THE SUPREME COURT

Record No. 293/2005

Murray C.J.
Denham J.
McGuinness J.
Hardiman J.
Geoghegan J.

BETWEEN/

PETAR PETROV ATANASOV

Respondent/Applicant

and

REFUGEE APPEALS TRIBUNAL
(TRIBUNAL MEMBER AIDAN EAMES),
CHAIRPERSON OF THE REFUGEE APPEALS TRIBUNAL
AND MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Respondents/Appellants

THE SUPREME COURT

Record No. 292/2005

BETWEEN/

MOTUNDE ALABA OPESYITAN AND BUNMI ALABA OPESYITAN (A MINOR SUING BY HER MOTHER AND NEXT FRIEND MOTUNDE ALABA OPESYITAN) AND OLAYEMI ALABA OPESYITAN (A MINOR SUING BY HER MOTHER AND NEXT FRIEND MOTUNDE ALABA OPESYITAN) AND OLUWADAMILOLA ALABA OPESYITAN (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND MOTUNDE ALABA OPESYITAN) AND ENIOLA ALABA OPESYITAN (A MINOR SUING BY HER MOTHER AND NEXT FRIEND MOTUNDE ALABA OPESYITAN)

Applicants/Respondents

and

THE REFUGEE APPEALS TRIBUNAL, IRELAND AND ATTORNEY GENERAL

Respondents/Appellants

and

THE HUMAN RIGHTS COMMISSION

Notice Party

THE SUPREME COURT

Record No. 294/2005

BETWEEN/

MASONGMEHI NJUAKEA FONTU

Applicant/Respondent

AND THE REFUGEE APPEALS TRIBUNAL, IRELAND
AND THE ATTORNEY GENERAL

Respondents/Appellants

AND HUMAN RIGHTS COMMISSION

Notice Party

JUDGMENT of Mr. Justice Geoghegan delivered the 26th day of July 2006

These three appeals which were heard together raise a point of great importance namely, whether an appellant before the Refugee Appeals Tribunal is legally and/or constitutionally entitled to access previous decisions of the Tribunal in which similar and, therefore, relevant issues of law arose.

As the history of each case is not identical, it is important that I should briefly summarise the procedural history and the nature of the claim in each case. But before doing so, I should mention that in the judicial review proceedings brought by each applicant in the High Court, that court (MacMenamin J.) made an identical order subject only to adjustments of pronouns, gender and singular and/or plural. By way of sample the order in the Atanasov case reads as follows:

> *"The court doth declare that the refusal of the first and second-named respondent to make available to the applicant relevant tribunal*

> *decisions as requested or identified and as sought by the applicant is in breach of the applicant's rights to fair procedures and natural and constitutional justice pursuant to the provisions of Article 40.3 of the Constitution."*

A summary of the proceedings in each case is as follows:

The Atanasov case

In this judicial review application made with leave, the applicant sought a large number of reliefs all essentially with the same end in view which is encapsulated in Relief L) in the statement of grounds. That reads:

> *"An order directing the first-named respondent to grant access to the applicant and/or his legal advisers to previous decisions and recommendations of the first-named respondent that are relevant to his appeal and/or the issues raised in his appeal".*

It is not necessary to detail the rest of the wide-ranging reliefs. It suffices to state that they included declaratory relief of the kind ultimately granted though not in the precise wording. The reference to *"the refusal of the preliminary application"* is a reference to correspondence to which I will now refer.

By letter of the 18th May, 2004 from Messrs Niall Sheerin and Co., solicitors for this applicant to Aidan Eames, the relevant tribunal member in the Refugee Appeals Tribunal, it was made clear that the solicitors were seeking access on behalf of their client to previous relevant decisions of the Tribunal and to be furnished with copies of any guidelines issued by the Tribunal to tribunal members which were relevant to the conduct of appeals and/or the issues which were named in the client's appeal. In the same letter, the solicitors drew attention to the amendment of section 19 of the Refugee Act, 1996 as inserted by the Immigration Act, 2003 which had come into force on the 15th September, 2003. It would seem sensible to flag at this point that an issue which arises in this case is whether, if there are such rights of access and if they arise solely by reason of that amendment effected by the Immigration Act, 2003, this particular applicant enjoys those rights, given that his appeal, unlike the other two, came into existence prior to the 15th September, 2003. I will return in due course to this point. The letter went on to set out the relevant amendment which was the insertion of a new subsection (2) and a new subsection (4A) into the 1996 Act. I will deal with these provisions in detail later. It is sufficient at this stage to indicate that the new section 19(2), subject to certain exceptions, prescribed that no matter, likely to lead members of the public to identify an applicant, should

be published in any written publication available to the public or be broadcast without the consent of that person. The new subsection (4A) is a curiously drafted provision in that it gives the discretion to the Chairperson of the Tribunal to decide not to publish a decision which in his or her opinion is not of legal importance. It then goes on to provide that any decision published should exclude any matters which would tend to identify a person as an applicant.

The solicitors went on to submit in the letter a case which has been made throughout these proceedings by all three sets of applicants, that the effect of the amendment was to impose a statutory obligation on the Tribunal to publish decisions of the Tribunal which were of legal importance. As will have been noted, the subsections do not expressly say any such thing. They are directed at what need not be published rather than what has to be published. I will be returning to this matter also. A lengthy argument in favour of the solicitors' point of view is set out in the letter and then more specifically, they inform Mr. Eames that the applicant and his advisers are seeking access to previous decisions of the Tribunal which concern or relate to fear of persecution on grounds of sexual orientation and/or which relate to fear of persecution by reason of membership of a particular social group and that they are also seeking access to previous decisions which concern the issue of the appropriate standard and burden of proof applicable in asylum appeals. By the time the matter came to court, the demands had narrowed but the point of principle remained.

In the same letter, the solicitors then go on to emphasize an important point which featured prominently in the High Court and in this court. They pointed out that the presenting officers who act as advocates on the appeals on behalf of the State are located in offices within the tribunal building and are granted access through what is described as the Tribunal's *"master file"* in respect of applicants and are, therefore, in a position to access the kind of information that the solicitors were seeking in respect of previous decisions. They went on to further point out that this meant that these presenting officers, in practice, could share the decisions with each other in effect enabling access for presenting officers to previous decisions in general. For the presenting officers to have this assistance and the appellant to be deprived of it, was a breach of fair procedures/natural justice in the view of the solicitors, and indeed in the view of the various applicants' counsel throughout the proceedings. The requirement of equality of arms under Article 6(1) of the European Convention on Human Rights is then referred to in the letter.

By a follow up letter of the 8th June, 2004 an audio cassette of a previous hearing was requested on the basis that it had already been promised and the submissions of the letter of the 18th May were reiterated. A formal letter

came from the Tribunal on the 9th June, 2004 without any reference to the various requests. Subsequently, a letter was written refusing the tape by virtue of a direction of the chairperson. Angry correspondence on this point then ensued but the next relevant letter is the letter from the solicitors to Mr. Eames dated the 21st June, 2004 in which further submissions are contained. In that letter, the solicitors made it clear that in addition to the submissions already made in the previous correspondence, the applicant was also relying on the provisions of Article 34.1 of the Constitution.

> *"having regard to the requirement upon the Tribunal to publish decisions in accordance with its statutory obligation to do so and to provide access to the applicant and his legal advisers to relevant previous decisions of theTribunal."*

The Tribunal was referred to the case of **Re Ansbacher (Cayman) Limited** [2002] 2 IR 517. Again, a strong plea is made that fair procedures required that the previous relevant decisions be furnished. The correspondence proved inconclusive with no concession being made by the Tribunal. As a consequence, judicial review proceedings were instituted.

In addition to the Statement of Grounds already briefly referred to there was filed in the judicial review proceedings an affidavit by this applicant. In the affidavit, he explained that he was a Bulgarian national and that he had arrived in Ireland on the 24th March, 2000. He claimed that he had fled Bulgaria in fear of persecution and discrimination amounting to persecution by reason of his sexual orientation and his membership of a particular social group comprising homosexuals in Bulgaria. This applicant claimed in the affidavit that he had suffered beatings, violent assaults, discrimination and harassment amounting to persecution in Bulgaria. He had had a relationship with a man who he had met in the university and whose family had political connections. He said that his family disapproved strongly of the relationship and orchestrated a campaign of attacks and violence against him. He claimed that as a result, he suffered significant injuries and was hospitalised more than once. He went on to state that Bulgaria did not provide protection to members of his social group and that there was significant discrimination against homosexuals. Having gone on to set out the history of his appeal which it is not necessary to reproduce here though what is relevant is that he refers to the fact that his legal advisers sought, on his behalf, access to and copies of relevant previous decisions and recommendations of the Tribunal. He goes on to say that by this was meant decisions or recommendations which concerned or related to a fear of persecution on grounds of sexual orientation or sexuality and decisions where the issue of fear of persecution by reason of membership of a particular social group were at issue. In paragraph 17 of the affidavit, he refers to the fact that the presenting officer

would have access to all the relevant previous decisions, a point to which I have already referred. The relevant correspondence is exhibited in the affidavit and I have already made reference to the salient parts of it. The affidavit goes on to describe how a decision on the preliminary application was made by the tribunal member and that he found that there was no legal basis for the entitlement to access to previous decisions and he referred to a recent decision of the High Court in this regard. The tribunal member did indicate that the chairman was in discussions regarding the publication of previous decisions.

An affidavit was sworn and filed on behalf of the Tribunal by John English, a Higher Executive Officer of the Tribunal. In paragraph 9 of that affidavit, he said the following.

> *"The first-named respondent does not intend to publish decisions of the refugee Tribunal made prior to the coming into force of section 19(4A) of the Refugee Act, 1996 or decisions which were made in respect of appellants whose applications for asylum were considered under the statutory scheme in existence prior to the coming into force of section 7 of the Immigration Act, 2003. I have been informed by the chairperson and believe that this decision has been made in order to protect the position of those persons who participated in the asylum process in the belief and expectation that the process was absolutely confidential and under a statutory scheme which both ensured and required such confidentiality."*

In the next paragraph, Mr. English goes on to state:

> *"The chairperson of the Refugee Appeals Tribunal has decided not to publish any decisions under section 19(4A), Refugee Act, 1996 at this time and prior to being in a position to decide, based on international best practice, which decisions, if any, should be published, and which decisions should not be published. For this purpose, the chairperson has set up a committee, which committee comprises of the chairperson, a number of tribunal members and a number of members of the administrative staff of the Refugee Appeals Tribunal."*

The deponent goes on to state that the committee were making extensive enquiries in other jurisdictions relating to their systems of publication. There the matter rested until this applicant, as already referred to, was successful in the High Court in his judicial review proceedings. The State authorities named above have appealed that decision.

The Opesyitan appeals

I do not find it necessary to give such a detailed history of these appeals as essentially, the issues are the same. In this particular case, the principal applicant (the others being her dependants) is a widow who claims in her refugee appeal that she should be permitted to remain in this country because if she is deported to her own country, Nigeria, her second eldest daughter will be subjected, by her husband's family, to circumcision and her sons to ritual markings. At a consultation, this applicant's counsel advised that there were two previous decisions of the Tribunal which related to a similar issue and were relevant. One of these decisions was by Ms. Sunniva McDonagh, B.L. and the other by Mr. Michael O'Kennedy, S.C. In correspondence, the applicant's solicitors primarily relied on section 19(4A)(a) of the 2003 Act notwithstanding its negative wording as making it mandatory for the chairperson of the Tribunal to publish decisions of legal importance. In their letter of the 14th September, 2004 and indeed in an earlier letter of the 30th August, 2004, they had made it clear that these previous decisions were, in their view, of general legal importance and of particular relevance to the appeal. In a letter of reply, the Tribunal maintained that the chairperson had been consulted and that he considered he had no obligation under section 19(4A) to publish. A more detailed letter was written by the solicitors on the 16th November, 2004. That letter contains the following paragraph.

> *"We submit that the decision of 'Oke' is of legal importance in that we understand it includes a finding that the treatment of widows in some cultures may constitute persecution on the basis of membership of a social group, for the purposes of section 2 of the Refugee Act, 1996. We submit that the decision in 'Manyara' is of legal importance because we understand it includes a finding that a fear of female genital mutilation can cost due to well-founded fear of persecution, for the purpose of section 2 of the Refugee Act, 1996. It is our submission that these findings are of general legal importance in that the underlying principles may be applicable in a considerable number of cases. We further submit that these*

cases are specifically relevant to the factual basis of the claim made by our client."

The Tribunal, however, merely reiterated its position. It was made clear in correspondence and in the affidavits that the applicant was not requiring the identity of the applicants, the subject matter of the two decisions, to be in any way disclosed, so that the request would not have involved any confidentiality issues.

In an affidavit sworn by Mr. Brendan Toal of the firm of solicitors acting for the applicants, he makes the important submission at paragraph 5 of the lack of equality of arms, a point which the other applicants had also made. I quote the paragraph in full:

"I further say and believe that the Tribunal's past decisions are available to the Office of the Refugee Applications Commissioner, which said office is represented at oral hearings before the Tribunal by persons known as Presenting Officers. I say that it is in breach of the applicants' right to fair procedures and equality of arms if they are denied access to previous tribunal decisions whilst the Office of the Refugee Applications Commissioner which will oppose the appeal, has access to all previous decisions. Lest there be any doubt, in my experience, it is the practice of Presenting Officers to oppose an appeal in a manner that is adversarial."

Mr. Toal goes on to make the point that the Tribunal's decision not to publish decisions on appeals was in contrast to the policy adopted by the other common law jurisdictions.

These applicants then instituted judicial review proceedings with leave. There were seven grounds set out in the statement of grounds for the relief sought. In addition to relying on section 19(4A) of the Refugee Act, 1996, as inserted by the 2003 Act, there were certain other general grounds, the most relevant one being *"the first-named respondent has acted unlawfully and in breach of the applicant's right to constitutional and natural justice and fair procedures."* The position maintained by the Tribunal is clearly stated in the statement of opposition and in particular paragraph 2 thereof which reads as follows:

"The Refugee Appeals Tribunal is not required to make available to the applicants previous

decisions of the Refugee Appeals Tribunal whether by virtue of section 19(4A), Refugee Act, 1996 as inserted, or otherwise."

Unlike the Atanasov case, these appeals and the appeal with which I am about to deal postdate the 2003 Act and, therefore, if that Act is relevant no point can be taken against these particular applicants that there can be no retrospectivity. It will become clear in this judgment that, having regard to the approach I am adopting, the retrospectivity issue does not arise.

The Fontu appeal

The same solicitors acted for this applicant as acted for the Opesyitans. The procedural history, therefore, is almost identical. The solicitor indeed tried to persuade, without success, the Tribunal to permit his other case to be taken as a test case and indeed later when he discovered the existence of the Atanasov case, he suggested that that be the test case. These requests were all refused and that is why there are three separate judicial review applications. The important letter of request in this case was dated the 24th December, 2004. It requested *"the publication"* of any decision of legal importance pertinent to the issues in the case but in particular pertinent to whether and in what circumstances forced marriage of young girls is persecution within the meaning of the Refugee Act, 1996 and the Geneva Convention. At that stage the claim was made solely on the basis of section 19(4A) of the Refugee Act, 1996, as inserted by the 2003 Act. This applicant is from the Cameroon and the issue in the case is, essentially, the issue of forced marriage. Following the same history of refusal, judicial review proceedings were instituted. As in the previous case, this applicant did not exclusively rely on section 19(4A) in the statement of grounds but in the alternative claimed that even if the Act did not place a mandatory obligation on the Tribunal, the policy of the Tribunal was *"unconstitutional and incompatible with the European Convention on Human Rights."* Again, as in the previous case, quite apart from the grounds based on the section 19(4A) the ground was put forward that the Tribunal had acted unlawfully and in breach of the applicant's right to constitutional and natural justice and fair procedures.

The judgment of the High Court

MacMenamin J. in his reserved judgment which was a combined judgment for all three appeals has exhaustively reviewed the relevant case law relating to fair procedures required by the Constitution. I gratefully adopt his analysis in so far as it relates to those matters and I do not find it necessary to cover that territory again. I intend to go straight to the basis of the actual decision of MacMenamin J.

At first sight, the basis of the decision appears to be that section

19(4A)(a)(b) of the Refugee Act, 1996, as inserted by the Immigration Act, 2003 must be given a constitutional interpretation and that when given that interpretation and notwithstanding the negative fashion in which the provision is drafted, the Chairman of the Tribunal is not just given a capacity to publish or not to publish but that the provision impliedly incorporates what the learned judge calls *"a correlative positive discretion"* which has to be exercised having regard to principles of fair procedures to publish decisions which are of legal importance. In short, although the statutory provision by its express terms authorises the Chairman not to publish decisions which are not of legal importance, there is by reason of that very wording an implied statutory obligation to publish those that are of legal importance. The learned trial judge went on to hold that that being his view, the Opesyitans and Miss Fontu were entitled to an order that they be provided with the relevant decisions being sought. The judge accepted that the provisions of that amending Act could only apply prospectively and that its provisions could not, therefore, be invoked by Mr. Atanasov.

The learned trial judge, however, then goes on to state the following:

> *"However, by virtue of their having* **asserted** *a constitutional entitlement on the basis of natural justice and fair procedures (but not otherwise) each of the applicants are (sic) entitled to obtain copies of relevant and material decisions which may be of importance, or identified decisions which may come within that category. Thus while the statutory discretion vested in the Chairman is prospective in nature, the specific constitutional right of the applicants should, but by virtue of the assertion of such right, be seen as applicable to decisions relevant to these cases. It must be stressed therefore that the applicants are entitled to rely on this right in these applications only by virtue of their timely assertion of the right before the Tribunal."*

From that passage, it can be understood why I have some difficulty in identifying the exact basis of the judge's decision. But I have come to the conclusion that when properly analysed it is both reasonably clear and in fact correct. Although the learned judge holds (incorrectly in my view) that the statutory provision, notwithstanding its negative wording, impliedly imposes a correlative positive obligation, this does not seem to be the ultimate unifying factor in his decision. In my view, his judgment is firmly based on the constitutional entitlement to natural justice and fair procedures and not on the statute as such. That is why all three applicants obtained judicial review, notwithstanding that the claims of one of them predated the

2003 Act.

Decision

I have arrived at the same conclusion as the learned trial judge but by a slightly different route. As to what kind of fair procedures the Constitution may require in any given instance will always depend on the particular circumstances and in the case of tribunals as to what constitutes fair practice may greatly differ. The refugee appeals are heard by single members of the Tribunal taken from a large panel. The Chairman of the Tribunal assigns a particular member of the Tribunal to hear a particular appeal. It is of the nature of refugee cases that the problem for the appellant back in his or her country of origin which is leading him or her to seek refugee status is of a kind generic to that country or the conditions in that country. Thus, as in these appeals, it may be a problem of gross or official discrimination against homosexuals or it may be a problem of enforced female circumcision or it may be a problem of some concrete form of discrimination against a particular tribe. Where there are such problems it is blindingly obvious, in my view, that fair procedures require some reasonable mechanisms for achieving consistency in both the interpretation and the application of the law in cases like this of a similar category. Yet, if relevant previous decisions are not available to an appellant, he or she has no way of knowing whether there is such consistency. It is not that a member of a tribunal is actually bound by a previous decision but consistency of decisions based on the same objective facts may, in appropriate circumstances, be a significant element in ensuring that a decision is objectively fair rather than arbitrary. In **Manzeka v. The Secretary of State for the Home Department** [1997] Imm. A.R. Lord Woolf M.R., as he then was, succinctly summed up the usefulness of previous relevant decisions when he said the following:

> *"It will be beneficial to the general administration of asylum appeals for special adjudicators to have the benefit of the views of a tribunal in other cases of a general situation in a particular part of the world, as long as that situation has not changed in the meantime. Consistency in the treatment of asylum seekers is important in so far as objective considerations, not directly affected by the circumstances of the individual asylum seeker, are involved."*

The learned High Court judge cited this useful observation of Lord Woolf. He also cited two earlier passages from his judgment which are worth quoting again. The first read as follows:

> *"Particularly when determining appeals brought where it is necessary to give consideration to the general situation in particular parts of the world, it is important for Tribunals, when appropriate, to give their views as to that situation, so far as relevant, to claims for asylum in that part of the world."*

In the later passage the judge continued:

> *"In administering the asylum jurisdiction, the Tribunal (whether it be a special adjudicator or an appeal tribunal) has to consider not only whether the individual asylum seeker has the necessary subjective fear to be regarded as someone who is entitled to asylum, but in addition has to be satisfied that fear is well-founded. Whether or not that fear is well-founded involves applying an objective standard (emphasis added) a standard which will depend upon the state of affairs in that particular country as well as the circumstances of the individual asylum seeker."*

Previous decisions of the Tribunal may be ones which if applied in the appellant's case would benefit the appellant but if there is no access he has no knowledge of them and indeed he has no guarantee that the member of the Tribunal has any personal knowledge of the previous decisions made by different colleagues. It does not require an elaborate review of relevant case law and fair procedures to come to the conclusion that such a secret system is manifestly unfair. The unfairness is compounded if, as in this jurisdiction, the presenting officers as advocates against the appellants have full access to the previous decisions. That raises immediately an *"equality of arms"* issue.

The 2003 legislation is, in my view, enacted against that constitutional backdrop. It assumes rather than creates fair procedures.

To illustrate what I mean by this, I think it appropriate to set out the relevant parts of the legislation. In its original unamended form, section 19 of the Refugee Act, 1996 is headed *"Protection of identity of applicants"*. While an enactment can never be interpreted by reference to its heading, it becomes perfectly clear when the section is read that that is the purpose and the sole purpose of it. In the original form, the section reads as follow:

> *"19.-(1) The Commissioner, the Appeal Board, the Minister, the Minister for Foreign Affairs and their respective officers*

shall take all practicable steps to ensure that the identity of applicants is kept confidential.

(2) Subject to sections 9(15) and 26, no matter likely to lead members of the public to identify a person as an applicant under this Act shall be published in a written publication available to the public or be broadcast without the consent of that person and the consent of the Minister (which shall not be unreasonably withheld).

(3) If any matter is published or broadcast in contravention of subsection (2), the following persons, namely -

(a) in the case of a publication in a newspaper or periodical, any proprietor, an editor and any publisher of the newspaper or periodical,

(b) in the case of any other publication, the person who publishes it, and

(c) in the case of matter broadcast, any person who transmits or provides the programme in which the broadcast is made and any person having functions in relation to the programme corresponding to those of the editor of a newspaper,

shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both.

(4) Where a person is charged with an offence under subsection (3) it shall be a defence to prove that at the time of the alleged offence he or she was not aware, and neither suspected nor had reason to suspect, that the publication or broadcast in question was of such matter as is mentioned in subsection (2).

(5) …"

It is not necessary to set out subsection (5) in full as it simply defines *"broadcast"* and *"written publication"*. Section 19 as originally enacted therefore has no relevance whatsoever to the issue of whether there is or is not a duty to provide access to redacted previous decisions which would not breach the confidentiality required by the section. It is simply neutral on that question. The exception under section 9(15) has no bearing on this case but it is worth citing the exception relating to section 26. That section provides as follows:

"The Minister shall, not later than 2 months after the end of each year beginning with the year 1996, make a report to each House of the Oireachtas stating the number of cases (if any) in

which sections 9(15), 17(2) and 18(5) were applied in the preceding year and the circumstances of any such case."

This section, though cited in argument in my view, has no bearing on the appeals. The instances referred to by reference to the three subsections are instances where national or public security is involved. It has no conceivable bearing on the issue as to whether constitutional fair procedures require reasonable access to previous relevant decisions suitably redacted.
I now turn to the key piece of legislation which has been so heavily relied on by the applicants and, partly, relied on by the learned trial judge namely, the new subsection (4A) inserted into section 19 of the Refugee Act, 1996 by section 7 of the Immigration Act, 2003. That new subsection reads as follows:

> *"(4A)(a) The Chairperson of the Tribunal may, at his or her discretion, decide not to publish (other than to the persons referred to in section 16(17)) a decision of the Tribunal which in his or her opinion is not of legal importance.*
>
> *(b) Any decision published shall exclude any matters which would tend to identify a person as an applicant under the Act or otherwise breach the requirement that the identity of applicants be kept confidential."*

The wording and context of that new subsection has a double significance in my view though I am unable to read it as imposing of itself some positive mandatory duty to publish.

The first of the two points of significance is that the subsection is still tightly contained within an overall section dealing with one topic, confidentiality. Paragraph (b) of the new subsection reinforces that position. It is clearly assumed in that paragraph that some decisions will be published but there is a statutory requirement imposed that such publishing matter be redacted so as to remove the danger of identifying a particular applicant. Paragraph (a) could not possibly be read in some context that had nothing to do with the rest of the section and even parts of the amended bit. Again, there is an assumption underlying that paragraph that decisions will be published in a redacted form but the Oireachtas is attempting to cut to a minimum any danger of disclosure of identity resulting therefrom. The chairperson is, therefore, being authorised not to publish decisions which, in his or her opinion, are not of legal importance. Although it might not arise directly in this case, I think I should state that it would be my opinion that *"legal importance"* must not be given too narrow a definition. A decision that deals with the question of whether refugee status should be granted in a

homosexuality situation or in a female circumcision situation, for example, would seem to me to be decisions of *"legal importance"*. It does not have to be some narrow point of law in the technical sense. On the other hand, there may be many cases that are based on particular facts that do not put the applicant into some particular category and would be of no legal relevance to any other applicant's case. The subsection is authorising the chairperson not to publish that type of decision.

The second point of significance of the new subsection is something which I have already touched upon. Both of the paragraphs in the new subsection clearly imply an assumption on the part of the Oireachtas that it would be normal practice to publish decisions. Putting it another way, it would have been assumed, in my view, that fair procedures would have required access to and reference to previous decisions in an appropriate case in the interests of consistency in the treatment and application of the law. But the jurisprudential basis for the obligation to provide such reasonable access is not the new subsection but the general constitutional requirement of fair procedures. As I have already indicated, despite some ambiguity in the judgment, nevertheless that is the basis on which the learned judge decided the case. If that were not so, the judge would have had to dismiss the Atanasov case as being a pre-2003 Act case. He did not do that for the reasons he set forth in the judgment.

As the State authorities have placed some reliance on the terms of section 16(17) of the Refugee Act, 1996, as amended, I think that I should at this point, cite it in its amended form and make my own observations on it.

> *"17 (a)A decision of the Tribunal under subsection (2) and the reasons therefor shall be communicated by the Tribunal to the applicant concerned and his or her solicitor (if known).*
>
> *(b) A decision of the Tribunal under subsection (2) and the reasons therefor shall be communicated by the Tribunal to the Minister together with a copy of the report of the Commissioner under section 13.*
>
> *(c) A decision of the Tribunal under subsection (2) shall be communicated to the High Commissioner."*

I do not consider that this subsection has any bearing on the issues involved in this appeal. It is simply dealing with procedures in relation to the appeals and in particular the question of to whom the Tribunal must communicate its decision.
Having regard to the views which I have expressed, based on the Constitution and indeed the common law understanding of fair procedures

together with the provisions of the relevant Acts, it does not seem necessary to consider any arguments based on the European Convention on Human Rights.

The State appellants have also relied in part on two decisions of the High Court, unreported. These are expressly referred to in the judgment of MacMenamin J. and I would adopt his views on them. The two cases are **Raiu v. The Refugee Appeals Tribunal**, unreported, Smyth J., 25th April, 2002 and **Pop v. The Refugee Appeals Tribunal,** unreported, Butler J., June, 2004. I agree with the learned trial judge that neither case could be regarded as a worthwhile authority on the issues in this case. In the **Raiu** case, the very first ground of refusal was that the proceedings should have been brought by plenary summons. It seems clear that only statutory arguments were made and both judgments pre-dated the Immigration Act, 2003. MacMenamin J. points out that *"a number of persuasive and relevant authorities from both this jurisdiction and elsewhere"* do not appear to have been cited to the respective courts in either of those cases. In this connection of particular importance are the passages from the judgment of Lord Woolf already cited.

I intend now to expand somewhat on the nature of the rights which should be asserted in favour of the applicants. It would be wrong for this court, certainly in these proceedings, to hold that there was any statutory or constitutional obligation to provide some open library containing redacted previous decisions. That may well be the system adopted for the purposes of affording access if the Chairman of the Tribunal considers it appropriate. But I do not think that it would be the function of this court or of any other court to direct the establishment of systems of that kind. What this court is concerned with is the personal rights of the particular applicants before it. Provided each of those applicants is given reasonable access in whatever form the Tribunal considers fit to previous decisions which are being reasonably required for legal relevance within the meaning which I have indicated, that aspect of the duty to provide fair procedures is complied with.

The court has been referred to systems in other countries and other jurisdictions. The U.K. appears to have had an elaborate system of categorising the decisions for particular forms of publication. It is a very large country with obvious practical problems involving numbers. I have come to the conclusion that the systems in other jurisdictions be it the U.K. or anywhere else, may well be suitable to those countries and jurisdictions but are of very little relevance in considering what are the constitutional requirements of fair procedures in this jurisdiction. Accordingly, I do not intend to refer to any of those authorities. Indeed, I do not find it necessary to refer to any more of the foreign case law as
none of it is directly in point to the issues in this case.

I would dismiss the three appeals as indicated.

I would, however, vary the form of order in each case so that the revised order would read as follows:

> *"The court doth declare that the refusal of the named respondent to make available to the applicant relevant tribunal decisions as requested by the applicant is an unlawful exercise of the discretion afforded it under the 2003 Act as well as being in breach of the applicant's rights to fair procedures and natural and constitutional justice under Article 40.3 of the Constitution."*

Finally, I should make it clear that this judgment relates only to the rights of persons who in advance of a hearing by the Tribunal have requested access to relevant precedents and have been refused. It can have no application to cases where the Tribunal hearings are completed without such access having been sought. It is hardly necessary to add also that this judgment concerns only the rights of persons appearing before the Refugee Appeals Tribunal and to the obligations of that Tribunal. None of these cases concern in any way applications to the Minister for Justice, Equality and Law Reform for permission to stay in the country.

Atanasov v. Refugee Appeals Tribunal & Ors.