THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 211

RECORD NO. 2023/1057JR

BETWEEN

AC

APPLICANT

and

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE CHIEF INTERNATIONAL PROTECTION OFFICER, THE MINISTER FOR JUSTICE, IRELAND, AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Hyland delivered on 17 April 2024

Introduction

1. The applicant brought proceedings challenging a decision of the International Protection Appeals Tribunal (the "IPAT") of 18 August 2023 affirming the decision of the International Protection Office (the "IPO") to transfer him to Spain (the "Transfer Order") pursuant to EU Regulation No. 604/2013 (the "Dublin III Regulation") for an assessment of his international protection application.

2. When the proceedings commenced on 3 October 2023 the applicant had an extant application for relief under Article 17 of Dublin III before the Minister, filed on 5 July 2022. I heard the application seeking leave for judicial review and for an injunction preventing his transfer to Spain on 31 January 2024. I gave my decision on 12 February 2024 in *AC v IPAT & Ors* [2024] IEHC 77 and granted an injunction restraining deportation, along with leave on the majority of the grounds sought. Of specific relevance to the matter as it stands: (i) I granted leave to seek a declaration that the Article 17(1) application and determination process is unlawfully uncertain, contrary to that principle of EU law; and (ii) I refused leave to seek a declaration that the Minister alone can make an Article 17 decision – the "*Carltona*" point – on the basis that, given no Article 17 decision had yet been made, the point would be entirely hypothetical.
3. On 6 February 2024 the Minister issued her determination under Article 17, refusing the applicant relief. Following this, the applicant issued a notice of motion returnable for 23 February 2024 seeking liberty to amend his Statement of Grounds grounded upon the third affidavit of the applicant sworn 14 March 2024. It is this motion that is before me.
4. On 23 February 2024, the Department of Justice indicated to the applicant that, given the Transfer Order would expire under the regime established by the Dublin III convention before his transfer to Spain could be effected, his application for international protection would now be considered in Ireland. Critically, the applicant concedes that this decision renders moot both the application to quash the Transfer Order, and the proposed amendment to challenge the Article 17 refusal because he has now achieved the aim of the proceedings i.e. to prevent his transfer back to Spain. Despite this, the applicant wishes to continue with these judicial review proceedings as he says it is in the public interest to have the grounds identified above at paragraph 2 of

this judgment determined. It is in those circumstances that he wishes to maintain his amendment application.

Motion to amend

5. The applicant seeks various amendments to his Statement of Grounds, including a plea that the Article 17 decision recently taken by the Minister is in breach of the principles in *Carltona*. That principle identifies that powers vested in a Minister may be exercised, without any express act of delegation, by responsible officials on his or her behalf but that the principle is capable of being negatived or confined by express statutory provisions or by clearly necessary implication. Now that the respondent has made an Article 17 decision, the applicant renews his application in this regard and seeks to challenge the Article 17 decision on the basis that it was not made by the Minister and that any such delegation is unlawful given the statutory scheme.
6. In response to the motion, the respondent filed an affidavit sworn by Mr. O'Riordan, officer of the Minister for Justice working in the Legal Services Support Unit, Immigration Services Delivery, of the Department of Justice on 21 March 2024. That affidavit identified that the opposition to the amendments was on the basis that the proceedings were now moot. I will return to some of the averments in that affidavit below.
7. I have decided to consider the question of mootness first, since if the proceedings are moot, then the question of the amendments becomes unnecessary to decide.

The arguments of the parties

8. The parties agree that the traditional position as regards moot proceedings is that they will rarely be entertained as the court is loath to engage in a hypothetical exercise or decide matters in the abstract. Per the decision of Clarke J. in *PV (a minor) v The Court Service* [2009] 4 IR 264, the starting point of any consideration of mootness must be as to whether the "*issue sought to be litigated is still alive in any meaningful sense*". He went on to identify that the circumstances where the court should entertain a moot should be limited and the discretion to do so "*should be sparingly exercised having regard…to the underlying rationale of the mootness rule in the first place*."
9. The applicant identifies that in the concurring judgment of McKechnie J. in *Lofinmakin v Minister for Justice, Equality and Law Reform* [2013] 4 IR 274 the Judge construed the approach as a two-step test; the first being a consideration of whether the matter "*can have no practical impact or effect on the resolution of some live controversy between the parties*" arising from "*some tangible and concrete dispute*" between them. If no such live tangible dispute exists, the matter is moot and the court will not, "*save pursuant to some special jurisdiction…offer purely advisory opinions or opinions based on hypothetical or abstract questions*." McKechnie J. went on to distil, at paragraph 51, various factors that may weigh in departing from the general rule, including:

> *"… (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;"

10. The applicant emphasises a number of other examples in the jurisprudence of principles that would allow for the departure from the general rule. In the decision of Denham C.J. in *Farrell v Governor of St. Patrick's Institution* [2014] 2 ILRM 341 the applicant relies on the third and fifth principles identified:

    "(iii) such an issue arises in circumstances which would escape review if the Court did not exercise a discretion to hear the appeal;

    …

    (v) the decision has a systemic relevance to cases before the courts, where an application for judicial review has been granted."

11. Attention is also drawn to the judgment of Hogan J. in *McDonagh v Governor of Mountjoy Prison* [2015] IECA 71 where he held that while mootness is a doctrine that serves to conserve the exercise of judicial power, it "*must yield on occasion to the greater imperative of resolving issues which, while moot, are apt to recur or where there are other compelling reasons why such an appeal should be entertained."*

12. Finally, the applicant refers to the dicta of O'Donnell C.J. in *Odum & Ors v Minister for Justice & Equality* [2023] IESC 3 discussed below.

13. In applying these principles, the applicant argues that having regard to the *Farrell* factors, if the two proposed points are not agitated, there will continue to be illegality and a lack of clarity with respect to the Article 17 procedure for all applicants for protection under the Dublin III regime. He further argues that if challenges to decisions

of the IPAT and Article 17 refusals are concluded on the same basis as in this case, with the Court granting injunctive relief and the State parties conceding that the relevant Transfer Order will expire before a substantive conclusion to a judicial review is made, that these points will never be determined by the High Court.

14. It is submitted that it is highly unlikely that an IPAT and/or Article 17 decision will be challenged and determined within the six-month time limit allowed by the Dublin III regime, and that it would be a more efficient use of the courts' resources for the issues to be determined in this case in circumstances where I have already given a detailed judgment.

15. In addition to the foregoing the applicant puts significant emphasis in his submissions on what is termed the "*Carltona* ground". The applicant contends that under Article 35 of the Dublin III Regulation and principles of domestic law, the Minister alone can make an Article 17 determination, displacing the *Carltona* principle. He relies on the dicta of MacMenamin J. in *WT v Minister for Justice and Equality* [2015] IESC 73 where he held that the Carltona principle could be displaced by "*express statutory provision to the contrary or by necessary implication*". It is submitted that the principle is displaced here by the finding of Charleton J. in *NVU v Refugee Appeals Tribunal* [2020] IESC 46 where he held that an example of a power as wide as that conferred by Article 17 being vested in an administrative or quasi-judicial body would be difficult to come by, if one existed at all, and that "*there is no sign of…any basis on which that discretion could ever be exercised by anyone other than the Minister*." It is further submitted that a simple redesignation of an IPO officer who would otherwise be prohibited from making the Article 17 decision as an "Officer of the Minister" does not suffice to enable them to exercise the discretion.

16. The respondent seeks to distinguish the decision in *Farrell*. It is argued that the position in this case is one where there is no reality to the argument that the point will evade review. As averred by Mr. O'Riordan in his affidavit at paragraph 9, it is the Minister's intention to transfer applicants the subject of transfer decisions who were unsuccessful on appeal to the IPAT unless the High Court has granted injunctive relief. It is submitted that the mere fact that an applicant may be transferred does not mean that they will be unable to pursue judicial review and raise the points they wish to argue. Reliance is placed on my decision in *RG v IPAT* [2023] IEHC 742 where I refused an injunction partly on that basis. The respondent goes on to submit that the legal issues here should be determined in a case where there remains a concrete dispute between the particular applicant and the state respondents. It is submitted that it is not the case that, if the relevant issues proposed by the applicant are not determined in these proceedings, those issues become immune from review.
17. Moreover, the respondent points out that if in a future case this issue arises again, to avoid the case becoming moot, the Court could give priority to a case and ensure it is heard with expedition.
18. The respondent further seeks to distinguish the situation that arose in *McDonagh* where the Court of Appeal was concerned that the issue in question would escape review if the court was not to exercise its discretion to hear the appeal. The respondent submits that the 90-day custodial period in question in that case was of significance and that the circumstances were much more pressing than arise here.
19. In addressing *Lofinmakin,* the respondent highlights from the decision of Denham C.J. at paragraph 22 where she held:

> *"The fact that a case raises an important point of law is not of itself a reason to bring it within the exceptional category. The foundations of a case that is moot have fallen away and so they are usually not appropriate cases upon which to decide important points of law, unless there are other factors such as arose in O'Brien v. Personal Injuries Assessment Board and Okunade."*

20. The respondent also rely on the concurring opinion of McKechnie J. Attention is drawn to paragraph 53 where McKechnie J. held that, in principle, the courts will not hear issues which are moot, notwithstanding that there may be important issues of law between the parties. He went on to hold it is only where there are a range of exceptional circumstances that the courts will exercise their discretion to intervene to hear an otherwise moot case.
21. Finally, reliance is placed on paragraph 68, where McKechnie J. held as follows: *"It should also be noted that the Minister for Justice opposes the application to have these questions determined. That of course cannot in any way be decisive, but given the centrality of his role as the decision-maker, and as operating the process by which such decisions are arrived at, his views must inevitably carry some weight in the exercise of the courts' discretion. In this respect, the case is unlike Dunne No. 1, O'Brien, or Irwin where the equivalent office holder was most anxious to have the matters determined."*

Analysis

22. The first question that arises from the two-step *Lofinmakin* approach is straightforward: is the matter moot? As outlined above, the applicant concedes that the Minister making the Article 17 decision rendered the substantive issues moot. However, the respondent notes that in the second last paragraph of the applicant's submissions the conclusion appears to be that the matter is still "*live*" for the purposes of the *Lofinmakin* principles

and that the matter retains the "*essential characteristics of a legal dispute.*" The respondent is at pains to argue that simply because the parties are not agreed as to the legal points at issue, this does not mean the matter is a "live controversy" for the purposes of *Lofinmakin*. She submits that the case is not live as its resolution will not have any effect on the legal situation of the applicant himself.

23. Insofar as it could be said the applicant is arguing that the case is a live controversy within the meaning of the *first part* of the *Lofinmakin* test, the respondent is entirely correct. The determination of the substantive matters at issue can no longer have any legal effect on the applicant.

24. As set out above, the main substance of the applicant's arguments revolves around the application of the *Farrell* principles to the effect that he does not believe that it is likely that the issues in this case will ever be determined in another case because the scenario that leads to mootness here is likely to reoccur in future cases. That will preclude determination of the Article 17 issues.

25. I do not accept this is necessarily the case. This case has become moot because I granted an injunction restraining transfer, the time identified in the Dublin III regime for such transfer then expired and therefore the respondent no longer seeks to transfer the applicant. The purpose of the proceedings was to prohibit the transfer. However, in another case, an injunction may not be granted, an applicant may be transferred, and the applicant may therefore still wish to challenge the Article 17 decision in an attempt to quash the transfer. Or if an Article 17 decision is made shortly after an IPAT decision, a challenge could be made to both and therefore expedited procedures could be put in place by the Court to ensure the challenge was heard before the six month time limit under the Dublin III regime expires. Accordingly, I cannot agree that if these

proceedings are not heard, the issues the applicant wishes to litigate are certain to evade hearing. Therefore, the applicant has failed to establish that this case falls into the *Farrell* exception.

26. But quite separately, there is another reason why this moot case should not be heard. As canvassed by McKechnie J. in *Lofinmakin*, it is of course true that two notable exceptions to the rule on mootness are *O'Brien v PIAB (No. 2)* [2007] 1 IR 328 and *Irwin v Deasy & Anor.* [2010] IESC 35. A summary of the facts in each can be found at paragraphs 40 to 46 of McKechnie J.'s judgment but for my purposes it suffices to understand that in both cases the Supreme Court determined matters despite questions as to their mootness where "*both…decisions, in some very definite, specific and constraining way, gravely impacted on the performance of statutory functions. Moreover, both were anxious to have the issues determined*.".

27. The applicant identifies those important points of law as (a) the argument that the Article 17(1) application and determination process is unlawfully uncertain; and (b) the alleged breach of the Carltona principle (assuming the amendment sought is permitted). But the affidavit of Mr. O'Riordan makes it clear that the Article 17 regime is on the brink of change. At paragraph 6 he avers as follows:

> *"In respect of putting a more formal Article 17 procedure, the intention of the Department of Justice and the Attorney General's office is to wait until the Court of Justice gives judgment in Case C-359/22 AHY v. Minister for Justice before taking steps in this regard. I believe that judgment is due to be delivered on 18 April 2024. Therefore the respondents do not see any reason connected with the public interest to proceed with this judicial review at this point in time, where the situation is in a state of flux".*

28. Therefore, the applicant is asking that the legality of the procedures employed in his case – now moot – should be evaluated in circumstances where the uncontroverted evidence before me is that the decision of the CJEU in *AHY* on the reference sent by Ferriter J. in 2022 is very likely to change the way the respondent approaches Article 17 decisions altogether. In those circumstances, it is difficult to see how the resulting decision could be of assistance to other situations in the future, as the respondent has averred to its attention to alter its approach depending on the outcome of the CJEU reference.
29. It is true that this proposed change most obviously will affect the plea that the current procedure is "unlawfully uncertain." But the reference in the averment to a "more formal Article 17 procedure" may also affect the identity of the persons who take those decisions and, in this way, may also be relevant to the *Carltona* argument. In any case, the *Carltona* ground is not part of the existing proceedings. The argument that an applicant should be entitled to argue a moot case, not on the basis that existing pleas require determination, but on the basis that pleas not yet in the case require determination, is an ambitious one indeed and no case law has been cited in support of an entitlement to do so.
30. Returning to the question of the utility of hearing this moot case, unlike in the cases identified above, no statutory functions are being curtailed. Equally, as identified by Mr. O'Brien, unlike in the *Irwin v. Deasy* and *O'Brien* cases, the respondent here actively does not want this resolved and in fact argues to the opposite effect.
31. In conclusion, it is helpful to recall the approach of the Supreme Court in *Odum*. There, O'Donnell C.J., having acknowledged the different considerations that apply to Supreme Court appeals given their implicit public importance, observed as follows: *"In general, the more clearly the case retains its essential character as a real*

controversy which is capable of being properly resolved and the less it resembles a contrivance for the purpose of achieving some change in the law abstracted from a real controversy, the more likely it is that a court will proceed to hear the case in the proper exercise of its jurisdiction."

32. In the circumstances of this case, I consider that the attempt to amend the pleadings to introduce new points is in substance a contrivance for having points determined that can have no relevance whatsoever to this applicant. These proceedings should not be used as a vehicle in respect of questions that (a) may be determined in another case where there are challenges to existing Article 17 decisions; and (b) are unlikely to impact on the exercise of statutory functions more broadly given the proposed change in approach of the respondent to the making of Article 17 decisions in future.
33. In conclusion, this case is entirely moot; it does not come within those exceptions where it is appropriate to determine moot cases; and accordingly I refuse to entertain the amendment application.

Costs/Other Orders

34. I will put the matter in for mention on **Friday 3 May 2024** in the asylum list for submissions to be made in relation to costs or any other Orders. The parties have liberty to apply in respect of the date.