Unapproved

THE COURT OF APPEAL
CIVIL

Neutral Citation Number: [2024] IECA 163
Court of Appeal No. 2023/130
High Court No. 2022/248 JR

Ní Raifeartaigh J.
Power J.
Meenan J.

BETWEEN:

A.A.

APPELLANT

- AND –

THE MINISTER FOR CHILDREN, EQUALITY, DISABILITY, INTEGRATION AND YOUTH AND THE MINISTER FOR JUSTICE

RESPONDENTS

JUDGMENT of Ms Justice Power delivered on the 24th day of June 2024

Introduction

1. This is an appeal against the judgment of the High Court refusing the appellant several reliefs sought, by way of judicial review, in respect of a decision taken by the first

named respondent ('the Minister') to transfer her from a Reception Centre in Dublin ('Balseskin') to an accommodation centre in Athlone.

2. The High Court (Hyland J.) found that the proceedings were moot. Lest she had erred in this regard, the trial judge proceeded to consider and, thereafter, refuse the substantive application for judicial review.

Background

3. A brief summary of the background to the appeal is sufficient as a comprehensive account of the facts is to be found in the judgment of the High Court ([2023] IEHC 208). The appellant and her son applied for international protection on 16 June 2021 having arrived in the State one month earlier. Pending the determination of their application, they were placed in Balseskin, a unit operated by the International Protection Accommodation Services ('IPAS'), which is a division within the Department of Children, Equality, Disability, Integration and Youth.

4. As an applicant for international protection, the conditions governing the appellant's reception fell within the provisions of the European Communities (Reception Conditions) Regulations 2018 (S.I. 230/2018), ('the 2018 Regulations').[1] The 2018 Regulations transpose into Irish law Directive 2013/33/EU ('the Directive') which lays down minimum standards for the reception of persons seeking international protection.[2]

5. On 17 August 2021, the 67-year-old appellant, assisted by an interpreter, underwent a '*Stage One Vulnerability Assessment*', conducted by IPAS in accordance with

[1] As amended by the European Communities (Reception Conditions) (Amendment) Regulations 2021 (S.I. 52/2021), the European Communities (Reception Conditions) (Amendment) (No. 2) Regulations 2021 (S.I. 178/2021) and (more recently) the European Communities (Reception Conditions) (Amendment) Regulations 2023 (S.I. 649/2023).

[2] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96.

Regulation 8 of the 2018 Regulations. It is clear from the answers the appellant gave during that assessment that she indicated that she had no physical disability such as being unable to move freely, to walk, to wash or to climb stairs unaided. The following is an extract from that assessment:

"

Stage One Vulnerability Assessment	***Answer***
1. *Is the applicant aged 18 years of age or more?*	***YES***
2. *If under 18 years of age, is the applicant accompanied by a parent, guardian or other legally responsible person over the age of 18?*	***N/A***
3. *Does the applicant indicate they have a physical disability? Such as being unable to move freely, walk, dress, wash or climb stairs unaided etc.* *If yes, provide further information:*	***NO***
4. *Does the applicant indicate they have a non-physical or other disability? Such as intellectual disability, or vision or hearing loss: are they registered as having disability in home country, are they unable to speak, self-care, or understand questions etc.* *If yes, provide further information:*	***NO***
5. *Is the applicant aged 65 years or more?*	***YES***
6. *Is the applicant pregnant, recently pregnant and/or breastfeeding? If pregnant what is the due date.*	***NO***
7. *Is the applicant a single parent or guardian? (i.e. providing care on their own for one or more children under the age of 18?)*	***NO***

8. *Does the applicant indicate that they may be a victim of human trafficking or have been brought to the State against their will?*	***NO***
9. *Does the applicant indicate that they suffer from an illness such as cancer, diabetes, COPD, heart disease HIV, hepatitis, or any other chronic or acute illnesses which may affect their quality of life?* 10. *If yes, has the applicant been prescribed medication or receiving treatment for their condition?*	***NO***
11. *Are there indications of, or does the person admit to a serious mental health condition or degenerative brain condition or have they been professionally diagnosed with a condition such as chronic depression, schizophrenia or dementia?*	***NO***
12. *Has the person given an indication that they have experienced torture or inhumane treatment, including psychological or sexual violence?*	***NO***
13. *Has the person indicated that they have been affected by, or directly experienced, physical, psychological or sexual violence due to their sexual orientation or gender?*	***NO***
14. *Has the person given any indications other than above about vulnerabilities which they may have?*	***NO***

Next Steps: ***Deemed not vulnerable***

Further information	***Yes/No***
Did the applicant state that they understand the purpose of this assessment?	***YES***
Did the applicant state that they understand questions 1-14 above?	***YES***

Did the applicant indicate that they are happy with the answers they gave?	***YES***
Did the applicant understand the explanation of what happens next?	***YES***

"

6. It would appear that for a short time the appellant's son was accommodated in Galway and on 23 August 2021, he emailed IPAS requesting to be accommodated with his mother, claiming that she '*[had] a mental illness*'. On 27 August 2021, he emailed IPAS again, claiming that his '*mother [had] Alzheimer's*'. No medical evidence was tendered in support of the appellant's son's claim, nor did he identify any physical illness or mobility difficulties in respect of his mother.

7. Among the papers before the Court was a letter of 3 September 2021 from the appellant's General Practitioner ('GP') to a Consultant Geriatrician in the Mater Hospital referring her for an assessment in respect of memory loss, dementia and pseudodementia. Under the section 'Clinical Notes', it is observed that the appellant was '*forgetful*' and that if she '*left a room she would never be able to find her way back*.' It was noted that the appellant was looking '*quite vague*' and had conversed with her son in '*short sentences*'.

8. On 10 September 2021, correspondence was sent from the Crosscare Refugee Centre ('Crosscare'), on behalf of the appellant, to IPAS, attaching a letter from her GP which made reference to a recent referral to a Consultant Geriatrician in the Mater Hospital due to a suspicion of dementia. Crosscare stated that the appellant had '*a multitude of health problems*' and advocated that she and her son be dispersed to a centre in Dublin as she would '*benefit greatly*' from being near '*many members of her extended family in Dublin*'. IPAS wrote to Dr O'Cleirigh on 17 September 2021 enclosing medical

correspondence and sought his advice on the claim that the appellant and her son should be accommodated in Dublin on medical grounds. He replied on 30 September 2021, stating that the '*medical details [did] not require them to remain in Dublin'* and that for medical issues, the appellant could be '*investigated at regional hospital level*.'

9. In a second letter dated 22 October 2021, the appellant's GP noted that she was being treated for hypertension and had been scheduled for an appointment with the geriatrician on 30 November 2021 to '*investigate 'memory loss – possible dementia*'. The GP stated that she also has '*mobility issues*' and '*walks with the support of her son*'.

10. As noted by the trial judge, at some time in February 2022, the appellant was told that she would be transferred to accommodation in County Westmeath. On 9 February 2022, the Irish Refugee Council ('the IRC') emailed to IPAS, on behalf of the appellant, seeking the cancellation or postponement of that transfer. The IRC claimed that the appellant suffered from '*memory loss (possibly dementia)*' and '*mobility issues*' and was attending '*regular medical appointments*' in Beaumont hospital. It stated that the appellant was '*awaiting*' a medical report and treatment plan '*in the coming days*' and sought confirmation that the appellant had had a vulnerability assessment. The planned move to County Westmeath was cancelled due to a medical '*hold*' and on 8 March 2022 the appellant and her son were given a new transfer date of 10 March 2022 to an accommodation centre in Athlone.

11. On 8 March 2022, the IRC emailed IPAS again and requested that the transfer be postponed so that documentation could be gathered and submitted or, in the alternative, that the appellant and her son be transferred to accommodation in Dublin to facilitate access to Beaumont hospital. Later that same day, the IRC sent '*documentation*' to IPAS, including, an appointment letter for the memory clinic at the Mater hospital scheduled for 13 April 2022.

12. IPAS replied to the IRC stating that the transfer would be postponed until 11 March 2022 to accommodate the appellant's son's appointment with the International Protection Office. IPAS confirmed that there was no available alternative accommodation in the Dublin area and that arrangements would be made for the appellant to be linked in with local medical services in Athlone. For any '*larger appointments*', IPAS observed that this location was within commuting distance of Dublin.

13. On 9 March 2022, the appellant's son contacted IPAS seeking accommodation in Balseskin or '*transport within Dublin or close to Dublin because of [his mother's] health condition*'.

14. On 10 March 2022, the appellant's solicitors wrote to IPAS and requested the cancellation of the planned transfer (on 11 March), pending an assessment of the specific reception needs of the appellant and her son. Her solicitors claimed that the appellant was a vulnerable person and that her reception needs were required to be assessed in accordance with the provision of the Directive. Enclosed with that correspondence were the aforementioned letters from the appellant's GP and a reminder letter from Beaumont hospital in respect of an outpatient appointment in Raheny.

15. IPAS replied that same day and informed the appellant's solicitors that due to high demand, IPAS had no available accommodation in the Dublin area. It clarified that Balskekin was a reception centre and could not accommodate recipients long-term as its function was to assess new arrivals. The proposed accommodation in Athlone, IPAS said, was an interconnecting unit and the appellant and her son would be linked into the local health services for any medical needs.

16. On 11 March 2022, the appellant and her son were transferred to residential accommodation in Athlone. They were provided with an interconnecting mobile home

that contained a private bathroom plus kitchen and bedroom facilities for their exclusive use.

17. Upon their arrival in Athlone, the appellant and her son complained to the Services Manager of the accommodation centre. The Manager, it appears, relayed their complaints to IPAS stating that the appellant was unhappy to reside in Athlone as she was '*under a lot of medical care in Dublin'* and had *'constant appointments*' and was unable to commute. The Manager also relayed the appellant's complaint about being unable to fit into the toilet room in the accommodation as it was too small, thus preventing her from using the toilet facilities.

18. On 29 March 2022, leave to apply for judicial review of the transfer decision was granted.

19. On 26 April 2022, the appellant was granted refugee status by the second named respondent.

20. Notwithstanding that the appellant was no longer an applicant for international protection, a second vulnerability assessment, which had previously been requested by her solicitors, was conducted on 28 April 2022. The appellant was deemed a vulnerable person in that she was '*an elderly person (over 65)*', with '*serious illness (possible dementia and memory loss)*' and a '*mental disorder* (*possible dementia and memory loss*)'. IPAS recommended that the appellant, a declared refugee, source independent accommodation outside the system of Direct Provision. Whilst it did not usually transfer residents who were granted refugee status, it recommended that the appellant be '*transferred on humanitarian grounds*.' The plan was that the appellant would continue attending the Dublin hospitals and that she have accessible accommodation with her son in a big city where she could easily access geriatric services.

The High Court Proceedings

21. The appellant's judicial review application was heard by the High Court on 28 March 2023. It is clear from the chronology outlined above that by the time the judicial review application was heard, matters had advanced, considerably, in that the appellant had been granted refugee status on 26 April 2022. No longer an applicant for international protection as of that date, the appellant's status had ceased to be governed by the provisions of the 2018 Regulations.

22. In her pleadings, however, the appellant had sought several reliefs, including, orders of *mandamus* compelling the Minister to conduct a vulnerability assessment to establish whether she was a recipient with special reception needs and to assess the nature of such needs, if any; an order of *certiorari* quashing the Minister's decision to designate Athlone as the accommodation centre for her material reception conditions; a 'Declaration' that the Minister's decision of 11 March 2022 to transfer her to Athlone constituted a breach of her '*private and/or health rights*' as protected by the Constitution, the Charter of Fundamental Rights of the European Union (the 'Charter') and section 3 of the European Convention on Human Rights Act 2003 (the '2003 Act'); a 'Declaration' that the Minister's ongoing failure to conduct an '*up-to-date*' vulnerability assessment constituted a breach of her rights under the Charter, the Constitution and the 2003 Act; and an interlocutory injunction requiring the Minister to make accessible to the appellant personal hygiene facilities pending the completion of that vulnerability assessment. The appellant also claimed damages.

23. In response to the Minister's claim that the proceedings were moot, the appellant conceded that the reliefs she had requested in terms of an injunction and orders of *mandamus* and *certiorari* were no longer being sought. However, she denied that the proceedings were moot in their totality, in circumstances where she continued to seek a

declaration that her '*private and/or health rights*' under the Constitution, the Charter and the 2003 Act had been breached. She also continued to seek an award of damages.

24. The High Court (Hyland J.) delivered its judgment on 3 April 2023 ([2023] IEHC 208). Having noted the contracted scope of the proceedings, Hyland J. emphasised that the declaration sought did not assert any breach of the 2018 Regulations. She found that, in circumstances where none of the conditions necessary for an award of damages had been identified or pleaded, the applicant had not established the existence of an extant damages claim that justified that court determining the substantive matters in the case. In Hyland J.'s view, the proceedings were moot. However, lest her conclusion in respect of the mootness issue was incorrect the trial judge proceeded to consider and determine the substantive issue.

The Appeal

25. Whereas eleven grounds of appeal are advanced, several concern alleged errors by the trial judge pertaining to the Minister's obligations and the appellant's entitlements, (particularly, to a second vulnerability assessment), under the 2018 Regulations. I do not propose to set out all grounds of appeal at this point and will consider, in the first instance, the appellant's claim that the trial judge erred in concluding that none of the conditions for damages had been identified or pleaded, and that the appellant's application for judicial review was moot. Both grounds of appeal are interconnected.

The Question of Mootness

The Parties' Submissions

26. The appellant submits that the trial judge erred in finding that the proceedings were moot and relies upon *MC v. The Clinical Director of the Central Mental Hospital* [2021] 2

IR 166 (‘*MC*’) as authority for the proposition that a claim in respect of fundamental rights does not become moot unless and until there is a determination as to whether the rights in question have been breached. She submits that, in *MC*, the Supreme Court recognised the importance of declaratory relief in vindicating a person whose fundamental rights have been violated. The Supreme Court’s position in *MC* is consistent, according to the appellant, with Article 47 of the Charter, which provides that *‘[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has a right to an effective remedy*’.

27. The appellant also relies on *SY v. Minister for Children, Equality, Disability, Integration and Youth* [2023] IEHC 187 (‘*SY*’) in support of her contention that the proceedings were not moot. SY’s application for judicial review concerned the failure of the Minister to provide him with material reception conditions. As it transpired, accommodation had been provided to him by the time the proceedings came on for hearing. The High Court (Meenan J.), nevertheless, held that the proceedings were not moot and that the declarations sought by SY had passed the threshold test as set down in *MC*.

28. The appellant further relies on the fact that the European Court of Human Rights considers the finding of a breach of rights to be an important remedy in itself. Whilst such a finding may not, necessarily, be accompanied by an award of damages, it can nevertheless be a means of vindicating an individual’s rights.

29. In circumstances where she had claimed before the court below that her ‘*right to dignity and to respect for her private life*’ were breached by the Minister and had sought declaratory relief to that effect, together with a claim for damages, the appellant’s case is that there remains a ‘live issue’ within the proceedings which requires a determination. Accordingly, she submits that the trial judge erred in determining that the proceedings were moot.

30. For their part, the respondents submit that the trial judge was entirely correct to find that the proceedings were moot. By the time the application came before the High Court, the appellant was no longer a person seeking international protection and thus, they say that any declaration could have had no material effect, there being no longer a live controversy between the parties.

31. The respondents say that the question of whether the appellant ought to have been transferred from one reception centre to another was '*entirely otiose'* as the trial judge had emphasised that the declaration she sought did not assert any breach of the 2018 Regulations. The only claim standing was for a declaration that her rights, as protected by the Constitution, the Charter and the European Convention on Human Rights ('Convention'), had been breached and for an award of damages arising therefrom.

32. The respondents submit that there must be a '*real question of substance*' to be decided before a court should consider the question of granting declaratory relief. In this regard, they rely on *Maguire v. South Eastern Health Board* [2001] 3 IR 26, wherein Finnegan J. held that not only was the substantive relief claimed moot, but that it would be inappropriate to grant the declaratory relief in the circumstances that prevailed. His conclusion was that events had overtaken the principal relief sought—in that case an order of *mandamus* compelling the respondent to provide midwifery services for a home birth delivery—by reason of the fact that the child in question had been born before the hearing commenced. According to Finnegan J., the court should not grant declaratory relief where the declaration relates, *inter alia*, to '*a mere academic question of no practical value*'. The respondents maintain that the declaration sought in these proceedings could not have any material impact on or practical value to the appellant, given that she obtained refugee status on 26 April 2022. They rely on *Lofinmakin v. Minister of Justice, Equality and Law Reform* [2013] 4 IR 274 ('*Lofinmakin'*) in which the Supreme Court held

that an appeal was moot when a decision could have no practical impact or effect on the resolution of some live controversy.

33. The respondents submit that the passage of time is also a factor that may render proceedings moot. In *XX v. Minister for Justice and Equality* [2020] 3 IR 532 Charleton J. (with reference to *G v. Collins* [2005] 1 ILRM 1 ('*G*')and *Hall v. Beals* 396 US 45 (1969)) had described a case as being moot, and hence not justiciable, '*if the passage of time has caused it completely to lose its character as a present, live controversy of the kind that must exist if [the court is] to avoid advisory opinions on abstract propositions of law*' (p. 543). In the same vein, the respondents consider that the observations of Hardiman J. in *G* (at p.13) are relevant to these proceedings. In *G*, Hardiman J. noted that while the parties may have a real dispute at the time when proceedings commence, time and events may render the issues in the proceedings, or some part thereof, moot, such that '*the eventual decision would be of no practical significance*'.

34. The respondents contrast the present proceedings with the recent decision of the Supreme Court in *Odum v. Minister for Justice* [2023] IESC 3 ('*Odum*'). In *Odum* the Supreme Court proceeded to hear an appeal, notwithstanding that the impugned deportation order had been revoked prior to the hearing, because the appeal itself involved an issue of law of general public importance. Given that the purpose of the appeal in *Odum* was to clarify and settle the law for all cases that raised a similar point, the Supreme Court in *Odum* held that it was in the interests of justice to determine the substantive issues in that case. The respondents say that no such point of law of general public importance arises in the present case. Any declaration or damages awarded could have no broader implications beyond the appellant, there being no claim that the 2018 Regulations were incorrectly transposed. No novel question of law is in issue nor is there

any uncertainty in the law rendered by the High Court judgment. The case was decided on the evidence and events pertaining only to the appellant.

35. As to the Supreme Court's ruling in *MC*, the respondents seek to distinguish that case from this one. The question in *MC* concerned the conditions attaching to Ms C's release from an involuntary and lengthy detention. The denial of her marital rights together with her fundamental rights to privacy, autonomous decision-making, self-determination and liberty were all engaged in *MC*. In stark contrast, the respondents say, the appellant in this case availed, voluntarily, of the accommodation and related services of the IPAS which were provided and was, at all times, in receipt of material reception conditions in accordance with the 2018 Regulations. Moreover, the respondents contend that, as a declared refugee, she was at liberty to source her own accommodation and had full access to the labour market, health care and social welfare benefits. In view of her change of status, the Supreme Court's observation in *Lofinmakin* (at p. 298) to the effect that *'the essential foundation of the action has disappeared'* was applicable to this case.

36. The respondents also rely on the fact that in *MC*, the Supreme Court observed that not every claim in which a declaration of a violation of constitutional or Convention rights is sought, passes the threshold test of mootness. What is required, they submit, is that the Court examine the reliefs sought and make a subjective and objective assessment of the importance of the issues at stake. This, according to the respondents, is precisely what the trial judge did in this case. She found, correctly, that the evidence underlying the appellant's claim was not sufficiently particularised to substantiate the breach alleged and the trial judge, correctly, had not approached the question of mootness by considering the likely quantum (if successful) as a starting point. The trial judge determined that the proceedings were moot and only then (lest she had erred in so doing)

went on to consider and decide the substantive issues, making findings of fact on the evidence before her.

37. The respondents' principal submission on the issue of mootness is that there remained no concrete legal dispute between the parties following the grant of refugee status to the appellant. The appellant achieved her desire to reside in Dublin, to be close to her daughter-in-law and to attend her medical appointments. In these circumstances, the trial judge was correct to find that the proceedings were moot.

THE LAW

On Mootness

38. The leading authorities on the issue of mootness are well-established. A helpful summary of the relevant principles has been set out as far back as 2013 by McKechnie J. in *Lofinmakin*. Mr Lofinmakin and his two children (both of whom were Irish citizens) and his wife, who was lawfully resident in the State pursuant to the terms of the Irish Born Child Scheme, 2005 (IBC/05), had sought an order of *certiorari* quashing a deportation order which had been made in respect of Mr Lofinmakin by the Minister for Justice, Equality and Law Reform.

39. In their application for leave to seek judicial review, the applicants argued that judicial review did not provide them with an effective remedy under Article 13 of the Convention, by reason of what was described as the '*common law constraints*' of judicial review. The High Court (Cooke J.) refused to grant leave, holding that the applicants had failed to advance any substantial grounds for contending that the Minister's decision ought to be quashed ([2011] IEHC 38). Following the CJEU decision in Case C-34/09 *Zambrano v. Office National de I'Emploi* [2011] ECR I-1177 ('*Zambrano*'), Cooke J. later granted the applicants leave to appeal his refusal decision to the Supreme Court,

certifying two questions as involving points of law of exceptional public importance ([2011] IEHC 116). The first concerned the application of Article 24.3 of the Charter to the impugned deportation decision.[3] The second concerned the test of '*rationality and reasonableness*' in the light of *Meadows v. Minister for Justice* [2010] 2 IR 701 ('*Meadows*').

40. Pending the appeal to the Supreme Court, the Minister revoked the deportation order in respect of Mr Lofinmakin. The appellants rejected the respondents' assertion that this rendered the appeal moot. McKechnie J. summarised, as follows, the principles to be applied by a court when determining whether proceedings were moot.

> *"(i) a case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing;*
>
> *(ii) therefore, where a legal dispute has ceased to exist, or where the issue has materially lost its character as a lis, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined;*
>
> *(iii) the rationale for the rule stems from our prevailing system of law which requires an adversarial framework, involving real and definite issues in which the parties retain a legal interest in their outcome. There are other underlying reasons as well, including the issue of resources and the position of the court in the constitutional model;*
>
> *(iv) it follows as a direct consequence of this rationale, that the court will not – save pursuant to some special jurisdiction – offer purely advisory opinions or opinions based on hypothetical or abstract questions;*
>
> *(v) that rule is not absolute, with the court retaining a discretion to hear and determine a point, even if otherwise moot. The process therefore has a two step analysis, with the second*

[3] Article 24.3 of the Charter provides that: *'[e]very child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'*

step involving the exercise of a discretion in deciding whether or not to intervene, even where the primary finding should be one of mootness;

(vi) in conducting this exercise, the court will be mindful that in the first instance it is involved in potentially disapplying the general practice of supporting the rule, and therefore should only do so reluctantly, even where there is an important point of law involved. It will be guided in this regard by both the rationale for the rule and by the overriding requirements of justice;

(vii) matters of a more particular nature which will influence this decision include:-

(a) the continuing existence of any aspect of an adversarial relationship, which if found to exist may be sufficient, depending on its significance, for the case to retain its essential characteristic of a legal dispute;

(b) the form of the proceedings, the nature of the dispute, the importance of the point and frequency of its occurrence and the particular jurisdiction invoked;

(c) the type of relief claimed and the discretionary nature (if any) of its granting, for example, certiorari;

(d) the opportunity for further review of the issue(s) in actual cases;

(e) the character or status of the parties to the litigation and in particular whether such be public or private: if the former, or if exercising powers typically of the former, how and in what way any decision might impact on their functions or responsibilities;

(f) the potential benefit and utility of such decision and the application and scope of its remit, in both public and private law;

(g) the impact on judicial policy and on the future direction of such policy;

(h) the general importance to justice and the administration of justice of any such decision, including its value to legal certainty as measured against the social cost of the status quo;

(i) the resource costs involved in determining such issue, as judged against the likely return on that expenditure if applied elsewhere; and

(j) the overall appropriateness of a court decision given its role in the legal and, specifically, in the constitutional framework." (pp. 298 to 300)

41. It is clear from the foregoing that a decision on mootness may be approached on the basis of a two-step analysis. First, the court should consider whether, on the facts of a given case, there remains some live controversy between the parties arising from a concrete dispute then existing. If it can be said that there is no longer a conflict capable of being determined, justiciably, because the essential foundation of the action has disappeared then, as a rule, the proceedings should be declared moot. Second, even if a case fails this threshold test and the proceedings should be declared moot, the court still retains a discretion to decide whether or not to intervene to hear and determine a case. That discretion should be exercised '*reluctantly*' and the court will be guided in this respect both by the rationale for the rule and the overriding requirements of justice.

42. Applying the relevant principles to the facts of the case before the Supreme Court, McKechnie J. determined that the appeal in *Lofinmakin* must be considered moot, in that both aspects of the appeal were predicated on the existence of a deportation order and on the unlawfulness of the disruption to family life which would result from that order. As this order no longer existed, the Court found that the appellants' family life had not and could no longer be disrupted by the existence of the order.

43. The Court then turned to the second tier of the analysis and considered whether, notwithstanding the finding of mootness, the Court should exercise its discretion to hear and determine the appeal. McKechnie J. declined to do so in *Lofinmakin*. The Court observed that even if the Minister were to initiate the deportation process afresh, the factual and legal framework of that process would be very different from the one which arose in the case before the Court. As the legal context had changed it would be highly undesirable, in McKechnie J's view, for the Court to discuss *Zambrano* in circumstances where it had not been argued in the court below. As to the second certified question, McKechnie J. considered (at p. 304) that the consequences of *Meadows* should be teased

out '*in the normal way*', in a case where concrete circumstances obtained, rather than by '*some notional pronouncement*'.

44. Recalling the principles governing the issue of mootness, Baker J. in *MC* undertook only the first step of the *Lofinmakin* analysis. Her finding that the proceedings were not moot, in the first instance, obviously obviated the necessity to proceed to the second step of the analysis. In view of the appellant's reliance on *MC* in this appeal, a close analysis of that decision is merited.

45. The applicant in *MC* was released from the Central Mental Hospital ('the CMH') on the basis of a conditional discharge order. One of the conditions her release was that her place of residence would be determined by her treating consultant psychiatrist. Post-discharge, Ms C applied for a variation of that condition and the notice party, the Mental Health (Criminal Law) Review Board, acceded to her request to determine her own place of residence. The notice party directed the CMH to assess and confirm the making of certain arrangements to facilitate the variation of the condition of her discharge. The respondent, the Clinical Director of the CMH, declined to do so being of the view that the planned variation was not clinically appropriate or in the best interests of Ms C. The applicant was granted leave to apply by way of judicial review for, *inter alia*, an order of *certiorari* of the Clinical Director's refusal to assess and confirm the making of the requisite arrangements. She also sought an order of *mandamus* directing the Clinical Director to make the relevant arrangements and she sought declarations that his refusal so to do was in breach of her rights, unreasonable, unlawful, and constituted an unwarranted interference with the exercise of the statutory powers and functions of the notice party.

46. By the time the application came on for hearing, the applicant had been unconditionally discharged from the CMH and, as a result, the orders of *certiorari* and

mandamus were no longer sought. Ms C, however, maintained her application for declaratory relief together with a claim for damages for breach of her constitutional and Convention rights. The High Court (Eager J.) dismissed the proceedings as being moot ([2016] IEHC 341). The Court of Appeal (Peart J.) agreed, holding that the claim for breach of constitutional and Convention rights was *'so minimal, tenuous and insubstantial as to not warrant the conclusion that there was a breach of those rights'* ([2019] IECA 4 at para. 41).

47. In the Supreme Court, Baker J. considered that the question to be determined was whether there remained a '*live controversy*' between the parties following the grant of MC's unconditional discharge from the CMH. The issue, in her view, must not be '*merely theoretical*', with the existence of a *lis* depending on whether the foundations of the action had disappeared. Importantly, in *MC*, Baker J. held that the mere addition of a claim for damages to a judicial review which might otherwise be moot, would not always, '*or perhaps usually*', save the proceedings from an argument of mootness. Assessing the quantum of damages that might be awarded if a breach of rights were to be found, could not form the basis of a decision that proceedings were moot. Even nominal damages in a given case would not, necessarily, make the proceedings moot. Baker J. articulated the test for mootness in the following terms (at p. 182):

> "*The test for mootness is more properly whether there is or remains at the date of hearing a live, unresolved, and concrete legal dispute between the parties, or whether the action is speculative or seeks an advisory decision from the court which could be of no practical effect. An award even of nominal damages is a practical consequence of litigation, and the award of nominal damages may reflect the view of the court as to the extent of injury, and may also, in a suitable case, reflect a degree of disquiet or even disapproval by the court of the actions of a plaintiff, or of the merits of litigation.*"

48. Applying that test, to the case before the Court, Baker J. held that Ms C's claim was not moot. She stated (at p. 182 to 183):

> "*In the present case [Ms C] seeks to vindicate her constitutional and [Convention] rights by two means: a claim for a declaration that there has been a violation or infringement of the rights; and a claim for damages for infringement. Whilst I would be reluctant to say that every claim which seeks a declaration that there has been a violation of constitutional and/or [Convention] rights would pass a threshold test if an argument of mootness was raised, the present case is one where [Ms C] seeks to assert a breach of established and fundamental rights. In particular, she seeks declarations regarding an alleged loss of personal and individual dignity, a breach of her right to marital and personal privacy, a breach of her rights of autonomous decision-making, and a breach of her right of self-determination. These are not abstract, vague or insubstantial claims. What is at stake is her personal right to make decisions as to where she would live, to live in her family home and, within her family unit as she chose, to enjoy the company of her children and her husband, and to have an untrammelled right to care for her children within the family unit. Rights to family and marital life and the right of a mother to be involved in the day-to-day care of her children are rights recognised in the constitutional order, and [Ms C] makes the further argument that the centrality of family life and of the family unit based on marriage within the Traveller Community adds an additional element of arguable prejudice and loss which might not be present in every case. They are credible claims, and even taking the factual scenario for which the Clinical Director contends, the claims are sufficiently borne out by the facts.*"

49. Before proceeding to consider this appeal in the light of the decision in *MC*, some more recent caselaw on mootness merits consideration. The governing principles on mootness were revisited by O'Donnell C.J. in *Odum.* In that case, he proceeded to exercise the court's retained discretion to hear a case which, on first analysis, appears moot. The more clearly a case '*retains its essential character as a real controversy which is capable of being properly resolved, […] the more likely it is that a court will proceed to hear the case in the proper exercise of its jurisdiction*' (para. 50). The discretion, O'Donnell C.J. observed,

is more likely to be exercised at the appellate stage and, in particular, where leave to appeal to the Supreme Court has been granted.

50. Mr Odum arrived in the State, unlawfully, in November 2007 and applied for permission to remain some seven years later in November 2014. The refusal of his application resulted in the making of a deportation order against him. Mr Odum (and his family) sought an order of *certiorari* quashing that order on the grounds that the Minister for Justice and Equality had not adequately or correctly assessed his family and private life rights under the Constitution and the Convention. Having obtained leave of the High Court to seek judicial review on 25 July 2016, the applicants' case was placed in abeyance pending the outcome of *Gorry v. Minister for Justice and Equality* [2020] IESC 55 ('*Gorry*') (as delivered on 23 September 2020).

51. Following the delivery of judgment in *Gorry*, Mr Odum's case was unsuccessful before the High Court. Having obtained leave of the Supreme Court to appeal, directly, the decision of the High Court, the applicants delivered submissions on 18 July 2022. However, three days earlier, on 15 July 2022, the Minister for Justice and Equality informed Mr Odum that he had been granted permission to remain in the State for a period of two years, on the basis of the Regularisation of Long Term Undocumented Migrants Scheme. The impugned deportation order was revoked.

52. O'Donnell C.J. held that the fact that the deportation order had been revoked was a '*powerful factor*' and that the proceedings were, as a starting point, moot as a matter of law. Nevertheless, the Supreme Court decided to proceed to hear and determine the appeal. O'Donnell C.J. proffered several reasons for this (at paras. 40 to 44). First, it was the applicants themselves who sought to maintain the appeal. Second, an adversarial context existed in that there was no suggestion that the issue of law would not be argued with the same vigour as it would have been argued had the deportation order not been

revoked. Third, the existence of that order prior to its revocation and the first named applicant's failure to comply with it could affect his subsequent applications to reside in the State. The decisive consideration in *Odum* was that the appeal to the Supreme Court had been granted and was ready for hearing, a determination having been made that the case involved an issue of law of general public importance that required clarification by that Court, rather than by the High Court. This issue, in O'Donnell C.J.'s view, would likely take up scarce court resources in the future and the Supreme Court's determination in *Odum* would not have amounted to an advisory opinion.

53. More recently, in *SY*, Meenan J. applied the threshold test articulated in *MC* to determine that judicial review proceedings concerning the Directive and the 2018 Regulations were not moot. *SY* concerned the alleged failure of the Minister to provide '*material reception conditions*' to the applicant, in the form of accommodation, food and basic hygiene facilities. Having been informed that there was no accommodation available for him by the International Protection Office, the applicant was provided with a €28 voucher to buy bedding and was given the address of a private charity. For 21 days, he slept rough in places, such as, on park benches and in train stations, during which time, he alleged, he felt scared and in danger. During that period, the applicant did not wash or change his clothes, and was forced, at times, to relieve himself in public places. In view of these circumstances, Meenan J. was satisfied that the applicant had been '*deprived of basic hygiene conditions*' and '*subjected to humiliation*'.

54. When the applicant was initially granted leave to seek judicial review, he had sought an order of *mandamus* requiring the Minister to provide '*material reception conditions*' and, additionally, had sought a declaration that the failure of the Minister to provide such conditions was unlawful. By the time of the hearing, the Minister submitted that the application was moot as the applicant had been provided with accommodation.

55. The High Court, nevertheless, decided to hear and determine *SY* as a '*lead case*', in that the application was but one of many concerning single young males who had applied for international protection and had experienced, thereafter, circumstances similar to those of the applicant. To dispose of the application on the grounds of mootness would, in the opinion of Meenan J. (at para. 32), '*totally defeat the whole point of having a "lead case"*.' While the question of accommodation had been resolved, Meenan J. relied on *Lofinmakin* and concluded that the issue in *SY* remained live in many other similar cases. On that basis, he determined that it must be in the interests of the parties that the issues raised by the applicant be resolved. In any event, he observed that even if the case before the court was not a 'lead case', the declarations sought by the applicant would pass the threshold test as identified in *MC*.

56. Finally, this Court's more recent observations on mootness in *Blythe v. The Commissioner of An Garda Síochána* [2023] IECA 255 ('*Blythe*') should also be borne in mind. Referring to *Odum* and *Kozinceva v. The Minister for Social Protection* [2020] IECA 7, Collins J. stated:

> *"As O'Donnell CJ noted [in Odum] (§12), the more advanced a case is the more each party stands to lose by way of costs if the case is halted by reasons of mootness. Furthermore – and perhaps more significantly – if an appellate court refuses to proceed with an appeal on the basis of mootness, a legal precedent will stand without ever having been subject to appellate review (or, in the case of an appeal from the Court of Appeal to the Supreme Court, without being subject to Supreme Court review). Once a case is decided and is the subject of an appeal, 'there will be a decision (which in some case may be capable of being a precedent controlling other cases and decisions) and an order for costs, which in some cases can be substantial' (§33). It may therefore be undesirable to refuse to decide the appeal leaving that decision unreviewed and (where wrong) undisturbed."*

DISCUSSION

57. It is common case that the central pillars of the appellant's application for judicial review had fallen away by the time the proceedings came on for hearing before the court below. It is also agreed that her grant of refugee status brought her outside the scope of the 2018 Regulations. By the time of the hearing, her case was then confined to a claim for declaratory relief in respect of the alleged breach of her *'private and/or health rights*', together with a claim for damages.

58. The appellant argued that insofar as she continued to seek damages and declaratory relief in respect of the six-week period between her transfer to Athlone and her grant of refugee status, there remained a live controversy in the proceedings. The trial judge disagreed. In her view, *MC* was authority for the proposition that a claim may avoid being treated as moot where there is a damages clam in respect of a substantial breach of rights, even if the damages themselves may be insubstantial or, indeed, only nominal. She found that none of the conditions that would be necessary for an award of damages to be made had been pleaded or identified in this case. There was, for example, no plea of *mala fides* on the part of the respondents nor any plea that they had any knowledge that the steps taken in respect of the appellant were unlawful. The High Court was satisfied that the appellant had not established the necessary conditions for an award of damages to be made, successfully.

59. The Court recalls that the appellant had sought a declaration that the Minister's decision to transfer her to Athlone constituted '*a breach of her private and/or health rights*' as protected by the Constitution, the Charter and/or section 3 of the 2003 Act. She had also advanced a claim for damages *simpliciter*.

The Threshold Test

60. The essential question, in considering the issue of mootness, is whether there was, at the date of the hearing, *'a live controversy between the parties'*, arising out of *'some tangible and concrete dispute then existing'*, or whether, in fact, the '*essential foundation of the action has disappeared*' such that a decision of the Court would have '*no practical effect*' (*Lofinmakin*). Whilst the appellant had claimed a variety of reliefs in respect of the transfer decision which she sought to impugn and the Minister's alleged failure to provide a second or '*up to date*' vulnerability assessment, the reality is that none of those issues were 'live' once the appellant had ceased to be an applicant for international protection. That reality, in my view, must be deemed a compelling factor in any consideration of whether the proceedings were moot.

61. What then of the remaining claims? Without determining the substantive issues, it is necessary to examine whether the proceedings disclosed '*a substantial breach*' of the rights in question (even if the damages payable would be modest or nominal) such that it could be said that some '*live controversary*' remained pending that required resolution when the case came on for hearing.

62. It is important to recall that in *MC*, the claims for declaratory relief at the heart of the case centred upon alleged violations of constitutional and Convention rights which have '*an undoubted centrality*' in the constitutional and Convention legal order. Baker J. held that such claims, if '*sufficiently particularised in concrete and credible complaints*', could not be readily characterised as insubstantial. It, therefore, falls to be considered whether the appellant's claims, in this case, were sufficiently particularised in concrete and credible complaints such as would constitute a 'substantial' breach of the rights in issue.

The Alleged Breach of 'Private Rights'

63. The right to privacy, as recognised under the Constitution, the Charter, and the Convention, is an important fundamental right of '*undoubted centrality*' in the legal order. The right itself and the conditions that would constitute a breach thereof, have been considered in several cases both by the Irish courts and at European level. I am not convinced that the appellant's articulation of the right to privacy or the circumstances which she says breached it, is sufficient to bring her claim within the boundaries of what the law requires before an award of damages could be made.

64. In her appeal on the mootness finding of the court below, the principal case on which the appellant relies is *MC*. In contrast with these proceedings, *MC*'s claim concerned a breach of her fundamental '*right to marital and personal privacy*' in the context of being obliged to live apart from her family. Fundamental questions concerning Ms C's personal right to make decisions for herself, where she would live and with whom she would live were in issue. Her freedom to dwell as part of a family unit, to enjoy the company of her children and her husband, and to have an untrammelled right to care for her children, were all in issue by reason of the decision taken by the Clinical Director of the CMH.

65. Privacy, in the sense of having some space and discretion in the realm of personal care, was not the issue in *MC*. Whilst one can readily empathise with the appellant in terms of the challenges she faced during the six-week period in issue, it must be recognised that the alleged breach of '*private rights*' in the instant appeal is of an altogether different order and magnitude than the breach that arose in *MC.* Here, the focus of the breach alleged centred upon the appellant's difficulty in using the toilet and taking a shower in the accommodation with which she and her son were provided. Her solicitor averred that the bathroom in her mobile home was '*very narrow*', making it

difficult for the appellant to use given her mobility issues. Her son made similar averments to the effect that the accommodation was '*completely unsuitable*' for his mother's needs and that accessing the toilet room was difficult for her because of a lack of space. There were *'no safety bars*' and he was required to try to assist his mother from outside the toilet door. He feared that she would fall, and, on many occasions, he claimed, she urinated on her clothes and/or on the bathroom floor.

66. As to the appellant's inability to use the shower, her solicitor was instructed that the shower was not accessible. The appellant's son averred that she could not use it as there was a large step up into it which she could not take because of her mobility issues. He claimed that his mother had not been able to shower since they arrived in Athlone and that this was '*very distressing*' for her. She had to travel with him to his wife's home in Dublin, several times per month, so that she could wash herself. Importantly, however, there was no question of the appellant and her son being deprived of access to hot and cold water facilities inside their mobile home which, as already noted, was for their private and exclusive use.

67. The circumstances in which the courts have grappled with the right to privacy under the Constitution – and these are by no means exhaustive – include a statutory restriction on the importation of contraceptives (*McGee v. Attorney General* [1974] IR 284); the tapping of journalists' telephones by An Garda Síochána (*Kennedy v. Ireland* [1987] IR 587); the secret filming of an individual's workplace (*Cogley v. Radio Telifís Éirean*n 4 IR 79); and, the publication of the transcripts of private telephone conversations by a newspaper (*Herrity v. Associated Newspapers* [2009] 1 IR 316).

68. In the context of the Convention, the Strasbourg Court has held that there were violations of the right to respect for one's private life where, for example, a warrant for a search of the applicant's office and the seizure of 'documents' issued without qualification

or limitation (*Niemietz v. Germany* [1993] 16 EHRR 97), or where laws rendered it a criminal offence to engage in homosexual conduct (*Norris v. Ireland* [1991] 13 EHRR 186). They also arose in some prison cases where detainees were obliged to use the toilet in the presence of other prisoners who shared a cell (*Szafrański v. Poland* (17249/12, 15 December 2015) ('*Szafrański*').

69. The situations that arose in these 'classic' cases on privacy rights are a far cry from the breach asserted by the appellant herein. I cannot conclude that a substantial breach of her right to privacy occurred in circumstances where, because she required support from her son, she had difficulty in accessing the small bathroom in their mobile home. Whilst the appellant relies on decisions like *Szafrański*, there is, in my view, a world of a difference between a prisoner being required to use the toilet in the presence of relative strangers and a mother being assisted into the bathroom, albeit with some difficulty, by an immediate, close and loving family member who provides physical support, as needed. The fact that accidents occurred, and her clothes got wet must, of course, have been upsetting for the appellant, but it does not translate, in my view, to a finding that the circumstances amounted to '*a <u>substantial</u> breach'* of her fundamental right to privacy for which the Minister must be held responsible. This is all the more so where, on the date of the initial assessment by IPAS, the appellant had denied having any physical disability or being unable to move freely, walk, wash or climb stairs unaided. To the extent that '*mobility issues*' were mentioned in a letter from her GP, nothing was submitted to the Minister as to what this meant in practical terms when it came to accessing personal care facilities.

The Alleged Breach of 'Health Rights'

70. I now turn to consider whether the proceedings disclosed a live controversy in respect of a substantial breach of the appellant's '*health rights*' such as would have allowed the trial judge to avoid a finding on mootness when the matter came on for trial. Once again, I am not convinced that that they did.

71. At the outset, it has to be said that the '*right to health'* is not a right guaranteed by the Constitution, the Charter or the Convention. Susceptibility, generally, to personal illness is part of the human condition. While provision may be made for health-related rights under the law, the principles articulated in the Strasbourg case law on point concern the broader question of the right of access to appropriate medical treatment (usually in the context of Article 3 on the prohibition of torture rather than Article 8). These cases typically concern prisoners who complain, for example, about the State's failure to prevent the transmission of hepatitis C in prison (*Machina v. The Republic of Moldova* (69086/14, 17 January 2023) or its failure to provide medical supervision where the authorities are aware of a prisoner's particular injuries (*Kolesnikovich v. Russia* (44694/13, 22 March 2016)). The Grand Chamber's conclusion in *Kudła v. Poland* (30210/96, 26 October 2000, § 94) was that the State, *under Article 3*, must ensure that a person is detained in conditions which are '*compatible with respect for human dignity*' and must ensure that a prisoner's '*health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance'.*

72. The particulars of the breach of 'health rights' alleged by the appellant are far removed from the type of issues arising in the above cases. The evidence adduced to support the appellant's claim that her '*health rights*' had been breached consisted of averments that she was suspected of suffering from dementia or pseudodementia, had hospital appointments in Dublin that she could not attend due to the commute involved,

and that she had '*mobility issues*' and was reliant on her son for support. The appellant furnished two letters from her GP, one being a referral to a Consultant Geriatrician and the second noting that she was being treated for hypertension, had '*mobility issues*' and had an appointment with geriatricians to investigate possible dementia. There was also evidence of some hospital appointments. Apart from emails from the IRC and Crosscare advocating for a postponement or cancellation of the proposed transfer to Athlone, that, it seems to me, was the height of the medical evidence adduced in support of a claim for a breach of '*health rights'*. There was no medical diagnosis from any Consultant Geriatrician to whom the appellant had been referred, no indication that any tests had been carried out, no medical report, and no description of the impact of the '*mobility issues*' on the appellant.

73. Hyland J. summarised, succinctly, the position as it stood prior to the Minister's impugned decision to transfer the appellant to Athlone as follows (para. 33):

> *"The first assessment had not disclosed any vulnerability. No medical conditions had been identified in the assessment in August 2021. There [was] no substantive medical evidence put forward justifying the necessity for the applicant's transfer to be delayed pending the assessment. The applicant was in a reception centre that was needed to process new arrivals. The respondent did not have accommodation available in Dublin which was the applicant's preferred option. There was no identification by the applicant or her solicitor of any mobility issues such that she required accommodation of any particular dimensions or specification. In short, it does not appear to me that there was any factual reason why she should not have been transferred to Athlone at that point in time."*

74. The proceedings disclosed that the appellant had full access to medical treatment while in Balseskin and that she was capable of being investigated, clinically, at regional level and linked in with health and medical services in Athlone. Moreover, the Minister had the benefit of Dr O'Cleirigh's medical opinion furnished in late September 2021 to the effect that the '*medical details [did] not require*' the appellant to remain in Dublin. There

was, as the trial judge noted no medical evidence whatsoever arising from consultations supporting the appellant's claim in respect of any medical condition and '*a glaring absence of medical evidence in the case both before the respondents when the application for delay in moving was being made and indeed, before this Court*' (para. 28).

75. No comparison can, reasonably, be made between the facts of this case and those in *Simpson v. The Governor of Mountjoy Prison* [2019] 1 ILRM 81 ('*Simpson*'). Nor can the appellant's situation be compared with the applicants in *Price v. UK* (33394/96, 10 July 2001) ('*Price*'), *Helhal v. France* (10401/12, 19 February 2015) and *Szafrański*, all of which concerned conditions of detention. Her circumstances were also very far short of the type of situation identified, for example, by the Court of Justice in Case C-233/18 *Haqbin v. The Federaal Agentschap* ECLI:EU:C:2019:956.

76. To my mind, it cannot be said that by the time the case came on for hearing before the High Court, the proceedings disclosed in a concrete and particularised fashion a breach, let alone a '*substantial breach'*, of the appellant's '*health rights*' in respect of which the Minister ought to have been held accountable. That being so, the contention that there remained a 'live controversy' that required resolution by a court is misconceived.

77. Moreover, the instant proceedings are entirely distinguishable from recent cases in which the threshold test for mootness was satisfied. The facts of this case bear no resemblance to the exceptional circumstances which arose in *SY*. Whilst the accommodation issue was resolved in *SY* prior to the hearing of the application, that case differs from the instant one not only on the basis of the severity of SY's circumstances but also by reason of the fact that the legal issue arising in *SY* was very much live in many similar cases. There is no question of the appellant's case being a 'lead' or test case – the resolution of which will influence other proceedings now pending.

78. Likewise, a distinction may be drawn between the instant proceedings and the recent judgment of this Court in *LA (A Minor) and Ors v. The International Protection Appeals Tribunal and Ors* [2024] IECA 133 ('*LA*') in which it was decided that the proceedings were not moot. The legal question raised in *LA* was a novel one. Bearing in mind the High Court's finding that if the law were to be interpreted in the manner contended for by the appellants, then their claim for damages had been advanced on a concrete and credible basis, this Court was satisfied that the threshold test for mootness had been met. By contrast, no novel question of law arises in the instant proceedings, nor did the trial judge consider that the appellant had made out a plausible claim.

79. These proceedings, in my view, resemble, more closely cases like *Lofinmakin* and *Odum* in which a finding of mootness was made on the first stage analysis (although for reasons specific to *Odum* the Court proceeded to exercise its discretion under the second-stage). As in *Lofinmakin*, there is no question of the impugned decision in these proceedings '*having effect, either retrospectively or prospectively, or at any time henceforth*'. Once the change in the appellant's status occurred, the legal effect of the transfer decision ended. The grant of refugee status was a '*powerful factor*' to be considered.

80. Moreover, the appellant's claim for damages on the basis of the declaration sought does not assist her in meeting the threshold test for mootness. As observed in *MC* (at para. 41) '*the mere addition of a claim for damages to a judicial review which might otherwise be moot would not always, or perhaps usually, save the proceedings from an argument of mootness*'.

The Court's Discretion

81. It should be recalled that a determination of mootness, in the first instance, is not, necessarily, dispositive of matters. A discretion is retained by this Court to hear and determine a point, albeit '*reluctantly*' even where a case is otherwise moot. It was this discretion which O'Donnell C.J. exercised in *Odum*, in deciding that the case sufficiently retained its '*essential character as a real controversy*' which was capable of being properly resolved.

82. Various factors militate against the exercise of the Court's discretion in this case. First, there is no suggestion, whatsoever, that the impugned transfer decision could affect the current or future legal position of the appellant. Second, while the trial judge made findings on the substantive complaints, lest she had erred on mootness, such findings are not '*capable of being a precedent controlling other cases and decisions*' (*Blythe*). Third, no uncertainty in the law has been rendered by the High Court judgment nor are there any other cases held in abeyance pending the outcome of this appeal. Fourth, the instant proceedings do not raise any legal issue of general public importance requiring clarification. Whereas the purpose of the appeal in *Odum* was to clarify and settle the law for all cases raising a similar point, there is no suggestion that any point of law requires to be settled by these proceedings.

83. Bearing these considerations in mind, there is no reason that would justify the Court in exercising its discretion, whether reluctantly or otherwise, to hear and determine the proceedings, notwithstanding its principal finding of mootness.

Miscellaneous

84. For the sake of completeness, I want to address the issue of the 2018 Regulation upon which strong emphasis was placed by the appellant during the course of the hearing

of this appeal. I am satisfied that the trial judge was entirely correct in her finding that the declaration sought by the appellant in her judicial review application did not involve or assert a breach of the 2018 Regulations. Pleadings matter. They '*set the parameters for the jurisdiction of a court*' to decide the issues identified and they ensure fairness in the process. (*Casey v. Minister for Housing, Planning and Local Government & Ors* [2021] IESC 42). The way in which a claim is pleaded in judicial review applications is, as the Supreme Court has underscored, a factor '*of some importance*' where, arguably, the requirement for clarity and specificity in pleadings and the extent to which the statement of grounds defines and confines the issues to be determined could be regarded as '*more strict*'. (Casey, paras. 27 to 29).

85. The only declaratory relief sought in the proceedings was in respect of the appellant's '*private rights'* and '*health rights'* under the Constitution, the Charter and the Convention. As such, it was not open to the appellant to argue, as she sought to do, that alleged failures on the part of the Minister constituted a breach of her entitlements under the Directive or the 2018 Regulations.

Conclusion

86. For the reasons set out above, I consider that the trial judge was correct in her determination that the present proceedings were moot by the time they came on for hearing in the court below. The foundation of the action had disappeared. Whilst the appellant was permitted to remain in accommodation provided by the Minister even after her grant of refugee status, this was entirely an act of goodwill on the Minister's part. Thereafter, the appellant achieved her desire to be accommodated in Dublin where she could be close to her extended family.

87. There was, in my view, no '*real question of substance*' to be decided such as would have allowed the court below to consider the question of granting declaratory relief. Any such grant would not have had a material impact in the case. Whilst the appellant has stressed that the Strasbourg court considers that declaratory relief, even without compensation, may constitute an effective remedy for Convention purposes, the finding of a violation is, nevertheless, always a prerequisite to the grant of such a remedy.

88. Having considered the pertinent facts of this case, I am satisfied that the proceedings disclosed nothing to substantiate a breach, let alone a substantial breach, of the appellant's 'private rights' or '*health rights*' for which the Minister ought to be held responsible, such as would warrant an award, even a nominal award, of damages. For that reason, the High Court judge was correct to find that none of the conditions for damages had been identified and that the appellant's application for judicial review was moot.

Decision

89. For the reasons set out above, I would dismiss the appeal.

90. As the appellant has failed in her appeal and the respondents have been entirely successful, I see no basis upon which the appellant might avoid an order awarding the costs of the appeal to the respondents, in accordance with section 169 of the Legal Services Regulation Act 2015. I would make such an order on a provisional basis. If the appellant wishes to argue for an alternative order, the matter will be listed for a short hearing on costs on the 26th day of June 2024 at 2.30 pm.

91. As this judgment is delivered electronically, Ní Raifeartaigh J. and Meenan J. have indicated their agreement with the reasoning and the conclusions reached herein.