THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 147
RECORD NO. 2017/265/JR

BETWEEN:

FA

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Ms Justice Tara Burns delivered on 3rd day of March, 2021.

General

1. This is an application for the Applicant's costs in a situation where the proceedings have become moot. The Respondents oppose this application and are seeking an order for their costs in light of the manner in which the Applicant has met the cost issue.

2. The proceedings relate to the perplexed issue of Article 17 of EU Regulation 604/2013 (hereinafter referred to as "the Dublin III Regulation"). It is one of approximately 270 cases which were placed in a Holding List while the lead case of *NVU v. RAT* which related to the issue of what body had jurisdiction to exercise the Article 17 discretion, was determined in the High Court and then pursued on appeal through the Court of Appeal and Supreme Court.

3. The Dublin III Regulation established the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

4. Article 17(1) of the Dublin III Regulation recognises that a Member State may, in its discretion, assume responsibility for an international protection application made in its territory notwithstanding that the application of the criteria contained in the Dublin III Regulation establishes that another Member State is responsible for that international protection application.

5. In *NVU v. RAT* [2020] IESC 46, Charlton J., delivering the judgment of the Supreme Court, set out the background and purpose to the Dublin III Regulation at paragraphs 17-20 as follows:-

> "17. A brief background to the Dublin Convention should be set out. A formalised system for deciding which European country was responsible for dealing with an asylum application was originally set out in the Dublin Convention of 1990, achieving the force of law in 1997. It applied also to some non-EU countries through agreement. The Dublin I Regulation was replaced by the Dublin II Regulation in 2003, replacing the Dublin Convention in all EU member states except Denmark, which joined later. Non-EU countries such as Switzerland also joined by agreement. Amendments were proposed which in 2013 became the Dublin III Regulation. In terms of purpose, the system was set up to deter forum choice while providing what is supposed to be an effective, objective and speedy system

for the identification of the country responsible for the determination of an application for international protection. While not initially constructed to share out responsibility for applications for international protection, the refugee applications burden forced some changes. What is central to the motivation for the Regulation is the need to have a coherent framework where the same applicant may not make repeated applications for asylum in different countries sequentially and without declaring a prior claim. Important also is the taking of responsibility by countries which issue visas to be the forum for any asylum application. While some countries may have systems that are perceived as slow, or as more sympathetic than others or as capable of being delayed by legal process, the series of Regulations based on the original Dublin Convention of 1990 have as their aim the setting of clear and common standards whereby forum choice by applicants must give way to responsibility of countries to finally determine asylum applications where an application has been made there or travel permission resulted in an applicant being present on that country's territory prior to an asylum application elsewhere.

18. The purpose of the Dublin III Regulation may be seen in the recitals to the Regulation. As recital 3 recalls, it was in consequence of a meeting of the European Council at Tampere in 1999 that agreement emerged on applying the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967, in order to ensure that "nobody is sent back to persecution". In that respect all of the European Council countries "are considered as safe countries for third- country nationals." It was necessary in that respect, all countries being in principle equal in their protection for those in need of asylum, that there be, as recital 4 declares, "a clear and workable method for determining the Member State responsible for the examination of an asylum application." This is to be, according to recital 5, "based on objective, fair criteria both for the Member States and for the persons concerned." The idea was simplicity and ease of application in order to "make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection." Regrettably, this family has now been in the country for 5 years pending the resolution of this point for them and for other applicants.

20. Thoroughness, commonality of system, fundamental standards of protection and dispatch in declaring the presence of refugee rights or in declaring that a person is required to leave a jurisdiction are the foundations upon which the Dublin III Regulation is built."

Unfortunately, the operation of Article 17 within this jurisdiction could not be characterised as simple or rapid with a build-up of approximately 270 cases in the course of four years.

The Applicant's Claim

6. The Applicant applied for asylum within this jurisdiction on 30 June 2015. However, the Applicant had previously been granted permission to remain in the United Kingdom which had expired less than two years prior to his application for asylum within this jurisdiction. Pursuant to Article 12(4) of the Dublin III Regulation, the United Kingdom was the appropriate Member State to determine the Applicant's asylum application and, upon request by this State, agreed to take charge of the application. The Office of the Refugee Applications Commissioner (hereinafter referred to as "ORAC"), who had jurisdiction to determine this issue pursuant to the European Union (Dublin System) Regulations 2014, issued a transfer decision on 6 May 2016.

7. The Applicant appealed this transfer decision to the First Respondent on 9 August 2016. His grounds of appeal included that Article 17 of the Dublin III Regulation was not considered by ORAC. The First Respondent was requested to exercise the Article 17 discretion in its determination regarding the transfer decision.

8. The First Respondent determined that it did not have jurisdiction to exercise the Article 17 discretion.

9. Leave to apply by way of Judicial Review for the following reliefs was granted by the High Court on 27 March 2017:-

    i) A Declaration that the first named Respondent has a power, duty and obligation to decide, in the context of an appeal from a decision/recommendation of ORAC or the International Protection Office that a "Notice of Decision to Transfer" be issued to the Applicant, whether the "discretion" available to a Member State under Article 17 of EU Council Regulation 604/2013 to examine an applicant's claim for protection despite it not being that State's obligation to do so under EU Council Regulation 604/2013 should be applied; or, in the alternative:

    ii) A Declaration that the failure of the State to put in place a mechanism through which an Applicant, such as the Applicant herein, may appeal a decision/recommendation of ORAC or the International Protection Office, that the Article 17 discretion to examine an applicant's claim not be applied, is contrary to law.

    iii) Certiorari of the decision of the first named Respondent dated the 12th March 2017 affirming the transfer decision of ORAC.

    iv) A stay / injunction restraining the execution of any Transfer Order issued in respect of the Applicant or the removal of the Applicant from the State pending the determination of these proceedings.

10. After leave was granted, the case was adjourned into the NVU holding list to await the outcome of the NVU proceedings.

History of the NVU holding list

11. In a number of other sets of proceedings relating to Article 17 which have been heard before this Court, interlocutory applications were brought by the Respondents seeking to set aside injunctions which the applicants in those cases had automatically obtained pursuant to High Court Practise Direction 81 which relates to asylum proceedings. In those proceedings, the Court received affidavit evidence regarding the history of the NVU list. No factual inaccuracy was raised by the several Counsel who appeared on behalf of the Applicants in those interlocutory applications regarding the facts averred to in those affidavits. In the course of the various cost hearings before me relating to the NVU list, reference has been made to the history of the NVU holding list in support of an argument that I should have regard to the operation of the list. Accordingly, it is appropriate that that history is set out in the instant case so that an accurate account can be recorded in this judgment, although the affidavits referred to have not been filed in the instant case.

12. An affidavit sworn by Mr Ross Murphy, Assistant Principal in the Department of Justice, in three sets of proceedings, namely *LK v. Minister for Justice; TAO v. Minister for Justice* and *AHS v. Minister for Justice*, sets out the following:-

> **"Historical Background to the Global Order and the Article 17 list**
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> 4. In early 2016 a number of challenges began to come before this Honourable Court to decisions made by the Refugee Appeals Tribunal, now the First Named Respondent, affirming decisions of the Refugee Applications Commissioner to transfer individuals to other EU Member States pursuant to the provisions of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person – known as 'Dublin III' and the 'Dublin III Regulation' - and pursuant to the European Union (Dublin System) Regulations, 2014, SI 525 of 2014.
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> 5. The common issue raised in these challenges concerned the body under Irish law that was competent to make decisions pursuant to the provisions of Article 17(1) of the Dublin III Regulation and in particular whether as contended for, the power had been vested by Regulation 3(1)(a) of the 2014 Regulations in the Refugee Applications Commissioner and thereafter on appeal pursuant to Regulation 6 in the Refugee Appeals Tribunal. Article 17(1) of the Dublin III Regulation is the provision that recognises that a Member State may in its discretion assume responsibility for an asylum application made in its territory notwithstanding that the criteria contained in Chapter III of the Dublin III Regulation establish that another Member State shall be responsible for that application.
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> 6. On 27 June 2016 this Court (MacEochaidh J) confirmed that interim injunctions in 17 cases were in place to restrain transfer of applicants to the Member State concerned in each of the cases pending judgment being delivered in the then identified lead case of *[S] v Refugee Appeals Tribunal*. Further cases were instituted during the course of 2016 and whilst a date was fixed for the lead case to

be heard on 26 and 27 January 2017, the *[S]* case was struck out by MacEochaidh J on 21 December 2016.

7. By 2 March 2017 there were at least 64 cases raising Article 17(1) related issues and by mid-March 2017 an alternate case, *NVU v Refugee Appeals Tribunal*, was identified as the subsequent lead case and that case came on for hearing before O'Regan J on a telescoped basis on 24 May 2017 and again on 26 July 2017. At this stage the size of what was by then being referred to as 'the Article 17 list' had multiplied and O'Regan J who had by this time become the presiding judge in the Asylum list determined that she would grant what was referred to as a 'global order' or 'global injunction' which would apply to all Article 17 cases at the time leave was granted to obviate the necessity of each and every applicant before the Court at leave stage seeking an injunction which said application would then have to be put on notice to the Respondents. O'Regan J delivered two substantive judgments in the *NVU* case on 26 June 2017, [2017] IEHC 490, relating to the Article 17(1) issue and on 24 October 2017, [2017] IEHC 613, relating to the Article 8(1) ECHR issue. The applicants in that case thereafter filed their Notice of Appeal with the Court of Appeal on 18 December 2017.

8. For the sake of giving a more complete picture I say and am advised that at this stage some of the cases relating to Article 17(1) such as *M.E. (Libya) v Refugee Appeals Tribunal & Ors* Record No. 2016/725, *and [H]arem v Refugee Appeals Tribunal & Ors* Record No. 2016/727, concerned situations where Article 17(1) had not in fact been raised before the Tribunal and were first raised in the judicial review proceedings and it was decided that these two cases would also be heard. All other cases raising Article 17(1) issues were adjourned to a holding list to follow behind *NVU and/or M.E. (Libya)* and *H.* This resulted in a situation whereby Ms. Justice O'Regan would simply apply the global injunction once she was satisfied to grant leave to seek judicial review.

9. Notwithstanding the outcome of the first judgment in *NVU* delivered on 26 June 2017, Mr. Justice Humphreys who by late 2017 was presiding over the asylum list heard a further Article 17(1) case on 25 October 2017, *M.A. v International Protection Appeals Tribunal* 2017/116JR and decided on 8 November 2017, [2017] IEHC 677 to refer certain questions, largely but not exclusively relating to Article 17(1), to the Court of Justice of the European Union.

10. When Mr. Justice Humphreys took over the operation of the asylum list the "global order" approach was continued and applied in all cases. That approach was then articulated in High Court Practice Direction 81 – Asylum, immigration and citizenship list which was signed by the then President of the High Court, Kelly J, on 17 December 2018 and came into operation on 1 January 2019.

11. The CJEU delivered its judgment in *M.A*. on 23 January 2019 and the appeal hearing in *NVU* before the Court of Appeal proceeded on 29 January 2019 with judgment being delivered on 26 June 2019 reported at [2019] IECA 183 and the

Order of that Court was perfected on 27 July 2019. The State thereafter sought to appeal the judgment of the Court of Appeal and by 16 December 2019 there was a minimum of 169 cases in the AZ list.

12. The Supreme Court thereafter permitted the appeal to proceed heard the appeal on 25 June 2020 following which it delivered its judgment on 24 July 2020 which is reported at neutral citation [2020] IESC 46. At the time of the judgment of the Supreme Court in *NVU* there were approximately 270 cases in the AZ holding list awaiting the outcome of the appeal."

History of the identification by the Second Respondent of who was entitled to exercise Article 17 discretion

13. Reference has also been made in this cost hearing to the history of the identification by the Second Respondent of who was entitled to exercise the Article 17 discretion. This was set out in the Court of Appeal decision in *NVU* [2019] IECA 183 at paras. 47 and 48 of the judgment, as follows:-

> "47. Up to 2015, the Minister was of the view that the exercise of discretion under Article 17(1) of Dublin III was vested in ORAC under r. 3(1) of the 2014 Regulations. This is confirmed at para. 6 of the affidavit of Brian Merriman, Principal Officer in the International Protection Policy Unit in the Department of Justice and Equality, sworn on 28 April 2017.
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> 48. The Minister now says this interpretation was not correct, and Mr Merriman avers '[i]t has now become clear that the discretion provided for in Article 17(1) is not so conferred', and further, that neither ORAC nor RAT have ever purported in practice to exercise the discretionary power"

14. In *M.A. v IPAT* [2017] IEHC 677, Humphreys J noted at paragraph 2 of his judgment:-

> "The original State position as outlined in a letter in November, 2015 from the asylum policy division of the Department of Justice and Equality to the Legal Aid Board (RLS) was that the discretion exercisable under art. 17 of the regulation is vested in the Refugee Applications Commissioner and that this was not a matter to be considered by the Refugee Appeals Tribunal at appeal stage.
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> However, there was then a volte face in the State's posture and as of the 25th April, 2017 a different position was articulated in the context of proceedings in U. v. Refugee Appeals Tribunal [2017] IEHC 490 (see para. 5). The current State position is that the function under art. 17 is an executive discretion for the Minister alone. The State continues to maintain that there is no appeal in relation to any decision under the regulation."

15. However, the identification of the appropriate body to exercise the Article 17 discretion was further complicated by rulings of the High Court which are referred to in *ME (Libya) v. RAT* [2018] IEHC 300. As set out at paragraph 10 of the judgment:-

"10. A significant complication exists here in the sense that while the Minister has agreed to consider the art. 17 issue, I held in M.*A. v. Minister for Justice and Equality* that he is not entitled to do so. Hogan J. has since weighed in in a similar vein, albeit merely dealing with the question of arguability, in *H.N. v. International Protection Appeals Tribunal* [2018] IECA 102 (Unreported, Court of Appeal, 19th April, 2018). For the reasons set out in *M.A.,* it seems to me that the Minister's agreement to consider the art. 17 discretion is not capable of being lawfully implemented as the legislation currently stands. But the State will have to implement at least the spirit of its offer by ensuring that someone should do so.

11. Perhaps I might be allowed to add that it is a matter of significant concern that by changing its position on the art. 17 discretion issue, the State seems to have single-handedly managed to grind the outgoing Dublin III system to a juddering halt. So far, there is no particular indication that the Department of Justice and Equality might be prepared to clarify matter through either primary or secondary legislation, despite the fact that they have not just my judgment in *M.A.* but Hogan J.'s in *H.N*. suggesting that they are driving down a dead-end with their current approach. The issue seems to me to be crying out for clarifying legislation. It is a matter of concern that insofar as outgoing requests from this country are concerned, an EU regulation has simply broken down due to the unsatisfactory manner in which the implementing secondary legislation is phrased combined with the change of mind by the State as to the meaning of that legislation; abandoning a workable and it seems to me correct interpretation in favour of an unworkable and incorrect one. I would, therefore, seriously suggest that the Oireachtas give urgent consideration to clarifying this matter if the Department does not prepare regulations under the European Communities Act 1972 to do so."

The outcome of the Article 17 dispute

16. The Court of Appeal determined that the Article 17 discretion could be exercised by either of the international protection bodies at the stage of the process in which they were involved or by the Second Respondent, in the very last instance. However, a stay was put on this order pending an appeal by the Second Respondent to the Supreme Court.

17. The Supreme Court, delivered its judgment on 24 July 2020 overturning the Court of Appeal. It found that the Article 17 discretion can only be exercised by the Second Respondent and had not devolved onto the international protection bodies, it stated at paragraph 34:-

> 'Nothing suggests that there is any basis for the argument that matters of discretion have been devolved by the State by virtue of SI 525 of 2014."

And at paragraph 36:-

> "There is no sign of any delegation or of any basis on which that discretion could ever be exercised by anyone other than the Minister. Of their nature, administrative bodies exist to make decisions based on fact and quasi-judicial

bodies are there to assess facts and to issue rulings within rigid boundaries of the powers so enjoyed through the setting of jurisdiction pursuant to statute. That does not embrace this discretion."

Accordingly, the discretion provided for in Article 17 of the Dublin III Regulation can only be exercised by the Second Respondent.

The re-action of the Second Respondent

18. On 30 July 2020, the Article 17 holding list was listed before the High Court. Counsel on behalf of the Second Respondent indicated to the Court that the Second Respondent was exercising her Article 17 discretion in favour of all of the applicants in the holding list so that they would all be permitted to stay within this jurisdiction to process their international protection claims.

19. In October 2020, the Respondents' solicitor wrote to all of the solicitors acting on behalf of applicants in the *NVU* list in the following terms:-

> "As you will be aware, the Supreme Court recently ruled in the Respondent's favour in the case of NVU v. Refugee Appeals Tribunal… The judgment confirmed that neither the Refugee Appeals Tribunal nor the Refugee Applications Commissioner has jurisdiction to consider requests for the exercise of discretion pursuant to… Article 17(1) of the Dublin III Regulations… As such the within proceedings are bound to fail.
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> Notwithstanding the judgment of the Supreme Court, the Minister for Justice… has decided to exercise discretion under Article 17(1) to assume responsibility in Ireland for the international protection application of your client whose proceedings are listed in the AZ Holding List…..
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> In the circumstances, the proceedings are now moot and in order to ensure a speedy resolution of the Holding List, the Respondent proposes that each party to the proceedings should bear its own costs and the proceedings should be struck out with no order as to costs at the first opportunity…"

20. As already indicated, the Applicant is not prepared to accept that proposal and is seeking his costs in the matter.

Reason for the Mootness

21. Both sides agree that the proceedings are moot, however they disagree fundamentally as to the cause of that mootness. The Respondents argue that the decision in *NVU* is the reason for the mootness, whereas the Applicant argues that it is the Second Respondent's decision to exercise her Article 17 discretion in favour of Applicant which is the reason for the mootness.

22. The principles applicable in respect of costs when proceedings have become moot have been addressed in a number of judgments of the Superior Courts and have been

considered again recently by the Court of Appeal in *Hughes v. Revenue Commissioners* [2021] IECA.

23. In Cunningham v. The President of the Circuit Court [2012] 3 IR 222 Clarke J stated at paras 24 to 27 of the judgment:-

> "24. [A] court, without being overly prescriptive as to the application of the rule, should, in the absence of countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot.
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> 25. It must, of course, be acknowledged that some cases which have become moot may not fit neatly into the category of proceedings which have become moot due to entirely external events, on the one hand, or due to the unilateral action of one of the parties, on the other hand. In particular there will be cases where the immediate reason why proceedings have become moot is because a statutory officer or body has decided not to go ahead with a threatened course of action (such as the criminal prosecution in this case). However, the reason why it may have been necessary or appropriate for that statutory officer or body to adopt a changed position may, to a greater or lesser extent, be due to wholly external factors. To take a simple example, one might envisage a criminal prosecution which was, on any view, wholly dependent on the evidence of an individual who unfortunately had died before the case could commence. If there had been a challenge, on judicial review grounds, to that prosecution which was not finalised, and if, as here, the D.P.P. were to enter a nolle prosequi because of the death of the only real witness, then it might superficially be said that the judicial review challenge had become moot by reason of the unilateral action of the D.P.P. but in truth the real reason why the judicial review challenge had become moot would have been because of the death of the witness which made it necessary for the D.P.P. to bring the criminal process to an end.
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> 26. In that context it is, of course, important to note that statutory officers and bodies have an obligation to exercise their powers in a proper manner. If circumstances change then it is, of course, not only reasonable but necessary for such officers and bodies to reflect the new circumstances by adopting a position (even if different) which takes into account the circumstances as they have come to be. The mere fact, therefore, that a statutory officer or body adopts a changed position which renders judicial review proceedings moot does not, of itself, necessarily mean that it is appropriate to characterise the proceedings as having become moot by reason of a unilateral act of one party.
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> 27. If there were no change in underlying circumstances and if the statutory officer or body had simply changed his or its mind or adopted a new and different view, then such a characterisation might be appropriate. Where, however, there is an

underlying change of circumstance, it is necessary to consider the extent to which it can properly be said that the proceedings have become moot by reason of the unilateral act of one party, on the one hand or, in reality have become moot by reason of a change in underlying circumstances outside the control of either party, on the other hand. The result of any such analysis should play an important role in the court's consideration of the justice of where the costs of proceedings rendered moot should lie.

28. It does, however, seem to me that, where the immediate or proximate cause of proceedings becoming moot is the action of such a statutory officer or body but where it is sought to argue that the true underlying reason is an external factor outside the control of that officer or body, it is incumbent on the officer or body concerned to place before the court sufficient evidence to allow the court to assess whether, and if so to what extent, it can fairly be said that there was a sufficient underlying change in circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances. Against those general observations it is necessary to turn to the circumstances in which these proceedings became moot."

24. In *Godsil v Ireland* [2015] 4 I.R. 535, McKechnie J. made the following observations regarding under a heading "Costs in our Legal System":-

"19. *Inter partes* litigation for those unaided is, or can be, costly: certainly it carries with it that risk. It is therefore essential in furtherance of the high constitutional right of effective access to the courts on the one hand and the high constitutional right to defend oneself, having been brought there, on the other hand, that our legal system makes provision for cost orders. This is also essential as a safeguarding tool so as to regulate litigation and the conduct and process thereof, by ensuring that it is carried on fairly, reasonably and in proportion to the matters in issue. Whilst the importance of such orders is therefore clearly self-evident, nevertheless some observations in that regard, even at a general level, are still worth noting.

20. A party who institutes proceedings in order to establish rights or assert entitlements, which are neither conceded nor compromised, is entitled to an expectation that he will, if successful, not have to suffer costs in so doing. At first, indeed at every level of principle, it would seem unjust if that were not so, but it is, with the 'costs follow the event' rule, designed for this purpose. A defendant's position is in principle no different: if the advanced claim is one of merit to which he has no answer, then the point should be conceded: thus in that way he has significant control over the legal process including over court participation or attendance. If however, he should contest an unmeritorious point, the consequences are his to suffer. On the other hand, if he successfully defeats a claim and thereby has been justified in the stance adopted, it would likewise be unjust for him, to have to suffer any financial burden by so doing. So, the rule applies to a defendant as it applies to a plaintiff."

25. McKechnie J also stated at para 58 of his judgment:-

> "It seems to me that even where the substantive point has become moot, the first inquiry which a court must make on a follow on costs application is to decide whether or not there exists an "event" to which the general rule can be applied. If such can be identified there will be no necessity to resort to the principles discussed in *Cunningham v. President of the Circuit Court* [2012] IESC 39, [2012] 3 I.R. 222."

26. He also noted at para 47 of the judgment, that the principles expressed in *Cunningham* were subject to two important caveats, namely that there were no "significant countervailing factors" in relation to costs, and that there was no "event" which costs could follow.

27. The jurisprudence was summarized by Humphreys J. in *M.K.I.A. (Palestine) v IPAT* [2018] IEHC 134 it at para 6:

> "6. So it seems then the law applicable in relation to costs of a moot action can be summarised as follows:
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> (i). The first inquiry that a court is required to make is to decide whether or not there existed an "event" to which the general rule that costs follow the event can be applied (see Godsil).
> (ii). An act that could only be regarded as an explicit acknowledgment and admission of the legal validity of the plaintiff's challenge is such an event, as in Godsil.
> (iii). Thus the event must normally in some way be caused by the applicant's proceedings; per MacMenamin J. in Matta.
> (iv). If the proceedings are moot due to a factor outside the control of either party, the view should be taken that there is no event in the Godsil sense and therefore the default order is no order as to costs, as discussed in Cunningham.
> (v). If the proceedings are moot due to a factor which is within the control of one party but that has no causal nexus with the proceedings or which relates, as it is put in Cunningham, to an underlying change in circumstances, then again there seems to be no event in the Godsil sense, so the court should lean in favour of no order (see per MacMenamin J. in Matta at para. 20).
> (vi). Finally, if the proceedings are moot due to a factor within the control of one party that does have a causal nexus with the proceedings then there is an event in the Godsil sense and the default order should be costs in favour of the other party (see Cunningham and Godsil in particular)."

28. In *Hughes v Revenue Commissioners* [2021] IECA 5 Murray J. stated:-

> "30. In *Telefonica* the High Court proposed, and in *Cunningham v. v. President of the Circuit Court* [2012] IESC 39 [2012] 3 IR 222 the Supreme Court developed, a

more structured approach. This has evolved further in *Godsil v. Ireland and the Attorney General* [2015] IESC 103 [2015] 4 IR 53, and *Matta v. Minister for Justice, Equality and Law Reform* [2016] IESC 45, the relevant principles being helpfully distilled and summarised by Humphreys J. in the course of his judgment in *MKIA (Palestine) v. IPAT* [2018] IEHC 134 at para. 6). This approach focuses not on the merits of the underlying action but instead on the cause of the mootness. *Garibov* and the approach it suggests must be taken as no longer representing the law in this jurisdiction in the light of these decisions and the different emphasis they propose (see the comments of MacMenamin J. in *Matta* at para. 22). The essential structure now put in place by these cases can, I think, be reduced to three broad propositions.

31. First, where the mootness arises as a result of an event that is entirely independent of the actions of the parties to the proceedings, the fairest outcome will generally be that the parties should bear the costs themselves. Neither is responsible for the mootness, and neither should have to pay for costs rendered unnecessary by an event for which they bear no responsibility.

32. Second, however, where the mootness arises because of the actions of one of the parties alone and where those actions (a) can be said to follow from the fact of the proceedings so that but for the proceedings they would not have been undertaken, or (b) are properly characterised as 'unilateral' or – perhaps – (c) are such that they could reasonably have been taken before the proceedings, or before all of the costs ultimately incurred in the proceedings were suffered, the costs should often be borne by the party whose actions have resulted in the case becoming moot. In the first of these situations, it can be fairly said that there was an event which costs can and should follow in accordance with conventional principle. In the second, it will frequently be proper that the party who is responsible for the unilateral action which results in the mootness should bear the costs. In the third, it might be said that where a party who could reasonably have acted so as to prevent the other party from incurring costs failed to do so, it is proper that they should have to discharge those costs.

33. The third general proposition addresses the particular position of statutory bodies. Agencies with obligations in public law cannot be expected to suspend the discharge of their statutory functions simply because there are extant legal proceedings relating to the prior exercise of their powers. They must be free to continue to exercise those powers in accordance with their legal obligations. At the same time, it would be wrong if under the guise of exercising their powers in the normal way, the statutory authority both effectively conceded an extant claim, and avoided the legal costs that would otherwise attend such a concession. The cases strike a balance between these two considerations by suggesting that where the mootness arises because a statutory body makes a new decision in the exercise of its legal powers, the court should look at the circumstances giving rise to that new decision in order to decide whether it constitutes a 'unilateral act' for these purposes. If the

new decision is caused by a change in the relevant circumstances occurring between the time of the first decision, and of the second, the Court might not treat the new decision as a 'unilateral act' and may accordingly make no order as to costs. If, however, there has been no such change in circumstances so that the body has simply changed its mind, costs may be awarded against it. If the respondent wishes to contend that there has been a change in circumstances it is a matter for it to place before the court sufficient evidence to allow the Court to assess whether and if so to what extent it can fairly be said that this is so. This requires the respondent to establish that there was a change in the underlying circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances. In conducting this analysis, the Court should not embark upon a determination of the merits of the underlying case.

34. Each of these three propositions – it must be stressed – present a general approach rather than a set of fixed, rigid rules. The starting point is that the Court has an over-riding discretion in relation to the awarding of costs, and the decisions to which I have referred are intended to guide the exercise of that discretion. They are thus properly viewed as presenting a framework for the application of the Court's discretion in the allocation of costs in a particular context and should not be applied inflexibly or in an excessively prescriptive manner (*PT v. Wicklow County Council* [2019] IECA 346 at paras. 18 and 19)."

Mootness arising from a Supreme Court decision?

29. Counsel for the Applicant submits that the Supreme Court decision in *NVU* could not render these proceedings moot: that leave had been granted by the High Court to bring judicial review proceedings and that the Applicant is therefore entitled to progress his case through the Courts and onto the Supreme Court as Counsel may not agree with the arguments made before the Court in the *NVU* case and may have different arguments to make. He suggested that simply because this case was in a holding list in the asylum list did not mean that the Applicant was bound by the decision made in the lead case: that he had never agreed to this course of action. He further suggested that he had a right to seek an amendment of his proceedings after the Supreme Court determination in *NVU* to cure any defects in his proceedings.

30. Of the several cost hearings which this Court has heard regarding the NVU list, no other Counsel made arguments of this nature, although another Counsel did make some complaint regarding the operation of the holding list which this Court in due course will review.

31. The argument that the Applicant can proceed with his case regardless of the decision in *NVU* fails to display any appreciation of the doctrine of precedent which this Court is bound by and the doctrine of stare decisis which governs the Supreme Court. The High Court cannot come to any other conclusion in any future Article 17 case but to follow the *NVU* decision and the Supreme Court cannot depart from its decision except in an

exceptional case and for compelling reasons. As stated by McKechnie J in *DPP v. JC* [2017] 1 IR 417 at paragraph 672 of his judgment:

> "The DPP seems to acknowledge that save in special circumstances and then only for "compelling reasons in exceptional cases", should this Court stand aside the principle of *stare decisis*. It can however do so and in the past has on a number of occasions exercised such power. The relevant case law shows that when considering this matter:-
>
> (i) The Court must clearly be satisfied that the earlier decision is wrong.
> (ii) The Court when making that assessment may be influenced, on the issue of principle, by approaches adopted in other jurisdictions.
> (iii) The nature of the issue, such as one having constitutional effect, may lend itself more readily to change than others, and finally
> (iv) Departure from earlier precedent may be more easily justified where traditional means of judicial positioning, as for example, by distinguishing the case, is unsatisfactory."

I suspect that any different arguments which Counsel for the Applicant might advance would not sway the Supreme Court from their very recent decision.

32. The submissions made by Counsel for the Applicant in relation to the Holding list and the suggestion that the Applicant has a right to seek an amendment to the proceedings after the judgment in the *NVU* case fails to have any regard to the doctrine of stare decisis; the efficient running of Court lists; the best use of Court resources; the case law regarding the amendment of proceedings; and the basic principle that a party should properly plead his case from its initiation. The Court system is not predicated upon amorphous litigation which changes shape according to a changing landscape: rather it is predicated upon facts and law and the application of the law to those facts. If Counsel for the Applicant was correct in his argument it would mean that in respect of this Holding list (noting that there are eleven other holding lists in the asylum division with over 250 cases in them), the Asylum list would have to have hear 270 NVU cases where the central point had already been determined by the Supreme Court and which the High Court is required to follow. Of course, in that scenario, the guaranteed outcome of the Applicant's case in the High Court and in the Court of Appeal, if an appeal was pursued, would be an order refusing the relief sought and granting an order for the Respondents costs as against the Applicant.

33. In any event, I disagree with Counsel for the Applicant that a Supreme Court judgment cannot render other proceedings moot. Although this was not argued in any great detail in the hearing before me and presented instead by Counsel for the Applicant as being the law, the question of what can render proceedings moot has been considered by the Supreme Court in *Goold v. Collins* [2004] IESC 38 and *Lonfinmakin v. Minister for Justice* [2013] 4 IR 274 which both drew heavily from a decision of the Supreme Court of Canada in Borowski v. Canada [1989] 1 SCR 342 which stated the following regarding the issue of mootness:-

"The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice."

34. The judgment in *Godsil v. Ireland* refers to these judgments when considering the issue of mootness and sets out the following at paragraph 36 and 37 of the judgment:-

"36. The case law, by which an action or an appeal, or an issue in either, can correctly be classified as moot, has developed substantially in recent times. *Goold v. Collins & Ors* [2004] IESC 38 is a leading authority in this regard….

37. Having reviewed these and other authorities at para. 51 of my judgment in *Lofinmakin*, I summarised as follows what the legal position is:-

'(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 issue 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".

What renders these proceedings moot?

35. As earlier indicated, the parties are agreed that the proceedings are moot. The argument between them is what rendered the proceedings moot. The arguments raised by Counsel for the Applicant regarding the possibility of the Applicant proceeding with his case after the *NVU* judgment brings into sharp focus the effect of the *NVU* case on similar cases in the Holding List, such as this case.

36. While the Second Respondent exercised her Article 17 discretion in favour of the Applicant after the Supreme Court's determination, that does not mean that that is the determining event which rendered the proceedings moot. The question which must be

addressed is whether the Supreme Court decision in *NVU* determined the proceedings such that there was no real controversy in existence which remained to be addressed in light of the doctrine of precedent.

37. With respect to the reliefs sought by the Applicant, as already recited, it is clear that each relief sought is governed by the Supreme Court decision in NVU, as follows:

(d)(i) - this Court could not grant a declaration that the First Respondent had a power to decide the Article 17 discretion as the Supreme Court found that it did not have this power;

(d)(ii) – this Court could not grant a declaration that there was a failure on the part of the State to put in place a mechanism for an applicant to appeal against a negative Article 17 determination of the Refugee Applications Commissioner, as that entity did not have jurisdiction to determine that issue in the first instance, according to NVU. This issue did not arise in the instant case in any event, as the Refugee Applications Commissioner had not purported to exercise an Article 17 discretion.

(d)(iii)– this Court could not grant an Order of certiorari of the First Respondent's decision on the basis that it had incorrectly determined the Article 17 issue, as it did not incorrectly determine the Article 17 issue having decided that it had no jurisdiction to consider this issue as was found by the Supreme Court in NVU.

38. Accordingly, there no longer remained in existence any conflict capable of being justiciably determined between the parties in these proceedings. The Supreme Court decision in *NVU* rendered these proceedings moot before the Second Respondent exercised her discretion to operate Article 17 in the applicant's favour: nothing remained at issue between the parties which was not governed by the Supreme Court decision.

39. Submissions were made that had the Applicants in the NVU list not instituted these proceedings, they would no longer be in the State and would have been transferred a long time ago. Justification for the institution of these proceedings seems to be placed on that fact with an assertion that they therefore should get their costs. However, that submission fails to have any regard to the fact that the determination of the Supreme Court in *NVU* in effect was against the claims of the *NVU* applicants. The fact that the result for the Applicants in the *NVU* list has been to remain in Ireland to have their international protection claims processed did not arise from the determination of any court proceedings in their favour but rather from the exercise by the Second Respondent of her Article 17 discretion. There was nothing arising from the *NVU* determination which required her so to do and indeed it has been averred on her behalf that this decision was taken on grounds unrelated to the reliefs sought. Accordingly, this submission is not relevant in relation to the cost determination before me.

Unfortunate Events

40. It is unfortunate that the exercise of the Article 17 discretion became such a complicated issue in this jurisdiction and that it has taken so long for the issue to resolve itself. The

change in position by the Second Respondent certainly created confusion in this area, but she has been clear in her position since the settlement of the S case in late December 2016 that she is the appropriate person to exercise the Article 17 discretion. Decisions of the High Court did not help matters, however it is clear from the decision in ME, that the Second Respondent was considering Article 17 applications.

41. The outcome for the Applicants in the Article 17 list, of course has been superb. They have achieved an outcome which they could never had achieved through the Courts: the Second Respondent has exercised her Article 17 discretion in their favour so that they are permitted to remain in this State to process their applications for international protection here. That is a major success for them, but that does not mean that they get their costs; nor does the delay in the matter; nor does the series of unfortunate events which have occurred in the protracted drawn out history of the Article 17 discretion litigation.

42. Once the Supreme Court delivered its NVU judgment, the High Court was bound to follow its findings which was the death knell for this case.

43. Furthermore, there are no countervailing significant factors in this case which would cause me to exercise my discretion in favour of granting the applicant his costs in this matter. In other proceedings, which I was referred to on behalf of the applicants in the NVU list, it has been averred that the Second Respondent was of the view that she had sole jurisdiction to exercise the Article 17 discretion from late 2015. In argument before me, the settlement of the S case has been set as a marker when this view was apparent and was being acted upon. Accordingly, as these proceedings were instituted after that date, there is no reason why I would depart from the normal rule. Accordingly, I am making no order as to costs in respect of the proceedings.