THE SUPREME COURT

[Appeal No: 205/19]

Clarke C.J.
Irvine P.
O'Donnell J.
MacMenamin J.
Dunne J.
O'Malley J.
Baker J.

Between/

Friends of the Irish Environment CLG

Applicants/Appellants

and

The Government of Ireland, Ireland and the Attorney General

Respondents

Judgment of Mr. Justice Clarke, Chief Justice, delivered the 31st of July, 2020.

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1. Introduction

1.1 Climate change is undoubtedly one of the greatest challenges facing all states. Ireland is no different. There are many issues at the level of both policy and practice as to how the problems associated with climate change can, or should, be tackled. However, it is important to emphasise that these proceedings are concerned with whether the Government of Ireland ("the Government") has acted unlawfully and in breach of rights in the manner in which it has adopted a statutory plan for tackling climate change. It is important at the outset to emphasise that the role of the courts generally, and of this Court in particular, is confined to identifying the true legal position and providing appropriate remedies in circumstances which the Constitution and the laws require.

1.2 The applicants/appellants ("FIE") contend that the Government, in the plan in question, has failed adequately to vindicate rights which are said to be guaranteed by either or both of the Constitution and the European Convention on Human Rights ("ECHR or "the Convention"). It is also said that the Plan is *ultra vires* the relevant legislation. On that basis proceedings were brought in the High Court seeking a range of reliefs, to which it will be necessary to refer in more detail in due course. For the reasons set out in a judgment of MacGrath J. (*Friends of the Irish Environment CLG v. The Government of Ireland* [2019] IEHC 747), the High Court dismissed FIE's proceedings. From that dismissal, FIE sought leave to appeal directly to this Court.

2. The Grant of Leave to Appeal

2.1 By determination dated 13th February 2020 (*Friends of the Environment CLG v. The Government of Ireland & The Attorney Genera*l [2020] IESCDET 13) this Court granted FIE leave to appeal the decision of the High Court for the following reasons:-

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> "8. The applicant and the respondents accept that there exists a degree of urgency in respect of the adoption of remedial environmental measures. There is no dispute between the parties as to the science underpinning the Plan and the likely increase in greenhouse emissions over the lifetime of the Plan. Further, the parties accept the gravity of the likely effects of climate change.
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> 9. It is unlikely, therefore, that the questions of law or the factual issues will be further refined as a result of a hearing before the Court of Appeal.
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> 10. The availability of judicial challenge to the legality of the Plan by the Government, the standard of such review if adoption of the Plan is justiciable as matter of law, and the broader environmental rights asserted by the applicant to arise under the Constitution, from the European Convention of Human Rights and/or from Ireland's international obligations are issues of general public and legal importance."

2.2 As noted, it is usually appropriate, even in cases which might meet the constitutional threshold for leave to appeal to this Court, that an initial appeal is considered by the Court of Appeal, where narrowing and clarification of the issues of importance can take place. However, in the present proceedings the parties did not dispute the relevant science, meaning that these issues were unlikely to require further refinement. Furthermore, the urgency which attends the resolution of this matter was determined by this Court to meet the additional criteria necessary for a leapfrog appeal.

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2.3 At a very general level it may be said that the issues arising on this appeal relate solely to standing, to justiciability, to the legality of the adoption of the National Mitigation Plan ("the Plan"), the correct standard of judicial review if the adoption of the Plan is justiciable and the broader environmental and other rights asserted by FIE to arise under the Constitution and the ECHR.

2.4 The background to these proceedings is, of course, the science surrounding climate change. While the dispute between the parties (insofar as it did not relate to legal issues) focused on the measures which FIE suggest the Government is legally required to take in order to alleviate climate change, both under the Constitution, the ECHR and under statute, the broad underlying scientific evidence as to the causes of, and problems created by, climate change was not in dispute. It may be necessary, in the context of some of the issues raised, to deal with that scientific evidence in more detail, but for present purposes it is appropriate to set out a brief broad overview of the agreed position as tendered in evidence before the High Court and as accepted by the trial judge.

3. A Brief Overview of the Science

3.1 Clearly one of the principal aspects of the factual background to these proceedings concerns the current scientific understanding of climate change itself, the consequences of a continuation of current trends and of the type of measures which may need to be put in place to minimise the extent of the rise in temperatures. There would not appear to have been any dispute before the High Court about that scientific analysis and, as it provides the backdrop to the legal issues which need to be explored, it is appropriate to set it out first.

3.2 Since the beginning of the Industrial Revolution, mankind has generated and consumed energy on a large scale, predominantly through the combustion of fossil

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fuels. This process produces carbon dioxide and releases it into the atmosphere, where it remains for hundreds of years. Carbon dioxide, along with other contributory greenhouse gases, traps the heat emitted by the earth in the atmosphere, in a process known as the greenhouse effect. The greenhouse effect produces a warming effect on global temperatures. The greater the quantity of carbon dioxide emissions, the more global warming becomes exacerbated. The climate system shows a delayed response to the emissions of greenhouse gases, meaning that the full warming effect of gases which are emitted today will only become apparent some 30 to 40 years in the future.

3.3 Studies have indicated that there is a consistent and almost linear relationship between carbon dioxide emissions and projected global temperature increases over the next 80 years. Climate change is already having a profound environmental and societal impact in Ireland and is predicted to pose further risks to the environment, both in Ireland and globally, in the future. While the challenges of climate change will affect all sectors of society, it is acknowledged that the impact will be felt most severely in developing countries. Future impacts of climate change are predicted to include further increases in global temperatures, rising sea levels and an increase in extreme weather events, such as episodes of flooding and drought. There are also reported increased risks of mortality and morbidity, as climate related extremes may place food systems at risk, lead to water shortages and the emergence of new pests and diseases, while also contributing to significant changes in the ecosystems of many plants and animals. The more global warming proceeds to a level which is 2°C higher than typical temperatures at the beginning of the Industrial Revolution, the greater are such risks.

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3.4 There is, therefore, a general consensus in climate science that, if the effects of global warming are to be mitigated or reduced, the rise in global temperatures should not exceed 2°C above pre-industrial levels. However, MacGrath J. in the High Court in this case noted that, since the Paris Agreement 2015, which forms part of the United Nations Framework Convention on Climate Change (1992)**,** scientific thinking has moved in the direction of a lower figure which is in the region of 1.5°C above pre-industrial levels. In October 2018, The Hague Court of Appeal in the Netherlands in *The State of the Netherlands v. Urgenda Foundation* (C/09/456689/ZA) found that global warming levels were approximately 1.1°C higher than they were at the beginning of the Industrial Revolution. It will be necessary to refer to the decision of the Hoge Raad (the Supreme Court of the Netherlands) on a cassation appeal in that case in due course. Scientific evidence suggests that, in order to meet either the 2°C temperature rise target, or the more ambitious 1.5°C target, net negative carbon dioxide emissions are required at some point during this century. Achieving net negative emissions will require the use of costly carbon dioxide removal technologies, such as bioenergy and extensive reforestation. Many of the measures necessary to reduce emissions are still in the development stages and much of the technology remains untested. While it is widely acknowledged that urgent action is required in order to address climate change, urgency is assessed differently within the global community.

3.5 The threats posed by climate change have been set out in greater detail in both the High Court judgment and in the affidavits sworn by Mr. Lowes, director of FIE, on its behalf and Mr. Frank Maughan, principal officer in the Department of Communications, Climate Action and Environment, on behalf of the Government. As

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noted earlier, it may be necessary to refer further to that evidence in respect of some of the issues arising.

3.6 It can, however, safely be said that the consequences of failing to address climate change are accepted by both sides as being very severe with potential significant risk both to life and health throughout the world but also including Ireland. While the severity of that situation is not disputed, a number of commentaries on the likely impact of global warming were established in evidence before the High Court. To take one example, it is possible to look at a summary of the impact on Ireland which was prepared by the Environmental Protection Agency. That summary referred to an increased risk from extreme weather likely to cause death, injury, ill health and disrupted livelihoods. It also referred to the risk that hundreds of square kilometres of coastal land could be inundated due to sea level rises. In similar vein, there was a reference to more extreme storm activity which would have the potential to bring the devastation of storm surges to the coast of Ireland. There was further reference to a likely increase in heat related mortalities and morbidity, together with a further risk in food-borne disease and infectious diseases. Reference was also made to a probable increase in cases of skin cancer and potential mental health effects.

3.7 At the oral hearing, counsel for FIE also drew attention to so-called tipping points. The scientific consensus suggests that, in general terms, rising greenhouse gas concentrations are likely to give rise to a slow evolution of temperature and precipitation with a certain delay. However, it is also accepted that, in addition, climate change may lead to more abrupt changes. There is as yet no consensus as to the precise level of climate change which is likely to trigger many of the tipping points in question. However, there are strong suggestions that even a level of global warming limited to below 2ºC may give rise to some important tipping elements. It

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has, for example, been suggested that the tipping point for marine ice sheet instability in the Amundsen Basin of West Antarctica may already have been crossed. While, therefore, it is not possible to predict the precise temperatures at which irreversible adverse events will occur, there does appear to be a consensus that the risk of such tipping points occurring is materially increased as temperatures themselves rise. It would certainly seem to me on the evidence that the practical irreversibility and significant consequences of reaching some of the tipping points in question adds a further imperative to the early tackling of global warming. That being said, it is, of course, necessary to again emphasise that this Court is not concerned with policy issues but rather with the lawfulness or otherwise of the Plan.

3.8 The central factual issue between the parties concerns aspects of the Plan. It is, therefore, appropriate to briefly outline the Plan with particular reference to the central contention made on behalf of FIE as to the manner in which it is said that the Plan breaches guaranteed rights.

4. <u>The Plan</u>

4.1 The Plan was adopted under the provisions of the Climate Action and Low Carbon Development Act, 2015 ("the 2015 Act"). The Plan is stated to be required, under s.3(1) of the 2015 Act, to be for the purpose of enabling the State to pursue and achieve the objective of transitioning to a low carbon climate resilient and environmental sustainable economy by the end of 2050. That objective is described as the National Transitional Objective ("NTO").

4.2 The Plan was published in draft form and a period of consultation followed. That consultation was required by s.4(8) of the 2015 Act. The procedure for the adoption of the Plan by the Government is specified in s.4 of the Act. The Minister for the Environment, Community and Local Government ("the Minister") is required

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to submit a plan for consideration by the Government which can then approve the plan either in the form submitted or subject to such modifications as the Government thinks appropriate (see s.4(1) and s.4(4)). However, the Minister is required, before submitting the Plan, to publish a draft and to have regard to any submissions made in respect of that draft. A significant number of observations from interested parties was received and considered by the Minister before the Plan was finalised.

4.3 While it may be necessary to go into some of the details of the Plan in due course, for present purposes it is sufficient to indicate that a central contention on the part of FIE draws attention to the fact that the Plan envisages an increase, rather than a decrease, in emissions over the initial period of the Plan while, at the same time, committing to achieving the objective of zero net carbon emissions by 2050. FIE describes this as the trajectory of the Plan. A key argument advanced by FIE suggests that the level of global warming which will have come about by 2050 will be dependent not only on whether zero net emissions have been achieved by that time, but also the way in which the pattern of emission reduction has developed in the intervening years. It is said that it is the total amount of emissions which drive climate change and that an initial increase in emissions, even if the ultimate target of zero net emissions by 2050 is achieved, will inevitably lead to a greater total volume of emissions in the period to 2050 thus it is said, not contributing sufficiently to the aim of reducing warming. There is a dispute between the parties as to whether any, or any sufficient, basis is given in the Plan for adopting this initial target which allows for an increase in emissions.

4.4 For its part, the Government suggested that FIE had mischaracterised the Plan as representing a stand-alone measure. Rather it was suggested that the Plan should be viewed, as the trial judge held, as being a living document whose measures are not

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set in stone and do not represent a once and for all response to the need for urgent action to tackle climate change. The Government argued that FIE had failed, in its submissions, to engage with this issue and with that finding of the trial judge.

4.5 As already noted, while there is significant scientific consensus both on the causes of climate change and on the likely consequences, there is much greater room for debate about the precise measures which will require to be taken to prevent the worst consequences of climate change materialising. FIE accepted that, in determining the measures required, the Government enjoys a very wide degree of discretion. However, it was said that, in adopting in the Plan, measures which will allow for an increase in emissions over the lifetime of the Plan, the Government had acted unlawfully.

4.6 In the context of the Plan, it is also worth mentioning at this stage that a range of measures have been adopted at European Union level designed to meet the EU's international obligations. Those measures do allow for a degree of what is called effort sharing. For example, the 2009 Effort Sharing Decision (Decision no. 406/2009/EU) set individual member states targets for certain types of emissions primarily associated with heating in buildings, transport and agriculture. It is not, however, said that Ireland is at this stage in breach of any of its international climate change obligations whether arising under EU law or under international treaties. Whether that will necessarily remain the case in the future will, of course, depend both on the trajectory of Irish emissions but also on any evolution in EU or other international treaty obligations.

4.7 Against that very brief account of both the science and the central thrust of FIE's challenge to the Plan, it is necessary to turn to the issues which arise on this appeal and the manner in which those issues were addressed by the trial judge.

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5. The Issues and the High Court Judgment

5.1 Having regard to the judgment of the High Court and the written submissions filed by the parties on this appeal, it is useful to set out the issues which require to be resolved on this appeal. In addition, both parties helpfully filed respective documents setting out the headings under which it was said the issues arise. While not identical to either document, what follows appears to be one convenient way of categorising the issues. It is proposed, at this stage, simply to set out a brief account of the central contentions of the parties on those issues so as to identify the mattes which may require to be explored further in order to resolve this appeal.

(a) The Rights Involved

5.2 FIE contended that it is entitled to rely on rights, said to be guaranteed both under the Constitution and under the ECHR, to put forward its claim that the Plan fails to vindicate the rights concerned such that the adoption of the Plan is unlawful.

5.3 So far as the Constitution is concerned, FIE placed reliance on the right to life and, in particular, on what is said to be the obligation of the State to seek to protect persons against a future threat to life arising from climate change. Likewise, FIE placed reliance on the constitutional right to bodily integrity, as also guaranteed by the Constitution. It was again said that the consequences of climate change will significantly impact on the health and bodily integrity of persons thus infringing that right.

5.4 There are, however, issues between the parties as to the extent of a third right said to be engaged. The Government raised a question over whether it can be said that there is a so-called unenumerated right to an environment consistent with human dignity. The High Court has recognised such a right in the judgment of Barrett J. in *Friends of the Irish Environment v. Fingal County Council* [2017] IEHC 695. The

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question of whether such a right is recognised by the Constitution has not been the subject of any decision of this Court as yet. In addition, it may be necessary to consider whether a more appropriate characterisation of those rights which have been identified in the jurisprudence of the Irish courts, even though not expressly referred to in the text of the Constitution, may be to describe such rights as "derived rights". Such a re-characterisation would not mean that any of the rights described as unenumerated rights in the jurisprudence would no longer be recognised. The term "unenumerated rights" is not inaccurate for it describes rights which are not expressly referred to in the text of the Constitution itself.

5.5 However, it may be necessary to consider, for the purposes of determining whether the asserted right to the environment exists and, if so, the parameters of any such right, the basis on which a court should analyse whether such a right is recognised by the Constitution. It may be that the term "derived rights" more accurately reflects the true nature of those rights which do not find expression in the text of the Constitution itself but may, nonetheless, be accepted as being recognised by the Constitution by virtue of representing aspects of rights positively identified in that text as interpreted in accordance with the terms of the Constitution as a whole or deriving from the values either expressly referred to or inherent in the structure of the Constitution.

5.6 For the purposes of the case, the trial judge was willing to accept that there was an unenumerated constitutional right to the environment consistent with human dignity. However, the trial judge concluded that, even if FIE was found to have standing to engage the asserted constitutional rights, he was not satisfied that the making or approval of the Plan could be said to put these rights at risk.

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5.7 It may be necessary, therefore, to address the question, insofar as it may be relevant to the resolution of this appeal, of the existence or extent of the right to the environment sought to be invoked.

5.8 In relation to the ECHR, FIE placed reliance on the rights guaranteed by both Art. 2 and Art. 8. In particular, attention is drawn to the requirements in the European Convention on Human Rights Act, 2003 ("the 2003 Act"), which places a positive obligation on all organs of the State (with the exception of the courts) to perform their functions in a manner compatible with the State's obligations under the Convention. On that basis it was said that decisions of the Government in relation to the Plan can be assessed to determine whether, in reaching any such decisions, the Government had met its obligations under the 2003 Act to properly act in a way which protects Convention rights.

5.9 That the rights sought to be relied on are recognised in the ECHR is, of course, clear. However, the precise way in which those rights may impact on legitimate decision-making in the field of climate change is disputed. There would not appear to have been any judgments, as yet, of the ECtHR directly in this area. On that basis the Government argued that national courts should not anticipate but rather should follow the ECtHR.

5.10 However, FIE drew attention both to the fact that ECtHR, in *Fadeyeva v. Russia* (App. No. 55723/00) (2005) 45 E.C.R.R. 10, considered rights in the context of pollution and did so while acknowledging that it was not for that Court to determine exactly what needed to be done, but rather to assess whether Russia had dealt with the issues under consideration with what was described as due diligence and proper consideration for all interests involved. The extent to which it may be appropriate for this Court to consider the precise application of the ECHR in an area

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which has not as yet been the subject of a determination by the ECtHR is another matter which may need to be considered.

5.11 On the other hand, the Government argued that the jurisprudence of the ECtHR in environmental pollution cases is confined to situations where the pollution concerned "directly and seriously" creates an imminent and immediate risk to guaranteed rights. In addition, the Government suggested that the relevant jurisprudence of the ECtHR makes clear that a state is entitled to maintain a "fair balance" in respect of all relevant interests. On that basis the Government argued that the existing jurisprudence of the ECtHR does not give guidance on the proper application of the Convention in relation to what was said to be an admittedly very difficult environmental challenge but one with global reach rather than relating to an immediate pollutant with direct effects. It follows that it may be necessary for this Court to consider what may be said to be the established application of the Convention in the context of claims that environmental issues may infringe convention rights.

5.12 In the context of the rights under the ECHR said to be engaged, there were significant references in the submissions of both parties to the decision of the Hoge Raad (Supreme Court of the Netherlands) in *Urgenda* (*the State of the Netherlands v. Stichting Urgenda* (ECLI: NL: HR: 2019: 2007). In that case the Dutch Supreme Court considered the scope of protection provided by Arts. 2 and 8 of the ECHR and considered it appropriate, as a matter of Dutch law, and having regard to the obligations arising under the ECHR as recognised in Dutch law, to make an order requiring the Dutch state to take measures against climate change.

5.13 FIE placed significant reliance in its submissions on *Urgenda* and suggested that this Court should consider the reasoning of the Supreme Court of the Netherlands

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as being persuasive as to the proper application of the ECHR to climate change. It was argued by FIE that, if the relevant interpretation of the Convention as determined by the Dutch Supreme Court is correct, then it would follow, on the facts, that Ireland is also in breach of its obligations under the Convention.

5.14 The Government argued that this Court should not consider the judgment of the Hoge Raad as being persuasive. This was done on a number of bases. First, it was said that, echoing a point already mentioned, national courts should exercise care in considering the decisions of other national courts under the Convention in circumstances where the ECtHR itself has not addressed the issue concerned. It was pointed out that a subscribing state to the Convention does not enjoy the right to bring proceedings before the ECtHR to suggest that an interpretation placed on the Convention by its own national legal system, which was unfavourable to the State, was incorrect.

5.15 It addition, the Government suggested that FIE has not established what were said to be necessary requirements in order that any significant weight might be paid to the judgment of a national court on convention issues. It was said that the precise status of the ECHR in Dutch law has not been established and it was further suggested that the Netherlands operates a monist system whereby, unlike the position in Ireland, international treaties can affect domestic law without the necessity of legislation. Furthermore, it was argued that FIE had not explained the manner in which any relevant provisions of Dutch law might have affected the Court's decision. There is, therefore, a significant issue between the parties as to the weight, if any, which this Court should attribute to the decision in *Urgenda*. In addition, and to the extent that this Court concludes that it should attach some weight to that decision, it might obviously be necessary for the Court to consider the reasoning of the Dutch Supreme

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Court for the purposes of determining whether that reasoning assists in assessing the issues which arise under Irish law in these proceedings.

5.16 As an overarching argument in respect of the various rights based claims made by FIE, the Government suggests that, contrary to FIE's submission, the fact that it accepts "the science" does not mean that it must also be taken to accept that the legal consequences of that science involve the sort of actionable breach of rights for which FIE contends. While not presented in this way, it might be said that the Government's argument suggests that three questions require to be addressed, being:-

(a) Is there a legal rights based obligation to take action;

(b) If so, what is the extent of that obligation; and

(c) In the light of any such obligations identified does the Plan comply with same.

5.17 The trial judge concluded that FIE had failed to establish that the Plan had breached rights under either Article 2 or Article 8 of the ECHR. Having considered the decision in U*rgenda,* in which the Dutch Government's failure to meet more ambitious levels of reduction of GHG emissions was held to violate the rights guaranteed by those articles, the trial judge noted that no evidence had been presented before the High Court relevant to the constitutional order of the Netherlands, particularly in relation to the separation of powers in that jurisdiction. The trial judge distinguished *Urgenda* from this case on the basis that no particular statutory framework had been impugned.

5.18 The trial judge then went on to consider the importance of the decision of this Court in *McD (J) v. L (P) & M (B)* [2009] IESC 81, in which it was held that it is not the role of a domestic court to declare rights under the Convention, but that this is rather a matter for the ECtHR. In the absence of any authority opened before the

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High Court to suggest that the ECtHR had previously dealt with this issue, the trial judge adopted the dicta of Fennelly J in *McD* to the effect that an Irish court cannot anticipate further developments in the interpretation of the Convention by the ECtHR in a direction not yet taken by that Court. As such, the High Court concluded that the adoption of the Plan could not be said to be incompatible with the rights guaranteed by Articles 2 and 8 of the ECHR.

5.19 While there are, as noted, some issues in relation to the precise scope of certain of the rights asserted, many of the contentious issues which may require resolution on this appeal stem from the extent to which the existence of those rights and any potential breach of them can provide a proper legal basis for the type of challenge which FIE has mounted in these proceedings.

(b) Can the Claim Be Maintained?

5.20 Under this general topic a number of sub-issues arise having regard to the arguments put forward by the Government which suggest that FIE's claim cannot properly be maintained in these proceedings. The following issues were relied on by the State.

(b) (i) Justiciability

5.21 The Government argued that, having regard to the separation of powers, the issues raised are matters of policy which are within the exclusive remit of the Oireachtas and the Executive and not within the scope of questions which can properly be the subject of litigation.

5.22 The Government argued that FIE's case represents a "merits based disagreement with government policies". It was accepted by the Government that questions concerning compliance with the provisions of the 2015 Act, concerning the

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procedures adopted in formulating the Plan, are justiciable. However, it was argued that the substantive provisions of the Plan itself involve policy choices made by the Government. It may be that the need to make such choices is mandated by the 2015 Act itself. However, it was argued that, on a proper construction of the Act, the requirements in that regard do not alter the fact that the Government is still required to make policy choices.

5.23 The trial judge held that the doctrine of the separation of powers was central to the arguments on the issue of justiciability in the present case. In the course of a lengthy discussion on the distinct functions of the organs of state, the trial judge observed that the jurisdiction of the courts can only be exercised in deciding on justiciable matters and that the courts have no general supervisory or investigatory functions. While the courts have a right and duty to interfere in the activities of the Government in circumstances where the constitutional rights of individual litigants are threatened, the trial judge considered that it is not for the courts to assume a policy-making role. Therefore, the courts should exercise caution when interfering in the exercise of Executive power, particularly where the aim is the pursuit of policy.

5.24 The trial judge held that, while the courts should be slow to find a matter or issue non-justiciable, they should also recognise that, due to the nature, extent or wording of a statutory obligation, it may be necessary to afford a wide margin of discretion to the Executive in discharging its obligations. In the present case, the trial judge considered that both the 2015 Act and the Plan were heavily oriented towards policy considerations and, therefore, even if it the Plan were justiciable, a considerable margin of discretion must be afforded to the Government in the Plan's preparation and approval, as well as in deciding how it should achieve its wider

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obligations under the 2015 Act. It was held by the trial judge that it is not the function of the courts to second-guess the Government in these matters.

5.25 In the light of justiciability issues raised by the Government, and at least significantly accepted by the trial judge, it is necessary for this Court to consider the extent to which, having regard to the separation of powers, it is open to the Court to judicially review those policy choices in the context of the argument put forward on behalf of FIE that some of the choices made, and in particular the emission reduction trajectory, are said to impermissibly interfere with rights guaranteed under the Constitution and the ECHR. In that context it is worth recalling the point made earlier to the effect that FIE accepted that the Government has a wide discretion as to the methods to be adopted to reduce emissions. However, the principal focus of the factual contention made by FIE centres on the fact that the Plan envisages an increase in emissions in the short term although seeking by 2050 to meet the NTO and also the National Climate Policy Position of April 2014. This policy envisages that there should be an aggregate reduction in carbon dioxide (CO_2) emissions of at least 80% (compared to 1990 levels) by 2050 across the electricity generation, built environment and transport sectors. It is also envisaged that there should be, 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.

(b) (ii) Standing

5.26 Insofar as the claims made by FIE involve an assertion of whatever rights may be established under either or both of the Constitution and the ECHR, the Government questioned the standing of FIE to bring such claims reliant on those rights.

5.27 In substance the Government argued that what FIE seeks to maintain in these proceedings is a so-called *actio popularis* which form of action, it was said, does not

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exist in Irish constitutional law. In that regard, reliance is placed on the decision of this Court in *Mohan v. Ireland and the Attorney General* [2019] IESC 18. On that basis it was said that only a person who is affected in reality or as a matter of fact may bring such a challenge.

5.28 In addition, it was argued by the Government that FIE, being an incorporated association, cannot assert either constitutional or convention rights which it does not and, it was said, could not, ever enjoy, such as the right to life or the right to bodily integrity. The Government submitted that, to allow FIE to maintain these proceedings would be to recognise a *jus tertii* contrary, it was argued, to the decision of this Court in *Cahill v. Sutton* [1980] I.R. 269. In addition, it was argued that none of the possible exceptions recognised in *Cahill v. Sutton* apply.

5.29 So far as rights under the ECHR are concerned, similar points were made. It was said that the Convention does not permit an *actio popularis* or complaints *in abstracto* and that likewise the ECtHR would not grant standing to corporate bodies for violation of rights which they do not have.

5.30 FIE noted in its written submissions that the High Court did not hold against it on the question of standing and suggested that the Government was precluded from raising the standing question by virtue of the fact that the Government did not seek to cross appeal. The Government did include the standing issue in the section of the respondent's notice at the application for leave stage which is headed "additional ground on which this decision should be affirmed".

5.31 However, without conceding that the point was invalid, FIE indicated in providing further clarification on foot of a request for such clarification, made under Practice Direction S.C. 21, that it was not pursuing the point. Thus the issue of standing is before the Court. I should, however, say that, in my view, the position

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adopted by the Government on this question was correct. The current procedure requires an application for leave to cross appeal only where the respondent to the appeal wishes to suggest that this Court should give a different result to the case, rather than that this Court might come to the same result by a different route. These proceedings were dismissed by the High Court. There was, therefore, nothing for the Government to appeal against. The procedures allow for the specification by a respondent of any alternative route by which the same result could be achieved. This is precisely what the Government did by indicating that it would urge on this Court that the proceedings could be dismissed on standing grounds as well.

5.32 Be that as it may, it is also important to note that the standing argument raised by the Government did not apply to the *ultra vires* part of the case for it was accepted that FIE had standing to raise those issues. There were, however, other procedural questions concerning that aspect of the case to which it will shortly be necessary to turn.

5.33 On the other issues, FIE argued that the Court should recognise the standing of FIE notwithstanding its corporate nature and the fact that it seeks to enforce rights whose infringement, if such be established, do not affect it in any particular way. It was said that this may be done by analogy with the position adopted by this Court in cases such as *SPUC Ltd v. Coogan* (No 1) [1989] I.R. 734 and *Irish Penal Reform Trust v. Minister for Justice* [2005] IEHC 305.

5.34 The trial judge concluded that FIE did enjoy standing in the particular circumstances of this case. MacGrath J. first considered the approach to standing set out by this Court in its decision in *Mohan* where it was held that, in Irish constitutional law, in order for a plaintiff to enjoy standing to challenge the validity of legislation on the grounds that it infringes their constitutional rights, a claimant must

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demonstrate that his or her interests have been adversely affected, or are in imminent danger of being adversely affected, by the operation of the legislation in question. The trial judge followed the observations of O'Donnell J. at para. 11 of *Mohan*.

5.35 In line with the approach taken by this Court in *Mohan*, MacGrath J. held that, in order for a potential plaintiff to establish that his or her interests had been adversely affected by legislation, it was sufficient that the court be satisfied that the plaintiff was affected in a real way in his or her life. Where a plaintiff successfully demonstrates to the court that the legislation they seek to challenge has had a real effect their life, they have standing to claim that the same legislation infringes on their constitutional rights. While the trial judge acknowledged that the term "interests" was deliberately intended by the court in *Mohan* to be broader than the term "rights", he was nevertheless willing to consider the nature of the constitutional rights which are alleged to have been infringed when determining whether FIE enjoyed standing, as, in his view, it was in this context only that one can consider whether interests relevant to the case being made have been affected.

5.36 The trial judge then moved on to consider *Digital Rights Ireland Ltd v. Minister for Communications* [2010] 3 I.R. 251, in which McKechnie J (in the High Court) had suggested that a more relaxed approach to standing might be taken where it was clear that a particular public act could adversely affect a plaintiff's constitutional or ECHR rights, or society as a whole. In these circumstances, McKechnie J held that a potential plaintiff should not be precluded from bringing proceedings to protect the rights of others.

5.37 Adopting the dicta of McKechnie J in *Digital Rights Ireland*, the trial judge concluded that, as FIE sought to raise important issues of a constitutional nature which affected both its own members and the public at large, as well as significant

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issues in relation to environmental concerns, in the interests of justice, FIE did have standing in the present proceedings.

(b) (iii) The Nature of the Challenge

5.38 The Government questioned the entitlement of FIE to maintain proceedings of this type. The first basis on which this challenge was made was the Government's submission that the absence of any challenge to the 2015 Act itself precluded FIE from obtaining the reliefs sought.

5.39 The Government argued that the challenge to the validity of the Plan amounts to a collateral attack on the 2015 Act itself. FIE argued that its complaint was directed towards the Plan rather than the 2015 Act. It is, of course, the case that FIE also challenged the legality of the Plan on the basis of a contention that it is *ultra vires* the 2015 Act. The issues under that heading will be briefly identified in succeeding paragraphs. Clearly if the Plan were found to be *ultra vires* the 2015 Act, then it would be unnecessary to consider the collateral challenge issues. However, the Government's argument was that, in the event that it successfully persuades this Court that the Plan is not *ultra vires* the 2015 Act, then it would follow that a challenge to the Plan, without also challenging the constitutionality of the legislation, would necessarily amount to a collateral challenge.

5.40 In this context it may be necessary for the Court to consider the extent to which it may be permissible to view the range of options open to a person or body under a statute as being circumscribed by the need to vindicate rights. On one view, it might be said that legislation would have to be interpreted in a constitutional manner, following *East Donegal* principles, so that, on its proper construction, the range of options available to a decision maker might be constrained in any event by the necessity to interpret the legislation in a manner which did not infringe rights. If that

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view were to prevail then, of course, an exercise of any discretion conferred on the decision maker in a manner which impermissibly infringed rights would itself be *ultra vires*. On the other hand, if it could be said that the relevant legislation could not be interpreted in a manner which would constrain the range of options open, then it might be argued that, by allowing a discretion which could be exercised in a manner which breached rights, the legislation itself was unconstitutional thus grounding an argument based on collateral attack.

5.41 The trial judge held that if, as FIE contends, the Plan is an inadequate response to, and does not propose to do enough, quickly enough, to combat the effects of climate change, then that is not a legal deficiency or inadequacy of the Plan, but of the provisions and objectives outlined in the 2015 Act and also possibly of national policy. The trial judge noted that the provisions of that act were not challenged by FIE and he therefore made no observation on them.

5.42 Second, it was argued by the Government that what were described as "fundamental rights-based relief" of the type sought by FIE is not available under the provisions of the European Convention on Human Rights Act, 2003 ("the 2003 Act").

5.43 Under this heading the Government argued that FIE had failed to identify the precise way in which the 2003 Act permits reliance to be placed on the Convention rights asserted. It was submitted that FIE sought to rely directly on the ECHR which, it was argued, is impermissible. FIE contended that the Government is under an obligation to perform its functions in a manner compatible with the State's obligations under the Convention and that it was, therefore, open to FIE to assert that the Government is in breach of the 2003 Act by virtue of what is contended to be a failure to comply with convention obligations in making the Plan.

(c) *Ultra Vires*

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5.44 FIE contended that the Plan is *ultra vires* the 2015 Act. The Government contested that assertion.

5.45 A series of detailed arguments were put forward in the written submissions under this heading. FIE drew attention to a number of what were said to be mandatory requirements under the 2015 Act such as those specified in s.3(1) and s.4(2)(a), (b) and (d). In addition, FIE drew attention to a range of obligations placed on the Government whereby the statute requires that regard be had to certain matters under, for example, s.3(2)(a) – (d). It is said that the Government, in adopting the Plan, failed to comply with each of the relevant obligations.

5.46 In substance the Government argued in its written submissions that each of the mandatory requirements were met and that there is no basis, on the facts, for suggesting that the Government did not have regard to the matters specified in the sections in question. The resolution of those issues would require a consideration of the precise way in which it is, respectively, argued that the relevant statutory provisions either were or were not complied with.

5.47 However, at the oral hearing a further dispute emerged between the parties concerning the scope of the appeal which was permitted, having regard to the grounds of appeal specified in the application for leave to this Court filed by FIE. With one narrow exception, it was suggested by the Government that FIE had not pursued an appeal to this Court in respect of many of the individual assertions by virtue of which it was argued that the Plan was *ultra vires*. On that basis, the Government contended that FIE was confined to a very narrow ground in respect of the *vires* argument. FIE disputed that contention on a number of bases to which it will be necessary to refer in due course. It follows, therefore, that it will be necessary to consider the scope of the appeal on *ultra vires* grounds which is properly before this Court.

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5.48 It should also be noted that the justiciability argument, to which reference has already been made, was put forward by the Government in respect of the *ultra vires* aspect of the case as well as the rights based elements. It follows, therefore, that while standing was not an issue in respect of these questions, justiciability was.

5.49 The trial judge concluded that the Plan did not breach any of the relevant sections of the 2015 Act and was, therefore, intra vires. In reaching this conclusion, MacGrath J. bore in mind both the standard of review which he considered should be applied to the Plan and the wide latitude to be afforded to the Government in making and adopting the Plan under the 2015 Act.

5.50 MacGrath J. found nothing in the Plan which, in his view, could be said to be inconsistent with the statutory aim to transition to a low carbon, climate resilient and environmentally sustainable economy by 2050 as required by the NTO. He also held that the Plan made clear proposals in respect of the state's pursuit of the NTO by 2050 and, therefore, it could not be said to be inconsistent with s. 4 (2) of the 2015 Act. Furthermore, the trial judge found that the Plan did specify policy measures which, in the opinion of the Government, would be required in order to manage greenhouse gas emissions, consistent with s. 4(2)(b) of the Act. It was also held that the Plan had fulfilled the obligations under s. 3(2) of the 2015 Act, as a result of which the Government was required to have regard to existing EU law and international agreements. Finally, the trial judge held that the plan contained clear sectoral analysis and that responsibilities had evidently been allocated to relevant government ministers under s. 4(2)(d) of the Act. None of the relevant sections of the 2015 Act having been breached, it was the conclusion of the trial judge that the Plan was *intra vires*.

5.51 In determining whether the Plan was ultra vires, the trial judge also placed a great deal of weight on the fact that the Plan represented, in his view, an initial step on

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a long and challenging journey towards achieving the NTO. MacGrath J. observed that the principal difference of approach between the parties was one of immediacy, as they disagreed on the extent of the measures required to be taken immediately in order to achieve the NTO by 2050. In this regard, he emphasised that that it was the 2015 Act, as opposed to the Plan, which provided for reaching the NTO by the end of the year 2050. On the basis of this interpretation of the 2015 Act, MacGrath J. found that the legislation did not prescribe or impose on the Government a statutory obligation to achieve particular intermediate targets.

5.52 Finally, in support of its submission that the Plan was ultra vires, FIE had relied heavily on the criticisms of the Plan made by the Advisory Council established under s. 8 of the 2015 Act. The trial judge found that, while the Advisory Council was obliged to review the Plan and was expected to deliver a robust and critical appraisal, its recommendations did not amount to the imposition of a statutory obligation. As such, it was the view of the High Court that the criticisms made by the Advisory Council were themselves insufficient to establish that the Plan was ultra vires.

(d) Standard of Review

5.53 Insofar as the Court might be persuaded that there are rights which can be asserted by FIE in these proceedings for the purposes of seeking to obtain relief of the type claimed, then an issue potentially arises as to the appropriate standard of review which should be applied by the Court in considering whether the Plan can be said to breach such rights to the extent that relief should be granted. In the same context, issues of proportionality may possibly arise.

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5.54 In the respective submissions of the parties there is a debate as to the role which proportionality might play in a judicial review of this type. It is, of course, the case that one of the issues which may arise in the context of a challenge to the substantive legality of a measure adopted under statute can involve the application of the test set out by this Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. To an extent that test may have been modified, at least in certain circumstances, by the introduction of a consideration of proportionality as identified by this Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, 2 I.R. 701. However, the Government argued that the place which proportionality holds in a challenge of this type is limited and asserted that the trial judge was correct to identify that proportionality must be seen "through the prism" of *O'Keeffe*. FIE urged that proportionality should be given a wider role.

5.55 Similar considerations arise in the context of the potential application of proportionality in relation to the asserted ECHR rights.

5.56 The Government also suggested that FIE has not truly identified what the practical consequences of the introduction of a test of proportionality would be in the context of this case. Furthermore, it was argued that proportionality can have little or no effect in a case where it can be established that a decision maker, such as the Government here, has a very wide margin of discretion. In the context of that margin of discretion, it was also said on behalf of the Government that the level of expertise required in the formulation of the Plan should lead the Court to afford a particularly wide margin of appreciation.

5.57 In respect of the correct standard of review to be applied to the Plan, the trial judge observed that it is not the role of the courts to engage in a merit-based review of the actions of the Government in the creation and approval of the Plan. MacGrath J.

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considered that the jurisprudence indicates that the test of irrationality and unreasonableness as set out in *O'Keeffe* remains largely unaltered.

5.58 Adopting the approach taken by this Court in *Donegan v. Dublin City Council* [2012] IESC 18 and *AAA v. Minister for Justice* [2017] IESC 80, the trial judge found that, where an issue of fundamental rights is agitated, it is appropriate to apply the *O'Keeffe* irrationality test viewed through the prism of a *Meadows* type proportionality analysis. However, the trial judge also emphasised that the court's review must be accommodated within the existing judicial review regime. On that basis, it was considered by MacGrath J. that the level of scrutiny required is perhaps greater than the "no evidence" standard required by *O'Keeffe*, but, at the same time, he was of the view that the review must be within the tenets of those principles and cannot be a merit-based review. MacGrath J. approached the assessment of FIE's claims on this basis.

5.59 In light of this approach to the standard of review, MacGrath J. concluded that, in the absence of any express authority relied on by the FIE to suggest that there is a free standing cause of action to have executive action assessed on the basis of proportionality and having regard to the wide discretion which is available to the Executive, FIE had failed to establish that that Government has acted in a disproportionate manner in the creation and adoption of the Plan.

5.60 I have set out the issues as they appeared from the written submissions filed by the parties subject only to noting where there were developments during either the clarification stage or the oral hearing. It is worth commenting, however, that the case as originally pleaded focused much more substantially on an allegation that the Plan was *ultra vires* the 2015 Act. As the case evolved, the rights based elements of the argument took greater prominence. However, it seems to me that there is a logic in

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considering the *vires* issue first. If FIE are correct in saying that the Plan did not comply with the 2015 Act then it would follow that the Plan would have to be quashed and that the Government would have to adopt a new Plan. Such a finding would at least have some implications as to how it might be appropriate to deal with the remaining issues. I, therefore, propose to turn first to the question of whether the Plan complied with the 2015 Act.

6. The Statutory Argument

(i) The Issues

6.1 For the reasons already identified there would appear to be five general questions which need to be answered under this heading.

6.2 The first is as to the permitted scope of this appeal so far as the question of *ultra vires* is concerned. As noted earlier, the Government suggests that many of the grounds relied on by FIE in its written and oral submissions in this regard go beyond the grounds specified in the application for leave to appeal. On that basis it is said that those wider grounds should not be entertained by the Court.

6.3 Second, there are certain issues concerning the proper interpretation of the 2015 Act which relate to the question of what that Act requires of a compliant plan.

6.4 Third, and at least in some respects inter-related with the second issue, there is the question of justiciability. In that context the Government argues that the Plan simply represents policy and that it is not, therefore, amenable to judicial review.

6.5 Fourth, there is the question of what is said to be an impermissible collateral attack on the 2015 Act. As noted earlier, the Government argues that the attempt by FIE to suggest that the Plan is *ultra vires* amounts, in substance, to a suggestion that the 2015 Act is itself unconstitutional in some respect and that such a course of action is not permitted.

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6.6 Fifth, and depending on the proper answers to the earlier questions, it may be necessary to assess whether the Plan actually complies with the statute as properly interpreted. I propose to deal with each of these issues in turn.

(ii) The Scope of the Appeal

6.7 A starting point has to be to note that it is accepted that a wide range of issues concerning the compliance of the Plan with the provisions of the 2015 Act were canvassed before the High Court and were dealt with by the trial judge in his judgment. This is not a case, therefore, where it is said that FIE are seeking to run a significantly different case on appeal than that which was canvassed at trial. Rather, it is suggested that the grounds of appeal set out by FIE in the application for leave to appeal narrowed the range of issues which can properly be canvassed.

6.8 The relevant part of the grounds of appeal dealing with the contention that the Plan does not comply with the 2015 Act are as follows:-

> "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."

6.9 Those grounds are, as the Government argued, quite limited. However, that is not the only factor to be taken into account. There is no doubt that FIE did include in its written submissions a number of different contentions concerning what was said to be the failure of the Plan to comply with relevant statutory requirements. Those contentions were addressed in the replying submissions filed on behalf of the Government. No suggestion was made in those replying submissions to the effect that the case made by FIE was said to go outside the proper scope of the appeal.

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6.10 In that context it is important to note the procedures which have been in place in respect of appeals to this Court since the new constitutional architecture brought about by the 33rd Amendment of the Constitution came into force. Each appeal is subject to detailed case management before a single judge. One of the questions which can arise, from time to time, in the context of that case management process, can involve an assertion by one or other party that the written submissions filed by its opponent seeks to rely on matters which are outside the scope of the appeal. Indeed, there have been a number of appeals where the Court has conducted a preliminary hearing to consider the scope of the appeal so that clarity can be brought in advance to the question of the issues which can be properly be canvassed at the hearing of the appeal itself. It is worth recording that neither in its own replying submissions, nor at any stage during case management, was any issue raised by the Government concerning what is now said to be an impermissible reliance by FIE on certain grounds for suggesting that the Plan does not comply with the 2015 Act. The first time that this issue arose was at the oral hearing.

6.11 In reply on this point, counsel for FIE made the point that, had the issue been raised earlier, it would have been open to FIE, if it was considered necessary, to invite the Court to allow FIE to expand its grounds of appeal. Given that, by so doing, FIE would not have been seeking to rely on issues which had themselves not been canvassed the High Court, it must be said that there would at least have been a reasonable possibility that the Court would have acceded to an application to extend the grounds of appeal had one been made.

6.12 But the matter does not end there. In accordance with Practice Direction S.C. 21, this Court issued a Statement of Case. This new procedure had been in contemplation by the Court for some little time but was brought forward in the

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context of the need to further refine issues prior to the hearing of the appeal in circumstances where it was anticipated that a significant number of appeals to this Court would, during the continuance of restrictions connected with COVID-19, be conducted as remote hearings.

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

6.14 Precisely because no question had been raised as to the scope of the appeal, the Statement of Case issued in respect of this appeal included, as some of the issues to be considered by the Court, the wider questions concerning the consistency of the Plan with the requirements of the 2015 Act that were dealt with in the written submissions filed by both parties.

6.15 It is again part of the process which has been put in place that parties are invited to identify any aspects of the Statement of Case which they consider to be inaccurate or incomplete. Indeed, in this case, a number of minor observations were made about the text of the Statement of Case which observations were taken on board by the Court leading to the issuing of a slightly revised version. However, no issue was taken about the fact that the Statement of Case suggested that a wider range of issues might require to be dealt with under this heading.

6.16 I would agree with counsel for the Government that it would require a somewhat strained interpretation of the grounds of appeal to suggest that the wider range of challenge set out in the written submissions and addressed in the Statement of Case come within those grounds. Nevertheless, it seems to me that no injustice

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would be done by allowing FIE to pursue those grounds. As noted, those grounds were canvassed before the High Court, were set out in the written submissions of FIE and fully replied to on behalf of the Government and form part of the Statement of Case which sought to frame the parameters of the issues which would need to be debated at the oral hearing. On that basis I would propose that the Court should consider the issues.

(iii) The Interpretation of the Act

6.17 For present purposes, the main relevant provisions of the Act are to be found in section 4 and in particular the following:-

> "4. — (1) The Minister shall—
>
> (a) not later than 18 months after the passing of this Act, and
>
> (b) not less than once in every period of 5 years, make, and submit to the Government for approval, a plan, which shall be known as a national low carbon transition and mitigation plan (in this Act referred to as a "national mitigation plan").
>
> (2) A national mitigation plan shall—
>
> (a) specify the manner in which it is proposed to achieve the national transition objective,
>
> (b) specify the policy measures that, in the opinion of the Government, would be required in order to manage greenhouse gas emissions and the removal of greenhouse gas at a level that is appropriate for furthering the achievement of the national transition objective,

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(c) take into account any existing obligation of the State under the law of the European Union or any international agreement referred to in section 2, and

(d) specify the mitigation policy measures (in this Act referred to as the "sectoral mitigation measures") to be adopted by the Ministers of the Government, referred to in subsection (3)(a), in relation to the matters for which each such Minister of the Government has responsibility for the purposes of—

(i) reducing greenhouse gas emissions, and

(ii) enabling the achievement of the national transition objective.

(3) For the purpose of including, in the national mitigation plan, the sectoral mitigation measures to be specified for the different sectors in accordance with subsection (2)(d)—

(a) the Government shall request such Ministers of the Government they consider appropriate to submit to the Minister, within a specified period, the sectoral mitigation measures that each such Minister of the Government proposes to adopt in relation to the matters for which each such Minister of the Government has responsibility,…".

6.18 A number of points are worth noting. First, the overriding requirement of a national mitigation plan is that it must, in accordance with s.4(2)(a), "specify the manner in which it is proposed to achieve the national transition objective". The national transition objective is defined by s.3(1) as requiring the transition by 2050 to a "low carbon, climate resilient and environmentally sustainable economy". Thus the

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overriding requirement of a compliant plan is that it specifies how that objective is to be achieved by 2050.

6.19 Section 4(2) goes on to require that a compliant plan specify the policy measures which, in the opinion of the Government, are needed to achieve the NTO. Furthermore, such measures are required by s.4(2)(d) to be specified by reference to various sectors.

6.20 It is true that s.4(1)(b) requires there to be a new plan at least every fifth year. But it would be wrong, in my view, to suggest that the legislation contemplates a series of five year plans. Rather, the legislation contemplates a series of rolling plans each of which must be designed to specify, both in general terms and on a sectoral basis, how it is proposed that the NTO is to be achieved. Given that the Plan was adopted in 2017, it was required to be a 33-year plan albeit one which the legislation understood was likely to be adjusted within five years to take into account further developments. However, it seems to me to be absolutely clear that it would be wrong to suggest that the legislation envisages that details be provided for only the first five years. The sole relevance of the five-year provision in s.4(1)(b) is that it recognises that circumstances generally, scientific knowledge and technology and, doubtless, other matters may alter so that it would be appropriate to adjust the Plan from time to time to reflect prevailing circumstances. It also seems to me that the legislation does contemplate, therefore, that the level of detail about what is to happen between, say, 2040 and 2050, may be less than the level of detail about what is to happen in the immediate future. By recognising the possibility of the need to adjust at least every five years, the legislation implicitly accepts that it may become possible, as time goes on, to give greater detail about precisely what is to be done in the latter part of the period up to 2050. However, that analysis does not seem to me to take away from the

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fundamental obligation of a compliant plan to, in the words of the statute itself, "specify" how it is intended that the NTO will be met by 2050.

6.21 While dealing with the proper interpretation of the statute, it also seems to me that it provides for two important obligations which inform the statutory purpose. Firstly, s.4(8) provides for a significant national consultation whenever a plan is being formulated. Thus there is a clear statutory policy involving public participation in the process. Second, the very fact that there must be a plan and that it must be published involves an exercise in transparency. The public are entitled to know how it is that the government of the day intends to meet the NTO. The public are entitled to judge whether they think a plan is realistic or whether they think the policy measures adopted in a plan represent a fair balance as to where the benefits and burdens associated with meeting the NTO are likely to fall. If the public are unhappy with a plan then, assuming that it is considered a sufficiently important issue, the public are entitled to vote accordingly and elect a government which might produce a plan involving policies more in accord with what the public wish. But the key point is that the public are entitled, under the legislation, to know what the plan is with some reasonable degree of specificity.

6.22 Thus, it seems to me that key objectives of the statutory regime are designed to provide both for public participation and for transparency around the statutory objective which is the achievement of the NTO by 2050. In the light of that view as to the proper approach to the interpretation of the statute, it is next necessary to turn to the question of justiciability.

(iv) Justiciability

6.23 The central argument put forward on behalf of the Government under this heading is that the Plan simply involves the adoption of policy and that, it is said,

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courts have frequently indicated that matters of policy are not justiciable. The Government draws attention to comments such as those made by Charleton J. (in the High Court) in *Garda Representative Association v. Minister for Finance* [2010] IEHC 78 at para. 15 where the following is said:-

> "The Government has the power to set policy on areas of national interest and to disperse funds in accordance with that policy. These decisions are, in my view, in a category beyond the scope of judicial review".

6.24 There may be an issue as to whether there are any areas which are truly completely outside the scope of judicial review on the grounds of a barrier, based on respect for the separation of powers, on the remit of the courts to review policy. But it does not seem to me that such questions properly arise in the circumstances of this case. If the government of the day were to announce that, as a matter of policy, it was going to publish, after public consultation, a plan designed to achieve precisely that which is defined in the 2015 Act as the NTO and then publish a plan which arguably failed to do what it was said it should do, then such questions might well arise. However, the position here is that there is legislation.

6.25 Most legislation has some policy behind it. It is likely to have been the policy of the government which was in power at the time when the legislation was enacted that legislation of the type in question should be promoted. Indeed, in the context of issues concerning whether there has been an impermissible delegation by the Oireachtas of the power to legislate, courts regularly have to consider whether legislation indicates the "principles and policies" by reference to which secondary law-making power can be exercised (see *Cityview Press v. An Chomhairle Oiliúna* (1980) IR 381). It may have been the policy of a particular government to introduce

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the legislation in question but once that legislation is passed it then become law and not policy.

6.26 In fairness, counsel for the Government accepted that insofar as the process set out in the 2015 Act was concerned, judicial review was available. It was accepted, for example, that, if the Minister did not engage in the statutorily mandated public consultation, then the courts could take appropriate action. However, the position of the Government was that judicial review could extend only to process or procedural matters and not to the substantive content of the report itself.

6.27 In that context, it does have to be acknowledged that some elements of the legislation simply require the Government to adopt a policy designed to the statutory end. For example, the legislation does not require any particular view to be taken as to which sectors are to contribute in which amounts to the reduction of carbon emissions. The legislation leaves it to the government of the day to make those policy choices. It is possible, therefore, that there may be elements of a compliant plan under the 2015 Act which may not truly be justiciable. However, it does seem to me to be absolutely clear that, where the legislation requires that a plan formulated under its provisions does certain things, then the law requires that a plan complies with those obligations and the question of whether a plan actually does comply with the statute in such regard is a matter of law rather than a matter of policy. It becomes a matter of law because the Oireachtas has chosen to legislate for at least some aspects of a compliant plan while leaving other elements up to policy decisions by the government of the day. It seems to me that the requirements of s.4, as to what a plan must specify, come within a category of statutory obligation which is clearly law rather than policy. Whether a plan complies, for example, with the obligation that it be specific as to how the NTO is to be achieved is, in my view, clearly a matter of

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law. The choices as to how the NTO might be achieved may well be policy choices and real questions might arise at to the extent to which those choices might be justiciable. However, whether the Plan does what it says on the statutory tin is a matter of law and clearly justiciable. For present purposes, it is sufficient to suggest that the Court should hold that a question of whether the Plan meets the specificity requirements in s.4 is clearly justiciable. In the light of that suggestion it is next necessary to consider the question of collateral attack.

(v) Collateral Attack

6.28 It is possible that there might be questions, in certain circumstances, as to whether a challenge to a measure adopted under legislation amounts to an impermissible collateral attack on the legislation itself. However, it seems to me that issues of that type can be reasonably described as amounting to a corollary of the jurisprudence which has followed from *East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General* (1970) IR 317. Under that jurisprudence, of course, a court must assume that any power or discretion available under a statute will be exercised in a constitutional manner. If the clear wording of the statute would not permit a power to be exercised in a way which was consistent with the Constitution, then the statute must be declared to be inconsistent with the Constitution and thus of no effect.

6.29 If there is only one, or a small number of ways in which a particular statutory power or obligation can be exercised, and if that way or all of those ways would give rise to a breach of the Constitution, then there might well be a case for saying that an attack on an individual exercise of the statutory power concerned would necessarily amount to an attack on the statute itself. If the statute requires something to be done, or done in a particular way, then an attack on a measure adopted under the statute may well amount to a collateral attack on the statute itself unless it could be demonstrated

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that there were other ways in which measures could have been adopted which would have been consistent with the Constitution.

6.30 It follows, in my view, that the real question that must be addressed is, therefore, as to whether a claim that the Plan is *ultra vires* necessarily amounts to an assertion that any plan adopted in accordance with the statute would have also been unlawful. If it is possible to have a lawful plan under the statute but if, equally, it might be possible to have a plan which, while in technical compliance with the statute, breached rights in some way so that it too was invalid, a challenge mounted on such grounds would clearly not, in my view, amount to a collateral attack. It would simply amount to an assertion that the plan chosen was invalid but that other plans could have been chosen which were valid. Such a challenge would not suggest that there was anything inappropriate about the Act itself.

6.31 Applying that general approach to, in particular, the claim that the Plan lacks the specificity required by s.4 does not, in any way, amount to a suggestion that the 2015 Act is inconsistent with the Constitution. On the contrary, it is simply an assertion that the legislation requires a particular level of specificity which has not been met in the formulation of the Plan. Such an assertion does not carry with it any suggestion that there is any problem concerning the consistency of the 2015 Act with the Constitution.

6.32 As already noted, there was no dispute about the standing of FIE to mount this aspect of the claim. For the reasons set out earlier, I would suggest that, notwithstanding that the matter is not properly addressed in the grounds of appeal, nonetheless this Court should go on to deal with the wider range of *ultra vires* issues canvassed in the written submissions. I have also indicated the reasons why I would hold that that at least some of those issues are clearly justiciable and also do not

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amount to a collateral attack on the 2015 Act itself. In particular, I would hold that the question of whether the Plan is sufficiently specific to meet the mandatory requirements of s.4 of the 2015 Act is both justiciable and does not amount to a collateral attack. It follows in turn that it is necessary to consider whether, on the merits, the Plan does meet those requirements of specificity.

(vi) Specificity

6.33 An important part of the case made by the Government draws attention to the fact that the Plan is a living document. So far as it goes, it seems to me that that is a reasonable proposition. As already noted, the 2015 Act contemplates a revision of the Plan at least every five years and that must carry with it an assumption that the intention is that it will be possible to provide greater detail of certain aspects of any plan made under the 2015 Act as matters progress.

6.34 In the course of submissions, counsel for the Government drew attention to a new document, the Climate Action Plan, which was produced in 2019 ("the 2019 Plan"). It was submitted that this 2019 Plan is an example of how policy is evolving. The introduction to the 2019 Plan states that it aims to build on the policy, framework, measures and actions of the Plan. The 2019 Plan, it was suggested, contains updated detail. In particular, Counsel for the Government drew attention to the fact that the 2019 Plan identifies measures which, it is said, were first envisaged in the Plan under review and which are aimed at closing the carbon gap but which will not be successful in closing it completely. Counsel then submitted that the 2019 Plan identifies the outstanding carbon gap which will remain after the measures referred to above have been implemented and goes on to identify further measures which will be necessary to completely close that gap.

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6.35 While there may be some merit in the suggestion that the document in question does provide greater detail in some areas, it must also be emphasised that it is not a plan in the sense in which that term is used in the 2015 Act. It has not been, for example, through the public consultation process which the 2015 Act mandates. While it may provide some level of transparency about the Government's thinking as of 2019, it does not do so in the very formal way which the 2015 Act mandates. Whatever level of clarity is required by that Act about government policy to achieve the NTO by 2050, it must be provided in a formal plan adopted in accordance with the public participation measures set out in the 2015 Act.

6.36 More importantly, the real question at issue is as to whether the Plan itself gives any real or sufficient detail as to how it is intended to achieve the NTO. In that regard a number of factors must be taken in to account.

6.37 First it is necessary to reach some overall conclusion as to the level of specificity which the Act requires. It seems to me that the starting point for a consideration of that question must be to consider the purpose of the 2015 Act as a whole. The public participation element of that purpose is, of course, met by the public consultation process set out in section 4(8). But it is to the transparency element of the purpose of the legislation as a whole that the specificity mandated by s.4 is directed. The purpose of requiring the Plan to be specific is to allow any interested member of the public to know enough about how the Government currently intends to meet the NTO by 2050 so as to inform the views of the reasonable and interested member of the public as to whether that policy is considered to be effective and appropriate.

6.38 What the public thinks of any plan and what the public might do about it if they do not like a plan is a matter for the public to consider. But the 2015 Act

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requires that the public have sufficient information from the Plan to enable them to reach such conclusions as they wish. On that basis, it seems to me that the level of specificity required of a compliant plan is that it is sufficient to allow a reasonable and interested member of the public to know how the government of the day intends to meet the NTO so as, in turn, to allow such members of the public as may be interested to act in whatever way, political or otherwise, that they consider appropriate in the light of that policy.

6.39 Next there is what the Plan itself says. In the Plan's introduction it is stated that,

> "Under the 2015 Act, each National Mitigation Plan must specify the policy measures that Government consider are required to manage greenhouse gas emissions and the removal of emissions at a level that is appropriate for furthering the national transition objective set out in that Act. Given that this long-term objective must be achieved by 2050, it is not prudent or even possible to specify, in detail, policy measures to cover this entire period as we cannot be certain what scientific or technical developments and advancements might arise over the next 30 years or so."

6.40 Furthermore, it is of some relevance to consider what the Climate Change Advisory Council ("the Advisory Council") says. The Advisory Council was established under s.8 of the 2015 Act. Section 11 of the Act provides that the functions of the Advisory Council include advising and making recommendations to the Minister and the Government in relation to the preparation and adoption of the Plan and in relation to the reduction of GHG emissions and adaptions to the effects of climate change. Sections 12 and 13 of the Act provide that the Advisory Council is to submit annual records and periodic review reports to the Minister. Under s.12(2) of

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the 2015 Act, the annual report of the Advisory Council is required to include recommendations in relation to the most cost-effective manner of achieving reductions in GHG emissions in order to enable the achievement of the NTO and such other recommendations or advice as the Advisory Council considers necessary or appropriate in order to enable the achievement of the NTO. Section 13(7) provides that a periodic review report should contain a consideration of the NTO and any matter relating to that objective as the Advisory Council considers appropriate, a consideration of (and recommendations in relation to) compliance with obligations arising under EU law or international agreements and any matters relating to such obligations as the Advisory Council considers appropriate together with such advice or recommendations as the Advisory Council considers appropriate in relation to the Plan. The Advisory Council is not, therefore, an informal body but rather one which is established by statute and has, therefore, a role in law.

6.41 I appreciate that the Government is not bound by the views of the Advisory Council. However, in considering, as this Court must, whether the Plan gives sufficient detail to allow a reasonable and interested observer to understand how it is suggested that the NTO is to be met by 2050, it seems to me that it is appropriate to place significant weight on the views of the Advisory Council which is, after all, set up under the same statute as requires the Plan to specify how the NTO is to be achieved.

6.42 In that context it is appropriate to consider what the Advisory Council says. In its 2018 annual report, the Advisory Council stated that,

> "Ireland's greenhouse gas emissions for 2016, and projections of emissions to 2035, are disturbing. Ireland's greenhouse gas emissions increased again in 2016. Instead of achieving the required reduction of 1 million tonnes per year

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> in carbon dioxide emissions, consistent with the National Policy Position, Ireland is currently increasing emissions at a rate of 2 million tonnes per year… Ireland is completely off course in terms of its commitments to addressing the challenge of climate change."

Similarly, in the Advisory Council's 2017 periodic review, it was stated that,

> "Ireland is not projected to meet 2020 emissions reduction targets and is not on the right trajectory to meet longer term EU and national emission reduction commitments."

6.43 Finally, it is necessary to look at the kind of policies which the Plan suggests need to be followed in order to meet the NTO. Having considered what the Plan says it does seem to me to be reasonable to characterise significant parts of the policies as being excessively vague or aspirational. For example, in the field of agriculture the following is said:-

> "Ireland is one of a small number of EU countries to have elected to report on grassland and cropland management activities for the 2nd commitment period of the Kyoto Protocol (KP) (2013-2020) so *we are endeavouring to improve our understanding* of the drivers of emissions from these activities with a view to developing policies and measures to reducing the source of these emissions… *Further investigation will also be necessary* to analyse synergies between these policies and mobilising carbon credits under the LULUCF (land use, land-use change and forestry) flexibility, referred to below, in particular related to emissions and removals from grassland and cropland activities… *While we cannot be sure what future technologies will deliver*, this is true of every sector. That said, new technologies are constantly emerging and we will be ready to encourage adoption of those that support climate ambition…

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> In addition, *continued research and development is needed* to support the development and roll-out of new technologies to reduce greenhouse gas emissions, which highlights the importance of national research and coherence with the EC Horizon 2020 programme and LIFE funding." (Emphasis added.)

6.44 Furthermore, several of the proposals made in the agriculture chapter of the Plan involve carrying out "further research" into areas such as beef genomics and the behavioural barriers which influence farmers' participation in environmental schemes. This chapter of the Plan also contains somewhat vague proposals to "continue to improve knowledge transfer and exchange to farmers by developing a network across State agencies and relevant advisory bodies" and to "further develop the range and depth of sustainability information collected for beef, dairy and other agriculture sectors."

6.45 I accept that the legislation clearly contemplates that knowledge will evolve and that the detail of the Plan will become more fixed as time moves on. However, that does not seem to me to prevent there being a clear present statutory obligation on the Government, in formulating a plan, to at least give some realistic level of detail about how it is intended to meet the NTO. Some general indication of the sort of specific measures which will or may be required needs to be given. The legislation does, after all, require that a plan "specify" how the NTO is to be met. For the reasons already set out, it seems clear that s.4 requires that the measures necessary to achieve the NTO must be specified not only for the first five years but for the full length of the period then unexpired up to 2050. The level of specificity for the latter years may legitimately be less but there must be, nonetheless, a policy identified which does specify in some reasonable detail the kind of measures that will be required up to 2050. The fact that some of those measures may come to be adjusted

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over time because of developments in knowledge, data or technology does not alter the fact that a best current estimate as to how the NTO is going to be achieved needs to be made and not left to sometime in the future. As noted earlier, this is not a five-year plan but rather ought to have been a 33-year plan.

6.46 In my judgment the Plan falls a long way short of the sort of specificity which the statute requires. I do not consider that the reasonable and interested observer would know, in any sufficient detail, how it really is intended, under current government policy, to achieve the NTO by 2050 on the basis of the information contained in the Plan. Too much is left to further study or investigation. In that context it must, of course, be recognised that matters such as the extent to which new technologies for carbon extraction may be able to play a role is undoubtedly itself uncertain on the basis of current knowledge. However, that is no reason not to give some estimate as to how it is currently intended that such measures will be deployed and what the effect of their deployment is hoped to be. Undoubtedly any such estimates can be highly qualified by the fact that, as the technology and knowledge develops, it may prove to be more or less able to achieve the initial aims attributable to it.

6.47 However, that is no reason not to indicate how and when particular types of technology are currently hoped to be brought on board. If it proves possible to achieve more than might currently be envisaged then, doubtless, other elements of the Plan can evolve in a way which may place a lesser burden on certain sectors. If it proves that the technology is less useful than currently envisaged, then the burden on some sectors may have to increase. But the public are entitled to know what current thinking is and, indeed, form a judgment both on whether the Plan is realistic and whether the types of technology considered in the Plan are appropriate and likely to

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be effective. In my view, a reasonable and interested observer would not really have a sufficient view of just how it is currently hoped that such measures might contribute towards achieving the NTO to form a considered judgement.

6.48 On that basis, I would hold that the Plan does not comply with the requirements of the 2015 Act and, in particular, section 4. On that basis I would hold that the Plan should be quashed on the grounds of having failed to comply with its statutory mandate in that regard.

6.49 Given that the Plan should, in my view, be quashed, it is necessary to consider whether, and, if so, to what extent, it is appropriate to deal with the wider rights based issues which arose on this appeal. In that context it is worth noting that I propose that the Plan be quashed on grounds which are substantive rather than purely procedural. On that basis this plan will never fall to be assessed again, for any new plan adopted under the 2015 Act will need to be different so as to meet the deficiencies which have been identified. There is, therefore, an argument to the effect that any consideration of the further rights based issues which arise on this appeal would be purely theoretical as such a consideration would have, as its focus, a plan which will not be reproduced. However, it seems to me that at least the question of standing is of some continuing importance because that issue would arise in any challenge sought to be brought by FIE, or indeed any other corporate NGO in the environmental field, in respect of any future plan. On that basis, it does seem to me to be appropriate to go on to consider at least the question of standing in respect of the rights based claims made under both the Constitution and the ECHR. It may also, to a limited extent, be appropriate to consider some of the other issues which arose on this appeal. I will address that question when I have outlined my views on the position in respect of standing to which I now turn.

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7. Standing

7.1 I propose to consider together the question of the standing of FIE to mount rights-based claims both in respect of certain rights guaranteed by the Constitution and also under the 2003 Act. It is appreciated that it does not necessarily follow that the requirements of standing must be the same under both headings but I nonetheless consider it to be convenient to address all standing issues at this stage.

7.2 The fundamental objection which the Government takes to the proposition that FIE has standing under either heading stems from the fact that all of the rights sought to be relied on, whether under the Constitution or under the ECHR, are personal rights which FIE itself does not enjoy. The rights relied on under the Constitution are the right to life and the right to bodily integrity. Those rights are personal to individuals. Likewise, the rights relied on under the ECHR are those guaranteed by both Article 2 and Article 8. These are again personal rights.

7.3 Counsel accepted that FIE, as a corporate entity, did not itself enjoy the rights sought to be relied on, whether under the Constitution or the ECHR. However, counsel argued that the jurisprudence recognises that there have been cases where entities have been accorded standing, even though the entities concerned did not enjoy the rights sought to be advanced in the relevant proceedings.

7.4 On the question of standing to put forward the claim based on constitutional rights, the argument put forward by the Government relies on well-established jurisprudence to the effect that Irish constitutional law does not recognise a so-called *actio popularis*, being an action brought, as it were, on behalf of the public as a whole. Furthermore, it is said that, relying on *Cahill v. Sutton* and subsequent case law, Irish standing rules in constitutional cases do not recognise a so-called *jus tertii*,

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or an action in which a person seeks to rely on rights enjoyed by others. The Government argues that these proceedings fall into both excluded categories.

7.5 As already noted, it was accepted at the oral hearing that FIE does not enjoy the personal constitutional rights on which reliance is sought to be placed. To that extent, it would appear that it must follow that FIE does not, *prima facie*, have standing for constitutional purposes so far as these proceedings are concerned. The real issue under this heading is as to whether this case comes within one of those exceptions where a third party, including a corporate body such as FIE, may have standing to maintain a claim based on the rights of others.

7.6 So far as standing to maintain the claims under the ECHR are concerned, it was accepted at the oral hearing that FIE would not have standing to bring a complaint before the ECtHR. However, it was argued that it did not follow that a party that would not have Strasbourg standing would necessarily be precluded from maintaining a claim under the 2003 Act. The real question, so far as standing to maintain the ECHR aspect of the claim is concerned, was as to whether it is possible for a party, who would not have standing before the ECtHR, to bring proceedings relying on the 2003 Act and, if so, what circumstances permit such a claim to be brought.

7.7 Before considering those issues in detail, it is also necessary to mention the potential reliance placed by FIE on an asserted right to a healthy environment, relying on the judgment of Barrett J. in *Fingal Co. Council*. However, at the oral hearing, counsel for FIE accepted that, in the context of these proceedings, there was no material difference, insofar as this case was concerned, between the established constitutional rights relied on, being the right to life and the right to bodily integrity, and any right to a healthy environment, should one exist. Counsel did, of course,

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indicate that, should such a right be found to exist under the Constitution, it might well have significant implications in other proceedings where the asserted rights sought to be relied on went beyond representing an aspect of the right to life or the right to bodily integrity. However, it was clear that no such issues arose in this case so that any right to a healthy environment which might be held to exist for the purposes of these proceedings would not extend beyond the boundaries of the right to life and the right to bodily integrity. In those circumstances, it does not seem to me that it is either necessary or appropriate to give any additional consideration to the question of identifying those persons or bodies as might have standing to maintain a claim based on the asserted right to a healthy environment said to derive from those quintessentially personal rights. In the particular circumstances of this case it is difficult to see how a body, such as FIE, could have standing to maintain a right to a healthy environment (which is co-extensive with the right to life and the right to bodily integrity) unless such a body also would have standing to maintain a claim based directly on those rights. Ultimately, therefore, the question of whether FIE has standing to maintain the constitutional rights based aspect of their case comes down to a question of whether they come within exceptions to the general rule.

7.8 In that context, reliance is placed on decisions such as *Coogan* and *Irish Penal Reform Trust*. However, it is important to return to *Cahill v. Sutton*, which remains the most important case in this area and represents the foundation of the modern law of standing in constitutional cases. It is important to recognise first that *Cahill v. Sutton* suggested a general rule which is to the effect that, in order to have standing, a claimant must be able to show that rights which that claimant enjoyed have potentially been interfered with (or be in danger of being interfered with) by the

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measure whose constitutionality is in question. In that context Henchy J. stated the following at pp. 281-282:-

> "The general approach to the question of standing that has been adopted in other jurisdictions was referred to as follows in the judgment of this Court in the *East Donegal Co-Operative* case (at p.338):
>
> > "With regard to the locus standi of the plaintiffs the question raised has been determined in different ways in countries which have constitutional provisions similar to our own. It is unnecessary here to go into this matter in detail beyond stating that at one end of the spectrum of opinions on this topic one finds the contention that there exists a right of action akin to an *actio popularis* which will entitle any person, whether he is directly affected by the Act or not, to maintain proceedings and challenge the validity of any Act passed by the parliament of the country of which he is a citizen or to whose laws he is subject by residing in that country. At the other end of the spectrum is the contention that no one can maintain such an action unless he can show that not merely do the provisions of the Act in question apply to activities in which he is currently engaged but that their application has actually affected his activities adversely. The Court rejects the latter contention and does not find it necessary in the circumstances of this case to express any view upon the former".
>
> In point of fact, in no comparable jurisdiction to which the Court's attention has been directed does either of those two polarised opinions or contentions seem to have received authoritative judicial acceptance. On the contrary, in other jurisdictions the widely accepted practice of courts which are invested

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with comparable powers of reviewing legislation in the light of constitutional provisions is to require the person who challenges a particular legislative provision to show either that he has been personally affected injuriously by it or that he is in imminent danger of becoming the victim of it. This general rule means that the challenger must adduce circumstances showing that the impugned provision is operating, or is poised to operate, in such a way as to deprive him personally of the benefit of a particular constitutional right. In that way each challenge is assessed judicially in the light of the application of the impugned provision to the challenger's own circumstances."

7.9 However, in *Cahill v. Sutton*, this Court also recognised that the general rule can be relaxed in appropriate cases. At p. 285 of his judgement in that case, Henchy J stated:-

"This rule, however, being but a rule of practice must, like all such rules, be subject to expansion, exception or qualification when the justice of the case so requires. Since the paramount consideration in the exercise of the jurisdiction of the Courts to review legislation in the light of the Constitution is to ensure that persons entitled to the benefit of a constitutional right will not be prejudiced through being wrongfully deprived of it, there will be cases where the want of the normal *locus standi* on the part of the person questioning the constitutionality of the statute may be overlooked if, in the circumstances of the case, there is a transcendent need to assert against the statute the constitutional provision that has been invoked. For example, while the challenger may lack the personal standing normally required, those prejudicially affected by the impugned statute may not be in a position to assert adequately, or in time, their constitutional rights. In such a case the

court might decide to ignore the want of normal personal standing on the part of the litigant before it. Likewise, the absence of a prejudice or injury peculiar to the challenger might be overlooked, in the discretion of the court, if the impugned provision is directed at or operable against a grouping which includes the challenger, or with whom the challenger may be said to have a common interest—particularly in cases where, because of the nature of the subject matter, it is difficult to segregate those affected from those not affected by the challenged provision.

However, those examples of possible exceptions to the rule should not be taken as indicating where the limits of the rule are to be drawn. It is undesirable to go further than to say that the stated rule of personal standing may be waived or relaxed if, in the particular circumstances of a case, the court finds that there are weighty countervailing considerations justifying a departure from the rule."

7.10 In my view, Henchy J. also made a number of important observations at pp. 282-284 in the following terms:-

"This general, but not absolute, rule of judicial self-restraint has much to commend it. It ensures that normally the controversy will rest on facts which are referable primarily and specifically to the challenger, thus giving concreteness and first-hand reality to what might otherwise be an abstract or hypothetical legal argument. The resulting decision of the court will be either the allowance or the rejection of the challenge in so far as it is based on the facts adduced. If the challenge succeeds, the impugned provision will be struck down. If it fails, it does not follow that a similar challenge raised later on a different set of facts will fail: see *Ryan v. The Attorney General* [1965]

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I.R. 294. at p. 353 of the report. In that way the flexibility and reach of the particular constitutional provision invoked are fully preserved and given necessary application.

...

There is also the hazard that if the courts were to accord citizens unrestricted access, regardless of qualification, for the purpose of getting legislative provisions invalidated on constitutional grounds, this important jurisdiction would be subject to abuse."

7.11 Henchy J. went on to comment as follows:-

"In particular, the working interrelation that must be presumed to exist between Parliament and the Judiciary in the democratic scheme of things postulated by the Constitution would not be served if no threshold qualification were ever required for an attack in the courts on the manner in which the Legislature has exercised its law-making powers. Without such a qualification the courts might be thought to encourage those who have opposed a particular Bill on its way through Parliament to ignore or devalue its elevation into an Act of Parliament by continuing their opposition to it by means of an action to have it invalidated on constitutional grounds. It would be contrary to the spirit of the Constitution if the courts were to allow the opposition that was raised to a proposed legislative measure, inside or outside Parliament, to have an unrestricted and unqualified right to move from the political arena to the High Court once a Bill has become an Act. And it would not accord with the smooth working of the organs of State established by the Constitution if the enactments of the National Parliament were liable to be

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thwarted or delayed in their operation by litigation which could be brought at the whim of every or any citizen, whether or not he has a personal interest in the outcome."

7.12 It might well be said that the distinction identified by Henchy J. is of some relevance in the context of these proceedings. There clearly is a risk of the distinction between rights based litigation, on the one hand, and political or policy issues, on the other becoming blurred in cases such as this. I would view the observations of Henchy J., which I have cited, as conveying a warning against an over-liberal use of the undoubted entitlement of the courts to relax the general rule. However, it also seems clear that cases such as *Coogan* and *Irish Penal Reform Trust* do represent appropriate relaxations of the general rule in accordance with the overall approach identified in *Cahill v. Sutton*. It is important to analyse the reasons why standing was accepted as existing in those cases.

7.13 The rights asserted in *Coogan* were the rights of the unborn. It is clear that any rights which the unborn might have enjoyed, whether under the 8th Amendment to the Constitution (since repealed) or otherwise, would inevitably involve some other person or body seeking to vindicate those rights. In *Coogan*, Finlay C.J. commented, at p. 742 as follows:-

"In such a case I am satisfied that the test is that of a *bona fide* concern and interest, interest being used in the sense of proximity or an objective interest. To ascertain whether such *bona fide* concern and interest exists in a particular case it is of special importance to consider the nature of the constitutional right sought to be protected. In this case that right is the right to life of an unborn child in its mother's womb. The threat to that constitutional right which it is sought to avoid is the death of the child. In respect of such a threat there can

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> never be a victim or potential victim who can sue… The part, however, that the plaintiff has taken in the proceedings to which I have referred, which were successfully brought to conclusion by the Attorney General at its relation, and the particular right which it seeks to protect with its importance to the whole nature of our society, constitute sufficient grounds for holding that it is a person with a *bona fide* concern and interest and accordingly has the necessary legal standing to bring the action."

7.14 While McCarthy J. dissented on the question of whether the plaintiffs in that case had standing, he did so on the basis of his view that the appropriate plaintiff was the Attorney General in all the circumstances of the case. McCarthy J., therefore, considered that the rights involved could be vindicated but with a different plaintiff. He did, however, in that context, observe, in a typically pithy fashion, at p. 750 the following:-

> "The direct threat to that right to life is an abortion, a procedure which in the nature of things is likely to be procured by the expectant mother. The two whose rights are protected cannot or will not invoke the constitutional guarantee. Who will?"

7.15 On one view it might be said that *Irish Penal Reform Trust* extends the scope of standing a little further. In that case the Irish Penal Reform Trust was one of three plaintiffs seeking to challenge prison conditions and their compatibility with the Constitution. The other two plaintiffs were former prisoners. The case sought to address what, it was contended, amounted to systemic deficiencies in the treatment of prisoners with psychiatric problems. If the case were limited to the personal experience of the two individual plaintiffs, it would not have been possible to advance the case that the deficiencies were systemic.

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7.16 Furthermore, a representative of the Irish Penal Reform Trust swore an affidavit setting out her belief, and that of the Trust, that, in their experience, prisoners affected by these deficiencies (by definition prisoners suffering from psychiatric illnesses) are not in a position to assert adequately or in time their constitutional rights, especially in regard to systemic deficiencies. The Trust had carried out a great deal of work and expended considerable effort in bringing the proceedings, including the retention of international experts. It was specifically stated that the Trust believed that, notwithstanding the fact that prison conditions were a matter of interest to the wider community, and that it strongly contended the conditions in Mountjoy Prison did not comply at the time with basic standards of human rights, nevertheless, such matters would never be adequately addressed unless the proceedings could be determined as constituted.

7.17 Gilligan J in his judgment observed that Henchy J in *Cahill v Sutton* had been careful to note that the rule on standing was a rule on practice and could be waived or relaxed if, in the particular circumstances of the case, there were weighty countervailing considerations. An example given by Henchy J was where those prejudicially affected by the impugned statute might not be in a position to assert adequately or in time their constitutional rights. Gilligan J considered that a case illustrating this exception was *Coogan*. Gilligan J also considered that prisoners with psychiatric problems were among the most vulnerable and disadvantaged members of society. Many prisoners might be ignorant of their rights and fear retribution if they challenged the prison authorities. Such prisoners might well be unaware of the constitutional right to receive a better standard of treatment. This put the particular category of prisoner in an extremely disadvantaged position. He considered that this was an appropriate case in which to relax the rules on standing in such circumstances.

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7.18 In the present case, no real attempt has been made to explain why FIE has launched these proceedings and why individual plaintiffs have not commenced the proceedings, or sought to be joined. It is not suggested that the potential class of individual plaintiffs (which is very extensive indeed) suffers from any vulnerability or would face any difficulty in asserting the claim or that the claim would in any way be limited if brought by individuals. For these reasons and more, it does not seem to me that *Irish Penal Reform Trust* supports the plaintiff's case on standing.

7.19 It should be emphasised that Irish standing rules are, therefore, flexible but not infinitely so. This point was again emphasised in *Mohan* which represents the latest clarification of the constitutional law of standing by this Court. In that context it is worth recalling that the standing recognised in *Digital Rights* involved claims which a company was entitled to bring as a company.

7.20 Thus there was no question in *Digital Rights* of a corporate entity being permitted to assert rights which were only those of others. The rights were those of the company itself. I would, in any event, reserve my position on whether I would fully follow all of the reasoning in *Digital Rights* concerning standing. For present purposes it is sufficient to indicate that *Digital Rights* does not provide any basis for suggesting that a corporate entity has standing to bring proceedings which solely seek to advance the rights of individuals rather than rights of the corporate entity itself.

7.21 I would accept, therefore, that there are circumstances in which an overly strict approach to standing could lead to important rights not being vindicated. However, that does not take away from the importance of standing rules in our constitutional order. The underlying position was reiterated in the recent decision of this Court in *Mohan*, which re-emphasised the need, ordinarily, for a plaintiff to be able to demonstrate that they have been affected in reality or as a matter of fact by virtue of

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the measure which they seek to challenge on the basis that it breaches rights. That remains the fundamental proposition. The circumstances in which it is permissible to accord standing outside the bounds of that basic principle must necessarily be limited and involve situations where there would be a real risk that important rights would not be vindicated unless a more relaxed attitude to standing were adopted.

7.22 That leads to a consideration of the reasons why a corporate entity has chosen to bring these proceedings relying, as FIE does, on personal rights which it does not enjoy. Other than a suggestion that it was desire to protect individuals from a possible exposure to the costs of unsuccessful proceedings, no real explanation was given as to why an individual or individuals could not have brought these proceedings instead of FIE. There does not seem to be any practical reason why FIE could not have provided support for such individuals in whatever manner it considered appropriate. It seems to me that these proceedings are a far cry from the kind of circumstances which this Court accepted justified departure from ordinary standing rules in cases such as *Coogan* and *Irish Penal Reform Trust*. To hold that FIE had standing in the circumstances of this case would, in my view, involve a move to a situation where standing was greatly expanded and the absence of standing would largely be confined to cases involving persons who simply maintain proceedings on a meddlesome basis. I do not consider that there is a justification for such a wide expansion of our standing rules. Nor do I consider that FIE have put forward any adequate basis to explain why these proceedings could not have been brought in the ordinary way by persons who would undoubtedly enjoy the right to life and the right to bodily integrity on which reliance is placed. In those circumstances I would conclude that FIE does not have standing to maintain the constitutional rights based aspect of their case.

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7.23 Turning to the issues which arise in respect of standing to maintain the ECHR claim, I am prepared to accept that there may be circumstances where a person or entity might not have standing to bring a complaint before the ECtHR but where, in accordance with Irish standing rules, the same party might be able to maintain a claim based on the 2003 Act. However, I find it difficult to see how a party who would not have standing to maintain a particular form of claim based on an asserted breach of Irish constitutional rights could have standing to maintain a claim based on the 2003 Act, where the rights under the ECHR said to be infringed are the same or analogous rights to those which might have been asserted under the Constitution.

7.24 Having concluded that FIE would not have standing to maintain a claim based on the right to life or the right to bodily integrity of others under the Irish Constitution, it seems to me to follow that FIE likewise does not have standing to maintain a claim based on the provisions of the 2003 Act where reliance is being placed on the analogous Art. 2 and Art. 8 rights. I would, therefore, conclude that FIE does not have standing to maintain any of the rights based claims put forward in these proceedings.

7.25 In those circumstances I would not, ordinarily, go on to deal with any other aspects of the case and would leave further consideration of any of the issues raised to a case brought by a person or persons who did have standing. However, there is one aspect of the case on which I feel it appropriate to comment. The question of whether there exists an unenumerated or derived right to a healthy environment under the Irish Constitution was debated in these proceedings both in the High Court and in this Court. MacGrath J., in the High Court, indicated that he was prepared to accept, for the purposes of these proceedings, that such a right does exist following on from the decision of Barrett J. in *Fingal Co. Council*. Lest by not commenting on those

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matters it might in the future be argued that this Court had implicitly accepted the position identified by Barrett J., and accepted by MacGrath J. for the purposes of the argument, in their respective High Court judgments, I feel it is necessary to go on to make at least some observations on that issue.

8. <u>A Constitutional Right to a Healthy Environment?</u>

8.1 In *Fingal County Council*, at para. 264 of his judgment, Barrett J. said the following:-

> "A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Art. 40.3.1° of the Constitution. It is not so utopian a right that it can never be enforced. Once concretised into specific duties and obligations, its enforcement is entirely practicable. Even so, every dimension of the right to an environment that is consistent with the human dignity and well-being of citizens at large does not, for the reasons identified previously above, require to be apprehended and to be described in detail before that right can be recognised to exist. Concrete duties and responsibilities will fall in time to be defined and demarcated. But to start down that path of definition and demarcation, one first has to recognise that there is a personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large and upon which those duties and responsibilities will be constructed. This the court does."

8.2 In the High Court in this case, MacGrath J. said the following at para. 133 of his judgment:-

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> "Accepting for the purposes of this case, that there is an unenumerated right to an environment consistent with human dignity, in my view, it cannot be concluded that it is the plan which places these rights at risk."

8.3 An appropriate starting point might well be to consider what precisely was meant by Barrett J. when he suggested that there was an unenumerated constitutional right to the environment consistent with human dignity. It is perhaps overly pedantic to say that everyone has an environment whether it be good or bad. A world in which some of the more pessimistic predictions connected with climate change had actually come to pass would still be a world in which there was an environment, albeit one which might be extremely hostile and very dangerous. I understand that it was for such reasons that, quite sensibly, counsel for FIE suggested that the appropriate characterisation of the right (at least for the purposes of this case) was to describe it as a right to a healthy environment. In fairness to Barrett J., it should again be noted that he did describe the right as being one of an entitlement to an environment consistent with human dignity.

8.4 I should start by commenting that, in my view, it would be more appropriate to characterise constitutional rights which cannot be found in express terms in the wording of the Constitution itself as being derived rights rather than unenumerated rights. The jurisprudence has, of course, identified rights recognised by the Constitution where the wording of the text does not use a term directly providing for the right concerned. There is no direct reference to privacy. There is no direct reference to a right not to be inappropriately deprived of the ability to work. Yet both of these rights have been recognised as existing under the Constitution, the former in *McGee v. The Attorney General* [1974] IR 284 and the latter in *N.V.H v. Minister for Justice and Equality* [2018] 1 IR 246.

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8.5 There is a sense in which the term "unenumerated" is not incorrect, precisely because the wording of the Constitution does not refer directly to rights such as those which I have mentioned. However, there is a danger that the use of the term "unenumerated" conveys an impression that judges simply identify rights of which they approve and deem them to be part of the Constitution.

8.6 That does not seem to me to have been the process by which the so-called unenumerated rights have come to be identified, but nonetheless it carries a risk of misimpression. It is for that reason that I would consider the term "derived rights" as being more appropriate, for it conveys that there must be some root of title in the text or structure of the Constitution from which the right in question can be derived. It may stem, for example, from a constitutional value such as dignity when taken in conjunction with other express rights or obligations. It may stem from the democratic nature of the State whose fundamental structures are set out in the Constitution. It may derive from a combination of rights, values and structure. However, it cannot derive simply from judges looking into their hearts and identifying rights which they think should be in the Constitution. It must derive from judges considering the Constitution as a whole and identifying rights which can be derived from the Constitution as a whole.

8.7 In saying that, I would emphasise that I do not thereby advocate a narrow textualist approach. In that context I fully agreed with the observations of Henchy J. in *McGee*, where, at p.325 he says:-

> "It is the totality and absoluteness of the prohibition effected by s. 17 of the Act of 1935 that counsel for the plaintiff impugn as infringing what they say are her constitutionally guaranteed rights as a citizen. As has been held in a number of cases, the unspecified personal rights guaranteed by sub-s. 1 of s. 3

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> of Article 40 are not confined to those specified in sub-s. 2 of that section. It is for the Courts to decide in a particular case whether the right relied on comes within the constitutional guarantee. To do so, it must be shown that it is a right that inheres in the citizen in question by virtue of his human personality. The lack of precision in this test is reduced when sub-s. 1 of s. 3 of Article 40 is read (as it must be) in the light of the Constitution as a whole and, in particular, in the light of what the Constitution, expressly or by necessary implication, deems to be fundamental to the personal standing of the individual in question in the context of the social order envisaged by the Constitution. The infinite variety in the relationships between the citizen and his fellows and between the citizen and the State makes an exhaustive enumeration of the guaranteed rights difficult, if not impossible."

8.8 This approach was extended on by Henchy J. in his dissenting judgment in *Norris v. The Attorney General* [1984] IR 36. The above passage was also cited by McCarthy J. in his judgment in the same case at p. 97, and the general approach identified has been affirmed by this Court more recently in *Fleming v. Ireland & Ors.* [2013] 2 IR 417 and in *N.V.H.*

8.9 What needs to be guarded against is allowing for a blurring of the separation of powers by permitting issues which are more properly political and policy matters (for the legislature and the executive) to impermissibly drift into the judicial sphere. Where it is possible properly to derive rights from the Constitution then no such risk arises. Where, however, judges are simply asked to identify rights which they consider might be "a good thing" then the separation of powers is truly blurred. Indeed, in this context, there are common considerations between these issues and questions of standing already addressed. Allowing even well motivated parties to rely

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on constitutional rights which they do not enjoy, likewise, runs the risk of blurring the lines between the judicial and the other powers of the State.

8.10 Returning to the issue in this case, it might be said that, in one sense, the beginning and end of this argument stems from the acceptance by counsel for FIE that a right to a healthy environment, should it exist, would not add to the analysis in these proceedings, for it would not extend the rights relied on beyond the right to life and the right to bodily integrity whose existence is not doubted. However, that very fact seems to me to demonstrate one of the difficulties with the asserted right. What exactly does it mean? How does it fit into the constitutional order? Does it really advance rights beyond the right to life and the right to bodily integrity? If not, then what is the point of recognising such a right? If so, then in what way and within what parameters?

8.11 The very vague nature of the right identified by Barrett J. in *Fingal Co. Council* can, in my view, be demonstrated from the fact that it seemed to have little or no bearing on the outcome of those proceedings. While it is of course the case, as Barret J. noted, that the parameters of identified rights can be refined as the case law develops, it does seem to me that there needs to be at least some concrete shape to a right before it is appropriate to identify it as representing a standalone and separate right derived from the Constitution. If it does not extend existing recognised rights, then there is no need for it. If it does extend existing recognised rights, then there needs to be at least some general clarity about the nature of the right so that there can be a proper analysis of whether the recognition of the asserted right can truly be derived from the Constitution itself. In my view, the right to an environment consistent with human dignity, or alternatively the right to a healthy environment, as identified in *Fingal Co. Council* and as accepted by the trial judge for the purposes of

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argument in this case, is impermissibly vague. It either does not bring matters beyond the right to life or the right to bodily integrity, in which case there is no need for it. If it does go beyond those rights, then there is not a sufficient general definition (even one which might, in principle, be filled in by later cases) about the sort of parameters within which it is to operate.

8.12 In the course of argument, the Court was referred to a textbook by David Boyd, a leading expert in Canadian environmental law and policy, entitled *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2011), which is a detailed and scholarly account of the recognition of environmental rights in many jurisdictions. It is, however, striking that, in most of the states where a constitutional right in the environmental field has been recognised, same has been achieved by the inclusion of express wording in the constitutional instruments of the state concerned. In other words, in accordance with the appropriate process to adopt or amend the Constitution of the state concerned, a particular type of environmental right has been inserted into the Constitution. The advantage of express incorporation is that the precise type of constitutional right to the environment which is to be recognised can be the subject of debate and democratic approval. As is also clear from *Boyd*, there have been a number of different models adopted to incorporate environmental rights into constitutional instruments.

8.13 It is striking that, with one exception, no such right has been recognised in countries within the broad common law family. The exception concerned is India. However, it is necessary to have regard to the fact that there are significant differences between the constitutional structure and context in India compared with this jurisdiction which would make it inappropriate, without significant further

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analysis, to consider that the relevant Indian jurisprudence in this case might prove persuasive in the Irish constitutional regime. Given that neither party sought to place reliance on Indian case law, I do not think it appropriate, in the context of this case, to consider the Indian case law further.

8.14 It does not seem to me that a cogent case has been made out for the identification of a derived right to a healthy environment. However, it is important, in saying that, to fully acknowledge that there may well be cases, which are environmental in nature, where constitutional rights and obligations may be engaged. Indeed, this case provides a good example. Had standing been established or had similar proceedings been brought by persons who undoubtedly had standing, then it would have been necessary for this Court to consider the circumstances in which climate change measures (or the lack of them) might be said to interfere with the right to life or the right to bodily integrity. Other examples could, doubtless be given. In indicating that I consider the asserted right to a healthy environment to be an 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), I should not be taken as suggesting that constitutional rights and state obligations have no role to play in environment issues.

8.15 There is, perhaps, a connecting thread between some of the important elements which are touched on in this judgment. As noted in the section on *ultra vires*, what might well have been a non-justiciable question of policy clearly became justiciable because both a policy (the NTO) and the need to specify how that policy was to be achieved became matters of law by virtue of the 2015 Act. The fact that policy became law obliges this Court to consider whether the Plan complied with the

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legal obligations imposed on a plan by the 2015 Act and, if not satisfied that the Plan does so, to say so in clear terms.

8.16 Similar considerations apply in respect of constitutional claims. It is again important to reiterate that questions of general policy do not fall within the remit of the courts under the separation of powers. However, if an individual with standing to assert personal rights can establish that those rights have been breached in a particular way (or, indeed, that the Constitution is not being complied with in some matter that affects every citizen equally as occurred in *Crotty v An Taoiseach* [1987] I.R. 713), then the Court can and must act to vindicate such rights and uphold the Constitution. That will be so even if an assessment of whether rights have been breached or constitutional obligations not met may involve complex matters which can also involve policy. Constitutional rights and obligations and matters of policy do not fall into hermetically sealed boxes. There are undoubtedly matters which can clearly be assigned to one or other. However, there are also matters which may involve policy, but where that policy has been incorporated into law or may arguably impinge rights guaranteed under the Constitution, where the courts do have a role.

8.17 In that context, I do acknowledge that, in an appropriate case, it may well be that constitutional rights might play a role in environmental proceedings. I would not rule out the possibility that the interplay of existing constitutional rights with the constitutional values to be found in the constitutional text and other provisions, such as those to be found in Art. 10 and also the right to property and the special position of the home, might give rise to specific obligations on the part of the State in particular circumstances. Exactly how any such rights or obligations should be characterised and how the boundaries of such rights and obligations might be defined is a matter to be addressed in cases where they truly arise and have the potential to

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affect the result. Those questions do not arise in this case and it would, therefore, be, in my view, wholly inappropriate to address them. For present purposes, I think it is sufficient to indicate that the ill-defined right to a healthy environment sought to be relied on is either superfluous or lacking in precision and I would not suggest that a right as so described can be derived from the Constitution.

9. Conclusions

9.1 In this judgment I first consider the argument put forward by FIE to the effect that the Plan does not comply with its legislative remit under the 2015 Act and is, therefore, *ultra vires*. It is noted that there was no question raised at the hearing as to the standing of FIE to make arguments along those lines. For the reasons set out in this judgment I conclude that, contrary to the submissions made on behalf of the Government, FIE should be entitled to pursue the wider range of argument on this issue addressed in their written submissions. I also conclude that the issues are justiciable and do not amount to an impermissible impingement by the courts into areas of policy. What might once have been policy has become law by virtue of the enactment of the 2015 Act.

9.2 I also conclude that the 2015 Act, and in particular s.4, requires a sufficient level of specificity in the measures identified in a compliant plan that are required to meet the National Transitional Objective by 2050 so that a reasonable and interested person could make a judgement both as to whether the plan in question is realistic and as to whether they agree with the policy options for achieving the NTO which such a plan specifies. The 2015 Act as a whole involves both public participation in the process leading to the adoption of a plan but also transparency as to the formal government policy, adopted in accordance with a statutory regime, for achieving what is now the statutory policy of meeting the NTO by 2050. A compliant plan is not a

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five-year plan but rather a plan covering the full period remaining to 2050. While the detail of what is intended to happen in later years may understandably be less complete, a compliant plan must be sufficiently specific as to policy over the whole period to 2050.

9.3 For the reasons also set out in this judgment, I have concluded that the Plan falls well short of the level of specificity required to provide that transparency and to comply with the provisions of the 2015 Act. On that basis, I propose that the Plan be quashed.

9.4 I have also considered in this judgment whether it is appropriate to go on to deal with any of the further issues raised, given that I propose that the Plan be quashed and that it follows that an identical plan cannot be made in the future. However, as the issues of standing debated in this appeal could well arise in any future challenge to a new plan, I do address those questions. For the reasons set out in this judgment I conclude that FIE, as a corporate entity which does not enjoy in itself the right to life or the right to bodily integrity, does not have standing to maintain the rights based arguments sought to be put forward whether under the Constitution or under the ECHR. I also conclude that it has not been shown that it is necessary to allow FIE to have standing under the exception to the general rule, which arises in circumstances where refusing standing would make the enforcement of important rights either impossible or excessively difficult.

9.5 On that basis I did not consider it appropriate to address the rights-based arguments put forward, but do offer views on the question of whether there is an unenumerated or, as I would prefer to put it, derived right under the Constitution to a healthy environment. While not ruling out the possibility that constitutional rights and obligations may well be engaged in the environmental field in an appropriate

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case, I express the view that the asserted right to a healthy environment is either superfluous (if it does not extend beyond the right to life and the right to bodily integrity) or is excessively vague and ill-defined (if it does go beyond those rights). As thus formulated, I express the view that such a right cannot be derived from the Constitution. I would reserve the position of whether, and if in what form, constitutional rights and state obligations may be relevant in environmental litigation to a case in which those issues would prove crucial.

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