Avosetta Questionnaire: Climate Litigation

Report for Ireland

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Introduction

Climate litigation in Ireland to date has generally involved judicial review proceedings against the State / public authorities. The most significant 'landmark' case concerned a challenge to the legality of the National Mitigation Plan in what has come to be known as 'Climate Case Ireland' (discussed below). In a unanimous decision delivered on 31 July 2020, the Supreme Court quashed the National Mitigation Plan on the grounds of failure to comply with the requirements of the Climate Action and Low Carbon Development Act 2015.

Following the success of Climate Case Ireland, there is far greater awareness among lawyers and the public of the potential role of the courts in the general push to ensure more urgent and more effective climate action, as well as the need for strong accountability and enforcement mechanisms where climate obligations are not met.

More recently, a campaign has been initiated calling for the forthcoming Citizens' Assembly on Biodiversity to include *inter alia* consideration of the possible recognition of a constitutional right to a safe, clean, healthy and sustainable environment.[2]

Climate Action and Low Carbon Development (Amendment) Act 2021

Things have moved on significantly at the political level since the judgment in Climate Case Ireland. New climate legislation, which amends the Climate Action and Low Carbon Development Act 2015, was signed into law on 23 July 2021. The new climate law includes *inter alia*: a new 'national climate objective' which requires the State to 'pursue and achieve' by the end of 2050 'the transition to a climate resilient, biodiversity rich, environmentally sustainable and climate neutral economy' and a strengthened Climate Change Advisory Council whose functions now include preparing a series of five-year carbon budgets. While there is disappointment regarding certain elements of the new legislation,[3] there is no doubt that the 2021 Act is a very significant and welcome advance towards strengthening climate law and governance in Ireland.

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[2] 'Call for environmental rights to be recognised in Constitution' *Irish Times* 10 June 2021; 'Call for establishment of constitutional protection for the environment' *Irish Times* 24 June 2021; 'Failure to convene citizens' assembly on biodiversity criticised' *Irish Times* 20 July 2021 and 'Environmental rights must be preserved in the Constitution' *Irish Times* 23 July 2021.

[3] 'Late changes to Climate Bill undermine its thrust, claim environmental groups' *Irish Times* 15 July 2021.

[1] State of play at national level:

***Friends of the Irish Environment v Government of Ireland* [2020] IESC 49 (31 July 2020)**

The most significant case to date is the Supreme Court decision in *Friends of the Irish Environment CLG v Government of Ireland* [2020] IESC 49. The unanimous ruling of the seven judge Supreme Court, in what has come to be known as *Climate Case Ireland*, was that Ireland's National Mitigation Plan was unlawful and must be quashed.

The Court reached this conclusion on narrow grounds. Essentially, it found that the plan did not comply with the Climate Action and Low Carbon Development Act 2015. This legislation established 'the national transition objective'. It required Ireland to transition to 'a low carbon, climate resilient and environmentally sustainable economy' by the end of the year 2050. The Government is required to 'specify' in the plan the policy measures required to achieve the national transition objective. In determining the level of detail that must be provided in the plan, the Court drew on the public participation and transparency obligations which underpin the statutory scheme. It ruled that a compliant plan must enable a reasonable and interested member of the public to know how the Government intends to meet the national transition objective and to determine whether the policy measures presented are realistic. The Court also considered that when assessing the plan it was appropriate to give 'significant weight' to the views expressed by the Climate Change Advisory Council, an independent body established under the 2015 Act. In its Annual Review 2018, the Council had concluded that Ireland was 'completely off course' to meet its climate obligations.

Having considered the content of the plan, the Supreme Court concluded that it fell 'a long way short' of what the 2015 Act required. The plan, as formulated, did not enable a reasonable and interested observer to discern how current Government policy intends to achieve the national transition objective. Too much was left to further study or investigation. Significant parts of the policies presented were 'excessively vague or aspirational'. The plan would therefore be quashed for failing to comply with its statutory mandate.

It is notable that, relying on the separation of powers, the Government had argued that the substance of the plan was not justiciable on the basis that it involved the adoption of policy. The Supreme Court disagreed. Whether the plan met the specificity requirements set down in the 2015 Act was 'clearly justiciable'. As Chief Justice Frank Clarke put it: 'What might once have been policy has become law by virtue of the enactment of the 2015 Act'.

While the outcome of the case turned on the requirements of the 2015 Act, there are two other aspects of the judgment that merit mention.

The first point concerns standing. The Supreme Court concluded that Friends of the Irish Environment (FIE), being a corporate entity, did not have standing to invoke personal rights under the Constitution of Ireland (including the right to life and the right to bodily integrity) or under the European Convention on Human Rights (specifically the rights guaranteed under Article 2 and Article 8).

The second point of note concerns the status of an asserted constitutional right to a healthy environment. In November 2017, in a different case that had also been brought by FIE, the High Court had recognised an 'unenumerated' right to an environment consistent with the human dignity and well-being of citizens.

FIE's challenge to the National Mitigation Plan provided the Supreme Court with its first opportunity to consider this newly asserted right. The Court took the view that 'a right to a healthy environment' cannot be derived from the Constitution. The basis for this conclusion was that the asserted right is either 'superfluous' (if it does not extend beyond the right to life and the right to bodily integrity), or it is 'excessively vague and ill-defined' (if it does extend beyond those rights). The Supreme Court was careful to acknowledge, however, that there may well be cases, which are environmental in nature, where constitutional rights and obligations may be engaged. For example, if FIE had established standing in this particular case, then the Court would have been required to consider the circumstances in which climate change measures, or the lack of such measures, might be said to interfere with the right to life or the right to bodily integrity. It remains to be seen how this aspect of the Irish jurisprudence will evolve into the future.

Overall, the Supreme Court's ruling provided a welcome fillip for climate action. It confirmed that the Government must present specific policy measures with a real and sufficient level of detail. Any attempt to 'kick to touch' by relying on vague or aspirational policies will not pass muster.

Selected other interesting developments in the national jurisprudence

An Taisce v An Bord Pleanála [2021] IEHC 254 (20 April 2021)

This case concerned judicial review proceedings challenging a decision of An Bord Pleanála (the Planning Board) to grant planning permission for a new cheese factory in Kilkenny. An Taisce (the National Trust for Ireland – an NGO) challenged the decision to grant permission in the High Court. This challenge was unsuccessful. An application for leave to appeal to the Court of Appeal was also unsuccessful: *An Taisce v An Bord Pleanála* [2021] IEHC 422 (2 July 2021)

The case concerned a range of important issues, in particular the scope of the duty to assess the indirect effects of a project for the purposes of Article 3 of the EIA Directive and Article 6(3) of the Habitats Directive (e.g. the need to assess impacts of the proposed milk production on water quality, biodiversity loss, greenhouse gas emissions and air pollution, as well as assessment of environmental impacts in supply chains critical to the function of the proposed new factory). An Taisce's decision to bring the judicial review proceedings generated sharp, negative criticism from a number of politicians. Even *An Taoiseach* (the Prime Minister) stated in the *Dáil* (Lower House of Parliament) on 11 May 2021 that he hoped the appeal would be withdrawn.[4]

There is now an intense public debate on this matter which highlights the long-standing, sharp tensions between the right of access to justice in environmental matters on the one hand, and powerful economic interests on the other.

[4] 'Taoiseach says An Taisce should not appeal decision on cheese factory' *Irish Times* 11 May 2021.

Friends of the Irish Environment v Minister for Communications (Shannon LNG terminal) [2021] IEHC 177 (30 March 2021)

Here the applicants challenged the establishment, by the European Commission, of a list of 'projects of common interest' pursuant to Regulation 347/2013 on guidelines for trans-European energy infrastructure (the TEN-E Regulation). In particular, the applicants challenged the inclusion on the list of the proposed Shannon Liquified Natural Gas terminal. One of the arguments submitted by the applicants in this regard was that the failure of Ireland to 'veto' the inclusion of this proposed project on the EU list of 'projects of common interest' was a breach of the State's obligations under the Climate Action and Low Carbon Development Act 2015.

A specific issue that the High Court was required to consider here was: do the obligations under section 15 of the Climate Action and Low Carbon Development Act 2015 Act apply to the Government when it is exercising the executive power of the State? Section 15 of the 2015 Act imposes an obligation on a 'relevant body' 'to have regard to the furtherance of the national transition objective' in the performance of its functions. At the time this case was decided, the 'national transitional objective' was defined in the 2015 Act as the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050. It was alleged that the State as a 'relevant body' had failed to have regard to this mandatory statutory consideration.

Having considered the definition of a 'relevant body' set out in the 2015 Act, the High Court concluded that the Government is not a 'relevant body' for the purposes of section 15.

Friends of the Irish Environment is now appealing this decision to the Court of Appeal (see Press Release).

Friends of the Irish Environment CLG v The Government of Ireland [2020] IEHC 225 (24 April 2020)

These judicial review proceedings involved a challenge to the legality of the National Planning Framework (NPF) on the grounds *inter alia* of alleged failure to assess the impact on the NPF on climate change. The High Court was satisfied that the strategic environmental assessment (SEA) statement, the appropriate assessment undertaken for the purpose of the Habitats Directive and the NPF itself:

> … have had regard to climate change and climatic factors as directed by the [SEA] Directive. It is not possible to provide a quantitative analysis of the effects of the implementation of the NPF in the future, as this is a policy document and one cannot say at this time what population growth will actually occur, where it will occur and what form of development may actually be carried out to accommodate it. All that one can say is that the provisions that are contained in the NPF are designed to reduce to the absolute minimum the effects on climate change and on the environment generally, caused by implementation of the NPF.

The applicant was unsuccessful on all their grounds of challenge.

Merriman v Fingal County Council; Friends of the Irish Environment v Fingal County Council [2017] IEHC 695 (21 November 2017)

These proceedings involved a challenge to a decision by Fingal County Council to grant an extension to a planning permission (dating from 2007) pursuant to which Dublin Airport Authority has permission to construct a new runway at Dublin Airport. The challenge was unsuccessful. A subsequent application for leave to appeal to the Supreme Court was also unsuccessful.

The decision to extend this permission was challenged on a wide range of grounds including failure to provide for public participation during the decision-making procedure governing applications for extensions to planning permissions under section 42 of the Planning and Development Act 2000 (as amended). (In a subsequent communication to the Aarhus Convention Compliance Committee concerning a different planning case, the Compliance Committee found that by failing to provide opportunities for public participation in the decision-making process to extend the duration of planning permission for a quarry under section 42, Ireland had failed to comply with Article 6(4) of the Convention. It also found a failure to comply with Article 6(10) of the Convention. See ACCC/C/2013/107 (Ireland)).

Another ground of challenge in the Dublin Airport case concerned an alleged failure to comply with section 15 of the Climate Action and Low Carbon Development Act 2015 (see above). On this particular point the High Court concluded that the obligation in section 15 did not provide a ground on which to refuse an application to extend a planning permission. The purpose of section 15, in the High Court's view, is 'to remind relevant bodies' 'to have regard to' the objectives referred to in section 15. Having considered the record of the Council's decision, the High Court was satisfied that it 'had managed to discharge' its statutory obligations under section 15. The court noted that it was open to the Oireachtas (Parliament) 'to apply a more stringent obligation to relevant bodies' under section 15, but it had elected not to do so.

Litigation concerning peat extraction

There is a series of cases concerning the regulation of peat extraction which merits noting:

Bulrush Horticulture & Westland Horticulture v An Bord Pleanála [2018] IEHC 58 (8 February 2018)

This decision confirms that any peat extraction on or after 20 September 2012 (when section 4(4) of the Planning and Development Act 2000 (as amended) came into force), which is subject to environmental impact assessment or appropriate assessment cannot be 'exempted development' and therefore requires planning permission

Friends of the Irish Environment v Minister for Communications, Climate Action and Environment [2019] IEHC 646 (20 September 2019)

This ruling overturned new legislative arrangements for large-scale peat extraction.

An Taisce v An Bord Pleanála and *Peter Sweetman v An Bord Pleanála* [2020] IESC 39 (1 July 2020)

This decision overturned the 'substitute consent' regime in the context of quarries. The ruling also had the effect of closing off the 'substitute consent' process for peat extraction, until the Government legislated in late 2020 to amend the substitute consent regime.

[2] Interconnections between developments at national and supranational level:

Ireland is one of the 33 respondent States in the *Duarte Agostinho* proceedings currently pending before the European Court of Human Rights (Application No 39371/20).