AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2022:000023

O'Donnell C.J.

Charleton J.

Woulfe J.

Hogan J.

Murray J.

Between/

GIDEON ODUM AND SOPHIE CHUKWUDI (AN INFANT SUING BY HER FATHER AND NEXT FRIEND GIDEON ODUM) AND RICHARD CHUKWUEBUKE AGBONUKE AGBONHESE (AN INFANT SUING BY HIS FATHER AND NEXT FRIEND GIDEON ODUM) AND WILLIAM ONYINYE AGBONHESE (AN INFANT SUING BY HIS FATHER AND NEXT FRIEND GIDEON ODUM)

Appellants

-and-

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

Judgment of Mr. Justice O'Donnell, Chief Justice delivered on the 2nd day of February, 2023.

Introduction

1. This appeal requires this Court to consider once again – this time in the light of the structure created by the Thirty-third Amendment of the Constitution in respect of the jurisdiction of this Court to entertain appeals from the Court of Appeal and High Court – the circumstances in which an appeal may be moot, and if moot, whether (and, if so when) the Court will nevertheless proceed to hear and determine the case.

2. The issue arises in the following way. The proceedings themselves are a challenge by way of judicial review seeking an order of *certiorari* quashing a deportation order made by the respondent in respect of the first named applicant, Gideon Odum on 21 June, 2016.

3. The applicant had arrived in this State unlawfully in November, 2007. He had never sought refugee status. In December, 2007 he went through a religious ceremony of marriage, such a ceremony is not recognised by the law in this jurisdiction. The couple did not go through a civil marriage ceremony and, accordingly, for the purposes of the law of this State, are not considered to be married. The couple had, however, three children, the second, third and fourth named applicants who were all born in the State. In November, 2014 the applicant and his partner/spouse separated, and at this juncture the applicant sought for the first time permission to remain in the State. That application was refused, resulting in the deportation order of 21 June, 2016, the subject matter of these proceedings.

4. High Court proceedings were commenced in July of the same year. In essence, the applicant challenged the decision of the Minister for Justice and Equality ("the Minister"), on the grounds that she did not adequately or correctly assess his family and private life rights under the Constitution and the European Convention on Human Rights (*Odum and ors v. The Minister for Justice* [2021] IEHC 747 (Unreported, High Court, Tara Burns J., 22 November, 2021)). Leave to seek judicial review was granted by the High Court on 25 July, 2016.

5. Thereafter, the case was placed by the High Court in a so called "Gorry list" i.e., a list which was waiting the outcome of proceedings entitled *Gorry v. The Minister for Justice and Equality* [2020] IESC 55 (Unreported, Supreme Court, O'Donnell and McKechnie JJ., 23 September, 2020) ("*Gorry*"). That case raised similar issues

in the context of immigration and deportation. A number of the cases in the Gorry list were resolved in the light of the decision of the Supreme Court in that case, but the proceedings in this case were not among those cases resolved by agreement. Instead, it proceeded to a hearing. On 22 November, 2021 the High Court refused the application for judicial review and in February, 2022, refused an application for leave to appeal to the Court of Appeal.

6. On 29 June, 2022, a panel of this Court granted leave to appeal. The panel considered that the case satisfied the provisions of Article 34.5.4° of the Constitution permitting an appeal from the High Court to this Court where the case involves a question of general public importance and there were exceptional circumstances warranting an appeal to the Supreme Court. The grounds upon which the panel were so satisfied to grant leave were explained as follows:-

> "17. The judgment in *Oguekwe v. Minister for Justice* makes it clear that constitutional rights arise in relationships between parents and children, regardless of citizenship status. The judgment in *Gorry v. Minister for Justice* emphasised that constitutional family rights, if arising, ought to be considered by the Minister when making deportation orders. How those rights are affected by the absence of a "meaningful involved relationship", and whether that is the correct test, or even a test at all, to be applied in deportation decisions are issues of general public importance.
>
> 18. A deportation order may have a very significant impact on its subject. It is in the interests of justice that the correct approach to considerations of constitutional family rights in deportation decisions be clarified, or indeed identified".

7. The case was admitted to case management, and the applicant delivered detailed submissions on 18 July, 2022. However, on 15 July, 2022 the respondent communicated with the applicant's solicitors, enclosing a decision on an application the applicant had made under the Regularisation of Long Term Undocumented Migrants Scheme. The effect of that decision was to grant the applicant permission to remain in the State for a period of two years from 15 July, 2022. Enclosed with the letter was a formal order made on 14 July, 2022 on behalf of the Minister, revoking the deportation order of 21 June, 2016. It was in the following terms:-

> "Immigration Act, 1999 Order for Revocation of Deportation Order. In exercise of the powers conferred on me by the Minister for Justice by section 3(11) of the Immigration Act, 1999, I hereby revoke the deportation order which was made in respect of Gideon Odum aka Gideon Chukwudi aka Gideon Chukwudi Odum on 21 June, 2016".

8. It should be said that the applicant's application under the Regularisation of Long Term Undocumented Migrants Scheme, and the Minister's decision in respect thereof appear to have occurred quite separately from either these proceedings or this appeal. There is no sense, therefore, in which it could be understood that either the application by the applicant, or the decision by the Minister, were prompted by the prospects of this appeal being heard, or by a desire to affect it in any way.

9. In the circumstances, the respondent Minister argues that the appeal is now moot and should be dismissed. After hearing argument, the Court gave its decision that it would proceed to hear the appeal and would give its reasons later. This judgment sets out those reasons.

Discussion

10. At the outset, it might be said that the decisions of these courts, and, indeed, other courts whose decisions are persuasive authority, on the question of mootness are something of the wilderness of single instances decried by Tennyson. On some occasions they are characterised by fine distinctions, and on others it may be difficult to ascertain at first glance a principled basis on which it has been decided that certain cases, although moot, should nonetheless be heard and determined. Nevertheless, it is possible to discern a rough consistency between the cases, suggesting that courts are able to recognise those cases which should not proceed and those which should be heard and determined notwithstanding the fact that they may have been substantially resolved or where events may have overtaken them, even if they sometimes struggle to identify a bright line rule. It is, moreover, clear that however strictly or flexibly the principle of mootness is applied, there remains a discretion vested in a court to proceed to hear such cases, even if considered technically moot. It might be thought, therefore, that in the light of this fact, and indeed the extent to which the governing legal principles have been reviewed on a number of occasions, recently in this Court, most notably in the decision in *Lofinmakin and ors v. Minister for Justice, Equality and Law Reform and ors* [2013] IESC 49, [2013] 4 I.R. 274 ("*Lofinmakin*"), there is little merit in a court doing more than announcing its

decision in this case, as one more illustration of the circumstances in which it will exercise its discretion in favour of hearing an appeal. However, I consider that there is some benefit in a more extended consideration of this matter particularly in the light of the jurisdiction of this Court, set out in Article 34.5 of the Constitution as inserted by the Thirty-third Amendment.

The Recent Case Law

11. In considering the case law in this area it will, I think, be useful to distinguish between at least three different situations. First, issues may arise on the commencement of proceedings, particularly in the public law sphere, as to whether a party has sufficient *standing* to bring proceedings. This occurs most clearly where the proceedings challenge the validity, having regard to the Constitution, of an enactment of the Oireachtas but also when an application is made for leave to seek judicial review of a public law measure. Second, events may occur after the commencement of proceedings but before the first instance decision, which are considered to render the proceedings *moot*. Third, the events which may be contended to render a case moot may occur after a decision has been made at first instance or by the Court of Appeal but before the appeal is – as the case may be – brought or decided. Insofar as the jurisdiction of this Court since 2014 is concerned, this may occur either before leave to appeal has been granted by this Court and the asserted mootness may be considered in the context of an application for leave to appeal, or after leave has been granted with the consequence that there has been a determination that the appeal involves an issue of general public importance or that it is otherwise in the interests of justice that there should be an appeal. In each of the above cases there may be a further refinement in that the event giving rise to the lack of standing or mootness may be one which occurs independent of the parties, or because of the actions of a party to the proceedings.

12. These three situations are different not simply because of the point in time at which the event rendering the case moot has occurred, but also because the implications for the parties and indeed the legal system more generally of arresting the case by reason of mootness may differ depending on how far advanced the case is when this happens. At its simplest, the more advanced a case is, the more each party stands to lose by way of costs (including, of course, by reason of the expectation that the successful party will entertain that it will recover its costs) if the case is suddenly halted by reason of the mootness. But systemically, if the mootness occurs after a

decision at first instance (or indeed by the Court of Appeal) has been made and if it is held that the effect of the mootness is to require that the courts refuse to proceed with an appeal, a legal precedent will stand without ever having enjoyed the benefit of review on appeal.

13. While there was some discussion of mootness in the judgment of Kenny J. in *Condon v. Minister for Labour* [1981] I.R. 62, at pages 70-72 where the approach adopted to mootness by the Supreme Court of the United States was expressly approved in the context of challenges in this jurisdiction to the validity of statutes having regard to the provisions of the Constitution, the modern case law of this Court is usually treated as commencing with the judgment *G. v. Collins* [2004] IESC 38, [2005] 1 I.L.R.M. 1 ("*G.*"). In that case, an applicant had sought judicial review for a protection order which had been granted against her. The proceedings also sought to challenge the constitutionality of the provisions of the Domestic Violence Act, 1996. The protection order had been withdrawn, and criminal proceedings for a breach of the protection order had been dismissed pursuant on agreement between the parties. The High Court (McKechnie J.) held that the proceedings by way of judicial review seeking *certiorari* of the protection order itself were moot, but, with some reluctance, concluded that because there was still a claim in relation to the constitutionality of the statute, those aspects of the claim were not moot. On appeal, the Supreme Court reversed the decision of the High Court and held that the entire proceedings were moot.

14. Hardiman J. reviewed what he described as the modern law in relation to mootness:-

> "A proceeding may be said to be moot where there is no longer any legal dispute between the parties. The notion of mootness has some similarities to that of absence of *locus standi* but differs from it in that standing is judged at the start of the proceedings whereas mootness is judged after the commencement of proceedings. Parties may have a real dispute at the time proceedings commence, but time and events may render the issues in proceedings, or some of them, moot. If that occurs, the eventual decision would be of no practical significance to the parties."

It is clear that Hardiman J. considered that the consequence for a pending case of mootness, where it arose, fell to be addressed within the rubric of the court's discretion, closely linked to the discretion to be exercised in relation to the granting of leave to apply for judicial review. He felt that this was particularly so where the

decision sought involved the constitutionality of a statutory provision, in which context, it was well settled law that it was not proper to embark upon a consideration of the constitutional validity of an Act of the Oireachtas except where the specific facts of a case exemplified the repugnancy of which the complaint was made (*McDonald v. Bord na gCon* [1964] I.R. 350). Furthermore, as elucidated in *McDaid v. Sheehy* [1991] I.R. 1 at page 17 (and cited with approval in *White v. Dublin City Council, Ireland and The Attorney General* [2004] IESC 35, [2004] 1 I.R. 545) the jurisprudence of the Court was that it should not engage in the question of the possible invalidity of an Act of the Oireachtas "unless it is necessary for its decision to do so." These considerations also underpin the court's approach to mootness.

15. Hardiman J. cited the well-known work by Professor Lawrence Tribe, *American Constitutional Law* (3rd edn., Foundation Press 2000), at paragraphs 3-11, to the effect that:-

> "… mootness doctrine centres on the succession of events themselves, to ensure that a person or group mounting a constitutional challenge confronts continuing harm or a significant prospect of future harm. A case is moot, and hence not justiciable if the passage of time has caused it completely to lose "its character as a present, live controversy of the kind that must exist if the Court is to avoid advisory opinions on abstract propositions of law"... Thus, the Supreme Court has recognised that mootness can be viewed as 'the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)"."

16. Hardiman J. considered that the rationale for modern mootness rules was well expressed in the leading Canadian case of *Borowski v. Canada* [1989] 1 S.C.R. 342 ("*Borowski*"). There, a plaintiff had challenged the validity of portions of a section of the Canadian Criminal Code dealing with abortion. Subsequent to a decision in the Court of Appeal, partly favourable and partly unfavourable, the entire section was struck down by the decision of the Supreme Court in a separate case, albeit on diametrically opposed grounds to those which had been advanced in *Borowski*. The plaintiff/ appellant sought to extend his grounds of challenge, but the Supreme Court of Canada, having considered the US case law, concluded:-

> "An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a

> live controversy must be present not only when the action or proceedings is commenced but also when the Court is called upon to reach a decision. The general policy is enforced in moot cases unless the Court exercises its discretion to depart from it."

17. The Supreme Court of Canada considered that the court's discretion to hear a moot case should be guided by a consideration of the underlying rationale of the mootness doctrine, which it explained as follows:-

> "The first rationale for the policy with respect to mootness is that a court's competence to resolve legal disputes is rooted in the adversarial system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on the concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootness doctrine is the need for the Courts to be sensitive to the effectiveness or efficiency of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. The Court, in exercising its discretion in an appeal which is moot, should consider the extent to which each of these three basic factors is present. The process is not mechanical. The principles may not all support the same conclusion and the presence of one or two of the factors may be overborne by the absence of the third, and vice versa."

18. Hardiman J. considered that the instant case was moot, in the sense that it did not feature a live controversy or dispute between the parties. A decision on the outstanding issues would have no direct impact on them. There were significant and particular reasons for this. The protection order which had been sought to be quashed, and the statutory authority for making it, which was challenged as unconstitutional, had been discharged on consent of the parties on foot of an agreement between them, and the criminal proceedings against the applicant alleging breaches of the order had been dismissed, again pursuant to an agreement between the parties. Over and above that, the applicant had herself also sought and obtained a protection order under the self-same statutory provisions which she sought to challenge in the proceedings under appeal. For all these reasons, which were perhaps unusual and particular to the case, Hardiman J. considered that the proceedings were moot.

19. A number of observations might be made about the decision in *G*. Although a decision of this Court, it was not a case of asserted mootness arising on appeal. Rather, it was a case raising the question of whether leave to seek judicial review ought to be granted, having regard to the particular circumstances applying as of the date upon which leave was sought. Furthermore, it was a case which arose in the context of a challenge to the validity of legislation having regard to the Constitution, where, as the Court observed, there were well-established principles of avoidance, derived in turn from the separation of powers, under which the Court will only entertain a claim challenging the validity of public general legislation where it is clearly necessary to do so. Insomuch as the decision makes reference to the jurisprudence of the United States, where the law on mootness has received perhaps the greatest elaboration, it is clear, if only by implication from the references to Tribe, that the law in that jurisdiction has been heavily influenced by the US Constitution, and the definition of the judicial power as arising where there is a case or controversy pursuant to Article III of the US Federal Constitution. This feature has not been present in other common law jurisdictions which nevertheless apply a mootness doctrine. In this regard the factors set out in *Borowski*, and adopted in *G*, have been repeatedly endorsed and are of more general application. In summary these are: the adversarial context of proceedings; the need for judicial economy; and the proper place of judicial decision-making in the separation of powers.

20. *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2006] IESC 62, [2007] 1 I.R. 328 ("*O'Brien*") was a challenge to the procedures adopted by the respondent Board in a personal injuries action. After succeeding in part in the High Court, there was an appeal by the applicant, and a cross-appeal by the Board. Subsequently, the applicant obtained an authorisation from the respondent Board permitting him to commence proceedings, and the applicant contended, therefore, that the appeal was entirely moot. The Supreme Court, (Murray C.J., Denham and Fennelly JJ.), held that the appeal should proceed.

21. The applicant relied heavily on *G*. Murray C.J. referred to the references in *G*. to both Tribe's *American Constitutional Law* (*supra*) and *Borowski*, noting at page 333 of the reported judgment:-

> "While the reluctance or refusal of courts to try issues which are abstract, hypothetical or academic and thus fall within the notion of mootness, is common to most systems of law, the breadth of that concept, its rigid or

discretionary application, as the previous passage suggests, is often informed by national judicial policy. It may also be influenced by the jurisdiction of the court concerned and the nature of the remedies sought. A particular aspect of the United States jurisdiction also referred to by Tribe is that "if mootness evolves later on appeal, the judgment below normally is vacated with directions to dismiss the complaint" citing *City of Mesquite v. Aladdin's Castle* (1982) 455 U.S. 283, at p. 289. Tribe, in a footnote, points out that the effect of such an order "is to deprive the decision below of any precedential value". Therefore, one must be cautious in applying too literally the principles as expressed or applied in other countries."

22. In the particular case, Murray C.J. considered at pages 333-334 of the reported judgment that the respondent Board had a real and current interest in the determination of the legal issues regarding the exercise of a statutory jurisdiction, and had an interest, "of course, in the substantial question of costs". He also considered that the appellate jurisdiction of the Court, as provided for under the then terms of Article 34.4.3° of the Constitution were relevant. Where a party had a *bona fide* interest in appealing against an order of the High Court, which was not confined to past events in the particular case, then "the court should be reluctant to deprive it of its constitutional right to appeal". Accordingly, quoting Tribe, Murray C.J. did not consider that the passage of time had caused the proceedings to completely lose "its character as a present, live controversy". It appears, therefore, that the Court in *O'Brien* did not consider that the proceedings were truly moot, although the case could also be read as one where the controversy was moot but where the court exercised its discretion to hear the appeal.

23. *Lofinmakin* is a case with obvious points of similarity to the present case, and, understandably, is heavily relied on by the respondent in this case. The applicants were Nigerian nationals, two parents and their children. The respondent Minister had made a deportation order against the third applicant, who was the father of the first and second applicants. The proceedings sought to quash the deportation order. The High Court, (Cooke J.), refused leave to seek judicial review. However, between that decision, and the application to the High Court in respect of a certification for leave to appeal to the Supreme Court, the European Court of Justice delivered its judgment in Case C-34/09 *Zambrano v. Office National de l'emploi* [2011] ECR I-1177 ("*Zambrano*"), relating to the rights of citizen children of the European Union in

respect of deportation orders against their parents. Cooke J. granted a certificate permitting appeal to the Supreme Court, noting that, although the appellants had not relied on Article 20 of the Treaty on the Functioning of the European Union, which was the basis of the decision in *Zambrano*, it was nevertheless relevant. The High Court also granted a certificate relating to the question as to what was necessary to formulate a challenge to a decision by reference to the test in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, as interpreted in *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701.

24. After the appeal had been lodged, the Minister decided to revoke the deportation order made in respect of the third named applicant and granted him temporary residence for two years. Denham C.J. (with whom Murray, Fennelly and MacMenamin JJ. agreed), pointed out that there was no longer a deportation order in respect of any of the applicants. The two children were Irish citizens and entitled to reside in Ireland. Their parents also had permission to reside in Ireland, and if the situation were to arise that either parent was to be in danger of deportation, the Minister would have had to make a fresh deportation order giving rise to fresh proceedings. Accordingly, she concluded that, as the deportation order had been revoked, there was no basis on which to proceed. Any decision of the Court would be based on a hypothetical and would be an advisory opinion. While the parties had a real dispute when the proceedings were commenced, this was no longer the case. Denham C.J. acknowledged that there was a discretion to hear and determine cases even if the appeal was moot, but considered it was not appropriate to do so. It was argued that, since there was an extant order for costs, this meant that the appeal was not moot. Denham C.J. considered it was not the jurisprudence of the court that a moot appeal should be heard to determine an issue of costs. While in *Caldwell v. Mahon Tribunal* [2011] IESC 21 (Unreported, Supreme Court, Macken J., 9 June, 2011), the Supreme Court had proceeded to determine an appeal in order to consider the appropriate order in respect of costs, that was in unique circumstances which do not apply in general, or to this case before the Court. Denham C.J. did not consider that costs should be a factor in determining whether such exceptional circumstances existed, and a moot appeal should be heard by the Court. It should be noted, however, that the respondent in that case had agreed that the order for costs in the High Court could be set aside if the court determined that the appeal was moot.

25. McKechnie J., with whom Fennelly J. agreed, made a number of interesting observations in the course of his judgment. At page 294 of the judgment, he endorsed the note of caution Murray C.J. sounded in *O'Brien* as to the dangers of too readily adopting the case law from other jurisdictions on mootness. However, he considered that the references in the US material to a continuing, live controversy were nevertheless useful. He also drew an analogy with the approach taken in questions of standing in constitutional challenges. Importantly, he explained that while the fact that there would often be a remaining issue as to costs in respect of any appeal, did not mean that an appeal was not or could not be moot. Costs were ancillary to the dispute. They traditionally "follow the event" and are not part of it. Mootness, therefore, was to be judged by the subject matter of the proceedings. As he explained at page 305 of the reported judgment:-

> "The type of "issue" which keeps a case alive and to which the doctrine of mootness is attached, is one which of itself gives rise to a dispute or controversy which the courts are called upon to resolve, so that some contested position may thereby be clarified. It is an issue which grounds the proceedings in the first instance, and which motivates their institution *ab initio*. It will typically have the features of a *lis* or other legal dispute, the resolution of which is intended to have an impact on one's legal position or on one's rights, obligations or status. It will give rise to a cause of action and will stand to the forefront of the substantive relief therein sought. Further, it will be of a class or kind which our adversarial system will recognise as such, and which is primarily designed to deal with. It is only an issue characterised by these notions, that mootness is intended to deal with".

26. This suggests that the fact that a costs award might have been the decision sought to be appealed did not in itself mean that the appeal was not moot as a matter of law (although the Court of Appeal has adopted the position that in exceptional circumstances a court can and should proceed to consider the merits of a case even if the only issue is one of costs: *FA and ors v. International Protection Appeals Tribunal and ors* [2021] IECA 296 (Unreported, Court of Appeal, Murray J., 9 November, 2021) at paragraph 63.

27. In this regard it is helpful to compare the approach suggested in some of the Irish cases with that adopted in other jurisdictions. For example in *Elders Pastoral Ltd v.*

Bank of New Zealand [1990] 1 W.L.R. 1090 ("*Elders Pastoral*") at page 1095, the Privy Council stated:-

> "It appears from the authorities that even if the only effect of a successful appeal between the parties will be to reverse an order for costs made in the courts below, there remains a *lis* or issue between the parties".

This statement has been applied in the decisions of the Australian courts: *State of South Australia v. Lampard-Trevorrow* [2008] SASC 370, a decision of the Supreme Court of South Australia. In *Elders Pastoral*, Lord Templeman noted that while supervening events render an appeal unnecessary save with regard to costs, there must however be cases in which it would be most unfair to decline to hear the appeal. However, the difference in approach is limited since it was recognised in *Elders Pastoral* that, even if not technically moot, there was a discretion not to hear appeals, and where the only effect of a successful appeal would be to reverse an order for costs that the Privy Council would not be minded to entertain an appeal. While McKechnie J. took a different view of the effect of an order for costs, he did consider there was a discretion to hear cases which were technically moot and the existence of a costs order it was a factor which should be weighed, and weigh heavily, in favour of the Court exercising its discretion to proceed. The end point of both approaches would appear almost indistinguishable. In *Lofinmakin* however, the Minister had during the course of the appeal hearing indicated through counsel that the costs order as made against the applicants in the High Court could be vacated with the result that the applicants would not continue to be disadvantaged thereby.

28. Finally, in this regard, it is to be noted that McKechnie J. in *Lofinmakin* at page 290 of the reported judgment, considered that the principle of mootness was also related to the principle that courts should not provide merely advisory opinions, something itself required by respect for the separation of powers:-

> "…the discharge of the judicial function is best performed where the reference point is focussed on resolving defined issues in a concrete legal setting. In that way there is much less danger of inadvertently overstepping the reach of the judicial role as envisaged in Article 34 of the Constitution".

Analysis

29. It is necessary to attempt to deduce some principles from the case law and the arguments advanced and to seek to explain the decision in this case by reference to those principles, not least since it would appear that the decision reached in this case

is contrary to the decision reached in *Lofinmakin*, in circumstances which at first sight might appear very similar.

30. First, the US approach, while the most well-developed jurisprudence on the concept of mootness, cannot however, be considered a direct guide to the decision in any case in this jurisdiction. There are a number of important distinctions between the position in the US and that which applies here. First, it is apparent that the US principle of mootness is treated as a principle to be deduced from the Constitution, and in particular the Article III requirement of a case or controversy. As a consequence, it is argued, that the principle is one which is mandatory, rather than discretionary. In this jurisdiction however, it is clear that mootness is a matter of judicial discretion and cannot be said to be mandated by the Constitution or any other provision of law, albeit, as will be discussed, the law on standing and mootness in Ireland is clearly influenced by constitutional considerations, most obviously the separation of powers. Second, and importantly, the US does not have a principle of an award of costs following the event. Accordingly, it is much easier to find that an appeal will be moot, and that there is no sufficient justification for hearing such an appeal. In Irish law, the existence of a costs order is a relevant factor, and one which weighs heavily not in determining mootness itself, but in considering the exercise of a discretion to permit an appeal to proceed. Third, and perhaps most importantly, as observed by Murray C.J. in *O'Brien*, the development of the principle in the US has led to the logical conclusion that when an appeal is found to be moot, the order made is one allowing the appeal and the decision and judgment of the trial court are vacated. As noted by Tribe in *American Constitutional Law* at page 353 "where a case becomes entirely moot in the Supreme Court on review from the lower federal courts as a result outside the control of the parties, the Court…. will "vacate the judgment below and remand with a direction to dismiss" and order "that strips the decision below of its binding effect"…". This *vacatur* is not available and does not occur in Irish law, or it appears, in the law of other common law jurisdictions. If an appeal in this jurisdiction is dismissed as moot, the consequences are the opposite: the decision of the court appealed against will remain binding between the parties, and the judgment will retain its status as a precedent.

31. It follows that the US approach cannot be simply read across to this jurisdiction. Instead, the jurisprudence of the US must, as both Murray C.J. and McKechnie J. observed, be approached with caution. Indeed, it might be thought that the logic of

the US approach would appear to be that where a judgment leads inevitably to a costs order, and where dismissal of the appeal would leave in place both the decision of the court below as between the parties, and the judgment of the court as a precedent more generally, that there would be a narrower scope for any doctrine of mootness.

32. Second, however, it is apparent that a core principle can be identified as justifying a principle of mootness in common law jurisdictions. That principle is based on the importance in the common law system of the resolution of cases which can characterised as present, live controversies. As set out in *Borowski*, this is central to the principle of mootness, because of the interlinked factors of a requirement of a full adversarial context for a legal decision; the management of scarce and expensive court resources; and in cases likely to become precedents, the desirability, and perhaps necessity, of avoiding purely advisory opinions. The strength with which these factors will apply in a particular case will determine the issue of whether a trial or appeal is moot, and the related question of whether, even if moot, the trial, or appeal should nonetheless proceed.

33. Third, there is a close connection between the principles underlying standing, particularly in constitutional claims, and mootness. However, that does not mean that circumstances where a court considers that a claimant does not have sufficient standing to commence proceedings, will inevitably lead to a conclusion that if similar circumstances arise pending an appeal, that the appeal will be moot. The position at the two points in time is not the same: once a case is decided and is the subject of an appeal, there will be a decision (which in some cases may be capable of being a precedent controlling other cases and decisions) and an order for costs, which in some cases can be substantial. It was for the first of these reasons that Haughton J. in *Kozinceva v. Minister for Social Protection* [2020] IECA 7 (Unreported, Court of Appeal, Haughton J., 28 January, 2020), at paragraph 63 said:-

> "in a case before an appellate court, where (whether because the lower court determined that the case was not moot, or because the case becomes moot after that decision) it may in some cases be undesirable to refuse to decide the appeal leaving that decision unreviewed and therefore (where wrong) undisturbed, even though the decision may function as a precedent in other cases."

34. In the particular case of an appeal to this Court, there is, moreover, the important factor that the Court will have determined that the appeal involves an issue of law

which can be said not only to be important, but to be of *general* public importance. This means both that the issue is likely to recur (since it is general) and that it is almost inevitable that when it does occur, that it will not be possible to resolve it at any lower level than this Court, and that leave to appeal to this Court will in due course be necessary. In such circumstances, the granting of leave to appeal raises at least a temporary question mark over the decision subject to an appeal and creates a degree of uncertainty about the law which in normal circumstances is the function of this Court to seek to resolve and clarify as soon as possible. Dismissal of an appeal in such circumstances has different consequences in law than the refusal of leave to commence proceedings which have not been determined, and accordingly it is not to be expected that the application of the same principles underlying the rules on both standing and mootness will lead to the same outcome in every case.

35. This last point deserves some emphasis. The passage of the Thirty-third Amendment to the Constitution is often described as creating a new court of appeal, which of course it did. But while the Court of Appeal is new, the jurisdiction is not: the amendment transferred to the new court the jurisdiction previously conferred upon and exercised by the Supreme Court. The novel jurisdiction created by the amendment was that conferred upon the Supreme Court, which thereafter would have second-tier appellate jurisdiction triggered by the fact that the appeal involved an issue of general public importance, or the interests of justice required that an appeal be carried to this Court. The interests of justice criterion speaks for itself and, in some cases, may be limited to the resolution of the issue in the specific case. However, the majority of appeals in which leave is granted to this Court from the Court of Appeal under Article 34.5.3° or the High Court under Article 34.5.4° are those which satisfy general public importance standard. The fact that the importance is described as both *general* and *public* suggests that the issue transcends the particular case and the private dispute of the parties. Indeed, it is the importance of resolving that issue in the public interest which justifies the second-tier appeal in such cases. In *E.L.G. (a minor suing by her mother and next friend S.G.) v. Health Service Executive* [2021] IESC 82 (Unreported, Supreme Court, Baker and Hogan JJ., 20 December, 2021) ("*E.L.G.*") both Baker and Hogan JJ. delivered judgments where they expressed the view that the existence of a judgment of the Court of Appeal or High Court which had been determined by this Court to contain an issue of general public importance, meant that the Court was entitled and even perhaps

obliged to proceed to determine the issue notwithstanding any question of mootness, which in that case was caused by the retirement of a judge who had stated a case. I made a similar point in *O'Sullivan v. Sea Fisheries Protection Authority* [2017] IESC 75, [2017] 3 I.R. 751 at paragraph 27.

Application to this Case

36. Turning to the case at hand, it is apparent that it can be said that in this case there is not the same degree of adversarial engagement as there was when the proceedings were commenced. The applicant does not need to obtain an order of *certiorari* now to remove the deportation order and avoid the possibility of removal from the State. The deportation order has been revoked by the Minister and has no current force or effect on the day-to-day life of the applicant. That is a powerful factor in this case that leans in favour of finding that the case is now moot. Courts exist to resolve controversies of real importance to real people. The decisions of courts not only resolve individual cases in ways that can be very burdensome to the losing party, but they also make decisions which are capable of becoming binding precedents which may control the circumstances of persons and entities who have not participated in the proceedings. The distinctive feature of the common law system which means that decisions of individual courts in particular cases can have the effect of law that is binding on the State, officials, and other individuals, is justified by the necessity of doing justice in an individual case, and nothing less. In this case, if the applicants had sought to commence proceedings seeking *certiorari* of the deportation order after that order had been revoked, and without being able to point to any circumstances particular to the case justifying the application, then in my view, a court would have been justified in refusing leave to seek judicial review.

37. This chimes with the law relating to standing, and, indeed, other prudential rules of avoidance. In *Mohan v. Ireland and the Attorney General* [2019] IESC 18, [2021] 1 I.R. 293, I said at pages 301-302 of the reported judgment:-

> "11 The decision in *Cahill v. Sutton* [1980] I.R. 269 contains an important discussion on the justification for a rule of *locus standi* (and, indeed, for the other prudential limitations on claims challenging the validity of legislation by reference to the Constitution). Standing is not, as a general rule, established by a simple desire to challenge legislation, no matter how strongly the putative claimant believes the provision to be repugnant to the Constitution. It is now clear that there is no *actio popularis* (a right on the part of a citizen to challenge

the validity of legislation without showing any effect upon him or her, or any greater interest than that of being a citizen) in Irish constitutional law, although, of course, some jurisdictions do permit such claims. Rather, in Irish law, it is necessary to show some adverse effect on the plaintiff either actual or anticipated. Part of the rationale for this rule is discussed in *Cahill v. Sutton*. Public general legislation exists because a majority of the members of the Oireachtas considered, at some stage, that the legislation was in the public interest. The particular provision challenged may indeed still operate entirely beneficially and helpfully for the great majority of cases. If such a provision is invalidated, it is, in principle, of no effect in law and the area is left unregulated, with the result that citizens may be deprived of the benefit of the provision. The invalidity of legislation is therefore a very significant disruption of the legal order which operates in a blunt and, essentially, negative way. It simply removes a law or an aspect of the law, can put nothing in its place, and yet can throw into question transactions taken on foot of the provision. As Henchy J. in the High Court put it more than a decade earlier in *State (P. Woods) v. Attorney General* [1969] I.R. 385, at p. 399:-

> "It unmakes what was put forth as a law by the legislature but, unlike the legislature, it cannot enact a law in its place. It is clear that if this power, which may seem abrogative and quasi-legislative, were used indiscriminately it would tend to upset the structure of government."

The step of permitting a challenge to the constitutional validity of a piece of legislation should not, therefore, be taken lightly, simply because someone wishes, however genuinely, to have the question determined, but rather should only be taken when a person can show that they are adversely affected in reality. Courts do not exist to operate as a committee of wise citizens providing a generalised review of the validity of legislation as it is enacted, nor should courts become a forum for those who have simply lost the political argument in the legislature to seek a replay of the argument in the courts, repackaged in constitutional terms. On the contrary, the question of the validity of legislation is treated by Article 34.3.2° as part of the jurisdiction of the superior courts only, established under Article 34.1, whose function it is to administer justice between the parties. This normally requires a real case or controversy which the parties require (rather than simply desire) to be resolved in order to

establish and justify the court's exercise of jurisdiction, and the possibility of the invalidation of legislation. Accordingly, it is necessary to show adverse effect, or imminent adverse effect upon the interests of a real plaintiff. This has the further benefit, as Henchy J. observed in *Cahill v. Sutton* [1980] I.R. 269, at p. 282, that:-

> "normally the controversy will rest on facts which are referable primarily and specifically to the challenger, thus giving concreteness and first-hand reality to what must otherwise be an abstract or hypothetical legal argument"."

38. While these considerations apply most obviously in the context of a challenge to the constitutional validity of legislation, similar considerations justify rules on standing and mootness in the broader sphere of public law litigation, and even in private law litigation more generally. The decision of a court, particularly a final court in the appellate structure, stands, and is intended to stand, as a precedent governing many other instances. That is central to the functioning of a common law system based on *stare decisis*.

39. This case is one example. It was part of a large group of cases awaiting the outcome of the decision in *Gorry* on the basis that the outcome of that case might well determine those cases, and, indeed, any similar case. If the argument of the applicants were to succeed in this case, it would mean not only that the deportation order in this case was invalid, but also any deportation order made in similar terms and following the same process, would be presumptively invalid. Even if this was merely a private law litigation, but one raising an issue of general importance, the decision in the case would, or at least could, have far-reaching consequences and at least in some respects can be said to make law, but without it being approved or decided by the representatives of the people under the democratic process established under the Constitution. As already discussed, the justification for this power, which at times can be momentous, is that it is a necessary and unavoidable consequence of the obligation to administer justice in an individual case. The requirement, therefore, of full adversarial context, and live controversy, is one which is justified by all the factors identified in *Borowski*. The resources of courts are both scarce and expensive and should be applied only to those cases which demand resolution. The proper determination of those cases is best achieved when rooted in

a live controversy, giving concreteness and first-hand reality to what must be decided. Finally, and at a fundamental level, a court which decides issues and, therefore, makes law which is not compelled by the requirement to resolve the real disputes of individual citizens or litigants, risks blurring and perhaps exceeding the proper bounds of the exercise of the judicial power.

40. However, the lack of full adversarial context applies with perhaps less force in this case than in the classic example. First, it is not irrelevant that it is the applicants themselves who seek to maintain the appeal. Second, the issue involved is an issue of law and there is no suggestion it will not be argued with the same detail and enthusiasm as it would have been if the deportation order had not been revoked in the period between the High Court decision and the hearing of this appeal. Third, the applicants claim that the existence of a deportation order between 21 June, 2016 and 15 July, 2022, which the State maintains was valid during that period, does have a continuing impact on the applicants since it cannot be said that the existence of a deportation order and the applicant's failure to comply with it is something to which regard would not be had on subsequent applications for permission to reside in the State or perhaps even elsewhere. These are relevant considerations, but the starting point, I consider, must be that the proceedings are as a matter of law, moot; the deportation order which the applicants solemnly asked this Court to exercise its power to quash, no longer exists. In such circumstances proceedings should not be commenced, and if commenced, and determined, an appeal should not proceed, unless there are factors which can be identified, which clearly justifies such a course.

41. One important factor in this case could be an extant order for costs. I accept the insightful analysis offered by McKechnie J. in *Lofinmakin* that costs must be considered to be ancillary or adjectival to the substance of the proceedings. If it were not possible to so characterise an order for costs, it would, of course, be impossible to find that any proceedings in which such an order was made were truly moot. However, I would also accept McKechnie J.'s characterisation of the question of costs as not only relevant to the exercise of the court's discretion, but also a substantial and important factor.

42. Here, again, it is necessary to underline the importance of looking at each case on its own facts and merits. Where the event that renders a case moot occurs at a relatively early stage of the proceedings, or at least at a point before substantial costs have been incurred in participating in a lengthy trial, costs may be relatively low and

certainly in themselves would not usually justify the court in proceeding to hear a case which is in law moot. In such cases, justice can be done between the parties by applying the factors identified by the Court in its decision in *Cunningham v. President of the Circuit Court* [2012] IESC 39, [2012] 3 I.R. 222 in allocating costs in a fair and principled way. However, it is different when an order for costs has been made against a party at the conclusion of a case which that party contends ought never to have been made. An order for costs is a judgment enforceable as such, and in many cases can involve very considerable amounts. It is not inconceivable that orders for costs in some cases may be of higher value than individual judgments that are the subject of regular appeals to this and other courts. The fact that the rule in this jurisdiction is that costs are generally awarded in favour of the party that has been successful, cuts both ways. It follows that in most — if not all — cases the justification for the significant money judgment that an order for costs involves, is to be found in the substantive decision. The purpose of any appeal is to contend that that decision is wrong. In many cases, it would not be reasonable or just to require a party to satisfy a judgment for an order for costs, while at the same time preventing that party from establishing that those costs had been ordered on a legally incorrect basis. Normally I would consider that the existence of an order for costs which would stand if an appeal was treated as moot, is itself a powerful factor leaning towards hearing such an appeal. However, in this case, the Minister has, realistically, adopted the same position as that which had been adopted in *Lofinmakin*, and has agreed that the order for costs would be waived in the event that the appeal was considered moot. Accordingly, that factor does not have weight in this case.

43. However, in this case it is an important, and indeed, decisive consideration in my view, that leave to appeal to this Court has been granted, and an appeal is ready for hearing. This has a number of consequences. First, and most importantly, it means that there has been a determination that the decision appealed against involves an issue of law of general public importance. Indeed, as discussed above, it can be said that the function of this Court since 2014 has been to hear and determine such cases. The purpose of an appeal is to clarify and settle the law for all such cases raising or having the potential to raise the same or similar points. If, however, the appeal is treated as moot, and dismissed, then these objectives will not be achieved. The law will remain unsettled, and in a state of uncertainty. That uncertainty will remain at least until a further case is brought and makes its way through the appellate process

and is finally determined by this Court. In the meantime, the decision-making process in respect of applications for permissions to remain in this country which have the potential to engage with family rights will be conducted under a cloud of uncertainty. A decision in the High Court cannot resolve that uncertainty. Instead of performing its function as the court having full and original jurisdiction to administer justice, a decision in the High Court would be merely a vehicle to bring the legal issue back to the point at which it stands now, awaiting the hearing of the appeal and decision of this Court. By that point however, in addition to the wasted resources expended on this case, there might either be a proliferation of decisions in the High Court or cases raising the point would have to be kept in a holding pattern awaiting the final resolution of the issue.

44. It is apparent that this is an undesirable scenario. Moreover, it is one in which the principles identified in *Borowski* as justifying a doctrine of mootness, point instead towards a conclusion that the case should be heard and determined. First, there is no absence of an adversarial context. The applicants wish to advance this appeal and their lawyers are willing to argue it. Second, far from court resources being saved by dismissing the case on grounds of mootness, those scarce resources will be wasted. The issue will be raised in other proceedings, and by necessity advanced to the point of decision. Finally, there is no sense in which it could be said the determination of this case would amount to or have the flavour of an advisory opinion or still less an impermissible expansion of the proper function of courts in the separation of powers. The facts in this case are not in dispute. If there was a dispute, it would have been resolved by the decision of the High Court. The issue in this case is the legal consequence of those facts and will be determined in exactly the same way as it would have been if the deportation order had not been revoked, or as it would be in any case in which a deportation order remained in existence.

45. Accordingly, I would proceed to hear and determine this appeal, notwithstanding the revocation of the deportation order in respect of the first named applicant.

46. It remains to consider how the principles outlined above, and the decision to which this Court has had to come can be reconciled with the judgments in *Lofinmakin*, and the outcome of that case. It will be recalled that in *Lofinmakin* this Court held that an appeal was moot, in similar circumstances to this case, in that the appellant challenged a deportation order which had been revoked after the decision in the High Court, but before the determination of the appeal. First, it should be observed that in

many cases the fact that a case is moot and does not require determination will be immediately recognised and will not require detailed argument. Neither *Lofinmakin*, nor, indeed, *G.*, are in my view, such clear cases. They are instead, cases very close to the borderline. It follows that it is only the combination of circumstances in the particular case which led to the conclusion of mootness, and the absence of even relatively minor factors may lead to a different conclusion. In *Lofinmakin*, it was conceded by the appellant that the deportation order had no legal or practical consequence once revoked. As set out above, this was not conceded in this case, where it was contended, realistically in my view, that it continues to have some effect since it forms part of the first named applicant's record, and its existence and the failure of the applicant to comply with it, could be taken into account in future immigration-related decisions in respect of the applicant.

47. Moreover – and, to my mind, critically – *Lofinmakin* was decided prior to the Thirty-third Amendment to the Constitution and the introduction of the constitutional provisions establishing the jurisdiction of this Court. Even though an appeal to the Supreme Court from a decision in relation to the validity of a deportation order required leave to appeal from the High Court, that context was subtly different to that which now applies. The Supreme Court was the only court of appeal from the decisions of the High Court, and it was likely that the issues of law raised and sought to be argued on appeal in *Lofinmakin* would arise and be determined in short order.

48. In this regard, perhaps the most decisive factor in *Lofinmakin* was the attempt made to argue the effect of the *Zambrano* decision in the course of the appeal. *Zambrano* was a case of considerable importance, not just for the immigration system in Ireland but in all Member States of the European Union. It was inevitable, therefore, that it would be raised in any immigration challenge involving family members and given the importance of the issue, it was desirable that it should be raised and determined in proceedings in which the evidence would be directed to the live issues in that case, and that there would be a High Court determination of those issues. The appeal in *Lofinmakin* raised, therefore, the prospect of a case which itself had no longer any reality being commandeered at the appellate stage to address an abstract issue of law which had not been raised at the outset of the proceedings, in respect of which evidence had not been adduced, and which had not been argued or been the subject of the High Court judgment. It thus appeared that the legal argument sought to be advanced on appeal was dangerously disconnected from the reality of the dispute

between the parties and being instead an almost abstract issue of law presented for resolution by the Court. It followed from this, and was also relevant, that the dismissal of the appeal as moot did not leave in place a High Court decision on the question of the application of *Zambrano* to the facts of that case.

49. None of these factors are present in this case. Instead, the fact that there is an extant High Court decision raising an issue this Court has determined to be one of general public importance, which the applicants wish to argue, and which the parties are prepared to argue, are factors which in this case mean that the Court should proceed to finish what has been started and should determine this appeal.

50. It is apparent, therefore, that the discretion to hear cases which are moot is likely to be exercised more readily on appeal, and particularly so in this Court because of both the precedential effect of the judgment appealed from and which would remain in place if the appeal is dismissed, and the function of this Court in determining matters of law of general public importance and which often transcend the particular dispute giving rise to the case. The further the case has proceeded will also be an important factor. It is apparent that there is no simple bright line rule applicable in the same way at all points and in all courts. In general, the more clearly the case retains its essential character as a real controversy which is capable of being properly resolved and the less it resembles a contrivance for the purpose of achieving some change in the law abstracted from a real controversy, the more likely it is that a court will proceed to hear the case in the proper exercise of its jurisdiction. This is more likely to occur at the appellate stage and particularly in this Court where leave has already been granted, and it is to be expected, therefore, that this Court will more readily exercise its discretion to hear cases which, applying the analysis in *Lofinmakin* may be technically moot than a trial court might do, or indeed this Court might have done prior to the Thirty-third Amendment.

51. This is indeed consistent with the practice of this Court. Even in the relatively recent past the Court decided that it had jurisdiction to proceed to determine a case stated notwithstanding the retirement of the Circuit Court judge stating the case (*E.L.G*)*;* has proceeded to hear an appeal even though the parties had settled (*O'Sullivan v. Health Service Executive* [2022] IESCDET 79); has heard a case on refusal of a right to remain where the individual concerned was due to leave the jurisdiction prior to the hearing of the appeal (*Middelkamp v. Minister for Justice and Equality* [2022] IESCDET 62); heard and determined a major case on the entitlement to obtain

calculated grades in the Leaving Certificate examination conducted during the pandemic when the grades had been awarded to the candidate and he had proceeded to third-level education (*Burke v. The Minister for Education and Skills* [2022] IESC 1, [2022] 1 I.L.R.M); and indeed, heard a case regarding the entitlement of applicants in certain environmental law proceedings to a cost exemption in circumstances in which the underlying case had proceeded, been determined in favour of the applicants, and costs ordered in their favour (*Heather Hill Management Co. C.L.G. and anor v. An Bord Pleanála and ors* [2022] IESC 43 (Unreported, Supreme Court, Murray J., 10 November, 2022)). While the Court will still refuse leave if it considers the case is so moot that it does not provide a proper or suitable vehicle for the determination of a legal issue (*Minister for Justice and Equality v. Gaffney* [2021] IESCDET 62), the fact is that it is by no means uncommon for this Court in the proper exercise of its discretion, to proceed to hear and determine cases which are technically moot by the time they reach this Court.

52. These are not aberrational decisions. In each case, the exercise of the Court's discretion can be explained by reference to the factors discussed in this judgment. It is apparent that the outcomes in each of these cases were reached without any elaborate discussion of the law on mootness and the decided cases, and it is conceivable that a satisfactory outcome could be achieved in most cases by no more than the application of instinctive judgement as to the desirability of hearing and determining a particular case. However, it must again be stressed that this decision addresses the implications of mootness for an *appeal* that is before *this Court*. It follows from everything I have said in the course of this judgment that quite different considerations will apply to cases that become moot before they are heard at first instance and, potentially, to many appeals before the Court of Appeal which might not present underlying issues of the kind in question here.

53. I have sought to explain the Court's conclusions for its decision to proceed to hear and decide the appeal in this case at greater length than might otherwise have been thought necessary or desirable for what is, after all, a matter of discretionary judgment. However, it is the function of this Court to give more general guidance. It is also desirable that the law should align with practice. What the Court says should, after all, match what it does.