



**THE COURT OF APPEAL
CIVIL**

**Neutral Citation No. [2021] IECA 296
Court of Appeal Record No. 2021/66
High Court Record No. 2017/265JR**

**Donnelly J.
Power J.
Murray J.**

BETWEEN

FA

APPLICANT/APPELLANT

- AND -

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

RESPONDENTS

**Court of Appeal Record No. 2021/74
High Court Record No. 2017/310JR**

BETWEEN

SS

APPLICANT/APPELLANT

- AND -

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

RESPONDENTS

**Court of Appeal Record No. 2021/75
High Court Record No. 2017/211JR**

BETWEEN

SH

APPLICANT/APELLANT

- AND -

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

RESPONDENTS

**Court of Appeal Record No. 2021/87
High Court Record No. 2017/181JR**

BETWEEN

AA

APPLICANT/APELLANT

- AND -

**THE MINISTER FOR JUSTICE AND EQUALITY AND THE INTERNATIONAL
PROTECTION APPEALS TRIBUNAL**

RESPONDENTS

**Court of Appeal Record No. 2021/69
High Court Record No. 2017/138JR**

BETWEEN

HN

APPLICANT/APPELLANT

- AND -

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

RESPONDENTS

**Court of Appeal Record No. 2021/76
High Court Record No. 2020/193JR**

BETWEEN

MT

APPLICANT/APPELLANT

- AND -

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

RESPONDENTS

JUDGMENT of Mr. Justice Murray delivered on the 9th day of November 2021

Summary

1. This should not be a complicated matter. Each of these judicial review proceedings was transferred to a holding list pending the outcome of another case raising similar legal issues, *NVU v. Refugee Appeals Tribunal* ('*NVU*'). The effect of the decision in *NVU* when ultimately determined by the Supreme Court ([2020] IESC 48) was that the principal issue in these proceedings could never have been decided in the applicants' favour. This notwithstanding, the applicants say that they are entitled to the full costs of these actions.
2. The applicants based that claim on the fact that subsequent to the judgment of the Supreme Court in *NVU* - and before any application was brought to dismiss their proceedings as being bound to fail - the Minister for Justice and Equality ('the Minister') made a decision which rendered the proceedings moot. Although that decision of the Minister conferred a significant benefit on the applicants, they say that because the mootness of their actions was brought about by a unilateral action of the Minister, the decision in *Cunningham v. President of the Circuit Court* [2012] IESC 39, [2012] 3 IR 222 ('*Cunningham*') dictates that they are entitled to their costs from her.
3. The applicants acknowledge that following the decision in *NVU* they could never obtain the principal relief claimed in their proceedings, and they accept that they secured an outcome from the decision of the Minister which they could never have gained from their legal actions. They say, however, that they should be awarded their costs because

the Minister has failed to properly explain why she reached the decision she did and thus that the Court must assume her decision was a response to the proceedings and therefore an ‘*event*’ triggering an entitlement to costs. They also contend that they should be awarded their costs because the Minister changed her position as to the substantive legal issue in the proceedings following their institution, because had she not made the decision in question they would have applied to amend their proceedings so as to seek different relief, and because their proceedings incorporated other reliefs which they claim justify their application for costs.

4. Burns J. refused the applicants’ application for their costs. I agree with her conclusion. The costs of proceedings (including the costs of proceedings that have become moot) are generally a matter for the discretion of the court. The decision of the Supreme Court in *Cunningham* provides guidance as to how that discretion should be exercised in many moot cases. However, nothing in the decision in that case or in the large number of reserved judgments applying it justifies the proposition that a party to judicial review proceedings whose action is clearly doomed to fail following the decision of the Supreme Court in a ‘*pathfinder*’ or ‘*lead*’ case can expect to obtain their legal costs when the State makes a subsequent decision in their favour of the kind in issue in this case.
5. Nor can I see any basis in principle for that contention. As of the date of the Supreme Court decision in *NVU* the applicants had no case on the central issue in their proceedings and no basis for seeking their costs of those proceedings. It does not make sense that they should acquire such a right by reason of a subsequent administrative decision in their favour. The fact that the proceedings could have been amended to

obtain different relief, or (in some of the cases) that other secondary grounds were agitated in the proceedings does not change that.

6. The application was argued by counsel for each of the six named applicants resourcefully and, at points, ingeniously. In deference to their endeavours, having regard to the fact that the determination of the costs of many other cases has been adjourned pending the outcome of this appeal, and noting that this appears to be the first occasion on which this Court has addressed the cost implications of the outcome of a '*pathfinder*' or '*lead case*' on other similar actions, I deal here in some detail with the contentions they advance. However neither the length of this judgment nor the range of issues it canvasses should detract from the simplicity of my conclusion or the reasoning that leads to it. The applicants brought a case in which the principal ground agitated by them has been found to be misconceived and, in normal course, they would not have obtained any Order for the costs incurred in bringing that action. The subsequent exercise by the Minister of a statutory discretion in their favour does not and cannot alter that.

Article 17 of the Dublin III Regulation

7. The issues between the parties start – and indeed end - with Article 17 of Regulation (EU) 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 (*'the Dublin III Regulation'*). Article 17(1) of the Dublin III Regulation confers a discretion on a Member State to

assume responsibility for a protection application made in its territory notwithstanding that under the relevant provisions of the Regulation, another Member State has that function. Where a Member State exercises that discretion, it becomes the State responsible for the application for protection.

8. The Article is framed in general terms, prescribing no procedure for the exercise of the discretion it confers:

‘By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.

The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility.

Where applicable, it shall inform, using the ‘DubliNet’ electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003, the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of, or to take back, the applicant.

The Member State which becomes responsible pursuant to this paragraph shall forthwith indicate it in Eurodac in accordance with Regulation (EU) No 603/2013 by adding the date when the decision to examine the application was taken.’

9. A question presented itself in Irish law as to where the power to exercise that discretion was vested. The applicants in these proceedings contended that it was conferred by the provisions of the European Union (Dublin System) Regulations 2014 S.I. No. 525 of 2014 (*'the domestic Regulations'*) upon the refugee assessment bodies - the Office of the Refugee Appeals Commissioner ('ORAC') and now the International Protection Office ('IPO'), and on appeal from a decision of that office to the Refugee Appeals Tribunal ('RAT') and now the International Protection Appeals Tribunal ('IPAT').

10. The Minister's stance on this issue was not straightforward. Originally, the Minister adopted the position that the relevant power was vested in ORAC under rule 3(1) of the domestic Regulations. That view was recorded in a letter sent in November 2015 by the asylum policy division of the Department of Justice and Equality to the Legal Aid Board (Refugee Legal Services). In that letter, while it was stated that the discretion exercisable under Article 17 of the Dublin III Regulation was vested in ORAC, the Minister also made it clear that this was *not* a matter to be considered by the Refugee Appeals Tribunal at appeal stage. While in one of these cases (that of AA) ORAC purported to exercise this jurisdiction, in a number of decisions RAT and thereafter IPAT refused to accept that it had any role in exercising the discretion provided for under Article 17. However, the Minister thereafter changed his position, insisting that the power to exercise this discretion was vested in the Executive and, never having been devolved, remained there. At the same time, in *M.A. (A Minor) v. International Protection Appeals Tribunal* [2017] IEHC 677 the High Court suggested that the Minister was *not* entitled to exercise the power conferred by Article 17, Humphreys J.

describing the position latterly adopted by the Minister as a '*volte face*'. The situation was, to put it at its mildest, confused.

The litigation

11. Inevitably, all of this resulted in litigation brought by applicants who had requested IPAT to either review the failure by ORAC to exercise the power they contended that it enjoyed to make the decision provided for under Article 17 or to exercise that jurisdiction itself, but where it had refused to do either. Many sets of proceedings of this kind were brought in which it was contended that IPAT had erred in law in determining that it did not have this jurisdiction. Up to January 2019, these proceedings were held in what was then termed the '*Article 17 list*' being subject, from the middle of 2017, to a '*global injunction*' applying to all such cases from the point at which leave was granted. From January 2019 the global order was governed by HC Practice Direction 82 and the list became known as the '*AZ holding list*'. A lead case was identified (*AKS v. Refugee Appeals Tribunal and ors* Record No. 2016/287 JR). This case was listed for hearing on 26 and 27 January 2017, but was settled the previous month. It is contended by the Minister that at that point she revealed a change in her position, then adopting the view that the Article 17 discretion could be exercised by, and only by, her. The letter recording the settlement offer (sent by the Chief State Solicitor and dated December 19 2016) provides that one of the terms of the proposed settlement was that AKS would '*be permitted to have his asylum claim determined in this jurisdiction*'. The letter did not purport to vacate the decision of RAT. The proceedings in *AKS v. Refugee Appeals Tribunal and ors* were struck out on December 21 2016. Then, in March 2017, a second lead case was identified, *NVU*.

- 12.** As it happens, all but one of the actions the subject of this application were initiated around this time (the proceedings brought by *MT* were commenced in early 2020). As with the other cases in the '*AZ holding list*' the various applicants sought reliefs arising from decisions of IPAT. The impugned decisions transferred the asylum claims advanced by the applicants to other EU States under the Dublin III Regulation, and the proceedings, essentially, asserted that IPAT had acted unlawfully in refusing to exercise the Article 17 discretion in their favour when determining those appeals.
- 13.** On April 28 2017 - shortly after the commencement of these actions - an affidavit was delivered on behalf of the Minister in the *NVU* proceedings. It was sworn by Mr. Brian Merriman, a principal officer in the Department of Justice and Equality. He noted that after the coming into force of the Dublin III Regulation it was initially understood that the discretion provided for by Article 17 was an element of the function assigned to ORAC under Regulation 3(1) of the domestic Regulations but stated that '*[i]t has now become clear that the discretion provided for by Article 17(1) is not so conferred*'. He proceeded to explain that as a result of legal advices provided to the respondents in those proceedings the view of the Minister was that the power under Article 17(1) was reserved to the State and therefore the Government acting through the Minister. In the course of this affidavit Mr. Merriman recorded the position of the respondents in that case as being that the appropriate remedy against a decision by the Minister made in reliance on her power under Article 17(1) is that of judicial review. It is not suggested on behalf of any of the applicants that they were unaware of this change of position at or shortly after this time.

14. The High Court (O'Regan J.) decided *NVU* by way of two judgments delivered on 26 June 2017 ([2017] IEHC 490) and 24 October 2017 ([2017] IEHC 613). She determined that the only body enjoying the power to exercise the Article 17 discretion was the Minister. This Court (Irvine, McGovern and Baker JJ.) issued its decision in the appeal from that decision on June 26 2019 ([2019] IECA 183). It held that ORAC and IPO had the power to exercise the discretion (although also envisaging a residual role for the Minister in making such decisions). On July 24 2020 the Supreme Court delivered its judgment in *NVU* ([2020] IESC 46), determining that it was the Minister and not the Refugee Appeals Tribunal (or, it followed, IPAT) that had the power to exercise this discretion, and that this power had not been passed on to any other agency by virtue of the domestic Regulations. Giving the judgment of the Court Charleton J. (with whom Clarke CJ, and O'Donnell, MacMenamin and O'Malley JJ. agreed) explained in some detail that, and why, no discretionary powers had been devolved from the Minister to the decision making bodies.

15. Charleton J. observed that what he described as '*the issue of rights*' was not part of the Statement of Grounds in that case. However, noting that the purpose of the Dublin III Regulation was to provide for a transparent, swift and mutually entrusted process, he said the following (at para. 37):

'Nor is it necessary for there to be a specific consideration of potential or possible rights. If these are specifically asserted and on a factual basis which, exceptionally, engages such rights, consideration should be given. But this would be a rare exception. This is an administrative scheme assuming equal protection in all participating countries. What it involves is returning those

seeking international protection to a country issuing travel or residence documents or where they had previously started an application.'

- 16.** By the time of this decision there were 270 cases in the AZ holding list. The effect of the Supreme Court ruling in *NVU* was that the applicants in these proceedings could not succeed in their claims insofar as they claimed that bodies other than the Minister enjoyed the power to exercise the discretion under Article 17. Nor could they succeed in any claims that were based on the assumption that that jurisdiction was vested in ORAC/RAT or IPO/IPAT.
- 17.** On July 30 2020 the Minister indicated to the High Court that she was exercising her discretion under Article 17 in favour of all applicants in the AZ holding list so that they would be permitted to stay within the jurisdiction to process their international protection claims. The effect of that decision, the applicants have said, was that the Minister had exercised her discretion not to enforce validly made and otherwise extant transfer decisions.
- 18.** On 16 October 2020 this decision of the Minister was recorded in a letter sent to the solicitors acting for the applicants in those proceedings. The letter stated that the proceedings were accordingly moot and that the Minister proposed that each party to the proceedings should bear its own costs, stating that if this proposal was not acceptable to the recipients the respondents would seek their costs against the applicants. The applicants in all of the cases the subject of this appeal have refused to accept this.

The reliefs claimed by the applicants

- 19.** As they were argued, the detail of the relief claimed in each case is important to these applications. In *FA* the applicant (who is a national of Bangladesh) applied for asylum in this jurisdiction in June 2015. He had previously been granted permission to remain in the United Kingdom, this having expired in 2013. The effect of Article 12(4) of the Dublin III Regulation was that the United Kingdom was the appropriate jurisdiction to determine the applicant's asylum application. On 6 May 2019 ORAC issued a decision that the United Kingdom was responsible for dealing with his application for asylum and that this applicant would be transferred to that jurisdiction.
- 20.** The applicant appealed this decision to the first respondent, his grounds of appeal contending that Article 17 of the Dublin III Regulation had not been considered by ORAC. He requested that the respondent exercise its discretion under Article 17 regarding the transfer decision, but IPAT determined that it did not have jurisdiction to exercise that discretion. Its reasoning was that Article 17 was directed to Member States, and that IPAT had no jurisdiction to exercise the discretion for which that Article provided in the absence of a lawful delegation to IPAT of that function. That delegation, it held, had not occurred.
- 21.** These proceedings were issued on March 23 2017, the applicant seeking a declaration that the first respondent had the power, duty and obligation to decide in the context of an appeal from a decision or recommendation of ORAC or the IPO 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 604/13 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:

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 the Refugee Applications Commissioner or International Protection Office, that the Article 17 discretion to examine an applicant’s claim not be applied, is contrary to law.’

- 22.** An order of *certiorari* was sought of the decision of IPAT of 12 March 2017 affirming the transfer decision of ORAC. All reliefs were based on a single ground, the applicant pleading that the Article 17 discretion was *‘an integral part of the decision to transfer’* proceeding that if he was wrong in this regard:

‘then the Applicant had no effective remedy in respect of the Commissioner’s decision, which itself is contrary to the Constitution .. and incompatible with European law (Article 47 CFEU). The failure of the Respondents to provide a scheme in the State which includes an effective remedy in respect of refusals of applications such as that impugned herein in accordance with Article 47 of the Charter of Fundamental Rights of the European Union is unlawful and unconstitutional.’

23. While, obviously, the specific facts, dates and details are different, the reliefs claimed in *SS* and *SH* were identical to those in *FA*, as were the grounds on which that relief was sought. *AA* falls into the same general category. There, the applicant was a Pakistani national who had applied for international protection in Ireland having previously travelled to the United Kingdom on a student visa, and applied for leave to remain in that jurisdiction. Having made an application to ORAC, he was advised by it in August 2016 that it had decided that the United Kingdom was responsible pursuant to Article 12(4) of the Dublin III Regulation for dealing with his application for international protection. The ORAC decision specifically referenced Article 17, and was treated by this applicant in his appeal as having amounted to a consideration of the discretion conferred by that provision.

24. On appeal, *AA* requested IPAT to exercise the discretion provided for under Article 17 and sought to thereby appeal the decision of ORAC not to exercise that discretion. That application having been refused, *AA* sought an order of *certiorari* quashing the decision of IPAT to refuse the appeal and affirm the recommendation of ORAC. As well as alleging that IPAT had failed to consider that application in a lawful manner, that it had thereby unlawfully fettered its discretion and that it had erred in law in concluding that it had no jurisdiction to consider aspects of the appeal pursuant to Article 17, he pleaded that the second named Respondent (which is IPAT) had:

‘... failed in her duty to provide the applicant with an effective remedy in the form of an appeal or a review, in fact and in law as required by Article 27 of EU Regulation 604/2013 and Article 47 of the Charter of Fundamental Rights.

25. It was claimed then that the first named Respondent (the Minister):

‘has breached its legal duties ... and/or breached the applicant’s rights and entitlements under EU Regulation 604/2013 by failing to provide a mechanism to raise humanitarian issues or other reasons as to why Ireland should exercise its discretion to examine the applicant’s claim for protection as provided for by Article 17 of the Regulation’.

26. MT’s case presented two particular issues. He is a national of Mauritius, and made an application for international protection on 23 January 2019. On 23 April 2019 the IPO notified him that the United Kingdom had accepted responsibility for his application under the Dublin III Regulation, but afforded him ten days to submit any further relevant information including humanitarian grounds. No submissions were delivered in response. A transfer decision having been made on 29 May, he appealed setting out in written submissions delivered in January 2020 that (and why) his was an appropriate case in which to exercise the discretion under Article 17.

27. Although IPAT determined that it did not enjoy discretion under Article 17, it found that if it had such discretion this would be an appropriate case in which to exercise it in the applicant’s favour. He had claimed that his particular circumstances were such that the making of a transfer decision would be disproportionate and in breach of his rights under the EU Charter of Fundamental Rights and the European Convention on Human Rights. This was, specifically, the case in circumstances in which (as the applicant asserted) he suffered from depression and anxiety, was suicidal and had thoughts of

self-harm, was only nineteen when he arrived in Ireland and was dependent on his aunt who resided here.

28. *MT* sought an order of *certiorari* quashing that decision of IPAT affirming the recommendation of IPO that the applications should be transferred to the United Kingdom. He also sought two declarations. One related to Brexit and is accepted as not being relevant to this application, while the other was to the effect that the respondents had failed contrary to the Dublin III Regulation to put in place a system to permit applicants for international protection to apply for discretionary relief under Article 17 of the Dublin III Regulation.

29. That relief was claimed on the basis that IPAT erred in concluding that it did not enjoy discretion under the Article 17, that its assessment was irrational in failing to make any determination in relation to the applicant's family law rights and that the Minister and the State were required by law to put in place a transparent system within which the Article 17 discretion could be exercised.

30. *HN* was an Afghan national who had applied for asylum in the United Kingdom in 2010, making an application in this jurisdiction in 2016. ORAC made a decision in 2016 to transfer him to the United Kingdom, that decision being unsuccessfully appealed to IPAT in February 2017. As in *MT*, IPAT determined that it did not have the power to exercise the jurisdiction provided for under Article 17, but proceeded to state that having regard to his particular situation if it had such a jurisdiction, it would have given serious consideration to exercising it in *HN's* favour. This followed from its findings that *HN* was particularly vulnerable on account of his poor mental health,

which had been linked to uncertainty regarding his immigration status over the six years he had been in Europe. The Tribunal also expressed the view that he may well have a strong putative claim to international protection.

31. Leave to seek judicial review of that decision was sought and obtained from O'Regan J. in March 2017. An order of *certiorari* was sought quashing the applicable decision of IPAT, as was a declaration that the decision was wrong in law. As in *MT* declaratory relief was claimed that the respondents had failed to put in place a system to permit applicants to apply for discretionary relief. This applicant additionally sought a declaration that he had a legitimate expectation that his application for asylum would be processed to completion at first instance within a reasonable period of time.

32. The grounds were similar to those in *MT*, asserting a fettering of discretion, a failure to put in place a system to permit applicants to appeal from a denial of discretionary relief under Article 17, and a failure to establish a means by which applicants for international protection may assert an effective remedy to their Article 17(1) claims. At the time the proceedings were originally instituted O'Regan J. refused to grant leave to seek judicial review on two grounds, her refusal was appealed to this Court and, this appeal being successful in part, an additional ground was added by amendment. As it appears in the amended Statement of Grounds it is to the effect that IPAT had erred:

'by ruling that it had no free standing discretion to set aside a transfer decision on the grounds that the Applicant's rights under Article 8 of the European Convention of Human Rights could be breached by his transfer to the United Kingdom.'

33. The Order made by this Court permitting this amendment makes it clear that the reference to a '*free standing discretion*' is in contradistinction to the discretion asserted by the applicant to exist in the context of a consideration of Article 17(1) of the Dublin III Regulation. The Order further records the decision that the costs of the appeal were to be costs in the cause.

34. There is a further feature of *HN* that differentiates it from the other proceedings. By letter dated 18 May 2019, his solicitors wrote directly to the Minister identifying certain mental health issues, and requesting that the Minister exercise the power under Article 17 not to transfer him to the United Kingdom. The application enclosed a medical report dated 11 April 2019 which stated that a lack of clarity about his status, his inability to work and his living environment were contributing to this applicant's mental health issues. He followed this up on 4 June. That letter was replied to on 10 June 2019, the CSSO stating that the then forthcoming judgment of this Court in *NVU* would likely to be determinative of many of the issues and that the matter would be more appropriately dealt with when the judgement of the Court was to hand in that case. This applicant never obtained an individual determination of his application but, obviously, benefitted from the blanket decision of the Minister to exercise her discretion under Article 17.

The issues

35. All parties are agreed that the proceedings are moot, and have to a large extent argued their respective positions by reference to the judgment of Clarke J. (as he then was, and

with whom Denham CJ and Hardiman J. agreed) in *Cunningham*. There, Clarke J. formulated guidelines for the allocation of costs in moot proceedings. Taking the decision at its most general, the Court suggested that where the event causing the mootness was an ‘*external event*’ (i.e. an event caused by the act of neither party) no order for costs should usually be made, but where the mootness was caused by the ‘*unilateral act*’ of one party so that it might be said to follow from the fact of the proceedings themselves, it might be appropriate to order costs against the party responsible for the proceedings becoming moot. The Court in its judgment also suggested that where the act causing the mootness was the result of the exercise by a statutory body of its legal powers, the onus fell on that body to establish that the mootness was the result of an ‘*external event*’ rather than a ‘*unilateral act*’ as would occur where the statutory body simply changed its mind. As subsequently elaborated upon by McKechnie J. in *Godsil v. Ireland and anor* [2015] IESC 103, [2015] 4 IR 535, much of this analysis is directed to ascertaining whether the actions of the person causing the mootness can be viewed, in practical terms, as giving the applicant what they sought in the proceedings, costs then following that ‘*event*’.

- 36.** Having regard to the guidelines suggested in *Cunningham*, the respondents say that the decision of the Supreme Court in *NVU* was the cause of the mootness and that because this was an ‘*external event*’ as described in that decision, each party should bear its own costs. The applicants, in response, say that the decision of the Supreme Court could not render the proceedings moot, and that in principle prior to the decision of the Minister the applicants remained entitled to pursue their cases notwithstanding the decision in *NVU*. They also say that they were entitled to apply to amend their proceedings to cure any defects in them.

37. Instead, they say, what rendered the proceedings moot was the decision of the Minister to exercise her discretion in favour of the applicants. Having made that decision and thereby rendered the proceedings moot (the argument is) the Minister should bear the costs of the proceedings in circumstances where she has not explained why the decision was reached and has thus not established a basis on which the court could conclude that the decisions were unrelated to the fact of the proceedings. Thus, it is argued, the decision of the Minister was an ‘*event*’ insofar as it provided the applicants with the outcome they ultimately sought to achieve in their proceedings (that is the determination of their claims for protection in this jurisdiction) and that it must be assumed to have been in response to the proceedings, the Minister having failed to establish otherwise. In that regard, the applicants stress that had the proceedings not been instituted, they would have been transferred out of the State many years ago.

38. Burns J. delivered a reserved judgment in the case of *FA* ([2021] IEHC 147) thereafter (on March 3 2021) giving *ex tempore* rulings outlining why she believed each of the other cases the subject of this appeal was governed by her conclusion in *FA*.

39. In her reserved judgment she explained that each relief sought by the applicants was determined by the decision of the Supreme Court in *NVU*. Therefore, there was no longer any conflict capable of being justiciably determined between the parties and, accordingly, the judgment of the Supreme Court in that case rendered these proceedings moot. The contention advanced by the appellants insofar as based on the proposition that the applicants would have been removed from the State had it not been for the fact of the proceedings, failed (she said) to have regard to the fact that the determination of

the Supreme Court in *NVU* was against the claims of the applicants. The fact that the consequence of the Minister's decision has been that those applicants will now be permitted to remain in Ireland to have their international protection claims processed did not arise from the determination of the court proceedings. There was nothing in the *NVU* decision that required the Minister to adopt this course of action. Accordingly, it was held, no order for costs should be made. In her subsequent *ex tempore* rulings, Burns J. applied the conclusion she had reached in *FA* to the other five cases, ultimately determining that insofar as those cases contained reliefs that differed from *FA*'s application, they too were essentially governed and rendered moot by the judgment in *NVU*.

Knowledge of the Minister's change of position

- 40.** While the essential basis of the High Court decision thus lay in the application of the approach outlined in *Cunningham* to the exercise of its discretion in the award of costs, focussing on the cause of the mootness and whether this was an '*external event*', Burns J. also made reference in the course of her ruling to the extent to which the various applicants knew of the change of the Minister's position. She adopted the position that where applicants were *not* aware of the change in that position in advance of the institution of their proceedings that this was a '*counterveilling circumstance*' which justified the Court in departing from the general approach outlined in *Cunningham* and awarding those applicants their costs. This formed the basis for a preliminary point made, in particular, by counsel for *FA*, which it is convenient to address separately and at the outset.

41. In the course of her judgment the trial Judge noted that the position adopted by the Minister ‘*certainly created confusion in this area*’. From there she observed that the Minister ‘*has been clear in her position since the settlement of the S case in late December that she is the appropriate person to exercise the Article 17 discretion*’. She concluded her judgment (at para. 43) as follows:

‘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.

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.’

42. Thus, the trial Judge did accede to applications for costs on the part of litigants who had brought their proceedings before the settlement in December 2016 of the S case (the reference is to *AKS v. Refugee Appeals Tribunal and ors* being the original test case to which I have previously referred). She thus treated that point as a ‘*marker*’ so that applicants who brought their cases *after* this date did not obtain their costs. The applicants in argument have referred to two cases – *E.* and *U.* – which were issued

before the settlement of the *S.* case and in which costs were awarded to the applicants. Indeed, in the course of her *ex tempore* ruling in *U.*, Burns J. explained that the fact that that applicant had moved his *ex parte* application prior to the settlement of *AKS* presented a ‘*significant countervailing factor*’ and that accordingly she would grant to that applicant the reserved costs of the leave application.

- 43.** In that connection, the applicants suggest that they were not aware of the Minister’s position until the delivery of Mr. Merriman’s affidavit in the *NVU* case and, accordingly, that they should be entitled to their costs – essentially on that basis. They then argue that the trial Judge chose the wrong ‘*marker*’. They say that they were unaware of the reason the Minister settled the ‘*S*’ case, and that it is therefore not right that it should be used as the dividing line between those who did, and those who did not, obtain their costs.
- 44.** In this regard, it appears to me that there are four relevant considerations. First, if the applicants wished to put up a case that the Minister’s original stance that the Article 17 discretion was vested in ORAC presented a basis on which they were entitled to their costs, it was incumbent upon them to provide some evidence from which the Court could conclude (a) that the formulation of the relief claimed in the proceedings was influenced by the position of the Minister, (b) when and why the applicant’s legal advisors realised that the Minister had changed that position, (c) that it was reasonable that that realisation dawned when it did and (d) that the proceedings were commenced before the applicant’s legal advisors knew or ought reasonably to have known of that change.

45. Second, even with such evidence, the underlying proposition is not a straightforward one. It was *never* the position of the Minister that RAT/IPAT had a function under Article 17(1). Even if it was, or if it is to be said that the fact that the Minister adopted the position that ORAC had the power reasonably implied as a matter of law that RAT or IPAT had the function on appeal, it was ultimately a matter for the applicant's legal advisors to form a view as to what the legal position was. Indeed when they proceeded to seek the relief they did against IPAT, they did form their own view as to the legal position as they understood it. An erroneous interpretation of the legal position might, if influenced by the position of the Minister responsible for the domestic Regulations, form the basis for resisting an application for costs against the applicants. It is quite another matter to suggest that it formed the basis for obtaining them. Acting reasonably in bringing legal proceedings is not necessarily the determinant of an entitlement to require another party to discharge one's costs.

46. Third, here there was no evidence from any of these applicants as to what they knew about the Minister's position or when they knew it. The applications proceeded before Burns J. on the understanding that counsel practising in the list were aware of the settlement of the AKS case and, it appears, of the document proposing those terms. As I have noted earlier the letter proposing settlement said that the applicants would have their protection claims determined in this jurisdiction. Given that RAT had decided the matter and was thus *functus officio* it was not necessarily unreasonable to expect the deduction to be made that the Minister was or may therefore have been purporting to exercise the power. At the very least one might have thought it reasonable to expect that those proceeding to litigation aware of that settlement might have reviewed the assumptions on the basis of which they had to date proceeded.

47. I say this having regard to a fourth relevant factor. In her *ex tempore* rulings on March 3 2021 Burns J. stated that in the course of the hearings as to costs as they proceeded before her, counsel for the respondents had very clearly said that from the date of the settlement of *AKS* the Minister had indicated that her view was that no one else bar her had the jurisdiction to exercise the Article 17 discretion. The trial Judge then said that there was no demur from any counsel that once *AKS* had settled, '*the view*' was that the Minister was the person who was exercising the discretion (Transcript 3 March 2021 at p. 45). In fact, counsel who had appeared for the applicant in *AKS* was then recorded as stating that it was widely expected following *AKS* that all of the cases in the *AZ* list would settle. At no point in the course of the hearing of this appeal was it said that the trial Judge was wrong in this summary of the parties' positions when they appeared before her (the relevant passage from the transcript is recited in the respondents' written appeal submissions).

48. What all of this shows is the need for a significant degree of deference to the decision of a High Court Judge who is managing a substantial list, on the allocation of costs in circumstances such as this. She is in a better position than this Court to judge what reasonable practitioners in the relevant field knew or ought to have known at the time legal proceedings were instituted. I cannot conclude on the basis of the material before this Court (which does not include evidence from either the applicants or the respondents that assists in determining who might reasonably be thought to have known what and when) that she was wrong to fix the settlement of the *AKS* case as a marker. That being so – and aside entirely from the analysis that follows - it means that the change in stance of the Minister is of no assistance to the applicants in agitating their

asserted entitlement to their costs. Each must be taken to have brought the proceedings at a point when '*the view*' was that the Minister was contending that she, not ORAC, had the power to exercise the discretion under Article 17.

The cause of the mootness

49. The basis for the decision of the trial Judge was thus, in effect, that because the ruling of the Supreme Court in *NVU* had conclusively determined the principal issue in each of these cases that no order for costs should be made notwithstanding the subsequent decision of the Minister. As I have stated and as I explain further later, I agree with that conclusion.

50. However, the trial Judge based this conclusion on the thesis that the effect of the decision in *NVU* was to render each of the proceedings the subject of this application moot. This characterisation (which it should be said the trial Judge specifically noted was disputed by only one of the counsel who argued the matter on behalf of the applicants and thus in a context in which the issue was not argued in any great detail in the hearing before her) was the subject of some criticism in the submissions of the applicants. While in my view this issue of characterisation is not determinative of the outcome, the identification of the cause of the mootness is important to the analysis.

51. A case is moot when the issue it presents is hypothetical or abstract and when, therefore, the decision of the court will not have the effect of resolving a controversy affecting a real and concrete dispute between the parties (*Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] IESC 49, [2013] 4 IR 274 at para. 82). If a case

requires the court to deliver an advisory opinion on an issue that does not affect the rights or interests of one or both of the parties at the relevant time, it is moot (see *G v. Collins* [2004] IESC 38, [2005] 1 ILRM 1). It has been said that mootness is the doctrine of standing set in a time frame: as with standing it goes to the character of the dispute and interests of the parties in the outcome, but not to the merits of the position of either party. The fact that the case is weak, governed by existing precedent or for that matter bound to fail does not mean that it is moot, it just means that it is hopeless. Even hopeless cases involve real rights or interests and, until they are actually determined, present real controversies. When the respondents say – as they do in their notice to this Court – that ‘*there is no real controversy in existence in the light of the doctrine of precedent*’ they thus confuse two entirely separate legal theories. The doctrine of precedent determines how a case should be decided; the principles of mootness address whether there is a real case to decide in the first place.

52. The decision of the Supreme Court in *NVU* did not accordingly render the proceedings moot as there remained a dispute between the applicants and the respondents as to where the Article 17(1) discretion was vested. That was a live dispute even after the decision of the Supreme Court in *NVU* because unless and until they withdrew some or all of their proceedings and/or the respondents obtained orders dismissing them, each of the applicants still sought to have IPAT exercise that discretion in their favour and each had a personal interest in its doing so. The decision of the Supreme Court did not convert the issue in those proceedings into one that was purely advisory – it simply meant that the issue could be resolved in only one way.

53. These are two quite different things. The case remained live unless and until the respondents successfully applied to the Court to dismiss it and/or to set aside the grant of leave, as they would have been entitled to do. So, while the trial Judge was entirely correct to observe that the High Court was bound by the doctrine of precedent and thus to follow the *NVU* decision, and indeed that the Supreme Court itself could not depart from its own decisions save in exceptional circumstances and for compelling reasons, what this meant was that the applicants had a case that was exceptionally weak: they still, however, had *a* case. The applicants' argument was neither hypothetical nor abstract, just doomed.

The Minister's decision

54. That being so, the mootness did not arise from the decision of the Supreme Court and, logically, is a consequence solely of the decision of the Minister to exercise her discretion under Article 17 in favour of the applicants. This was not a decision she had to make. However, the judgment of Clarke J. in *Cunningham* suggests that generally if a statutory body is to successfully contend that a decision made in the exercise of its legal powers which results in legal proceedings becoming moot is not an '*external event*' in the sense in which that term is used in that case, the onus is on that body to provide the Court with evidence from which it can so conclude. The position was explained as follows in that case (at para. 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.'

(Emphasis added)

55. Thus, in *Cunningham* costs were awarded against the respondent Director of Public Prosecutions because it was his decision to enter a *nolle prosequi* that rendered the proceedings seeking to prohibit a criminal trial moot but where the Director failed to lay sufficient evidence before the Court to allow it to conclude that the reason for this course of action was disconnected from the merits of the prosecution (and to that extent the proceedings). The Court concluded as it did because there was '*a virtual absence of evidence as to the true reasons why the second respondent came to the view that the criminal proceedings against the applicant were no longer sustainable*' (at para. 29). Similarly, in *Godsil v. Ireland* the facts and circumstances caused the Court to conclude that the reason for the repeal of legislation which was the subject of the plaintiff's constitutional challenge was the plaintiff's legal action. In both cases costs were awarded because the party responsible for the mootness could not establish that the decision that prevented the proceedings from continuing was not a response, in whole or in part, to the proceedings themselves.

56. Here, the Minister relies upon an affidavit sworn by Mr. Ross Murphy. Mr. Murphy averred that the decision of the Minister to assume responsibility in Ireland for the international protection applications of those applicants whose cases had been moved

to the Article 17 holding list by the time of delivery of the judgment, was ‘*made on grounds unrelated to the reliefs sought and the grounds pleaded in the present case and indeed in the other cases also*’. That averment was not elaborated upon at all. It certainly posits that the decision was not a consequence of the proceedings. However, the approach outlined by the Court in *Cunningham* envisages that there will usually be more than a bald averment of this kind: the evidence must be such that the Court can fairly assess whether the decision was due to an ‘*external circumstance*’. This requires some explanation of why the decision was made. That requirement is not met by an undeveloped assertion that it was made for reasons unrelated to the proceedings.

57. The applicants thus say that these cases are on all fours with *Cunningham* because the respondents have also failed to lay the evidence before the Court from which it can conclude that, in fact, the decision rendering the actions moot was not made in response to them. In one sense this is true. *Cunningham* envisages that *generally* the evidence adduced by the party responsible for the mootness will do more than advance a bald and unsubstantiated averment: as Clarke J. put the matter in his judgment, the evidence must be such that the court can ‘*form a view on the issue of the real reason why the[] proceedings became moot*’ (at para. 31).

Application of Cunningham to the Minister’s decision

58. However, these applications are not on all fours with that considered in *Cunningham* and it would be wrong to apply the approach in that case to these proceedings without qualification. In these proceedings the decision rendering the actions moot was rendered *after* the Supreme Court had made it clear that the applicants could not

succeed in the principal relief claimed in their actions. Moreover, the conclusion ultimately reached by the Supreme Court occurred in a context in which the High Court had designated *NVU* as a ‘*pathfinder*’ or ‘*lead*’ case by which it was clearly intended the other proceedings would be bound.

59. In resolving how these particular characteristics of this application fall to be accommodated within the approach suggested in *Cunningham*, two features of that case are particularly relevant. First, while the debate in this appeal (and indeed in some of the other applications in which this issue has arisen) has treated the decision in *Cunningham* as imposing a set of rigid rules it is clear that this was not what the Court in *Cunningham* intended. Instead, it prescribes a general approach which should, in most cases, enable an easy resolution of the costs of moot proceedings. However it is clear that there will be circumstances in which a case does not fit neatly into that approach.

60. This is evident from the frequency with which Clarke J. expressed the flexibility of the approach he proposed. At para. 24 of his judgment Clarke J. said that the approach suggested was not intended to be ‘*overly prescriptive*’, that what was being proposed was subject to ‘*the absence of counter-veiling factors*’, that the suggested approach was the one to be ‘*ordinarily*’ undertaken and, indeed, he proceeded later to stress the fact that what was being identified in that case was described as a ‘*general rule*’ (at para. 37). This, it should be observed, reflects the approach taken by the same judge in *Telefonica O2 Ireland Ltd. v. Commission for Energy Regulation and ors.* [2011] IEHC 380 at para. 6.1 (‘*[i]t is impossible to be overly prescriptive as to the proper approach which the court should adopt as the range of factors that may be relevant are wide*’),

and indeed was re-iterated in the judgment of McKechnie J. in *Godsil v. Ireland and anor* at para. 46 (*‘[t]here will be many situations displaying multiple and variable factors all calling for separate evaluation’*).

61. The proposition that *Cunningham* posited a general approach applicable to most cases, but not a fixed set of rules to be applied mechanically without taking into account the particular features of the case at hand has been repeatedly stressed in this Court (see *PT v. Wicklow County Council* [2019] IECA 346 at para. 20, *Hughes v. Revenue Commissioners* [2021] IECA 5 at para. 34, *G and ors. v. Minister for Justice and Equality* [2021] IECA 242 at para. 53 and most recently *JO and ors. v. Minister for Justice and Equality and ors* [2021] IECA 293 at para. 37). Those decisions confirm that the correct analysis of *Cunningham* and later cases applying it is that the factors identified in that decision are thus properly viewed as presenting a guide to the application of the Court’s general discretion in the allocation of costs in a particular context and should not be applied in an excessively prescriptive manner.

62. The second issue relates to the relevance of the merits of the case to the award of the costs of moot proceedings. In this regard it is important to underline that the reason the Court in *Cunningham* devised the approach it did lies in one aspect of the rationale for the mootness doctrine. Logically, the fairest way to determine how costs should be borne in a case which has become moot is for the court to follow the merits of the case, the party who is most likely to have won the action obtaining their costs from the party likely to lose. However, in many cases this would undermine the doctrine of mootness as it is presently understood in this jurisdiction as being intended to preclude the court from deciding the merits of a moot case, even where there is an outstanding issue as to

costs. At the level of both theory and practice, accordingly, it will in the vast majority of cases be wrong (at least based on the mootness case law as it presently stands) for costs to be decided according to the merits, as it is liable to result in the Court adjudicating indirectly on a dispute which (as the case law presently stands) it is not supposed to hear, and will involve an expenditure of time and resources in so doing which the doctrine is supposed to avoid. Therefore, in the vast majority of cases it is necessary to approach the matter differently.

- 63.** However, the prospect remains that a court may in exceptional circumstances take account of the merits of a case in determining the costs of a moot action – at least where the claim is overwhelmingly weak or strong (*Hughes v. Revenue Commissioners* at para. 55). In that situation, none of the arguments of practicality which preclude the the Court from taking account of the merits of the case apply: in a clear case this can be done without any great argument. If it requires studied argument, the case is neither obviously weak or strong and the approach adopted in *Cunningham* should generally be applied. Insofar as the implications of *NVU* upon the principal relief claimed in the proceedings are concerned, this is about as clear a case as one could expect to find.

Costs and lead cases

- 64.** Here, there is another critical factor. As I have observed the fact that *NVU* was a ‘*lead case*’ means that the cases the subject of this application are very different from any other action in which the application of *Cunningham* has fallen for consideration. Under the law as it presently stands, the courts do not have the power to compel parties to multiple legal actions which depend upon similar issues of law or fact to agree that one

or more cases will be taken to trial and the parties to the other actions bound by the outcome of some or all common issues. However, the courts in their capacity to manage their own lists do have the power to adjourn or stay cases pending the determination of actions which involve similar issues of fact or law. The fact of, and reasons for, that jurisdiction was addressed by Clarke J. in *Kalix Fund Ltd. v. HSBC Institutional Trust Services (Ireland) Ltd.* [2009] IEHC 457 at para. 48, who explained that this power of management is directed to ensuring that the court brings about a just and expeditious trial while seeking to minimise costs. The adoption of measures that have the effect of preventing one or more cases from progressing in the way they might ordinarily be expected to progress were they to be considered on a stand alone basis (the Court explained) are no more than is necessary and proportionate to achieve the end of preventing unnecessary expense or use of court time (at para. 49(c)).

- 65.** When those ‘*lead*’ or ‘*pathfinder*’ cases are determined by the Supreme Court, the parties to the adjourned actions cannot be precluded from bringing their cases to trial simply because a ‘*lead*’ or ‘*pathfinder*’ case has been decided. Practice Direction HC 81 acknowledges this fact and, indeed, this is in part why those proceedings are not properly described as being ‘*moot*’. However, the operation of the doctrine of precedent will make proceeding in the teeth of such a decision pointless, and will expose parties who insist on so doing to legal costs if they carry on in the teeth of a decision in a ‘*lead*’ case. It is important to remember that it is precisely *because* the first case to be tried will in practical terms bind all others that the subsequent cases are stayed in the first place. This was explained by Clarke J. in *Kalix Fund Ltd.* as follows (at para. 49(b)):

‘in any set of common litigation where there is a legal issue arising in each case which may be significant or, indeed, determinative of important issues (such as liability) it is, in practical terms, so that the first case which happens to be tried (no matter how the matter is managed or not managed) will determine that legal issue in a way that will, in substance bind all subsequent cases.’

66. Where litigants in this situation do seek to proceed notwithstanding the binding precedent of the decision in the lead cases, they may (if applicants or plaintiffs) be met with applications to dismiss their proceedings as disclosing no cause of action where the issues have been resolved against them, or (if respondents or defendants) with applications to strike out their opposition or defences. In that circumstance, the party seeking to proceed carries a heavy burden where the basis for their claim or defence rests on a ground that has been clearly, authoritatively and recently rejected by the Supreme Court by which, of course, both the High Court and this Court are bound. A claim is not ‘arguable’ if it is in the teeth of established law. At the very least, a party in these circumstances would have to adduce cogent grounds on which it could be said either that his case is so different in nature from that considered in the earlier decision that it could be distinguished and/or that the Supreme Court had erred in, and that it was arguable that it could be prevailed to overturn, its earlier decision. The more recent a decision of that Court, and the more closely aligned in fact and time it is with another case, the less likely it becomes that a litigant will be able to make out such a case even to the low standard required to proceed with a claim or defence.

67. The fact that *NVU* was a lead case, that the principal issue in these proceedings depended on an issue of law that has now been determined in *NVU*, and the fact that

accordingly once the Supreme Court had decided *NVU* these cases were liable to be dismissed on the basis I have just described, appears to me to be the key consideration in determining how the costs arising from the intervening mootness should be resolved. This, in substance, is the conclusion reached by the trial Judge, although as I have noted she expressed that in a somewhat different way.

- 68.** While Clarke J. in *Cunningham* was accordingly clear that the determination of the costs of such proceedings should not involve the hearing of the case solely for the purposes of determining where costs should lie, he also acknowledged that there may be cases in which this could happen. At para. 21 of his judgment he explained:

‘It seems to me that it could only be in wholly exceptional circumstances that the very limited time available for the conduct of appeals in this court ... could be used to determine issues of substance which were moot and not within any of the generally recognised exceptions to the mootness rule, and which issues were being determined solely for the purposes of deciding who should pay and who should obtain costs.’

(Emphasis added).

- 69.** In my view, these cases are properly viewed as coming within that exception. The Supreme Court has decided that the discretion vested by Article 17 falls to be exercised by the Minister. It did so in a ‘lead case’ designated for the purposes of determining the issue for the benefit of a large number of parties – including these applicants. It has done so recently, and it was accepted at the hearing of this appeal that if that is correct,

these cases would each fail insofar as they seek relief based on the contention that another party has that function. In those very particular circumstances, the Minister did not have to go further than she did in her affidavit evidence. That evidence was that the decision she made which rendered the proceedings moot was not related to the proceedings themselves. It follows that (as it was aptly put by counsel for the respondents in this case) the Minister did not have to explain precisely why she made the decision she did because her motivation could not have been a response to the proceedings: insofar as the principal issue in those actions was concerned she had for all practical purposes won the proceedings.

70. Thus, while the exercise by the Minister of her discretion under Article 17 in favour of the applicants was certainly the occurrence which resulted in these proceedings becoming moot, it could not have been the '*event*' as that term is used in *Godsil* for the simple reason that in reality the Minister had already won '*the event*'. The fact that the Minister had not, before making her decision, applied to strike out the proceedings as being '*bound to fail*' does not change this. Subject to the entitlement of the applicants to apply to amend their proceedings or to the implications of the other grounds sought to be agitated in some of the actions – to both of which I will return – the proceedings *were* bound to fail insofar as based on the proposition that ORAC/IPO or RAT/IPAT had the power to exercise the Article 17 discretion, and at no point did any of the applicants point to any basis on which the principal relief claimed in the actions could have been decided other than as in *NVU*. It would be odd in these circumstances if the law required the Minister and the parties as a precondition to avoiding an award of costs in a follow-on application of the kind in issue here to incur more costs by bringing a

separate application to strike out proceedings that are, on any reasonable view of matters, bound to fail.

Amendment of proceedings

71. In the course of oral argument in this Court counsel for *FA* said that there was a live controversy in his client's case as to whether there was an appeal from the decision refusing to exercise the discretion in question in his favour. However, the complaint as expressed in his proceedings, insofar as grounded upon the lack of an appeal or of a published scheme by reference to which the Article 17 discretion could be exercised, was entirely based on the assumption that the initial exercise of that discretion was vested in ORAC/IPO. The relief sought was a declaration that in the context of an appeal from a decision of ORAC or the IPO to the effect that a notice of decision to transfer should issue, IPAT had a duty to decide whether the discretion under Article 17 should be applied. Alternatively, it was said that the State was acting unlawfully in failing to put in place a mechanism through which the applicant could '*appeal a decision/recommendation of the Refugee Applications Commissioner or International Protection Office*' that the Article 17 discretion be exercised in his favour.

72. Thus, the pleaded contention in these cases that there was no '*effective remedy*' was not open ended: as pleaded the ground was that the remedy was ineffective '*in respect of the Commissioner's decision*'. The pleading that there was no '*scheme in the State which includes an effective remedy*' was directed to, and only to, a structure in which the decision was made by the Commissioner. The pleading in *SS* and *SH* was, as I have

noted, identical. Therefore, the issue around an appeal and the compatibility of the ‘*scheme*’ for the exercise of the Article 17 discretion with European law in these cases were not questions that could be detached from the finding in *NVU* that neither ORAC/IPO or RAT/IPAT had any function under Article 17. It followed from the fact that the applicants’ position on the location of the discretion was doomed after that decision, that the complaints as pleaded by them around the exercise of the discretion and absence of a ‘*scheme*’ for its application, were also bound to fail.

73. It was in that context that all applicants said that had the Minister not made her decision, they would have applied to amend their proceedings, and that because they would have so applied and may have been granted such amendments, the Court cannot refuse to award them their costs on the basis that their actions were bound to fail. Counsel for *FA*, for example, said that had the proceedings not been rendered moot:

‘I would have sought to amend these proceedings with a view to the same challenge except against different bodies, albeit parties to the proceedings, mainly the Minister, that there should be place an appeal from the Minister’s exercise of discretion’.

74. In the High Court written submissions in *FA*, the ambit of the possible amendment application was described as covering *inter alia*:

‘such issues as the lack of transparency in the scheme in operation under the Dublin Regulations, the absence of an appeal mechanism from any decision of the Minister in regard to discretionary relief, the breach of Article 47 of the

Charter of Fundamental Rights of the European Union, the very significant delay in dealing with the Applicant's application for international protection and the breach of the Applicant's rights to good administration ...'

75. In that connection, counsel for *FA* stressed that even after the decision of the Supreme Court in *NVU* there was no clarity as to whether there should be an appeal against a decision of the Minister reached in the exercise of her discretion under Article 17 and, if there was such an appeal, to whom that appeal should be brought.

76. I have difficulty in understanding how this alters matters insofar as costs are concerned.

The fact that the applicants might have applied to amend their proceedings had the proceedings not been rendered moot is neither here nor there. This had not happened. The Court in this application is concerned with the costs of the action as it was, not the costs of a case as it might have been. To say that the applicants should be awarded the costs of a case in which they were doomed to defeat because they could have made a different case is in every sense to put the cart before the horse. The purpose of an award of costs in favour of an applicant in moot judicial review proceedings is to ensure that the expense they have incurred *in the past* in bringing a claim the validity of which has been impliedly accepted, is recouped. The contention that they can avoid the fact that their investment was made in Case 1 that could not succeed, by subsequently making an entirely different Case 2 and thereby obtain the costs of Case 1 turns that purpose on its head.

77. Two closely related factors – one practical and one legal – show why this must be so.

At the level of practicality, any Judge faced with an application to amend these

proceedings to claim that the Minister should exercise her discretion under Article 17 in the applicants' favour would have immediately inquired of the applicants before acceding to any such application whether they had actually asked the Minister to do so. Inevitably, the same question would have arisen had it been sought to assert that there should be an appeal against any adverse decision by her, and/or to complain that the absence of a proper structure for the making of applications to have the Article 17 discretion exercised was in breach of European law.

78. Having regard to the decision reached by the Minister on July 30, it must be assumed had such a request been made following the decision of the Supreme Court in *NVU*, that the Minister would have acceded to that application. Had the Minister done so there would have been no basis for amending any aspect of the applicants' pleadings. The proceedings would have thus become moot because of the applicants' action in asking the Minister to exercise the power in their favour and her agreement to do that. Even on the most rigid application of *Cunningham* they could not have obtained their costs as the cause of the mootness would not have been a *unilateral* act granting the applicant the relief they sought in the case, but an action initiated by the applicants themselves seeking a relief that was not sought against the Minister in the proceedings. As the decision in *Hughes v. Revenue Commissioners* shows, the principles in *Cunningham* do not have direct relevance to circumstances in which both parties have acted to bring about a situation in which the issues in the case will not be determined. The mootness in that situation is caused by a *bilateral* event, not a *unilateral* one.

79. It is impossible to see how the position on costs can be different because the Minister acted without request. All of the moot costs applications have involved proceedings in

which the applicants had asked the respondents to adopt a particular course of action, in which the respondents failed and/or refused to do so, in which proceedings were thereupon brought and in which either (a) the respondents changed their mind or (b) circumstances occurred which justified the respondents providing the benefit originally sought. The point is, however, that the benefit was sought from the party entitled to confer it. The sequence shows that arguments based upon hypothetical applications to amend the proceedings must fail.

80. That is related to the legal issue I have earlier referenced. To seek to amend proceedings to claim that the process was flawed because of the absence of an appeal would in normal course have required not merely a request, but an adverse decision. This follows from the usual inclination against permitting a party to embark upon proceedings that are premature or presenting issues that are not ripe for adjudication. The purpose of legal action of the kind in issue here is not to resolve hypothetical disputes but real situations. It is difficult to imagine circumstances in which an applicant asking the Minister to exercise her discretion under Article 17 would have the right to litigate the question of whether he or she has a right to appeal if there is no adverse decision in the first place. Until such an adverse decision is reached, there is nothing to appeal. In his submissions to the High Court counsel for *FA* said that the declaratory reliefs he sought had been rendered moot because, following the Minister's decision, he no longer had *locus standi* to pursue them. This was correct. But it inevitably follows for precisely the same reason that following the decision in *NVU* he had no entitlement to challenge the absence of an appeal from the '*regime*' the Minister operated under Article 17 until he had actually sought and obtained an adverse decision. Until that happened, the question of whether there was an appeal against the decision which the applicants had

not sought was purely hypothetical and it was generally impermissible to assert it in legal proceedings for precisely the same reason as a moot claim is inadmissible. The relevance of the prematurity of an issue to the award of costs following mootness is confirmed by the decision of this Court in *JO and ors. v. Minister for Justice and Equality and ors.* to which I return later.

81. In summary, the applicants suggest that they should be entitled to an order in their favour because they were going to make a case that they never made, and should therefore recover the costs of a case in which they could never have succeeded. Thus, reference was made throughout oral submissions to the Minister preventing them from amending their claims, or pulling the rug from under their proceedings. All of this is, in my view, quite wrong. The applicants framed their cases as they chose to do, the Supreme Court decided that the theory underlying their cases was erroneous, and the Minister gave them what they ultimately wanted but could never have obtained from their action. Certainly, they can have ground for valid complaint that the Minister changed her position on the issue of whether ORAC had the power to exercise the Article 17 discretion. Had the cases gone to trial this might have been a consideration in not ordering costs against the applicants in the event of an adverse decision on the merits in their claims if the applicants were in a position to establish that, and why they were, influenced by the position of the Minister in proceeding as they did. It does not provide a basis on which the applicants can recover their costs.

The other reliefs claimed in the actions

(i) *Some general comments*

82. In this Court, and across multiple sets of written and thereafter oral submissions counsel for each of the applicants focussed on the detail of their pleadings with a view to contending that there were reliefs sought by them that stood independently of the decision in *NVU*. In this way it was sought to contend that there were aspects of their cases that remained undecided following the decision in *NVU* and, to that extent, that even if they were disentitled from seeking costs because that decision determined some claims against them, there were other parts to which the rules on moot costs should apply in the ordinary way. No authority was cited to the Court in which this approach has ever been taken in an application of this kind.

83. For my part I believe this contention, and the approach to this application which resulted from it – while understandable – will in most cases be misplaced. Where there are multiple grounds of relief in a judicial review proceeding which is said to have become moot, the Court in determining how costs should be awarded ought generally to focus on the principal substantive relief in the proceedings and to identify what Noonan J. in *Sherlock and ors. v. Clare County Council* [2020] IECA 251 (at para. 21) referred to as ‘*the gravamen*’ of the case to which the principles in the cases should be applied. When (as happened here) that is what the trial Judge does, the exercise by that Court of its discretion should not be interfered with by this Court unless there has been a specific error of principle in the identification of the core features of the case, or the Judge in engaging in that exercise has otherwise gone outside the parameters of the margin of appreciation he or she enjoys in such a determination. It is critical to restate that this standard of appellate review applies to a decision on the costs of moot proceedings in precisely the same way as it does to other decisions of a trial Judge on the allocation of

the costs of an action (see *JO v. Minister for Justice and Equality* at para. 51). It should, in particular, not usually be necessary for either the trial Court or this Court to engage in a detailed slicing and word by word analysis of the pleadings and claims to determine what parts of what relief were rendered moot by what and why. As Clarke J. said, in addressing a slightly different point in *Cunningham*, there are limits to the extent to which it is appropriate to go into minute detail on the essential matters to be addressed in an application of this kind (at para. 31).

84. In this regard it must be remembered that this is an application for costs not a substantive trial, and that the entire object of the principles as developed by the Court in *Cunningham* was to enable such applications to be determined with relative despatch and by reference to clear guidance which should govern the majority of cases. One of the purposes of the mootness doctrine is to avoid the unnecessary expenditure of court time on matters that are not relevant to the rights and interests of the parties. It was not the intention of the Court in designing a system for the just allocation of costs in such proceedings to point the parties or the Court in the direction of time consuming cost applications involving a detailed parsing of pleading and the application of subtle distinctions based upon the relationship between particular grounds of relief, and the cause of the mootness with, potentially, the Court splitting costs between issues which were moot for one reason, but not another, none of which had ever come to trial. Nor was it the intention that the framework suggested in *Cunningham* would itself give rise to involved debates around the location of an individual case within the categories it identified.

85. To view such applications in this way is, moreover, to acknowledge the essential rationale of the case law. As the decision in *Godsil* - in particular – makes clear, the Court is often concerned in applications such as this with determining whether the actions of the respondent giving rise to the mootness can be characterised as an ‘*event*’. I have explained earlier why this is not the case in relation to the decision of the Minister here on the particular facts of this case. What is important, however, is that this inquiry itself necessarily involves a conspectus view of the action, and a determination having regard to the overall substance of the case of who really won (see *Godsil* at para. 54). In moot cases, this should be determined having regard to ‘*the principal objective of the proceedings*’ (*Sherlock and ors. v. Clare County Council* at para. 27; *JO and ors. v. Minister for Justice and Equality and ors.* para. 49). Indeed, an applicant who persists to trial with and loses the main issue in his case but nonetheless prevails on an ancillary question may well find that they obtain no order for costs (see *Chubb v. Health Insurance Authority* [2020] IECA 183). There is, accordingly, a certain symmetry in focussing on the principal issue in the case where the issue is that of costs following mootness.

86. I do not think that there can be any serious doubt as to what the gravamen of these proceedings was. The applicants contended that ORAC/IPO had the power to exercise the Article 17(1) discretion in their favour, and that where it refused to do so RAT/IPAT enjoyed a jurisdiction on appeal to exercise that same power. Their primary concern was to obtain an order of *certiorari* quashing decisions of IPAT because that discretion was not exercised. Declaratory orders were sought directed to this asserted jurisdiction. This was the centrepiece of the claims, and the Court was required to (and the High Court Judge did) determine the question of where costs lay following mootness by

reference to it. I can see no basis for interfering with that determination. The sense of the approach I thus suggest, and the conclusion that follows from it, is I think clear when one follows the exercise urged by counsel in respect of the individual claims.

(ii) FA, SS and SH.

87. For the reasons I have explained in detail above, no order for costs should be made in *FA*, and therefore in the identically pleaded cases of *SS*, *SH*. In all of these cases, the relief was entirely predicated upon ORAC/IPO and, on appeal, IPAT having the power to exercise the Article 17 discretion. Because the effect of *NVU* was that all of these reliefs could only be determined in one way and having regard to the analysis I have set out above, the subsequent decision of the Minister could not confer upon these applicants an entitlement to costs that they would not otherwise have enjoyed.

(iii) AA

88. While the pleadings in *AA* were framed somewhat differently the same conclusion follows. Four of the five grounds advanced for the reliefs claimed are expressly directed to IPAT. While the fifth referred to the Minister having breached her legal duties by failing to provide a mechanism for applicants to present reasons why the State should exercise the Article 17 discretion, this was framed in a context where the only complaint made was of the failure by IPAT to exercise that function. This is clear from the fact that the five specific grounds are framed in the Statement of Grounds as particulars of the general claim that it was IPAT that acted unlawfully. Indeed, this applicant's grounding affidavit (at para. 14) specifically relates the complaint that there

was no effective remedy, to the failure of IPAT to consider whether the applicant's case was an appropriate one in which to exercise the discretion provided for in Article 17. The written legal submissions delivered by this applicant for the purposes of his application for leave (at para. 33) referenced the ground to the inability of the applicant to appeal '*the determination of the Commissioner*' as regards the exercise of the Article 17 discretion. At no point does the pleading suggest that this complaint was directed to a situation in which the Minister was the person in whom that discretion was vested.

(iv) MT and HN: the grounds.

89. Counsel for both *MT* and *HN* contended that in their cases relief was sought which did not depend on the outcome of *NVU*. As I have noted earlier, *MT* sought *inter alia* a declaration that the respondents had failed to put in place a system to permit applicants for international protection to apply for discretionary relief under Article 17. All of the reliefs claimed were referenced to four headings of grounds, one of which related to Brexit which, it was accepted, is not relevant here.

90. The first collection of grounds all related to alleged illegality and/procedural unfairness by IPAT '*in relation to Article 17*' and, clearly, depend upon its having a jurisdiction under that provision. The next is headed '*material or immaterial considerations*'. It focusses on the applicant's family rights alleging (i) an unfairness in failing to make a determination regarding those rights, (ii) an error in finding this was not an appropriate case in which to exercise the Article 17 discretion having regard to those rights, and (iii) an error in failing to have regard to or to vindicate the family rights of his relatives. The second of these points clearly depends on Article 17, but I can find nothing in the

pleading to suggest that the other grounds carried with them the claim that the Tribunal had a separate ‘*stand alone*’ jurisdiction to refuse transfer because of those rights. The grounds, it must be recalled, are directed to errors in IPAT’s decision and there is nothing in that decision, or the papers submitted to this Court, to suggest that this applicant ever contended before IPAT that it had a jurisdiction independently of Article 17 to engage in such an assessment.

91. The final ground was the foundation for the following relief against the Minister and the State, and was based upon the assertion that they:

‘have failed to put in place a transparent system to permit applicants for international protection to apply for discretionary relief under Article 17 of the Dublin III Regulation and to appeal from the denial of same.’

92. HN’s claim similarly asserted an illegality in the finding of IPAT that it lacked jurisdiction to exercise the Article 17(1) discretion. He also sought a declaration that the respondents acted unlawfully in failing:

‘to put in place a system to permit applicants for international protection to apply for discretionary relief under Article 17 of the Dublin III Regulation.’

93. This was sought on the following basis:

‘If the First Named Respondent [IPAT] is correct in that it has no jurisdiction to consider Article 17(1) claims, then the Third and/or Fourth Named Respondents [the Minister and the State] have failed in their obligations to establish a means by which applicants for international protection may assert an effective remedy to their Article 17(1) claims to which they are entitled under the Dublin III Regulation.’

94. *HN* also sought a specific declaration to the effect that he had a legitimate expectation that his application for asylum would be processed to completion at first instance within a reasonable time. As I have explained earlier, the effect of his appeal to the Court of Appeal was that he had a further claim to the following effect:

‘The respondent Tribunal erred in law by ruling that it had no free standing discretion to set aside a transfer decision on the grounds that the Applicant’s rights under Article 8 of the European Convention of Human Rights could be breached by his transfer to the United Kingdom.’

95. It follows from the foregoing that those parts of *MT*’s case directed to the asserted illegality and/or procedural unfairness in relation to Article 17, and what are termed ‘*material or immaterial considerations*’, and that part of *HN*’s action asserting an illegality in IPAT’s decision arising from its failure to consider the Applicant’s claims under Article 17(1) fall to be addressed in the same way as the proceedings brought by *FA*, *SS*, *HS* and *AA*. All of these grounds were directly or indirectly dependant upon IPAT enjoying a jurisdiction to exercise the discretion vested by Article 17(1), and all accordingly fell away when the Supreme Court decided *NVU*.

(v) The different grounds in MT and HN's proceedings

96. In relation to both of these cases, however, the issue remains whether the fact of three reliefs/grounds alters the conclusion that otherwise flows from my earlier analysis. These are the claim that the Minister and State had acted unlawfully in failing to establish a mechanism for invoking the Article 17(1) discretion (which is common to both cases), the assertion that IPAT erred in ruling that it had no free standing discretion to set aside a transfer decision on the basis of Article 8 of the European Convention on Human Rights (pleaded only in *HN's* case) and the application for a declaration that there was a legitimate expectation that the claim for asylum would be dealt with expeditiously (a point also made only in the case of *HN*).
97. The claim that the State had failed to put in place a transparent system for the invocation of the Article 17(1) discretion and the bringing of an appeal against a decision refusing to do so was, in every sense, ancillary to the principal argument that IPAT had acted unlawfully in not exercising the Article 17 discretion in his favour. It was an inevitable consequence of the case made by these applicants that their starting point was that there *was* such a system in place and that there was an appeal from the entity charged with making the initial decision. It was the failure by what they claimed to be the relevant appellate body within that system to exercise that jurisdiction that gave rise to the claim for an order of *certiorari*.
98. The other case made was an alternative and thus secondary ground arising only if these applicants were wrong in the primary case they made. Even then it is notable that

although claiming that if IPAT did not have the relevant power the State had acted unlawfully in failing to put in place a system by which the party in whom it was vested could be called upon to exercise it, the pleading does not actually state who that party was (even though the Minister was asserting that it was her). No reference is made to the parties having actually asked the Minister how an application should be made in the event that she was the person in whom the function under Article 17 was vested. In fact, quite remarkably having regard to the ‘*view*’ of practitioners as it was found by the trial Judge and the position of the Minister recorded on affidavit since April 2017, none of the pleadings acknowledge – even as an alternative – that the Minister enjoyed that function. As this Court has recently noted in *JO v. Minister for Justice and Equality* the applicants having deliberately elected not to make an application to the Minister under Article 17 (although noting here the particular position of *HN* to which I return) they could not retrospectively recast their submissions to IPO and IPAT as constituting an application to the Minister (at para. 46).

99. The decision in *JO v. The Minister for Justice and Equality and ors.* also shows the relevance to costs of the fact – to which I have earlier made reference – that this relief was premature in the absence of a decision from the Minister or, at least, a reasonable opportunity for her to reach such a decision. That case arose from proceedings in the High Court the judgment in which is issued under the title *TAO and ors. v. The Minister for Justice and Equality and ors.* [2020] IEHC 648. In that action (which was commenced three months after the decision in *NVU*) the Minister had been asked to exercise her discretion under Article 17 and when she had failed to do so five weeks after that request and while an appeal was still pending before IPAT, proceedings were

instituted seeking an order for mandamus compelling her so to do. Together with that order of *mandamus*, a declaration was sought to the following effect:

‘that the uncertainty surrounding the determination of issues under Article 17 and the failure to make an Article 17 decision or to indicate when same shall issue is in breach of the Applicants’ rights to fair procedures and effective remedies in Irish and EU law’.

100. A telescoped hearing of an application for leave to seek judicial review and the substantive hearing commenced in late November, on the second day of which the Minister gave an undertaking to make a decision on the application under Article 17 by a stated date. The hearing continued (including not merely the complaint based upon the alleged absence of an effective remedy but also various arguments arising from the departure of the United Kingdom from the EU), the Court delivering judgment some days after its conclusion. The trial Judge found that in light of the indication by the Minister that she would determine the Article 17 application by a specific date, the claims for an order requiring her so to do and the declaration I have quoted no longer arose to be considered. The remaining reliefs were rejected. In the course of so concluding the Court noted that the Statement of Grounds referred to a breach of EU law by the respondents in failing to put in place a transparent system for an Article 17 application to be made to the Minister. Noting that no relief was specified as being sought on foot of this, the trial Judge also said that having regard to the fact that IPAT had made its decision to transfer some weeks before the hearing commenced and that the Minister had following that stated that she would make her decision by the middle of December *‘no issue arises in terms of transparency having regard to that timeline’.*

- 101.** Eventually the Court ordered that the applicants recover 1/8th of their costs because of the limited ‘*win*’ the applicants had obtained as a result of the Minister’s agreement to exercise the discretion by a stated date, that award being reduced from 1/4 of the costs that might otherwise have been awarded having regard to deficiencies in the applicants’ pleading. In that regard it should be stressed that in that case – unlike any of these proceedings – relief had been sought against the Minister on the basis that the Article 17 discretion was vested in her. The Court also took into account its view that, having regard to the fact that the action was commenced while an appeal was still pending before IPAT, the proceedings had been commenced ‘*at a stage that was far too early*’.
- 102.** On appeal to this Court the applicants contended that they should have been awarded all of their costs or at least more of them. In a judgment delivered by Collins J. (with whom Noonan J. and Ní Raifeartaigh J. agreed), the Court refused to interfere with the exercise by the trial Judge of her discretion in the allocation of the costs. After reiterating the principles to be applied in reviewing a decision of a trial Court in respect of costs, Collins J. observed as follows (at para. 46):

‘The fact that the application to the Minister was only made on 15 September 2020 was something that the Judge was entitled to have regard to, in circumstances where the proceedings were commenced less than five weeks later, at a time when the Appellants appeal was still pending before IPAT. In these circumstances, it was open to the Judge to take the view that the proceedings had been brought prematurely and before the Minister had had a reasonable opportunity to reach a decision on the Article 17 applications.’

103. Finally, as to the issue stressed by *HN* and based on the claim that IPAT nonetheless has a function in determining whether a transfer order should be made having regard to constitutional or family law rights, this case only arose if IPAT did *not* enjoy a discretion under Article 17(1) because if it did have such a discretion and if it did have an obligation to take account of the constitutional and convention rights of the applicant as alleged, it would necessarily have exercised that discretion having regard to those rights. That the claim was a secondary one is evident, if nothing else, from the fact that it never appears to have been advanced before IPAT itself. Certainly, the decision of IPAT records this applicant as having invoked Articles 3 and 8 of the European Convention on Human Rights only in the context of the Article 17 discretion (although the Tribunal itself proceeded to examine it on a ‘*stand alone*’ basis) and, if this was mistaken, the applicant has neither so stated nor exhibited any material from which one could so conclude. While, of course, this Court acknowledged this contention to be stateable, it did so at a point *before* the decision of the Supreme Court in *NVU* which makes it clear that there may be exceptional cases in which *the Minister* should entertain arguments based upon an applicant’s rights. The basis on which a parallel obligation is imposed on IPO or IPAT is, to say the least, unclear.

104. Adopting the analysis I have earlier suggested and looking at the principal relief claimed in the proceedings, there is in my view no doubt but that the making of a case based upon these grounds does not affect the conclusion that otherwise follows from the decision in *NVU*. Apart from the fact that the arguments are ancillary to the main contention, and apart from the fact that that main contention was following *NVU* bound to fail, the decision in *NVU* presented a legal structure for the exercise of Article 17

rights which was not contemplated in any way by the applicant's claims. For whatever reason, at no point did any of them in their pleadings acknowledge – even conditionally – that the Minister had this power. I cannot see how the Court could plausibly conclude that the Minister's decision was in any sense a response to these claims.

- 105.** Burns J. in the course of her *ex tempore* ruling in this case described the relief sought by *HN* to the effect that he had a right to a speedy determination of his asylum claim as '*a ground without any life*'. That seems to me to be quite correct. Even if the case could be viewed as properly pleaded (no grounds appear to have been identified in support of it) it is ancillary to the main grounds of relief in every sense.

Miscellaneous issues

- 106.** A number of further and case specific arguments were raised throughout the wide-ranging submissions of counsel for the individual applicants. None of these affect the conclusion I have reached and outlined above, and they can be dealt with briefly.
- 107.** First, the point is made that *HN* had asked the Minister to exercise the Article 17 discretion in his favour, that he never received a response to that request, and that he then obtained precisely that benefit when the Minister made her decision as announced on July 30. The Minister has not provided any explanation for the failure to reach a decision in response to that letter – it may have been explicable by reference to the stay placed on the Court of Appeal decision (which envisaged a residual power on the part of the Minister to exercise the discretion). However, I cannot see how this can be related to the proceedings. *HN* never sought an order requiring the Minister to exercise

the discretion, so her failure to do so earlier can have no effect on the costs of the action. For the same reason the point made on behalf of *MT* that the Minister at all times knew that the applicants were seeking to have the Article 17 discretion exercised in their favour does not advance matters. I have noted earlier the rejection of a similar argument when advanced before this Court in *JO*.

108. Second, *MT* attached some importance to the fact that IPO invited him to make submissions to it on the humanitarian aspect of his case. Indeed it will be recalled that IPAT having expressed the view that his would be an appropriate case in which to exercise the discretion conferred by Article 17 (but at the same time finding that it did not enjoy the jurisdiction so to do), effectively invited *MT* to draw the attention of IPO to the decision and to communicate further with it. Putting to one side the fact that *MT* never took up that proposal, these comments of IPAT do not impact on the essential reason I have concluded that none of the applicants are entitled to their costs. They may be relevant to whether *MT* acted reasonably in bringing his case, but not on the fact that – as the Supreme Court has determined the legal position to be – his action was based on an erroneous foundation.

109. Third, AA makes a point very particular to his case. There, unlike the applications made by the other applicants, ORAC addressed the Article 17 discretion in making its decision. Thus, AA says, this makes his case different. He says that ORAC, as matters have now transpired, acted unlawfully and he acted reasonably in seeking judicial review of the failure of RAT to exercise the discretion in his favour. However – while I do note that in at least one other case not before this Court the High Court Judge viewed this as a distinguishing feature – I do not see that this affects the impact of the

decision in *NVU* on AA's action. AA never contended that the body ultimately found to enjoy this power was required to exercise it in his favour.

- 110.** Finally, a number of the applicants made the point that the transfer decision was in limbo after the Minister's decision, suggesting that there was a requirement to cancel it which, in turn, would represent an event. I do not see that this argument advances matters. If the Minister has the power to exercise the Article 17 discretion she must be entitled to do so following a transfer decision. Whether or not her exercise of that discretion in favour of an applicant results in an implied cancellation of the decision (an issue on which I express no view) does not affect the rationale for my decision that these are not cases in which it is appropriate to direct the respondents to pay the applicants' costs.

Reference to the CJEU

- 111.** Three of the applicants (*FA*, *SH* and *SS*) say that in the event that the Court were contemplating a refusal of his appeal, it should refer to the Court of Justice of the European Union a question as follows:

'Would the refusal of a costs award in favour of the Appellant be precluded by/incompatible with the Appellant's right to, and/or Ireland's obligation to provide an effective remedy to the Appellant pursuant to Article 27 of Regulation (EU) No. 604/2013 of European Parliament and of the Council of 26th June 2013.'

112. These applicants say that very considerable expense has been incurred in the preparation of these proceedings, applying for leave to seek judicial review, and the seeking of an injunction and that these would all be thrown away if there is to be no order for costs made in the applicants' favour. Five specific features of the context are emphasised – that the applicants applied for protection, that the State refused to process that application, that the appellant sought and was granted leave to apply for judicial review challenging that refusal, that the applicants' cases were put in a 'holding list' without opportunity to have their applications for judicial review determined, that the Minister then voluntarily provided what was sought in the proceedings and that the applicants were then refused their costs and the costs of a costs hearing are awarded against them.

113. In this regard, these applicants refer to Article 27 of the Regulation which, *inter alia*, mandates that an applicant shall have an effective remedy in the form of an appeal or review against a transfer decision before a court or tribunal. The judicial review, it is said, could never provide an effective remedy having regard to the five matters emphasised by them.

114. I do not think that there is any reality to this request. These appeals are concerned exclusively with the matter of costs. These are a matter for national procedural law. No question of EU law requiring determination or clarification has been identified by these applicants such as to give rise to a reference.

Conclusion and orders

- 115.** This is one of a number of appeals brought in the past two years to this Court against determinations of the High Court as to the awarding of the costs of proceeding that have become moot. In many of these applications, sight has been lost of two over-riding considerations. First, decisions as to costs are a matter for the discretion of the High Court and this Court should not, generally, interfere with the the High Court Judge's decision save where he or she has erred in principle or otherwise gone outside the parameters of the margin of appreciation he or she enjoys in making such a determination. Second, the guidance afforded by the Supreme Court in *Cunningham* and subsequent cases is important in defining the correct approach to be adopted to such applications. However, that guidance must be applied having regard to the specific circumstances of a particular action and the reasons it has become moot.
- 116.** In this case, the High Court Judge decided that in these cases no order for costs should be made, even though they had been rendered moot. While I believe that the trial Judge erred in deciding that the proceedings had become moot because of the decision of the Supreme Court in *NVU*, that characterisation did not affect the essential reason for her decision. This reason was that having regard to the decision in that case the principal issue in these proceedings could only be decided in favour of the respondents. While it is not usual to determine an application for the costs of a moot proceeding by reference to the merits of the underlying claim, these cases were different because that issue had been decided recently and conclusively by the Supreme Court in a '*lead*' case designated as such by the High Court in the exercise of its powers of management to the intent that it would determine the outcome of other like cases (including these proceedings). In so concluding the trial Judge was correct.

- 117.** The trial Judge ordered costs of the applications before that Court against the applicants, and I am not inclined to interfere with that decision. However, having regard to the fact that my decision adopts an analysis that differs from that urged by the respondents in this Court and in the Court below, my preliminary view is that no order should be made in respect of the costs of this appeal. If either party wishes to dispute this preliminary view (as of course they are free to do) they should advise the Court of Appeal Office within ten days of the date of this decision, whereupon the Court will convene a hearing to address the question of costs.
- 118.** Donnelly J. and Power J. agree with my conclusion that this appeal should be dismissed and the reasons I have reached that view.