Neutral Citation No. [2004] IEHC 433

**THE HIGH COURT**
**JUDICIAL REVIEW**

**Record Number: 2002 No. 656 JR**

**BETWEEN**

**LISA NWOLE ( SUING BY HER MOTHER AND NEXT FRIEND, ANGELA NWOLE)**
**CHICHI NWOLE ( SUING BY HER MOTHER AND NEXT FRIEND, ANGELA NWOLE)**
**ULOMA NWOLE ( SUING BY HER MOTHER AND NEXT FRIEND, ANGELA NWOLE)**
**CHRISTLE NWOLE ( SUING BY HER MOTHER AND NEXT FRIEND, ANGELA NWOLE),**
**AND**
**WHITNEY NWOLE ( SUING BY HER MOTHER AND NEXT FRIEND, ANGELA NWOLE)**

**APPLICANTS**

**AND**

**THE MINSTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE COMMISIONER AN GARDA SIOCHANA**

**RESPONDENTS**

**Judgment of Mr Justice Michael Peart delivered the 26th day of May 2004**

1. The applicants named in these proceedings are all minors, being the daughters of Angela Nwole, (hereinafter referred to as "mother") who is acting as their next friend in these proceedings. They are all Nigerian nationals who arrived together in the State on 10th May 1998 as a family unit. The father of these children is not married to mother, and remained in Nigeria. At the time of arrival in this State, the eldest daughter was aged 12 years, and the others were aged 8, 6 (twins) and 4 respectively.

2. Mother completed an application form for asylum (Form ASY1) on the 11th May 1998, and on 13th May 1998 completed the usual Questionnaire form in which she named the applicants as being her children, giving their dates and place of birth, as well as indicating that they were with her in Ireland. I will deal in more detail later with the content of this Questionnaire.

3. Following the completion of this document mother attended for interview on the 30th March 1999. In due course she was notified that her application for refugee status had been refused, by letter dated 18th February 2000. She eventually lodged an appeal against this refusal, and on the 25th July 2000 a Recommendation was made by the Refugee Appeals Authority, following an oral hearing, that the appeal be dismissed on the basis that she had not satisfied the Authority that she had a well-founded fear of persecution on a Convention ground.

4. By letter dated 23rd August 2000 mother was notified of this recommendation, and of the fact that it was being upheld, and that as a result, the Minister proposed to make a Deportation Order in respect of her pursuant to s. 3 of the Immigration Act, 1999. She was invited to make any representations as to why she should be allowed to remain in the State, within a period of 15 days, and was advised of other options open to her, such as leaving the State voluntarily or consenting to the making of the Deportation Order. It is stated in an affidavit of Kevin Tunney, solicitor for the applicants, sworn on the 16th October 2002, that submissions may have been made subsequent to that letter, but these are not before the Court, and it would appear that different solicitors were acting for her at that time.

5. For some reason unknown to me there followed a period of almost two years during which nothing appears to have happened on foot of what had been described in the letter dated 23rd August 2000 as a proposal to make a deportation Order. That letter had been addressed to mother only and not to her children. But in any event a further letter was received from the Minister, which is dated 1st July 2002, and this letter is addressed to mother and each of her daughters. All names are included as addressees. A copy of this letter was sent also to the solicitors presently acting, namely Cathal O'Neill & Co.

6. This letter refers to and attaches a further copy of the earlier letter dated 23rd August 2000. *Inter alia*, it states as follows:

> *"I refer to the attached copy of the letter issued to you by the Minister for Justice, Equality and Law Reform indicating that he proposed to make a deportation order in respect of you under the powers given to him under Section 3 of the Immigration Act, 1999.*
>
> *The purpose of this notice is to confirm that the Minister proposes to make Deportation Orders in respect of you and your daughters, being all of the six persons named above, in accordance with the power given to him by Section 3 of the Immigration Act, 1999.*
>
> *The reasons for the Minister's proposal were set out in the letter attached and, lest there be any misunderstanding, it is hereby clarified that the reasons for the proposal to make the deportation orders are that you, the six named persons, failed in your asylum application."*

7. This letter goes on to set out the various options of making submissions, leaving voluntarily or consenting to the making of the Deportation Orders, but refers always to *"you and your daughters"* even though the letter itself is addressed to both mother as well as her daughters. In other words, even though it is a letter addressed to all, the writer is actually speaking to or communicating with mother only.

8. The solicitors wrote to the Minister by letter dated 8th July 2002 which is headed "Angela Nwole and children" and states:

> *"We acknowledge receipt of your letter dated the 1st of July herein with enclosures.*
>
> *Please note that representations have already been made by us in this case and our client wishes such representations to be considered by the Minister."*

9. By further letter dated 16th July 2002 these solicitors wrote again to the Minister enclosing address notification forms duly completed, and this letter is headed "Angela Nwole and children". These forms had been sent by the Minister with his letter dated 1st July 2002, which, it will be recalled, was addressed to mother as well as each daughter. It is fairly clear to me from a perusal of each address form completed in respect of the daughters, that mother signed each form on their behalf in respect of each daughter.

10. The Minister signed a separate Deportation Order in respect of mother and each daughter on the 2nd August 2002, and wrote a single letter dated 9th August 2002 (a copy of which was also sent to the present solicitors) which is addressed to mother and all daughters, in which he sent a copy of each Deportation Order, and informed them that the reason why he had decided to make the

orders was that they "are persons whose refugee status has been refused" as well as that having regard to the factors set out in s.3(6) of the Immigration Act, 1999, including representations made on their behalf, he was satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of their case as might tend to support their being granted leave to remain in the State. That letter, in the usual way, required them all to present themselves at a Garda Station on a specified date so that the necessary arrangements for their deportation could be made. They were warned that failure to comply with this requirement may result in them being arrested and detained without warrant.

11. It would appear that immediately mother received this letter she consulted her present solicitors, because they wrote on the 13th August 2002 to the Minister seeking documentation pursuant to the Freedom of Information Act, 1997. Notwithstanding, however, nothing further happened until on the early hours of Saturday 5th October 2002, according to the affidavit of the applicants' solicitor to which I have already referred, members of An Garda Siochana arrived at the house where mother and her daughters resided and arrested mother and detained her in Mountjoy Prison, presumably leaving the daughters in the house. Some ten days later, on the 15th October 2002 the Gardai again called to the house and informed the daughters that they would be deported on the following day, the 16th October 2002. I should add that it is deposed by Mr Tunney that on the 13th October 2002 the eldest daughter, Lisa Nwole, left the home as she feared that she would be deported, and she went missing as of that time.

12. Mr Tunney's affidavit was sworn on the 16th October 2002 for the purpose of seeking leave to apply by way of Judicial Review for reliefs including immediate injunctive relief to restrain the threatened deportation, as well as an order of certiorari quashing the Deportation orders.. At paragraphs 14 and 15 of the said affidavit he deposes to a fear on the part of his clients – a fear not previously expressed anywhere in the documentation or at interview in the case – that because of *"their race, ethnicity or membership of a social group, they will be subjected to female genital mutilation if returned to Nigeria and that their health and life will be severely impaired and threatened if so returned."*

13. He also states in paragraph 16 – again something not previously mentioned by him or his clients during correspondence or other communication with the Minister – that *"the aforementioned Deportation Orders may inaccurately reflect the sequence of events in so far as the children are concerned in that the children never applied for asylum nor did (sic) were they afforded the opportunity of independent application or separate advocacy of their concerns."*

14. In response to that affidavit, the respondents filed an affidavit sworn by Mr Charles O'Connor, an Assistant Principal Officer in the Minister's Department. He deposes to the fact that on receipt of the application for asylum completed by mother in May 1998 the Minister's office treated it as an application for asylum on behalf of mother as well as on behalf of each of what he describes as *"the accompanied minors"*. He goes on to say that each person's file was assigned a distinct file reference, and that it is clear that at the time of mother making her application her daughters were dependent children and that therefore the application was *"regarded as including the children for the purpose of the asylum process."* He further states that this is a proper course for the Minister to take, given what he describes as *"the diminished capacity"* of the children. He further states that no objection was ever taken by mother or the children to this course of action and that neither mother nor any of the children has suffered any prejudice as a result. In support of this course of action he refers to a passage at paragraph 213 of the *Handbook on Procedures and Criteria for Determining Refugee Status***"**. In fact this paragraph is headed "Unaccompanied Minors", and it states:

> *"213. There is no special provision in the 1951 Convention regarding the refugee status of persons under age. The same definition of a refugee applies to all individuals, regardless of their age. When it is necessary to determine the refugee status of a minor, problems may arise due to the difficulty of applying the criteria of 'well-founded fear' in his case. If a minor is accompanied by one (or both) of his parents, or another family member on whom he is dependent, who requests refugee status, the minor's own refugee status will be determined according to the principle of family unity (paragraphs 181 to 188 above)."*

15. Mr O'Connell then states that details of mother and the children were taken in order to record their application for asylum, as well as photographs of all of them, and he asserts that the fact that photographs were taken of the children confirms that the Minister was treating the application by mother as an application also on behalf of the children, and that they all *"acquiesced in the taking of these details and in treatment (sic) of the First Named Applicant's application as an application on behalf of all of them*."

16. He then outlines the sequence of events leading up to the making of the Deportation Orders, and which I have already outlined.

17. In response to that affidavit, mother has sworn her own affidavit in December 2002 (filed in the High Court on the 27th January 2003). In that affidavit she says that she applied for asylum on the 11th may 1998 and was given the ASY1 form to complete, and she says that there was nothing in that form to indicate that furnishing the names of her children rendered the application an application on behalf of her children, and that it is clear from the layout and content of the form that it relates to a singular applicant, and that in the portion of the form headed "Reason for Claiming Asylum" it is clear that the reference is to her and her alone in that it refers to "the applicant". In fact if one looks at that form and to the portion headed "Reason for Claiming Asylum" it is clear that it has been completed incorrectly, in that the box in question contains information about where she went on arrival here, and contains nothing about any reason for seeking asylum. But mother refers to that section of the form only to highlight that it refers only to "applicant", and therefore, in her contention, to her alone and not her children. The affidavit purports to exhibit the ASY1 form as exhibit "AN 1", but in fact what is contained in that exhibit is the longer form of Application for Refugee Status in the form of a Questionnaire. The ASY 1 form itself is exhibited by Mr O'Connor in his affidavit.

18. In the Questionnaire form, in answer to the question asking for her reasons for seeking refugee status, she states that she is seeking asylum because her brother was in the army , and that he had a problem with the army and they were looking for him. She says that he had run away and that the army people looking for him said that they would arrest all his family, all his people and would kill them if her brother did not come out. She says that they then phoned her in order to tell her that the army was coming to her house from the village because they had gone to the village and could not find him there. She says that she then ran to "the agent" that brought her to Ireland and that he then brought her and the children here via a certain route which she describes and she says that she told this agent to get money from her uncle who knows him. That is the extent of the explanation for her flight at that stage of completing the application form and questionnaire.

19. In her affidavit, having referred to her application form, she goes on to say that she was not acquainted with the Department's policy of treating her application as an application for herself as well as for her children, and that accordingly she believes that there is no basis for the contention that she acquiesced in that regard. She says that if she had been so informed she would have ensured that she spoke for her children and furnished details of their fears, and that her children would have wished to express those fears also for themselves. She then says in paragraph 5:

> *"Accordingly, the primary fear of my daughters, namely being subjected to female genital mutilation if returned to*

*Nigeria, was not advanced by me or anyone else on their behalf at any stage of the process or at all."*

20. She takes issue with a number of matters deposed to by Mr O'Connell – for example that the taking of the photographs of her children was indicative that the Minister was treating her application as an application also for her children. She also says that the Questionnaire related solely to her as *"the applicant"*, and that when she was called for interview, the letter which she received specifically said she would have to make arrangements to have her children looked after for the duration of the interview since there were no facilities for children in the Department, and that this supports her contention that the children were not being considered in the application process. She makes specific reference to page 15 of the interview where in answer to the question *"What grounds are you claiming asylum?"* she replied: *"Political grounds because they would kill me and the five children".* She says that simply because she mentioned the children, it cannot be taken as consent to her application *"being examined together with applications of her children (sic)".*

21. She says that she was not asked questions at the interview about her children, nor whether they might have had grounds peculiar to themselves, and that the Minister could not purport to consider the case of the children without seeking or being furnished with any information about them. She refers to the "Assessment of Claim" by a Pacelli Clancy and to the fact that he refers only to *"the applicant"* and not to her children, and also to an adverse credibility finding against her, and states that it would be unfair to refuse asylum to her children on the basis of an adverse credibility finding against her.

22. She also refers to the Appeal form "A" which she lodged against the refusal of refugee status, and in which she stated that she wanted an oral hearing. She says in that regard that if her application was interpreted as an application for all her children as well, then her election for an oral hearing ought to have been interpreted as an oral hearing by all applicants. She further refers to the Recommendation of the Appeals Authority and to the fact that it refers to the applicant as being *"a 34 year old Nigerian National"*. She also refers to the letter dated 23rd August 2000 notifying her of the decision of the Appeals Authority, noting that it was addressed only to her, and that it refers only to "your appeal". The same category of comment applies in relation to a number of other letters and documents. She states in relation to the completion of the address forms sent to her and returned by her solicitor on the 16th July 2002 in respect of her and her children, that they were returned as it was stated to be a requirement pursuant to the Aliens Order, 1946 and thus a legal requirement, and that she was anxious to comply with her legal obligations in that regard. However, I would just refer in relation to that averment of her wish to comply with her obligations that an affidavit of a Det. Sgt. Colm Hilliard has been filed by the Respondents on the 5th December 2002 and which was sworn on the 29th November 2002, and therefore the replying affidavit of mother sworn in December 2002, and in which he states that he believes that she moved with her children from the address notified, namely 41, New Inn, Enfield, towards the end of July 2002 (i.e. immediately after notifying that as her address), and moved to her sister's house at 1, The Courtyard, St. Raphael's Manor, Celbridge, Co. Kildare where the arrest eventually took place on 5th October 2002. That averment has not been contradicted by mother in her replying affidavit sworn in December 2002 or in any later affidavit.

23. In the penultimate paragraph of her affidavit she avers that her children should have an opportunity to make a case or have made on their behalf a case why each or any of them are entitled to refugee status, and that they are individually and collectively very afraid that they will have to endure female genital mutilation if returned to Nigeria, and that she believes that any Deportation Order that purports to be based on the premise that the children went through the asylum process cannot be allowed to stand.

24. Before dealing with the legal submissions which were made to the Court, there is one matter not referred to in any of the affidavits, but which is contained at the end of the interview notes. The interviewer asks whether mother wishes to add anything to what she has said at the interview, and she replies: "that it's up to you to keep **us** as **we** can't go back."(my emphasis)

**Legal submissions on behalf of the applicants:**
25. By Order dated 5th November 2003, Ms. Justice Finlay Geoghegan granted leave to the applicants herein to bring this application for an Order of Certiorari on one ground only, namely:

> *"The Deportation Orders of the 2nd August 2002 relating to the second to sixth named applicants are invalid in that the second to sixth named applicants were not on that date persons whose applications for asylum had been refused by the first named Respondent within the meaning of Section 3(2)(f) of the Immigration Act, 1999."*

26. That learned judge refused leave to the first named applicant in the application for leave, namely mother – hence the reference only to the second to sixth named applicants in the order. Those applicants are the applicants herein before me.

27. Mr Colman Fitzgerald SC on behalf of the applicants submits that the Deportation Orders against the children are invalid as they were not on the 2nd August 2002 (the date of the Deportation Orders) persons whose application for asylum had been refused within the meaning of s. 3(2)(f) of the Immigration Act, 1999. He submits that they have never applied for asylum and nor did any person on their behalf. He further submits that even if the application by mother is held to be an application on their behalf also, no consideration was given by the Minister to any individual claim by each or any of the children.

28. It is submitted on their behalf that there is no provision in the statutory framework which provides for a family application for asylum as is contended by the Respondents, and that even if there is, that the evidence, which I have already set out in some detail, does not support the contention in this case that mother applied on behalf of her children when she completed her own application. On the 11th May 1998 and/or the 13th May 1998, or that the Respondents deemed or were entitled to deem mother's application to be a family application. Mr Fitzgerald also submits that it is clear from the evidence that no separate consideration was given by the Minister to each of the applicants herein. In all the circumstances it is submitted that it cannot be stated that the children are persons whose application for asylum has been refused, as claimed by the Minister as the basis of his making the Deportation Orders.

29. Mr Fitzgerald has submitted that it is clear from the statutory framework and in particular to s. 2 of the Refugee Act, 1996 ("the 1996 Act") as amended which defines a refugee as *"a person who, owing to a well-founded fear of being persecuted ……is unwilling to avail himself or herself of the protection of that country"* that it is envisaged that a minor can make application for asylum, there being no exclusion of minors from the definition of a refugee.

30. He also points to the provisions of s. 8 (5) of the same Act which specifically makes provision for applications to be made on behalf of child under the age of 18 years, who arrives in this State and who is not *"in the custody of any person"*. In such a case, the health board is empowered to appoint an officer of the health board to make an application on behalf of such a child. That provision applies only in respect of an unaccompanied child. There is and can be no dispute about that.

31. He has also pointed to the provisions of s. 9A(1) of the 1996 Act, as inserted by s. 11(1)(e) of the Immigration Act, 1999 which permits the taking of fingerprints from an applicant above the age of 14 years. That provision is not confined to unaccompanied

minors, but would include such children who arrive in the custody of an adult.

32. He submits that it clearly envisaged that a minor, even an accompanied one, can be an applicant for refugee status. Since there is nothing to suggest the contrary anywhere in the statutory framework, I agree.

33. But Mr Fitzgerald goes further and submits that it would be an absurdity and would create an inequality if only unaccompanied minors were entitled to an individual assessment of their application, and he submits that to deny such an assessment to an accompanied minor has no statutory or other foundation and would be contrary to natural justice and contrary to law. It is submitted also that the State cannot assume, especially in the absence of any enquiry in that regard, that a parent represents all the interests of her children and advances all their individual fears, and that there is a duty upon the organs of state to ensure that children's interests are individually considered. In support of this submission, Mr Fitzgerald has referred to the judgment of the Chief Justice (albeit the dissenting judgment) in *The North Western Health Board v. H.W. and C.W.* [2001] 3 I.R. 622, in which he accepted that the rights of the child were not confined to the rights enshrined in Articles 41 and 42 of the Constitution, but include also unenumerated rights under Article 40.3, and that the Courts enjoyed an inherent jurisdiction to protect those rights which was not dependent on any Statute. He said at page 690:

> *"That such a jurisdiction exists is, I think, clear. The cases in which it will be invoked will, of course, be unusual and perhaps even exceptional, since in the vast majority of cases it can safely be left to the parents to protect their children's rights. It is not the law, however, that the courts are powerless to protect those rights in cases where, for whatever reason, they cannot be afforded that protection by the other organs of the State or where – as here – it is said that it is not being upheld by the parents."*

34. While that passage is called in aid of the submission that the State has a duty to ensure that children's interests and rights are considered individually, it seems to be against the connected submission expressed by Mr Fitzgerald in his written submissions when he submits that *"it cannot be assumed, in the absence of inquiry in that regard, that a parent who is an applicant in her own right represents all the interests of her children and advances all their individual fears."*

35. Mr Fitzgerald submitted that one of those unenumerated rights in Article 40.3 of the Constitution is the right to communicate and express views and referred to the judgment of Barrington J. in *Murphy v. Independent Radio and Television Commission* [1999] 1 I.R. 12 in which that learned judge stated that the right to communicate *"must be one of the most basic rights of man. Next to the right to nurture it is hard to imagine any right more important to man's survival. But in this context one is speaking of a right to convey one's needs and emotions by words and gestures as well as rational discourse."*

36. It has been submitted that even if mother's application can be deemed to have been an application also on behalf of the children, the Minister failed to consider their application separately and individually, and basically that he based his decision in respect of the children on his consideration of mother's application, and it is submitted that there has therefore been a breach of the *audi alteram partem* principle of natural and constitutional justice first of all by failing to inform mother that her application was being regarded as an application also for her children, and by failing to inform her that they had the right to make a case in relation to their particular interests. He submits that the children ought also to have been informed of the fact that mother's application was being deemed to be their application also.

37. Counsel also made reference to Article 12 of the Convention on the Rights of the Child, to which mention is made also in the judgment delivered by Ms Justice Finlay Geoghegan on the 5th November 2003 when she was granting leave to the present applicants. That Article, as stated by the learned judge, entitles children, capable of forming their own views to:

> *"the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."*

38. The learned judge also noted also that the said Article provides that:

> *"the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*

39. I shall return to that Article later in my conclusions. But Mr Fitzgerald has submitted that it is clear from the material and evidence in this case that there was barely any reference to the children in the application, the questionnaire or the interview notes, and that when mother was being notified by letter of the date of her interview she was in effect told not to bring her children as there are no facilities for children in the Department. He states that it is therefore manifest that they were not afforded any opportunity of being heard.

40. Related to these submissions on the right to be heard is a submission made in relation to the principle of family unity which is dealt with in the UNCHR Handbook on procedures and Criteria for Determining Refugee Status. This principle is that if the head of a family meets the criteria for refugee status his/her dependents are normally granted refugee status according to the principle of family unity. But the converse does not apply. If the head of the family is not a refugee there is nothing to prevent any one of his/her dependents from applying, if they can invoke reasons of their own. In other words, the family unity principle operates in favour of dependents but not against them.

41. In the light of this principle, Mr Fitzgerald submits that in a situation where mother was being refused refugee status by the Minister it was incumbent upon him then to give separate and individual consideration to the children's applications to see whether they or any of them had reasons of their own separate from those of their mother as to why they may or may not be refugees. In this regard Mr Fitzgerald has pointed to the fact that mother's application was refused largely on grounds of credibility and that there is no reason why any lack of credibility on her part should be visited upon the children who had no opportunity to speak or make separate representations.

42. I note that in the said judgment of Ms Justice Finlay Geoghegan in the leave application, to which I have already referred, she has concluded that, in so far as the Minister may rely on the principle of family unity as described in the UN Handbook, in seeking to justify the deeming of mother's application to be the application also on behalf of the children, there is nothing in the 1996 Act or the procedures established thereunder (including the earlier procedures notified to the United Nations High Commissioner) which would permit her to conclude that there was in existence in the State at the time of mother's application an authorised scheme based on the principle of family unity, such as there is in the United Kingdom's current Immigration Rules (HC 395) , as she points out, and she quotes the relevant rule 349. There is no need for me to repeat it here. But she makes the point that while other countries have

implemented the Convention in a way which incorporates the principle of family unity in their domestic implementing legislation, the Oireachtas seems in her view not to have done so since there is no procedure set out in the 1996 Act or in the procedures thereunder, which provides for a minor to be included in the application of the parent.

**Legal submissions on behalf of the Respondents:**
43. Ms. Nuala Butler S.C. on behalf of the Respondents has commenced by stating that the Court needs to look closely at the central facts in this case rather than at some of the matters highlighted on behalf of the applicants regarding what file reference was put on various letters emanating form the Minister's office at different times, or the precise addressees of letters and soforth, as support for their contention that the Minister regarded this as an application only on behalf of mother. She says that when mother presented herself in the Minister's Department on 11th May 1998 she had her four small children with her, who, as I have already stated, ranged in age from 12 down to 4 years of age. She made an application for asylum, and there is and was nothing to indicate that she was not acting at the time in the best interests of her children at that time, and that the Court is entitled to assume that at the time mother was conducting herself in a manner consistent with what is the best interests of the children in her care.

44. Ms. Butler also submits that there is no obligation imposed on the RAT to take upon itself the responsibility of looking after the interests of accompanied children, the more so when those children are accompanied by and in the care of their mother. She has referred to the provisions of s. 8(5) of the 1996 Act which specifically makes provision for an officer of the health board to be appointed to make an application for a declaration on behalf of an unaccompanied child, where it appears to the health board, on the information available to it, that such an application should be made. The health board in that situation could be said to be *in loco parentis*.

45. No such similar provision is made in respect of an accompanied child, and she submits that there is no obligation on the Minister to take over any role of parental responsibility in respect of such a child.

46. Ms. Butler has submitted also that a child, especially a child of the age of even the eldest of these children would require the assistance of either a parent or a legally appointed guardian to assist them in making an application for a declaration, and that in the present case, the mother must be presumed to be looking after their interests in that regard, and that she was at all times in the best position to put forward any grounds on behalf of her children, if such grounds exist which are separate and distinct from the grounds upon which she herself is relying in her application. It is also submitted that mother would be in the best position to assist her child or children in expressing their fears, choosing legal representation, and deciding what witnesses to call.

47. It is submitted that in the present case there is no evidence of any kind to suggest other than that mother was looking after the interests of her children, and accordingly, since making an application which included them was clearly in their best interests at that time (since without doing so her children would have no legal entitlement to enter this country at all) mother must be assumed to have done so in a way which she believed safeguarded the position of her children.

48. Referring to this lack of any entitlement on the part of the children to remain here in the absence of any application being made under s. 8(1)(a) of the 1996 Act, Ms. Butler referred to s. 9(1) of the same Act which provides:

> *"9.– (1) Subject to the subsequent provisions of this section, an applicant, being a person referred to in section 8(1)(a), shall be given leave to enter the State by the immigration officer concerned."*

49. Ms. Butler has pointed to the fact that even now, when at a very late stage, the fear on the part of the eldest daughter, and imputed to the younger children also, which is related to the possibility of enforced female genital mutilation if returned to Nigeria, is expressed through mother who continues to act as next friend in the proceedings. This is not a fear being put forward by any of the children separately from mother. It is pointed out that this fear has been expressed as a reason for the children not being returned only after the Deportation Orders have been made, and in the affidavit sworn at the commencement of these proceedings, by the solicitor acting on behalf of the applicants herein. This fear had not been adverted to by mother in any way in the application she made at the outset upon arrival, or at the subsequent interview or appeal, or anywhere else in the correspondence with the Minister prior to the Deportation Orders being made, but was mentioned by her for the first time when she averred to it in her affidavit in these proceedings which was sworn on some date in December 2002 and filed on the 27th January 2003.

50 It has also been pointed out that the United Nations Handbook at paragraph 213 provides that where a minor is accompanied by an adult, that minor's status is determined according to the principle of family unity. What that means in practice is that where the parent is declared to be a refugee, the minor will be given the same status automatically. On the other hand, it is submitted that this principle of family unity does not preclude a minor from expressing individual fears. In other words it does not preclude a minor making a separate application from the parent, and paragraph 185 of the Handbook states that where the parent is not a refugee *"there is nothing to prevent any one of his dependents, if they can invoke reasons on their own account, from applying for recognition……..in other words, the principle of family unity operates in favour of dependents, and not against them."*

51. I note and leave over for the moment the interesting point made by Ms. Justice Finlay Geoghegan in her judgment on the leave application as to whether the legislative framework introduced here has made provision for a family application of the kind referred to in the Handbook, and if not whether the Minister could bring in the necessary regulation to deal with any difficulty in that regard.

52. Ms. Butler has submitted that it is manifest that at the time of the application being made in May 1998 there were no separate grounds stated for seeking a declaration which applied to the children distinctly from those put forward and relied upon by mother herself. In this regard reference has been made to the answers by mother in her questionnaire relating to the fact that the threat made was that her family would be killed if her brother was not found. That is why she fled and took her children with her. In particular the answer to the question *"What grounds are you claiming asylum?(sic)"* was *"Political grounds because they would kill me and the five children".* I have already referred also to the sentence included at the end of the questionnaire when she was asked if she wished to add anything further, to which she replied: *"that it's up to you to keep us as we can't go back."(emphasis added)*

53. These submissions relate to what the intention of mother must be presumed to have been on the 11th May 1998.

54. I will deal also with Ms. Butler's submissions on the related question as to whether, on the assumption that a mother makes what I will describe as a family application, the Minister is actually entitled by law to receive it and treat it as an application on behalf of the dependent children named therein.

55. The Court has been referred to the clear sequence of events which occurred after mother made her application. In particular reference has been made to the answers which mother gave in the Questionnaire to which I have already referred, and to the fact that there was no mention whatsoever to the question of female genital mutilation if returned. In that regard Ms. Butler has submitted

that in an application such as this there is an obligation on the applicant of good faith and honesty in her dealings with the authorities here, and that it is incumbent upon her, both on her own behalf and on behalf of her children, to be truthful in her answers to questions. In fact this is stated on the front of the application form when it says; *"It is important, therefore, that you answer all questions fully and truthfully."* A similar exhortation is contained on the first page of the Report of Interview which is signed by mother. Similarly at the conclusion of that Report of Interview document there is a request made as to whether the applicant understands how important it is that all information and documentation has been supplied so that a fair assessment of the claim is made, and an opportunity to add anything which might have been left out, or to change anything said, is afforded. So there can be no doubt but that the applicant has been fully informed of the need to be candid, frank and honest in her application.

56. In furtherance of her submission that it was the duty of mother to act in the best interests of her children, and that the Minister was entitled to work on that assumption without any obligation on him, or perhaps even an entitlement, to make any enquiry or take any step on behalf of the children, Ms. Butler has referred to certain of the judgments delivered in the Supreme Court in *North Western Health Board v. H.W.* [2001] 3 I.R. 622. This was a case in which the plaintiff Health Board wished to carry out a P.K.U. screening test on a child of the defendants even though those parents were not willing to consent to that test being carried out. It was not a mandatory test but nevertheless the Board provided the test for the benefit of the community, and the Court had to consider whether the defendants, the parents, could be required by an order of the Court to permit the Board to carry out the test on their child – a test which involved the taking of a small amount of blood which is subsequently submitted to examination in order to establish the presence or absence of four metabolic conditions which can cause either mental handicap or life threatening illness if not detected early. This test is sometimes referred to as "the heel-prick test" and the risks attached to carrying it out are known to be minimal. The parents indicated to the Board that they would not allow the test to be carried out unless a non-invasive method could be used, such as the testing of a urine or hair sample, since due to their strong religious beliefs, they cannot allow any person to injure another person, and that the taking of the blood was invasive, involving as it must, the puncturing of a blood vessel.

57. The Court held, *inter alia*, that the State recognised the family as the natural primary and fundamental unit in society possessing rights superior and anterior to positive law as guaranteed to protect it pursuant to Article 41 of the Constitution, that there was a constitutional presumption that that the welfare of the child was found within the family, that the parents had the primary responsibility for their children's upbringing and welfare, and that it was only in exceptional circumstances, in the interests of the common good or where for physical or moral reasons the parents failed in their duty, that the State would endeavour to supply the place of the parents. The judgments of the majority in the Supreme Court are replete with passages which could be quoted to demonstrate its view as to the primacy of the parental duties and responsibilities regarding all matters touching upon the welfare of their children. Ms. Butler referred to a number of them, such as the following from the judgment of Mrs. Justice Denham at page 725:

> *"The rights of the child encompass the panoply of constitutional rights which include personal rights to life and bodily integrity. However in addition the child has a right to and in his family. When assessing the welfare of a child – the fundamental concept in analysing the position of a child - complex social, political, educational and health rights of the child in and to his family are important. The bonds which tie a child in a family are strong. However any intervention by the courts in the delicate filigree of relationships within the family has profound effects. The State (which includes the legislature, the executive and the courts) should not intervene so as to weaken or threaten these bonds unless there are exceptional circumstances. Exceptional circumstances will depend on the facts of a case; they include an immediate threat to the health or life of the child."*

58. Ms. Butler submits therefore that the State acted lawfully therefore in assuming that the mother intended her own application to be also an application on behalf of her children, and that there can be no prejudice to the child in a situation where he/she is so included, or in relying on a parent make a separate application for a child in a situation where the parent is not himself/herself making an application.

59. The Court has also been referred to paragraph 214 of the *United Nations Handbook* where it is stated that:

> *"in the absence of parents or of a legally appointed guardian, it is for the authorities to ensure that the interests of an applicant for refugee status who is a minor are fully safeguarded."*

60. Ms. Butler submits that this makes it clear that as far as the Handbook is concerned the State can rely on a parent or guardian to promote the best interests of the child, and that it may therefore assume that where a child is in the care and custody of a parent, such as in this case, the State can assume that the representations of the parent represent the wishes and/or best interests of the child.

61. Submissions were also made in relation to whether the requirements of Article 12 of the United Nations Conventions on the Rights of the Child have been met in this case by the manner in which the Minister has construed the application of mother as an application on behalf of the children, and in the manner in which that deemed application has been considered. This question was referred to by Ms. Justice Finlay Geoghegan in her judgment at the leave stage. For the reasons she set forth she was satisfied that there were substantial grounds for contending that the provisions of the Refugee Act, 1996, and the earlier procedures, properly construed in accordance with Article 12 of the Convention, impose an obligation on the Minister to determine whether each individual child's application for a declaration of refugee status should be granted, and that in this case for contending also that no such individual determination occurred.

62 Counsel on behalf of the applicants before me have made a submission that Article 12 of the Convention has not been observed in this case, in view of the fact that the children were not heard in this case, and that they have a right to be heard in all matters affecting their welfare.

63. Ms. Butler has submitted that Article 12 rights for the child are somewhat limited in the sense that they are enjoyed only by children of sufficient capacity of forming views, and they are to be given "due weight in accordance with the age and maturity of the child". She has also referred the Court to paragraph 2 of Article 12 which provides:

> *"For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*

64. She lays emphasis on the fact that this paragraph recognises that the participation right of the child can be enjoyed "through a representative", and that in this jurisdiction the duty to represent the best interests of a child reposes primarily in the first instance with his/her parents or legally appointed guardian. In the case of an unaccompanied minor those interests are protected by the involvement of the Health Board. But she submits that the right to participation does not in all cases require that a child is heard

through his/her own voice, so long as he/she has an adequate opportunity of having his/her views heard through a representative or an administrative body, and in this case mother was the representative.

65. She has submitted that the Minister's willingness to receive and treat an application by mother as an application also for her dependent children, and to receive an application by an unaccompanied minor in accordance with the statutory procedure in that regard under s. 8 of the 1996 Act, fulfils the objective of Article 12 of the Convention, and that even though the 1996 Act is silent as to what is to take place in respect of an application on behalf of an accompanied minor, it is clear that what happens in practice is not precluded by the statutory framework, or the provisions of the Convention, and that the UN Handbook in fact adopts the position that a minor should be represented by a parent or legally appointed guardian.

66. It has also been submitted that the provisions of the Refugee Act, 1996 when interpreted in the light of the jurisprudence in the area of parental rights and duties, and the family, require the Minister to respect the right of a parent to make decisions on behalf of a child, and that any other reading would mean that in all cases where minors accompany their parents the Minister must interview the children separately in order to satisfy himself that none such child wishes or has reason to apply and be considered for a declaration separately from the parent. Ms. Butler submits that this would involve the Minister in forming an opinion as to whether the child in question had the necessary capacity to form an opinion and express his/her own views, and if necessary appointing a legal guardian to represent the child's interests. She submits that this would be an impermissible interference with the parents' right to act in the best interests of the child, and with the constitutionally recognised authority of the family, and that it is only if there has been a failure on the part of the parents to discharge their parental duties that the State can intervene.

67. The Court has also been referred to Paragraph 215 of the United Nations Handbook which expresses the view that normally a child under the age of 16 years will not be regarded as sufficiently mature to express his or her own views, and that such an application must be determined by reference to the parents' fear, and that the parents can express on behalf of the child any fears of the child over and above their own fears. In the present case, Ms. Butler has highlighted the fact that the oldest child was 12 years of age, and that mother referred to these children in her application, and that if she had reason to express fears on behalf of her children which were over and above and separate from her own fears she had an obligation and an opportunity of doing so in the application, the questionnaire and interview. In the absence of her doing so, Ms. Butler submits that it would be oppressive in the extreme if there was to be an obligation in all cases on the Minister to interview the children in order to satisfy himself that they had no separate ground of application which had not been put forward by the parent applicant. In some cases such an interview might have to occur even against the express wishes of the parent. That would be invidious.

68. Ms Butler has finally pointed to the terms in which the original application for leave was made by mother on her own behalf and on behalf of her children. The Grounds, as originally appearing, challenge the fairness of the hearing of the application of the applicants. This includes the children. The Grounds included one that the Minister failed to accord to the applicants and each or either of them *"a fair or any hearing in relation to their request for asylum" (my emphasis).*

69. It is also a fact, as submitted on behalf of the Respondents, that at no stage during the course of the application(s) for asylum did mother raise any objection or point in relation to the procedures adopted in relation to her children.

**Conclusions:**
70. I want to first of all deal with facts of this particular case before considering some legal issues which arise. Before doing so, I should refer to a passage in the Recommendation of the Appeal Tribunal Member dated 25th July 2000 where he states in relation to mother:

> *"I am satisfied that the appellant's evidence today was tailored to fit the documentary evidence produced by the Respondent in relation to her stay in London during the early part of 1998. I am satisfied that the appellant's evidence in relation to her dates of departure and arrival in London is not credible. I find that her evidence in relation to her reasons for leaving Nigeria not to be credible, given that her parents and siblings still live there."*

71. She had not mentioned a stopover or stay in London when she completed her application form on 13th May 1998.

72. In the present application I find the same lack of credibility in relation to contents of mother's affidavit and the instructions on foot of which Mr Tunney swore his affidavit on the 16th October 2002. I find it so incredible as to lead to a conclusion that it is untrue, that the applicant at the time she completed the application for refugee status had a fear in respect of her young daughters that if returned to Nigeria they would be subjected to female genital mutilation, and that she did not even mention this at the time or subsequently. She now says that her daughters also have this fear. One can only ask the question rhetorically as to where they acquired such a fear as no basis whatsoever for this fear is contained in any affidavit sworn in these proceedings, either by mother or on her behalf. Mr Tunney says in his said affidavit at paragraph 15 thereof that he is instructed that mother did not fully outline her fears and concerns in this regard during her asylum application process, and that the children did not get an opportunity to outline their concerns. The fact is that mother did not outline this as a concern at all – there can be no question of her simply not having outlined her concerns "fully". I have already referred to the fact that on the application and the questionnaire and at the interview it is made clear that all matters relevant to an application must be put forward at that time so that they can be considered, and it is not open to the applicant to allege that she had no opportunity to express concerns and fears present at that time. I am satisfied that the fear of female genital mutilation is something which has been invented now in order to bolster up an attempt to have the process of application recommenced on behalf of the present applicants in these proceedings, namely the children.

73. I view with the same scepticism the averments of mother and the instructions to the same effect given to her solicitor that when she completed her application form she never intended that it should constitute an application also on behalf of her children. Such a claim rings very hollow in my ears I am afraid to say. As I have said already these children were aged 12 years down to 4 years. Without any application made on their behalf on arrival they would enjoy no status here and would have no entitlement to remain. The right to remain applies only to those persons who seek asylum, and then only during that process of application. Even if mother might not have been aware of that fact, which is possible but unlikely in my view, it is clear from the manner in which she completed the documents and answered the questions at interview, that her concerns were for her and her children, and she went so far, as I have already stated earlier in my judgment, to say in answer to the question at the end of the interview as to whether she wanted to add anything, to say *"that it's up to you to keep us as we can't go back."* Earlier in the interview she had said that she feared that she and the children would be killed if they went back. It is clear beyond any doubt that she intended to apply for a declaration on her own behalf and on behalf of her children, and that at the end of the interview she wished to emphasise that just in case the authorities were in any doubt about it.

74. It is clear that such an intention is one that is entirely consistent with a parent acting in the best interests of her children because, as I have said, without it the children enjoy no right to remain here with her. In my view any other interpretation of what

mother did on arrival and during the application process, such as is contended, defies logic and flies in the face of any reasonable or commonsense interpretation of the facts, or credibility, and must be discounted completely.

75. It is also a fact, as pointed out by Ms. Butler in her written submissions, that when the Statement of Grounds was first prepared in this case at a time when leave was being sought on behalf of mother and of her children, and before leave in respect of mother was refused, the Grounds upon which the Deportation Orders were sought to be quashed included Ground A which was:

> *"The first named respondent failed to accord the respondents and each of them a fair or any hearing to their request for asylum."(my emphasis)*

76. That alone would not be determinative in relation to factual credibility, but in the present case it certainly lends support to my earlier conclusion in that regard.

77. However, regardless of the fact that in my view mother clearly intended her application to be one on behalf of her children also, it is necessary also to consider the following questions:

> 1. whether mother was legally entitled to make that application on behalf of her children in the way she did;
>
> 2. whether, if she was so entitled, the Minister is entitled to carry out his consideration of the application as an application by mother to which the children's application was linked; or
>
> 3. whether he is obliged to give separate consideration to each child's application, and if necessary give each child an opportunity of expressing her views to him, separately and distinctly from their mother, or whether she can be assumed by the Minister to be acting on their behalf and in their best interests in all matters.

78. Before dealing with these points, I want to refer to a passage from the Supreme Court's judgment in the Matter of Article 26 of the Constitution and *in the matter of ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill, 1999 [2000] 2 I.R. 360*

79. At page 395 where the Court stated:

> *"First, it must be observed that a person seeking asylum or refugee status is the applicant for that status. There is an administrative procedure in place to carry out and assist him or her in the processing of that applicant. He or she is not a passive participant in that process……In availing of such procedures and in exercising any discretion in relying on such procedures the State is bound to act with due respect to the constitutional right of access to the Courts and the right to fair procedures of the persons concerned…"(my emphasis)*

80. This statement is important. The mother in this case has proceeded, subsequent to the Deportation Orders being made, though not beforehand in my view, as if it was entirely up to the Minister to take the initiative in the matter of the children, to assess whether they had capacity to express views separate from mother, to enquire into whether, inspite of mother's silence in this regard, there may be grounds applicable to one or more of the children which might entitle them, if not mother, to a declaration, and then to interview each of the children, and consider their applications individually and separate from mother. This could not be correct. For this to be correct it would be necessary to subordinate the role of the children's mother to that of a passive and disinterested bystander, whose responsibilities in relation to her children effectively ceased once she set foot in this country, and that thereafter the welfare and interests of the children become instantly the responsibility of the State. Such a situation would be to undermine her constitutionally recognised role as the person in whom is vested the primary duty and obligation in all matters related to all aspects of her children's welfare. I have already referred to the judgments of Supreme Court in *North Western Health Board v. H.W.* (supra) and there is no need for me to quote again the passage already quoted which entirely supports my view. Indeed, if the State was to impose a situation on the children regardless of the mother's constitutional rights in that regard, she would, I imagine, be the first to claim that her constitutional rights had been infringed.

81. I have no doubt that the legislation permits of an interpretation consistent with this. It is immediately apparent from the legislation that special arrangements have been put in place in order to ensure that the interests of an unaccompanied child are looked after, and it is only right and proper that this should be done, since there can be no room for doubt but that a minor is a 'person' who can therefore seek a declaration of refugee status upon arrival in the State. It seems clear from the U.N. Handbook, which has been judicially approved as a useful document for the purpose of interpreting and understanding the legislation in these cases, that where a minor is accompanied by an adult on arrival in the State, that adult may take care of the interests of the minor, and in the case of that adult being a parent of the minor, the parent's application will be treated as an application also for the minor, and that the minor's application will be determined on whatever basis the parent's application is determined. The reverence, respect and recognition which the judgments of the Courts have found that the Constitution pays to the primacy of the rights and duties of parents in respect of their children's welfare, means that the absence of a special provision in the legislation or the procedures thereunder as to what should happen in relation to an application of an accompanied child, does not result in a lacuna in the legislative provisions. A constitutionally harmonious interpretation of the legislative framework in relation to the interests of a minor accompanied by a parent is that the parent is the person who continues to carry the responsibility of looking after the minor's interests, and as a consequence, continues to have the responsibility, in the capacity of active participant in the asylum process, of setting out in an appropriate way any grounds for the application, including those referable to the minor where they differ from or are in addition to the parent's own grounds. Such an interpretation is consistent with the Constitution's recognition of the primacy of the parent's duties and obligations in this regard.

82. It follows in my view that not only did mother intend to include her children in her application, but was also entitled to make an application in the way she did which included her children, and that she had a duty to do so as parent acting in their best interests, especially given the fact that if she did not do so her children would enjoy no legal entitlement to remain while her own application was being processed.

83. It has been submitted that in all cases s. 8(1)(a)(i) of the 1996 Act requires that a person who arrives in the State seeking asylum shall be interviewed, and that since any minor is a 'person' within the meaning of the Act, each minor must therefore be interviewed. I agree respectfully with the view expressed by Mr Justice Smyth in *Emekobum v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, 18th July 2002) in the following way:

> *"In my judgment the word "shall" in Section 8(1)(a)(i) of the Act of 1996 does impose a duty to interview but it does not impose an absolute obligation to do so. To insist on such a provision, irrespective of facts and circumstances, could lead to imposing unnecessary hardship and trauma on persons under a disability (such as minors) which is inimical to the*

*purposes of the legislation."*

84. I would just add that in the present case the section must certainly be interpreted as meaning that the mother must be interviewed. To have refused the application without interview would almost certainly be vulnerable to a constitutional justice challenge, the more so because the section imposes the duty to interview. But having interviewed mother in a very detailed way, at which mother was given every opportunity to express her fears and reasons for departure from Nigeria, and during which she referred to the same fears in respect of her children (i.e the fear that she and they would be killed), and having regard to the fact that she added, as I have already stated, at the end of her interview when asked if she wished to add anything, that *"it's up to you to keep us as we can't go back"*, there can be no question in my view that there remained outstanding any obligation upon the authorities arising from the provisions of that section. As an active participant in the asylum process mother was obliged and had every opportunity to express and make known then all grounds upon which she, including on behalf of her children, feared persecution in Nigeria if returned.

85. There is also the question of the significance of Article 12 of the Convention on the Rights of the Child, and whether there is anything arising from Article 12 thereof or the provisions generally of the Convention which ought to cause this Court to strain for a different interpretation of the Ministers obligations in relation to accompanied minors when they arrive in this State with a parent who seeks asylum. Ms. Justice Finlay Geoghegan in her judgment on the leave application herein identified an issue arising from Article 12, namely as to whether by virtue of that Article the Minister was obliged at the minimum to inquire as to the capacity of a minor and the appropriateness of conducting an interview with him or her, and whether there was an obligation on the Minister to consider whether each individual applicant is or is not entitled to a declaration for refugee status, even in a situation such as the present case, where mother made an application in which she referred her children.

86. It is important first of all to have regard to Article 3.2 of the Convention which provides:

> *"State parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."*

87. Bearing in mind what I have said about the constitutional recognition of the primacy of the parental rights and obligations in all matters affecting the welfare of their children, and having regard to the part of Article 3.2 which I have emphasised. It seems to me that in enacting the provisions of the Refugee Act, 1996, as amended, the legislature has acted in a way which safeguards the rights and entitlements of an unaccompanied minor by ensuring that the interests of those persons are looked after by an officer of the health board, and that the legislature was entitled to not make a specific provision as to what was to happen in relation to an application in respect of an accompanied minor, on the basis that, and in the knowledge and expectation that such a minor's interests are best looked after by the parent. It is not a reasonable interpretation of the provisions to say that in all cases of an accompanied child the Minister has obligations which override and supercede those of the parent or parents who accompany the minor. This seems to be entirely consistent and harmonious with Article 2 of the Convention.

88. Again, if one looks at Article 5 of the Convention, the respect accorded to the rights, duties and responsibilities of parents in relation to the guiding of their children in the exercise of their Convention rights, is consistent with the approach which has been taken to these matters by the Supreme Court such as in *North Western Health Board v. H.W.* (supra). It does not seem to me that the situation of the children in this case in any way comes within the definition of any exceptional circumstance, such as would mandate this Court to exercise its inherent jurisdiction to intervene on their behalf in the way contemplated by the passage in that case from the judgment of the Chief Justice which I have quoted earlier. Their rights ought to have been and in my view were fully protected by their mother in the manner in which she proceeded with the application for asylum.

89. Finally, I must refer to Article 12 itself. While in my view I respectfully agree that for the purpose of a leave application the point about the Minister perhaps having an obligation to consider the capacity of even an accompanied child to be interviewed separately from the accompanying parent, and that the statutory provisions require that a separate determination be made by the Minister in respect of each child, are points which rise above the necessary threshold of arguability, and certainly are not trivial and unstatable,

90. I am not satisfied that they survive the more rigorous standard by which they must be examined and considered on the substantive hearing. It seems to me that Article 12.1 undoubtedly imposes on the State an obligation to enact legislation such as has been done by s. 8(5) of the 1996 Act, in relation to an unaccompanied minor, and there would have to be compelling reasons why the Minister would elect not to interview such a minor, in so far as it was possible do so, since Art 12.1 obliges the State to assure the child's right to express his/her views. But, Article 12.2 states:

> *"For this purpose [i.e. assuring the right of the child to express his/her views], the child shall in particular be provided the opportunity to be heard……either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law"(emphasis added).*

91. In view of what I have decided in relation to the supremacy of the parent's right and duty to act in a child's best interests, there can be no doubt that the children in the present case had that opportunity through "a representative". As it happens that representative was the children's mother, who must be in this respect be regarded as the best possible person to speak on their behalf.

92. In fact, it seems to me that Article 12.2 could be open to the interpretation that it does not apply in relation to a child who is in the company of a parent, since a parent is not mentioned specifically as one of the persons through whom a child's views may be expressed. Such an interpretation would also be consistent with the prior provisions of the Convention to which I have referred and in which the primacy of the parent's rights and duties in relation to the child's protection and care is recognised. Be that as it may, I am satisfied that there is nothing in the Convention which requires a State to provide, in all cases of minors accompanied by a parent or parents, that a separate application must be made out in respect of each accompanied child and that a separate determination must be made in respect of each, in situations such as the present case where no grounds separate from those in respect of the parent have been put forward by that parent in respect of her children or any one or more of them.

93. It follows in my view that where no such separate grounds of application have been identified by the parent in respect of any child in his/her company, that the Minister has no obligation to consider each child separately from his consideration of the parent's application, since there is in effect nothing separate to consider. No right of the child is infringed in this way, and it would defy commonsense, and would ignore the two-way process involved in these applications, if for some theoretical reason devoid of any practical purpose, the Minister was obliged to require a separate form to be completed in respect of each child, involving thereafter a separate questionnaire, a separate interview, and a separate consideration, in circumstances where consideration has already been

given to the identical grounds of application made out by mother.

94. It is true in my view that the statutory framework introduced in this jurisdiction has not been drafted in a way which introduced an authorised scheme based upon the principle of family unity. It is equally true that the 1996 Act must be construed and interpreted in a manner which gives effect to the Convention. In my view, my findings in relation to capacity of the Minister to treat mother's application as an application also in respect of her children does no violence to the 1951 Convention, even if the principle of family unity itself cannot be relied upon by the Respondents for this view. Equally, there is nothing in the findings which I have made which, in my view, offends against what is contained in the relevant passages of the UN Handbook on Procedures and Criteria for Determining Refugee Status.

95. Referring in particular to Paragraph 185 of the Handbook which is fully set forth in the judgment of Ms. Justice Finlay Geoghegan at leave stage, it is clear, as she has stated, that the principle of family unity is not intended to take away from persons who may be dependents of the parent the right to individually apply for recognition as refugees. But that cannot go further and place on the Minister here the onus of inquiring about and ensuring in every case that a separate application is made by all such dependent children. But it does of course mean that any dependent who has grounds for applying for refugee status which are not dependent upon, or which are separate and distinct from, his/her parents' grounds, must be afforded an opportunity of making his/her own application and must be facilitated in that regard, but in the absence of any information or request in that regard from the parent, and particularly so in the present case where the children's ages ranged from 12 down to 4, there is no residual obligation or duty on the Minister.

96. From what I have concluded I am satisfied that mother was entitled to make application on behalf of her dependent children in the way she did, and that the Minister is and was entitled to treat mother's application as an application also on behalf of her children, and that he is entitled to have considered and determined the children's application as part of his consideration of the mother's application, there being no separate matters to take into consideration, and therefore, upon the refusal of mother's application, he was entitled to regard the application on behalf of the children as also refused. In my view therefore the Deportation Orders made against each of the applicants in this application are valid, since they are made in respect of persons whose application for asylum has been refused.

97. Finally, I note the remarks of Smyth J. in the Emekobum case already referred to in this judgment, when he stated:

> *"Finally, I observe that for the avoidance of doubt in any future cases in which there are accompanied minor children, the parent or parents, as the case may be, might be requested to make an express declaration as to whether or not they wish to have the minor children's rights, interests or entitlements included with their own application for refugee status."*

98. I can but agree with and, if necessary re-iterate this suggestion.