



**APPROVED  
NO REDACTION REQUIRED**

**THE COURT OF APPEAL**

**Record Number: 2020/250**

**Whelan J.  
Faherty J.  
Haughton J.**

**Neutral Citation Number [2022] IECA 241**

**BETWEEN/**

**LAWRENCE SHIELDS**

**APPLICANT/  
APPELLANT**

**- AND -**

**THE CENTRAL BANK OF IRELAND**

**RESPONDENT**

**Judgment of Ms. Justice Faherty delivered on the 26<sup>th</sup> day of October 2022**

1. This is Mr. Shield's (hereinafter "the appellant") appeal against the Order of the High Court (Barr J.) of 16 November 2020 striking out his proceedings as having become moot. The Order was made on foot of an application brought by the Central Bank of Ireland (hereinafter "the respondent") for a declaration that the proceedings were moot together with an order striking out the proceedings. In the alternative, the respondent sought an order dismissing the proceedings on the grounds that they were bound to fail.

2. In the event, in a judgment delivered on 15 October 2020 Barr J. (“the Judge”) determined that the proceedings were moot. Before setting out the basis upon which the Judge reached his determination, it is apposite to set out the background to the proceedings.

3. On 19 February 2019, the appellant submitted an application form to the respondent seeking the exchange of banknotes to the value of €4,950. The amount involved was made up of 51 x €50 notes and 12 x €200 notes which were in a damaged condition. The application was sent *via* the Bank of Ireland and was received by the respondent on 21 March 2019. In his application form the applicant said that all the banknotes were in an envelope that had been put into a fire and that the notes were retrieved from the fire. At the foot of the form, the following declaration was made and signed by the appellant:

- He was entitled to submit the damaged euro notes for exchange;
- The damaged currency was not deliberately mutilated, soiled or damaged;
- The damaged currency did not originate from any illegal activity;
- All information provided was accurate;
- The appellant was aware that the respondent might forward details of the application, including copies of ID received, to other authorities such as An Garda Síochána and/or the Revenue Commissioners;
- The appellant understood the requirements in relation to exchange of damaged euro notes as set out in the application form.

4. By letter of 5 April 2019 (“the First Decision”), the respondent informed the appellant that it had been determined that the banknotes had been intentionally damaged and that they were being withheld by the respondent so as to avoid the return of the notes into circulation. The appellant was advised that the respondent had reached its decision “following assessment, testing and analysis of the banknotes in accordance with Decision

of the ECB of 19 April 2013 on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes” (hereinafter “the ECB Decision”).

5. There followed a series of correspondence between the appellant’s solicitors, J.T. Flynn & Co, and the respondent and later with the respondent’s solicitors, McCann Fitzgerald, commencing with a letter of 24 April 2019 from J.T. Flynn & Co. which stated that the notes submitted were lawfully within the possession of the appellant, that proper protocol had been followed and that a valid provable reason had been provided for the minor damage to the banknotes. It was further stated that theft had been committed by the respondent pursuant to the Criminal Justice (Theft and Fraud Offences) Act 2001 and that the decision of 5 April 2019 had created such a stressful and outrageous shock and unlawful accusation that the appellant had had to consult his doctor. The respondent was called upon to immediately refund the appellant and an account number was provided for this purpose. The respondent was further informed that the writer had received instructions to seek a mandatory injunction compelling the refund of the money.

6. On 3 May 2019, the respondent advised that the appellant’s letter was receiving consideration and he was requested not to take any further steps at that time.

7. On 14 May 2019, the respondent wrote to the appellant’s solicitors advising that the damage to the banknotes was consistent with their “having been immersed in a chemical, (acid or similar), resulting in...alteration of the condition of the surface of the banknote, attack of a chemical nature (strong acid type) on the edges of the banknote”. The respondent repeated its assertion that it had reason to believe that the notes had been intentionally damaged. The letter went on to state:

“Should your client wish to furnish the Bank with further information/submissions in relation to the damage to the bank notes, however, the Bank will give any such

submission due consideration and will reconsider its decision not to exchange the notes in accordance with Article 3(3)(a) of the decision”.

**8.** The appellant, however, did not provide any such information in correspondence sent by his solicitors on 16 May 2019, his solicitors asserting only that the contents of the respondent’s letter were “incredible”. In the absence of the respondent having furnished them with a copy of its report, they requested the immediate return of the banknotes so that the appellant could embark on his own forensic analysis.

**9.** By letter dated 17 May 2019, the respondent repeated its assertion that there was sufficient reason to believe that the notes “have been chemically treated”. It further stated:

“Should you opt to make a further submission to the Bank, you may wish to include, in particular, details of the source of the banknotes and any explanation of the findings of chemical damage. We would advise that you should also provide additional information about the circumstances leading to your assertion that the notes were put into a fire.

In light of the Central Bank’s obligations as a National Central Bank under the Decision, we are unable to release samples of the bank notes to you, but we will send the notes for further analysis to an external accredited laboratory. We will reassess the decision not to exchange the damaged banknotes to your client in light of all the information that is available - including your client’s original submission and anything further you may wish to furnish to us, as well as the results of the Bank’s own analysis and the independent testing in accordance with the Decision.”

**10.** By email of 18 May 2019, the appellant’s solicitors repeated their request for a copy of the respondent’s report and went on to state:

“Our client has complied with all requirements and has completed the declarations when submitting the fire damaged notes to his bank on 19 February 2019.

In view of the fact that there are now allegations being [advanced] that some type of criminality is involved, together with the refusal to return the banknotes to enable us to have conducted a forensic analysis beggars belief and is an absolute infringement of our client[’s] constitutional rights and Article 6 of the European Convention on Human Rights.

Please be advised that the bank notes are our client’s property.

We now call upon you to return our client’s property.

Failing the return of the said property by 5pm on the 21 May 2019 our instructions are to seek mandatory relief without further notice.”

**11.** On 21 May 2019, the respondent’s solicitors, McCann Fitzgerald, wrote to the appellant’s solicitors noting, *inter alia*, that no submissions had been made to the respondent’s request of 17 May 2019. They wrote again on 23 May 2019 noting the 18 May 2019 correspondence from J.T. Flynn & Co.

**12.** On 10 June 2019, J.T. Flynn & Co replied to the letter of 21 May 2019. While the letter is long and detailed, it did not engage, by way of any explanation or submission, in respect of the respondent’s invitation of 16 May 2019 to the appellant to provide “any details of the source of the bank notes, any explanation of the findings of chemical damage”, as noted by the respondent’s solicitors in their reply of 14 June 2019. This reply went on to state:

“You have been invited [to make submissions] on a number of occasions now and rather than addressing this issue your client has simply relied on the declaration he provided in the application form which was submitted with the damaged euro bank notes for exchange.”

The letter also confirmed that a sample of the banknotes had been sent for further analysis to a laboratory accredited by the ECB.

13. The appellant's solicitors responded on 16 July 2019, again making complaint that the respondent had failed to advise the appellant of the name and address of the independent laboratory and the type of tests intended to be carried out and had failed to provide him with a sample of the banknotes for him to have the notes independently assessed. The letter also advised that the appellant had permitted a reasonable amount of time to elapse since the respondent's previously stated intention to provide him with details of the outcome of the independent testing but that the appellant had not been furnished with any report or details of further testing. The letter further stated:

“Lest there be any issues in relation to our client's *bona fides* as referred to in your letters of the 14 and 17 May 2019, and prior to the issue of proceedings, we are instructed to advise you of our client's position and provide further information leading to the notes being inadvertently placed in the fire.

Our client's partner, while attempting to clean out our client's workshop placed the notes with other items in the furnace utilised in the workshop. Our client has and continues to engage in the production and manufacture of fibreglass objects of art. This work of necessity entails the use of chemical products. Acetone is by far the most common cleansing agent utilised for brushes, cleaning moulds etc.

We are instructed that there were some plastic containers placed in the furnace as part of the cleansing process and it may be that the same in some way damaged the notes.”

The respondent was again called upon to refund the appellant's money and/or provide a sample of the notes for the purpose of the appellant carrying out his own independent assessment. It was advised that the failure to take either of those steps would result in the issue of proceedings without further notice.

**14.** The respondent's solicitors responded on 19 July 2019 stating, *inter alia*, that they would "need to consider this new information as part of its assessment of the bank notes". They repeated that the respondent would "not be in a position to finalise its assessment of [the appellant's] application" until its consultation with the ECB had concluded.

**15.** On 29 July 2019, the appellant made an *ex parte* application seeking leave for judicial review of the First Decision. By Order of the High Court (Barrett J.) of 29 July 2019 (as perfected on 31<sup>st</sup> July 2019) the appellant was granted leave to apply for judicial review.

**16.** In his statement of grounds, by way of relief, the appellant firstly sought *certiorari* of the First Decision. Secondly, he sought *mandamus* to compel sight of the report upon which it had been decided that the banknotes had been intentionally damaged. Thirdly, he sought *mandamus* to compel details of the laboratory to which the notes had been sent and a sample of the notes for the purposes of conducting his own independent tests. Fourthly, he sought a declaration that when the respondent proposed to withhold the banknotes and declined to exchange them for value pursuant to the ECB Decision, it was required to have regard to the appellant's due process and property rights under Article 40.3 and Article 43 of the Constitution, and/or Article 47 of the European Charter of Fundamental Rights ("EU Charter") and Article 6 and Article 1 of Protocol 1 of the European Convention on Human Rights ("ECHR"). Fifthly, the appellant sought damages for breach of his said rights.

**17.** The grounds upon which relief was sought were said to be illegality, procedural unfairness and a breach of due process and property rights.

**18.** In summary, Ground 1 of the Statement of Grounds pleads that the illegality arose by dint of the respondent having unlawfully deprived the appellant of the value of his money in circumstances where:

- (i) Pursuant to Article 3(3)(a) of the ECB Decision, the respondent may only refuse to exchange and withhold bank notes where it has “sufficient reason to believe” that they had been “intentionally damaged” and where the respondent does not “know or have sufficient reason to believe that applicants are *bona fide*...” (emphasis in original);
- (ii) The respondent acted irrationally and unfairly in failing to provide the appellant, upon request, with any evidence upon which it had based its reason to believe that the banknotes had been intentionally damaged;
- (iii) That the respondent without proper or lawful reason refused to accept that the appellant was a *bona fide* applicant and had disregarded his declaration as made in the application form.

**19.** Ground 2 pleads that the First Decision was procedurally unfair in circumstances where the respondent had determined that the banknotes were “intentionally damaged” and had refused to accept the appellant’s *bona fides*, the respondent in this regard being in breach of the principle of *audi alteram partem* in failing to accede to the appellant’s request for a copy of the report upon which it had based its assessment that the banknotes were “intentionally damaged” and/or chemically altered.

**20.** Ground 3 pleads that the respondent erred in law in failing to protect and vindicate the appellant’s property and due process rights pursuant to the Constitution, EU Charter and ECHR by depriving him of the value of the banknotes without sufficient reason and/or for an unreasonable period of time and/or in failing to provide him with a proper account of monetary property which had been retained and withheld from him.

**21.** In November 2019, some months after leave was granted and before the hearing of the application for judicial review in the High Court, the respondent made a decision to exchange the appellant’s banknotes for value. This was communicated to the appellant by



letter dated 6 November 2019 wherein he was informed that, having received and considered the results of further testing, the respondent had decided to exchange the damaged banknotes (hereinafter “the Second Decision”). The letter went on to state:

“The results of the further more forensic testing do not fully support the explanations you provided for the damage to the banknotes and are inconclusive as regards the cause of the damage to the banknotes. Given the inconclusive nature of the test results, we do not consider that the threshold provided for in Article 3(3)(a) of the ECB Decision for withholding bank notes on the basis of a belief that they were intentionally damaged has been met. The Central Bank has therefore decided to exchange your damaged banknotes”

**22.** On 7 November 2019, McCann Fitzgerald wrote to J.T. Flynn & Co. enclosing the letter the respondent had sent to the appellant on 6 November 2019. They noted that they had advised on several occasions that the issue of proceedings would be premature. The letter stated that the proceedings were now moot. However, if the appellant agreed to discontinue his proceedings, the respondent would bear its own costs of the matter. The letter went on to state that if the respondent was required to bring an application to have the proceedings struck out, it would seek an order for costs in respect of the costs of the premature proceedings and the strike out application.

**23.** On 11 November 2019, the appellant’s solicitors responded stating that the appellant would not be discontinuing his proceedings and they referred back to previous correspondence.

**24.** Following the matter having been listed for mention in the High Court on 19 November 2019, on 20 November 2019, McCann Fitzgerald wrote to the appellant’s solicitors reiterating the respondent’s offer to bear its own costs to date if the appellant discontinued his proceedings and agreed not to commence further proceedings in the

matter. This was responded to by J.T. Flynn & Co. on 25 November 2019 to the effect that they awaited receipt of the respondent's motion to strike out the proceedings (without reference as to whether the appellant was willing to discontinue the proceedings). In their letter, the appellant's solicitors alleged defamation of the appellant by the respondent and they requested confirmation that McCann Fitzgerald had authority to accept service of proceedings under the Defamation Act 2009. On 28 November 2019, McCann Fitzgerald sought information as to the alleged cause of action in defamation. A response sent by the appellant's solicitors on 2 December 2019 provided no further information as to the alleged cause of action in defamation.

25. The respondent's motion to strike out the proceedings was filed on 3 December 2019. The application was grounded on the affidavit of Lucy O'Donovan, Head of Currency Issue Division with the respondent. On 10 December 2019, James T Flynn, the appellant's solicitor, swore an affidavit in response to the strike out application.

26. On 10 December 2019, the respondent requested the appellant to furnish details of the bank account into which he wished to have the funds in exchange for the banknotes transferred. Those details were duly furnished, and the transfer of funds occurred electronically on 13 January 2020.

27. The respondent's application came on for hearing before Barr J. on 24 September 2020.

### **The High Court judgment**

28. The Judge commenced his judgment by setting out in some detail the pleadings, the background to the proceedings and the parties' submissions. Thereafter, he set out the relevant jurisprudence on the issue of mootness. The curial part of the judgment commences at para. 71 under the heading "Conclusion".

**29.** The Judge considered the “critical events” in the case to be the banknotes exchange application made by the appellant on 19 February 2019, the issuing of the First Decision on 5 April 2019 and the series of correspondence that passed between the parties following the First Decision which culminated in both the commencement of the judicial review proceedings on 29 July 2019 and the issuing of the Second Decision on 6 November 2019. Noting that the upshot of the Second Decision was that the respondent was prepared to exchange the appellant’s banknotes for value, the Judge was satisfied, insofar as the appellant sought *certiorari* of the First Decision, that that issue was moot as the First Decision had been replaced by the Second Decision which found in favour of the appellant and “acceded to his application to have the damaged banknotes exchanged for value.” The Judge found that, “accordingly, the primary issue in the proceedings [the application for *certiorari* of the First Decision] has to be seen as entirely moot at this stage” and that “the correctness or legality of the first decision of the respondent communicated on 5th April 2019, has been completely obviated by the second decision reached by the respondent” (at paras. 76 – 78). He was satisfied that “the proceedings come fairly and squarely within the doctrine of mootness” as set out in *Goold v. Collins* [2004] IESC 38, *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] 4 IR 274 and *P.V. (a Minor suing by his Mother and Next Friend A.S.) v. The Courts Service & ors* [2009] IEHC 321.

**30.** With regard to the appellant’s contention that his proceedings remained live due to the fact that he was seeking reliefs in relation to the process both leading up to the impugned decision and the months thereafter when the respondent was reconsidering its decision, the Judge was satisfied from the relevant case law “that once the underlying decision has gone out of the picture, because it has been revoked, or set aside, any allegations of unfairness, or breach of rights in respect of fairness of procedures leading to that decision, also fall away and become moot” (at para. 80). As he put it, the right to fair

procedures exists in the context of a trial, inquiry or decision-making process, or will have arisen in the context of a trial decision or inquiry that has already taken place, but one “cannot claim breach of fair procedures as a standalone cause of action” (at para. 83). Thus, while the Judge was satisfied that the appellant might have had some grounds for arguing that there was a breach of his right to fair procedures “those heads of claim fall away once the impugned decision itself has been revoked, as has happened in this case” (at para. 85). In the words of the Judge, once the impugned decision was revoked, any alleged breach of the appellant’s procedural or property rights “does not prevent the action being declared moot” (at para. 85).

**31.** The Judge was also satisfied that insofar as the appellant’s private law rights had been infringed by anything done or omitted by the respondent, he was entitled to bring separate proceedings in respect of such matters, the Judge noting that the appellant had commenced defamation proceedings against the respondent.

**32.** The Judge was further satisfied that the case did not come within any of the exceptions to the doctrine of mootness as outlined by Denham J. in her judgment in *Lofinmakin*. He found that the case did not involve a point of law of exceptional public importance. Nor was it a test case. Moreover, it was bereft of any live issue that had yet to be determined.

**33.** The Judge also addressed the appellant’s claim for damages. He found that insofar as that claim could be said to emanate from a want of fair procedures in relation to the First Decision, that decision had been overtaken by the Second Decision the consequences of which were that the alleged procedural frailties fell away: so also must the claim for damages grounded as it was on the alleged procedural frailties. Moreover, the Judge found that there was no basis upon which damages could be awarded as there was no loss pleaded by the appellant. Insofar as the appellant contended that there was a delay between the

receipt of his application in March 2019 and the issuing of the Second Decision on 6 November 2019, the Judge found that “that delay was in part occasioned by virtue of the fact that it was only on 16th July, 2019, that the applicant gave further significant information in respect of the possible causation of the damage to the bank notes” (at para. 89). He went on to comment that the explanation latterly tendered by the appellant on 16 July 2019 raised a number of questions as outlined by the Judge at para. 90 of the judgment.

**34.** At para. 91, the Judge noted that notwithstanding the explanation given to the respondent in July 2019, the appellant had continued to maintain that the banknotes had been damaged in a fire, yet the respondent’s initial analysis “did not indicate any fire damage at all”. He thus opined that these issues would have had to have been considered in some depth by the independent laboratory to which the respondent had sent the notes. In those circumstances, the Judge found it “difficult to see how any complaint in relation to delay could be made in the period between the receipt of the further information in July 2019 and the issue of the second decision in November 2019”.

**35.** Thus, for the reasons he outlined, the Judge was satisfied that the damages claim, being no more than an assertion of a right to damages, was not sufficient to render the proceedings “live” as between the parties.

**36.** Finally, the Judge found that the fact that there may be a second set of judicial review proceedings involving an application for exchange of a further set of banknotes, albeit commenced in the name of the appellant, was not relevant to the issue of whether the within proceedings were moot (at para. 95).

**37.** Accordingly, for all the reasons he set out in the judgment, the Judge was satisfied that the proceedings were moot by virtue of the decision of the respondent communicated

on 6 November 2019 “which revoked the earlier decision communicated on 5th April, 2019 and which second decision was entirely in favour of the applicant”.

### **The appeal**

#### ***The argument advanced on behalf of the appellant***

**38.** In essence, the appellant disputes the Judge’s finding that the proceedings were moot and asserts that a live controversy remains in respect of:

- (a) the primary relief of *certiorari*: The issues in dispute in respect of the First Decision have not been resolved and continue to affect the appellant, it being important to note what in fact the respondent determined on 6 November 2019, namely that as the test results were inconclusive, the threshold for withholding the banknotes was not met and, therefore, the respondent had decided to exchange the notes. Moreover, the Second Decision was not made on the basis of the appellant’s explanation but rather on a grudging acceptance by the respondent that it did not have the legal means to withhold the notes;
- (b) the applications for *mandamus*: the requirement to compel disclosure of the reports remains current;
- (c) the application for a declaration as to the appellant’s due process and property rights which requires judicial oversight; and
- (d) the appellant’s outstanding claim for damages.

**39.** The appellant’s primary contention is that the High Court in striking out the proceedings as moot erred in failing to properly apply the principles set out in *Lofinmakin* to the facts of the case and failed, in particular, to conduct the requisite two-stage analysis mandated by *Lofinmakin*.

**40.** It is said that the Judge erred in finding the proceedings moot in the absence of any attempt to hold the respondent to any explanation for the basis of its original finding. In the

High Court, all of the appellant's submissions were directed to the proceedings not being moot yet the Judge, in his analysis of the issue of mootness, failed to have regard to the provisions of Article 3(3)(a) of the ECB Decision which provides:

“Where NCBs know or have sufficient reason to believe that the genuine euro bank notes have been intentionally damaged, they shall refuse to exchange and shall withhold the euro bank notes, in order to avoid the return of such euro bank notes into circulation or to prevent the applicant from presenting them to another NCB for exchange. However, they will exchange the damaged genuine euro bank notes if they either know or have sufficient reason to believe that applicants are *bona fide*, or if applicants can prove that they are *bona fide*. Euro bank notes which are damaged to a minor degree, *e.g.* by having annotations, numbers or brief sentences placed on them, will in principle not be considered to be intentionally damaged euro bank notes...”

**41.** The appellant's circumstances are that he handed over his property in the form of cash to the respondent for an exchange for value. Under the ECB Decision, the respondent was required to exchange those banknotes for value and could only refuse to do so under two conditions once such conditions were satisfied, to wit, (i) if the respondent knows or has sufficient reason to believe that the notes were intentionally damaged and, (ii) that the appellant's *bona fides* are rejected. It is submitted that the appellant's declaration, upon submitting the banknotes for exchange, namely that the notes were not intentionally damaged, was of itself sufficient to establish his *bona fides*.

**42.** Specifically, it is said that the Judge failed to have regard to the second prong of Article 3(3)(a) of the ECB Decision which, it is submitted, compels the respondent to exchange damaged banknotes where it knows or has sufficient reason to believe that an applicant is *bona fide* or can prove his *bona fides*. The appellant's position is that he had

established his *bona fides* by dint of his declaration. Not accepting that declaration was, counsel says, tantamount to unfair procedures. Counsel for the appellant also says that the appellant's challenge to the First Decision was not limited to the First Decision but rather to the manner by which it was determined by the respondent that the banknotes had been intentionally damaged, as well as the respondent's basis for its rejection of the appellant's *bona fides*. Thus, a matter of controversy still pertains in respect of how the respondent arrived at the original decision, and the reasons for same, which has not been cured by the Second Decision. It is submitted that the respondent advanced no reasons for its determination that the banknotes had been intentionally damaged. The failure to adduce reasons offends against the requirements set out in *Meadows v. Minister for Justice* [2010] 1 IR 710 and *Mallak v. Minister for Justice* [2012] 3 IR 297 for reasoned decision-making.

**43.** Counsel also points to the fact that the appellant had sought mandamus to compel the respondent to furnish him with (a) a copy of the original report upon which it had based its assessment that the banknotes were intentionally damaged, (b) details of the laboratory to which the banknotes had been sent for testing, and (c) a sample of the banknotes so that he could conduct his own testing. Moreover, the appellant had sought declaratory relief to confirm that where the respondent determines to decline to exchange monies for value and to withhold such monies, it was required to have regard to the appellant's due process rights under articles 40.3 and 43 of the Constitution, Articles 17 and 47 of the EU Charter and Articles 6 and Article 1 of Protocol 1 of the ECHR. The declaratory relief sought by the appellant went directly to the issue of how the respondent processes applications pursuant to the ECB Decision for the exchange of damaged banknotes.

**44.** Counsel distilled the grounds of appeal to what he described as three essential flaws in the High Court judgment. Firstly, the Judge's determination that by the Second Decision the appellant gained everything he had sought in the judicial review is incorrect



since the appellant obtained none of the reliefs he had sued for. This, counsel says, is clear from the appellant's pleadings. The second flaw is that the Judge "shoehorned" the reliefs the appellant had sought into the Second Decision. The third, and principal flaw, was the failure by the Judge to recognise that the decision of the respondent was an EU decision, on foot of an EU instrument, such that the process leading to the decision should have been dealt with under the provisions of EU law, including the appellant's procedural and property rights. It is also urged that in determining the proceedings as moot, the Judge offended against the appellant's right to an effective remedy under EU law, which in the instant case was the judicial review process.

**45.** It is said that the overarching thread that binds the flaws in the Judge's reasoning is the Judge's failure to consider the full scope of Article 3(3)(a) of the ECB Decision, and in particular on whom the burden lies. Counsel says that, in essence, the High Court failed to hold the respondent to account for the latter's flawed decision-making and the flawed process in that decision-making: the fact that the money was ultimately exchanged by dint of the Second Decision is not sufficient to render the proceedings moot as that decision did not emanate from any proper interpretation of the ECB Decision or have regard to the appellant's due process rights flowing from Article 3(3)(a) of the ECB Decision.

**46.** While the appellant relies on the principles set out in *Lofinmakin*, it is submitted that the facts in the present case are very different to the facts in issue in *Lofinmakin* and *Malone v. Minister for Social Protection* [2014] IECA 4. Unlike in *Lofinmakin*, the appellant here was not seeking a discretionary revocation of a deportation order. Nor, as in *Malone*, was he seeking social security benefits which came under a defined statutory regime which includes an entitlement to a built-in right of appeal. It is argued that the within proceedings were not rendered moot for the purposes of either the first or second limb of the *Lofinmakin* principles.

***The respondent's argument***

47. The respondent's core position is that while it made a decision (the First Decision) that the banknotes presented by the appellant had been intentionally damaged (and would thus be withheld), that decision was overtaken by the Second Decision (pursuant to which the banknotes in question were exchanged for value), all of which rendered the within proceedings consequently entirely moot. For this reason, the respondent opposes the appeal in its entirety. It is further submitted that the Judge properly applied the law as set out in *Lofinmakin* to the present case.

**Discussion**

48. The essence of the mootness doctrine is encapsulated at para. 82 of the judgment of McKechnie J. in *Lofinmakin v. Minister for Justice, Equality and Law Reform* where, in formulating the mootness principles as he did, the learned judge drew on an already established substantial body of case law, including *Goold v. Collins* [2004] IESC 38, *O'Brien v. Personal Injuries Board (No. 2)* [2006] IESC 62, [2007] 1 IR 328, *Dunne v. Governor of Cloverhill Prison* [2009] IESC 11, [2009] 3 IR 378 and *Irwin v. Deasy* [2010] IESC 35, to name but a view. McKechnie J explained the doctrine in the following terms:

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

*(i) a case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing;*

*(ii) therefore, where a legal dispute has ceased to exist, or where the issue has materially lost its character as a lis, or where the essential foundation of the*

*action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined;*

*(iii) the rationale for the rule stems from our prevailing system of law which requires an adversarial framework, involving real and definite issues in which the parties retain a legal interest in their outcome. There are other underlying reasons as well, including the issue of resources and the position of the court in the constitutional model;*

*(iv) it follows as a direct consequence of this rationale, that the court will not – save pursuant to some special jurisdiction – offer purely advisory opinions or opinions based on hypothetical or abstract questions...”*

**49.** McKechnie J. went on to also consider the discretionary power of the court to hear and determine a point “*even if otherwise moot*”. He explained the position in the following terms at para. 82(v)-(vii):

*“ (v) [the mootness] rule is not absolute, with the court retaining a discretion to hear and determine a point, even if otherwise moot. The process therefore has a two step analysis, with the second step involving the exercise of a discretion in deciding whether or not to intervene, even where the primary finding should be one of mootness;*

*(vi) in conducting this exercise, the court will be mindful that in the first instance it is involved in potentially disapplying the general practice of supporting the rule, and therefore should only do so reluctantly, even where there is an important point of law involved. It will be guided in this regard by both the rationale for the rule and by the overriding requirements of justice;*

*(vii) matters of a more particular nature which will influence this decision include:-*

- (a) the continuing existence of any aspect of an adversarial relationship, which if found to exist may be sufficient, depending on its significance, for the case to retain its essential characteristic of a legal dispute;*
- (b) the form of the proceedings, the nature of the dispute, the importance of the point and frequency of its occurrence and the particular jurisdiction invoked;*
- (c) the type of relief claimed and the discretionary nature (if any) of its granting, for example, certiorari;*
- (d) the opportunity for further review of the issue(s) in actual cases;*
- (e) the character or status of the parties to the litigation and in particular whether such be public or private: if the former, or if exercising powers typically of the former, how and in what way any decision might impact on their functions or responsibilities;*
- (f) the potential benefit and utility of such decision and the application and scope of its remit, in both public and private law;*
- (g) the impact on judicial policy and on the future direction of such policy;*
- (h) the general importance to justice and the administration of justice of any such decision, including its value to legal certainty as measured against the social cost of the status quo;*
- (i) the resource costs involved in determining such issue, as judged against the likely return on that expenditure if applied elsewhere; and*
- (j) the overall appropriateness of a court decision given its role in the legal and, specifically, in the constitutional framework...”*

**50.** It is important to note that where the court proceeds to determine a moot point, “*the issue in question is not thereby reclassified; rather it remains moot*” (McKechnie J. in *Lofinmakin*, at para. 66). McKechnie J. went on to state:

*“There are therefore two steps in the evaluation process. The first is to decide whether the point is moot: if it is not, that is meant to be the inquiry. If it is, and if either or both parties still wish to proceed, the second question centres on the court’s discretion.”*

**51.** Having regard to the relevant principles which govern the issue of mootness, the first question to be addressed here is whether the Judge properly determined that the proceedings were moot.

**52.** The first thing to be said is that I am entirely in agreement with the respondent’s submission that the statement of grounds makes it clear that the primary issue in the within proceedings was the validity of the First Decision. While the appellant does not really dispute that the First Decision was superseded by the Second Decision, the case he seeks to make on appeal is that the Judge failed to appreciate that his challenge was to the “basis” for the First Decision (i.e. the respondent’s determination that the banknotes were intentionally damaged) and not just the decision itself. Indisputably, when arriving at the First Decision, the respondent premised its decision on the first limb of the provisions of Article 3(3)(a) of the ECB Decision, namely that “[w]here NCBs know or have sufficient reason to believe that the genuine euro bank notes have been intentionally damaged, they shall refuse to exchange and shall withhold the euro bank notes, in order to avoid the return of such euro bank notes into circulation or to prevent the applicant from presenting them to another NCB for exchange”. As noted by the respondent in its written submissions, the appellant’s position appears to be that the reason given by the respondent for the First Decision confers a standalone right on the appellant to pursue his litigation and/or

constitutes a live controversy, matters which are independent of the First Decision and thus capable of preventing a finding of mootness. As already referred to, this position is advanced by the appellant in circumstances where there is no real argument made in the appeal against the Judge's finding that the challenge to the legality of the First Decision is moot by reason of that decision having been overtaken by the Second Decision.

**53.** Insofar as the appellant seeks to argue that his challenge to the basis for the First Decision remains a live controversy, that position is unsustainable, in my view. I accept the respondent's submission that not only is there no live adverse decision for the appellant to challenge, there is also no underlying reasoning (or "basis") for the First Decision that remains operative. This is made abundantly clear by the contents of the Second Decision which states, *inter alia*, "we do not consider that the threshold provided for in Article 3(3)(a) of the ECB Decision for withholding bank notes on the basis of a belief that they were intentionally damaged has been met." The upshot of the Second Decision is that the funds which the appellant proffered to the respondent have been exchanged for value. In effect the essential object sought to be achieved by the institution of the within proceedings has come to pass.

**54.** The appellant also asserts that the respondent failed to provide him with any documentation or report evidencing that it had engaged in any assessment of the banknotes. He also says that the respondent provided no information as to what any such assessment and testing as may have been conducted showed. Moreover, the respondent did not accede to a request to provide the appellant with a sample of the banknotes so that he could conduct his own testing. Rather, the respondent said that it would send off the notes for further testing and that once this was done it would provide the appellant with a report. Yet that was never provided. It is submitted that the respondent continued to fail to accept the appellant's *bona fides* until, eventually, after an exchange of correspondence, the

appellant was required to bring an application for judicial review of the First Decision, including seeking mandatory reliefs to safeguard his due process rights.

**55.** The appellant further asserts that, in the period between the First Decision and the Second Decision, he was deprived of the value of his property and that this deprivation was based on documentation that he was not provided with and will never see unless the respondent is compelled to provide such documentation to him. Similarly, the appellant says that he has been deprived of the reasons the respondent reached the First Decision and, ultimately, the Second Decision. In essence, it is argued that the respondent did not provide the appellant with either the documentation pertaining to or the reasons for the First Decision, which decision is the subject of the judicial review proceedings. The appellant says that the breach of fair procedures “implicates his public law rights” (emphasis in original) and is thus “intimately connected to [the] making of the Impugned Decision” which, it is asserted, was made in breach of the ECB Decision. He contends that the public law error was not cured by the respondent’s subsequent exchange of the banknotes. He submits that for these reasons the judicial review proceedings are not moot.

**56.** I cannot accept the appellant’s submissions in the above regards. The case law has made clear that where a person has challenged a particular decision and has also challenged aspects of the process leading to the making of that decision on the grounds of the absence of due process or want of fairness, once the decision itself is struck down, revoked or otherwise rendered inoperative, the challenge to the process of fairness thereof also falls. As noted by McKechnie J. in *Lofinmakin*, the process by which the decision in that case had been made were circumstances entirely of the past. He opined:

*“It is legally impossible to sustain a continuing challenge to an order, which is of no effect which no longer exists, and that even if it were possible, it would be an*

*exercise in the utmost futility to do so. This must equally apply to the underlying process, as both are inextricably linked.”*

**57.** This issue was also addressed in *Malone v. Minister for Social Protection*. There, the applicant challenged the original decisions of the Minister for Social Protection to refuse her Domiciliary Care Allowance (DCA) on the basis that her son in respect of whom the application for DCA was made did not meet the requisite statutory criteria. She also challenged the process leading to the determination on the grounds of procedural unfairness, including the absence of reasons in the decisions. The reliefs sought were declaratory reliefs in respect of the alleged procedural unfairness, and an order of *certiorari* quashing the decisions refusing the application for the DCA. The applicant’s judicial review proceedings were unsuccessful in the High Court. Thereafter, she pursued a statutory appeal and was successful in that. Accordingly, as found by the Court of Appeal, by the time the appeal of the High Court Order came before the Court, it was entirely moot. That included both the challenge to the original decisions and the challenge to the fairness of the process leading to those decisions. Irvine J. expressed it thus at para. 26:

*“Following the rejection of her claim by the High Court, Ms. Malone proceeded to appeal the respondent’s refusal of her right to the DCA under s. 311 of the 2005 Act and that appeal was resolved in her favour thus disposing of any dispute of any nature concerning her entitlement to the allowance. As a result, the process adopted by the respondent when rejecting her applications under s. 300 and s. 301 of the 2005 Act is of no practical significance to the parties and should therefore, on the basis of the decisions already referred to, be deemed to be moot.”*

**58.** All the complaints the appellant makes, specifically the complaints about an unfair process both leading up to and post the First Decision, are, in my view, entirely subsidiary to the alleged invalidity of the First Decision. As correctly determined by the Judge, once



the Second Decision was made and the appellant's money returned, the First Decision fell away. Based on the caselaw just referred to, it also follows that the due process complaints as set out in Grounds 1, 2 and 3 of the statement of grounds, and the mandatory and declaratory reliefs sought by the appellant, also fell away upon the issuing of the Second Decision. As both *Lofinmakin* and *Malone* make clear, allegations of procedural unfairness or breaches of due process, where they are made to support an impugned decision, do not survive when the impugned decision is revoked or otherwise superseded. This is because such allegations have no independent existence outside of the main complaint in the case.

**59.** Part of the case the appellant makes on appeal is that he requires the reports the respondent is in possession of for the purposes of his defamation proceedings. However, that is not, in my view, a sufficient basis upon which it can be held that these judicial review proceedings remain live. It is a general principle that a stand-alone claim for disclosure of documents cannot be maintained save in very limited circumstances (such as disclosure for the purpose of identifying a potential defendant) that do not arise in this case. In any event, the appellant has available to him the procedure provided for in the Rules of the Superior Courts ("RSC") by way of discovery to assist the progression of his defamation proceedings.

**60.** Insofar as it is argued that the First Decision was challenged on the basis of an alleged failure to give reasons (and/or insofar as it argued in the appeal that the Judge failed to address this issue), again, any alleged frailty either on behalf of the respondent and/or the Judge cannot assist the appellant in maintaining these proceedings. The alleged failure to give reasons is essentially a procedural complaint or a due process complaint. Thus, since the allegedly unreasoned First Decision fell away upon the issuing of the Second Decision, it follows that the complaint of a failure to give reasons also fell away upon the making of the Second Decision.

**61.** The appellant further contends that the proceedings cannot be regarded as moot by reason of his outstanding claim for damages. Insofar as he rests his damages claim on an alleged breach of fair procedures in relation to the making of the First Decision, for the reasons already set out, that claim has fallen away by dint of the issuing of the Second Decision.

**62.** In response to questions from this Court as to what damage was sustained by the appellant such as to warrant an award of damages, his counsel submitted that the withholding of the appellant's property with no compensation for some nine months formed the essential claim for damages, that claim emanating from the appellant's EU and ECHR rights.

**63.** In my view, the contention that the appellant's claim for damages survives by reference to his asserted EU and ECHR rights is wholly without merit. This is primarily, because, beyond the broad contention that he is entitled to damages under the Constitution, the EU Charter and the ECHR, there is no detail of what the damage is said to be. As determined by the Judge, there is no sustainable claim for damages. The unsustainability of such a claim is underscored by the absence of any pleaded detail in the proceedings in relation to the damages claim. Furthermore, as commented on by the Judge at paras. 89-91 of his judgment, the unreality of such a claim is also underscored by reason of the drip-feed nature of the information given by the appellant to the respondent such that any alleged delay between the First Decision and the making of the Second Decision must be regarded as largely attributable to the manner in which the appellant dealt with the respondent's legitimate enquiries and its invitation to him to provide further information.

**64.** While the Judge noted the respondent's submission that the appellant was not in a position to claim damages by reason of the provisions of s. 33AJ(2) of the Central Bank Act 1942, quite properly he determined that this was something he could not take account of

since, firstly, no statement of opposition had yet been filed and, secondly, it would in any event be open to the appellant to argue that the provisions of the section should not apply.

**65.** Ultimately, the Judge's conclusion on the damages claim was that same was "no more than an assertion of a right to damages" and was not sufficient to render the proceedings "live" between the parties, a conclusion that I would uphold for the reasons set out.

**66.** Albeit the First Decision has been overtaken by the Second Decision, the appellant also argues that the matter is not moot and remains "live" in the following circumstances (as also claimed in the court below).

**67.** In a set of judicial review proceedings bearing the title "*Lawrence Shields v. The Central Bank of Ireland and An Garda Síochána (Notice Party)*" and bearing the record number 2020/377/JR, the appellant sought relief by way of judicial review in respect of the refusal of the respondent to exchange a further €4,400 worth of damaged banknotes, which, it was alleged, had been submitted by the appellant. It was alleged that the banknotes in question had been provided by the appellant to his solicitor as payment for professional fees. As noted by the Judge at para. 35 of his judgment, in a replying affidavit sworn by Mr. Alan Briscoe of the respondent in the 2020/377/JR proceedings, Mr. Briscoe pointed out that on the appellant's own evidence, the appellant was no longer the owner of the banknotes the subject of those proceedings as he had transferred them to his solicitor.

**68.** The banknotes in question were initially presented to the respondent by a former employee of the appellant's solicitors and later resubmitted by Mr. J.T. Flynn of that firm. It is common case that they involved banknotes from the same batch of banknotes that had been retrieved by the applicant from the fire. Essentially, therefore, the first batch the appellant himself had presented to the respondent, and the second batch he gave to his solicitor as legal fees who later presented them to the respondent for exchange.

**69.** As recorded at para. 33 of the judgment under appeal here, by letter dated 15 May 2020, the respondent informed the appellant’s solicitor that an interim decision had been reached by the respondent to defer consideration of the application for exchange pending conclusion of a separate investigation by An Garda Síochána. In relevant part, the letter advised:

“The Central Bank has been informed by An Garda Síochána that they have commenced an investigation into the source of funds of the firm’s application. Accordingly, pursuant to Article 3(3)(a) of the ECB Decision, the Central Bank is not exchanging and is withholding the damaged bank notes. Unless otherwise decided by the competent authorities, the damaged bank notes shall at the end of the investigation qualify for an exchange under the conditions laid down in Articles 3(1) and (2) of the ECB Decision.”

**70.** As noted by the Judge, at the time respondent’s application to strike out the within proceedings was before the court, no *ex parte* application had yet been made by the appellant for leave to proceed by way of judicial review in the proceedings bearing record number 2020/377/JR. At the hearing in the court below of the respondent’s application to strike out the within proceedings, the submission advanced on behalf of the respondent was that the appellant lacked *locus standi* to bring the judicial review proceedings bearing record number 2020/377/JR as he no longer had any proprietary interest in the banknotes.

**71.** Ultimately, the Judge determined that “the fact that there may be a second set of judicial review proceedings involving an application for exchange of a further set of bank notes, which may have been damaged in the same event, is not relevant to the issue of whether or not these proceedings have become moot.” (at para. 95)

**72.** As explained at the hearing of the within appeal, the appellant’s application for leave in respect of the second set of proceedings for judicial review was ultimately refused by

Barr J. ([2021] IEHC 444) on the basis that the appellant did not have *locus standi* to challenge the impugned decision. Barr J. also refused to allow the appellant's solicitor to be joined as a second applicant to those proceedings. Barr J. further determined that even if he was wrong in finding that the appellant lacked *locus standi*, the court was nevertheless satisfied that the application for leave was premature on the basis that the decision of the respondent in that case was "clearly a holding decision" and no final decision had been made. In his oral submissions in the within appeal, the appellant's counsel alluded to the appellant's intention to appeal the Order made by Barr J. in the second set of judicial review proceedings.

**73.** It is the appellant's contention in the within appeal that the existence of this second controversy (and the consequent second set of judicial review proceedings) aligns with the criteria set out in *Lofinmakin* that render proceedings not to be moot. His counsel submits that the existence of these second set of judicial review proceedings had the effect (notwithstanding the Second Decision) of revitalising the within proceedings given that there was a risk of repetition of the wrong that had befallen the appellant when he presented the first batch of banknotes to the respondent for exchange. It is thus contended that the High Court erred in finding that that the fact that there may be a second set the judicial review proceedings involving an application for exchange, which may have been damaged in the same event as that said to have caused the damage to the banknotes in issue here, was "not relevant" to the issue of whether the within proceedings had become moot. It is also the appellant's contention that the respondent is wrong to say that the issue of the collateral garda investigation is unconnected with the appellant's case. In this regard, counsel refers to para. 30 of the High Court judgment in the within proceedings wherein, *inter alia*, the Judge noted that four of the banknotes the subject of the appellant's application for exchange had been passed to the gardaí for the purposes of their

investigation into the second batch of banknotes which Mr. Flynn had presented to the respondent.

**74.** Insofar as the appellant asserts that both the existence of this second set of judicial review proceedings and the garda investigation are factors which evidence an ongoing “*adversarial relationship*” and, accordingly, prevent the within proceedings from being moot, I must respectfully disagree. The fact of the matter is that the First Decision (in respect of which judicial review is sought) is not connected to any other civil proceedings or investigation or indeed to any criminal investigation. Nor is the Second Decision connected to such civil or criminal investigation. While a criminal investigation may or may not be ongoing, it only arises in the context of the subsequent application by the appellant’s solicitor to exchange banknotes, and not the exchange application the subject of the within proceedings.

**75.** Furthermore, contrary to the appellant’s submission, I do not accept merely because four of the banknotes which the appellant had submitted for exchange have been passed on to the gardaí in connection with an investigation they are carrying out in respect of the source of funds the subject of the appellant’s solicitors’ application for exchange that that factor, of itself, is of sufficient importance or has sufficient connectivity to keep live the controversy between the appellant and the respondent. I so find in circumstances where the banknotes proffered by the appellant have been exchanged for value further to the Second Decision and the appellant can have no right, interest or entitlement in the four banknotes in the possession of the gardaí.

**76.** Contrary to the appellant’s submission, there is no spectre of repetition in this case for him since the offending First Decision has been entirely supplanted by the Second Decision. Moreover, there is no suggestion that the appellant holds more damaged banknotes from the same batch. Thus, the factual matrix here is not akin to the

circumstances that pertained in *McCann v. Judge of Monaghan District Court* [2009] 4 IR 200 (upon which the appellant relies).

**77.** In *McCann*, the plaintiff instituted proceedings seeking to challenge the validity of an order committing her to prison for one month for failure to comply with an instalment order which had been obtained against her in the District Court. She also sought to challenge the validity of the legislation under which the order was made on the basis that it was invalid having regard to the provisions of the Constitution and the ECHR. One of the issues that arose in the proceedings was the submission of the State parties that if the District Court order committing her to prison was quashed, the plaintiff's challenge to the legislation under which it was made would be moot. This stratagem was opposed by the Human Rights Commission on the basis that there was no guarantee that the plaintiff would be afforded procedural safeguards if the matter were to be remitted to the District Court as there remained a risk to the plaintiff's liberty by the very existence of the legislative procedures that gave rise to the impugned order committing her to prison for failure to pay an instalment order.

**78.** Laffoy J. found that the most important factor was that *"if the course advocated on behalf of the State parties is adopted and the matter is remitted to the District Court without the impugned legislation being subjected to the scrutiny which the plaintiff contends should result in it being held to be invalid, the plaintiff's right to liberty will be potentially affected by the very same legislative procedures that gave rise to the 2005 order, which the state parties agree should be quashed but without identifying the precise basis which warrants an order for certiorari"*. She was thus satisfied that if the court adjudicated on the validity of the impugned legislation it would not be giving what is purely an advisory judgment. She went on to state:

*“On the contrary the court will be giving a judgment which will determine not only issues as to the plaintiff’s historic treatment by the credit union and the District Court in reliance on the impugned legislation, but also issues as to her potential treatment in the future as a judgment debtor whose rights and obligations and the sanctions to which she is potentially exposed, which extend to deprivation of liberty for three months, are governed by the impugned legislation”* (at para. 42).

**79.** Thus, as held by Laffoy J., *“the proposal that the 2005 order be quashed and that the matter be remitted to the District Court does not render moot the issues raised by the plaintiff as to the validity of the impugned legislation”* (at para. 46).

**80.** Here, the appellant did not seek to challenge the legality of Article 3(3)(a) of the ECB Decision; rather, he challenged only the validity of a decision (the First Decision) made pursuant to the ECB Decision. As I have said, ultimately, *via* the Second Decision, the appellant obtained the exchange for value of his banknotes, which, as I have already said, was the objective of his presenting the notes for exchange in the first place.

**81.** For the reasons set out above, there is no merit in the argument the appellant seeks to make, namely that there remains a “live” controversy by dint of either the existence of the second set of judicial review proceedings, or any criminal investigation into the banknotes the subject of those proceedings.

**82.** It is well established that the rule in relation to mootness is not absolute. The exceptions to the mootness rule were addressed in the judgment of Denham J. in *Lofinmakin*. In essence, the Supreme Court recognised that it would be appropriate to allow a moot action, or a moot appeal, to proceed in three broad circumstances. Firstly, where the issue, while no longer live for the particular applicant, remained a very live issue for the respondent in the exercise of their statutory functions in future cases. It was on that basis that the appeal was allowed to continue in *O’Brien v. Personal Injuries Assessment*



*Board (No.2)* [2006] IESC 62, [2007] 1 IR 328. There, the issue was whether the respondent Board had a statutory responsibility to deal directly with the applicant's solicitors. After the determination of the proceedings in the High Court in the applicant's favour and an appeal was filed, the applicant received an authorisation permitting him to institute a personal injury claim against his employer. In the appeal, the applicant argued that his proceedings were moot and that, accordingly, the appeal should not proceed. The Board wished to proceed because of the potential of the High Court's determination to affect many other cases. As pointed out by Murray C.J., at p. 334:

*“Where, as in this case, a party has a bona fide interest in appealing against a declaratory order which is not confined to past events peculiar to the particular case which has been resolved one way or another, the court should be reluctant to deprive it of its constitutional right to appeal. In this case the respondent continues to be constrained in the exercise of public powers under Statute by virtue of the declaration granted in the High Court at the instance of the applicant”.*

**83.** The second exception to mootness is where the case involves a point of law of exceptional public importance. Thus, the trial court, or the appeal court, may decide that it is appropriate to deal with the proceedings notwithstanding that they had become moot. As put by Murray C.J. in *Irvine v. Deasy* [2010] IESC 35:

*“The general practice of this Court is to decline, in principle, to decide moot case. In exceptional circumstances where one or both parties has a material interest in a decision on a point of law of exceptional public importance, the Court may in the interest of due and proper administration of justice determine such a question.”*

**84.** Thirdly, if the case is a test case and there are many other cases which have been adjourned pending the decision in the test case, then it may be appropriate to allow the proceedings to continue notwithstanding that they have become moot. This was the

position in *Okunade v. Minister for Justice* [2012] 3 IR 152. Albeit the issue was “*strictly speaking moot*”, it was permitted to proceed because it was a test case.

**85.** Here, one of the principal arguments advanced by counsel for the appellant is that the Judge failed to engage on the two-tier analysis referred to by McKechnie J. in *Lofinmakin* before he dismissed the proceedings as moot. It is also contended, insofar as the Judge determined (at paras. 86 and 87 of his judgment) that the case did not come within any of the exceptions to the doctrine of mootness, that that determination is flawed because the Judge did not properly engage upon the first limb of the relevant test by inquiring whether the proceedings were properly moot in the first place. This latter argument, however, cannot be regarded as persuasive given the findings I have already made as regards mootness, as set out heretofore.

**86.** Thus, the question now to be decided is whether, before he struck out the proceedings as moot, the Judge embarked on the requisite second limb of the test set out in *Lofinmakin* and thus considered whether, albeit the proceedings were moot, he should nevertheless exercise his discretion in favour of determining the issues in the judicial review. Even if the Judge did embark on the requisite analysis, the question that arises is whether he properly exercised his discretion when finding that there were no factors which warranted the disapplication of the mootness rule.

**87.** In the first instance, I cannot agree with the submission that the Judge did not engage on the requisite two-tier analysis. Clearly, the Judge did so. While he did not premise his analysis or conclusions by reference to the formulation used by McKechnie J. in *Lofinmakin* as to when the court’s discretion to hear proceedings that are otherwise moot might be exercised, he clearly found, at para. 86 of his judgment, that the case did not come within any of the exceptions outlined by Denham J. in *Lofinmakin*. The question is

whether there are any grounds upon which this Court should interfere with that determination.

**88.** In advocating that the Judge erred in his application of the second limb of the requisite analysis, counsel for the appellant relies on “*the matters of a more particular nature*” which McKechnie J. identified, at para. 82(vii) of *Lofinmakin*, as relevant to a decision to disapply the mootness rule. It is submitted that even if the within proceedings could be said to be moot, there were factors in the proceedings that met many of the criteria set out by McKechnie J. at para. 82 (vii) and which warranted the Judge exercising his discretion in favour of permitting the proceedings to continue.

**89.** Insofar as counsel seeks to argue that the appellant’s case satisfies the criterion of “*the continuing existence of any aspect of an adversarial relationship*” as referred to by McKechnie J. at para. 82(vii)(a), it is clear the Judge did not find evidence of any continuing *lis* between the parties, whether civil or criminal, in which the impugned decision here was directly relevant and in respect of which a decision should therefore be made by the court. He was correct in this finding, in my view. For the reasons earlier set out, and in light of the relevant case law, all elements of the controversy between the parties effectively evaporated once the Second Decision issued. Moreover, for the reasons I have already stated, the Judge was also correct in finding the second set of proceedings to be not relevant to the issue he had to determine.

**90.** Insofar as the appellant seeks to rely on “*the form of the proceedings, the nature of the dispute, the importance of the point and frequency of its occurrence and the particular jurisdiction invoked*” as referred to by McKechnie J. at para. 82(vii)(b), I am satisfied that that criterion is also not met in this case. This case concerned the respondent’s negative decision in respect of appellant’s application for the exchange of banknotes, a decision which was later reversed, as a consequence of which the appellant received an exchange

for value. This had the result such that, in the words of McKechnie J. in *Lofinmakin*, “*the essential foundation of the action*” disappeared. There is thus no extant issue of substantive EU law that requires determination. Nor am I convinced of the likelihood of a recurrence of the events in issue. While there is a second batch of banknotes (and there exist the events that have occurred subsequent to the presentation of that batch to the respondent), even if the present proceedings could be deemed sufficiently connected to this other batch (which I do not find for the reasons earlier set out), to my mind, the dispatch of the banknotes into a fire can only be deemed to be a “one off” event. In those circumstances, it can hardly be said that this case meets “*the overriding requirements of justice*”, a criterion identified by McKechnie J. at para. 82(vi) as being necessary in order to disapply the mootness doctrine.

**91.** Similarly, the reliance placed by the appellant on subparagraph (c) of para. 82(vii), to wit, “*the type of relief claimed and the discretionary nature (if any) of its granting, for example, certiorari*”, cannot assist him. For the reasons I have already referred to, the order of *certiorari* sought by the appellant was rendered entirely otiose by the issuing of the Second Decision. Equally, the mandatory and declaratory reliefs he sought, grounded as they were on alleged procedural and due process frailties, again, by virtue of the reasoning of Irvine J. in *Malone*, all fell away once the First Decision was replaced by the Second Decision.

**92.** Pursuant to (d), it cannot be said that there will not be an opportunity for further review of the substantive legal issue raised by the applicant in these proceedings. Opportunity will arise in an appropriate case which has not been rendered moot by events. Nor, to my mind, can factor (e) be said to operate in favour of the appellant in all the circumstances of this case.

**93.** While counsel for the appellant, relying on factor (f), also argued that a decision in the matter would have scope across the EU on how damaged banknotes are dealt with by Central Banks, I do not find that argument particularly convincing.

**94.** In my view, counsel did not advance any persuasive argument by reference to the factors set out in at sub-paras (a) –(j) of para. 82(vii) such that warrants any interference with the Judge’s determination that the circumstances of this case did not warrant the disapplication of the mootness rule.

**95.** Undoubtedly, there have been occasions when ongoing relationships and circumstances were considered by the courts as relevant to the issue of whether moot cases should be heard. In *Howard v. Early* [2000] IESC 34, a case referred to by the Judge here, the Supreme Court found that it was not futile to quash an order remanding an individual in custody (which was in excess of jurisdiction) on the specific ground that the criminal proceedings were ongoing and, thus, the remand order and its consequences would be a relevant factor for consideration when it came to sentencing.

**96.** In *Farrell v. Governor of St. Patrick’s Institution* [2014] 1 IR 699, the question was whether an appeal in respect of the legality of the decision of the District Court to remand the applicant in custody (after the High Court had granted a stay on the District Court proceedings) became moot after the applicant was released. The Supreme Court found the appeal to be moot but exercised a discretion to find that the appeal should nevertheless be heard on the basis that it potentially affected other cases and it had an effect on criminal proceedings against the applicant.

**97.** The issue of mootness also arose in *SMcG v. Child and Family Agency* [2017] 1 IR 1. There, interim care orders were made in the District Court, which resulted in an application by the parents of the children concerned for an Article 40.4.2 inquiry into their detention. The High Court held that the applicants’ rights to constitutional fair procedures

had not been fully respected in the District Court and granted relief under Article 40. The High Court did not grant an order for the release of the children. Instead, following agreement between the parties, there was an order made for their phased return to their parents. Subsequently by way of a renewed care application in the District Court, the children were placed in the interim care of the Child and Family Agency.

**98.** The Child and Family Agency were granted leave to appeal directly to the Supreme Court against the Order of the High Court. One of the issues which confronted the Supreme Court was the issue of mootness, the impugned interim care order made by the District Court having been spent by the time of the appeal hearing.

**99.** As observed by Charleton J. in *SMcG*, “[e]xceptional circumstances” can override the mootness principle (at para. 95). After referring to the generally accepted exceptions to the mootness rule, he went on to opine that the appeal in *SMcG* “*may not be moot at all*”. He continued:

*“96...There is ongoing litigation between the mother and father as parents in relation to the future care of their children by the child and Family Agency. There have been several orders made in this context by the District Court and there will probably be more. It is capable of repetition that one or other parent will be unrepresented but that a court will feel that a decision simply must be made. In those situations of a conflict between the procedural rights of the parents and the requirement to consider whether an order is necessary, the ancient common law principle, now enshrined in Article 42A, should require a court to consider at least the best interests of the child.*

*97 Additionally, this case is important and as a precedent it carries the potential to bring further cases before the High Court in the context of a procedural dispute. Finally, without the chance to analyse s.23 of the 1991 Act, the High Court in*

*future might have been left floundering in the exceptionally rare cases that might potentially justify such an application in simply making a nullifying order with nothing to replace it in aid of the welfare of the children.”*

**100.** To my mind, the appellant’s circumstances bear no comparison to the factual matrices at play in *Howard, Farrell* or *SMcG*. The same can be said of *Kozinceva v. The Minister for Social Protection* [2020] IECA 7. That case concerned judicial review proceedings taken by the applicant against the respondent Minister’s refusal to grant her Jobseekers Allowance in the absence of her being able to establish she was living in a named catchment area. The applicant could not do so as she was of no fixed abode. She claimed she was refused JSA on grounds of homelessness. By the time of the hearing in the High Court, a sum of €2450.20 had been transferred to the applicant apparently in discharge of all back payments of JSA. Despite the respondent’s argument in the High Court that the application for judicial review was moot, the case proceeded in the High Court and was determined adverse to the applicant on the merits. On appeal, the Minister argued that the applicant’s case was moot as she had received all back payments in respect of JSA following the submission of a valid application for her by her solicitors.

**101.** Haughton J. (writing for the Court), having adopted the two-stage approach advocated by McKechnie J. in *Lofinmakin*, found the applicant’s claims for *certiorari*, damages and declaratory relief to be moot but nevertheless exercised the Court’s discretion to hear the claim for declaratory relief. He did so in circumstances where the applicant in that case “*with a history of homelessness, is at very real risk in the future of finding herself in the situation in which she found herself in 2016. Thus, the controversy in the present case potentially affects her future rights.*” He found that nothing in the Minister’s submissions “*addresses the simple question of where a homeless person is meant to apply for JSA in the future*”. Unlike the unfortunate circumstances of the applicant in *Kozinceva*,

in the present case I am of the view there is no real likelihood of a repeat of the events that caused the appellant to seek an exchange of banknotes from the respondent. Nor is there any likelihood of the present controversy affecting his future rights.

**102.** No matter from what angle the present case is approached, it cannot be said that the nature of the reliefs sought by the appellant are such as would warrant the exercise of a discretion that is reserved for points of law of exceptional public importance, test cases or the type of situations that arose in the case law just considered.

**103.** As observed by McKechnie J. in *Lofinmakin*, the court should be very slow to allow a case that is moot to proceed. He opined that “*strong, compelling and persuasive reasons*” need to exist before the court would make an exception to the mootness rule (at para. 91). No such strong or compelling or persuasive reasons have been advanced in this case.

**104.** For all the reasons set out above, I am satisfied that the Judge properly determined that the proceedings were moot. As said by Murray C.J. in *Irwin v. Deasy* [2010] IESC 35:

*“The mootness doctrine is applied by the courts to restrain parties from seeking opinions on abstract, hypothetical or academic questions of law by requiring the existence of a live controversy between the parties to the case in order for the issue to be justiciable”.*

**105.** Here, no justiciable issue has survived the making of the Second Decision and the resultant exchange of the appellant’s banknotes for value.

**106.** One of the appellant’s overarching submissions was that because the matter concerns the ECB Decision and, hence, engages the appellant’s EU procedural and property rights, those factors distinguish the case from the factual matrices at issue in *Lofinmakin* and *Malone v. Minister for Social Protection*. I am satisfied, however, and as set out earlier, that no substantive issue of EU law remains engaged in this case. The



Second Decision has rendered otiose the issue of whether the respondent was correct in refusing to exchange the banknotes under the first limb of Article 3(3)(a) without also deciding whether the declaration the appellant made when submitting the banknotes for exchange met the requirements of the second limb of Article 3(3)(a).

**107.** More fundamentally, in my view, the fact that a litigant has pleaded a breach of EU law, or asserts EU rights, does not mean that the doctrine of mootness has no application if the circumstances of the case otherwise meet the requisite test in Irish law for dismissing proceedings as moot.

**108.** Whether pursuant to domestic law, the EU Charter or Article 6 ECHR, a litigant's right of access to the courts is not unlimited. The effective right to a fair hearing, whether at domestic level or pursuant to EU law or the ECHR, does not deny to a court the opportunity of carrying out a proper examination of the arguments and submissions of the parties, either at a preliminary stage or at the trial or on appeal, for the purpose of assessing whether the case is moot. The appellant has not cited any authority from the European Court of Human Rights or the Court of Justice of the European Union for the proposition (lest it be the argument the appellant seeks to advance) that signatory States are prohibited from having procedures or rules which enable cases to be struck out in line with the type of tests set out in the Irish authorities on the doctrine of mootness.

**109.** Accordingly, there is no merit in the contention that the striking out of the proceedings as moot deprived the appellant of his entitlement to an effective remedy for the purposes of EU law or denied him an effective hearing as required by Article 6 ECHR or indeed offended against his constitutional right to a fair hearing. The within judicial review process afforded the appellant his effective remedy, as required by EU law, to vindicate his procedural and substantive rights under EU law. The fact that that process did not conclude in a determination on the merits of the appellant's complaints has not

offended against any substantive or procedural EU rights the appellant may have in circumstances where the appellant's objective in submitting banknotes for exchange in accordance with the ECB Decision has been achieved by dint of the Second Decision.

**110.** It will be recalled that in its notice of motion, by way of an alternative to the order sought striking out the proceedings on the grounds that they were moot, the respondent sought an order pursuant to the inherent jurisdiction of the court dismissing the appellant's proceedings on the ground that they were bound to fail. It appears to be the case that this alternative relief sought by the respondent was the subject of written submissions by both parties in the High Court. It was not, I understand, the subject of any substantive oral submissions in the court below save the respondent's argument that the appellant's damages claim was bound to fail having regard to s. 33JA(2) of the Central Bank act 1942, an argument the Judge declined to take into account in assessing the damages claim for the reasons he set out at para. 92 of the judgment.

**111.** In ground 1 of his appeal, and in his written submissions to this Court, the appellant contends that the High Court exercised its jurisdiction pursuant to Order 19, r.28 RSC by striking out the proceedings as being bound to fail. He asserts that in doing so the Judge failed to have regard to the principles governing the jurisdiction to strike out pursuant to Order 19, r.28, as established by case law. He cites *Aer Rianta v. Ryan Air* [2014] 1 IR 506, *Irish Bank Resolution Corporation Ltd v. Purcell* [2016] 2 IR 111, *O'Connell v. Environmental Protection Agency* [2001] 4 IR 494 and *Alen-Buckley & Anor v. An Bord Plenala & Ors* [2017] IEHC 311, in aid of his argument. He submits that the High Court should have been slow to exercise jurisdiction to strike out the proceedings unless "it was clear that all of the Appellant's reliefs were bound to fail, on the admitted facts." The appellant further contends that the High Court was required to treat his claim "*at its high*

*water mark*” and that the respondent carried the burden to prove that the appellant’s claims were bound to fail.

**112.** The respondent disputes the appellant’s contentions and submits that the Judge did not purport to exercise any jurisdiction to strike out the proceedings on the ground that they were bound to fail. It says that no reference was made in the judgment to Order 19, r.28 RSC. That is indeed the case. Furthermore, for what it is worth, I note that the respondent’s motion invoked only the inherent jurisdiction of the court to strike out proceedings as being bound to fail and made no mention of Order 19, r.28.

**113.** In any event, I agree entirely with the respondent’s submissions. I am satisfied that the entire thrust of the High Court judgment was directed to the respondent’s application to strike out the proceedings on the basis that they were moot. Thus, the jurisdiction to strike out proceedings as being bound to fail, either pursuant to Order 19, r.28, or pursuant to the inherent jurisdiction of the court, is not germane to any of the findings in the judgment that led the Judge to strike out the proceedings as moot.

**114.** In his oral submissions to this Court, counsel for the appellant also sought to argue that when the Judge ruled as he did with regard to the mandatory and declaratory reliefs sought by the plaintiff he was invoking the court’s bound to fail jurisdiction and, thus, it was accordingly incumbent on him to apply the relevant jurisprudence in respect of the bound to fail jurisdiction. I am satisfied that counsel’s submission is completely without merit. When the Judge found that once the First Decision fell away so also did the appellant’s complaints about procedural frailties and lack of reasoning in respect of the impugned decision, he was clearly invoking the established mootness principles in *Lofinmakin* and *Malone*, namely that once the alleged illegal decision is supplanted or superseded, any alleged frailties of reasoning or breach of fair procedures in respect of that decision likewise fall away.

**Summary**

**115.** For all the reasons set out above, I would dismiss the appeal and uphold the decision in the court below including the Judge's adjudication on costs. I note that while the appellant's notice of appeal sought an order setting aside the High Court Order as to costs, no submissions were advanced at the appeal hearing as to why, were this Court to uphold the substantive decision of the High Court, this Court should nevertheless overturn the High Court's Order as to costs.

**Costs of the appeal**

**116.** The appellant has not succeeded on any of the grounds in the appeal. It follows that the respondent should be awarded its costs. If, however, any party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the twenty-one-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

**117.** As this judgment is being delivered electronically, Whelan J. and Haughton J. have indicated their agreement therewith and the orders I have proposed.