When is a Plan Not a Plan? The Supreme Court Decision in "Climate Case Ireland"

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1 The Decision

The recent Supreme Court decision in *Friends of the Irish Environment v Ireland*[1] was clearly going to be significant, and when delivered with commendable rapidity despite the constraints of the COVID-19 pandemic (with hearings conducted in the King's Inns rather than the Four Courts), it did not disappoint. Known as 'Climate Case Ireland', it was an appeal from a decision of MacGrath J in the High Court[2] and had come to the Supreme Court through the 'leapfrog' procedure (bypassing the Court of Appeal).[3] A seven-judge panel decided the case, further denoting what the Court's leave to appeal determination acknowledged to be the 'general public and legal importance'[4] of the issues raised.

Delivering judgment one month after oral argument, the Court found that the Government's July 2017 'National Mitigation Plan', developed pursuant to section 4 of the Climate Action and Low-Carbon Development Act 2015, was in fact *ultra vires* that legislation because it lacked 'specificity'. The judgment also re-considered the question of standing to bring court challenges in environmental matters, established a new approach to rights not explicitly mentioned in the Constitution (for which the Court preferred the label 'derived rights'), and stated that there is no constitutional right to a 'healthy environment' or an 'environment consistent with human dignity' (overruling an earlier dictum to that effect by Barrett J[5]).

2 Background

In 2015, the Oireachtas passed the Climate Action and Low Carbon Development Act ('the 2015 Act'), the aim of which is to enable 'the State to pursue, and achieve, the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050 (in this Act referred to as the "national transition objective" [NTO])'.[6] The 2015 Act requires the Minister for the Environment to 'make and submit to the Government for approval' two plans: a national mitigation plan (NMP), and a national adaptation framework (NAF).

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[1] [2020] IESC 49.
[2] [2019] IEHC 747.
[3] Supreme Court Determination in *Friends of the Environment CLG v Ireland* [2020] IESCDET 13 (Clarke CJ, Irvine J, Baker J) (13 February 2020).
[4] [2020] IESCDET 13 [1].
[5] *Friends of the Irish Environment v Fingal Co Co* [2017] IEHC 695 [264].
[6] Climate Action and Low Carbon Development Act 2015, s 3(1).

Following government approval these plans are to be published,[7] and renewed at least every 5 years.[8]

The NMP is concerned with the reduction of Ireland's greenhouse gas (GHG) emissions. Section 4(2) of the Act sets out what the NMP must contain as follows:

> A national mitigation plan shall—
>
> (a) specify the manner in which it is proposed to achieve the national transition objective,
>
> (b) specify the policy measures that, in the opinion of the Government, would be required in order to manage greenhouse gas emissions and the removal of greenhouse gas at a level that is appropriate for furthering the achievement of the national transition objective,
>
> (c) take into account any existing obligation of the State under the law of the European Union or any international agreement referred to in section 2, and
>
> (d) specify the mitigation policy measures (in this Act referred to as the 'sectoral mitigation measures') to be adopted by the Ministers of the Government, referred to in subsection (3)(a), in relation to the matters for which each such Minister of the Government has responsibility for the purposes of—
>
> (i) reducing greenhouse gas emissions, and
>
> (ii) enabling the achievement of the national transition objective.

The 2015 Act mandates that a draft of the NMP is consulted upon publicly for a period of up to two months. The Act also establishes an independent Climate Change Advisory Council (CCAC).[9] The CCAC is required to publish an annual report which summarises the Environmental Protection Agency's (EPA) most recent inventory and projections of national GHG emissions and makes recommendations to government regarding achievement of the Act's national transition objective (NTO) and compliance with any EU law or other international treaty obligations.[10] The CCAC has further obligations and powers under the Act to conduct periodic reviews.[11]

The Act's definition of the NTO does not state any particular percentage of GHG emissions reduction that must be achieved, either by the end of 2050 or at defined points along the way, in order to arrive at 'a low carbon, climate resilient and environmentally sustainable economy' by the end of 2050. However, the Act does provide that when considering an NMP for approval, the Government must 'have regard to', among other things, 'the ultimate objective specified in Article 2 of the United Nations Framework Convention on Climate Change [UNFCCC] … and any mitigation commitment entered into by the European Union in response or otherwise in relation to that objective' and 'any existing obligation of the State under the law of the European Union or any international agreement'.[12] The CCAC has described the NTO established by the Act as follows: 'the country should "transition to a low carbon, climate resilient and environmentally sustainable economy by 2050" taking into account the objectives of the UNFCCC and existing obligations under EU law'.[13]

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[7] NMP, s 4(10); NAF, s 5(6)

8 NMP, ss 3(1), 4(1); NAF, ss 3(1), 5(1).

[9] S 9.

[10] S 12.

[11] S 13.

[12] S 3(2).

[13] Climate Change Advisory Council, *Periodic Review Report 2017*, 13.

The Irish Government published its first NMP under the Act on 19 July 2017.[14] The 191-page document was immediately criticised by environmentalists,[15] and (importantly for the judgment under discussion) the CCAC. The CCAC concluded on the basis of the NMP[16] that Ireland was 'unlikely…by a substantial margin' to meet its EU target of a 20% reduction in non-ETS emissions[17] by 2020 compared to 2005 levels.[18] The CCAC's report called for 'additional and enhanced policies and measures' to be identified in the NMP to help 'address the gap in emissions reductions required to meet the 2020 targets and ensure that the anticipated 2030 EU targets will be achieved'.[19] The CCAC's report referred to the EPA's April 2017 emissions projections, indicating that 'carbon dioxide emissions will increase between now and 2035', and noted that '[i]f this trajectory is followed then achievement of the low-carbon transition would become increasingly difficult and the costs would likely increase over time'.[20]

Friends of the Irish Environment ('FIE'), an environmental non-governmental organisation (NGO), sought judicial review of the July 2017 NMP. It argued that (i) the NMP violated rights protected by the Constitution and the European Convention on Human Rights (ECHR), and (ii) the NMP was *ultra vires* for failing to comply fully with section 4 of the 2015 Act. FIE is open in stating that its decision to litigate was inspired by the *Urgenda* case, which culminated in a decision of the Dutch Supreme Court in January 2020 requiring the Netherlands to ensure a 25% reduction in greenhouse gas emissions in 2020 compared to 1990 levels.[21]

3 The Supreme Court judgment

3.1 3.1 Preliminary

The Supreme Court delivered only one judgment, although a seven judge panel heard oral argument. The decision of Clarke CJ is treated here as a decision of the Court, similar to the single judgment delivered in Article 26 references,[22] because it was clearly written on behalf of a unanimous Court.

The State did not oppose FIE's application for leave to appeal directly to the Supreme Court, or for a priority hearing.[23] There was no dispute between the parties regarding the

[14] [2019] IEHC 747 [1].
[15] For example, Kevin O'Sullivan, 'Ireland can't meet simple climate change targets. How will it meet ambitious ones?' *The Irish Times* (Dublin, 19 July 2017), and Tim O'Brien, 'National Mitigation Plan: Climate action or regulatory effort?' *The Irish Times* (Dublin, 19 July 2017).
[16] Climate Change Advisory Council, *Periodic Review Report 2017*, i. The report notes 'This report was finalised before the National Mitigation Plan was published. As a result, the comments here are based on the draft National Mitigation Plan, published in March 2017. However, most of the comments will also apply to the final version of the National Mitigation Plan as published.'
[17] The EU Effort Sharing Decision (Decision 406/2009/EC) required Ireland to reduce non-ETS (e.g. transport, buildings, agriculture, waste, and non-ETS industry) emissions by 20% compared to 2005 levels.
[18] Climate Change Advisory Council, *Periodic Review Report 2017*, i and 7. See also John Fitzgerald, 'Pay now, be rewarded later – the political hot potato of climate change' *The Irish Times* (Dublin, 28 July 2017).
[19] Climate Change Advisory Council, *Periodic Review Report 2017*, 10.
[20] ibid, 14.
[21] See Climate Case Ireland, 'Climate Case' (2020), <www.climatecaseireland.ie/climate-case/> accessed 30 September 2020, discussing *Netherlands v Urgenda* NL:HR:2019:2007.
[22] See Nóra Ní Loinsigh, 'Judicial Dissent in Ireland: Theory, Practice and the Constraints of the Single Opinion Rule' (2014) 51 Irish Jurist 123; Niamh Howlin, 'Shortcomings and Anomalies: Aspects of Article 26' (2005) 13 ISLR 26, 37 - 42.
[23] *Friends of the Irish Environment CLG v The Government of Ireland, Ireland & The Attorney General*, Record No 2019/205, 9 December 2019, Respondent's Notice, <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191209_2017-No.-793-JR_reply-1.pdf> accessed 5 October 2020.

scientific evidence, leading the Supreme Court to decide that a Court of Appeal hearing would not further narrow or clarify the issues of importance. This is more significant than it might initially seem; it means that the Government has accepted the scientific consensus on climate change, of which the Court provided a brief overview.[24] This will enhance litigants' ability to hold the State to account regarding its climate change-related legal obligations in the future.

The Supreme Court decided to address FIE's legality/statutory argument first, notwithstanding the Court's recognition that '[a]s the case evolved, the rights based elements of the argument took greater prominence'.[25] The Court's view was that, if it found the NMP to be *ultra vires*, this would affect whether and to what extent the Court would be required to address the rights issues. The Government did not dispute that FIE had standing to pursue the *ultra vires* challenge; it did, however, contest FIE's standing to raise constitutional and ECHR-based arguments.

3.2 The statutory argument

3.2.1 Grounds of appeal

The Court identified five questions arising from the *ultra vires* argument, the first of which was procedural: did the grounds of appeal stated in FIE's written application for leave to appeal[26] include an argument that the Plan was *ultra vires*—specifically, in contravention of section 4 of the Act? The Government argued (and the Court agreed) 'that it would require a somewhat strained interpretation of the grounds of appeal to suggest that the wider range of challenge set out in the written submissions and addressed in the Statement of Case come within those grounds.'[27] Nonetheless, the Court held that because

> … those grounds were canvassed before the High Court, were set out in the written submissions of FIE and fully replied to on behalf of the Government and form part of the Statement of Case which sought to frame the parameters of the issues which would need to be debated at the oral hearing … the Court should consider the issues.[28]

As it was on the *ultra vires* ground that FIE finally succeeded, this was an important question, and it is notable that the Court gave particular weight to the responses of the parties to the 'Statement of Case' which had been prepared by the Court and circulated for approval in advance of the hearing. As the Court explained:

> The Statement of Case involves the Court setting out its understanding, drawn from the papers filed and from the written submissions of the parties, as to the facts, the issues before the Court, the relevant aspects of the judgment/judgments of the court/courts which have dealt with the case previously and the position of the parties on the issues.[29]

This innovation had been brought forward to streamline remote hearings.[30] Although this case was not heard remotely, the procedure was applied and the government did not raise any issues

[24] [2020] IESC 49 [3.1 – 3.8].
[25] [2020] IESC 49 [5.60].
[26] Application for Leave to Appeal, 15 November 2019, <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191115_2017-No.-793-JR_appeal-1.pdf> accessed 5 October 2020.
[27] [2020] IESC 49 [6.16].
[28] ibid.
[29] [2020] IESC 49 [6.13].
[30] [2020] IESC 49 [6.12].

with the Court's understanding that the matter included a dispute as to whether the Plan was *ultra vires* the Act. This highlights that the Court regards the Statement of Case as not simply an administrative convenience but as a way of flushing out issues and clarifying what is to be dealt with in oral argument. Issues which are sought to be excluded must be flagged at this stage; raising them at the hearing itself may be too late.

3.2.2 Interpretation of 2015 Act

The second question was the interpretation of the Act: specifically, what did section 4 of the 2015 Act require the July 2017 NMP to contain?

First, the Court noted that, 'the overriding requirement of a national mitigation plan is that it must, in accordance with s.4(2)(a), "specify the manner in which it is proposed to achieve the national transition objective"'.[31] This led the Court to find that the NMP, despite needing to be renewed at least every five years, was not simply a five-year plan but was in fact a 33-year plan which was subject to revision and could become more detailed over time as the state of knowledge improved. According to the Court, 'the legislation contemplates a series of rolling plans each of which must be designed to specify, both in general terms and on a sectoral basis, how it is proposed that the NTO is to be achieved.'[32]

The Court then identified 'two important obligations which inform the statutory purpose' of every NMP under the Act: first, the section 4(8) requirement of what the Court described as 'a significant national consultation whenever a plan is being formulated'; and second, 'the very fact that there must be a plan and that it must be published'—which, the Court found, 'involves an exercise in transparency'.

In an important passage, the Court said:

> The public are entitled to know how it is that the government of the day intends to meet the NTO. … [and] … to judge whether they think a plan is realistic or whether they think the policy measures adopted in a plan represent a fair balance as to where the benefits and burdens associated with meeting the NTO are likely to fall. If the public are unhappy with a plan then, assuming that it is considered a sufficiently important issue, the public are entitled to vote accordingly and elect a government which might produce a plan involving policies more in accord with what the public wish. But the key point is that the public are entitled, under the legislation, to know what the plan is with some reasonable degree of specificity.
>
> Thus, it seems to me that key objectives of the statutory regime are designed to provide both for public participation and for transparency around the statutory objective which is the achievement of the NTO by 2050.[33]

3.2.3 Justiciability of the Plan

The third question was the justiciability of the NMP. The Court summarised the Government's 'central argument' on this issue as being that 'the Plan simply involves the adoption of policy and … courts have frequently indicated that matters of policy are not justiciable.'[34] The Court

[31] [2020] IESC 49 [6.18].
[32] [2020] IESC 49 [6.20].
[33] [2020] IESC 49 [6.21].
[34] [2020] IESC 49 [6.23].

disposed of this argument relatively quickly on the basis that legislation existed in this case, mandating and prescribing many aspects of the NMP.[35]

The Court then proceeded to address the Government's more nuanced argument: that whereas the *process* by which the NMP was created might be amenable to judicial review, the *substantive content* of the Plan was nonetheless pure policy and therefore outside of the Court's jurisdiction. The Court accepted that 'there may be elements of a compliant plan under the 2015 Act which may not truly be justiciable.'[36] However, it continued:

> … it does seem to me to be absolutely clear that, where the legislation requires that a plan formulated under its provisions does certain things, then the law requires that a plan complies with those obligations and the question of whether a plan actually does comply with the statute in such regard is a matter of law rather than a matter of policy. It becomes a matter of law because the Oireachtas has chosen to legislate for at least some aspects of a compliant plan while leaving other elements up to policy decisions by the government of the day.
> … a question of whether the Plan meets the specificity requirements in s.4 is clearly justiciable.[37]

3.2.4 Collateral Attack on 2015 Act

The fourth question was whether FIE's challenge to the NMP amounted to an impermissible 'collateral attack' on the 2015 Act. In other words, was FIE's claim that the Government acted unlawfully in the way that it discharged its obligations under the 2015 Act inevitably a challenge to the constitutionality of the 2015 Act?

The Court regarded this issue to be 'a corollary of the jurisprudence which has followed from *East Donegal Co-Operative Livestock Mart Ltd. v Attorney General*',[38] according to which 'a court must assume that any power or discretion available under a statute will be exercised in a constitutional manner'.[39] Whether or not a claim of illegality in the exercise of a statutory power amounts to an attack on the constitutionality of the legislation concerned depends on the degree of latitude that the legislation provides to the decision-maker:

> If the statute requires something to be done, or done in a particular way, then an attack on a measure adopted under the statute may well amount to a collateral attack on the statute itself unless it could be demonstrated that there were other ways in which measures could have been adopted which would have been consistent with the Constitution.[40]

In this case, the Court held that 'the claim that the Plan lacks the specificity required by s.4 does not, in any way, amount to a suggestion that the 2015 Act is inconsistent with the Constitution.'[41]

Interestingly, the idea that FIE's case amounted to a 'collateral attack' on the 2015 Act arose in the High Court judgment in a different guise. A key element of MacGrath J's judgment was the finding that administrative action determined to be *intra vires* a statute could not, logically, breach a constitutional right unless the legislation allowing the action was itself

[35] [2020] IESC 49 [6.24].
[36] [2020] IESC 49 [6.27].
[37] [2020] IESC 49 [6.27 – 6.28].
[38] [1970] IR 317.
[39] [2020] IESC 49 [6.28].
[40] [2020] IESC 49 [6.29].
[41] [2020] IESC 49 [6.31].

unconstitutional (which FIE did not claim).[42] In the course of its discussion of the 'collateral attack' issue, the Supreme Court expressed a different view to MacGrath J on this important point, stating:

> If it is possible to have a plan which, while in technical compliance with the statute, breached rights in some way so that it too was invalid, a challenge mounted on such grounds would clearly not, in my view, amount to a collateral attack. It would simply amount to an assertion that the plan chosen was invalid but that other plans could have been chosen which were valid. Such a challenge would not suggest that there was anything inappropriate about the Act itself.[43]

3.2.5 Plan Not Specific Enough

Having decided the above questions, the Court considered 'whether, on the merits, the Plan does meet [the] requirements of specificity' in section 4 of the 2015 Act.

The Court dismissed the Government's argument that the recent 2019 Climate Action Plan was 'an example of how policy is evolving' and 'build[ing] on the policy, framework, measures and actions' of the 2017 NMP.[44] While acknowledging that 'there may be some merit in the suggestion that the document in question does provide greater detail in some areas', the Court held that the 2019 Climate Action Plan was not a 'plan' in the sense of section 4 of the 2015 Act—partly because it had not been through the public consultation process required under that provision.[45]

The Court held that the 'real question' was 'whether the [2017] Plan itself gives any real or sufficient detail as to how it is intended to achieve the NTO.'[46] In answering this, the Court took into account the purpose of the 2015 Act 'as a whole', which it had already determined to include public participation and transparency in pursuit of the NTO. In a key passage concerning the interpretation of section 4 of the Act, the Court said that

> [t]he purpose of requiring the Plan to be specific is to allow any interested member of the public to know enough about how the Government currently intends to meet the NTO by 2050 so as to inform the views of the reasonable and interested member of the public as to whether that policy is considered to be effective and appropriate. … the level of specificity required of a compliant plan is that it is *sufficient to allow a reasonable and interested member of the public to know how the government of the day intends to meet the NTO* so as, in turn, to allow such members of the public as may be interested to act in whatever way, political or otherwise, that they consider appropriate in the light of that policy.[47]

The Court highlighted the following passage in the NMP's Introduction, which referenced the Government's statutory obligation to 'specify' measures designed to achieve the NTO:

> Given that this long-term objective must be achieved by 2050, it is not prudent or even possible to specify, in detail, policy measures to cover this entire period as we cannot

[42] [2019] IEHC 747 [120].
[43] [2020] IESC 49 [6.30].
[44] [2020] IESC 49 [6.34].
[45] [2020] IESC 49 [6.35].
[46] [2020] IESC 49 [6.36].
[47] [2020] IESC 49 [6.38]. Emphasis added.

> be certain what scientific or technical developments and advancements might arise over the next 30 years or so.[48]

The Court then drew attention to CCAC reports from 2017 and 2018 which criticised, respectively, the fact that Ireland was 'not projected to meet 2020 emissions reduction targets' and the fact that '[i]nstead of achieving the required reduction of 1 million tonnes per year in carbon dioxide emissions, consistent with the National Policy Position, Ireland is currently increasing emissions at a rate of 2 million tonnes per year'.[49] The Court pointed to examples of the NMP's content concerning agriculture, and noted that 'several of the proposals made in the agriculture chapter of the Plan involve carrying out "further research"'.[50] The Court continued:

> This chapter of the Plan also contains somewhat vague proposals to "continue to improve knowledge transfer and exchange to farmers by developing a network across State agencies and relevant advisory bodies" and to "further develop the range and depth of sustainability information collected for beef, dairy and other agriculture sectors".[51]

Ultimately, the Court concluded that the content of the NMP did not meet the 'clear present statutory obligation on the Government, in formulating a plan, to at least give some realistic level of detail about how it is intended to meet the NTO'.[52] The Court explained: 'Some general indication of the sort of specific measures which will or may be required needs to be given. The legislation does, after all, require that a plan "specify" how the NTO is to be met.'[53] In particular, the Court held, the NMP needed to 'specify in some reasonable detail the kind of measures that will be required up to 2050' because '[a]s noted earlier, this is not a five-year plan but rather ought to have been a 33-year plan'.[54] The Court acknowledged that 'matters such as the extent to which new technologies for carbon extraction may be able to play a role is undoubtedly itself uncertain on the basis of current knowledge',[55] but held 'that is no reason not to indicate how and when particular types of technology are currently hoped to be brought on board.'[56] In sum, the Court stated:

> In my judgment the Plan falls a long way short of the sort of specificity which the statute requires. I do not consider that the reasonable and interested observer would know, in any sufficient detail, how it really is intended, under current government policy, to achieve the NTO by 2050 on the basis of the information contained in the Plan.[57]

On that basis, the Court held 'that the Plan does not comply with the requirements of the 2015 Act and, in particular, section 4 … [and] should be quashed on the grounds of having failed to

[48] [2020] IESC 49 [6.39].
[49] [2020] IESC 49 [6.42].
[50] [2020] IESC 49 [6.44].
[51] ibid.
[52] [2020] IESC 49 [6.45].
[53] ibid.
[54] [2020] IESC 49 [6.46].
[55] ibid.
[56] [2020] IESC 49 [6.47].
[57] [2020] IESC 49 [6.46].

comply with its statutory mandate in that regard.'[58] The Court noted that its quashing of the NMP was 'on grounds which are substantive rather than procedural'.[59]

3.3 Constitutional and European Human Rights

Having adjudicated FIE's legality argument, the Court went on to respond (*obiter*) to some aspects of FIE's rights-based claims. The Court acknowledged that such consideration was arguably 'purely theoretical' because the NMP, being quashed, would not fall to be reviewed again.[60] However, the Court opined, questions of FIE's standing to claim Constitutional and ECHR-based rights violations were 'of some continuing importance because that issue would arise in any challenge sought to be brought by FIE, or indeed by any other corporate NGO in the environmental field, in respect of any future plan.'[61] The Court identified two questions concerning standing:

> [first] … whether this case comes within one of those exceptions where a third party, including a corporate body such as FIE, may have standing to maintain a claim based on the rights of others[?][62]
> [second] … whether it is possible for a party, who would not have standing before the ECtHR, to bring proceedings relying on the 2003 Act and, if so, what circumstances permit such a claim to be brought[?][63]

Regarding the first question, the Court took as its starting point the foundational case of *Cahill v Sutton*,[64] which established that any party seeking to bring a constitutional challenge must show that there is a potential interference with their rights.[65] It set out in detail some comments of Henchy J in that decision, to the effect that this was not a hard rule and might be relaxed in appropriate cases but this should be done sparingly.[66] It also considered the approaches taken by the Court in *Coogan*[67] and *Irish Penal Reform Trust*,[68] where companies were permitted to bring a challenge on behalf of others (the unborn and prisoners, respectively).

However, the Court stated that '[o]ther than a suggestion that it was desire [sic] to protect individuals from a possible exposure to the costs of unsuccessful proceedings, no real explanation was given as to why an individual or individuals could not have brought these proceedings instead of FIE.'[69] It dismissed the standing which was given to a company in *Digital Rights Ireland*[70] as irrelevant, as that company had asserted its own rights rather than those of others.[71] It therefore refused to relax the general standing requirements in this case.[72] It also dismissed any ECHR-related claims, on the basis that:

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[58] [2020] IESC 49 [6.48].
[59] [2020] IESC 49 [6.49].
[60] [2020] IESC 49 [6.49].
[61] ibid.
[62] [2020] IESC 49 [7.5].
[63] [2020] IESC 49 [7.6].
[64] [1972] IR 269.
[65] [2020] IESC 49 [7.8].
[66] [2020] IESC 49 [7.9 – 7.12].
[67] [1989] IR 734 (SC).
[68] [2005] IEHC 305.
[69] [2020] IESC 49 [7.22].
[70] [2010] 3 IR 251 (HC).
[71] [2020] IESC 49 [7.20].
[72] [2020] IESC 49 [7.22].

> [while] there may be circumstances where a person or entity might not have standing to bring a complaint before the ECtHR [but] in accordance with Irish standing rules, the same party might be able to maintain a claim based on the 2003 Act… [it is] difficult to see how a party who would not have standing to maintain a particular form of claim based on an asserted breach of Irish constitutional rights could have standing to maintain a claim based on the 2003 Act, where the rights under the ECHR said to be infringed are the same or analogous rights to those which might have been asserted under the Constitution.[73]

Although this would seem to have put an end to any other rights-based questions, the Court also addressed the question of the 'right to a healthy environment', lest it be mis-understood as accepting by its silence the previous statements of Barrett J and MacGrath J in the High Court.[74] This 'right' had been discussed by Barrett J in *Fingal County Council* as follows:

> A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Art. 40.3.1° of the Constitution. It is not so utopian a right that it can never be enforced. Once concretised into specific duties and obligations, its enforcement is entirely practicable.[75]

Although the full description of the alleged right given by Barrett J is lengthy, counsel for FIE accepted that it could be characterised as 'a right to a healthy environment'.[76]

The Court went on to say that 'it would be more appropriate to characterise constitutional rights which cannot be found in express terms in the wording of the Constitution itself as being derived rights rather than unenumerated rights',[77] because 'the use of the term "unenumerated" conveys an impression that judges simply identify rights of which they approve and deem them to be part of the Constitution.'[78] The 'derived rights' label is meant to show

> … that there must be some root of title in the text or structure of the Constitution from which the right in question can be derived. … It must derive from judges considering the Constitution as a whole and identifying rights which can be derived from the Constitution as a whole.[79]

The Court stated that this should not be 'a narrow textualist approach', again citing with approval comments of Henchy J in *McGee*[80] and *Norris*[81] to the effect that '[t]he infinite variety in the relationships between the citizen and his fellows and between the citizen and the State makes an exhaustive enumeration of the guaranteed rights difficult, if not impossible.'[82] However, requiring a connection with an existing express Constitutional guarantee would

[73] [2020] IESC 49 [7.23].
[74] [2020] IESC 49 [7.25].
[75] [2017] IEHC 695 [264].
[76] [2020] IESC 49 [8.3].
[77] [2020] IESC 49 [8.4].
[78] [2020] IESC 49 [8.5].
[79] [2020] IESC 49 [8.6].
[80] [1974] IR 284 (SC).
[81] [1984] IR 36 (SC).
[82] [2020] IESC 49 [8.7].

guard against the 'risk' of 'a blurring of the separation of powers by permitting issues which are more properly political and policy matters (for the legislature and the executive) to impermissibly drift into the judicial sphere.'[83]

> Following from this analysis, the Court held that
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> > the right to an environment consistent with human dignity, or alternatively the right to a healthy environment … is impermissibly vague. It either does not bring matters beyond the right to life or the right to bodily integrity, in which case there is no need for it. If it does go beyond those rights, then there is not a sufficient general definition (even one which might, in principle, be filled in by later cases) about the sort of parameters within which it is to operate.[84]

The Court was strengthened in its conclusion by reference to a textbook by David Boyd,[85] from which the Court deduced that similar rights have been added to national constitutions by explicit amendment rather than a process of judicial discovery.[86] The only exception is India, but as its constitutional order is different to Ireland's and the parties had not put any relevant arguments before the Court, this was not considered further.[87] However, the Court clarified that its conclusion did not mean that constitutional rights could not be pleaded in environmental cases.[88] Drawing 'a connecting thread' between this discussion of constitutional rights and its earlier finding regarding the *ultra vires* argument, the Court noted:

> Constitutional rights and obligations and matters of policy do not fall into hermetically sealed boxes. There are undoubtedly matters which can clearly be assigned to one or other. However, there are also matters which may involve policy, but where that policy has been incorporated into law or may arguably impinge rights guaranteed under the Constitution, where the courts do have a role.[89]

The Court went so far as to muse on which particular constitutional rights 'might play a role in environmental proceedings' in future, and

> … would not rule out the possibility that the interplay of existing constitutional rights with the constitutional values to be found in the constitutional text and other provisions, such as those to be found in Art. 10 and also the right to property and the special position of the home, might give rise to specific obligations on the part of the State in particular circumstances.[90]

4 Discussion

4.1 The *ultra vires* finding

[83] [2020] IESC 49 [8.9].
[84] [2020] IESC 49 [8.11].
[85] *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2011).
[86] [2020] IESC 49 [8.12].
[87] [2020] IESC 49 [8.13].
[88] [2020] IESC 49 [8.14 – 8.17].
[89] [2020] IESC 49 [8.6].
[90] [2020] IESC 49 [8.17].

The Court's judgment under the legality ground of appeal is somewhat confusing, as it engages in novel reasoning regarding both the meaning of 'specify' in section 4 and the standard of review for determining whether the NMP was sufficiently specific, without referring to established principles of statutory interpretation or to the usual deference where the execution of a statutory duty involving a substantial degree of discretion is concerned.[91]

To interpret the meaning of 'specify', the Court first turned to the Act's purpose as stated in the statute's long title: the achievement of the NTO. On this basis, it found that inherent in the word 'specify' was a requirement that each NMP set out a map of how the State is to get all the way to the Act's end goal in 2050. The Court identified this requirement in summary fashion, stating that due to the NTO's wording the NMP 'was required to be a 33-year plan' and that 'it seems to me to be absolutely clear that it would be wrong to suggest that the legislation envisages that details be provided for only the first five years'.[92] (MacGrath J, on the other hand, had concluded, in the Supreme Court's words, that 'it was the 2015 Act, as opposed to the Plan, which provided for reaching the NTO by the end of the year 2050'[93]).

It is likely that a missing explanation for the Supreme Court's finding that the word 'specify' imposed an obligation on the government to provide a map of the whole journey to 2050 was the scientific evidence presented to it that this can only remain a target date for measures to ensure a less than 2°C increase on pre-industrial global temperatures *if* the remaining 'carbon budget' for achieving this is not used up in the meantime by either rising, or too-small progressive reductions in, GHG emissions. In other words, the Court seems to have been persuaded that the aim of reaching 2050 without in the meantime over-spending the carbon budget for staying (well) below a 2°C increase in warming must be factored explicitly into every NMP.

The Court went on to identify further content in the term 'specify' based on its identification of 'two important obligations which inform the statutory purpose', namely, public consultation and transparency.[94] According to the Court, any NMP adopted under section 4 needed to be specific enough to enable 'a reasonable and interested member of the public' to make decisions about whether they were happy with how the government was dealing with this significant public policy issue, and to come to conclusions about how they might vote or otherwise act based on this assessment.[95] While this is undoubtedly sensible in a democratic state, the Court appears to have stepped outside the usual process of statutory interpretation in arriving at this conclusion, without clearly explaining why.

Section 5 of the Interpretation Act 2005 requires the courts to give a statutory provision a construction which reflects the 'plain intention' of the legislature 'where that intention can be ascertained from the Act as a whole', but only when a literal interpretation would be absurd. One of the usual starting points for determining this plain intention is the long title of an act (as used, at first, by the Court).[96] There is no mention of consultation or transparency in the 2015 Act's long title, and approval of an NMP is clearly a matter for the cabinet, not the people. While section 4 does provide for public participation, the final decision on the acceptability of an NMP is 'in the opinion of the government'. Such executive decision-making has traditionally been off-limits for the courts, except in limited circumstances where the decision

[91] Gerard Hogan, David Gwynn Morgan and Paul Daly, *Administrative Law in Ireland* (5th edn, Roundhall, 2019), Chapter 17, Section A.
[92] [2020] IESC 49 [6.20].
[93] [2020] IESC 49 [5.51].
[94] [2020] IESC 49 [6.21-6.22].
[95] [2020] IESC 49 [6.38]. Emphasis added.
[96] David Dodd, *Statutory Interpretation in Ireland* (Bloomsbury Professional, 2008), [3.04].

is in some way unreasonable.[97] A literal reading of the text of the Act, therefore, indicates that that the specificity of the NMP is entirely a matter for government.

Furthermore, public consultation can have several purposes: the provision of information, filling information gaps, making information contestable, problem solving and social learning, influencing decisions, enhancing democratic participation, and enabling pluralistic representation.[98] It is not clear how or why the Court selected the second last of these as best representing the plain intention of the Oireachtas.

Once it had determined the meaning of 'specify', the Court progressed to considering whether the 2017 NMP was, in substance, sufficiently specific to comply with the 2015 Act. Earlier in the judgment the Court had noted that '[i]nsofar as the Court might be persuaded that there are *rights* which can be asserted by FIE in these proceedings … then an issue potentially arises as to the appropriate standard of review which should be applied by the Court'.[99] In relation to rights, the Court acknowledged, 'issues of proportionality may possibly arise'[100] and the relevance of *Meadows* would need to be considered.[101] However, the Court refused to countenance constitutional or ECHR rights claims in this case, and the part of the judgment determining whether or not the 2017 NMP was sufficiently specific contains no explicit reference to an established standard of review, whether *O'Keeffe* unreasonableness[102] or *Meadows* proportionality.

In order to determine 'whether the Plan gives sufficient detail to allow a reasonable and interested observer to understand how it is suggested that the NTO is to be met by 2050', the Court relied heavily on the views of the CCAC, which has been highly critical of Ireland's slow and inadequate progress towards the NTO. However, while the fact that the NMP will not achieve its statutory objective according to the CCAC (and FIE, among others) is a strong indicator that the plan is not sufficiently specific to enable individuals to form an opinion as to its adequacy, the second does not necessarily follow from the first.

In addition, the strong language of the CCAC on this lack of progress indicates that there is, in fact, a mechanism for ensuring that the public are properly informed built into the legislative framework, further undermining the Court's logic. The Court had no evidence on whether the putative 'reasonable and interested member of the public' does or does not know how the government of the day intends to meet the NTO. To use an analogy from intellectual property law, if this case were a trademark or passing off action, the Court would have before it survey evidence as to whether ordinary consumers were confused. There is no evidence cited in the judgment as to what the public has been able to learn from the Plan, and the Court seems to have taken a view on what is ultimately a question of fact rather than law without it being dealt with by the High Court. Nor did the Court seem to have the benefit of expert evidence regarding the state of scientific knowledge in areas where it determined the NMP to be too vague. The Court substituted its own views on these complex matters for those of the experts who were engaged by the government to prepare the Plan, which again seems to go against the principle of deference to executive decision-making articulated in *O'Keeffe* and other cases.

Had the Court applied the *O'Keeffe* test, the agreed scientific evidence might have provided a basis for finding that no reasonable authority could have formed the opinion that an NMP which provided for rising GHG emissions would achieve the NTO. It may be true that

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[97] Mark de Blacam, *Judicial Review* (Bloomsbury Professional, 2017), Chapter 27.
[98] Ciaran O'Faircheallaigh, 'Public participation and environmental impact assessment: Purposes, implications, and lessons for public policy making' (2010) 30 Environmental Impact Assessment Review 19, 20–22.
[99] [2020] IESC 49 [5.53]. Emphasis added.
[100] [2020] IESC 49 [5.54].
[101] ibid, referring to *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 IR 701 (SC).
[102] *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 (SC).

adopting an NMP which cannot meet its intended objective, as the CCAC states the Government did in 2017, 'plainly and unambiguously flies in the face of fundamental reason and common sense'[103] (to use the language of Henchy J in *Keegan*, the precursor to *O'Keeffe*). However, it would have considerably elucidated the reasoning of the Court if this had been clearly stated, particularly when the legislation expressly reserves the approval of the NMP to the Government. It is interesting to consider whether the unique features of the cabinet as decision-maker in this case (perhaps being considered more political than any other decision-maker under administrative law) were behind the Court's use of the politically-engaged citizen's understanding as the measure by which to determine the NMP's specificity.

4.2 Standing

While the Court seems to have taken a radical approach to standards of judicial review, it demonstrated considerable conservatism in the face of FIE's arguments that the realities of the Irish litigation landscape, and of climate change, warranted a grant of standing to FIE in order to ensure access to justice regarding (potential) rights violations.

The Court was quick to dismiss FIE's contention that it had taken this case because the costs risks were too great for an individual litigant to bear: the judgment classified this as only a 'suggestion' by FIE, finding that 'no real explanation was given as to why an individual or individuals could not have brought these proceedings instead of FIE.'[104] The Court also opined that '[t]here does not seem to be any practical reason why FIE could not have provided support for such individuals in whatever manner it considered appropriate.'[105] However, the Irish legal costs regime (where costs ordinarily 'follow the event') has been highlighted for decades by scholars and practitioners as a real and critical barrier to public interest and rights-based litigation.[106] While the courts retain discretion to depart from the ordinary costs rule in 'exceptional' circumstances, the Supreme Court has declined to establish any hard-and-fast principles on the basis that any '[i]f there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation'.[107] Moreover, the current system of legal aid has been criticised repeatedly by the Free Legal Advice Centres (FLAC) among others as not fit for purpose; it suffers from long delays and excludes provision for multi-party actions.[108] The Oireachtas has not legislated for protective costs orders, and FLAC notes that '[w]hile the Irish courts have accepted in principle that PCOs can be granted, there are no specific rules or guidance on public interest litigation comparable to other common law jurisdictions.'[109] As Matthew Holmes argues, it is also unclear whether crowdfunding for

[103] *The State (John Keegan and Eoin J. Lysaght) v The Stardust Victims Compensation Tribunal* [1986] IR 642 (SC), 658.
[104] [2020] IESC 49 [7.22].
[105] [2020] IESC 49 [7.22].
[106] See for example Public Interest Law Alliance, *The Costs Barrier & Protective Costs Orders: Report* (FLAC 2010), <www.pila.ie/assets/files/pdf/flac_pila_report_final.pdf> accessed 30 September 2020; Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, Institute of Public Administration 2015).
[107] *Dunne v Minister for the Environment, the Attorney General and Dun Laoghaire-Rathdown County Council* [2005] IEHC 94 & [2007] IESC 60. See also *Ryanair Ltd v Revenue Commissioners* [2017] IEHC 272, where Barrett J applied the approach of Clarke J in *Cork County Council v Shackleton & Ors* [2011] I.R. 443 to identifying a 'test case', but nonetheless noted (at [2]) that 'Clarke J. does not closely define the meaning of what constitutes a "test case"'.
[108] See for example Free Legal Aid Centres, *Examining Access to Justice in the Draft Programme for Government 2020* (FLAC 2020), 8, <www.flac.ie/assets/files/pdf/flac_response_to_draft_programme_for_government_2020_final_ver.pdf?issuusl=ignore> accessed 30 September 2020.
[109] ibid 9.

litigation is permissible in light of Ireland's ancient maintenance and champerty rules.[110] A recent report of the EU Bar Association and the Irish Society for European Law recommended an overhaul of Ireland's collective action and crowdfunding rules, recognising these areas as key barriers to litigation in Ireland.[111] It is striking, and not a little disappointing, that the Court made such short shrift of FIE's claim that it had taken the legal challenge because an individual litigant could not. The financial barriers to rights-based and public interest litigation in Ireland surely raise issues under the Aarhus Convention;[112] the case of *European Commission v the United Kingdom of Great Britain and Northern Ireland* is instructive.[113]

The Court's conclusion that FIE's case was 'a far cry' from *Coogan* and *Irish Penal Reform Trust*'[114] is also worth querying. Article 1 of the Aarhus Convention[115] and several judgments of other national courts have recognised that states' actions vis-à-vis the environment and climate change concern future generations—perhaps not a 'far cry' from *Coogan* after all. In *Urgenda*,[116] the Dutch District Court accepted the NGO's standing on behalf of people outside the Netherlands and on behalf of future generations. Philip Alston and others note that the Supreme Court of the Philippines has developed rules authorising suits by 'any Filipino citizen in representation of others, including minors or generations yet unborn',[117] and that similar approaches have been adopted in Latin America and India.[118]

The Court's judgment did not engage with FIE's argument that the particular phenomenon of climate change justifies an exceptional approach to standing. FIE had contended that it was relevant, bearing in mind the focus in *Irish Penal Reform Trust* on the NGO's unique ability to challenge problems that were systemic, that climate change is creating generalised impacts for which there may not be 'an obvious standout plaintiff'.[119] To this point, Alston and others write:

> Like many types of environmental harm, climate change will affect people generally and in similar ways. Moreover, while there is a high likelihood that these harms will materialise in the near future if adequate mitigation measures are not implemented, in many cases those likely to be the most affected are yet to suffer any particular harm or loss. In these circumstances, traditional doctrines of standing, causation and redressablity, which often require plaintiffs to demonstrate that they have suffered harm or loss as a direct result of the conduct in question, have the potential to preclude litigants from seeking remedies that can either prevent climate change harms from

[110] Matthew Holmes, 'Two's company, fee's a crowd', Law Society Gazette (October 2017), 30.
[111] EU Bar Association, Irish Society for European Law, *Report of the EU Bar Association and the Irish Society of European Law relating to Litigation Funding and Class Actions*, 29 January 2020.
[112] FIE is litigating for access to legal aid on this basis; see *Friends of the Irish Environment v Legal Aid Board* [2020] IEHC 347. The Convention is part of European law – see Council Decision 2005/370/EC of 17 February 2005 on the conclusion on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124/1.
[113] Case C-530/11 *European Commission v the United Kingdom of Great Britain and Northern Ireland* EU:C:2014:67, [2014] QB 988.
[114] [2020] IESC 49 [7.22].
[115] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (opened for signature 25 June 1998, entered into force 30 October 2001) 2161 United Nations Treaty Series 447, Article 1.
[116] *Urgenda Foundation v The Netherlands* NL:RBDHA:2015:7145 (District Court of the Hague).
[117] Philip Alston, Victoria Adelmant and Matthew Blainey, 'Litigating Climate Change in Ireland', NYU School of Law, Public Law Research Paper No. 20-19, <papers.ssrn.com/sol3/papers.cfm?abstract_id=3625951> accessed 30 September 2020, 3.
[118] ibid, 3, citing Erin Daly and James May, *Global Environmental Constitutionalism* (CUP 2014) 131.
[119] Maeve O'Rourke, Note of Hearing, 23 June 2020.

occurring or enable them to obtain compensation when they do, thereby denying access to justice.[120]

4.3 'Derived rights'

Given that the Court refused to adjudicate FIE's rights arguments, it is perhaps unfortunate that the Court still took the opportunity to state categorically that the concept of a right to an environment consistent with human dignity cannot exist as a 'derived' right under the Constitution because it lacks sufficient definition. The admission by counsel for FIE that such a right would not add anything to FIE's case (because all of FIE's contentions were already encapsulated by its right to life and right to bodily integrity / right to respect for private and family life arguments)[121] indicates that these proceedings were never going to lead to a resounding affirmation of Barrett J's finding in *Fingal Co Council*. FIE's arguments were a reminder, too, that if the European Court of Human Rights is going to exercise jurisdiction over states' climate change-related actions it will have to do so within the strictures of the existing ECHR Articles. However, the Court could have left the door open to future interpretations of such a right, bearing in mind that climate change-related litigation is still in its infancy.

It remains to be seen whether the 'derived' rights doctrine will present problems where litigants seek to expand the Irish courts' interpretation of, or obtain identification of a right linked to, an established 'unenumerated' constitutional right that is not expressed in the text of the Constitution but has a corollary in the ECHR (bearing in mind the Court's statement that 'derived' rights will be identified from 'some root of title in the text or structure of the Constitution'[122]). Article 8 ECHR, which protects the right to respect for private and family life, is playing a central role in climate litigation in Europe at present, for example. In light of this new doctrine, how quick will the Irish courts be to discover 'new' rights under the Constitution which the ECtHR might derive from Article 8? (The right to identity is an example of an 'unenumerated' constitutional right,[123] the equivalent of which the ECtHR derives from Article 8 ECHR.)

Finally, it is noteworthy that the Court acknowledged but did not comment on the reference by MacGrath J in the High Court to the decision of Fennelly J in *McD (J) v L (P) & M (B)*,[124] to the effect that it is not for the Irish courts to interpret the ECHR in relation to issues (here, climate change) that the ECtHR has not yet addressed. In *McD (J)*, Fennelly J cited with approval the holding of Bingham LJ that '[t]he duty of national Courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.[125] However, UK Supreme Court judgments since *Ullah*, and senior judges' additional *obiter* and extra-judicial statements, have departed from the seemingly strict approach of Bingham LJ in that case and instead have adopted an approach that seeks to follow the ECtHR where it has delivered clear judgments on an issue, but otherwise to allow the domestic courts to interpret the ECHR for themselves.[126] It appears that courts in other European jurisdictions—for

[120] Alston and others (n 123) 3.
[121] [2020] IESC 49 [8.10].
[122] [2020] IESC 49 [8.6].
[123] *IO'T v B* [1998] 2 IR 321 (SC).
[124] [2009] IESC 81.
[125] *R (on the application of Ullah) v Special Adjudicator* [2004] 2 AC 323.
[126] See for example, Brenda Hale, 'Argentoratum Locutum: is Strasbourg or the Supreme Court supreme?' (2012) 12(1) Human Rights Law Review 65; Nuno Ferreira, 'The Supreme Court in a final push to go beyond Strasbourg' (2015) Public Law 367; Helen Fenwick and Roger Masterson, 'The Conservative Project to 'Break the Link between British Courts and Strasbourg': Rhetoric or Reality?' (2017) 80(6) Modern Law Review 1111.

example France and Germany, which are monist—have also taken a proactive approach to interpreting the ECHR and have been encouraged to do so by the ECtHR.[127]

5 Consequences

Despite the Supreme Court's rejection of FIE's rights-based arguments, the result of Climate Case Ireland is a monumentally progressive step into a new era of the Irish courts engaging with climate science and the all-encompassing and rapidly worsening effects of global warming. The Government must now amend the NMP, and it will be interesting to see the ways in which the revisions respond to the Court's elaboration of the specificity required. The purpose of FIE's case, however, was not just to bring about a change in the NMP. Andrew Jackson, who litigated the case on behalf of FIE, explained in the aftermath that:

> The aims of Climate Case Ireland were two-fold from the outset. First, to win in court, quashing the National Mitigation Plan and requiring a more ambitious Plan to be drawn up; and second, to create a focal point around which the climate movement could coalesce and grow in Ireland, helping to transform the conversation around climate action. That more than 20,000 members of the public signed in support of the case is a testament to the movement that built around the case.[128]

Certainly, since its inception, the litigation and social and traditional media coverage of it has contributed to public debate regarding the 2015 Act. Prior to the Supreme Court's judgment, environmental activists worried that the Act lacked 'teeth'—in other words, that its wording was not precise enough or strong enough to allow for its enforcement through the courts.[129] Since its enactment, NGOs have criticised the absence of a 'numeric target for emissions reductions' in the Act.[130] Persistent civil society advocacy led to the inclusion in the 2020 Programme for Government of a commitment to introduce within the first 100 days of government an amending statute which would, among other things, establish a net zero GHG emissions target for 2050 and 'define how carbon budgets will be set'.[131] The Government published the Climate Action and Low Carbon Development (Amendment) Bill 2020 on 7 October 2020.[132] While welcoming elements of the Bill as initiated, campaigners immediately

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[127] Eirik Bjorge, 'National supreme courts and the development of ECHR rights' (2011) 9 (1) Int J Constitutional Law 5.

[128] Kayle Crossan, '"It was just an incredible moment"—reactions to the historic climate case ruling' (*Greennews.ie*, 7 August 2020), <greennews.ie/climate-case-win-reactions/> accessed 30 September 2020.

[129] See for example, Crossan ibid; Stop Climate Chaos, Briefing Paper February 2015, 'The Climate Action and Low Carbon Development Bill 2015 and the Recommendations of the Joint Committee on the Environment, Culture and the Gaeltacht', <www.trocaire.org/sites/default/files/pdfs/campaigns/scc-briefing-2015.pdf> accessed 30 September 2020, 1; Sadhbh O'Neill, NUIG Human Rights Podcast, 23 September 2019, <soundcloud.com/user-418068292/climate-justice-with-sadhbh-oneill> accessed 30 September 2020. For academic commentary along similar lines, see Rónán Kennedy, 'New Ideas or False Hopes? : International, European, and Irish Climate Change Law and Policy After the Paris Agreement' (2016) 23 Irish Planning and Environmental Law Journal 75.

[130] Stop Climate Chaos, ibid.

[131] Government of Ireland, 'Programme for Government: Our Shared Future' (June 2020) <static.rasset.ie/documents/news/2020/06/programmeforgovernment-june2020-final.pdf> accessed 30 September 2020; see also Climate Chaos Coalition, 'Programme for Government offers promise of faster and fairer climate action, says Climate Coalition' (15 June 2020) <www.stopclimatechaos.ie/news/2020/06/15/programme-for-government-offers-promise-of-faster/> accessed 30 September 2020.

[132] Department of the Environment, Climate and Communications, Climate Action and Low Carbon Development (Amendment) Bill 2020, <www.gov.ie/en/publication/984d2-climate-action-and-low-carbon-development-amendment-bill-2020/> accessed 8 October 2020.

questioned whether its wording is capable of ensuring that the newly required five-year carbon budgets will be calculated to meet the NTO.[133]

The Court's refusal to countenance recognising a 'derived' right to a healthy environment, either now or in the future, likely means that the civil society campaign for a referendum vote will gain momentum in the coming years. The 2017 recommendations of the Citizens' Assembly on climate change included no such proposal.[134] Orla Kelleher argues that the promised Citizens' Assembly on biodiversity loss could provide an opportunity not only to examine the possibility of a referendum but also the notion of a right that extends its protection beyond humans,[135] which would have far-reaching implications.

The judgment will clearly have important and immediate consequences in terms of these very pressing areas of social, economic, and environmental policy. In the longer term, despite its opacity, its approach to judicial review and statutory interpretation should give pause to the Government and heart to activists, as the Court is clearly not willing to allow a pettifogging approach to implementation to undermine an ambitious policy framework. While its perspective on constitutional and European human rights is lamentably conservative, it takes care not to close the door to creative advocates in the future. Most significantly, it demonstrates that the Court understands the importance and seriousness of the climate crisis, and its role in making Irish society face its local, European, and global responsibilities in tackling this. All of these aspects of its reasoning, for better or for worse, will have consequences for litigation in environmental law and beyond for decades to come.

[133] See Kevin O'Sullivan, 'Climate Bill a "significant milestone" but firmer requirements needed, environment groups warn' *The Irish Times* (Dublin, 8 October 2020).
[134] The Citizens' Assembly, 'Previous Assemblies: Making Ireland a leader in tackling climate change', <2016-2018.citizensassembly.ie/en/How-the-State-can-make-Ireland-a-leader-in-tackling-climate-change/> accessed 30 September 2020.
[135] Orla Kelleher, 'The Supreme Court of Ireland's decision in Friends of the Irish Environment v Government of Ireland ("Climate Case Ireland") (*EJIL: Talk!*, 9 September 2020), <2016-2018.citizensassembly.ie/en/How-the-State-can-make-Ireland-a-leader-in-tackling-climate-change/> accessed 30 September 2020.