

O. 58, r. 15

No. 1



SUPREME COURT

Record No: 2017/793 JR

Application for Leave to Appeal

Part I

The information contained in this part will be published. It is the applicant's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court

1. **Date of Filing:** 15th November 2019
2. **Title of the Proceedings:** Friends of the Irish Environment CLG

-v-

The Government of Ireland, Ireland and the Attorney General

3. **Name of Applicant:** Friends of the Irish Environment CLG

What was the applicant's role in the original case: Applicant

4. **Decision of Court of Appeal (where applicable):** N/A
5. **Decision of the High Court:**

Record No: 2017/793 JR

Date of Order: 22nd October 2019

Perfection Date: 25th October 2019

Date of Judgment: 19th September 2019

Names of Judge(s): Mr Justice MacGrath

Where this application seeks leave to appeal directly from an Order of the High Court has an appeal also been filed in the Court of Appeal in respect of that Order?

Yes No

6. **Extension of Time:** Yes No

If an application is being made to extend time for the bringing of this application, please set out concisely the grounds upon which it is contended time should be extended.

N/A

7. **Matter of general public importance:**

If it is contended that an appeal should be permitted on the basis of matter(s) of general public importance please set out precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance justifying appeal to the Supreme Court.

This section should contain no more than 500 words and the word count should appear at the end of the text.

- 1) The case involves a challenge to the legality of the National Mitigation Plan adopted under the Climate Action and Low Carbon Development Act 2015.
- 2) There is no dispute between the Parties in relation to the facts/science. National greenhouse gas (GHG) emissions are due to significantly increase over the period 1990-2020 and over the Plan's lifetime (2017-2022). The Respondent's Climate Change Advisory Council said:

"Irish [GHG] emissions are rising rather than falling. Ireland is completely off course in terms of achieving its 2020 and 2030 emissions reduction targets. Without urgent

action that leads to tangible and substantial reductions in [GHG] emissions, Ireland is unlikely to deliver on national, EU and international obligations and will drift further from a pathway that is consistent with transition to a low-carbon economy and society.

Ireland's [GHG] emissions for 2016, and projections of emissions to 2035, are disturbing."

- 3) The Parties accept the gravity of climate change, including the risks to current generations of severe, pervasive and irreversible impacts, including: significant mortality and morbidity; disruption of food production and water supply; damage to infrastructure and homes; irreversible biodiversity loss; increased incidence and severity of coastal inundation, storm surges and extreme weather events.
- 4) The case therefore raises the following matters of general public importance:
- 5) Is the Respondent entitled to adopt a Plan that will lead to increased GHG emissions over the period 1990-2020 and over the lifetime of the Plan (2017-2022) where it is on notice that increased emissions will lead to serious environmental impacts and fundamental rights breaches?
- 6) It is the Respondent's case that it is so entitled on the basis that it has a broad degree of discretion; that the Plan is non-justiciable on separation of powers grounds; and that it is entitled to postpone making emissions reductions to some point in the future.
- 7) It is the Applicant's case that the agreed science makes it clear that any delay in achieving substantial emissions reductions increases the risks of severe climate-related harms, and that any such delay is incompatible with the fundamental rights relied upon. Given the undisputed projected impacts of climate change, the issues raised by these proceedings are *ipso facto* issues of general public importance.
- 8) In addition, these proceedings raise a series of legal points of general public importance including for example:
 - The standard of review in a case seeking to challenge executive action on constitutional and European Convention on Human Rights (ECHR) grounds in an environmental context;
 - Whether an Applicant is entitled to raise fundamental rights grounds of objection to a decision in circumstances where the court concludes that the decision was *intra vires* the enabling Act and the Applicant has not challenged the constitutionality of that Act;

- Whether a court in this jurisdiction can make findings in respect of Articles 2 and 8 ECHR in the context of the harms associated with climate change where the European Court of Human Rights has not already ruled on the issue.

Word count - 493

8. Interests of Justice:

If it is contended that an appeal should be permitted on the basis of the interests of justice, please set out precisely and concisely, in numbered paragraphs, the matters relied upon.

This section should contain no more than 300 words and the word count should appear at the end of the text.

- 1) The Applicant is conscious that the constitutional architecture is such that the default position is an appeal to the Court of Appeal with, in appropriate cases, onward appeal to this Court. However, in this case there would, in the Applicant's view, be no benefit to an intermediate appeal. There are no issues of fact between the Parties. An intermediate appeal will not therefore serve to refine the factual issues further.
- 2) Nor, given the nature of the proceedings, are the legal issues likely to be narrowed in the course of an intermediate appeal. The legal issues have already been netted down and it is the Applicant's view that an additional hearing in the Court of Appeal is unlikely to advance that process.
- 3) Moreover, given the gravity of the issues at stake and the rights engaged (right to life; right to bodily integrity; right to an environment consistent with human dignity; right to respect for private and family life and home), it is likely that there will be a second appeal irrespective of a decision from the Court of Appeal.
- 4) Finally, according to the scientific consensus that is not in dispute, the only way to lessen the increase in future harms as a result of climate change is to reduce emissions rapidly and deeply, in line with the IPCC's advice. Delaying such emissions reductions will inevitably increase the risks of harm from climate change. As per the scientific consensus, this is particularly urgent. It is a case where, as per the Supreme Court in *Barlow*, "a clock in the real world is ticking" and the balance favours a direct appeal to this Court, "precisely because the downside of any delay which would be caused by two appeals would be disproportionate in the circumstances of the case."

Word count - 298 words

9. Exceptional Circumstances: Article 34.5.4:

Where it is sought to apply for leave to appeal direct from a decision of the High Court, please set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.

This section should contain no more than 300 words and the word count should appear at the end of the text.

- 1) The scientific consensus submitted by the Applicant and not disputed by the Respondent establishes unequivocally that time is of the essence in keeping global temperature rise below safe limits.
- 2) In its Fourth Assessment Report the IPCC in 2007 determined that in order to stay below 2°C, the so-called Annex I (developed) countries including Ireland would need to follow an emissions trajectory that would reduce emissions by 25-40% by 2020 and by 80-95% by 2050 (both compared to 1990). However, Ireland's emissions are projected to *increase* by 11-12% over this period and to increase over the life of the impugned Plan (2017-2022). Therefore, national emissions pursuant to the Plan are going in the opposite trajectory to the one required.
- 3) Merely meeting an emissions reduction target in 2050 is insufficient. To have any chance of limiting temperature rise to non-dangerous levels, intermediate emissions reduction targets **also** need to be met as these are points on a required *trajectory* in order to respect a carbon budget consistent with limiting global temperature increase to "*well below*" 2°C (the aim of the Paris Agreement).
- 4) It is the Applicant's case that the Respondent does not have the power, under the Act or otherwise, to pursue a course of action that infringes fundamental rights including *inter alia* the right to life, the right to an environment consistent with human dignity, and the right to respect for private and family life and home.
- 5) A requirement to first pursue an appeal in the Court of Appeal would incur delay and would heighten the risks of dangerous climate change. This is because there is a strong, consistent, almost-linear relationship between cumulative emissions and temperature increase, and because each unit of emissions worsens the risks of harm from climate change.

Word count – 294 words

10. Grounds of Appeal

Please set out in the Appendix attached hereto the grounds of appeal that would be relied upon if leave to appeal were to be granted.

11. Priority Hearing:

Yes No

If the applicant seeks a priority hearing please set out concisely the grounds upon which such priority is sought.

This section should contain no more than 100 words and the word count should appear at the end of the text.

- 1) The need to reduce GHG emissions urgently and the drastic consequences of failing to do so are central parts of the consensus accepted by the Parties.
- 2) The harms occasioned by elevated GHG emissions pursuant to the Plan and the risks of ecological damage and rights infringements are severe and in many cases irreversible.
- 3) Due to its high per capita emissions - third highest in the EU - Ireland contributes disproportionately to the creation of these harms.
- 4) Any delay in having the matter heard increases the risks of dangerous climate change and associated harms.

Word count - 96 words

12. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union please identify the matter and set out the question or questions which it is alleged it is necessary to refer.

N/A

Appendix

Notice of Appeal

1. **Title of the Proceedings:** Friends of the Irish Environment CLG -v- The Government of Ireland, Ireland and the Attorney General

2. **Grounds of Appeal:**

Please set out in numbered paragraphs the Grounds of Appeal relied upon if leave to appeal were to be granted.

- 1) It was wrong to construe the appropriate level of review as that applied in *O’Keeffe v An Bord Pleanála* “viewed through the prism of a *Meadows* type proportionality analysis” [Judgment (81)] in circumstances where the Applicant asserts breaches of constitutional rights (Relief 6) and rights under the ECHR as protected under the European Convention on Human Rights Act 2003 (Relief 7)(“Convention rights”) in consequence of the Respondent’s adoption of a Plan that fails to reduce GHG emissions in the short term as scientifically required to help avert dangerous climate change, instead allowing emissions to increase from 1990 to 2020 and over the life of the Plan (2017-2022). The Supreme Court in *AAA v Minister for Justice* held that “*the full extent of the interaction of proportionality in decision making with the duty to act reasonably [...] should await scrutiny in an appropriate case....*”. The present appeal is such a case, given the alleged violation of constitutional and Convention rights, and the relevance of international environmental norms (Article 9 of the Aarhus Convention) to that consideration.
- 2) It was wrong to conclude that the Applicant was not entitled to raise fundamental rights grounds of objection to the adoption of the Plan in circumstances where the court had concluded that the Plan was *intra vires* the Act and the Applicant had not challenged the constitutionality of the Act. [Judgment (119 and 121)] The judgment under appeal admits the possibility that the Court’s analysis may be incorrect on this point. [Judgment (122)]
- 3) It was wrong not to follow the decision of the Dutch Court of Appeal in *Urgenda*, which found that by failing to pursue a more ambitious GHG emissions reduction, the Dutch Government acted in breach of the ECHR, particularly Articles 2 (right to life) and 8 (right to respect for private and family life and home). [Judgment (135 et seq.)]
- 4) It was wrong to conclude that because the European Court of Human Rights has not addressed the application of Arts. 2 and 8 ECHR to harms caused by climate change, the domestic court cannot address the issues raised because “*it is not for the domestic court to declare rights under the Convention, but that this is a matter for the European Court.*” [Judgment (139 et seq.)] In this regard it was wrong to apply the principles enunciated in *McD v L* and *R(Ullah) v The Special Adjudicator* to this case, since *Ullah* no longer reflects the approach of the UK courts and *McD* addresses a different situation.

- 5) It was wrong to conclude, with regard to Articles 2 and 8 ECHR, that the Respondent did not exceed a margin of appreciation that the Court held the Respondent enjoys in the creation and adoption of the Plan. [Judgment (143 and 144)] There is clear authority that the ECHR concept of a margin of appreciation should not be applied in the domestic courts. A substantive review of the compliance of the Plan with Articles 2 and 8 ECHR is required.
- 6) It was wrong to fail to examine in any detail the alleged violation of Convention rights, as required under s.3 ECHR Act. Given this fact, it was not possible, and thus incorrect of the Court [at Judgment (145)], to reach any conclusion regarding proportionality.
- 7) While the Court was correct to conclude that constitutional rights are engaged by the case [at (133)], it was wrong to conclude, without analysis, that the making or approval of the Plan did not have the effect of infringing those rights [also at (133)].
- 8) It was wrong to divorce consideration of the discretion afforded to the Respondent as to how it should achieve the national transition objective and in respect of the adoption of the Plan [Judgment (97, 112, 113)] from the question of fundamental rights. The Respondent enjoys a considerable measure of discretion in these matters, but this does not extend to infringing such rights where the Act would allow a course of action that respects rights.
- 9) It was wrong to conclude that if, as the Applicant contends, the Plan is an inadequate response to climate change and does not propose to do enough, quickly enough, then that is not a legal deficiency or inadequacy of the Plan but of the provisions and objectives in the Act, and possibly national policy, which are not challenged. [Judgment (141)]
- 10) It was wrong to conclude that the Respondent had discharged its obligation to have regard to EU and international law obligations in considering the Plan for approval by virtue of simply referring to those obligations. [Judgment (113)] The judgment under appeal did not address the Applicant's specific, separate point re *Tristor* [para 7.14]: cogent reasons must be provided where a decision flies in the face of a matter to which regard must be had.
- 11) Regarding any suggestion that an appeal in this case will be rendered moot by time or by policy developments:
 - (a) the impugned Plan covers the years 2017-2022;
 - (b) each additional unit of CO₂ emitted into the atmosphere worsens climate impacts; thus all delay, be it before or after 2020, increases climate risks;
 - (c) the impugned Plan has not been replaced by the Respondent's Climate Action Plan 2019. The Respondent intends to bring forward a new Climate Action (Amendment) Bill that will *inter alia* establish a Long-Term Climate Strategy as "*a statutory successor to the National Mitigation Plan.*" This Amendment Bill has not yet materialised. The impugned Plan remains *the* National Mitigation Plan under the Act.

3. Order(s) sought

Please set out in numbered paragraphs the order(s) sought if the Appeal were to be successful.

1. An Order of *Certiorari* by way of application for judicial review quashing the decision of the Government (hereinafter referred to as “the Respondent”) to approve the National Mitigation Plan published on 19th July 2017.
2. An Order, if appropriate, remitting the said National Mitigation Plan to the Respondent for revision in accordance with the requirements of the Climate Action and Low Carbon Development Act 2015.
3. A Declaration that the said National Mitigation Plan as approved is not consistent with the requirements of the Climate Action and Low Carbon Development Act 2015.
4. A Declaration that it was unreasonable and/or disproportionate in all the circumstances for the Respondent to approve the said National Mitigation Plan.
5. A Declaration that the Applicant is entitled to a mechanism to review the said National Mitigation Plan for both its procedural and its substantive legality for the purposes of the Aarhus Convention which involves applying a degree and type of scrutiny different from that provided by the application of traditional Irish judicial review law.
6. A Declaration that the approval of the said National Mitigation Plan is unconstitutional and/or in breach of the Charter of Fundamental Rights in circumstances where a failure by the Respondent to adopt any or any adequate means to reduce greenhouse gas emissions as required to contribute to meeting the objectives of the UNFCCC, the Kyoto Protocol and the Paris Agreement will endanger the rights of the Applicant, the Applicant’s Members and the population at large under the Constitution and the Charter.
7. A Declaration that, in breach of the provisions of section 3 of the European Convention on Human Rights Act 2003, the Respondent has failed to perform its functions in a manner compatible with the State’s obligations under the provisions of the European Convention on Human Rights.
8. An Order providing for the costs of the application and, where appropriate, an Order pursuant to the Aarhus Convention and/or Part 2 of the Environment (Miscellaneous

Provisions) Act 2011 in respect of the costs of this application.

9. Such further or other Order as this Honourable Court deems appropriate.