THE SUPREME COURT

416/04

BETWEEN

GRACE EDOBOR

Respondent/Applicant

and

JOHN S. RYAN AS CHAIRPERSON OF THE REFUGEE APPEALS TRIBUNAL, JOSEPH BARNES SITTING AS A MEMBER OF THE REFUGEE APPEALS TRIBUNAL, BEN GARVEY SITTING AS A MEMBER OF THE REFUGEE APPEALS TRIBUNAL

and

THE MINISTER FOR JUSTICE EQUALITY & LAW REFORM

Applicants/Respondents

AND

417/04

BETWEEN

ABDENOUR MESSAOUDI

Respondent/Applicant

and

THE CHAIRPERSON OF THE REFUGEE APPEALS TRIBUNAL, MR. JOSEPH BARNES (SITTING AS THE REFUGEE APPEALS TRIBUNAL),
MR. JAMES NICHOLSON (SITTING AS THE REFUGEE APPEALS TRIBUNAL), and THE MINISTER FOR JUSTICE, EQUALITY & LAW REFORM

Applicants/Respondents

Judgment of Fennelly J delivered the 16th day of March, 2005.

1. The factual and legal background to these two appeals have been fully summarised in the judgment of Kearns J and it is not necessary for me to repeat them. It suffices to say that the Tribunal assigned the second-named Respondent (hereinafter "Mr Barnes") to hear the appeals of the two present applicants pursuant to section 16 of the Refugee Act 1996 as amended. He conducted oral hearings respectively in March and May 2003. He had not determined either case prior to March 2004. Indeed, it is clear that these were by no means isolated cases. Mr Barnes had also heard a considerable number of other refugee appeals, without pronouncing decisions on them. This led to concern on the part of the Refugee Legal Service and, in turn, the Chairperson of the Refugee Appeals Tribunal.

2. In March 2004, the Chairperson decided to reassign a number of cases to other Tribunal members for re-hearing. These included the appeals of the present Applicants, which he assigned in each case to the member described in the title of the application as the third-named Respondent. This information was conveyed in each case in the form of a letter from the Tribunal giving notice that the oral hearing was rescheduled for a particular date. In response to a letter from the Refugee Legal Service, Mr W. Delaney of the Scheduling Unit of the Tribunal, wrote a letter, the operative part of which (in the Messaoudi case) stated:

> *"The hearing before Mr. Joe Barnes took place on the 15 May 2003.*
>
> *At a recent meeting between representatives of the Refugee Appeals Tribunal concern was expressed by representatives of the Refugee Legal Service at the inordinate delay between the hearing of an Appeal and a Decision being issued. We shared that concern.*
>
> *The Chairperson has considered the matter and has decided pursuant to the Refugee Act 1996 (as amended) and in particular paragraphs 13 and 14 of the Second Schedule to reassign this case. The Chairperson has taken into account the delay that has elapsed since the hearing of the case and the likelihood of the Member being unable to issue a Decision within an acceptable time frame."*

3. A virtually identical letter, the dates only being different, was sent in the *Edobar* case.

4. Finlay Geoghegan J summarised the legal issues as follows:

> *"1. Was the second named respondent under a duty to the applicants at any time to make a decision on his or her appeal or is the only such duty on the Tribunal?*
>
> *2. If so is or was he in breach of such duty?*
>
> *3. The limits to the first named respondent's power to reassign appeals to another member of the Tribunal after an oral hearing has been held.*
>
> *4. On the facts of each of these applications, has the first named respondent acted ultra vires or intra vires in deciding to reassign the respective appeals?*
>
> *5. What, if any, are the reliefs to which either applicant is entitled?* "

5. Finlay Geoghegan J expressed her conclusion on the first two issues as follows:

> *"I have concluded that where an appeal is assigned to a member of the Tribunal in which an application for an oral hearing has been made and that member conducts the oral hearing, he has commenced or entered up [recte upon] a consideration of the appeal and is as a division of the Tribunal obliged to determine the appeal."*

6. She added later:

> *"Accordingly I have concluded that the second named respondent having conducted an oral hearing in the appeals of each of the applicants became, as a division of the Tribunal, obliged to determine their respective appeals. That*

obligation must be an obligation owed to the applicant."

7. Finally, she stated that Mr Barnes *"was at least prior to* [the decision reassigning the cases] *in breach of duty to the applicants."* Consequently, she made orders of Mandamus directing Mr Barnes to make a decision in each case.

8. I entirely agree with the reasoning of Finlay Geoghegan J regarding the obligation of Mr Barnes to make a decision. It does not appear to me to be particularly material, for the purposes of this case, whether this was an obligation owed individually by Mr Barnes as distinct from the Tribunal to the Applicants. The Tribunal owed that obligation and is amenable to Judicial Review. Section 15 of the Act of 1996 (as amended by section 11 of the Act of 1999) established the Tribunal "*to consider and decide appeals under section 16 of this Act*."

9. It is important to note, however, that the learned judge's finding of breach of duty by Mr Barnes flowed from the undisputed fact cited by the learned judge that a *"reasonable period of time had expired prior to the decision of the first named respondent to reassign these appeals……"* Furthermore, at that point of her judgment she was careful to limit the finding to the period before the reassignment. Thus, the learned judge determined that the delay, which had been described as "inordinate," in issuing decisions in the two cases was sufficient to place the Tribunal and/or Mr Barnes in breach of their legal duty imposed by the statutes.

10. However, the fact that the Tribunal or Mr Barnes were in breach of duty by reason of delay does not determine these appeals. As a result of the delay, the first-named Respondent made decisions reassigning the "business" in question. At this point in the argument, the outcome of the appeal depends on the answer to the third issue identified by Finlay Geoghegan J, namely the *"limits of the* [chairperson's] *power to reassign appeals to another member of the Tribunal after an oral hearing"* has taken place.

11. Paragraph 13 of the second Schedule to the Refugee Act, 1996, as inserted by section 11 of the Immigration Act, 1999 (amending section 15 of the Act of 1996), read in the light of paragraph 11 confers power on the chairperson to "*assign to each member the business to be transacted*."

12. The first-named Respondent, in reassigning the appeals of the two Applicants in March 2004, purported to exercise this power. Finlay Geoghegan J held that exercise to be *ultra vires.* Hence she also made orders of certiorari in each case quashing the reassignment decisions.

13. Finlay Geoghegan J noted that it was *"common case that a power to reassign even after an oral hearing* [was] *implicit in the power to assign in paragraph 13…"* Here, the learned judge was, in reality, and in spite of the use of the word "implicit" identifying an express power. While, in her ensuing reasoning, she occasionally used language appropriate to the exercise of an implied power, it seems to me clear that she did not intend to refer to that quite distinct type of power. Both sides refer in their written submissions on the appeal to the judgment of Hamilton C. J., speaking for the majority of this Court in *Keane v An Bórd Pleanála and others* [1997] 1 I.R. 184 at 212. The learned Chief Justice cited, with approval, the words of Costello J in the course of his judgment in *Howard v Commissioners of Public Works* [1994] 1 I.R. 101 at 112:

> *"It has long been established as a general principle of the construction of the powers of statutory corporations that whatever may be regarded as incidental to, or consequential upon those things which the legislature has authorised, ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires (Attorney General v Great Eastern Railway Company [1880] 5 A.C. 473 at 478."*

14. The well-know dictum of Lord Selborne LC in the *Great Eastern Railway Company* case, whose language Costello J there referred to, is generally cited as supporting the existence of implied ancillary or incidental powers in the cases of statutory corporations. (see Hogan and Morgan *Administrative Law in Ireland* Third Ed. Round Hall Sweet and Maxwell. Dublin 1998 pages 402, 403; Bennion, *Statutory Interpretation,* Fourth Ed. Butterworths London 2002, pages 429, 430). In the present case, the primary question to be addressed is whether the Rules in the Second Schedule to the Act of 1996 and, in particular, paragraph 13, conferred power on the first-named Respondent to take the steps which he did. If an affirmative answer can be given to that question, there is no need to consider whether he had implied power to do the same thing.

15. The respondents accepted both in their written submissions and in oral argument that there are some circumstances in which a chairperson may remove an appeal from one division and assign it to another. They say that such a step can be justified only when it is necessary and required for the fulfilment by the Tribunal of its statutory functions.

16. Finlay Geoghegan J gave extensive consideration to whether and in what circumstances a chairperson of a Refugee Appeals Tribunal had the power to reassign an appeal already assigned.

17. Firstly, she held *"in circumstances other than the death of the member or a person ceasing to be a member of the Tribunal, a decision to "reassign" includes both a decision to remove the appeal from the division of the Tribunal which has conducted the oral hearing and also a decision to assign it to a different member of the Tribunal."* She thought that the decision to remove was *"crucial."* She then continued:

> *"Construing any such implicit power in accordance with the principles of constitutional justice and fair procedures, it appears that such implicit power will arise only either where the relevant member of the Tribunal is unable for physical or mental reasons to determine the appeal or is unable as a matter of law to issue a valid decision. Illness may obviously give rise to the first of these. Examples of the second might include the existence of a bias or conflict of interest or perceived predetermination of the issues. In practice, where an order of certiorari of a decision of the Tribunal is made the matter is readmitted for hearing before another member of the Tribunal."*

18. The learned judge did not consider that the power could be *"construed consistent with an applicant's right to fair procedures so as to give the chairperson power to remove an appeal from a serving member of the Tribunal after he has conducted an oral hearing other than in the circumstances referred to above."* It is, of course, beyond argument that the powers of the chairperson, as the learned judge stated, must be exercised in accordance with the principles of constitutional justice and fair procedures. But there is a distinction between the scope of the power conferred and the principles governing its exercise. What the learned judge has done, in the passage cited above, is to deploy those principles in aid of the interpretation of the provision and not simply to apply

them to its exercise. In effect, she held that it would be inconsistent with the principles of constitutional justice and fairness to interpret paragraph 13 as entitling the chairperson to make the decisions which he did.

19. The learned judge then went on to consider whether facts existed which could justify the exercise of an implicit power. In doing this she asked whether there was evidence before the first-named Respondent that either:

> *"1) The first member* [meaning Mr Barnes] *is unable for physical or mental reasons to determine the appeal, or*
>
> *2) the first member is unable as a matter of law to issue a valid determination."*

20. Having analysed the affidavit evidence of Mr English, provided on behalf of the Tribunal, which is set out in the judgment of Kearns J, she concluded that there was no evidence that either of these situations existed. In this particular respect, I have to say that I believe she was entirely correct. Mr English did not contend either that Mr Barnes was unable for physical or mental reasons or as a matter of law to issue a valid determination. It is clear that the reason for the reassignment decisions was that Mr Barnes had presided in a large number of cases in which he had failed to render decisions within a reasonable time, the delay in many cases being inordinate, a matter which was of joint concern to the persons affected (as shown by the representations made by the Refugee Legal Service) and that, although progress had been made over a number of months, the chairperson considered that the situation remained unsatisfactory. The evidence was that the first-named Respondent, in reaching decisions to reassign cases, had "*regard to the obligation on the part of the Tribunal to dispose of appeals with due expedition consistent with fairness and natural justice.*"

21. The first question to be answered, in my view, is whether the chairperson, when he has assigned business to a division of the Tribunal, may, on the true interpretation of paragraph 13, in <u>any</u> circumstances reassign it to another division. This will involve a consideration of the further question of whether there are, as a matter of interpretation of the power, any restrictions on those circumstances. Finally, it will be necessary to consider whether the power has been validly exercised in the case of the applicants in the present cases.

22. It is not possible to discern the meaning of paragraph 13 without reference to surrounding provisions. It uses, in particular, the two expressions "*business*" and "*division,"* whose meaning can be gathered only from a reading of other provisions. The second of these terms is an artificial description of a member of the Tribunal. Paragraph 1 designates the chairperson and the ordinary members as "*members*." Paragraph 11 provides:

> *"Whenever the Tribunal consists of more than one member, it shall be grouped into divisions each of which shall consist of one member."*

23. The function of all members, as seems to follow from paragraph 1(b), is *"the expeditious dispatch of the business of the Tribunal."* This latter objective has been further reinforced by amendments made in 2003, which came into effect after the oral hearings in these two cases. I will refer to these later.

24. The expression *"business"* does not appear in section 15 of the Act of 1996 as amended, which established the Tribunal *"to consider and decide appeals under section 16 of the Act."* But that is clearly what is meant by "*business*" and the expression appeared in the former version of the Second Schedule, now replaced: the Appeal Board was to "*determine, by rules or otherwise, the procedure and business of the Board.*"

25. Are there, however, circumstances in which business, having been assigned to one division may be reassigned to another? It is obvious and was accepted by the learned trial judge that, in some such circumstances, such a power necessarily exists. To begin with, the Second Schedule envisages four distinct circumstances in which a member of the Tribunal may cease to be a member. They are:

- Expiry of term of office of the chairperson (paragraph 3) or another member (paragraph 4);
- Resignation (paragraph 6);
- Removal from office (paragraph 7);
- Death (paragraph 8).

26. Each of these cases is expressly envisaged by the Second Schedule. There is, however, no express provision, other than paragraph 13, for reassignment of uncompleted business. In these cases, of course, it might be said that any particular incomplete business, including appeals where there has been an oral hearing, has ceased to be assigned. There is force in the suggestion of Finlay Geoghegan J that it is the "*removal*" of an appeal from an assigned member which is crucial. Nonetheless, it is clear from these examples that business already assigned may, in certain circumstances, be reassigned.

27. However, as already noted, Finlay Geoghegan J also accepted that the chairperson would have power to reassign in at least two other situations. These are:

- Inability for physical or mental reasons to determine an appeal;
- Inability, as a matter of law to issue a valid determination.

28. If the chairperson has power to reassign business in these two circumstances, it must follow that he or she may remove that business (appeal) from a member so affected by illness or legal inability. This "*crucial*" power is thus, according to the reasoning of

the learned judge, interpolated into the power conferred by paragraph 13 in some cases but not, in the view of Finlay Geoghegan J, in others. The stated reason for this conclusion is the need to act in accordance with the principles of constitutional justice and fairness.

29. It is, as I have already stated, beyond argument that a chairperson, like any other decision-maker, is bound to respect and observe these principles. It does not seem to me, however, that these principles require the courts to interpret the provision at issue so as to exclude the exercise of a power of reassignment (including a power of removal) in circumstances such as the present.

30. In this respect, the Appellants submit that the learned judge has misapplied the principles enunciated in *East Donegal Co-Operative Livestock Mart v Attorney General* [1970] I.R. 317. In that most celebrated passage at page 343 of the judgment, Walsh J explained how the Constitution affects the exercise of statutory powers:

> *"All the powers granted to the Minister by s. 3*[of the Livestock Marts Act, 1967] *which are prefaced or followed by the words "at his discretion" or "as he shall think proper" or "if he so thinks fit" are powers which may be exercised only within the boundaries of the stated objects of the Act; they are powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or an unqualified or an arbitrary power to grant or refuse at his will. Therefore, he is required to consider every case upon its own merits, to hear what the applicant or the licensee (as the case may be) has to say, and to give the latter an opportunity to deal with whatever case may be thought to exist against the granting of a licence or for the refusal of a licence or for the attaching of conditions, or for the amendment or revocation of conditions which have already attached, as the case may be."*

31. The effect of the application of these principles, an extension of the principle of double construction, was to rescue the statute from the finding of unconstitutionality which had been made in the High Court.

32. I believe that the learned judge erred in reaching the conclusion that the principles of constitutional justice and fairness of procedures required her to restrict the scope of the power conferred by paragraph 13 in the manner which she did. In substance, she decide that the chairperson had the power to remove and reassign business, presumably meaning that this could be done without the consent of the division first assigned, in the event of illness or legal incapacity but not on the grounds related to the pursuit of the Tribunal's obligation to ensure the "*expeditious dispatch of [its] business*." Such interpretation risks the description of judicial legislation. The court is interpreting general words as applying only to specific situations, not mentioned in the statutory provision. In my opinion, the chairperson has general power, pursuant to paragraph 13, to assign and to reassign cases already assigned. In short, where the circumstances warrant that step, he may remove business (an appeal) from one member and assign it to another. In doing so, he must act fairly and respect the principles of natural and constitutional justice. It is obvious that any capricious or unfair use of this power would be subject to Judicial Review. In that way the necessary respect for the principles of constitutional justice and fairness can be ensured. Paragraph 13 is clearly designed to enable the chairperson to pursue the objective of the expeditious dispatch of business. The court has not heard any evidence regarding the day-to-day operations of the Tribunal. It is easy, nonetheless, to envisage that hearing rosters may need to be adjusted on an *ad hoc* basis in response to levels of business, the speed or slowness of disposal of particular cases or types of cases, the relative efficiencies of individual members, their personal circumstances, the availability of interpreters, vacations and any number of other banal daily circumstances. It is true that Finlay Geoghegan J expressly tied her conclusion to the circumstance that an oral hearing had taken place in each of the current cases. However, her conclusion necessarily applies to all cases, unless the further step is to be taken of judicially interpolating a provision to that effect into the provision. In short, I cannot see how the general power can be judicially cut down in the manner claimed on behalf of the applicants.

33. It remains to consider whether, on the facts of the present appeals, the decision of the chairperson should be quashed on normal Judicial Review grounds. Finlay Geoghegan J naturally addressed this issue exclusively in the light of her own conclusion that the power to reassign existed only in the event of physical or legal incapacity of the member. Since neither of these had been advanced by the first-named Respondent as the basis for his decision, the learned judge correctly concluded that they had been made out. She did, however, in the context of the argument on interpretation, consider paragraph 14 of the Second Schedule. That paragraph had been introduced as an amendment to the existing Schedule by section 7 of the Immigration Act, 2003. That Act was passed on 14th July 2003 and was brought into force on 15th September 2003 (Immigration Act, 2003 ((Section 7) Commencement Order S.I. No 415 of 2003.) Therefore, while not in force on the date of the oral hearings relevant to the present appeals, it was in force at the date of the chairperson's decision to reassign. It reads:

> *"The chairperson shall endeavour to ensure that the business of the Tribunal is managed efficiently and that the business assigned to each division is disposed of as expeditiously as may be consistent with fairness and natural justice."*

34. Finlay Geoghegan J held that this provision could not be *"construed consistent with the applicant's right to fair procedures so as to give the chairperson power to remove an appeal from a serving member of the Tribunal after he has conducted an oral hearing other than in the* [two] *circumstances referred to above."*

35. In essence, the complaint expressed by the applicants, whether in relation to the interpretation issue or the validity of the decision is that, where an applicant has gone through an oral hearing, having prepared and presented his or her case, it is unfair to reassign the appeal. Reference has been made to some English cases concerning the risk that assessment of credibility will be unreliable where a Tribunal member has unduly delayed consideration of oral evidence. I am satisfied, as was Finlay Geoghegan J, that this issue does not arise. The chairperson's decision was not made on this ground.

36. It is clear, in my opinion, that the chairperson was confronted with a difficult situation. There was a serious backlog of cases, especially associated with one member. As stated by Finlay Geoghegan J, this was not of the chairperson's making. Some cases had been heard as far back as July and August 2002. The chairperson had a number of meetings with the Refugee Legal Service, which quite properly made representations to him arising from the existence of this backlog. He reached a carefully balanced conclusion. Where the lapse since the hearing was only six months or where Mr Barnes had substantially completed his decision, he did not reassign it. The affidavit sworn on his behalf stated that he "*had regard to the obligation on the part of the Tribunal to dispose of appeals with due expedition consistent with fairness and natural justice*."

37. It seems clear to me that the principal if not exclusive basis of the applicants' complaint has at all times been the claimed lack of

power of the chairperson to reassign. Although there has been some reference to the cases on the topic, there has been no real attempt to show that the decision of the first-named Respondent was irrational in the sense in which that expression is used in Judicial Review. Leave to apply was not, in either case, granted on that ground.

38. Basically, the complaint is that it is unfair to reassign after there has been an oral hearing. Each of the applicants made one individual point in the affidavit grounding the application for Judicial Review. The first-named applicant claimed that she would suffer prejudice "*in giving evidence relating to subjective facts*" regarding her troubled history and family relationships in Nigeria, "*after I no longer suffer from these facts*." I cannot see how this forms a basis for Judicial Review of the decision in question and, in any event Finlay Geoghegan J made no determination on this issue. The second-named applicant expressed concern that notes from his first hearing might be available to the member of the Tribunal at the second hearing. Mr English has sworn that this is not so. He says that the notes taken by Mr Barnes are not kept on file and that the Tribunal will ensure that any notes on the file are removed.

39. In all these circumstances, I have come to the conclusion that the first-named Respondent made valid decisions, within the scope of his powers, reassigning the two appeals at issue in these proceedings pursuant to section 16 of the Act of 1996 and that no ground has been made for them to be quashed. I would allow the appeals and make an order dismissing each application for Judicial Review.