APPROVED **NO REDACTION NEEDED**

THE COURT OF APPEAL

Civil

Neutral Citation Number: [2025] IECA 43

Court of Appeal Record Number: 2024/144

High Court Record Number: 2023/104 JR

Whelan J.
Meenan J.
O'Moore J.

IN THE MATTER OF SECTION FIVE OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED)

BETWEEN/

FOM

APPLICANT/RESPONDENT

- AND –

THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS/APPELLANTS

Court of Appeal Record Number: 2024/145

High Court Record Number: 2023/640JR

BETWEEN/

KE

APPLICANT/RESPONDENT

- AND –

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

RESPONDENTS/APPELLANTS

JUDGMENT of Mr. Justice Charles Meenan delivered on the 25th day of February 2025

Introduction: -

1. This is an appeal by the above-named appellants (The Minister) from a decision of the High Court (Phelan J.) granting FOM, the first named respondent: -

(1) An order of *certiorari* quashing the decision of the Minister made under s. 50A of the International Protection Act 2015 (the "Act of 2015").

(2) An order of *certiorari* quashing the return order made by the Minister under s. 51A of the 2015 Act dated 26 January 2023 requiring the first named applicant to leave the State and return to the United Kingdom.

The second named respondent, KE, was granted the following reliefs: -

(1) An order of *certiorari* quashing the decision of the Minister dated 27 April 2023 made under s. 21(6) of the Act of 2015 affirming the recommendation of the International Protection Office (IPO) confirming the applicant's application for international protection be deemed inadmissible.

(2) An order of *certiorari* quashing the decision of the International Protection Appeals Tribunal dated 27 April 2023 made under s. 21(6) of the Act of 2015

affirming the recommendation of the IPO that the applicant's application for international protection be deemed inadmissible.

(3) An order of *certiorari* quashing the decision of the Minister made under s. 21(11)(b) of the Act of 2015 dated 10 May 2023 determining that the applicant's application for international protection be deemed inadmissible.

In addition, the High Court granted both respondents a declaration in the following terms: -

"That the designation of the United Kingdom as a 'safe third country' pursuant to the International Protection Act 2015 (Safe Third Country) Order 2020 S.I. 725/2020 is contrary to Ireland's obligations under EU law."

2. In December 2020, contemporaneous with the withdrawal of the United Kingdom from the European Union, the Minister signed the International Protection (Safe Third Country) Order 2020 (S.I. No. 725 of 2020) ("The Safe Third Country Order") into law, pursuant to s. 72A of the Act of 2015. The effect of this Order was to designate the United Kingdom of Great Britain and Northern Ireland as a safe country for the purposes of the Act of 2015. The concept of a *"safe third country"* refers to a country transited by an applicant for international protection which is considered safe for the provision of international protection.

3. These proceedings concern the lawfulness of the designation of the UK as a *"safe third country"* in light of the then British government's "Rwanda policy". This policy was the response of the government of the UK to the significant increase in the number of people crossing the English Channel in small boats to seek asylum in the UK. Under this policy, following agreement with the government of Rwanda, those arriving in the UK without permission, with some exceptions, would be relocated to Rwanda where their asylum claims would be determined. Those granted refugee status would remain in Rwanda and be ineligible to return to the UK.

4. The Rwanda policy was the subject of judicial review proceedings in the UK. Ultimately, the Supreme Court of the United Kingdom upheld an earlier Court of Appeal (UK) decision that the Rwanda policy was unlawful. It is not necessary to set out in any detail the decision of the UK Supreme Court (see *AAA & Ors v Secretary of State for the Home Department* [2023] 1 WLR 4433; [2023] UKSC 42) but, relevant to these respondents, the court held that there were substantial grounds for believing that the removal of those seeking asylum in the UK to Rwanda would expose them to a real risk of ill treatment by reason of refoulement.

5. In light of the Rwanda policy, the respondents challenged the lawfulness of the decisions made under the Act of 2015 to (i) refuse to admit them to the protection process in this jurisdiction and (ii) to return them to the UK for further processing of their claims for protection in reliance of the UK being designated a safe third country.

6. Following the judgment of the High Court there were two significant events. Firstly, following a change of government in the UK, it was announced that the Rwanda policy would no longer be pursued. Secondly, and more significantly, the Civil Law, Criminal Law and Superannuation (Miscellaneous Provisions) Act 2024 (the Act of 2024) was enacted. This Act provided for, *inter alia*, the repeal of S.I 724 of 2020 which designated the UK as a safe third country and made a number of significant amendments to the Act of 2015. Counsel for the appellants accepted that these amendments, reflected or mirrored the judgment of the High Court but emphasised that this did not amount to an acceptance of the judgment. Further, no further order has been made designating the UK as a safe third country. Following these statutory amendments, the question of mootness clearly arises. In considering this question it is necessary to set out the relevant provisions of Irish legislation, the effects of the amendments set out in the Act of 2024 and the relevant provisions of EU law.

<u>Irish statutory provisions</u>: -

7. I will set out the relevant provisions of the Act of 2015 prior to the amendments provided for in the Act of 2024.

Section 21 is titled *"Inadmissible Application"* and provides: -

"(1) A person may not make an application for international protection where the application is, under *subsection (2)*, inadmissible.

(2) An application for international protection is inadmissible where one or more than one of the following circumstances applies in relation to the person who is the subject of the application

(a) ---

(b) ---

(c) the person arrived in the State from a safe third country that is, in accordance with *subsection (17)*, a safe country for the person.

(3) Where an international protection officer is of the opinion that an application for international protection is inadmissible, he or she shall recommend to the Minister that the application be determined to be inadmissible.

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(17) For the purposes of this section, a safe third country is a safe country for that person if he or she–

(a) ---

(b) will not be subjected in the country concerned to the death penalty, torture or other inhuman or degrading treatment."

8. Section 50A makes provision for the prohibition of refoulement concerning applications for international protection which were determined under s. 21 to be inadmissible.

9. Section 51A makes provision for the Minister to make a *"return order"* to require a person whose application for international protection has been determined under s. 21 to be inadmissible to leave the State.

10. Section 72A provides: -

"(1) The Minister may by order designate a country as a safe third country.

(2) The Minister may make an order under *subsection (1)* only if he or she is satisfied that a person seeking to be recognised in the country concerned as a refugee will be treated in accordance with the following principles in that country–

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

(b) the principle of non-refoulement in accordance with the Geneva Convention is respected;

(c) the prohibition of removal, in violation of the right of freedom from torture and cruel, inhuman or degrading treatment, as required by international law, is respected, and

(d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention."

11. Pursuant to the provisions of s. 72A of the Act of 2015, by order dated 31 December 2020, the Minister designated the UK as a safe third country for the purposes of the Act of 2015 (S.I. 725 of 2020).

EU law: -

12. Article 27 of Council Directive 2005/85/EC (*"The Asylum Procedures Directive"*) provides, under the heading *"The Safe Third Country Concept"*, that: -

> "(1) Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned: --"

13. The Article then lists some four principles (a) to (d). It is to be noted that these are the four principles as are set out in section 72A of the Act of 2015 (see above).

14. Article 38 of Council Directive 2013/32/EU (*"Recast Asylum Procedures Directive"*) (the *"Recast Directive"*) repeats the provisions of Art. 27 of the earlier Directive but with the addition of the following principle: -

> "(b) there is no risk of serious harm as defined in Directive 2011/95/EU"

Article 15 of Directive 2011/95/EU defines *"serious harm"* as consisting of: -

> "(a) the death penalty or execution; or
>
> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
>
> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

15. In the Recast Directive, Recital no. 58 provides that Ireland is not bound by the provisions of the Directive. Recital 58 provides: -

> "In accordance with Article 1, 2 and Article 4a(1) of Protocol number 21 on the position of the United Kingdom and Ireland in respect of the area of freedom security and justice, annexed to the TEU the TFEU, and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption of this Directive and are not bound by it or subject to its application."

16. Regulation (EU) no. 604/2013 (*"Dublin III"*) provides in Chapter II under the heading *"General Principles and Safeguards"* at Article 3:

> "3. Any Member State shall retain the right to send an applicant to a safe third

> country, subject to the rules and safeguards laid down in Directive 2013/32/EU."

Article 49 Provides under the heading "*Entry into force and applicability*": -

> "—References in this Regulation to (the Recast Directive) shall be construed until the dates of their application, as references to --- Directive 2005/85/EC .."

The Respondents: -

17. I will set out the background and legal position of each of the respondents.

FOM: -

18. This respondent is a man from Iraq of Kurdish origin who applied for protection in the State on 18 May 2021. He stated that he had applied for international protection in the UK in 2018 but that his application was refused. He claimed protection on religious and political grounds and confirmed that he was convicted of a border crossing offence in Iraq but had not served any custodial sentence. He claimed that he had travelled from the UK to Iraq in December 2020 to seek out family, believed lost during ISIS incidents occurring in September 2017. He claimed he had left Iraq on 29 March 2021 and travelled through several countries before arriving in Ireland.

19. On 4 October 2021, the UK informed the International Protection Office (the IPO) that this respondent was accepted to be readmitted to their immigration procedures. On 3 March 2022, the IPO issued a recommendation under s. 21(4) of the Act of 2015 confirming that the application had been determined to be inadmissible under s. 21(2)(c) and 21(17) as the UK was considered to be a safe third country.

20. This respondent unsuccessfully appealed the decision to the Tribunal. In its decision, the Tribunal referred to inconsistencies and contradictions which negatively affected this respondent's claim to have left the UK. The Tribunal was satisfied that this respondent had *"sufficient connection"* to the UK and it would be reasonable to return him there.

21. On 5 August 2022, the Minister issued a notice confirming the application to be inadmissible and stated that the Minister would proceed to make a return order under s. 51A, subject to s. 50A of the Act of 2015. On 26 January 2023 the Minister issued a return order under s. 51A of the Act of 2015 directing the respondent to return to the UK.

22. In his proceedings, the respondent challenged the safe country return system as operated as being *ultra vires* by reason of non-compliance with EU law. He contends that the designation of the UK as a safe third country was unlawful by reason of a failure to conduct a meaningful review and/or irrationality.

23. During the course of the hearing before the High Court information came to light bearing on the candour of this respondent's application and his entitlement to obtain relief. Further affidavits that were filed disclosed that in October 2021, in responding to a biometric data request which had been made on 28 September 2021, the UK authorities had advised that this respondent had been convicted of an offence in June 2018 in the UK and was, as a consequence, registered as a sex offender. It would appear that this information had been redacted by reason of data protection concerns but that an *"alert"* was placed on the respondent's file. This *"alert"* was only noticed by an official in the Repatriation Unit on 14 December 2023 and further information was only forthcoming from the UK on 19 February 2024, the day before the hearing in the High Court was due to commence.

<u>KE</u>: -

24. This applicant is a Nigerian national who applied for international protection in the State on 24 May 2022. At interview, it was confirmed that he had been living in the UK pursuant to a visa. Information from the UK confirmed that this respondent had been granted a student visa from 26 December 2020 to 31 May 2022. He entered the UK on 2 January 2021 and remained there for approximately five months before travelling to the State to apply for protection.

25. In July 2022 the respondent submitted an application for international protection claiming that he and his family were prominent members of the Indigenous People of Biafra and had been targeted by both Fulani herdsmen and the Nigerian Security Forces.

26. Further information from the UK authorities stated that this respondent had made an application for asylum in the UK which had been refused on 5 November 2019. Subsequently, following an appeal, he was given permission to work in the UK on 16 June 2022.

27. In November 2022, following a further biographical data request from the IPO, the UK accepted this respondent's readmission. It was confirmed that he had no known relatives in the UK.

28. In February 2023 the IPO conducted an inadmissibility consideration interview during which this respondent confirmed that he had lived in the UK for a year and five months on a student visa, had no family there and had worked in a warehouse. He claimed that he was unsafe in the UK as he owed money and his life was in danger. The IPO recommended that the respondent's application be deemed inadmissible because the UK is *"a safe third country"* and the applicant had *"a connection with the UK on the basis of which it is reasonable to return him there."*

29. The respondent unsuccessfully appealed the decision of the IPO to the Tribunal. On 10 May 2023 the Minister issued an inadmissibility decision under s. 21(11) of the Act of 2015. Proceedings by way of judicial review had commenced before the Minister proceeded to consider making a return order under s. 51A of the Act of 2015.

30. In his proceedings, this respondent challenges the inadmissibility decision and the original and continuing designation of the UK as a safe third country as well as the Tribunal decision finding his application inadmissible.

31. Both respondents in their judicial review proceedings raised issues concerning the prohibition against non-refoulement and data protection rights.

Judgment of the High Court: -

32. At paragraph 115 of the judgment of the High Court the Trial Judge identified some nine substantive issues to be determined. However, in considering the matter of mootness, the following issue is central: -

> *"Is the designation of the UK as a safe third country under s. 72A of the Act of 2015 and S.I. 725/2020 ultra vires the Procedures Directive and/or the Recast Directive".*

33. The Trial Judge set out the provisions of the Asylum Procedures Directive and the Recast Directive, stating: -

> *"126. Although in almost identical terms to Article 27 of the Procedures Directive, Article 38 of the Recast Procedures Directive added an additional requirement (at Article 38(1)b)) that Member States are permitted to operate the safe third country concept only where there is no risk of serious harm as defined in Directive 2011/95/EU … . This is the primary material difference between the Procedures Directive and the Recast Procedures Directive relevant to the issues in these proceedings.."*

34. The Trial Judge then referred to the Dublin III Regulation, stating: -

> *"129. Notably, under Article 3(1) of Dublin III, a right to have an application for international protection made within the territory of a Member State examined by a Member State is established as follows:*
>
>> *'1. Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.*

130. ---

131. Importantly for present purposes, under Article 3(3) of Dublin III, provision is made for the application of the Safe Country Concept as follows:

'(3) Any Member State shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU."

35. The Trial Judge then referred to the provisions of s. 72A the Act of 2015, which concerns the designation safe third countries by the Minister. The Trial Judge stated: -

"134. As is immediately apparent, s. 72A is drafted in terms which mirror the requirements of the Procedures Directive at Art. 27(1)(a) – (d) but not the Recast Procedures Directive at Art. 38(1)(a) – (e). Specifically, a requirement has not been specified that the Minister only operate a safe third country designation when satisfied there is no risk of serious harm as defined in Directive 2011/95/EU (the Recast Qualifications Directive)."

36. The respondents submitted that the designation of the UK as a safe third country was *ultra vires* as there was a failure on the part of the Minister to provide for safeguards necessitated under EU law, specifically under Art. 38 of the Recast Procedures Directive. They submitted that this obligation arose under the provisions of Art. 3 of Dublin III. The Trial Judge accepted this submission, stating: -

"158 ---

Article 3(1) clearly, in express terms and using plain English, provides for a right to have an application for international protection made within the country of a Member State examined by a Member State. Article 3(1) makes it mandatory ('Member States shall examine any application') that an application for international protection by a third country national or a stateless person who applies on the territory of any Member

State be examined by a single Member State. While the Dublin III regulations thereafter provide for a system for determining which Member State is responsible, the only exception to the obligation of the responsible Member State as determined in accordance with Dublin III regulation criteria is that provided for at Article 3(3).

159. As I read it, Article 3(3) does not operate to merely signal that the safe third country concept remains available, as the Respondents posit, but rather makes the right of any Member State to rely on that concept 'subject to' the rules and safeguards laid down in the Recast Procedures Directive. The plain meaning of the language of the provision is therefore to permit reliance on the concept provided the conditions specified in the Recast Procedures Directive are complied with. That being so, it follows that the risk of serious harm as defined under the Recast Qualifications Directive must be excluded where reliance is placed on the safe third country concept consequent upon the terms of Article 38(1)(b) of the Recast Procedures Directive which imports this requirement by way of enhanced protection in addition to that previously provided under Article 27 of the Procedures Directive."

37. Under the heading *"Conclusion"* the Trial Judge stated: -

> *"294. Mandatory conditions prescribed by EU law have not been provided, however, through the legislative provision made for the same under the 2015 Act (as amended). Specifically, no proper provision has been made for conditions precedent to the application of a safe third country concept necessitated by Article 38(1)(b) of the Recast Procedures Directive as regards a risk of serious harm within the meaning of Article 15(c) of the Recast Qualifications which applies by operation of Article 3(3) of the Dublin III Convention …"*

<u>Notice of Appeal</u>: -

38. The Minister appealed all of the judgment of the High Court. In their written submissions in support of the appeal, the Minister contended that the Trial Judge was in error in her interpretation of the Dublin III Regulation. The Minister submitted that Ireland did not participate in the adoption of the Recast Directive and it was clear from Recitals 12, 41 and Article 49 of the Dublin III Regulation that references to the Recast Directive should be construed as references to the original Asylum Procedures Directive, in relation to any Member State not bound by the Recast Directive. (Article 49 is set out at para. 16 above).

39. The Minister also submits that the Trial Judge did not take into account the State's position as is provided for in the EU Treaties. It is submitted that the Recast Directive is a measure adopted pursuant to Article 18(2)(d) of the Treaty of the Functioning of the European Union (TFEU) which falls within Title 5 of Part 3 which contains provisions in respect of the area of freedom, security and justice. Protocol (no. 21) of the Treaty on European Union (TEU) on the position of Ireland in respect of the area of freedom, security and justice expressly referred to in Recital 58 of the Recast Directive, provides that no measure *"shall in any way affect the competences, rights and obligations"* of Ireland, unless Ireland expressly adopts to participate in such a measure. (Recital 58 is set out at para. 15 above).

40. More fundamentally, the Minister submitted that as a matter of constitutional law Ireland cannot be bound by any provision of the Recast Directive where it has opted not to participate in that Directive. Ireland cannot opt to disapply Protocol (no. 21) in whole or in part without the prior approval of both houses of the Oireachtas, pursuant to Art. 29.4.(iii) of the Constitution.

41. These are, without doubt, substantive submissions raising serious issues of constitutional and EU law. However, the provisions of the Act of 2024 fundamentally

altered the statutory framework against which the position of both respondents has to be considered.

42. The respondents lodged a Notice of Cross Appeal concerning, *inter alia*, the Trial Judge's finding on the non-transposition of the Asylum Procedures Directive, alleged breach of the principle of non-regression and alleged breach of data protection rights.

The Act of 2024: -

43. Section 6 of the Act of 2004 revokes S.I. 725 of 2020 which designated the UK as a safe third country. As of the date of the hearing of this appeal (16 December 2024) no further order designating the UK as a safe third country had been made.

44. Section 9 of the Act amends s. 50A of the Act of 2015 by the substitution of the following subsection or subsection (1): -

> *"(1) A person shall not be expelled or returned in any manner whatsoever to the frontier of a territory–*
>
> *(a) where, in the opinion of the Minister–*
>
> *(i) a life or freedom of the person would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or*
>
> *(ii) there is a risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, or a serious and individual threat to his or her life or person by reason of indiscriminate violence in situations of international or internal armed conflict, or*
>
> *(b) where the Minister is of the opinion that such expulsion or return would be prohibited under any enactment or rule of law as a breach of the person's fundamental rights."*

It can be seen that this amendment reflects the additional principle set out in Art. 38 of the Recast Directive concerning the concept of a safe third country.

45. Section 13 of the Act amends s. 72A of the Act of 2015 by the insertion of the following paragraph: -

> *"(a)(a) there is no risk that a person would be subjected to the death penalty, torture or inhuman or degrading treatment or punishment, or a serious and individual threat to his or her life or person by reason of indiscriminate violence in situations of international or internal armed conflict."*

Like the amendment of s. 50A of the Act of 2015 s. 72A, which concerns the designation of safe third countries, is amended to include the additional principle set out in Art. 38 of the Recast Directive.

46. Counsel for the appellants accepted that these statutory amendments mirrored or reflected the terms of the High Court judgment but strongly resisted any suggestion that the amendments amounted to an admission that the judgment of the High Court was correct. However, it seems to me inescapable that if, in the future, either of the respondents are going to be returned to the UK as a safe third country such would involve consideration by the Minister of an additional principle provided for in Art. 38 of the Recast Directive. A reconsideration by the Minister of the situations of both respondents would be inevitable. This clearly raises the issue of mootness.

<u>Mootness</u>: -

47. The respondents submit that the consequences of the amendments provided for in the Act of 2024 are that, even if the Minister was successful in this appeal and established that her decision and/or that of the Tribunal was lawful at the time they were made, these decisions are no longer of relevance as any further decisions concerning the respondents

would have to be made in accordance with the said amendments. Hence, there is no longer any live issue or controversy between the parties.

48. The principles to be applied in considering the issue of mootness are comprehensively set out in the judgments of Denham C.J. and McKechnie J. in the decision of the Supreme Court in *Lofinmakin v Minister for Justice and Ors.* [2013] 4 IR 274. Like the instant case, the facts of *Lofinmakin* raised issues of asylum law. In *Lofinmakin* the first and second named appellants, having been born in the State, were Irish citizens. Both were the children of the third and fourth named appellants, who were Nigerian nationals. The Minister for Justice made a deportation order against the third named appellant. The appellants sought the leave of the High Court to bring judicial review proceedings seeking, *inter alia*, an order of *certiorari* quashing the order of the Minister. Leave was refused by the High Court but some six weeks later the Court of Justice of the European Union delivered judgment in the *Zambrano* case, in which the rights of citizen children of the European Union were held to derive from Art. 20 of the Treaty on the European Union. The High Court subsequently granted a certificate for leave to appeal to the Supreme Court on two certified questions against the refusal of leave. The Minister then revoked the deportation order against the third appellant and submitted, successfully, that the appeal was now moot.

49. In her judgment, Denham C.J. recited the decision of the Canadian Supreme Court in *Borowski v Canada (AG)* [1989] 1 SCR 342 where it was stated: -

> *"An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceedings is commenced but also when the Court is called upon to reach a decision. The general policy is enforced in moot cases unless the Court exercised its discretion to depart from it."*

Denham C.J. was of the view that this reflects the law in this jurisdiction.

50. On the issue of discretion, Denham C.J. stated: -

"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 (No. 2) [2006] IESC 62, [2007] 1 IR 328 and Okunade v Minister for Justice [2012] IESC 49, [2012] 3 IR 152."

51. *O'Brien* and *Okunade* illustrate the nature of the factors that need to be present if a court is to exercise its discretion that an action is not moot notwithstanding the fact that there is no longer a live controversy between the parties. In *O'Brien*, though there was no longer an issue between the parties, such an issue was live in many other similar cases involving other parties and the Personal Injuries Assessment Board (PIAB). It was clearly in the public interest that it be resolved and that PIAB would have clarity on its statutory duties.

52. *Okunade v Minister for Justice* also concerned issues of asylum law. In this case, the appellants were Nigerian nationals who had unsuccessfully applied for refugee status and subsidiary protection. The respondent sought to deport them. The appellants had sought to judicially review the refusal of subsidiary protection and the decision to deport them. The respondent gave a limited undertaking not to deport them until the first return date of their judicial review proceedings. The appellants unsuccessfully sought an interlocutory injunction restraining their deportation pending the hearing of their application for leave to seek judicial review. The appellants appealed this refusal to the Supreme Court but prior to the hearing of the appeal the application for leave to seek judicial review was refused by the High Court, thus rendering the appeal moot. However, the Supreme Court proceeded to hear the appeal. Clarke J. (as he then was) considered the issue of mootness. At p. 168 of the judgment, he stated: -

"(36) --- On that basis the full appeal was listed for hearing at an early stage. A further reason for adopting that course of action was that the court was told that the issues which arose on this appeal, at least the general level of principle, arise in a significant number of other cases so that an early determination by this court of the substantive appeal was considered desirable for the purposes of clarifying the law in this area ...

(37) This case had, therefore, been, in a sense, designated as an appropriate test case by reference to which the broad issues which are addressed in this judgment were to be determined .."

53. Turning to *Lofinmakin*, McKechnie J. in his judgment stated: -

"(82) From the relevant authorities thus reviewed and leaving aside the issue of costs which is dealt with separately (para. 102, infra et seq.), the legal position can be summarised as follows: -

(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 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.

(83) ---

(84) In summary it can be said that, in light of the considerations stated above, the courts do not in principle try issues which are moot, notwithstanding that these may have been an important question of law in issue between the parties and it is only where there are a range of exceptional circumstances that the courts will exercise their discretion to do so."

54. In applying these principles, the first question I have to address is whether, following the enactment of the Act of 2024, there is any longer a live controversy between the parties. The central issue was the designation by statutory instrument of the UK as a safe third

country. That order has now been revoked. If a further designating order is to be made, the Minister will be obliged to consider a new principle, namely that set out at s. 72(2)(a)(a) of the Act of 2015. Such an order could be the subject of further judicial review proceedings.

55. Other legislative amendments brought about by the Act of 2024 include an amendment to s. 21 of the Act of 2015, giving additional protections to persons returned to a safe third country. The amendment to s. 50A provides that a return order would not be made where such would be in breach of a person's fundamental rights (see s. 50A(1) of the Act of 2015).

56. The effect of these legislative amendments is to afford additional protections to persons who may be the subject of a process that leads to the making of a *"return order"* than were available prior to the passing of the Act of 2024. Both these respondents are entitled to these additional protections. As no decisions have been taken by the IPO, the Tribunal or the Minister concerning the respondents under these new statutory provisions, it must follow that there is no longer a controversy between the parties. Thus, even a decision in favour of the Minister on this appeal would have no practical impact or effect. I refer to the following passage from the judgment of McKechnie J. in *Lofinmakin*: -

> *"(65) A case, an appeal, or some issue within either, may cease to give rise to any real or actual conflict between the parties for numerous reasons. Changed circumstances may result in either the loss or absence of a legal interest for many causes. A few examples will suffice to illustrate the point:*
>
> - *the repeal of the impugned provision or the expiry of the entire statute leaving no issue; ..."*

57. The next matter that has to be considered is whether, even though there is no longer a controversy between the parties, this Court should exercise its discretion and proceed to hear the appeal.

58. I have already referred to the decisions in *O'Brien v PIAB* and *Okunade v Minister for Justice* which give guidance on how a court's discretion ought to be exercised. In both of these cases there were wider considerations. In *O'Brien* the consideration was how PIAB should exercise its statutory functions and in *Okunade* the criteria for the granting of a stay or interlocutory injunction in the context of judicial review proceedings. No such wider considerations are present in these appeals.

59. I understand it to be the case that these two appeals are *"lead cases"* for a number of other similar type applications. However, both of these respondents and those involved in other applications will have their position determined under amended legislation, not the legislation that had been applied to the respondents.

60. As I have mentioned earlier, the Minister in her written submissions has raised serious issues of both domestic and EU law. It is clear from the authorities which I have cited that raising important issues of law is not, of itself, a reason to bring these appeals within the exceptional category. Were these appeals to proceed, this Court would be asked, in effect, to give an opinion or advice on legislation that has been repealed or amended. As was stated by McKechnie J. in *Lofinmakin*: -

> *"(59) The rule by which a court will decline to hear and determine an issue on the grounds of mootness is firmly based on the deep-rooted policy of not giving advisory opinions, or opinions which are purely abstract or hypothetical. This policy stems from and is directly related to the system of law within which our courts discharge their essential function of administering justice. ..."*

61. The appellants sought to rely on the provisions of s. 27 of the Interpretation Act 2005, which provides: -

> "27.—(1) Where an enactment is repealed, the repeal does not—

(a) revive anything not in force or not existing immediately before the repeal,

(b) affect the previous operation of the enactment or anything duly done or suffered under the enactment,

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment,

(d) ---

(e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention.

(2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred -- may be -- continued or enforced --, as if the enactment had not been repealed."

62. I do not think that this statutory provision is of assistance to the Minister. It is clear that the provisions of the Act of 2024 go considerably further than repealing the relevant statutory instrument. The amending legislation provides new and additional safeguards for the respondents which, as I have said, they are entitled to rely on. The respondents would be further entitled, should they establish grounds for such, to have any decisions taken pursuant to the amending legislation reviewed by the High Court. These entitlements are not set at naught by s. 27.

63. By reason of the foregoing, I am satisfied that these appeals are moot.

Consequential orders: -

64. At the hearing of the appeals, this Court indicated that it had reached a decision, with reasons to be furnished later, that the appeals were moot. On being informed of this, the respondents withdrew their cross-appeal. Thus, both the appeals and the cross-appeal will be dismissed.

65. As for costs, as the respondents have been "entirely successful" in resisting the appeal, the provisional view of the Court is that they are entitled to their costs. However, a withdrawal of the cross-appeal during the hearing may have a bearing on what costs order, if any, should be made. The Court requests the respondents to deliver written submissions (not more than 1,500 words) within 14 days of the date of the delivery of this judgment and the appellants to deliver their written submissions in response (again not more than 1,500 words) within 14 days thereafter on the issue of the appropriate costs order to be made.

66. As this judgment is being delivered electronically, Whelan and O'Moore JJ. have authorised me to record their agreement with it.