[2020] IEHC 518

THE HIGH COURT
JUDICIAL REVIEW

[Record No. 2019/565 JR]

BETWEEN

LAWRENCE SHIELDS

APPLICANT

AND

THE CENTRAL BANK OF IRELAND

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered electronically on the 15th day of October, 2020

Introduction

1. This is an application brought by the respondent for a declaration that the applicant's proceedings herein are moot; together with an order striking out the applicant's proceedings on the same grounds. In the alterative, it seeks an order dismissing the applicant's proceedings on the grounds that they are bound to fail.

2. While it will be necessary to go into the background to these proceedings in some detail later in the judgment, for the purposes of this introductory section, the background to the proceedings can be summarised in the following way: on 19th February, 2019, the applicant submitted an application form seeking the exchange of bank notes to the value of €4,950 (€50 x 51 and €200 x 12), which were in a damaged condition. That application was sent via Bank of Ireland and was received by the respondent on 21st March, 2019. In the application form, the applicant had stated that all the notes were in an envelope that had been put into a fire and the notes were retrieved from the fire. That was the explanation given for the damage to the 63 notes.

3. By letter dated 5th April, 2019, the respondent informed the applicant that they had determined that the notes were intentionally damaged and therefore, the notes were being withheld by the respondent to avoid the return of the bank notes into circulation. The letter further stated that the respondent had reached its decision following assessment, testing and analysis of the bank notes in accordance with the Decision of the European Central Bank of 19th April, 2013 on the denominations, specifications, reproduction, exchange and withdrawal of euro bank notes. Accordingly, the respondent had decided that it was not going to exchange the bank notes which had been submitted by the applicant.

4. Thereafter, there was a series of correspondence passing between the applicant's solicitor and the respondent and latterly with the respondent's solicitor.

5. On 17th May, 2019, the respondent sent a letter indicating that they were going to send the notes for further forensic analysis. By letter dated 16th July, 2019, the applicant furnished further information in relation to the cause of the damage to the bank notes.

6. On 29th July, 2019, the applicant moved his ex parte application seeking relief by way of judicial review against the respondent's decision communicated to him on 5th April, 2019.

7. On 6th November, 2019, the respondent wrote to the applicant, informing him that in light of the further analysis that had been carried out at an independent laboratory, they were in fact going to exchange the bank notes which had been submitted by the applicant.

8. In light of that decision, the respondent has brought the present application seeking to have the proceedings against it struck out on the grounds that as a result of the second decision issued by the respondent on 6th November, 2019, which reversed the decision impugned by the applicant in these proceedings and which gave the applicant all that he was looking for in his original application, the within proceedings had therefore become moot.

9. The applicant resists that application primarily on the basis that in his statement of grounds, he was seeking not only *certiorari* of the first decision communicated to him on 5th April, 2019, but also orders of mandamus to compel the respondent to provide him with a copy of the report on which it had based its original decision and to provide details of the independent laboratory to which the bank notes had been sent by the respondent for further testing and an order of mandamus directing the respondent to provide the applicant with a sample of the bank notes to allow him to conduct his own independent tests.

10. The applicant also sought a declaration that where the respondent proposed to withhold and decline to exchange monies for value pursuant to the decision of the European Central bank of 19th April, 2013, it had to have regard to the claimant's rights to due process and to the claimant's property rights as protected under the Constitution of Ireland and under European law. In addition, the applicant sought damages for breach of the applicant's rights under the Constitution and under various headings of European law. It was submitted that in light of these reliefs which were sought in the applicant's statement of grounds, it could not be said that all the issues between the parties in these proceedings had become moot as a result of the second decision of the respondent on 6th November, 2019.

11. That is a very short summary of the factual background and the broad issues that arise for determination on this application.

Background

12. As noted above, on 19th February, 2019, the applicant completed an application form seeking the exchange of damaged bank notes to the value of €4,950. In that application form, there was a small box provided for the provision of details of how the notes were damaged. In that box, the applicant wrote as follows:-

> *"All notes were in an envelope that was put in a fire, notes were retrieved from fire."*

At the foot of the form, the following declaration was made by the applicant: that 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 applicant was aware that the Central Bank of Ireland might forward details of the application, including copies of ID received, to other authorities e.g. An Garda Síochána and/or the Revenue Commissioners and that he understood the requirements in relation to exchange of damaged euro notes as set out in that document. That application was signed by the applicant.

13. That application was received by the respondent on 21st March, 2019. By letter dated 5th April, 2019, the respondent refused to exchange the bank notes on the following basis:-

> *"The Central Bank has determined that the bank notes were intentionally damaged and therefore the bank notes are being withheld by the Bank to avoid the return of the bank notes into circulation.*
>
> *The Central Bank has reached its decision following assessment, testing and analysis of the bank notes in accordance with Decision of the European Central Bank of 19th April 2013 on the denominations, specifications, reproduction, exchange and withdrawal of euro bank notes."*

14. By letter dated 24th April, 2019, Messrs J.T. Flynn & Co., solicitors, informed the respondent that they were acting for the applicant. They stated that the notes submitted were lawfully within the possession of their client and proper protocol had been followed with a valid provable reason provided for the minor damage to the bank notes. They went on in the letter to state that they were of the opinion that there had been a breach in relation to nondisclosure and that theft had clearly occurred and had been committed by the respondent pursuant to the Criminal Justice (Theft and Fraud Offences) Act, 2001 and, in particular, ss. 6 and 11 thereof. The letter went on to state that the respondent's decision of 5th April, 2019 had caused their client considerable stress and upset, as a result of which he had had to consult with his doctor. The respondent was called upon to immediately refund the sum of €5,000 [sic] to their client and, for that purpose, a particular account was identified. The respondent was further informed that the writer had received instructions to seek a mandatory injunction compelling the respondent to refund the money.

15. By letter dated 3rd May, 2019, Messrs J.T. Flynn & Co. were informed by the respondent that their letter was being given due consideration. They were requested not to take any further steps on foot of same at that time. By further letter dated 14th May, 2019, the respondent informed the applicant's solicitor that the bank had carried out an assessment of the bank notes, including testing via ultraviolet light and microscope analysis and had found no evidence of fire damage. However, the bank's analysis had shown that the damage was consistent with the bank notes having been immersed in a chemical (acid or similar), resulting in: alteration of the condition of the surface of the bank note, attack of a chemical nature ("*strong acid*" type) on the edges of the bank note. That letter went on to state that given the contradiction between the applicant's submission regarding how the notes had been damaged and the bank's findings, the bank had sufficient reason to doubt the *bona fides* of the application. The applicant's solicitor was informed that should

his client wish to furnish the bank with further information/submissions in relation to the damage to the bank notes, the respondent would give any such submission due consideration and would reconsider its decision not to exchange the notes in accordance with Article 3(3)(a) of the ECB Decision.

16. By letter dated 16th May, 2019, the applicant's solicitor complained about the content of the respondent's letter of 14th May, 2019 as being somewhat *"incredible and not something our client comprehend*s". They stated that their client had acted in good faith, had furnished the bank notes and provided an honest explanation of what had occurred to cause the damage. They went on to state that in order for their firm to have a forensic analysis conducted, they required the immediate return of the bank notes.

17. By letter dated 17th May, 2019, the respondent wrote to the applicant's solicitor, stating that the respondent's findings had identified that there was sufficient reason to believe that the notes had been chemically treated. He was informed that should he wish to make a further submission to the bank, he may wish to include, in particular, details of the source of the bank notes and any explanation of the findings of chemical damage. He was advised that he should also provide additional information about the circumstances leading to the assertion that the notes were put into a fire. The letter continued as follows:-

> *"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 bank notes to your client in the 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.*
>
> *We will progress the retesting of the notes as expeditiously as possible but please be advised that it could take some time to obtain the results."*

18. By email dated 18th May, 2019, the applicant's solicitor called for a copy of the report which had allegedly found that the bank notes had been chemically treated rather than damaged as a result of a fire. The respondent was again called upon to return the applicant's bank notes. They were warned that failing return of the property by 5:00pm on 21st May, 2019, they had instructions to seek mandatory relief without further notice.

19. On 21st May, 2019, the respondent's solicitors, Messrs McCann Fitzgerald, wrote to the applicant's solicitor informing him that no further submission had been received from the applicant in response to the invitation to do so in the respondent's letter dated 17th May, 2019. It went on to state that the respondent intended to send the bank notes for further analysis to an external independent laboratory and would reassess its decision in the light of that further analysis. The letter stated that the respondent was in the process of arranging such further testing, which would be carried out by a laboratory accredited by

the European Central Bank. The letter went on to state that any application to court by the applicant at that time would be wholly premature and without foundation. The letter also stated that the respondent would provide the applicant with details of the outcome of the external independent testing and would give him an opportunity to make further submissions in relation to the matter at that stage. It was stated that in those circumstances, any application to court for interlocutory orders would be unwarranted and premature and would be a waste of court resources and costs. The respondent's solicitors sent a further letter dated 23rd May, 2019 just referring to the letter from the applicant's solicitor dated 16th May, 2019. However, it did not change the content of the earlier correspondence.

20. On 10th June, 2019, Messrs J.T. Flynn & Co. responded to the correspondence from the respondent's solicitor. That letter set out in some detail the correspondence and other communications which had passed between the applicant, his solicitor and the respondent. The letter concluded by repeating the request that the respondent furnish the applicant with a copy of the report on which it had based its assessment that the notes were intentionally damaged and/or chemically altered and the respondent was further called upon to provide details of the independent laboratory to which the notes had been sent for testing. The respondent's solicitor was warned that in the absence of any satisfactory response by close of business on 14th June, 2019, the applicant would exercise his right to seek an effective remedy by way of an application for judicial review to vindicate his rights.

21. By letter dated 14th June, 2019, the respondent's solicitor stated that there had been some delay in sending the bank notes to the independent laboratory, due to the fact that the respondent had had to consult with the European Central Bank in respect of an issue in relation to applications for the exchange of damaged bank notes. However, the letter confirmed that a sample of the bank notes had been sent to a laboratory accredited by the ECB for further testing. It was expected that results would be available at the end of that month. The letter further stated that it would probably be necessary for the respondent to consult further with the relevant directorate of the European Central Bank prior to concluding the matter. The writer reiterated the opinion that, in the circumstances, it would be premature and unwarranted for the applicant to issue proceedings at that time.

22. By letter dated 16th July, 2019, the applicant, through his solicitor, provided further significant information in relation to the cause of the damage to the bank notes. In that letter, the applicant's solicitor stated as follows:-

> *"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 engaged 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."

23. The letter went on to call upon the respondent to refund the applicant the money which it was alleged the respondent was unlawfully withholding and/or provide a sample of the notes to enable the applicant to have them analysed. The respondent's solicitor was informed that failing to accede to these requests by 5:00pm on 19th July, 2019, the applicant would proceed to issue proceedings without further communication with the respondent.

24. By letter dated 19th July, 2019, the respondent's solicitor wrote to the applicant's solicitor informing him that the respondent's assessment of the bank notes had not yet been concluded. They noted that in the letter of 16th July, 2019, the applicant had provided for the first time an explanation for the suspected chemical damage to the bank notes, referring, in particular, to possible contact with acetone. The letter expressed surprise that despite the initial statement by the respondent of its findings that the damage had been caused by chemical immersion, the applicant had delayed until July, 2019 in providing the further explanation. The letter went on to state that the respondent would have to consider this new information as part of its assessment of the bank notes. The letter further stated that in the circumstances, the commencement of any proceedings by the applicant would be premature and unwarranted.

25. On 29th July, 2019, the applicant moved his *ex parte* application before Barrett J. seeking leave to proceed by way of judicial review and, in particular, the applicant sought the following reliefs: an order of *certiorari* in respect of the decision of the respondent communicated in its letter dated 5th April, 2019; an order of mandamus to compel the respondent to provide the applicant with a copy of the report on which that decision had been based; an order of mandamus compelling the respondent to provide the applicant with details of the independent laboratory to which the bank notes had been sent; an order of mandamus to compel the respondent to provide the applicant with a sample of the bank notes so as to enable him to conduct his own independent tests; a declaration that where the respondent proposed to withhold and decline an exchange of the notes for value pursuant to the Decision of the European Central Bank of 19th April, 2013, it must also have regard to the claimant's rights to due process, as well as his property rights under the Constitution and under European law; damages for breach of the applicant's rights under the Constitution and under European law, together with a claim for further and other relief and costs. The applicant was granted leave by the High Court. The proceedings were served on the respondent on 6th August, 2019.

26. After service of the proceedings on the respondent, there was some correspondence passing between the parties in relation to whether the respondent should file its statement of opposition prior to completion of the assessment process. The respondent refused to file its statement of opposition at that time.

27. By letter dated 6th November, 2019, the respondent informed the applicant that it had received the results of the further analysis and had had an opportunity to consider the implications of those results for his application. The letter continued as follows:-

> *"The results of the further forensic testing do not fully support the explanations you provided for the damage to the bank notes and are inconclusive as regards the cause of the damage to the bank notes. 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 bank notes. Please provide us with confirmation of your bank account details to facilitate the transfer of the funds to your account."*

28. By letter dated 7th November, 2019, the respondent's solicitor invited the applicant's solicitor to convey to his client that if he agreed to discontinue the proceedings against the respondent and that the applicant would not commence further proceedings in respect of the matter, they had instructions that the respondent would agree to bear its own costs. The letter further stated that if the respondent was required to bring an application to have the proceedings struck out, the respondent would seek an order for costs against the applicant in respect of the costs incurred by it as a result of the premature and unnecessary issue of the proceedings, as well as the costs of any such application. The applicant through his solicitor refused to compromise the proceedings on that basis.

29. On 3rd December, 2019, the respondent issued the notice of motion in respect of the present application. By letter dated 13th December, 2019, a request was made of the applicant to furnish details of the bank account to which he wished the funds in exchange for the bank notes to be transferred. Those details having been furnished, the transfer of funds occurred electronically on 13th January, 2020.

30. By letter dated 10th August, 2020, the respondent's solicitor informed the applicant's solicitor that, following on the decision made by the respondent on 6th November, 2019 to exchange the bank notes for value and following the transfer of funds to the account nominated by the applicant in January, 2020, it had recently come to the attention of the respondent's legal team that the decision to make that payment had triggered the bank's standard operating procedures that follow a payment on exchange of damaged bank notes. That failed to take account of the proceedings and resulted in the destruction of the damaged bank notes. The letter further stated that four of the damaged bank notes, which had been sent to an external body for testing, had not been destroyed. Those constituted two €50 notes and two €200 notes. Those remaining four bank notes had ben furnished to An Garda Síochána as part of an investigation that they were carrying out.

Other Proceedings

31. It is necessary to note that there are two other sets of proceedings which are connected to a greater or lesser extent to the present judicial review proceedings. Firstly, the court was informed that arising out of the letter issued by the respondent on 6th November,

2019, the applicant had commenced defamation proceedings. The court has not been furnished with a copy of the pleadings in that case.

32. Secondly, in a related set of judicial review proceedings bearing the title "*Lawrence Shields v. The Central Bank of Ireland and An Garda Síochána (Notice Party) (Record No. 2020/377/JR)*", the applicant is seeking relief by way of judicial review in respect of the refusal of the respondent to exchange a further €4,400 damaged bank notes, which it was alleged had been submitted by the applicant. It was alleged that the bank notes in question had been provided by him as payment for professional fees to his solicitor.

33. It appears that by letter dated 15th May, 2020, the respondent informed the applicant's solicitor, who had sought the exchange of the damaged bank notes, that an interim decision had been reached by the respondent to defer consideration of the application pending conclusion of a separate investigation by An Garda Síochána. The salient part of that letter was in the following terms:-

> *"The Central Bank has been informed by An Garda Síochána that they have commenced an investigation into the source of funds the subject of the firm's application. Accordingly, pursuant to Article 3(3)(b) 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."*

34. In the application form exhibited to the affidavit sworn by Mr. James T. Flynn on 10th June, 2020 in those proceedings, in the box provided in the application form for details of how the notes were damaged, the following was written: "Fees paid by Lawrence Shields subject of proceedings Record No. 2019/565JR". A description of the cause of the damage to the notes may been contained in an earlier application submitted by Ms. Daly, a former employee of the firm.

35. As far as the court is aware, no ex parte application has yet been made by the applicant for leave to proceed by way of judicial review in those proceedings. However, somewhat curiously, a replying affidavit was sworn by Mr. Alan Briscoe on 16th September, 2020 in response to the statement of grounds and the affidavits sworn by the applicant and his solicitor in the matter. In his affidavit, Mr. Briscoe pointed out that on the applicant's evidence, he was no longer the owner of the bank notes, as he had transferred same to his solicitor in payment of fees owed by him to the solicitor. Furthermore, the application for exchange of the bank notes had been made initially by Ms. Sandra Daly, a former employee of the solicitor's firm, and was subsequently remade by Mr. Flynn. Accordingly, it was submitted that the applicant lacked locus standi to bring the judicial review proceedings as he no longer had any proprietary interest in the notes.

36. It was further submitted that it was inappropriate to seek certiorari of the impugned decision, as that was only an interim decision declining to make any decision in the matter until conclusion of the separate Garda investigation into the source of the funds.

37. It is not necessary to deal with these proceedings any further in this judgment, as it does not appear that leave has yet been granted to the applicant to seek the reliefs set out in the statement of grounds in those proceedings.

Decision of the European Central Bank of 19th April, 2013

38. The Decision of the European Central Bank of 19th April, 2013 on the denominations, specifications, reproduction, exchange and withdrawal of euro bank notes (recast) (ECB/2003/10) (2013/211/EU) is relevant to the duties and obligations of the respondent in this matter. The relevant provision of that decision is contained in Article 3 which governs exchange of damaged genuine euro bank notes. It provides as follows at Art. 3(3)(a):-

> *"(a) 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 the 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 note be considered to be intentionally damaged euro bank notes."*

The Present Application

39. Senior Counsel, on behalf of the respondent, submitted that there was clear authority in Irish law going back over many years to the effect that the court would not entertain proceedings that had become moot due to the happening of some event between the time that the proceedings had been commenced and the time that they fell to be determined, such that there was no longer any real issue in dispute between the parties. In this regard, counsel relied primarily on the decision in *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] 4 IR 274, together with the decisions in *Malone v. Minister for Social Protection* [2014] IECA 4; *P.V. (a Minor suing by his mother and Next Friend A.S.) v. The Courts Service & ors* [2009] IEHC 321; *Salaja v. Minister for Justice* [2011] IEHC 51; and *Goold v. Collins* [2004] IESC 38.

40. It was submitted that in this case, the present proceedings had clearly become moot, due to the fact that there was no "live issue" left for determination between the parties. The proceedings had been instituted because the applicant was dissatisfied on a number of grounds with the initial decision issued by the respondent on 5th April, 2019, which had declined his application for exchange of the bank notes for value. That decision had been entirely reversed by the subsequent decision of the respondent on 6th November, 2019, which had held that the applicant was entitled to an exchange of the bank notes for value. In these circumstances, it was submitted that the applicant had nothing left to complain about, as he had been given the entirety of what he had applied for in his application made on 19th February, 2019, which was received by the respondent on 21st March, 2019.

41. Mr. McCullough SC, on behalf of the respondent, accepted that there were exceptions to the general rule that the courts would not entertain a moot action. Those exceptions arose in the following circumstances: where the issue that had been raised in the proceedings which had become moot, was an issue that was relevant to the decision maker in the carrying out of its statutory functions in the future: see *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2007] 1 IR 328; where the proceedings raised a point of law of exceptional public importance and, thirdly, where the action was a test case, which would have ramifications for other similar cases that were pending before the courts. Counsel submitted that the present case was entirely unique to the applicant and did not come within any of the exceptions provided for in the case law.

42. It was submitted that insofar as the applicant complained in his statement of grounds about alleged breach of his rights to fair procedures, either in the lead up to the decision made by the respondent on 5th April, 2019, or in its handling of the further assessment which was conducted in the weeks and months thereafter, it was well settled that once the substratum of the case had been removed, due to the fact that the impugned decision had been reversed or revoked, any complaints in relation to unfairness or illegality of the process leading to that decision also fell away and became moot: see *dicta* of Irvine J. (as she then was) in *Malone* at para. 26 and *dicta* of McKechnie J. in *Lofinmakin* at paragraph 87.

43. In relation to the claim for damages, it was submitted that there was no basis on which damages could be claimed by the applicant. It had been made clear to him from 17th May, 2019, that the respondent was going to send a sample of the notes to an independent laboratory for further analysis. Therefore, he knew that the application was under review. He did not furnish the further important information in relation to the presence of acetone in the relevant area until 16th July, 2019. The respondent immediately responded through its solicitor, stating that this information would be taken into account. The respondent went on to consider all the information available and, in particular, the results of the further independent testing of the notes and then came to its revised decision on 6th November, 2019. That decision was in favour of the applicant. It was submitted that, in these circumstances, there was no possible claim for damages.

44. Furthermore, it was submitted that the applicant had neither pleaded, nor established that he had suffered any loss as a result of any alleged wrongdoing on the part of the respondent in relation to the consideration by it of his application, which had ultimately resulted in a determination in his favour. Insofar as there was any delay in reaching the ultimate determination, that was due to the delay on the part of the applicant in submitting the further information in relation to the cause of the damage to the notes.

45. Counsel further submitted that the claim for damages and the proceedings in toto, were bound to fail, due to the provisions of s. 33AJ(2) of the Central Bank Act, 1942 (as amended) which provided as follows:-

"A person to whom this section applies is not liable for damages for anything done or omitted in the performance or purported performance or exercise of any of its functions or powers, unless it is proved that the act or omission was in bad faith."

46. It was submitted on behalf of the respondent that that section provided a clear immunity to the respondent and, as a result, any claim to damages which the applicant may wish to mount, was bound to fail.

47. In the circumstances, it was submitted that this was a clear case in which the court should strike out the proceedings in their entirety as being moot.

The Applicant's Submissions in Response

48. Mr. Dornan BL on behalf of the applicant, stated at the outset that he did not dispute that the current state of the law on mootness was that set down in the decisions in *Goold v. Collins, Lofinmakin v. Minister for Justice, Equality and Law Reform, P.V. v. The Courts Service and Malone v. Minister for Social Protection*. However, he stated that in moving this application, the respondent had focused almost entirely on the first relief sought by the applicant in his statement of grounds, which was for an order of *certiorari* in respect of the decision of the respondent communicated on 5th April, 2019. This ignored the other reliefs that had been sought by the applicant.

49. It was submitted that in this regard, it was important to note that while Art. 3(3)(a) provided that where the National Central Bank of a European State knew or had sufficient reason to believe that the genuine euro notes had been intentionally damaged, they were to refuse to exchange the notes for value; there was an important rider to that provision which was contained in the same Article, which provided that they were to exchange the damaged genuine euro notes if they either knew, or had sufficient reason to believe, that the applicant was *bona fide*, or if the applicant could prove that he was *bona fide*. It was submitted that there was a mandatory obligation on the National Central Bank to exchange the damaged notes where they knew or had sufficient reason to believe that the applicant was *bona fide*. It was in that context that the remainder of the reliefs sought by the applicant, which were directed to curing the alleged want of fairness in the process which had been adopted by the respondent in this case, had to be viewed.

50. He submitted that the court had to bear in mind two important facts: firstly, that these were accepted as being genuine euro bank notes and, secondly, that they were the property of the applicant. Furthermore, the applicant in the application form had made a specific declaration that the damaged notes had not been deliberately mutilated, soiled or damaged and that the notes did not originate from any illegal activity. It was submitted that in these circumstances, where the respondent had formed the initial opinion as communicated on 5th April, 2019, that the applicant had intentionally damaged the bank notes, it was incumbent on them to provide the applicant, against whom that serious allegation had been made, with the evidence on which they had formed such opinion. It was both reasonable and in accordance with the dictates of fair procedures, that the applicant should be furnished with a copy of the forensic analysis which had been carried out by or on behalf of the respondent, and which had led them to reach the opinion that

the notes had been intentionally damaged. However, when the applicant asked for production of that report, it had been refused.

51. It was submitted that even after the respondent had indicated that it was going to carry out further analysis and reassess its initial decision, it continued to act in breach of the applicant's rights to due process and fair procedures, by refusing to identify the independent laboratory to which they had sent a sample of the notes and by refusing to provide the applicant with a sample of the notes so that he could carry out his own forensic analysis, so as to test whether the determination which had been reached by the respondent at that time, namely, that the notes had been intentionally damaged, was sustainable from a scientific point of view.

52. Counsel submitted that the respondent had acted in breach of the applicant's rights under the Irish Constitution and, in particular, his rights under Arts. 40.3 and 43 thereof. Furthermore, as the matter involved the application of European law in the form of the ECB Decision of 19th April, 2013, his rights under European law were engaged. In this regard, it was submitted that the applicant's rights under Arts. 17 and 47 of the European Charter of Fundamental Rights and/or pursuant to s. 3 of the European Convention on Human Rights Act, 2003, having regard to Art. 6 and Art. 1 of Protocol 1 of the European Convention on Human Rights, had all been breached by the refusal of the respondent to provide the documentation and/or information and/or to provide a sample in the circumstances outlined above. It was submitted that having regard to these allegations of breach of the due process rights of the applicant, which he enjoyed both under the Irish Constitution and under European law, it was not correct to say that there did not remain any live issues between the parties for the determination of the court simply due to the fact that the respondent had issued a second decision in favour of the applicant on 6th November, 2019.

53. It was further submitted that the respondent's submission on this application also ignored the fact that the applicant had a claim for damages in his statement of grounds. It was submitted that s. 3 of the European Convention on Human Rights Act, 2003, expressly provided for the recovery of damages where there was a breach of rights under the Convention. In its very simplest terms, what had happened here was that the respondent had made an initial decision that the notes had been intentionally damaged, but refused to provide any basis for that decision, or to provide the means by which the applicant could effectively challenge that assertion by denying him the opportunity to carry out his own forensic analysis on a sample of the notes. It was submitted that these were important matters upon which the determination of the court should be given.

54. It was submitted that when the respondent communicated its first decision on 5th April, 2019, it merely set out the conclusion that it had reached. It totally failed to give any reasons why it had reached that decision, which had the effect of depriving the applicant of his property rights, in that he was neither going to be refunded the damaged notes, nor given the value thereof in exchange. Counsel submitted that it was well settled in Irish law that where a decision affected the interests or rights of a party, that person was

entitled to be told the reasons why the deciding authority had reached their decision, at the very least, so that he or she could take legal advice and decide whether to pursue any appeal that may be available and/or to pursue a remedy by way of judicial review. The applicant had not been given that opportunity in the decision communicated by letter dated 5th April, 2019.

55. Insofar as the respondent had submitted that the applicant's claim to damages was bound to fail having regard to s. 33AJ(2) of the Central Bank Act, 1942 (as amended), counsel pointed out that in the absence of the filing of a statement of opposition, that defence had simply not been pleaded as yet on behalf of the respondent. If and when it came to be pleaded by them, the applicant would challenge the constitutionality of that section. Counsel pointed out that in *Irish Bank Resolution Corporation Limited & anor v. Purcell* [2014] IEHC 525, the section had been raised and it had been argued that the asserted claim of immunity provided for under the section was unconstitutional. However, the court did not resolve the damages issue in that case, so there was no determination on the point.

56. Counsel referred to the decision in McDonagh v. Governor of Mountjoy Prison [2015] IECA 71, where Hogan J., having reviewed the rationale behind the doctrine of mootness, stated as follows at para. 12:-

> *"The critical feature, however, of the mootness doctrine is, therefore, that it is simply a rule of practice which may be relaxed as the occasion appropriately presents itself."*

57. Counsel submitted that having regard to the issues of fairness and due process which had been raised by the applicant in this case, it was appropriate for the court to allow those issues to be determined and to give a ruling on them, as they constituted important issues of fairness and due process, not only for the applicant, but for other people who may make similar applications to the respondent in the future.

58. In support of that submission, counsel referred to the decision in *Howard v. Early* [2000] IESC 34, where the Supreme Court held that while it would not be appropriate to grant *certiorari* of a remand order which was spent, it was nevertheless appropriate in the circumstances to make a declaration that the particular order remanding the appellant in custody had been made without jurisdiction, because the order had been made without the appellant's consent and had been in excess of fifteen days in duration, contrary to s. 24 of the Criminal Procedure Act, 1967, as amended. Thus, the mere fact that the order in question was spent, did not prevent the court granting some of the declaratory relief that had been sought in the statement of grounds. Counsel submitted that this case was broadly similar to the circumstances that arose in the *Howard* case.

59. Finally, it was submitted that the issue of the costs of the proceedings remained live and, in order to determine that, it would be necessary for the court to carry out some evaluation of the arguability and validity of the applicant's case. The costs of the proceedings were a significant matter that the court would have to address.

The Law

60. The law on the doctrine of mootness has been settled in this jurisdiction for a considerable period. Hardiman J. delivering the judgment of the Supreme Court in *Goold v. Collins* in 2004, made reference to the decision of the Supreme Court of Canada in *Borowski v. Canada* [1989] 1 SCR 342. That decision has been referred to in a number of cases since that time, in particular, in the *P.V*. case and in the *Lofinmakin* case. In *Borowski*, the Supreme Court of Canada gave the following definition of when an appeal is moot:-

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

61. The Supreme Court of Canada gave the following rationale for the doctrine:-

> *"The first rationale for the policy with respect to mootness is that a court's competence to resolve legal disputes is rooted in the adversary 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."*

62. In the *P.V*. case, decided in 2009, Clarke J. (then sitting as a judge of the High Court) having reviewed the authorities on mootness, came to the following conclusion at para. 5.7:-

> *"5.7 It is clear from the above authorities that the starting point of any consideration of mootness has to be a determination as to whether the issue sought to be litigated is still alive in any meaningful sense such that it cannot, in the words of Murray C.J. in O'Brien, be "purely hypothetical or academic". In addition there may be circumstances where it may be appropriate to nonetheless determine issues even though such issues may, strictly speaking, be moot. For example, the types of issues with which the Supreme Court was concerned in O'Brien stemmed from a situation where the same issue was likely to arise for the respondent in very many cases, and where the respondent was faced with an adverse judgment of this court*

from which it sought to appeal. While the issue might have become irrelevant to the applicant in that case (given that his personal injury litigation had gone beyond the stage of the Personal Injuries Assessment Board), it was still very much alive from the perspective of the respondent. Likewise there may be cases, such as those identified in the American jurisprudence, where, in practical terms, it may be impossible to have a final determination on important legal issues unless the courts (and in particular Appellate Courts) are prepared to relax a strict application of a mootness rule.

5.8 However, it is clear that the cases where the court should depart from the general rule should be limited and the discretion to entertain moot proceedings should be sparingly exercised having regard, as the Supreme Court of Canada noted in Borowski, to the underlying rationale of the mootness rule in the first place."

63. In the *Lofinmakin* case, decided in 2013, McKechnie J., in the course of a minority concurring judgment, summarised the current position in respect of mootness at Irish law at para. 82 as follows:-

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

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

(ii) therefore, where a legal dispute has ceased to exist, or where the issue has materially lost its character as a lis, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined;

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

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

(v) that rule is not absolute, with the court retaining a discretion to hear and determine a point, even if otherwise moot. The process therefore has a two step analysis, with the second step involving the exercise of a discretion in

deciding whether or not to intervene, even where the primary finding should be one of mootness;

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

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

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

64. It has also been made clear in the case law, 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 grounds of lack of due process or want of fairness, once the decision itself is struck down, or revoked, or otherwise rendered inoperative, the challenge to the fairness of the process also falls with it. In the course of his judgment in the *Lofinmakin* case, McKechnie J. noted that both the order and the process by which such had been made in that case, were circumstances entirely of the past. He asked could it, therefore, be said that there remained in existence any legal dispute between the parties? He answered that in the following way at para. 87:-

> *"If it cannot, it seems to me that it is legally impossible to sustain a continuing challenge to an order, which is of no effect and 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."*

65. In *Malone v. Minister for Social Protection*, Irvine J. (as she then was), giving the judgment of the Court of Appeal, noted that the applicant had challenged the original decision to refuse her Domiciliary Care Allowance and had also challenged the process leading to the determination, that while her son had autism spectrum disorder, it was not of such magnitude as to warrant any additional support over and above that which would be needed by a healthy child. Thus, she attacked the decision in its substance and also on the grounds of procedural unfairness and incorrect statutory interpretation. Irvine J. noted that when the applicant's judicial review proceedings had been unsuccessful in the High Court, she pursued a statutory appeal and was successful in that. Accordingly, by the time the matter came before the Court of Appeal, it was entirely moot. That included both the challenge to the original decision and the challenge to the fairness of the process leading to that decision. The judge stated as follows 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."*

66. While the case law establishes that the doctrine of mootness is well established in Irish law, it also recognises that there can be exceptions to the application of the rule. These were summarised by Denham C.J. giving the majority judgment in the *Lofinmakin* case at paras. 17-20. In summary, the 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, where the appeal court proceeded to deal with the appeal notwithstanding that the applicant in the interim had obtained an authorisation from PIAB to continue with his action and, therefore, did not need to further litigate the issue whether PIAB was obliged to deal with his solicitor in connection with his application to PIAB. However, given that there was in existence at that stage a High Court judgment to the effect that the statutory body had to deal with the applicant's solicitor and as that would have ramifications for the statutory body in the exercise of its core statutory functions in all future cases, the court permitted the appeal to continue.

67. Secondly, where the case involves a point of law of exceptional public importance, the trial court, or the appeal court, may decide that it is appropriate to continue with the

proceedings, notwithstanding that they have become moot in the interim. 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.

68. However, it has also been made clear in the cases decided to date, that the court should be very slow to allow a case to proceed notwithstanding that it has become moot. In his judgment in the *Lofinmakin* case, McKechnie J. stated that the court would not lightly embark upon such a course and normally would be most reluctant to do so. He stated that "*strong, compelling and persuasive reasons*" would need to exist before the court would make an exception to the mootness rule: see para. 91 of the judgment.

69. Finally, it has been made clear in a number of decisions that the fact that the issue of the costs of the proceedings which have become moot, remains a live issue between the parties, will not of itself mean that the proceedings are not moot. Denham C.J. stated as follows at para. 25 in her judgment in the *Lofinmakin* case:-

> *"It is not the jurisprudence of this Court that a moot appeal should be heard to determine an issue of costs. If such were the case, it would render at nought the discretion of the Court on a moot appeal. In moot cases on appeal there may be an issue of costs in both this Court and the High Court. However, that is not a factor in determining whether such exceptional circumstances exist, that a moot appeal should be heard by the Court."*

70. Similar views were expressed by McKechnie J. in his judgment in the same case at paragraphs 103-105.

Conclusion

71. While a detailed chronology of the relevant events has been set out earlier in this judgment, it seems to the court that the following are the critical events in the consideration of this application. On 19th February, 2019, the applicant submitted an application for exchange of 63 damaged bank notes to the value of €4,950. That application was received by the respondent on 21st March, 2019. By a decision communicated to the applicant on 5th April, 2019, the respondent refused to exchange the bank notes for value.

72. Upon receipt of that correspondence, the applicant through his solicitor complained in relation to the correctness of the decision reached by the respondent on his application. By letter dated 14th May, 2019, the respondent indicated that their initial analysis revealed that there was no evidence of fire damage to the notes which had been submitted for exchange, but there was evidence of partial immersion in a chemical substance, which had caused the damage to the notes. The applicant was given an opportunity to make further submissions in the light of these findings. Three days later, the respondent by letter dated 17th May, 2019, informed the applicant that they were going to send the damaged bank notes to an independent laboratory for further analysis. By so doing, it was clear that they were reconsidering his application.

73. On 16th July, 2019, the applicant through his solicitor furnished further significant information in relation to the cause of the damage to the bank notes. In that letter, the respondent was informed of two critical facts: firstly, the envelope containing the banknotes had been placed in a furnace in the applicant's workshop; and, secondly, the notes would have been in proximity to acetone, which was used in the course of the applicant's business manufacturing fibreglass objects of art. The respondent was informed that there were some plastic containers placed in the furnace as part of the cleansing process and it was suggested that they may have in some way damaged the notes.

74. The respondent responded to that correspondence by indicating that they would bring this information to the attention of the independent laboratory which was carrying out the further analysis of the damaged bank notes. Some ten days after that letter was issued by the respondent, the applicant applied *ex parte* for leave to seek judicial review in these proceedings. The notice of motion was served on the respondent on 6th August, 2019.

75. By letter dated 6th November, 2019, the applicant was informed by the respondent that they had reconsidered the matter in light of the further information furnished and in light of the further analysis carried out at the independent laboratory and were of the view that the evidence before it did not reach the threshold which would enable them to form the belief that the notes had been intentionally destroyed and, accordingly, the respondent was prepared to exchange the damaged bank notes for value. That was subsequently done by an electronic transfer of funds on 13th January, 2020.

76. The court is satisfied that insofar as the applicant has sought *certiorari* of the decision communicated to him on 5th April, 2019, by which the respondent refused to exchange the damaged bank notes for value, that issue is now moot, as the decision communicated to the applicant in that letter, was subsequently replaced by the decision of the respondent communicated to the applicant on 6th November, 2019, which found in favour of the applicant and acceded to his application to have the damaged bank notes exchanged for value.

77. The applicant does not challenge the second decision of the respondent communicated by letter dated 6th November, 2019, which was in his favour. He has obtained that which he initially sought in his application of February 2019, being the exchange of the bank notes for value. It is clear that the primary relief which he sought at the time that he moved his *ex parte* application, was an order of *certiorari* in respect of the first decision made by the respondent. That issue is no longer live between the parties due to the fact that that first decision was replaced by the second decision of the respondent communicated on 6th November, 2019, which was in favour of the applicant. Accordingly, the primary issue in the proceedings has to be seen as entirely moot at this stage.

78. The court is satisfied that that issue, being 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. The court is satisfied that in these circumstances, the proceedings come fairly and squarely within the doctrine of mootness as set out in the case law in the *Goold, Lofinmakin* and *P.V*. cases.

79. It has been submitted on behalf of the applicant that his proceedings are still live due to the fact that he seeks reliefs in relation to the process leading to the impugned decision and in the months thereafter when it was reconsidering its decision. In particular, he alleges that the process adopted by the respondent in considering his application was unfair and in breach of his rights to due process, by reason of the refusal of the respondent to either return all of the bank notes, or a sample thereof, so as to enable him to carry out his own forensic examination and also by their refusal to provide him with a copy of whatever scientific report or evidence, had led to their initial decision made on 5th April, 2019 and, further, by their refusal to identify the independent laboratory to which the notes had been sent for further analysis.

80. While the applicant may have some grounds for complaint in relation to the process that was adopted by the respondent, whereby they effectively refused to give him any relevant information, or to provide him with a sample of the notes so as to enable him to carry out his own independent forensic analysis, and thereby deprived him of the opportunity to effectively challenge their first decision communicated on 5th April, 2019; it is clear from the decisions given by both the Supreme Court and the Court of Appeal 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 the fairness of procedures leading to that decision, also fall away and become moot: see judgment of McKechnie J. in *Lofinmakin* at para. 87 and judgment of Irvine J. in *Malone* at para. 26.

81. The rationale for the rule which provides that once the challenge to the initial decision falls away due to that decision being revoked, or repealed, or set aside and therefore, the ancillary claim to relief due to an alleged breach of fair procedures, also falls away, is based on the fact that the right to fair procedures does not exist in a vacuum, it exists in relation to a particular event, such as a trial, an inquiry, or a decision.

82. In other words, where a person claims that their rights to fair procedures have been infringed, such rights do not exist on their own; they can only exist in relation to a particular event, procedure or decision, that is either in the process of being taken, or has been taken. So, for example, if an accused wishes to make the case that due to delay in bringing the prosecution against him to trial, he can no longer get a fair trial, he can make application in advance of the trial to obtain an order of prohibition preventing the trial proceeding, on the basis that due to the lapse of time and perhaps the unavailability of witnesses, or the destruction of relevant documents, he can no longer get a fair hearing. Similarly, where a particular body is proposing to make a decision that affects the rights or interests of a party and is adopting a procedure which that party feels is unfair, they can bring an application to the court preventing either the procedure being continued, or preventing the body reaching a decision, unless and until his alleged rights to fair procedures have been complied with.

83. Alternatively, if the inquiry, or decision, has been reached and the person affected feels that their rights to fair procedures have been breached, they can bring an application

seeking to have the decision, or the results of the inquiry, set aside on the basis that there was a breach of fair procedures. However, in all these cases, the rights enjoyed by the person to fair procedures, exist in the context of either an ongoing trial, inquiry, or decision-making process, or have arisen in the context of a trial, decision or inquiry, that has already taken place. In other words, you cannot claim breach of fair procedures as a standalone cause of action.

84. Insofar as the applicant is of the view that his private law rights have been infringed by anything done or omitted to be done by the respondent, he is entitled to bring separate proceedings in respect of those matters. Indeed, the applicant has exercised that right, in that he has commenced defamation proceedings in relation to the letter issued by the respondent on 6th November, 2019.

85. The court is satisfied that while the applicant may have had some grounds for arguing that there was a breach of his rights to fair procedures by reason of the matters outlined above, those heads of claim fall away once the impugned decision itself has been revoked, as has happened in this case. Thus, the claims to other reliefs in the applicant's statement of grounds concerning an alleged breach of his right to fair procedures, or breach of his property rights, by the process adopted by the respondent, does not prevent the action being declared moot.

86. The court is further satisfied that this case does not come within any of the exceptions to the doctrine of mootness as outlined by Denham C.J. in her judgment in the *Lofinmakin* case. The court is satisfied that this case does not involve a point of law of exceptional public importance, nor is it a test case, nor does it have the features that were present in the *O'Brien* case, where the statutory authority requested a decision of the appellate court, because there was in existence a decision against it in the High Court which would have had a very marked effect on the core statutory functions carried out by the statutory body, if it were allowed to stand as a result of the appeal being deemed moot. It was in those particular circumstances that the court acceded to the request to allow the proceedings to continue. No such considerations apply in this case.

87. While it is correct that in the *Howard* case, the court did proceed to make a declaration that the applicant's incarceration had been unlawful, notwithstanding that the remand order was spent, that was because the issue of sentence remained live and had to be determined, so a declaration as to the illegality of her incarceration would be relevant when the judge came to consider sentence. The court does not consider that the *Howard* decision assists the applicant in this case.

88. The applicant also maintained that because there was a claim to damages in the statement of grounds, that that would suffice to constitute a live issue and, therefore, permit the continuation of the proceedings. That claim to damages concerns a claim for damages in respect of an alleged breach of the applicant's rights to fair procedures, and an alleged breach of his property rights as enjoyed under both the Constitution of Ireland and under European law. However, as noted above, the claim in respect of breach of fair procedures falls away once the decision, which was the alleged outcome of the allegedly

unfair procedures, has been revoked. In this case, the impugned decision, being the decision communicated on 5th April, 2019, has been revoked and replaced by a subsequent decision, which was entirely in favour of the applicant. In such circumstances, his claim to damages, such as it is, in respect of breach of his rights to fair procedures, must also fall away.

89. Furthermore, as submitted by the respondent, there is no basis on which such damages could be awarded, there being no loss pleaded by the applicant. Insofar as it may be contended that there was a delay between the receipt of the original application by the respondent in March, 2019 and the issuance of its second decision in November, 2019, and that that could in some way give rise to a claim to damages, it has to be remembered 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.

90. However, one would have to note that that explanation possibly raised a number of questions which would have taken some time for the respondent and its scientific advisors to resolve. Firstly, the fact that the bank notes were in an envelope, would make it difficult to understand how the damage, which appears on the notes and which was allegedly caused by some contact with a chemical, may have arisen. Secondly, the fact that the envelope containing the bank notes was placed into a furnace, must mean that the furnace was not switched on, or in operation at the time, because if it was, the bank notes would probably have ben incinerated within seconds. It may have been that the envelope was put into the furnace with an intention to burn it, but the mistake was discovered before the furnace was actually turned on. Thirdly, the court has had regard to the photocopies of the damaged bank notes as set out at exhibit "LS1" in the applicant's affidavit sworn on 29th July, 2019. As can be seen therefrom, the damage was fairly minor to the individual notes, generally occurring along the edges and at some points on the body of the note. This may suggest that the notes were taken out of the envelope and placed on a worktop, where they came into contact with acetone. However, all of this is supposition on the part of the court, as there was no extensive evidence in any of the affidavits in relation to how the damage may have occurred.

91. Furthermore, it does not get over the central point that the applicant, notwithstanding having given further information in July, 2019, maintained the assertion that his notes had been damaged by fire and yet the initial analysis of the notes carried out by the respondent, did not indicate any fire damage at all. All of these issues would have had to have been considered in some depth by the independent laboratory to whom a sample of the notes were sent for further analysis. The respondent informed the applicant that it would provide him with the results of the independent forensic analysis when they came to hand. In these circumstances, it is difficult to see how any complaint in relation to delay could be made in the period between receipt of the further information in July, 2019 and the issuance of the second decision in early November, 2019.

92. Insofar as it was argued by the respondent that having regard to the provisions of s. 33AJ(2) of the Central Bank Act, 1942 (as amended), the applicant was not in a position to claim damages in respect of any of the matters alleged in his statement of grounds, the court does not accept that submission as being relevant to its consideration of this application. It may well be a good defence if the matter were to proceed to a full hearing. However, it is not something that can be taken into account at this stage of the proceedings for two reasons: firstly, that aspect has not been pleaded because no statement of opposition has yet been filed by the respondent and, secondly, I accept the applicant's submission that if such defence were pleaded, it would be open to him to make an argument, either that the section should not apply or, in the alternative, that the section is invalid as being unconstitutional. Accordingly, the court would not reject the damages claim on the basis that such a defence may be pleaded by the respondent in its statement of opposition.

93. However, for the reasons outlined above, the court is satisfied that the damages claim itself, which is really no more than an assertion of a right to damages, is not sufficient to render these proceedings "*live*" as between the parties. The claim to damages is alleged to have arisen as a result of the alleged breach of the applicant's rights to fair procedures leading to the making of the first decision and also in connection with the actions of the respondent in the months leading up to the second decision. As the second decision revoked the first decision and was totally in favour of the applicant and as it has not been challenged, it cannot be said that the alleged breach of the applicant's rights to fair procedures led to any adverse consequence for him. Therefore, just as the claim in relation the process must fall away, so too must the claim for damages.

94. While the issue of costs certainly remains as a live issue, the court is satisfied having regard to the *dicta* of Denham C.J. and McKechnie J. in the *Lofinmakin* case that the existence of such an issue cannot be used as a means of rendering the proceedings live when they would otherwise be deemed moot. There are separate principles that have evolved in the case law to deal with the issue of costs of proceedings which have become moot. The costs issue will be dealt with later in the judgment.

95. Finally, 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.

96. For the reasons set out above, the court is satisfied that the applicant's proceedings are moot by virtue of the decision of the respondent communicated on 6th November, 2019, which revoked the earlier decision communicated on 5th April, 2019 and which second decision was entirely in favour of the applicant. The court will accede to the respondent's application to strike out the applicant's proceedings herein.

Costs of these Proceedings

97. As the parties made both oral and written submissions in relation to the issue of costs, it is appropriate for the court to now make a determination on the costs of these proceedings having regard to the findings made by it on this application.

98. In *Cunningham v. President of the Circuit Court & anor* [2012] IESC 39, the applicant sought to prevent her prosecution on grounds of delay. Clarke J. (as he then was) gave the judgment of the Supreme Court in relation to the issue of costs in respect of an appeal which had become moot by virtue of the fact that between the date of the delivery of judgment in the High Court and the time when the appeal came on for hearing in the Supreme Court, a *nolle prosequi* had been entered by the DPP. As a result, the proceedings had become entirely moot. At para. 4.7, Clarke J. stated as follows in relation to the issue of costs in proceedings that had become moot:-

> *"In summary, and for the reasons set out in Telefonica, a court, without being overly prescriptive as to the application of the rule, should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot."*

99. Further on in the judgment Clarke J. dealt with the situation that can occur where a statutory authority having reached one decision in a matter, then subsequently changes its mind. Effectively, the key issue there, is whether the change of mind was caused by a unilateral act on the part of the decision maker, or was due to some change in circumstances outside his or her control, which led to the issuance of the second decision. Clarke J. stated as follows at paras. 4.9 and 4.10:-

> *"[4.9] In that context it is, of course, important to note that statutory officers and bodies have an obligation to exercise their powers in a proper manner. If circumstances change then it is, of course, not only reasonable but necessary for such officers and bodies to reflect the new circumstances by adopting a position (even if different) which takes into account the circumstances as they have come to be. The mere fact, therefore, that a statutory officer or body adopts a changed position which renders judicial review proceedings moot does not, of itself, necessarily mean that it is appropriate to characterise the proceedings as having become moot by reason of a unilateral act of one party.*
>
> *[4.10] If there were no change in underlying circumstances and if the statutory officer or body had simply changed his or its mind or adopted a new and different view, then such a characterisation might be appropriate. Where, however, there is an underlying change of circumstance, it is necessary to consider the extent to which it can properly be said that the proceedings have become moot by reason of the unilateral act of one party, on the one hand or, in reality have become moot by reason of a change in underlying circumstances outside the control of either party, on the other hand. The result of any such analysis should play an important role in*

the court's consideration of the justice of where the costs of proceedings rendered moot should lie."

100. In this case, both parties have submitted that they are entitled to an order for costs in their favour. The respondent argues that the proceedings were clearly premature at the time when they were commenced by the applicant, because the respondent had made it abundantly clear that it was reassessing the application and, in particular, it had an obligation to do so upon receipt of the further information furnished by the applicant in the letter dated 16th July, 2019. It was submitted that in these circumstances, it was both premature and an abuse of process for the applicant to have sought leave to proceed by way of judicial review proceedings ten days after receiving the letter from the respondent indicating that it was conducting these further enquiries and, in particular, when it had sent the notes to an independent laboratory for further analysis in light of the information furnished by the applicant.

101. It was submitted that in these circumstances, where it was clear that the respondent was reassessing the applicant's application; it was, therefore, clear that the initial decision was being reassessed and, in such circumstances, it was inappropriate and unnecessary for the applicant to seek to set that decision aside. It was submitted that in these circumstances the respondent was entitled to the costs of the proceedings.

102. It was further submitted that they were entitled to the costs of the present application, by virtue of the fact that after the issuance of the second decision of 6th November, 2019, they had written to the applicant's solicitor indicating that the proceedings had become moot and that they would be agreeable to the proceedings being struck out with each party bearing their own costs. However, that had not been accepted by the applicant, hence the need for the present application. It was submitted that if the court held with the respondent, it was entitled to the costs of this application.

103. On behalf of the applicant, it was submitted that given the fact that the respondent had deliberately and consciously withheld information reasonably requested by the applicant and had refused to furnish him with a sample of his own bank notes, so as to enable him carry out an independent forensic analysis thereon and given that such requests had been made over a number of months since the issuance of the first decision, it was reasonable for the applicant to have commenced his proceedings by way of the *ex parte* application made on 29th July, 2019.

104. It was submitted that if the court found in favour of the applicant and allowed the proceedings to continue, then obviously the costs of the proceedings to date would not arise and the applicant would be entitled to the costs of the present application. If the court were to hold against the applicant, it was submitted that such had only come about due to the unilateral act of the respondent in issuing the second decision in November, 2019. In these circumstances, it came within the second portion of the general rule set out by Clarke J. in the *Cunningham* case. On this basis, it was submitted that even if the court were to hold that the proceedings were moot, the applicant should still be awarded his costs.

105. In deciding the issue of costs, the court has to have regard to all the circumstances in the proceedings to date. The court is of the view that there is certainly merit in the argument put forward by the applicant that he was treated unfairly by the respondent by their refusal to give him either a copy of their initial forensic analysis on which they had based their refusal to exchange the bank notes and by their refusal to either return the damaged bank notes to him, or to give him a sample of the damaged notes, so that he could carry out his own forensic analysis.

106. However, the applicant knew that he had given very significant additional information in relation to the possible cause of damage to the notes in the letter from his solicitor of 16th July, 2019. He knew that the respondent was having the notes further analysed by an independent laboratory and that they had said that such analysis would be done in light of the further information that had been submitted on behalf of the applicant. The court is of the view that to have moved the ex parte application ten days after the date of that letter from the respondent's solicitor, was unreasonable in the circumstances.

107. The court is of the view that the second decision reached by the respondent, which was communicated by letter on 6th November, 2019, which effectively made these proceedings moot, came about as a result of the further analysis of the bank notes, which was conducted in light of the additional information supplied by the applicant in July, 2019, which information could easily have been provided back in February, in his original application. In such circumstances, it is difficult to see how the respondent could be blamed for changing its opinion and reaching the second decision which it did in light of the further information submitted and in light of the independent forensic analysis carried out of the damaged bank notes. Accordingly, one could not characterise this change in decision by the respondent as merely being a unilateral act on its part, without any external influence.

108. The court is satisfied that in these circumstances, the normal rule should apply where proceedings have become moot, that each party should bear their own costs of the proceedings, save for the costs of this application. The respondent, through its solicitor, made a reasonable offer to the applicant after it had reached the second decision in November, 2019, which was to the effect that they would consent to the proceedings being struck out and they would bear their own costs. That offer was refused by the applicant. The respondent had to bring this motion. They have succeeded in their application. The respondent is entitled to the costs of this application.

Order of the Court

109. The order of the court will be that the proceedings herein are to be struck out, same having become moot. Each party is to bear their own costs of the proceedings, save for the costs of this application, which are awarded in favour of the respondent against the applicant.

110. If the parties wish to make any further submissions on the terms of the final order, or in relation to a stay on the operation of the order, they may do so in writing within a period of two weeks from the date of this judgment.