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Recent Developments: Ireland

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Project Ireland 2040: National Planning Framework

The most significant contemporary policy development is the publication by the Government of Ireland in February 2018 of *Project Ireland 2040: National Planning Framework* (NPF).¹ The NPF is a high level strategic plan which maps out Ireland's development path to 2040. It provides for a 'region-focused' strategy for managing growth and is linked with a 10-year Government investment plan - *Project Ireland 2040 National Development Plan 2018-2027 (NDP)*. The NDP anticipates €116 billion of investment in infrastructure over the 10-year period.

The NPF speaks of refocusing future planning and development at local level to enable a national transition to a competitive, low carbon, climate resilient and environmentally sustainably economy by 2050 by harnessing Ireland's renewable energy potential. It anticipates 'more strategic and co-ordinated planning' for Ireland's cities and large towns. Moreover, a 'new streamlined and integrated planning process' will be introduced to manage more effectively Ireland's marine areas and land-sea interface 'to double the economic value' gained from Ireland's ocean wealth by 2030 and further increase economic value beyond that timeframe.

The NPF is to be given 'full legislative support within the planning system, including regular reviews and updating to reflect changing circumstances'. The planning legislation underpinning the NPF will provide for the creation of a new independent 'Office of the Planning Regulator' which will be responsible for monitoring

¹ Government of Ireland, *Project Ireland 2040: National Planning Framework* (2018) <http://npf.ie/>

implementation of the NPF. It is notable that an independent Planning Regulator has been anticipated for a number of years now, but has yet to materialise.

It is clear that the NPF is high on ambition and paints a rosy path to a sustainable future. How the ambitions set out in the plan will be realised in practice, however, remains to be seen. Taking the necessary steps to address effectively the ever present problem of Ireland's rising greenhouse gas emissions remains a particularly serious issue in this context.²

Challenge to National Planning Framework

On 14 May 2018, the environmental NGO Friends of the Irish Environment was granted leave by the High Court of Ireland to bring judicial review proceedings challenging the Government's decision to adopt the National Planning Framework. The challenge is based on *inter alia* alleged failure to comply with environmental assessment obligations, habitats directive obligations and failure to address Ireland's greenhouse gas emissions. See Press Release issued by Friends of the Irish Environment: <https://www.friendsoftheirishenvironment.org/climate-case>

High Court of Ireland recognises an unenumerated constitutional right to an environment that is consistent with the human dignity and well-being of citizens.

Adopted in 1937, the Constitution of Ireland (*Bunreacht na hÉireann*) does not include any reference to environmental rights or a particular level of environmental protection. Over the years, the Superior Courts have determined that the Constitution protects a number of so-called 'unenumerated' rights, beyond the specific civil and political rights guaranteed expressly in the Constitution.

² *Ireland's Final Greenhouse Gas Emissions 1990-2016* (Environmental Protection Agency, April 2018)
https://www.epa.ie/pubs/reports/air/airemissions/ghgemissions2016/Report_GHG%201990-2016%20April_for%20Website-v3.pdf

Friends of the Irish Environment v Fingal County Council [2017] IEHC 695³ involved a challenge to a decision to grant an extension to a planning permission originally granted in 2007 under which Dublin Airport Authority has permission to construct a new runway at Dublin Airport. Giving judgment on 21 November 2017, Barrett J, sitting in the High Court of Ireland, recognised an unenumerated constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large and that this right is an essential precondition for the fulfilment of all human rights. It is important to note that this element of the judgment is *obiter*, so it is difficult to predict how the law will evolve on the constitutional point into the future. But there is no doubt that this is a very significant development in the constitutional and environmental jurisprudence. It may well come to underpin further new developments in the law as the jurisprudence evolves. The challenge itself, which was brought by the environmental NGO, Friends of the Irish Environment, was ultimately unsuccessful. However, the recognition of this new unenumerated right has been greeted with great enthusiasm by environmental NGOs and community groups.

Climate Case Ireland

In October 2017, inspired by climate litigation in other jurisdictions, including the well-known *Urgenda* judgment in the Netherlands and *Juliana v The United States of America* (Our Children's Trust), the environmental NGO Friends of the Irish Environment launched proceedings in the High Court of Ireland challenging the legality of Ireland's *National Mitigation Plan (NMP)*.⁴ More specifically, the case argues *inter alia* that the Government's approval of the NMP violated the Climate Action and Low Carbon Development Act 2015 (Ireland's climate legislation), the Constitution of Ireland and human rights obligations. It is also alleged that the NMP falls short of what is required under the Paris Agreement. Further details about the case are available

³ <http://www.bailii.org/ie/cases/IEHC/2017/H695.html>

⁴ Text of NMP, which was published in July 2017, and related documentation available here: <https://www.dccae.gov.ie/en-ie/climate-action/topics/national-mitigation-plan/Pages/default.aspx>. Press release on publication of NMP: <https://www.dccae.gov.ie/en-ie/news-and-media/press-releases/Pages/Minister-Denis-Naughten-publishes-Ireland's-first-statutory-National-Mitigation-Plan.aspx>

on the *Climate Case Ireland* website.⁵ The next court date for the case is scheduled for 5 June 2018.

Interpretation and implementation of the Habitats Directive

Ireland now holds the distinction of being the Member State responsible for two of the leading cases from the Court of Justice of the EU on mitigation issues: First, Case C-323/17 *People Over Wind and Sweetman v Coillte Teoranta* EU:C:2018:244, a reference from the High Court of Ireland. In a judgment delivered on 12 April 2018, the CJEU ruled that it is not appropriate, at the screening stage to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on the protected site.

Second, Case C-164/17 *Grace and Sweetman v An Bord Pleanála*, a reference from the Supreme Court of Ireland. Advocate General Tanchev delivered his Opinion on 19 April 2018. The Advocate General concluded, in the circumstances of this particular case, that measures proposed in a management plan - as part of a development project - which are designed to ensure that, at any given time, the amount of the protected site, the essential purpose of which is the provision of habitat for a protected species (in this case the hen harrier), which is suitable habitat for that species is not reduced and may even be enhanced, but some of the site will, for the lifetime of the development project, be excluded from having the potential to provide appropriate habitat for that species, do not meet the requirement of sufficient protective (mitigatory) measures under the CJEU's jurisprudence interpreting Article 6(3) of the Habitats directive.

Access to justice in environmental matters that is 'not prohibitively expensive'

In Case C-470/16 *North East Pylon Pressure Campaign Ltd v An Bord Pleanála* EU:C:2018:185, a reference from the High Court of Ireland, the CJEU in a judgment delivered on 15 March 2018 provided important points of interpretation concerning the ban on prohibitive costs in the context of the Environmental Impact Assessment

⁵ <https://www.climatecaseireland.ie/>

directive (in particular Article 11 of Directive 2011/92/EC) and Article 9(3) and (4) of the Aarhus Convention. Another reference, this time from the Supreme Court of Ireland in Case C-167/17 *Klohn v An Bord Pleanála*, is pending at the time of writing.

Citizens' Assembly considers 'How the State can make Ireland a leader in tackling climate change'

In July 2016, the Houses of the Oireachtas (Irish Parliament) determined that a 'Citizens' Assembly' should consider a number of topics of considerable public importance and make recommendations to Parliament.⁶ The Citizens' Assembly comprised 100 members, 99 citizen members and a Chairperson.⁷ The Government appointed the Hon Ms Justice Mary Laffoy, a retired judge of the Supreme Court of Ireland, to chair the Assembly. Among the five topics that the Citizens' Assembly was asked to examine was 'How the State can make Ireland a leader in tackling climate change'.

The Citizens' Assembly met to consider the climate change topic over two weekends last year: 30 September-1 October 2017 and 4-5 November 2017. Following deliberations, 13 recommendations were reached by secret ballot voting. The first recommendation (approved by 97% of the Assembly members) was as follows:

To ensure climate change is at the centre of policy-making in Ireland, as a matter of urgency a new or existing independent body should be resourced appropriately, operate in an open and transparent manner, and be given a broad range of new functions and powers in legislation to urgently address climate change. Such functions and powers should include, but not be limited to those outlined below.

- To examine any legislative proposals, it considers relevant to its functions and to report publicly its views on any implications in relation to climate change; the

⁶ *Resolution Approving Establishment of the Citizens' Assembly* (July 2016) <https://www.citizensassembly.ie/en/About-the-Citizens-Assembly/Resolution.pdf>

⁷ <https://www.citizensassembly.ie/en/About-the-Citizens-Assembly/>

relevant Minister must respond publicly to the views expressed in a report prior to the progress of the legislative proposal;

- To propose ambitious 5 year national and sectoral targets for emissions reductions to be implemented by the State, with regular review and reporting cycles;
- To pursue the State in legal proceedings to ensure that the State lives up to its legal obligations relating to climate change.

This particular recommendation confirms the importance members of the Assembly attached to effective oversight and enforcement of Ireland's climate obligations.

The final report and recommendations on the climate change topic was laid before the Houses of the Oireachtas by the Chairperson on 18 April 2018.⁸ All material relating to the climate change module at the Citizens' Assembly is available publicly on the Citizens' Assembly website.⁹

Government proposals to restrict access to judicial review in the case of challenges to strategic infrastructure development

In February 2018, it was reported that the Government intends to introduce a number of measures to restrict access to judicial review in the specific context of strategic infrastructure development.¹⁰ The underlying objective is to accelerate the judicial review process in order to provide more certainty for developers.

It is anticipated that the proposed measures will include: reducing the time period to seek leave to apply for judicial review from the current period of eight weeks to four weeks; setting out criteria by which to determine whether an applicant seeking leave

⁸ <https://www.citizensassembly.ie/en/How-the-State-can-make-Ireland-a-leader-in-tackling-climate-change/Final-Report-on-how-the-State-can-make-Ireland-a-leader-in-tackling-climate-change/Final-Report-on-how-the-State-can-make-Ireland-a-leader-in-tackling-climate-change.html>

⁹ <https://www.citizensassembly.ie/en/How-the-State-can-make-Ireland-a-leader-in-tackling-climate-change/How-the-State-can-make-Ireland-a-leader-in-tackling-climate-change.html>

¹⁰ 'Proposed rules aim to limit challenges to building projects' *Irish Times* 7 February 2018.

to bring judicial review has 'a sufficient interest' in the matter (i.e. tightening the *locus standi* requirements); and prescribing requirements for the NGOs that are deemed to have standing to bring judicial review proceedings (e.g. it is expected that NGOs will have to demonstrate that they are not-for-profit, that they are active in environmental matters and that they were established more than three years prior to the relevant application for leave to bring judicial review proceedings). It is expected that these proposed measures will be included in a forthcoming Planning Bill later in 2018. The precise nature of any new measures remains to be seen and any commentary must await publication of draft legislation.

With a view to accelerating the judicial review process in strategic infrastructure cases, in February 2018 a judge of the High Court was designated to hear applications for leave to bring judicial review proceedings in such cases. Amendments to the procedural rules governing such cases are also anticipated.

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