Murray C.J.
Fennelly J.
Kearns J.

THE SUPREME COURT

[2004 No. 416 JR]

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 AND LAW REFORM

APPELLANTS/RESPONDENTS

AND

[2004 No. 417 JR]

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 AND LAW REFORM

APPELLANTS/RESPONDENTS

JUDGMENT of Mr. Justice Kearns delivered the 16th day of March, 2005. In each of these cases an order of *mandamus* was sought in the High Court to compel the second named respondent to make and give a decision in appeals brought by the applicants to the Refugee Appeals Tribunal. Each case had been assigned for hearing before the second named respondent by the first named respondent who is chairperson of the Tribunal. An order of *certiorari* was also sought in each case to quash the decision of the first named respondent to ultimately re-assign the hearing and determination of each applicant's appeal to a member of the Tribunal other than the second-named respondent. In respect of the two applicants, the decision was to assign the appeals to the third named respondents named in the title hereof. At the conclusion of the hearing in the High Court, Finlay Geoghegan J., on

29th July, 2004 made orders of *mandamus* and *certiorari* as sought. From the applicants' point of view the history of this matter must be bewildering in the extreme. The first-named applicant, Grace Edobor, is a Nigerian national who arrived in this State on 4th July, 2002. As part of the asylum process, she completed an application form entitled "Application for Refugee Status Questionnaire" and also attended at an interview with a servant or agent of the Refugee Applications Commissioner. Thereafter the authorised officer prepared a report pursuant to s. 11(2) of the Refugee Act 1996 which is dated 27th September, 2002. Subsequently the report of the results of the investigation pursuant to s. 13(1) of the Refugee Act 1996 was completed by the authorised officer, Thomas O'Sullivan on the 10th October, 2002. On 14th October, 2002 Mr. Sean McNamara for the Refugee Applications Commissioner made a recommendation pursuant to s. 13 of the Act to refuse refugee status to the applicant.

The facts upon which Grace Edobor had made her claim for asylum were set out in the questionnaire and interview and were to the effect that she had been made pregnant by an older man in Nigeria. Her uncle, her mother's brother, who was effectively looking after her family, told her she would have to have her child aborted and that if she did not organise that herself, he would take her to the hospital and have it done. The applicant states that she was fearful of undergoing such a procedure both for her own safety and because an abortion would have constituted a criminal offence for which she could have faced a lengthy period of imprisonment. She also set out reasons why she feared for the safety of her person by reason of persecution if she was returned to Nigeria. Following her arrival in Ireland she gave birth to a baby girl on 20th August, 2002. In the affidavit supporting her application in the High Court, she deposes that she had a further anxiety that her daughter would be subjected to female genital mutilation by way of circumcision if she and her baby were forced to return to Nigeria. She also deposes that she herself had had this procedure forced upon her as a child.

She accordingly appealed against the said recommendation to the Refugee Appeals Tribunal. Her appeal came on for hearing before the second named respondent, Joseph Barnes, as a member/division of the Refugee Appeals Tribunal and her case was heard by him on 20th March, 2003. The applicant states that she was represented by counsel and a Refugee Legal Services caseworker. The appeal hearing ran for a number of hours before Mr. Barnes and included oral evidence and submissions.

Thereafter the applicant awaited delivery by the second named respondent of his decision which, having regard to the fact that not only her human rights but those of her child also were at stake, was one which she was entitled to expect would be speedily delivered.

The facts of the other applicant's case may be briefly referred to. Mr. Messaoudi arrived in Ireland in May, 2002. He is a national of Algeria. He attended for interview with the Refugee Applications Commissioner on 30th

September, 2002. The Commissioner held that Mr. Massaoudi should not be granted a declaration of asylum. He appealed to the Refugee Appeal Tribunal and an oral hearing took place before the second-named respondent on 15th May, 2003, at which the applicant gave oral evidence and was cross-examined. Thereafter he too heard nothing until by letter dated 5th March, 2004 he was advised of the purported re-assignment of his case to Mr. Nicholson, another member of the Tribunal. As in the case of Grace Edobor, Mr. Massaoudi was entitled to believe he would get a speedy decision on a matter of such crucial importance for him.

Section 7(i)(x) of the Immigration Act, 2003 amended s. 16 of the Refugee Act, 1996 by inserting the following subsection after subsection (17):

> *"(18) the Tribunal shall ensure that an appeal against a recommendation of the Commissioner to which s. 13(5) or 13(8) applies shall be dealt with as soon as may be and, if necessary, before any other application for a declaration"* (emphasis added).

Given that these were appeals against recommendations that the applicants should not be declared to be refugees, the statutory obligation to deal with the appeals *"as soon as may be"* clearly applied.

Unfortunately, no decision, ruling or determination was made in either case either then or since.

The requirement for courts of law or administrative tribunals which perform judicial-type functions to decide cases quickly is increasingly emphasised, both at international and domestic level.

The recent decision of the European Court of Human Rights in the case of *McMullen v. Ireland* (delivered 29th July, 2004) is indicative of that fact. It emphasises that a State is obliged to organise its legal system so as to allow its courts to comply with the *'reasonable time'* requirement of Article 6 of the Convention which, insofar as relevant, reads as follows:

> "*In the determination of his civil rights and obligations ... everyone is entitled to a hearing within a reasonable time by a tribunal"*.

The court noted (at par. 38) that:

> *"If a State lets proceedings go beyond the 'reasonable time' prescribed by Article 6 of the Convention without doing anything to advance them, it will be considered responsible for the resultant delay"*.

In our own domestic law, recognition for the requirement that courts deliver their judgments speedily has now received statutory acknowledgement in the Civil Liability and Courts Act, 2004. Section 55 (a) of that Act amended s.46 of the Courts and Court Officers Act, 2002 by inserting the following terms:

> *"Subject to subsection (6), if judgment in the proceedings concerned is not delivered before the expiration of 2 months*

from the date on which it is reserved, the President of the Court shall, as soon as may be after -

(a) the said expiration, and

(b) the expiration of each subsequent period of 2 months (if judgment is not delivered first),

list the proceedings or cause them to be listed before the judge who reserved judgment therein and shall give notice in writing to the parties to the proceedings of each date on which the proceedings are listed in accordance with this section."

While the difficulties attendant on the non-delivery of decisions in the present cases may pre-date the two examples I have cited, the principle is neither revolutionary nor novel. Indeed the maxim *"justice delayed is justice denied"* is as old as the legal system itself.

In refugee applications where human rights are so essentially at stake, the requirement for speedy adjudication is both self-evident and indeed apparent from the relevant legislation. For example, judicial review applications challenging a decision of the Refugee Appeal Tribunal under s. 16 of the Refugee Act, 1996 must be brought within 14 days of the Tribunal's determination. Whether or not it is specifically provided for by statute (and it is in this case), there is therefore a clear onus on a member/division of a tribunal who is dealing with business of this nature to do so expeditiously and promptly. This the second named respondent has singularly failed to do, and his failure to provide any explanation for his inactivity only adds insult to injury.

Some background information as to what happened appears from an affidavit which was sworn by Mr. John English, Higher Executive Officer of the Refugee Appeals Tribunal, in which he deposed as follows:

"3: The decision by the Chairperson of the Tribunal to re-assign a number of appeals that had been heard but not yet determined by Mr. Joseph Barnes followed representations from the Refugee Legal Service. On 28th November, 2003, there were in respect of this particular member a backlog of decisions affecting 90 applicants. As of 31st December, 2003 the backlog had been reduced to 85 applicants. This number was reduced to 62 in total as of 4th February, 2004 and 58 as of 27th February, 2004. During this four month period, there were a number of meetings between the member and the chairperson in an attempt to resolve the problem and although progress was made in a number of outstanding decisions, it was considered unsatisfactory by the Chairperson.

4. At a meeting in February 2004, representatives of the Refugee Legal Service expressed concerns to the Tribunal at the length of time between the hearing of the cases and the issuing of the decisions. The Refugee Legal Service had

particularly identified the problem relating to decisions following hearings before Mr. Joseph Barnes. In fact, the Legal Service at the time acted on behalf of the applicant.

5. Following this meeting, the Chairperson of the Tribunal decided to re-assign cases from the member in question to other members of the Tribunal where the Refugee Legal Service had acted as solicitor and where there had been substantial delay by the member in issuing his decision following the hearing. In all, cases affecting 33 people were re-assigned to 3 different experienced members of the Tribunal. Some of the cases had been heard as far back as July and August 2002 by Mr. Barnes and the most recent had been heard in May 2003. Where only 6 months had elapsed since the hearing of the case or where Mr. Barnes had substantially completed his decision, the Chairperson did not re-assign it.

6. In reaching his decision, the Chairperson of the Tribunal had regard to the obligation on the part of the Tribunal to dispose of appeals with due expedition consistent with fairness and natural justice. Whilst some progress had been made by the particular member during the four months up to February 2004, there remained a substantial backlog of cases that had to be addressed. That has been done by re-assigning appeals to other members of the Tribunal as aforesaid in circumstances where they will be entitled to a full re-hearing de novo. In this regard, notes taken by Mr. Barnes are not kept on file and the Tribunal will, in accordance with its normal practice where cases are re-heard following a successful judicial review, ensure that any notes on the file are removed".

Following this determination, Ms. Edobor's legal representatives were notified on 16th March, 2004 that there would be an oral hearing of the applicant's appeal on 29th March, 2004 before the third named respondent. A similar notification, as already noted, was sent to Mr. Massaoudi's advisers.

This purported divesting of the cases from the member/division of the Refugee Appeal Tribunal led to the instigation of the present proceedings which resulted in the making of orders of *mandamus* by the High Court directed to the second named respondent and of *certiorari* quashing the decision of the first named respondent.

Section 15 of the Refugee Act 1996 (as substituted by s. 11 of the Immigration Act, 1999 and s. 7 of the Immigration Act, 2003) provides:

"(1) On the establishment day there shall stand established a Tribunal to be known as the Refugee Appeals Tribunal (in this Act referred to as 'the Tribunal') to consider and decide appeals under s. 16 of this Act.

(2) the Tribunal shall be independent in the performance of its functions

(3) the provisions of the Second Schedule shall have effect in relation to the Tribunal".

Paragraph 1 of the Second Schedule provides:

"(1) the Tribunal shall consist of the following members –

(a) a chairperson, and

(b) such and such number of ordinary members as the Minister, with the consent of the Minister for Finance, considers necessary for the expeditious dispatch of the business of the Tribunal,

each of whom shall have had not less than 10 years experience as a practising barrister or a practising solicitor before his or her appointment.

Paragraph 11 of the Schedule provides:

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

13. The chairperson shall assign to each division the business to be transacted by it.

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

15. The chairperson may, if he or she considers it appropriate to do so in the interest of the fair and efficient discharge of the business of the Tribunal, assign classes of business to each division having regard to the following matters:-

(a) the grounds of the appeal set out in the notices of appeal,

(b) the country of origin of the applicants,

(c) any family relationship between applicants,

(d) the ages of the applicants and, in particular, of persons under the age of 18 years in respect of whom applications are made,

(e) the provision of this Act pursuant to which the appeals are made,

16. The chairperson may delegate to a member of his or her staff his or her functions of assigning to each division the business to be transacted by it."

Quite clearly the '*business*' must be taken as describing the statutory function of the Tribunal under s. 15 *'to consider and decide appeals'* under s. 16 of the Act.

It seems incontrovertible, and was so found by the High Court judge, that once an appeal is assigned to a member of the Tribunal, that person, acting as a division of the Tribunal, must then discharge the statutory function and duty of the Tribunal to consider and determine the appeal. In so doing, he or she must, of necessity, possess both the independence of the Tribunal and have all the statutory powers and duties conferred on the Tribunal. There is

nothing in s. 16 of the Act or the Second Schedule thereto which suggests that any distinction be drawn between a division of the Tribunal and the Tribunal itself in this context.

Any suggestion that the member owes a duty only to the Tribunal, and not to an applicant, seems to me to be an unstateable proposition. The person whose interests and rights are most at stake in this process is the applicant, and where such an interest exists there must be a corresponding duty on the deciding officer to adjudicate. The duty of the Tribunal and its chairperson on the other hand is both a duty to the applicant and a more general duty to ensure that the business of the Tribunal is managed in accordance with its statutory remit to transact its business efficiently and expeditiously, consistent with fairness and natural justice.

No authority for the proposition that the Tribunal may divest and re-assign cases from a member who has heard the appeal to some other member has been opened to the court.

Where a division of the Tribunal has business assigned to it, it is a startling proposition and one that requires some considerable justification to suggest that, without good and sufficient reason, the case sent for determination and actually heard by the member/division can be removed from that member/division. To begin with, it is an affront to the notion that the Tribunal, when acting through one of its divisions, is independent in the performance of its functions.

While no contention has been advanced on behalf of Mr. Barnes in the instant case that his independence has been interfered with by the purported re-assignment, the court must look beyond the facts of the present case to other cases where that consideration might well arise. Where a member/division of the Tribunal actively resists the withdrawal and re-assignment of a case which has been assigned to and perhaps heard by him, one can readily imagine that considerations of independence can and will then be under intense focus. This is a backdrop to be kept in mind when considering the present case.

The learned High Court judge noted that the statutory provisions outlined above were entirely silent on the issue as to whether or not a member/division could be divested of a case which had been assigned to it. However, the High Court found that the legislation must be read and interpreted as being subject to an implied power to re-assign an appeal to another member of the Tribunal – even perhaps after an oral hearing – in certain circumstances. Those circumstances were identified by the court as involving cases where:-

(a) The first member is unable for physical or mental reason to determine the appeal, or

(b) The first member is unable as a matter of law to issue a valid determination.

This interpretation is entirely in conformity with the presumption that the

Oireachtas is taken not to intend the carrying out of its enactments to be unworkable or impracticable, and obviously the court should be slow to find in favour of a construction that leads to such consequences. A failure to find that those two circumstances at least may be implied into the statute would have precisely that effect.

As Bennion points out at p.832 of his text on *Statutory Interpretation* (4th Edition, 2002):-

"The court seeks to avoid a construction of an enactment that produces an unworkable or impracticable result, since this is unlikely to have been intended by Parliament. Sometimes, however, there are overriding reasons for applying such a construction, for example where it appears that Parliament really intended it or the literal meaning is too strong."

The former of the two considerations cited by Bennion clearly requires adopting the approach taken by the learned High Court Judge.

However, I would be strongly of the view that cases where the statutory scheme can be interpreted in this way must be very limited in number, having regard to the requirement for independence of the Tribunal and, thus by extension, any member/division performing the role of the Tribunal. This requirement calls for a narrow, and not a broad, interpretation of the statutory provisions.

In *Boland v. Garda Síochána Complaints Board and Garda Síochána Complaints Tribunal* (Unreported, High Court, 28th November, 2003) no statutory provision was in place to allow the Tribunal to which a case had been assigned to send it back to the Board. There was in the particular case no evidence of any sort that the Tribunal, which had embarked upon the case and held a preliminary hearing, had ever decided of its own volition to refer the particular complaint back to the Garda Síochána Complaints Board. The particular Tribunal had held an initial hearing in June 2000 but there was no evidence it had ever sat again. I found in that case that the removal by the Board of the complaint from the Tribunal body to which it had been entrusted by the Board was an *ultra vires* act and that it would therefore follow that any purported re-allocation of the matter to a new Tribunal would for that reason be *ultra vires*. It seems to me that a similar statutory and evidential vacuum, and one with similar consequences, exists in this case also.

The instant case leaves many questions unanswered and singularly fails to provide an explanation for the inactivity of the second named respondent. To suggest that there was a heavy workload in the Refugee Appeals Tribunal and that the system is in some way to blame in no way exonerates the second named respondent. There is no suggestion that the second named respondent was compelled to undertake and deal with the particular number of cases which were assigned to him, or that he was ill or otherwise incapacitated. In fact, this court was informed through counsel that he remains a member of the Refugee Appeal Tribunal, continuing to hear, and

one hopes, dispose of cases coming before him.
No evidence has been led or tendered in this case which would suggest that the second named respondent came within any of the categories identified in the judgment of the High Court. I can see no reason for widening those categories, given that any such approach would reduce the autonomy and independence of the member/division charged with decision-making in any particular case.
Even if there was an implied general power to re-assign cases for *any* good or sufficient reason, I would agree with the learned High Court judge that there would have to be some clear evidence before the chairperson to enable him form the view that there was such reason before making any decision to re-assign. If there was in these cases evidence of relevance to this consideration, then that evidence was not placed before the High Court. In such circumstances it seems to me there could be no power to remove either of the appeals in these cases from the second named respondent. That being so, the decision to remove the appeals from the second named respondent was, in my view, *ultra vires* and should be quashed. I would also see the order of *mandamus* as one properly made in the circumstances.
I would wish to add the following observation. It appears to me that the applicants, by opting to seek the remedy of *mandamus*, have thereby disentitled themselves from raising any objection on grounds of delay in the context of any further consideration of this matter now by the second named respondent. It is simply not open to an applicant to simultaneously affirm and disavow when seeking a remedy by way of judicial review. Reference has been made to a number of English cases where delay *per se* provides a basis for quashing a decision of this nature, particularly where issues of the applicant's credibility might be involved.
Some such entitlement might also have arisen in the instant case if a remedy other than *mandamus* had been sought.
I would have preferred an outcome which drew a line altogether under this unhappy business, but will confine myself in the circumstances to the view that the appeal herein should be dismissed.