend had procured for him, and knew nothing of this until her house was destroyed. However, the Tribunal, more importantly, concluded that the husband's claim was not credible and "thus, this applicant's ignorance on the topic may be explained by the fact that none of what he said occurred in any event".

20. The Tribunal concluded that the findings made in respect of the husband's claim to have been involved with MEND were relevant to O.E.'s claim. The Tribunal identified a number of issues upon which the husband was not credible:-

> (i) The Tribunal identified some confusion in the different reasons advanced by P.E.E. as to why he had joined MEND. He claimed that he had complained to his friend about the rate of pay that he received in his employment. He stated he joined because he needed a job building. On the other hand, he alleges that he was forced to take a job from MEND or they would approach his then employer and he would lose the existing job and that they would also kidnap his family.
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> (ii) Initially he claimed he was forced to take an oath, whereas later at the Tribunal hearing he said he refused to take an oath.
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> (iii) Having claimed to have joined MEND under duress, he claimed that he laid down conditions for joining the movement in that they were required by him to desist from violent tactics and engage in peaceful mass protests. He claimed that they had agreed and promised to abide by his terms.

(iv) He claimed that he engaged in recruitment among the youth of the area. At the Tribunal hearing he claimed that he never canvassed support for MEND. In that regard, the Tribunal noted that he claimed to be opposed to bunkering (tapping oil pipes and stealing oil), kidnapping and blowing up pipelines which, were the main activities of the group and "begged the question what he was recruiting these youths to do".

The Tribunal summarised these inconsistencies as follows:-

> "Thus, he wants a job, is coerced into joining the group and then dictates his terms and conditions as to how they run their organisation. This is internally inconsistent and in my view is not capable of being believed. This evidence would lead one to conclude that this man was never a member of this group because it makes no sense for reasons outlined."

21. The Tribunal also disbelieved the account given of the planned attack on the oil field about which he claimed to have forewarned the oil company. He informed the Tribunal that he heard about the planned attack when he went to meet one of the leaders of MEND. While waiting for him, he was informed that this man was at another meeting. The security guards let him into that meeting because "he had sworn an oath". Apart from the conflict about whether he swore an oath or not, if the organisation had accepted his terms of passive resistance and peaceful protest as guiding their future conduct, the Tribunal concluded that it was not credible that he would be allowed to be present at a meeting in which they were clearly breaking this alleged agreement.

22. The Tribunal also disbelieved his account of travelling to the Shell Petroleum Development Company in a speedboat, waiting for a white man and informing him that he belonged to the MEND group and of the planned attack. He also claimed that he had worn overalls with the "Afro Nobel Nigeria Limited" company name or logo upon it, which is how MEND came to know that he was the informer. The Tribunal concluded that "if he was attempting to pass on information secretly, he could not have gone about it in a more overt way". The overalls worn by the applicant contained the name of the first company with which he worked and earned so little money about which he complained and, as a result of which, he was offered a job by MEND:-

> "Thus, why he was wearing these overalls at all is amazing given that he was not working for them any longer and if they decided to investigate the leaking of the information they would clearly be able to narrow down who the informer was with this information. Leaving aside the identifying overalls, he approaches security to try to get in and is refused entry and apparently waits around the gates until this white man turns up. He then divulges the information to the white man apparently within earshot of a security man. This is not the behaviour of a person trying to pass on information in a clandestine fashion. It is impossible to believe that a man wishing to remain undetected would behave in such a manner. The scenario as outlined by the applicant gives the impression as having been concocted to create a series of events to give him an ostensible reason to embark on his flight from Nigeria."

23. The Tribunal also disbelieved P.E.E.'s account of how his friend found out about his involvement in the leaking of the information. He claimed that his friend questioned him about the matter and he denied being an informer. His friend produced a gun and told him that if he denied it again he would shoot him. He then agreed that he was the informer. He then claimed that following his admission his friend left him and went to meet other members of MEND. The Tribunal concluded:-

> "That an informer would be just dealt with in this manner by such a group is not credible. Leaving him to his own devices for a number of weeks knowing he was the informer and more importantly his knowing that they knew this and remaining there, is just bizarre. Most people would simply leave/abscond at that stage. Instead this applicant stayed around waiting for the inevitable to happen which again is not the behaviour of someone who believes they are at risk. This inexplicable behaviour is in my view yet another example of this applicant setting the scene for his flight from Nigeria. I do not believe this man has any involvement with this group for the reasons outlined."

24. The Tribunal also considered the country of origin information about the MEND group that was available. It concluded that the information supplied indicated that the group carried out activities such as those described by the applicant, but the Tribunal was satisfied that:-

> "This applicant has tailored his story to fit in with information which details the activities of this MEND group. His evidence is internally inconsistent, contradictory and in my view not capable of being believed."

25. The remaining basis upon which a claim for refugee status was sought was O.E.'s stated fear (also expressed by her husband) that if returned to Nigeria their two elder daughters would be subjected to circumcision or FGM. The Tribunal concluded as follows:-

> "Regarding her daughters and the risk of FGM to them she maintains that her in-laws wanted to circumcise the children and this was why they moved. She gave no evidence of any difficulties regarding FGM once they relocated to Bayelsa. That being so, it appears their problems on that front were solved by internal relocation and indicates to me that it is an option. Going to Abuja or Lagos were mentioned to her and the country of origin (information) annexed to the s. 13 (report) at para. 3.9.6 indicates that women throughout Nigeria have the option to relocate to another location if they do not wish to undergo FGM. On the basis of her own experience with relocation in the FGM context, and the country of origin information I am of the view that such a course is reasonable in all the circumstances and would not be unduly harsh for her to do so…"

The Tribunal was satisfied that the question of internal flight only arose where a claimant had a well founded fear of persecution in their home area. It must be established that there is no other part of the country where the applicant would be safe and where it would be reasonable, but not unduly harsh, to expect them to reside. The Tribunal was not satisfied that relocation was not an option since the family had, following the alleged claims made in respect of FGM towards the children, successfully relocated to Bayelsa State where they had resided without incident for a considerable time.

26. The Tribunal also considered the father's reliance upon the FGM issue concerning his children. It was indicated that this aspect of his application would be dealt with in the decision concerning his wife's appeal, as it was based on the same evidence. The Tribunal stated:-

> "Regarding the FGM issue his children are included in his wife's application and same will be dealt with there, but if there was a genuine issue regarding FGM he gave no evidence of any difficulties regarding FGM since his relocation to Bayelsa and thus, he appears to have been able to avoid his difficulties in that regard and can do so again."

27. Both appeals were refused on the same day by the same tribunal member. The oral hearings in both cases took place on the same day and the evidence taken was typed during the course of the hearing in both cases. The conclusions set out by the Tribunal in the

father's case are the same as those cited, quoted and relied upon in the mother's case in respect of the MEND group issues.

The Tribunal Decision in the Case of F.E.
28. A decision in this case was delivered on 7th March, 2011, following the hearing of further evidence from the child's mother on 11th August, 2010. F.E.'s claim was based on the same facts as those advanced by her mother in her own application and that made on behalf of the two elder daughters. It also mirrored the claim made by her husband.

29. The Tribunal recognised this factor and that the mother and father's applications for asylum had been refused. It was claimed that F.E. would be circumcised by her father's family and community if she returned to Nigeria and also that the group MEND, of which her father was a member, "would be after her daughter because her father gave a report to a Shell company about MEND". The Tribunal was satisfied that the findings in the parents' appeals were clearly relevant to this case. The Tribunal then quoted the evidence and findings in the mother's appeal and determined that since it had not accepted that the applicant's parents' claims were genuine, it followed that the applicant's claim based on the same evidence as that of her parents, must also fail. In addition, however, the Tribunal relied upon further serious credibility issues which arose in respect of the applicant's mother's evidence. The Tribunal set out in some detail what it regarded as a serious contradiction between the previous testimony and assertions by the applicant's mother that the two elder daughters had not been subjected to FGM before the family left for Bayelsa State, and her claim that they had been subjected to FGM made in the course of her s. 11 interview on 27th November, 2009, which the mother emphasised as a point of clarification. The Tribunal noted that, though the mother reverted to the claim that they had not been subjected to FGM at the Tribunal hearing, she was unable to account for this fundamental inconsistency in the story which the Tribunal determined "seriously undermines her credibility and the credibility of the applicant's claim". The Tribunal rejected the appeal.

The Mother's Challenge
30. A total of fifteen grounds were initially relied upon in the mother's application. The focus of the claim was reduced in written and oral submissions to the following matters:-

> (i) Grounds 2, 6, 7, 8, 11 and 14 relating to internal relocation;
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> (ii) Ground 3 – concerning reliance placed by the decision maker upon a decision in respect of the applicant husband's appeal;
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> (iii) Ground 4 – the failure to use up to date country of origin information;
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> (iv) Ground 5 – failure to apply a forward looking test;
>
> (v) Ground 12 – the delay of approximately eight months in arriving at a decision in the case was said to be a breach of the applicant's right to good administration;

Grounds 2, 6, 7, 8, 9, 11 and 14
31. It was submitted that the Tribunal determination that there was no evidence of a threat in respect of FGM to the two elder daughters because the family had previously lived for a period of over two years in Bayelsa State before their departure for Ireland, amounted to a determination that internal relocation in Nigeria was an alternative open to the applicant mother and her daughters. It was also submitted that the Tribunal erred in law in treating internal relocation as a component part of the determination of refugee status rather than as a matter to considered separately as an alternative open to the applicant following the determination of that status. Furthermore, it was submitted that the Tribunal erred in failing to nominate a place where relocation ought to take place and to assess it by reference to up to date country of origin information. In that regard, it was submitted that pursuant to para. 34 of the UNHCR Guidelines on Internal Relocation, the burden of proof in relation to the matter lay upon the decision maker but that the Tribunal failed to have regard to that burden of proof.

32. I am satisfied that there is no merit in any of these submissions. The Tribunal carefully assessed all of the evidence tendered in respect of the issue concerning FGM. Even if such a fear existed, the family had successfully relocated to Bayelsa State and remained there for a period of over two years. This clearly was not an immediate cause for the flight of the family. In addition, the court does not accept that the issue of relocation was inappropriately considered on the basis that internal relocation should be considered as an alternative to refugee status and not as a component of the test as to whether one was entitled to claim it.

33. Article 8 of the Qualification Directive (Council Directive 2004/83/EC of 29th April, 2004) provides:-

> "1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.
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> 2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.
>
> 3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin."

This provision has had legal affect in this country since 2006. There is ample authority for the proposition that the Tribunal is entitled to adopt a holistic approach by considering the issue of refugee status and in that context, may consider whether a claimant has an alternative of internal flight or relocation in determining a claim for refugee status. A person may be excluded from refugee status if, in all the circumstances, it would be reasonable to expect him to seek refuge in another part of the country (see *Januzi v. Secretary of State for the Home Department* [2006] 2 A.C. 426: *Imoh & Ors v. Refugee Appeals Tribunal & Ors* (Unreported, High Court, 24th June, 2005, Clarke J.): *Darjania v. Refugee Appeals Tribunal & the Minister for Justice*, *Equality and Law Reform* [2006] IEHC 216: and the judgment of this Court in *M.I. v. Refugee Appeals Tribunal* [2013] IEHC 368).

Grounds 3 and 5
34. The claim was made that the tribunal member who dealt with O.E.'s claim should not have done so because she had also dealt with P.E.E.'s claim and had quoted extensively from the adverse finding against P.E.E. in the decision in O.E.. It was claimed that this involved a pre-judgment of O.E.'s claim and that she was entitled to an independent assessment of her claim for asylum. The

weakness of this proposition was properly recognised by counsel in the course of the oral hearing. As already noted and set out above, this husband and wife though making separate applications and entitled to separate determinations, nevertheless advanced the same facts in each case in their claims for asylum. The tribunal member convened oral hearings on the same date for both parties and a note was taken and typed up on that date of the evidence given. It is completely unrealistic to suggest that these claims were not intimately connected when each party relied upon the story told by the other. Moreover, the decision in respect of each parent was delivered on the same date. No evidence exists of any bias or objective bias arising out of the manner in which these claims were considered or assessed by the tribunal member. This ground is wholly without merit.

35. It is equally untenable to submit that because the husband's account was rejected on credibility grounds that it is irrational to select elements of his account and conclude that they undermine O.E.'s claim, when their claims are so closely connected and were considered fully.

Ground 4
36. It is claimed that the Tribunal's assessment of O.E.'s credibility included matters which were based on conjecture and surmise and the "gut feeling" of the decision maker rather than any proper analysis of the applicant's claim. In particular, it was suggested that there was no basis to assume that P.E.E. would have made O.E. aware of his activities. I am satisfied, and it is clear from the extracts of the Tribunal decision already set out, that the tribunal member had regard to the complete factual matrix that emerged from the evidence and materials produced. I am completely satisfied that this material was "rationally analysed and fairly weighed". The Tribunal decision was based clearly on the facts which were outlined in detail in the decision and the conclusions reached are cogent and "bear legitimate connection to the adverse finding". There is no suggestion that any mistake of fact was made in the determination. I am satisfied that this decision conforms with the principles set out in *I.R. v. Minister for Justice, Equality and Law Reform and Refugee Appeals Tribunal* [2009] IEHC 353 in that the tribunal member has, in this case, properly weighed and assessed the evidence.

Ground 12
37. It is submitted that the delay between the hearing of O.E.'s application on 28th May, 2008, and the making of the decision on 22nd January, 2009, rendered the findings concerning the applicant's lack of credibility unsafe because of the time span between the hearing and the making of the decision. It is said that this delay was a breach of the applicant's right to good administration. The duty to determine an appeal within a reasonable period by the Tribunal is well recognised. (*A.M. v. Chairperson of the Refugee Appeals Tribunal & Ors* (Unreported, High Court, 29th July, 2004) and *N.M.B. v. Refugee Appeals Tribunal & Ors* [2005] IEHC 13). Thus, if there is a significant gap between an oral hearing and the determination of an appeal, it may become unsafe to rely upon the decision. The rationale for this principle is that the assessment of an applicant's claim depends upon careful scrutiny of the evidence given by the applicant in relation to past events and where a decision is not given within a reasonable time, it may become unsafe because the impact of the oral testimony upon the decision maker may have dimmed. As Finlay Geoghegan J. recognised in *N.M.B.*, this is particularly so if no transcript of an oral hearing is taken.

38. In this case there has been a delay of some nine months between the oral hearing and the delivery of the decision in O.E.'s case. A substantial amount of time was devoted at the hearings to the testimony of O.E. and that of P.E.E., notes of which were taken and typed on the same day. To that extent there was, at all material times, a note or transcript available of the all of the evidence given. No issue was taken in relation to any misstatement or error of fact or error made by the tribunal member in her recollection of any fact relied upon in the decision. There is no claim of any prejudice to the applicants arising from this delay. Though the analysis carried out by the tribunal member was focused, in large measure, on the internal inconsistencies arising from the testimony given by P.E.E. which was of enormous importance in the consideration of O.E.'s case, the testimony relied upon in that regard is not said to have been inaccurately remembered or recorded. I am not satisfied that the delay in this case may be regarded as so substantial or unreasonable as to give rise to concerns as to the reliability of the decision made or to render it fundamentally flawed.

Ground 13
39. It is also submitted that the refusal of the applicants claim based upon a finding of lack of credibility is invalid because of the failure on the part of the Tribunal to apply the provisions of s. 11(B) of the Refugee Act 1996 (as amended). The Tribunal stated that it considered all the papers submitted for the purposes of the appeal and all the matters required to be considered under the Refugee Act 1996. Regard was also had to other provisions of the Act insofar as they applied to the determination of the appeal. It was accepted by the Tribunal and the Commissioner that O.E. was Nigerian. She had no documents on arrival which could verify her identity according to the questionnaire because of the alleged burning of their home in Nigeria before the family left. The issues under s. 11(B) were well known to the Tribunal as is clear from the recital of the section in the decision. I am satisfied that the Tribunal considered all relevant matters under the statutory provisions and it is not necessary to have a ritual incantation in relation to each and every element of s. 11(B) set out in the analysis of the decision. In this case it concentrates properly on what is most relevant to the fair and proper determination of the real issues of the case. No argument has been advanced as to the prejudice that arose from the suggested failure to consider any element of s. 11(B) and the decision itself indicates that the Tribunal was mindful of its obligations under the section.

40. Grounds 10 and 15 are too vague and general to attract any relief by way of judicial review.

41. I am, therefore, satisfied that O.E. has failed to establish any substantial ground upon which leave might be granted to apply for judicial review. I am not satisfied to extend time for the making of this application having regard to the absence of substantial grounds and the court will, therefore, refuse the application.

The Father's Challenge
42. A total of ten grounds were relied upon in the father's application. The basis of his claim can be reduced to the following terms.

Grounds 1 – 4
43. Grounds 1(a) and (b), 2, 3 and 4 challenge the refusal by the Minister under s. 17 of the Refugee Act 1996, to refuse refugee status to P.E.E. It is submitted that the first named respondent failed to provide an effective remedy compliant with the minimum standards required by the Procedures Directive, Council Directive 2005/85/EC and, in particular, Article 39 thereof. It is also claimed that the prioritisation of the consideration of Nigerian applicants for asylum pursuant to s. 12(1) of the Refugee Act 1996, is unlawful. The focus of this challenge is clearly upon the decision of the Refugee Appeals Tribunal in affirming the decision of the Refugee Applications Commissioner which recommended that refugee status not be granted to P.E.E.. That decision was made by the Tribunal on 30th January, 2009, and the applicant was notified of the decision of the Minister to refuse refugee status on 27th February. Application was made to challenge the decision of the Minister by notice of motion dated 18th March, 2010, in excess of twelve months after the notification of the decision. The court is not offered any explanation for this delay which is well outside the statutory period of fourteen days. A bare assertion is made that the applicant was not previously advised of the existence of the grounds now relied upon to advance his challenge to the decision. This is completely insufficient to justify an extension of time. He

was at all material times legally represented. Having regard to the limited time within which an application may be presented, the complete inaction of the applicant when he was at all times legally represented and the very limited evidence advanced to explain the extensive delay in the case, I am not satisfied that there is good and sufficient reason to extend the time for the bringing of this application. Furthermore, as appears from what follows, I am not satisfied that there are any substantial grounds in this case upon which leave might otherwise have been granted to justify such an extension.

44. These grounds were the subject of the judgment of the European Court of Justice in the cases of *H.I.D. & B.A. v. Refugee Applications Commissioner* Case C-175/11 (judgment delivered on 31st January, 2013) which answered two questions concerning identical issues. The court concluded that the prioritisation of cases under s. 12(1) of the Refugee Act 1996, was not in violation of Article 23 of the Directive. It also concluded that the remedies available to asylum applicants in this jurisdiction were not in breach of the Directive. I am, therefore, satisfied that P.E.E. has not demonstrated substantial grounds upon which to grant leave to apply for judicial review in respect of these matters.

Grounds 4 & 5
45. The only challenge made to the subsidiary protection decision is that the respondent failed to consider the prevalence of indiscriminate violence in the Delta region in Nigeria or the potential exposure of P.E.E. to harm on return. It was sought in the course of argument to raise the issue of the decision of the European Court of Justice in *M.M. v. Minister for Justice, Equality and Law Reform & Ors*, Case C-277/11 (First Chamber) judgment delivered on 22nd November, 2012, and the subsequent decision of Hogan J. in *M.M. v. Minister for Justice and Law Reform & Ors (No.3)* [2013] IEHC 9. I am not satisfied that this argument is open to the applicant having regard to the terms of grounds 4 and 5. Ground 4 is clearly limited and dependent upon a successful challenge to the decision of the Minister refusing a declaration of refugee status and cannot succeed. Ground 5 relates to a claim that the respondent failed to consider the prevalence of indiscriminate violence in the Delta region and the resultant alleged exposure of the applicant to harm when determining the subsidiary protection application. Although it was attempted in written submissions to expand the nature of the argument in respect of these grounds to include the *M.M.* decisions, this is not possible within the terms of the grounds advanced and no application on notice was brought to amend the grounds.

46. I have considered the submissions made in respect of Ground 5. It is clear that the applicant's claims to be in fear from members of MEND or, indeed, from other indiscriminate violence in the Delta region, were considered by the officials and the Minister and it was found that adequate state protection was available to address any concerns that he may have in that regard. It is clear also that any representations made in this regard and any materials submitted were considered in reaching the decision.

47. I am, therefore, satisfied that no arguable or stateable ground has been advanced to challenge the decision refusing subsidiary protection in this case.

Grounds 4 & 9 – The Deportation Order
48. The deportation order is also challenged in Ground 4 on the basis that because no lawful first instance decision was made in respect of the refusal of refugee status by the Minister, as discussed earlier, the first named respondent lacked the jurisdiction to make the deportation order. I am satisfied that this not so for the reasons already given in respect of the subsidiary protection decision.

49. In Ground 9 it is claimed that the analysis of the applicant's family life was lacking in cogency and that no regard was had to the best interests of the applicant's children in respect of their ability to properly present their asylum or other claims in the absence of their father. This argument is totally without merit. The proceedings initiated by O.E. challenges the decision made in respect of O.E. and his daughters P.B. and P.P., and the proceedings brought in respect of this daughter, F.E., are maintained in the name of her mother. It is not necessary that he be present in this jurisdiction to advance or assist in the cases brought concerning this daughters. Indeed, the case on behalf of each child has been presented to the relevant authorities and to the High Court, and no complaint has been made in any respect that their interests were not adequately protected at any stage of those proceedings by reason of the absence of their father. The children's mother has, at all material times, represented their interests and been legally represented in so doing.

50. The applicant stated his belief in his s. 3 application that it was in the best interests of the children and their welfare that he was given permission to remain in Ireland and continue to be a central figure in their upbringing. The examination of file in this applicant's case contains an extensive consideration of his right to private life under Article 8 of the Convention and a somewhat shorter consideration of his family life rights under the same Article. However, it is clear from the submissions and the materials submitted to the Minister and the terms of the examination of file that full regard was had to the family circumstances of P.E.E. and that of his children and wife. The Minister was fully aware of the applications made for asylum and the challenges brought by way of judicial review. A submission was made to the Minister that this applicant should not be deported prior to the conclusion of the asylum process in relation to other members of his family. It was noted in the examination of file that there was nothing to prevent the deportation of one member of a family while decisions were awaited in respect of other members (see *F.P. v. the Minister for Justice* [2002] 1 I.R. 164).

51. It should be noted that although it is complained that the examination of file contains a "minimalist" consideration of the best interests of the children, very little was advanced in the submission made to the Minister concerning how the best interests of this applicant's children would be adversely affected by his removal. It is notable that separate proceedings were conducted by separate firms of solicitors representing husband and wife in this case. The same firm of solicitors represented P.E.E. and F.E., though the proceedings issued in respect of F.E. are in the name of her mother and not her father. I am not satisfied that the bests interests of the children in this case were not considered in the father's case insofar as they were relevant, and nothing has been advanced to indicate in what particular respect their best interests were ignored or not considered. It is obvious that a deportation order would result in family disruption. The facts of the family's life in Ireland are set out in detail in the asylum papers which were considered. The position was that the mother and children only had the right to remain in this State for the purpose of their asylum applications. These have now failed and the court has determined that their respective challenges to the refusal to grant them refugee status have also failed and they, therefore, remain in the state as failed asylum seekers. The children are not Irish citizens, are not the subject of the deportation order under challenge or parties to the father's proceedings. I am satisfied in all the circumstances that this applicant has failed to establish any substantial ground upon which to challenge the deportation order pursuant to Ground 9. I am also satisfied that notwithstanding the omission of the words "best interests of the children" from the examination of file, it is clear, in this case, that all relevant aspects of their best interests in respect of this deportation order were adequately considered.

52. I am not satisfied that any substantial ground arises from the matters set out at grounds 6, 7 or 10. The issue of refoulement was adequately considered in the examination of file and the grounds advanced are in the most vague and general terms and not susceptible to a grant of leave to apply for judicial review.

53. I am, therefore, not satisfied that P.E.E. has established any substantial ground upon which to grant leave to apply for judicial review and I also refuse his application.

F.E.'s Challenge

Grounds 1(a), (b) and (c) 4 and 10
54. Grounds 1(a) and (b) mirror F.E's father claim that her claim was unlawfully prioritised and that the existing procedures under the Refugee Act 1996 (as amended) failed to provide and effective remedy in accordance with Chapter V of Directive 2005/85/EC of 1st December, 2005. These grounds are now unarguable following the decision of the European Court of Justice in *H.I.D. v. Refugee Applications Commissioner* Case C-175/11 referred to earlier in this judgment.

55. Ground 1(c) claimed that an interpreter was not provided in accordance with the provisions of the Directive to the applicant. The applicant was aged two years and two months in April, 2010, at the date of the oral hearing. Her mother gave evidence at the hearing without any necessity for a translator then, or at her earlier hearing and stated that English was her first language. This ground is unstatable. Ground 4 constitutes a general claim that an effective remedy was not afforded to the applicant under Article 13 of the European Convention on Human Rights in respect of what is presumably a breach of her Article 8 rights. I am not satisfied that this ground is precise in its formulation or gives any particulars or identifies any facts or matters relied upon which would enable the court to grant leave to apply for judicial review.

Ground 2
56. It is submitted that a delay of seven months between 11th August, 2010, and 7th March, 2011, in the making of a decision by the Tribunal was in breach of para. 14 of the Second Schedule of s. 15 of the Refugee Act 1996, as substituted by s. 11 of the Immigration Act 1999, and s. 7 of the Immigration Act 2003.

57. No case has been advanced that the child applicant was in any way prejudiced by this delay. As set out earlier in this judgment, the Tribunal had a duty to determine the application within a reasonable period. There is no complaint in this case of any error of fact by the Tribunal in F.E.'s decision and no other specific prejudice caused to the applicant by the delay is cited. The mother and father provided the factual basis for the child applicant's claim. Furthermore, the evidence given by the mother at the Tribunal hearing was analysed and the additional feature which emerged in relation to a claim made in the course of the child applicant's application that the two older daughters had been subjected to FGM in Nigeria and, subsequently withdrawn, was addressed by the Tribunal. Once again, the evidence was typed at the hearing thereby ensuring that a record was maintained of the evidence given, as happened in all three cases. I am not satisfied that the integrity of the decision in this case was in any way undermined by the delay or could give rise to a substantial ground upon which to grant leave to apply for judicial review.

Ground 8
58. It is contended that the Tribunal erred in making a finding concerning potential internal relocation in Nigeria of the child applicant as part of the determination of whether she was entitled to refugee status and, without having due regard for the UNHCR guidelines on internal relocation. A complaint is made that the intended destination for relocation was not specified in any detail. The relocation issue was raised in respect of the fear of FGM. It is clear that the family, as then constituted, left their home area and relocated to Bayelsa where they lived for a considerable time before they left for Ireland. They lived in Bayelsa without interference from family members from whom the threat of FGM arose. The reality is that this couple and their two daughters, if they had the alleged fear, successfully relocated to Bayelsa and, in the view of the Tribunal, were not in need of international protection in respect of FGM. The alleged lack of specificity as to where the family might relocate is somewhat artificial when these facts are considered. Ground 8 does not offer a substantial ground upon which to seek leave.

Grounds 3, 5, 6, 7, 9, 11 and 12
59. I have considered each of these grounds and find them so vague and lacking in focus and specificity that I do not consider it appropriate that they could properly give rise to a substantial ground on which to grant leave to apply for judicial review. They each amount to an assertion in general terms without particulars and failed to identify the facts or matters relied upon as supporting each ground. I am satisfied that the decision of the Tribunal is intelligible, clear, and focused having considered the material submitted to the court, and I am also satisfied that the Tribunal made findings in respect of all relevant issues. In particular, the allegation that the Tribunal had pre-judged the case in respect of the child applicant is baseless and nothing was offered to support this proposition other than findings relied upon in respect of the parents claim which formed part of the determination of the Tribunal in the child applicant's claim. As noted earlier, their claims were closely linked. F.E.'s story is dependent on her mother's, which is unsurprising since her sisters' claims are also dependent on their parents' stories. Furthermore, it is clear that the additional evidence that emerged in F.E.'s case relating to the inconsistencies in her mother's narrative concerning FGM were also considered.

Ground 13
60. The issue of an effective remedy by way of judicial review was dealt with in the case of *Efe* (also referred to earlier in the judgment). No specific grounds were advanced as to how the common law rules relating to the conduct of judicial review proceedings are contrary to the provisions of the Constitution because they fail in some way to provide an effective remedy for some alleged breach of a constitutional right. The ground is so lacking in detail and imprecise as to be unarguable.

61. I am, therefore, satisfied that no substantial grounds have been advanced on behalf of F.E. to justify an order granting leave to apply for judicial review.

Conclusion
62. I am, therefore, satisfied having regard to all of the evidence and materials submitted to the court that there is no basis upon which to grant leave to apply for judicial review in respect of any of the reliefs claimed in each of the cases, or to extend the time for the initiation of these applications where that is required.