A critical appraisal of *Friends of the Irish Environment v Government of Ireland*

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This case note examines the judgment of the Irish Supreme Court quashing Ireland's National Mitigation Plan and the earlier judgment of the High Court dismissing judicial review proceedings in *Friends of the Irish Environment v Government of Ireland*. It explores the contrasting legal reasoning of the two courts on the issues of standard of review, justiciability, compliance of the National Mitigation Plan with the Climate Action and Low Carbon Development Act 2015, *locus standi* and the constitutionality/compatibility of the National Mitigation Plan with the European Convention on Human Rights.

1 INTRODUCTION

On 31 July 2020, the Irish Supreme Court determined that the National Mitigation Plan, the main plank of the Irish government's climate mitigation policy, was unlawful and should be quashed.[1] The Supreme Court found that the National Mitigation Plan failed to comply with the requirements of the Climate Action and Low Carbon Development Act 2015 (the 2015 Act).[2] The unanimous decision of a seven-judge Supreme Court has been welcomed as a 'landmark judgment';[3] as 'a turning point for climate governance in Ireland';[4] and as a 'watershed moment'[5] for constitutional rights adjudication. This case note considers whether the Supreme Court's judgment is deserving of such accolades. It proceeds in four parts. Section 2 outlines the background to the case. Section 3 analyses the judgment of the High Court dismissing judicial review proceedings. Section 4 evaluates the Supreme Court's judgment quashing the Plan. Section 5 concludes.

2 BACKGROUND TO THE CASE

Inspired by the landmark *Urgenda* case in the Netherlands,[6] Friends of the Irish Environment (FIE) – a non-profit company limited by guarantee and a charity – sought to challenge the government's adoption of the National Mitigation Plan. The 2015 Act sets Ireland the objective of a 'national transition' to a 'low carbon, climate resilient, and environmentally sustainable economy' by 2050.[7]

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[1] *Friends of the Irish Environment CLG v Government of Ireland* [2020] IESC 49 (*FIE*, Supreme Court judgement).
[2] ibid paras 6.46–6.48.
[3] UN Special Rapporteur on Human Rights and the Environment, 'Amidst a Climate and Biodiversity Crisis, Hope Emerges: Friends of the Irish Environment Win Historic "Climate Case Ireland" in the Irish Supreme Court' (31 July 2020) <https://www.climatecaseireland.ie/amidst-a-climate-and-biodiversity-crisis-hope-emerges-friends-of-the-irish-environment-win-historic-climate-case-ireland-in-the-irish-supreme-court/>.
[4] Á Ryall, 'Supreme Court Ruling a Turning-Point for Climate Governance in Ireland' (Irish Times, 7 August 2020).
[5] D Kenny, 'The Supreme Court's Ruling on the Government's Climate Plan is a Watershed Moment' (thejournal.ie, 1 August 2020).
[6] At the time FIE launched its case in 2017, only the District Court's ruling had been given in the *Urgenda* case: (24 June 2015) ECLI:NL:RBDHA:2015:7196. See Climate Case Ireland, 'What Was the Inspiration of the Case?' <https://www.climatecaseireland.ie/climate-case/#about-the-case>.
[7] Section 3(1) of the Climate Action and Low Carbon Development Act 2015.

The National Policy position on Climate Change, which is meant to inform the national transition objective, envisaged 'an aggregate reduction in carbon dioxide emissions of at least 80% (compared to 1990 levels) by 2050 across the electricity generation, built environment and transport sectors; and in parallel, an approach to carbon neutrality in the agriculture and land-use sector, including forestry, which does not compromise capacity for sustainable food production.'[8]

With a view to achieving this transition, and similar to climate legislation elsewhere,[9] the 2015 Act requires the government to adopt a National Mitigation Plan every 5 years.[10] In 2017, the Irish government adopted its first National Mitigation Plan which the government had intended to cover the initial period between 2017 and 2022.

This Plan has faced a barrage of criticism. The Climate Change Advisory Council, an independent statutory body established under the 2015 Act,[11] has strongly criticized the government's poor climate performance and the lack of ambition in the Plan.[12] The Climate Change Advisory Council has described Ireland's current and projected emissions up to 2035 as 'disturbing',[13] and has cautioned that 'the National Mitigation Plan does not put Ireland on a pathway to a low-carbon transition'.[14]

In October 2017, FIE were granted leave by the High Court to challenge the government's adoption of the National Mitigation Plan by way of judicial review.[15] In January 2019, over the course of a four-day hearing, FIE argued that the adoption of the Plan: was manifestly unreasonable/disproportionate; was *ultra vires* the 2015 Act; violated the right to life, bodily integrity and an environment under the Irish Constitution; and was in breach of 2 and 8 of the European Convention on Human Rights (ECHR) via the statutory duty on organs of the State to perform functions compatibly with ECHR obligations.[16] As a remedy, FIE sought an order quashing the Plan and declarations that the Plan was manifestly unreasonable/disproportionate and in violation of the Irish Constitution and the ECHR.[17]

FIE highlighted how Irish emissions are projected to rise by approximately 10 percent between 1990 and 2020 and further increase by 2030.[18] Like the *Urgenda* case,[19] FIE emphasized the findings of the Intergovernmental Panel on Climate Change's (IPCC) 2007 Fourth Assessment Report (AR4) that developed countries were required to reduce emissions by at least a 25–40 percent compared with 1990 levels by 2020 (and 80–95 percent by 2050) to have a 66 percent chance of staying below 2°C.[20] FIE also emphasized the repeated endorsement of this emission reduction pathway by the European Union (and Ireland, by

[8] Department of Communication, Climate Action and the Environment, 'National Policy Position on Climate Action and Low Carbon Development' https://www.dccae.gov.ie/en-ie/climate action/publications/Pages/National-Policy-Position.aspx.
[9] See section 13 of the Climate Change Act 2008 (UK) and section 35 of the Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 (Scotland).
[10] Section 3(1)(a) and section 4(1)(b) of the Act 2015 (n7).
[11] Section 8 of the Act 2015 (n7).
[12] Climate Change Advisory Council (CCAC), *Annual Review 2017* (November 2017) i–iii; CCAC, *Annual Review 2018* (July 2018) iii–v.
[13] CCAC, *Annual Review 2018* (n12) iii.
[14] ibid 23. See also CCAC, *Annual Review 2017* (n 12) 21.
[15] 'Environmental Group Launches Court Challenge to Government's National Mitigation Plan' (The Irish Examiner, 23 October 2017).
[16] *Friends of the Irish Environment CLG v Government of Ireland* [2019] IEHC 727 paras 12–13 (*FIE*, High Court Judgement).
[17] Ibid para 12.
[18] CCAC, *Annual Review 2018* (n 12) iii; *FIE*, High Court Judgement (n 16) para 24.
[19] L Burgers and T Staal, 'Climate Action as Positive Human Rights Obligation: The Appeals Judgment in Urgenda v The Netherlands' (2018) 49 Netherlands Yearbook of International Law Springer 223, 234.
[20] *FIE*, High Court Judgement (n 16) para 19.

extension) through the United Nations Framework Convention on Climate Change (UNFCCC) process.[21] FIE acknowledged that the 25–40 percent emission reduction trajectory was not a legally binding target, but relied on it to allege that a National Mitigation Plan not geared to achieve substantial short term emission reductions created 'an unacceptable risk' of contributing to global warming in excess of 2°C.[22] This level of warming would be incompatible with the global temperature goal of 'well below 2°C' and 'pursuing efforts to limit temperature increase to 1.5°C above pre-industrial levels' enshrined in the Paris Agreement.[23] An even steeper emissions reduction trajectory than that outlined under AR4 is required to limit warming to 1.5°C.[24]

FIE also relied on the concept of carbon budgets and the near-linear relationship between cumulative emissions and global temperature rise, discussed in the IPCC's 2014 Fifth Assessment Report (AR5), to demonstrate that last-minute reductions would not suffice to keep global average temperature rise below 2°C.[25] In addition, FIE relied on AR5 and other peer-reviewed reports on the adverse impacts that climate change would have on humans and the environment.[26] These included Ireland's Environmental Protection Agency (EPA) reports, which detail Ireland's particular climate change vulnerabilities, including an increased risk of fatalities, injury and ill health.[27] Other risks highlighted by the EPA include disruptions to people's livelihoods from extreme weather events and damage to property in coastal areas as a result of more extreme storms and inundation from sea level rise.[28]

The crux of FIE's argument was that it is unlawful to adopt a Plan that is not designed to achieve significant emissions reductions in the short to medium term.[29] FIE claimed that the Plan was justiciable[30] and insisted that it was not requesting the court to order the production of a particular climate mitigation policy.[31] FIE argued that the adoption of the National Mitigation Plan by the government was *ultra vires* the 2015 Act, in part because the Plan failed to 'specify' how to achieve the national transition objective.[32] FIE also claimed that the adoption of a Plan that was not calculated to achieve short-term emission reduction targets, amounted to a violation of rights under the Constitution and the ECHR.[33]

In response, the government argued that Plan was non-justiciable.[34] The government pleaded that even if the Plan were amenable to review by the courts, a high degree of deference should be afforded to the government's discretion on climate action.[35] The government also asserted that, as an incorporeal body, FIE lacked standing to litigate personal and human rights

[21] ibid. The repeated endorsement of the 25–40 percent emission reduction target was also referred in *Urgenda*. See *Urgenda Foundation v Netherlands* (24 June 2015) ECLI:NL:RBDHA:2015:7196 paras 2.48–2.52; Urgenda's notice of appeal of 18 April 2017, paras 6.14–6.18. *Netherlands v Urgenda Foundation* (9 October 2018) ECLI:NL:GHDHA:2018:2591 para 11. *Netherlands v Urgenda Foundation* (20 December 2019) ECLI:NL:HR:2019:2006 paras 7.2.1–7.2.11.
[22] *FIE*, High Court Judgement (n 16) at para 64.
[23] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 55 ILM 740 art 2(1)(a).
[24] Intergovernmental Panel on Climate Change, *Special Report on Global Warming of 1.5 ºC* (2018).
[25] *FIE*, High Court Judgement (n 16) paras 7–9.
[26] ibid 27–30.
[27] The Environmental Protection Agency (Margaret Desmond, Philip O'Brien and Frank McGovern), *A Summary of the State of Knowledge on Climate Change Impacts for Ireland* (2016) 30.
[28] ibid 15 and 26.
[29] *FIE*, High Court Judgement, (n16) para 64.
[30] ibid paras 61, 65.
[31] ibid paras 65, 85.
[32] ibid para 12; see also sections 4(2)(a) and 4(2)(b) of the 2015 Act (n7).
[33] *FIE*, High Court Judgement (n16) paras 6, 26, 71–73.
[34] ibid para 38.
[35] ibid para 41.

under the Constitution and the ECHR.[36] The government further denied that there was any breach of the 2015 Act or constitutional and ECHR rights.[37]

3 THE HIGH COURT JUDGEMENT

On 19 September 2019, the High Court dismissed FIE's judicial review challenge finding that the Plan was *intra vires* the 2015 Act because the government enjoys a 'considerable latitude' under the 2015 Act in how it goes about achieving the national transition objective.[38]

3.1 Standard of review, justiciability and compliance with the 2015 Act

The level of deference that a court should observe in reviewing a decision of another branch of government or public body has long been a site of contention in Irish administrative law. Judicial review is concerned with the legality of an impugned decision and not necessarily its substantive merits. The traditional, highly deferential Irish approach – Influenced by the United Kingdom's (UK) *Wednesbury* unreasonableness test[39] – is that a court may only intervene on a substantive point in extreme cases where 'the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense'.[40] In more recent times, the Irish courts have accepted that a more stringent standard of review should apply where constitutional or ECHR rights are affected.[41] In such cases, the courts use a proportionality test which stipulates that 'the effects on or prejudice to an individual's right by an administrative decision [must] be proportional to the legitimate objective or purpose of that decision'.[42] The parameters of this more stringent proportionality standard, however, remain unclear.[43] The Supreme Court recently suggested a restrictive interpretation of the proportionality test so that it would operate within the confines of the traditional unreasonableness test, but stressed that the full interaction between proportionality and unreasonableness should be determined in a future case.[44] FIE asserted that the appropriate standard of review was a standalone proportionality test but claimed the decision to adopt the Plan was so unreasonable and lacking in proportion to the uncontested scientific evidence that the threshold for judicial intervention would be met either way.[45] FIE submitted that a freestanding proportionality test was to be preferred to meet the 'review of substantive legality' requirements laid out by the Aarhus Convention.[46] Article 9 of the Aarhus Convention requires access to review procedures for members of the public concerned to challenge procedural *and* substantive legality of environmental decisions, acts and omissions. FIE drew the High Court's attention to section 8 of the Environment (Miscellaneous Provisions) Act 2011, which requires 'judicial notice' to be taken of the Convention. FIE also relied on the finding of the Aarhus Convention Compliance Committee against the UK, which considered whether the *Wednesbury* unreasonableness test satisfied the

[36] ibid para 38.
[37] ibid para 42.
[38] ibid para 112.
[39] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[40] *State (Keegan & Lysaght) v Stardust Victims Compensation Tribunal* [1986] IR 642 ,658; *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39, 72.
[41] *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701 (see the judgements of Chief Justice Murray, Justice Denham (later Chief Justice) and Justice Fennelly).
[42] ibid 723.
[43] P Daly, 'Substantive Review in the Common Law World: *AAA v Minister for Justice* [2017] IESC 80 in Comparative Perspective' (2019) Irish Supreme Court Review 105.
[44] *AAA v Minister for Justice* [2017] IESC 80, para 26.
[45] *FIE*, High Court Judgement (n 16) 70.
[46] Ibid.

requirement to provide for a substantive review of legality under Article 9(2) of the Aarhus Convention.[47] The Compliance Committee stated that it was 'not convinced that the [*Wednesbury* unreasonableness test]… meets the standards for review required by the Convention as regards substantive legality'.[48] The Compliance Committee further stated that 'the application of a "proportionality principle" … could provide an adequate standard of review in cases within the scope of the Aarhus Convention'.[49] The Compliance Committee also elaborated on what it understood a proportionality test to entail: '[it] requires a public authority to provide evidence that the act or decision pursued justifies the limitation of the right at stake, is connected to the aim(s) which that act or decision seeks to achieve and that the means used to limit the right at stake are no more than necessary to attain the aim(s) of the act or decision at stake.'[50]

In *FIE*, the High Court took the view that the appropriate test was unreasonableness through the prism of proportionality,[51] without engaging in any in-depth analysis of the State's obligations under Article 9. The consequence of the High Court's endorsement of the highly deferential unreasonableness through the prism of proportionality test was that the government's decision to approve the Plan was not subject to a more intensive level of judicial scrutiny.

The High Court noted, after a protracted discussion on the functions of the organs of the State, that while the courts should not trespass on the executive's function, they should also be slow to decide that a matter was non-justiciable and insulated from review.[52] The High Court sidestepped the question as to whether the government's climate mitigation policies expressed in the Plan were justiciable.[53] Instead, the Court focused on the wording of the 2015 Act which, in its opinion, gives the government considerable latitude in achieving its 2050 national transition objective.[54] In light of this considerable discretion, the High Court was of the view that the National Mitigation Plan was *intra vires* the 2015 Act and it was not its role to 'second-guess the opinion of Government on such issues'.[55]

Given that justiciability has long been a stumbling block in climate litigation elsewhere,[56] the High Court's decision to avoid simply characterizing climate change as a non-justiciable policy matter was a positive result. Nevertheless, the High Court's treatment of the separation of powers is at striking variance to the Dutch courts' treatment of the same issue in *Urgenda.* As the Supreme Court of the Netherlands put it, notwithstanding the 'large degree of discretion' afforded to the government and parliament, 'it is up to the courts to decide whether, in taking their decisions, the government and parliament have remained within the limits of the law by which they are bound. Those limits ensue from the ECHR, among other things.'[57]

Surprisingly given its expertise, the High Court did not pay much heed to the Climate Change Advisory Council's criticisms of the Plan noting that such criticisms could not be 'determinative' of whether the government had breached its obligations under the 2015 Act.[58]

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[47] Case ACCC/C/2008/33 <https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/C33_Findings.pdf>.
[48] ibid para 125.
[49] ibid para 126.
[50] ibid.
[51] *FIE*, High Court Judgement (n 16) para 81.
[52] ibid para 94.
[53] ibid para 91, 94, 97, 112.
[54] ibid para 97, 112.
[55] ibid.
[56] J Peel and H Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015) 270–275, 308.
[57] *Urgenda*, Supreme Court Judgement (n21) paras 8.1-8.3.5 and in the summary of the decision.
[58] *FIE*, High Court Judgement (n 16) para 115.

The High Court rightly observed that the 2015 Act does not prescribe interim targets.[59] However, it then went on to find that that 'there is [nothing] in the Plan which resiles from the national transition objective'.[60] The logic underpinning this conclusion seemed to be that because the Plan makes some proposals in respect of achieving the far-off 2050 national transition objective, the Plan was *intra vires* the 2015 Act. However, this reasoning jarred with basic principles of climate science, in particular the concept of carbon budgets. The world's remaining carbon budget for a 66 percent chance of staying within 1.5 °C of warming is only about 420 gigatons of carbon dioxide.[61] The United Nations Environment Programme *Emissions Gap Report 2019* found that to stay within 1.5 °C of warming global emissions must fall by 7.6 percent every year from now until 2030,[62] but this model is premised on net-negative emissions in the second half of the century.[63] According to the news outlet *Carbon Brief*, limiting warming to below 1.5°C starting in 2019, without (as of yet under-developed) net-negative emissions, would require a 15 percent reduction each year through to 2040.[64] The longer action is delayed, the greater the emissions reductions will need to be.[65] This is before any consideration of the growing risk of climate tipping points,[66] which could all but deplete the 1.5 °C budget, and the fact that under international climate law countries' climate policies must reflect the 'highest possible ambition'[67] and that wealthy developed countries like Ireland are supposed to be 'taking a lead' on climate mitigation, 'by undertaking economy-wide absolute emission reduction targets'.[68]

By postponing rapid and substantial reductions and by failing to curb emissions in the short term, the Plan not only resiled from the national transition objective (delay may indeed make achieving such a transition *impossible*), it also resiled from the course of action Ireland ought to be taking (i.e. a rapid downward trajectory of emissions) if it were to take relevant scientific and technical advice, the objectives of international climate law and climate justice seriously.[69] Under the 2015 Act, before adopting a Plan, the government is also required to have regard to a range of criteria. These criteria include the objectives of international climate law, climate justice, the EPA's greenhouse gas emissions inventory, and relevant scientific/technical advice.

In finding that the Plan was *intra vires*, the High Court took the view that FIE was not entitled to bring a freestanding challenge on constitutional or ECHR grounds.[70] The High Court cited no case law to support this finding. Accepting that its analysis could therefore be incorrect, and the Plan might still be reviewable by way of a freestanding challenge, the High Court went on to consider the constitutional and ECHR aspects of the case.[71]

3.2 The constitutionality of the Plan and its compatibility with the ECHR

[59] ibid para 117.
[60] ibid para 116.
[61] Intergovernmental Panel on Climate Change, *Special Report on Global Warming of 1.5 ºC: Summary for Policy-makers* (2018), 12.
[62] United Nations Environment Programme (UNEP), *Emissions Gap Report 2019* (UNEP 2019) xx.
[63] ibid 23.
[64] Z Hausfather, 'UNEP: 1.5C Climate Target "Slipping out of Reach"' (Carbon Brief, 26 November 2019).
[65] United Nations Environment Programme (UNEP), *Emissions Gap Report 2019* (UNEP 2019) xx.
[66] TM. Lenton et al, 'Climate Tipping Points: Too Risky to Bet against' (2019) 575 Nature 592.
[67] Paris Agreement (n 23) art 4(3).
[68] ibid art 4(7).
[69] See section 3(2) and section 4(7) of the 2015 Act (n7).
[70] *FIE*, High Court Judgement (n 16) para 121.
[71] Ibid para 122.

The High Court first dealt with the issue of FIE's standing to litigate personal fundamental rights. The government had not disputed FIE's standing to challenge the Plan as *ultra vires* the 2015 Act, but had contested FIE's standing, as an incorporeal body, to challenge the Plan on constitutional and human rights grounds.[72] The High Court restated the general rule of practice that to have standing a plaintiff's rights or interest have to be 'adversely affected or in real and imminent danger',[73] stressing that the question of standing can be resolved by considering FIE's interests rather than its rights.[74] The High Court also endorsed the position[75] that:

> *a plaintiff should not be prevented from bringing proceedings to protect the rights of others, where without otherwise being disentitled, it had a* bona fide *concern and interest, taking into account the nature, extent, importance and application of the right which it sought to protect or invoke, and where the plaintiff was not a cranky, meddlesome or a vexatious litigant … where it was clear that a particular public act could adversely affect a plaintiff's constitutional, European, or [ECHR] rights, or society as a whole, a* more relaxed approach to standing might be called for *in order for the court to uphold that duty and to vindicate those rights.*[76]

The High Court recognized the *bona fides* of FIE, and acknowledged that it enjoyed *locus standi*, particularly in the context of an environmental judicial review.[77] In light of the importance of the constitutional and environmental issues raised and the fact that these issues affected both FIE's members and the public at large, the High Court was 'satisfied … that [FIE had] established that it has *locus standi*'.[78]

The High Court's common-sense approach to standing was not only consistent with the more liberal approach taken by the Irish Courts in public interest cases generally, but also showed a commendable recognition of the difficulties climate change poses for traditional legal doctrines like standing.[79] A rigid approach to standing could deny individual plaintiffs and groups access to the courts to litigate climate-related harms and has been a major obstacle for litigants in rights-based climate litigation in other jurisdictions.[80]

Unfortunately, this pragmatic approach did not extend to the High Court's assessment of whether there had been a breach of the constitutional rights to life, bodily integrity, and an environment consistent with human dignity. In its earlier case law, the High Court identified the right to an environment consistent with human dignity as a right that was not expressly provided for, but that could be recognized as a latent right under the Irish Constitution.[81] The

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[72] ibid para 77.
[73] *Cahill v Sutton* [1980] IR 269, 286.
[74] *FIE*, High Court Judgement (n16) para 129. See *Mohan v Ireland and the Attorney General* [2019] IESC 18; *Cahill v Sutton* (n 73) 286.
[75] See *Digital Rights Ireland Ltd v Minister for Communications* [2010] 3 IR 251.
[76] *FIE*, High Court Judgement (n 16) para 131 (emphasis added).
[77] ibid para 132.
[78] ibid.
[79] P Alston, V Adelmant and M Blainey, 'Litigating Climate Change in Ireland' (2020 fc) Journal of Human Rights Practice.
[80] ibid. For examples of cases in which standing has been a major stumbling block see *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and Others*, Federal Administrative Court of Switzerland, Section 1 Judgment A-2992/2017 of 27 November 2018; *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and Others*, Federal Supreme Court of Switzerland, Public Law Division I Judgment 1C_37/2019 of 5 May 2020; *ENVironnement JEUnesse v Canada*, Superior Court of Québec, 500-06-000955-183, 11 July 2019. PLEASE CONFIRM CORRECT CITATIONS FOR SWISS/CANADIAN CASE LAW
[81] *Merriman v Fingal County Council* [2017] IEHC 695 [264]. For a discussion of this unenumerated right to an environment, see O Kelleher, 'The Revival of the Unenumerated Rights Doctrine: A Right to an Environment and

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High Court held, with very little analysis, that it could not be said that making or approving the Plan had the effect of breaching rights or that the Plan put these rights at risk.[82] In other words, there was no causal link between the government's approval of the Plan that would do little or nothing to reduce emissions and the alleged breach of constitutional rights. Given that the impacts of climate change on fundamental rights are now well documented,[83] and that the proposals under the Plan are not designed to achieve substantial emissions reductions, it seems problematic that the Court summarily dismissed the alleged violation of constitutional rights.

Regarding the alleged breaches of Articles 2 and 8 of the ECHR, the High Court's attention was drawn to the 2018 Dutch Court of Appeal judgment in *The State of the Netherlands v Urgenda Foundation.*[84] Here, the Dutch Court of Appeal upheld the judgment of the Hague District Court in *Urgenda Foundation v State of the Netherlands*,[85] that the Dutch State had acted negligently and unlawfully in implementing climate mitigation measures that 'only' pursued emissions reduction targets in line with what was required by the EU's overall reduction target of a 20 percent reduction by 2020 (compared to 1990).[86] However, the Court of Appeal found that the Dutch State had also breached the ECHR[87]– a breach that has since been confirmed by the Dutch Supreme Court.[88]

Based on the so-called mirror principle, the High Court opted not to follow the approach of the Dutch Court of Appeal *vis-à-vis* the application of the ECHR to climate harm.[89] The mirror principle provides that the duty of domestic courts to 'take account'[90] of the jurisprudence of the European Court of Human Rights (ECtHR) involves 'keep[ing] pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.[91] The Supreme Court had already established the ECHR is not directly applicable in Irish law[92] and

its Implications for Future Climate Change Litigation in Ireland' (2018) 25 Irish Planning and Environmental Law Journal 97.

[82] *FIE*, High Court Judgement (n 16) para 133.

[83] See 'Report of the Special Rapporteur on Extreme and Human Rights: Climate Change and Poverty' UN Doc A/HRC/41/39 (17 July 2019) 65; 'Report of the UN Special Rapporteur on Human Rights and the Environment on a Safe Climate' UN Doc A/74/161 (15 July 2019); M Bachelet, 'Open-Letter from the United Nations High Commissioner for Human Rights on Integrating Human Rights in Climate Action' (21 November 2018) <https://www.ohchr.org/Documents/Issues/ClimateChange/OpenLetterHC21Nov2018.pdf>; The Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities, 'Joint Statement on "Human Rights and Climate Change"' (16 September 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998>; M Bachelet, 'Bachelet Welcomes Top Court's Landmark Decision to Protect Human Rights from Climate Change' (20 December 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25450&LangID=E>.

[84] *Urgenda*, Court of Appeal Judgement (n21).

[85] *Urgenda*, District Court Judgement (n21). See M Peeters, '*Urgenda Foundation and 886 Individuals v. The State of the Netherlands*: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (2016) 25 Review of European, Comparative and International Environmental Law 215.

[86] *Urgenda*, District Court Judgement (n21) para 4.93.

[87] *Urgenda*, Court of Appeal Judgement (n21) para 73. J Verschuuren, '*The State of the Netherlands v Urgenda Foundation*: The Hague Court of Appeal Upholds Judgment Requiring the Netherlands to Further Reduce Its Greenhouse Gas Emissions' (2019) 28 Review of European, Comparative and International Environmental Law 94.

[88] *Urgenda*, Supreme Court Judgement (n21).

[89] *FIE*, High Court Judgement (n 16) para 139.

[90] See section 2 of the Human Rights Act 1998 and section 4 of the European Convention on Human Rights Act 2003.

[91] *R. (Ullah) v. Special Adjudicator* [2004] 2 AC 323 para 20; [91] *McD (J) v L (P) & M (B)* [2009] IESC 81 para 100

[92] *McD* (n91) para 57. Section 4 of the ECHR Act (n90) requires 'judicial notice' to be taken of the ECHR and decisions of the ECtHR.

that 'the European Court has the prime responsibility of interpreting the Convention' and for reasons of consistency, a national court 'should not adopt interpretations of the Convention *at variance* with the current Strasbourg jurisprudence'.[93] Because the ECtHR has not yet ruled on the applicability of its Article 2 and 8 case law to harm arising from climate change, the High Court in *FIE* took the view that 'it was not for domestic courts to declare rights under the [ECHR]'.[94]

This finding is problematic. There was no reason why the High Court in *FIE* could not have interpreted the 2015 Act in light of the existing case law of the ECtHR on environmental harm, to reach a decision on the compatibility of the government's adoption of the Plan with its Convention obligations. This line of analysis would even have been consistent with the approach previously advocated by the Irish Supreme Court. In this respect, it is also interesting to note that the President of the ECtHR recently commended the Dutch Supreme Court in *Urgenda* for its application of the ECHR to climate-related harm.[95] It also bears mentioning here that 'a retreat from the mirror principle' is already evident in the UK.[96]In recent times, the UK Supreme Court has repeatedly acknowledged that it would be 'absurd' to have to wait for the ECtHR to make an authoritative decision almost directly on point before a domestic court could find a violation of the Convention.[97] The UK Supreme Court has also found that where there is no Strasbourg authority directly on point, it falls to the domestic court to extract principles expressed in the case law of the ECtHR, even if only indirectly relevant, and apply them to the case before it.[98] It was anticipated that on appeal the Supreme Court would correct the High Court's restrictive interpretation of the mirror principle. In other words, that the Supreme Court would have confirmed that Irish courts are not precluded from ruling on an issue in advance of the Strasbourg Court but simply precluded from reaching a decision 'at variance' with the jurisprudence of the ECtHR. In the alternative, it was hoped that, in recognition of the chilling effect the mirror principle is having on Convention rights adjudication in Ireland, the Supreme Court would consider following the UK approach and moving away from the mirror principle altogether.

In February 2020, FIE were granted permission to appeal the decision of the High Court directly to the Supreme Court.[99] In June 2020, a panel of seven Supreme Court judges heard the case over two days. Oral submissions were made in relation to justiciability, compliance with the 2015 Act, the standing of an nongovernmental organization (NGO) to litigate fundamental rights, whether constitutional rights (including the right to an environment) were violated by the adoption of the Plan, and whether the government breached its obligations under the ECHR by adopting this Plan.[100]

4 THE SUPREME COURT JUDGEMENT

4.1 Justiciability and compliance with the 2015 Act

The Supreme Court's unanimous judgment found that the issue of whether the National Mitigation Plan complied with the requirements of the 2015 Act was a matter of law, and that

[93] *McD* (n 91) para 104 (emphasis added).
[94] *FIE*, High Court Judgement (n16) para 139.
[95] See LA Sicilianos 'Speech of the President of the ECtHR on the Occasion of the Opening of the Judicial Year' (31 January 2020) <https://www.echr.coe.int/Documents/Speech_20200131_Sicilianos_JY_ENG.pdf>.
[96] *Moohan, Petitioner* [2014] UKSC 67, paras 104–105.
[97]*Rabone and another v Pennine Care NHS Trust* [2012] UKSC 2, para 112; Moohan (n96) para 104.
[98] *Surrey County Council v P (Equality and Human Rights Commission intervening)* [2014] UKSC 19, para 62; *D v Commissioner of Police of the Metropolis* [2018] UKSC 11, para 77.
[99] *Friends of the Irish Environment v Government of Ireland* [2020] IESCDET 13.
[100] *FIE*, Supreme Court judgement (n 1) paras 5.1–5.60.

it had jurisdiction to determine whether the Plan complied with the requirements of the 2015 Act.[101]The Supreme Court reasoned that the Irish Parliament had enacted legislation detailing at least some of the elements of a compliant National Mitigation Plan, while leaving some other elements as policy decisions for the government of the day.[102] Once the policies of a particular government were enshrined in legislation (here, the 2015 Act) they became law, not policy, and could be reviewed by the courts.[103]

The Supreme Court's approach to justiciability chimes with the approach to the separation of powers and climate change litigation in other jurisdictions. For example, after a survey of climate litigation in the United States, Canada, England and the Netherlands, the High Court of New Zealand noted that courts have not considered climate change to be an area completely outside the scope of judicial review.[104] Civil and common law courts alike have consistently rejected claims by governments that, because climate change is a global problem and because the governments' responses involves the weighing of social, economic and political factor, climate policies are non-justiciable.[105] At a domestic level, the justiciability finding is significant because it signals to the government that all future National Mitigation Plans adopted under the 2015 Act can also be subject to judicial review.

On the *ultra vires* issue, the Supreme Court focused on the government's statutory obligations under section 4(2)(a) of the 2015 Act, which states that a National Mitigation Plan must 'specify' how the government proposes to achieve the national transition objective. Adopting both a literal and purposive approach to statutory interpretation, the Supreme Court noted that a 'fundamental obligation of a compliant Plan' is that it *specifies* in 'real and sufficient detail' how the government intends to meet the national transition objective by 2050.[106] The Supreme Court noted that the objectives of the 2015 Act are to provide for public participation and transparency so that any 'interested member of the public' can decide whether the National Mitigation Plan is 'effective and appropriate' for meeting the national transition objective by 2050.[107] In assessing whether the National Mitigation Plan was 'sufficiently specific'[108] the Supreme Court, unlike the High Court, stated that 'significant weight' should be attached to the Climate Change Advisory Council's criticisms of the Plan, even if the government was not bound by those findings.[109] The Supreme Court also looked at examples of policies proposed to achieve the national transition objective, such as the agriculture chapter of the Plan, and characterized them as 'excessively vague' and 'aspirational'.[110] Echoing the wording of Article 9 of the Aarhus Convention, the Supreme Court said 'it is worth noting that [it was proposing] that the Plan be quashed on grounds which are *substantive rather than purely procedural*'.[111] The significance of these judicial *dicta* for future environmental judicial review is that they seem to signal a willingness to engage in a more substantive form of judicial review under the *ultra vires* doctrine. This is likely to be an important weapon in the arsenal of future litigants in environmental cases. The Supreme Court concluded by stating that the National Mitigation Plan fell 'a long way short of the sort of specificity required' to comply with the 2015 Act.[112] The Supreme Court indicated that, given it was adopted in 2017, a compliant Plan

[101] ibid para 6.27.
[102] ibid.
[103] ibid para 6.25.
[104] *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, 133. See Alston (n79).
[105] ibid.
[106] *FIE*, Supreme Court judgement (n 1) para 6.36.
[107] ibid para 6.37.
[108] ibid para 6.32.
[109] ibid para 6.41.
[110] ibid para 6.43.
[111] ibid para 6.49 (emphasis added).
[112] ibid para 6.46.

should have in fact been a 33-year mitigation plan (covering the period up to 2050) rather than a five-year one, albeit one which is likely to be adjusted every five years in light of developments in knowledge, data and technology.[113] It follows that any future National Mitigation Plan will have to clearly spell out the pathway to achieving the national transition objective if it is to survive judicial scrutiny.

4.2 The fundamental rights issues with the Plan

Having determined that the National Mitigation Plan was *ultra vires*, the Supreme Court acknowledged that it did not have to consider the rights-based issues.[114] However, the Supreme Court did consider two issues on the basis that they could be of 'continuing importance' to future cases: whether NGOs can have standing to litigate personal constitutional and ECHR rights and the existence of an unwritten constitutional right to an environment.[115]

On the standing issue, the Supreme Court emphasized that there is no *actio popularis* in Irish constitutional law[116] and referred to general rule in *Cahill v Sutton*.[117] The Supreme Court found that in circumstances where FIE did not itself enjoy personal rights contended for[118] under the Constitution and the ECHR, it did not *prime facie* have standing to maintain this aspect of the case.[119] The Supreme Court acknowledged that there are exceptions and that standing rules can be relaxed where there are 'weighty countervailing considerations'.[120] The issue then became whether the case could come within these exceptions.[121]

The Supreme Court referred to two important cases in this respect. The first was a case from the late 1980s in which an NGO was deemed to have standing to seek an injunction restraining the publication of information relating to abortion services on the basis that it had a '*bona fide* concern and interest' and the nature of this constitutional right engaged (the right to life of the unborn) meant there could not be a victim to sue in respect of that right.[122] The second case from the mid-2000s concerned an NGO that was granted standing to challenge the constitutionality of systemic deficiencies in Irish prison conditions on the basis that:

> Cahill v Sutton *allows… for the relaxation of personal standing rules where those prejudiced may not be in a position to adequately assert their constitutional rights. It does not restrict this category of persons to the living, the dead or the unborn … provided the relevant person or body is genuine, acting in a* bona fide *manner, and has a defined interest in the matter in question.*[123]

The Supreme Court in *FIE* expressed the view that Irish standing rules are 'flexible but not infinitely so'[124] and characterized the exceptions as being limited to situations 'where there would be a real risk that important rights would not be vindicated unless a more relaxed attitude

[113] ibid para 6.20.
[114] ibid para 6.49.
[115] ibid.
[116] ibid para 7.4. See also *Mohan v Ireland* (n 74).
[117] *FIE*, Supreme Court judgement (n 1) para 7.9. See *Cahill v Sutton* (n 73) 286.
[118] *FIE*, Supreme Court judgement (n 1) para 7.20. It was on this basis the Supreme Court distinguished *Digital Rights Ireland* [2010] 3 IR 251.
[119] *FIE*, Supreme Court judgement (n 1) para 7.5.
[120] ibid para 7.9. See *Cahill v Sutton* (n 73) 285.
[121] *FIE*, Supreme Court judgement (n 1) para 7.5.
[122] *SPUC v Coogan* [1989] IR 734, 742.
[123] *Irish Penal Reform Trust Ltd and Others v Governor of Mountjoy Prison and Others* [2005] IEHC 305, para 30.
[124] *FIE*, Supreme Court judgement (n 1) para 7.19.

to standing were adopted'.[125] The Supreme Court was critical of the fact that an individual plaintiff had not been joined to the proceedings to surmount the standing requirement and expressed the view that a risk of cost exposure for an individual if unsuccessful was not a good enough excuse.[126] The Supreme Court concluded that the present case was a 'far cry' from the cases in which the courts had previously departed from the ordinary standing rules.[127]

These *dicta* potentially create legal uncertainty. It is difficult to see how a case, taken by an NGO with a *bona fide* interest in environmental protection and climate action and strong track record in environmental litigation, challenging a systemic environmental issue that affects the wider community is all that different from these earlier cases. Like those earlier cases that recognized an exception to the general standing rules, those whose interests are prejudiced by the government's inadequate response to climate change are 'the most vulnerable and disadvantaged members of our society'.[128] Standing rules are there to prevent the circumvention of the political process through the courts and to ensure that disputes ventilated in the court are not just hypothetical.[129] Given the urgent, far-reaching and unprecedented threat runaway climate change poses to a panoply of rights, it is questionable whether the nominal addition of an individual plaintiff would have made the constitutional rights arguments canvassed any more concrete. This aspect of the judgment shows little sensitivity to the challenges that climate change poses to the standing doctrine. It is also difficult to square these *obiter* remarks on standing with Ireland's prohibitive legal costs regime, where an unsuccessful litigant can be pursued for often eye-wateringly high legal costs of the winning side.[130] The risk of an adverse costs ruling is widely recognized as a major deterrent for litigants in Ireland and is only compounded by the limited availability of protective cost orders and civil legal aid for strategic environmental litigation.[131] By shutting down FIE's rights-based arguments on procedural grounds, the Supreme Court passed up an important opportunity to clarify the ECHR issues arising out of the High Court's decision – which by the same token are likely to be of 'continuing importance' in future cases.

The Supreme Court did seize upon the opportunity to clarify that an unwritten constitutional right to an environment consistent with human dignity (or as the Supreme Court preferred to characterise it a right to a healthy environment) could not be 'derived' from the text or the structure of the Constitution.[132] The existence of such a right had been strongly contested by government in the High Court[133] and on appeal.[134] The Supreme Court's rationale was that 'as thus formulated'[135] the right to a healthy environment was 'either unnecessary addition (if it does not go beyond the right to life and the right to bodily integrity) or to be impermissibly vague (if it does)'.[136] The Supreme Court's hostility towards a derived right to

[125] ibid para 7.21.
[126] ibid para 7.22.
[127] ibid.
[128] *Irish Penal Reform Trust* (n 123) para 34.
[129] *Cahill v Sutton* (n 73) 282–284.
[130] For an overview of cost issues in Irish environmental judicial review, see Á Ryall, 'Challenges and Opportunities for Irish Planning and Environmental Law' (2018) 25 Irish Planning and Environmental Law Journal 104. See also Public Interest Law Alliance (PILA), 'FAQ on Protection Costs Orders' (PILA, July 2016); and O 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).
[131] Kelleher (n130).
[132] *FIE*, Supreme Court judgement (n 1) paras 8.3–8.6.
[133] *FIE*, High Court judgement (n 16) para 73.
[134] *FIE*, Supreme Court judgement (n 1) para 5.4.
[135] ibid para 9.5. By this the Supreme Court meant as an unwritten 'derived' right as opposed to a right expressly provided for under the Constitution.
[136] ibid para 8.14.

an environment also stemmed from the fact that in most countries that have such a right, it has been formally adopted or inserted through a formal constitutional amendment.[137]

The difficulty with giving a 'green interpretation' to existing rights like the right to life and bodily integrity is that there are many situations where the impacts of environmental harm on humans require preventative or precautionary measures or the impacts are confined to nature.[138] Given that the right recognized by the High Court was quintessentially anthropocentric in nature, it is certainly arguable that the right, as conceived by the High Court, was redundant because existing constitutional rights could have been used to challenge the validity of the government's Plan (had a litigant with standing taken the case).[139] However, the Supreme Court's position on the vagueness of a right to a healthy environment does not hold water because fundamental rights are by their nature vague and subject to evolution in light of prevailing ideas.[140]

The judgment leaves two doors open for developments in rights-based environmental litigation. The first is an opportunity to enshrine a right to a healthy environment in the Irish Constitution by a popular referendum. Over the last five years, Ireland has passed two landmark progressive constitutional referenda on same sex marriage and abortion rights. Both referenda were preceded by constitutional assemblies which appear to have improved voter understanding and turnout[141] and helped persuade politicians that these constitutional reforms were 'politically saleable'.[142] The proposed Citizens' Assembly on Biodiversity Loss[143] could provide an forum for a national dialogue on constitutionalizing a right to a healthy environment, which also encompasses a protection for nature based on its own intrinsic worth.[144] The second development is that the doors to the superior courts have been left open for individuals, rather than incorporated bodies like NGOs, to bring systemic rights-based climate cases. The Supreme Court was clear that constitutional rights and obligations could have a role to play in future environmental cases, even if these cases were to involve complex matters that touch upon policy.[145] In other words, systemic rights-based climate cases are not off the cards in Ireland. The Supreme Court signalled that if an individual were to take a similar case, it would in those circumstances have to consider whether the right to life an bodily integrity[146] were violated by unambitious climate policies.[147] It hinted that the constitutional guarantees in respect of the ownership of natural resources and state property, property rights and the special

[137] ibid para 8.12.
[138] D Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2011) 35.
[139] Kelleher (n130).
[140] ibid.
[141] J Suiter, 'Lessons from Ireland's Recent Referendums: How Deliberation Helps Inform Voters' (LSE British Politics and Policy Blog, 10 September 2018) <https://blogs.lse.ac.uk/politicsandpolicy/irish-referendums-deliberative-assemblies/>.
[142] E Carolan, 'Ireland's Citizens' Assembly on Abortion as a Model for Democratic Change?: Reflections on Hope, Hype and the Practical Challenges of Sortition' (IACL-AIDC Blog, 28 November 2018) <https://blog-iacl-aidc.org/blog/2018/11/28/irelands-citizens-assembly-on-abortion-as-a-model-for-democratic-change-reflections-on-hope-hype-and-the-practical-challenges-of-sortition-6j5rw>; F de Londras, 'The Citizens' Assembly and the Disciplining of Activist Demands' (IACL-AIDC Blog, 26 November 2018) <https://blog-iacl-aidc.org/blog/2018/11/26/the-citizens-assembly-and-the-disciplining-of-activist-demands>.
[143] Fianna Fáil, Fine Gael and Green Party, 'Programme for Government – Our Shared Future' <https://static.rasset.ie/documents/news/2020/06/draft-programme-for-govt.pdf> 42.
[144] Kelleher (n130).
[145] *FIE*, Supreme Court judgement (n 1) paras 8.14, 8.16.
[146] In *State (C.) v Frawley* [1976] IR 365, 372, the Irish High Court described the right to bodily integrity as extending to 'prevent an act or omission of the Executive which, without justification, would expose the health of a person to risk or danger'.
[147] *FIE*, Supreme Court judgement (n 1) para 8.14.

position of the home could be of particular salience to future environmental cases.[148] Other constitutional provisions that could also serve as an 'interpretive aid'[149] to support meaningful environmental protection by the State and private actors in future cases include the rights of the child and the directive principles of social policy.[150] However, these avenues for future cases will only be viable if steps are taken to improve access to the courts. Legislative reforms to standing rules to support rather than lock NGOs with expertise and *bona fide* interest in environmental protection out of the courts and the removal of cost barriers for environmental public interest litigation would be a good place to start.

5 CONCLUSION

The Supreme Court's judgment in *FIE v Government of Ireland* can fairly be described as a decisive moment for climate action in Ireland. It has made clear that climate policy is amenable to judicial review and that deferring rapid and substantial emission reductions is not compatible with the Ireland's national transition objective. It has also left many doors open for future environmental public interest litigation, including more substantive forms of review under the *vires* doctrine and potential for constitutional rights-based arguments. For now, uncertainty remains over the strategic value of litigating ECHR rights in future systemic climate cases in Ireland in the absence of a ruling from the ECtHR. However, this stumbling block for systemic rights-based climate litigation in Ireland might be overtaken by events in Strasbourg because a climate case has recently been filed be with the ECtHR.[151] In the meantime, efforts are now needed to improve access to the superior courts in environmental public interest cases and to ensure that that the judgment is translated into climate policies that ensure fair, rapid and substantial emission reductions. This ground-breaking judgment is clearly just the beginning.

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[148] ibid para 8.17.
[149] Alston et al (n79).
[150] See *Brownfield Restoration Ireland Ltd v Wicklow County Council* [2017] IEHC 456, para 307; and Alston et al (n79).
[151] *Youth for Climate Justice v Austria, et al* (2020) <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_12109_complaint.pdf>. It is also worth noting that having now exhausted all domestic remedies the individual litigants in the Swiss climate case may file an application with the ECtHR and have until early 2021 to make a decision on whether to file an application.