[2019] IEHC 747

THE HIGH COURT
JUDICIAL REVIEW

[2017 No. 793 JR]

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT

-AND-

THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

RESPONDENT

JUDGMENT of Mr. Justice MacGrath delivered on the 19th day of September, 2019.

Climate Change

1. This case concerns a challenge by the applicant to the National Mitigation Plan ("*the Plan")* published on the 19th July, 2017 which was approved by the Government under s. 3 of the Climate Action and Low Carbon Development Act, 2015, (hereafter referred to as "*the Act*"). The long title of the Act, which came into operation on 10th December, 2015, states that it is:-

   "to provide for the approval of plans by the Government in relation to climate change for the purpose of pursuing the transition to a low carbon, climate resilient and environmentally sustainable economy".

2. The threat to the earth, its inhabitants and ecosystems, posed by the effects of climate change is well documented. The need for action is undoubted. International treaties have been adopted. In 1988 the Intergovernmental Panel on Climate Change ("*IPCC*"), a scientific international body, was founded. It operates under the auspices of the United Nations and acts as an independent evaluator of published information about climate science. Within the IPCC there are a number of working groups which publish Assessment Reports ("*AR*"). These reports involve a thorough investigation and analysis of scientific knowledge of climate change, its impacts, risks and future options. A number of relevant reports have been referred to in these proceedings, in particular, AR4 in 2007, and AR5 in 2014. These have been described as the main sources of the undisputed scientific information about climate change. Special Reports ("*SR*") have also been produced on topics agreed by member governments, in particular a report known as SR15, which followed the Paris Agreement, 2015.

3. Measures have been taken within the European Union and, in this jurisdiction, the Oireachtas has enacted the aforesaid Act of 2015. The Environmental Protection Agency ("*EPA*") has produced reports in September, 2017, on the state of knowledge on climate change impacts for Ireland and in December, 2018, dealing with emissions and emission projections in this country. The Climate Change Advisory Council, established under s. 8 of the Act of 2015, has also reported and reviewed the Plan.

4. The scientific community agrees that global warming can be prevented, mitigated or reduced by ensuring the reduction of the emission of greenhouse gases into the atmosphere but significant effort is required. Adaptation measures may be also taken to counter the consequences of climate change. Further, the scientific community is

attempting to develop measures to reduce existing levels of carbon dioxide in the atmosphere. This case concerns the former i.e. the plan for mitigation measures.

5. It is self-evident that climate change is a problem of and for the global community. No one country, particularly that of the size of this State, can tackle the problem on its own. That however, does not lessen the requirement to do what is necessary to achieve scientifically advised targets. This was recognised in *The State of the Netherlands v. Urgenda Foundation* (C/09/456689/ZA), where the court observed that, although a global problem which the State could not solve on its own:-

> *"this does not release the State from its obligations to take measures in its territory within its capabilities which in concert with the efforts of other states provide protection from the hazards of dangerous climate change."*

Indeed, in the introduction to the Plan, it is acknowledged that climate change is already having diverse and wide-ranging impacts on Ireland's environment, society and on economic and natural resources. Future impacts are predicted to include sea-level rise; more intense storms and rainfall; increased likelihood and magnitude of river and coastal flooding; water shortages in summer; increased risk of new pests and diseases; adverse impacts on water quality; and changes in the distribution and time of lifecycle events of plant and animal species on land and in the oceans. The plan also recognises the limited window for real action to ensure that current and future generations can live sustainably in a low carbon climate resilient world. Acknowledging that impacts will be felt unevenly, and the responsibility to support less developed countries in achieving objectives, nevertheless, it also states that the climate challenge cuts across all sectors of society.

6. The information and studies opened to this court indicate that there is a relationship between cumulative emissions, temperature rises and global risks to the environment, risk of death, of injury and health particularly in low-lying coastal zones and small island developing states due to storm surges, coastal flooding and sea level rises. There are also reported risks of mortality and morbidity during periods of extreme heat. Food systems may be at risk and there is a risk of loss of rural livelihoods and income. The more one proceeds to global warming of 2°C higher relative to the beginning of the Industrial Revolution the greater are such risks. AR5 indicates that there is evidence of a strong, consistent, almost linear relationship between cumulative carbon dioxide emissions and projected global temperature change to 2100. Representative Concentration Pathways *("RCPs")* which are greenhouse gas concentration (not emission) pathways, were adopted in AR5. Risks have been identified in all such pathways. That report contains the following passage:-

> *"Multi-model results show that limiting total human-induced warming to less than two degrees relative to the period 1861 to 1880 with a probability of >66% would require cumulative CO2 emissions from all anthropogenic sources since 1870 to remain below about 2,900 Gt of CO2 (with a range of 2,550 to 3,150 GtCO2 depending on non – CO2 drivers). About 1,900 GtCO2 has already been emitted by 2011."*

7. The applicant maintains that crucial to understanding the risks of climate change and to appreciate warming levels are historical cumulative emissions. Every unit emitted contributes equally to warming, regardless of when or where it is emitted. Thus, the more emissions that have taken place over past years, then the less emissions can be afforded in the future if we wish to stay within particular concentrations in the atmosphere and therefore below particular temperatures. There are "*budgets*" of the maximum amount that can be afforded to carbon dioxide emissions, to keep the temperature increases below 2°C above preindustrial levels. This court has been informed that the world cannot afford to emit more than a further 1000 gigatons of carbon in order to stay below the 2°C limit. In order to achieve, or stay under 1.5°C, this amount will need to be reduced significantly.

8. The applicant contends that last minute reductions will not achieve the desired targets and what matters for the purposes of assessing the effect on concentrations and thus temperature is what occurs during the entire period over which one is attempting to reduce emissions. Therefore, to prevent harm, emissions must be reduced in a feasible but sharply downwards trajectory. The applicant maintains that for the State to argue that measures will be put in place to achieve a reduction by 2050 does not meet the case, as it does not avoid the serious risk of damage that follows from the failure to reduce or take steps to reduce emissions in the short term. Even if all emissions ceased today, it is contended that the current concentration levels will continue to change the climate for decades to come.

9. The evidence suggests that net negative carbon dioxide emissions are required at some point during the century to stay within the 2°C limit. Such scenarios assume that carbon dioxide removal technologies such as bioenergy, extensive reforestation and forest growth will be required. Negative emissions are likely to be expensive and technology remains untested. It is therefore submitted that any mitigation plan has to be one that is calculated to achieve substantial emission reductions in the short term and that the State is failing to do that is not controverted. Thus, it is argued that focusing on long-term reduction targets, will lead to early depletion of carbon budgets.

10. Thus, the problem is clear. No party before this court disputes this. What is in dispute is whether the respondent and its Minister, in making and approving the plan, is doing enough to tackle the problem and, if not, whether this gives rise to a breach of the Act and of the applicant's rights which the courts can entertain and enforce.

The Applicant

11. The applicant is a company limited by guarantee with an address at Beara, Co. Cork. It is an environmental non-governmental organisation which has been active in the protection and the promotion of the Irish environment for approximately 20 years. An issue of defence raised in these proceedings is whether the applicant, an incorporeal body, enjoys sufficient *locus standi* to maintain this challenge particularly in the context of the personal and human rights under the Constitution and the Convention on Fundamental Rights and Freedoms, alleged to have been breached.

The Grounds of Challenge

12. The applicant alleges that the Plan is unconstitutional, is in breach of the European Convention on Fundamental Rights and Freedoms and is *ultra vires* the powers of the Minister under the Act. The applicant seeks to quash the decision of the respondent to approve the Plan and, if appropriate, an order remitting the Plan for revision in accordance with the requirements of the Act. It also seeks, *inter alia*, declarations that the Plan as approved is not consistent with the requirements of the Act and, in particular, is contrary to those requirements identified in s. 4 of the Act. It is contended, *inter alia,* that the Plan does not specify any or any adequate measures to achieve the management of a reduction of greenhouse gas emissions in order to attain emission levels appropriate for furthering the achievement of the National Transition Objective as provided for and defined in s. 3 of the Act. (emphasis added) The applicant maintains that the Plan, in a number of respects, is in breach of the provisions of s. 4 of the Act and seeks declarations that the Plan did not take any or any adequate account of existing obligations of the State as identified in s. 2 of the Act. It further seeks a declaration that the approval is unconstitutional and breaches the Charter on Fundamental Rights and Freedoms in circumstances where the failure to adopt any or any adequate means to reduce greenhouse gas emissions as required to contribute to meeting the objectives of the UNFCCC, the Kyoto Protocol and the Paris Agreement will endanger the applicants rights, the rights of the applicant's members and the population at large. A declaration is sought that the respondent has failed to perform its functions in a manner compatible with the State's obligations under the provisions of the European Convention on Human Rights, contrary to s. 3 of the European Convention on Human Rights Act, 2003. It also seeks a declaration that it is unreasonable for the respondent to approve the Plan and that the Plan fails a test of reasonableness.

13. At the heart of this case is the applicant's claim that the respondent, in measures which it has adopted in the Plan, has failed to take action to ensure a reduction in such emissions particularly in the short and medium-term and thereby to attempt to achieve the targets which the international community has deemed to be not only desirable but necessary in order to protect the world's climate and environment for not only the current but importantly for future generations.

Climate Change Advisory Council

14. The Act makes provision for the establishment of the Climate Change Advisory Council (hereafter referred to as "the *Advisory Council").* The applicant relies, *inter alia,* on the Council's criticism in its first report published in 2016, in correspondence and in its periodic review in 2017, of the State's response to the challenges of climate change and the contents of the Plan. In particular its observation that Ireland is unlikely to meet its 2020 targets for reducing greenhouse gas emissions by a substantial margin is criticised and that this will have implications not only for 2020, but for compliance with 2030 targets. The Advisory Council considered it urgent that additional and enhanced policies and measures be identified in the Plan, which will assist in addressing the gap in emissions reductions required to meet the 2020 targets and ensure that the anticipated 2030 EU targets will be achieved as part of the low-carbon transition to 2050.

The main provisions of the Act – the National Transition Objective and the National Mitigation Plan

15. Section 2 of the Act provides, *inter alia*, that nothing in the Act and the National Mitigation Plan shall operate to affect existing or future obligations of the State under EU law or existing or future obligations of the State under any international agreement or domestic legislation.

16. Section 3 addresses the National Transition Objective and provides as follows:-

"(1) For the purpose of enabling the State to pursue, and achieve, the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050 (in this Act referred to as the "National Transition Objective") the Minister shall make and submit to the Government for approval—

(a) a National Mitigation Plan, and

(b) a national adaptation framework.

(2) When considering a plan or framework, referred to in subsection (1), for approval, the Government shall endeavour to achieve the National Transition Objective within the period to which the objective relates and shall, in endeavouring to achieve that objective, ensure that such objective is achieved by the implementation of measures that are cost effective and shall, for that purpose, have regard to—

(a) the ultimate objective specified in Article 2 of the United Nations Framework Convention on Climate Change done at New York on 9 May 1992 and any mitigation commitment entered into by the European Union in response or otherwise in relation to that objective,

(b) the policy of the Government on climate change,

(c) climate justice,

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

(e) the most recent national greenhouse gas emissions inventory and projection of future greenhouse gas emissions, prepared by the Agency."

Section 4 imposes an obligation on the Minister, not later than 18 months after the passing of the Act, and not less than once in every five-year period, to make and submit to the Government, for approval, a national low carbon transition and mitigation plan. Section 4(2) provides:-

"(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,

(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."

Section 4(3) makes provision for the Government to request Ministers to submit, within a specified period, the sectoral mitigation measures that each such Minister of the Government proposes to adopt in relation to matters for which they have responsibility. There is an obligation on the Minister for the Environment, Local Government and the Community (*"the Minister")* to include those measures in the plan. Section 4(4) provides that the Government may:-

"(a) approve, or

(b) approve, subject to such modifications as they consider appropriate,

a National Mitigation Plan submitted to them under this section."

If and when a periodic review report is submitted to Government, the Minister may make and submit to the government, for approval, a plan varying, revising or replacing an improved National Mitigation Plan. The Government has the power to vary or revise the plan.

Section 4(7) imposes an obligation on the Minister and the Government to take into account:-

"(i) any existing obligation of the State under the law of the European Union or any international agreement referred to in section 2,

(ii) likely future mitigation commitments of the State and the economic imperative for early and cost-effective action, and

(iii) the requirement to be able to act quickly in response to economic and environmental occurrences and circumstances;

(b) the need to promote sustainable development;

(c) the need to take advantage of environmentally sustainable economic opportunities both within and outside the State;

(d) the need to achieve the objectives of a National Mitigation Plan at the least cost to the national economy and adopt measures that are cost-effective and do not impose an unreasonable burden on the Exchequer;

(e) relevant scientific or technical advice;

(f) the findings of any research on the effectiveness of mitigation measures and adaptation measures;

(g) the sectoral mitigation measures included in the National Mitigation Plan pursuant to subsection (2)(d) that are to be adopted by each Minister of the Government in relation to the matters for which each such Minister of the Government has responsibility;

(h) where a National Mitigation Plan has been approved by the Government, the most recent approved National Mitigation Plan;

(i) any recommendations or advice of the Advisory Council;

(j) mitigation measures, specified in a notification to the Minister or the Government under subsection (13); and

(k) the protection of public health."

17. Before making the Plan, the Minister is obliged to have regard to submissions made pursuant to and in accordance with a notice which must be published by him on the internet and in more than one newspaper circulating in the State, inviting members of the public and any interested parties to make submissions in writing in relation to proposed National Mitigation Plans. The court was informed that following the publication of the draft Plan, 124 submissions were made and in consequence an additional 43 new actions were added, with certain amendments being made to the actions proposed contained in the draft plan.

The Basis of the Claim

18. The applicant pleads that, pursuant to the United Nations Framework Convention on Climate Change (UNFCCC)(hereinafter referred to as the "*Framework Convention*") the respondent is committed to the stabilisation of greenhouse gas concentrations in the atmosphere at a level that will prevent dangerous anthropogenic interference with the climate system to achieve such stabilisation within a timeframe sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner. To enhance the implementation of the Framework Convention, including the central objective of international climate law and policy, the respondent is further committed under the Paris Agreement, 2015, to arrest the increase in the global average temperature to well below 2°C above pre-industrial levels; and to pursue efforts to limit the temperature increase to 1.5°C, recognising that this would significantly reduce the risks and impacts of climate change.

19. It is pleaded that prior to the adoption of these more ambitious temperature goals under the Paris Agreement the aim of the Framework Convention and related instruments had been to keep the increase and the global average temperature to below 2°C above pre-industrial levels. With what has been described as this less ambitious goal, Ireland and the EU recognised *via* the Framework Convention process that a reduction in emissions of 25% to 40% on 1990 levels was required from the parties described in Annex 1 of the agreement, which includes Ireland, in order to contribute to fulfilling the Framework Conventions' objectives. The applicant further pleads that notwithstanding this, the EU committed to reduce its emissions by a lower figure, being 20% by the year 2020, compared with those of 1990. It is pleaded that it is recognised that greenhouse gas emissions reductions by Annex 1 parties of 80 to 95% by 2050 (in comparison with 1990 levels) are required in order to contribute to keeping the increase in global average temperature to below 2°C above pre – industrial levels.

20. The applicant places considerable emphasis on the path of reduction and the necessity to reach interim emission reduction targets (emphasis added). Several reduction paths with the same starting point and the same end point can vary dramatically in the amount of cumulative or aggregate emissions.

21. Insofar as Ireland's contributions to EU commitments pursuant to the Framework Convention process, it is submitted that this includes a binding 20% reduction in emission from non-energy transmission system ("ETS") sectors by 2020 (compared to the baseline adopted by the EU in 2005) and a binding commitment to ensure that by 2020, renewable energy has a 16% share in the gross final consumption of energy in Ireland. It is pleaded that in the context of long term goals, the EU aims to cut greenhouse gas emissions by 80% compared to 1990 levels through domestic reductions alone *(i.e*. rather than relying on international credits) and it is the applicant's case that the plan does not adequately take into account the State's EU obligations or commitments and that it provides no mechanism by which the respondent's obligations or commitments to EU law will be complied with. It should be noted that in submissions to the court, counsel for the applicant accepted that the reduction of emissions figures of 25% - 40% by 2020 and 80% - 90% by 2050, determined in AR4, which trajectory was acknowledged by the EU and Ireland, were subject to political endorsement but did not create legally binding targets as such. The Paris Agreement recognised the need to reduce the safe temperature limit rises and thus increase these targets.

22. The Plan is further criticised in that the respondent, in approving the Plan, failed generally to ensure the achievement of the National Transition Objective by the implementation of measures that are cost effective and that it failed further to take into account matters specified in s. 3(2) of the Act. It is pleaded that the ultimate objective of the Framework Convention is to achieve stabilisation of greenhouse gas concentration in the atmosphere at a level that will prevent dangerous anthropogenic interference with the climate system and to achieve that level within a specified time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner. The applicant

describes the plan as wholly inadequate and one which fails to take seriously the urgent need to reduce emissions.

23. The applicant also relies on a failure by the respondent to comply with its policy on climate change which includes a National Climate Policy position from 2014, containing as it did, a policy directed at an aggregate reduction of carbon dioxide emissions of at least 80% by 2050, in comparison to 1990 levels, across the electricity generation, build environment and transport sectors and, in parallel, an approach to carbon neutrality in the agricultural and land use sector including forestry. With regard to the provisions of s. 3(2)(c), the applicant contends that climate justice requires that Ireland has recognised *via* the Framework Convention process that Annex 1 countries, which include this State, ought to be delivering a reduction in emissions of 25 to 40% by 2020 when compared with 1990 levels to contribute to achieve a below 2°C goal of the Framework Convention, and to pursue efforts to limit the temperature increase to 1.5°C. By failing to provide in the Plan for emission reductions in accordance with the required standard, the applicant maintains that the respondent has had no, or no adequate, regard to climate justice.

24. It is also contended by the applicant that the State has failed to take adequate account of the obligations and requirements of ss. 3(2)(d) and 3(2)(e), the latter being the most recent national greenhouse gas inventory and projection for future greenhouse gas emissions prepared by the EPA. The most recent projections from the EPA reveal that Ireland is projected to miss its binding EU law target if 20% reduction in non – ETS emissions by 14% to 16%. It is also projected that Ireland will miss its binding EU law renewable energy target for 2020 by 2.7% and that without additional and enhanced policies and measures it will miss its indicative 2030 target of a 30% reduction in emissions by 27% to 29%. It is pleaded that Ireland's greenhouse gas emissions are projected to increase between 1990 and 2020 by between 7.5% and 10% at least and that these will further increase by 2030 and that this is recognised in the Advisory Council report that Ireland is "*way off target*" to achieve the required reductions. Thus, in approving what is described as the wholly inadequate Plan which fails to take seriously the urgent need to reduce emissions as required, it is pleaded that the respondent has failed to have any or any adequate regard to the EPA's most recent inventory and projection.

25. While it was initially alleged that the Advisory Council was not given an adequate opportunity to comment on the Plan, or that the respondent failed to take into account the comments of the Advisory Council in respect of the Plan, this was not pursued at hearing.

26. By failing to take any or any adequate measures to reduce greenhouse gas emissions as required, or to identify specific measures by which the respondent will achieve its 2020 to 2050 targets, the objectives of the Framework Convention and the Paris Agreement, it is pleaded that the plan will impinge on and threaten the right to life, the right to liberty and security, the right to the integrity of the person, the right to respect for family and private life and home, the right to property, the rights of the child, the rights of the elderly,

equality between men and women, environmental protection and/or the unenumerated constitutional right to a reasonable environment. It is also pleaded that this will breach the unenumerated constitutional commitment to intergenerational solidarity and/or unenumerated constitutional obligation to vigilantly and effectively protect the environment. It is the applicant's case that when a Plan will have such an effect, its approval is repugnant to the Constitution and is in breach of the respondent's obligations, including the protection of human rights under the European Convention on Human Rights and the EU Charter on Fundamental Rights.

Affidavit of Mr. Tony Lowes

27. The application is grounded on the affidavit of Mr. Tony Lowes sworn on 13th October, 2007. He is a director of the applicant company. He has also sworn a further affidavit on 16th April, 2018. Mr. Lowes avers that the science presented in the IPCC's assessment reports is regarded as representing the overwhelming scientific consensus shared by the parties thereto, including the respondent. These reports contain summaries for policy makers which have been thoroughly discussed by scientists as well as Government representatives. All Governments have committed themselves to the findings, conclusions and implications thereof. He makes particular reference to passages from the summary for policy makers in the synthesis report of AR5 of 2014. This synthesis report states that changes in many extreme weather and climate events have been observed since 1950. Some of these changes have been linked to human influences, including a decrease in cold temperature extremes, an increase in warm temperature extremes, an increase in extreme high sea levels and an increase in the number of heavy precipitation events in a number of regions. It is recorded that impacts from recent climate related extremes such as heatwaves, floods, cyclones and wildfires, reveal the serious vulnerability of certain ecosystems and many human systems to current climate variability. The Summary for Policy Makers of the Synthesis Report of the IPCC's Fifth Assessment Report (2014) reflects the current situation which is discussed at para. 76 et seq below.

28. This report outlines in stark terms, the challenges and risks of climate change. The report also states that substantial emission reductions over the next few decades can reduce climate risk but that:-

> "*…Without additional mitigation efforts beyond those in place today, and even with adaptation, warming by the end of the 21st Century will lead to high to a very high risk of severe, widespread, and irreversible impacts globally (high confidence – being a reference to the degree of assuredness with which this opinion is expressed by the authors). Mitigation involves some level of co – benefits and of risks due to adverse side effects, but these risks do not involve the same possibility of severe, widespread and irreversible impacts as risks from climate change, increasing the benefits from near term mitigation efforts.*
>
> *There are multiple mitigation pathways that are likely to limit warming to below 2°C relative to pre-industrial levels. These pathways would require substantial emissions reductions over the next few decades and near zero emissions of CO2*

and other long-lived greenhouse gases by the end of the century. Implementing such reductions poses substantial technological, economic, social and institutional challenges, which increase with delays in additional mitigation and if key technologies are not available. Limiting warming to lower or higher levels involves similar challenges but on different timescales." (emphasis added)

The applicant places significant emphasis on this last paragraph. This assessment report has led policy makers to the conclusion that an increase of 2°C may not in fact be a safe limit, and Mr. Lowes avers that that is why the Paris Agreement provides for an even lower limit. In AR5 the view is expressed that without additional efforts to reduce greenhouse gas emissions beyond those in place today, emission growth is expected to persist driven by growth in global population and economic activities. It continues:-

"baseline scenarios—those without additional mitigation— result in global mean surface temperature increases in 2100 from 3.7 degrees Centigrade to 4.8 degrees Centigrade compared to preindustrial levels."

With increased warming, some physical systems or ecosystems may be at the risk of abrupt and irreversible changes, known as tipping points, and that such risks will increase disproportionately as temperatures increase.

29. Mr. Lowes also refers to a number of international peer – reviewed research documents, including a World Bank report entitled "*Turn down the heat: Why a 4°C World Must be Avoided"* which warn of the consequences of climate change.

30. He also calls in aid a report of the International Energy Agency (hereafter "*the IEA*") entitled "*Redrawing the Energy-Climate Map*" (June, 2013) which warns that the World is not on track to meet the target agreed by governments to limit the long term rise in the average global temperature to 2°C. In that report, the IEA highlights the delay in climate action in the energy sector will come at a high cost and that because emissions are still growing, the remaining carbon budget for energy may be used up within 20 years.

31. Mr. Lowe avers that Ireland's contribution to climate change in this regard is disproportionate as evidenced by the per capita emissions which are the third highest in the EU and thus Ireland must meet appropriate targets in 2020 and 2030 and not just long term emission targets. By failing to meet its 2020 and/or 2030 targets, Ireland's total cumulative emissions will be larger than is permissible given the carbon budget available to Ireland on the basis of a fair and equitable distribution of the global carbon budget. Missing either or both of these targets will have consequences for the 2050 target. He avers that the concept of the carbon budget illustrates why Ireland must meet appropriate targets in 2020 and 2030, and not just a long-term emissions target, to avoid contributing to a dangerous climate change.

32. Reference is also made to the UN Environmental Programme ("UNEP") Emissions Gap Report, 2016, published in November, 2016, which emphasises that urgent action is required if the goals of the Paris Agreement are to be met and notes that current

emission reduction pledges, that is the nationally determined contributions, are insufficient to meet the goals of the Paris Agreement. Emphasis is placed on the requirement for urgent enhancing of early mitigation measures and that enhanced early action is critical for pursuing the 1.5°C target. It is stated in that report that:-

> *"The urgency of enhancing pre – 2020 mitigation acts are, thus, indisputable:*
>
> *(i) It supports the transition towards a least cost emissions reduction trajectory after 2020 that is consistent with the well – below 2 degrees' Centigrade target;*
>
> *(ii) It is likely the last chance to keep the option of limiting global warming to 1.5 degrees Centigrade in 2100 open, as all available scenarios consistent with the 1.5-degree target imply that global greenhouse gas emissions peak before 2020."*

33. In short, this report warns and advises that delaying action is associated with greater risks of failing to meet the temperature target, increase the costs of mitigation in the medium and long term, implies greater risks of economic disruption and will result in greater lock-in of carbon and energy-intensive infrastructure in the energy system and society, as a whole.

34. Mr. Lowes refers at some length to EU legislation and what is described as the climate and energy package which consists of four main legislative provisions adopted in 2009, dealing with reforms of the emissions trading scheme, reform of goals relating to renewable energy, covering sectors falling outside the ETS and the environmentally safe sequestration of carbon dioxide underground. Pending other developed countries committing themselves to comparable reductions, the EU committed itself in March, 2007 to what Mr. Lowe has described as a less ambitious target, and one that it would later effectively accept via the UNFCCC and Kyoto, is insufficient to contribute to preventing dangerous anthropogenic interference with the climate system:-

> *"the EU makes a further independent commitment to achieve at least a 20% reduction of greenhouse gas emissions by 2020 compared to 1990."*

35. Mr. Lowes states that the EU reaffirmed its commitment to increasing the 20% target to a 30% reduction by 2020 in December, 2008 and Annex I parties to the UNFCCC should deliver emission reductions of between 25% and 40% by 2020. The further goals of the EU over the period 2013 and 2050 are discussed in detail by Mr. Lowes. He references the Effort Sharing Decision, Decision 406/2009/EC, under which Ireland must reduce its non-ETS emissions by 20% by 2020 compared to 2005 greenhouse gas emissions levels, with annual limits set for each year over the period 2013-2020.

36. In addition to the Advisory Council's Report and Review, Mr. Lowes also refers to the EPA's greenhouse gas emissions projections report and states that Ireland is projected to miss its binding EU target of 20% reduction in non-ETS emissions by 14% to 16%, miss

its binding EU law renewable energy target by 2.7% and without additional and it has policies and measures, miss its 2030 target by between 27% to 29%.

The respondents pleading

37. The respondent opposes this application and raises a number of preliminary objections. It pleads that the relief sought is inadmissible by reason of delay, the proceedings not having been commenced within three months from the date of the approval of the Plan by the government which was on the 27th June, 2017. The Plan was in fact published on the 19th July, 2017. This was not advanced at hearing.

38. Importantly, the respondent contends that neither the decision to approve the Plan nor the Plan are amenable to judicial review, as they do not grant rights or impose obligations and the Plan is therefore a non – justiciable statement of government policy which is not subject to the remedy of judicial review. The respondent also pleads that the applicant lacks *locus standi* and that it is not entitled to advance those aspects of its claim in respect of the alleged breaches of the Constitution and/or alleged breaches of the European Convention of Human Rights on the basis of *actio popularis.*

39. It is to be observed that the applicant in its statement of grounds contended for a different and higher level of scrutiny in the present case, than that which applies to standard judicial review proceedings and the respondent objects to this. The respondent pleads that the standard of scrutiny applicable to the within proceedings under Irish law is wholly compatible with the requirements of EU law. Further objections are taken in relation to the inadequacy of the matters pleaded, and as particularised. Significantly, it is the respondent's case that the applicant fails to engage with the substance of the Plan itself and that despite alleging widespread deficiencies, it fails to particularise the manner in which the Plan is alleged to be deficient.

40. The respondents also argue that certain of the pleas are vague, thus the plea of unconstitutionality does not identify the articles of the Constitution alleged to have been breached and the manner in which they are allegedly breached.

41. On a substantive basis, the respondent pleads that the applicant's case relies upon a fundamental misconception of the scheme and purpose of the Act and the role of National Mitigation Plans. Even if the Plan is justiciable, a very wide measure of discretion and considerable deference must be shown to the decision maker in respect of the approach to be adopted. Such decisions are made having regard to a variety of factors including that the Plan will have to be revised at least six times over a 33 – year period. The Plan is required to specify each of its objectives in a variety of subject matters including the national economy, society, environment, climate, science, technology, legal context, all of which are complex, difficult to quantify and are constantly evolving and interacting with each other in unpredictable ways. It is also contended that a wide measure of discretion ought to be allowed to the plan maker. While the applicant repeatedly alleges that the Plan ought to set out sufficient mitigation measures as to meet the national transitional objective, the first mitigation plan is an initial step to set Ireland on a pathway to achieve a transition to a low carbon economy. The respondent contends that each individual

mitigation plan does not and could not provide a complete road map to the achievement of the National Transition Objective to be a low carbon economy by 2050.

42. It is the respondent's contention that the applicant is effectively calling upon the court to substitute either the applicant's view, or the court's view, for the view of government as to which measures are cost effective and will achieve adequate mitigation. That is not the function of the court in judicial review proceedings. It is a matter for the executive branch of government and for the Oireachtas. The respondent contends that the Act requires the Government to endeavour to achieve policy objectives and it does not impose binding obligations susceptible to being breached, or create mandatory obligations, the breach of which can be sanctioned. The respondents deny that there has been any breach of the applicant's Constitutional rights, of any statutory provision, or provision of EU law or that there has been a breach of Convention rights.

Affidavit of Mr. Frank Maughan

43. In a replying affidavit sworn on the 15th February, 2018, Mr. Frank Maughan, Principal Officer in the Department of Communications, Climate Action and Energy accepts that the veracity or accuracy of the science referred to in the applicant's affidavit is generally not in dispute. He contends, however, that the proceedings raise relatively net points of law.

44. Mr. Maughan makes a number of points in relation to the international legal framework in which Ireland's national climate policy operates and these may be summarised as follows:-

(i) The Framework Convention was designed explicitly so that the commitments contained therein were not considered to be immediately sufficient to resolve the problems presented by climate change;

(ii) The Kyoto Protocol was adopted on the 11th December, 1997 and came into force on the 16th February, 2005. The major distinction between the Kyoto Protocol and the Framework Convention is that while the Convention encouraged developed countries to stabilise greenhouse gas emissions, the protocol commits them to do so. Parties listed in Annex 1 to the Protocol took on qualified emission reduction targets for the commitment period 2008 – 2012 based on a 1990 baseline.

(iii) The Doha amendment to the Kyoto Protocol was adopted on the 8th December, 2012, which included new commitments for the Annex 1 parties, which include Ireland. Those parties and countries agreed to take on a second commitment period from 2013 to the end of 2020. Ireland was not assigned a specific emission reduction target for the second commitment for that period. Ireland in fact submitted its instrument of acceptance of the Doha amendment to the Kyoto Protocol on the 21st December, 2017. Ireland was not assigned a specific emission reduction target for this period. For this reason the EU and its Member States undertook to jointly fulfil its commitment in accordance with Article 4 of the Protocol; that commitment being to reduce EU emissions by 20% on 1990 levels by 2020. These targets have now been incorporated into EU law and given effect in the

Effort Sharing Decision, which imposes binding legal obligations on Member States to reduce emissions from certain of their economies in that period, 2013 – 2020;

(iv) The Paris Agreement was adopted on the 12th December, 2015. The parties specifically agreed to the objective of reaching a global peak of greenhouse gas emissions as soon as possible and to undertake rapid reductions thereafter. The parties further agreed to undertake and communicate ambitious efforts with a view to holding the increase in global average temperatures to well below 2°C above pre – industrial levels and pursuing efforts to limiting the temperature increase to 1.5°C above pre – industrial levels. The Agreement was ratified by the European Union on the 5th October, 2016 and came into force on the 4th November, 2016, when Ireland also ratified it. Mr. Maughan describes the Agreement as representing a milestone in international efforts to strengthen the global response to the threat of climate change. The international effort is now represented by 188 nationally determined contributions (*"NDC's")* which the Paris Agreement anticipates will increase in ambition over time. The Paris Agreement will measure the effectiveness of NDC's in achieving the goals of the agreement via a series of global stocktakes to be held in five year cycles, beginning in 2023. Mr. Maughan states that it is anticipated in line with the principle of the Paris Agreement that the ambition reflected in each of the parties' NDC's will increase over time. Ireland's contribution to the Paris Agreement is by way of an NDC tabled by the EU on behalf of its Member States which commits the EU as a whole to reduce greenhouse gas emissions by at least 40% by 2030 compared with 1990 levels. Member States do not have specific targets assigned to it under the Paris Agreement. Instead the State is to meet its obligations through the NDC of the EU. Mr. Maughan places significance on the fact that Ireland's contribution and obligations with respect to the Paris Agreement shall be determined and articulated through EU legislation and that this legislation has yet to be enacted.

(v) Within the EU framework, the overall EU objective for 2020 is to reduce its greenhouse gas emissions by 20% by 2020 compared with 1990 levels and this reduction is to be achieved in all sectors of the economy. Reductions to the EU's ETS are complemented by the individual targets set by the EU for each Member State. Mr. Maughan goes into some detail in relation to the legislative framework and observes that the European Union's greenhouse gas emissions reduction objective for 2020 is approached by a twofold legislative framework being the ETS and a series of individual targets for each Member State (Non – ETS). He observes that the target set for Ireland is that by 2020 emissions should be 20% lower than their level in 2005 and that this target is jointly the most demanding reduction target allocated to an EU Member State, with the average reduction applying to Member States being 10%. Mr. Maughan notes that the ETS affords Member States flexibility to achieve their annual emission limits through measures to bank or to borrow allowances between individual years or to purchase additional allowances from other Member States or from international carbon markets. In October, 2014, the EU Council reached political agreement on headline greenhouse gas emission reduction targets, being an overall EU reduction of at least 40% by 2030 (compared to 1990 levels). These targets which form the basis for the EU's first NDC under the Paris Agreement. Negotiations have taken place on the proposal to revise the EU's emissions

trading directive for the 2021 – 2030 period and at the time of the drafting of his affidavit, no legally binding obligations had been agreed.

45. Mr. Maughan describes the Plan as being an output of a national policy and a statutory framework "*that places the National Transition Objective (as defined at s. 3 of the 2015 Act) at the heart of Government policy*." The key national policy position on climate action and low carbon development was adopted by the Government and published in 2014; the objective being the transition to a competitive low carbon, climate resilient and environmentally sustainable economy by 2050. He describes how Ireland has introduced a carbon tax on a phased basis beginning in 2009 in sectors of the economy not covered by the ETS and that Ireland is one of a minority of countries internationally to have implemented carbon pricing on an economy wide basis.

46. In 2015, the Department of Communications, Energy and Natural Resources published a White Paper on "*Ireland's transition to a low carbon energy future 2015 – 2030*". Mr. Maughan states that the Act provides a statutory basis for the achievement of the national policy position on climate action and low carbon development. The making of National Mitigation Plans pursuant to this is described as a key process by which the Act will frame and drive Ireland's climate policy towards the National Transition Objective for 2050. Prior to its approval, a draft plan was prepared and this together with an associated strategic environmental assessment report and appropriate assessment natural impact statement were published for statutory public consultation in March, 2017. These reports provided information on the decision making process. The Plan took into account the cost effectiveness of measures which he describes as a policy decision for the Government and was considered in the context of the duration of the lifetime of the Plan as well as in the context of the long term objectives of the Framework Convention, existing EU and international obligations. He describes how the lists of measures adopted for inclusion in the final plan represented the outcome of a lengthy consultation and analytical process. This plan covers the period 2017 to 2022 and further mitigation plans will set out Ireland's approach to achieving mitigation commitments for the period 2021 to 2030 arising from legislation currently being finalised at EU level. He describes how the current plan nevertheless addresses the nature of the challenge Ireland will face in reducing its emissions over the period to 2030. The plan is a living document which anticipates that it will be continually updated as ongoing analysis, dialogue and technological innovation generate more cost effective sectoral mitigation options. It should be observed in passing that Mr. McCullough S.C., representing the applicant, in his submissions to the court stated that this is part of what the applicant relies upon and that the State is able to and should adapt new measures so as to bring the plan into accord with the Constitution and its human rights obligations.

47. Mr. Maughan avers that the plan recognises that it is not feasible to prescribe precisely in 2017 which measures will be put in place by government to achieve the National Transition Objective for 2050. The plan signalled the intention of government to take a number of further significant steps in the months following its publication including a new National Planning Framework and a 10 year capital investment plan. The Act provides for

a formal update to the Plan at least once every five years and in this context, he avers that the Government has recognised the high likelihood that technology and innovation will continue to evolve over the coming decades. Mr. Maughan also refers to the requirement to recognise the need to achieve the objectives of the Plan at the least cost to the national economy and to adopt measures that are cost effective which do not impose an unreasonable burden on the exchequer.

48. In a further affidavit sworn on the 16th January, 2019, Mr. Maughan outlines legal developments that have occurred and measures which have come into force since the publication of the plan for the purpose of drawing attention to developments in national climate change policy since the adoption of that plan. He refers to the 2018 Annual Transition Statement ("*ATS*") and to developments in EU law. He points out that phase III of the EU ETS runs from 2013 to 2020 and that agreement was reached on Phase IV on the 8th December, 2017. A revised ETS directive (Directive No. 2018/410) was published on the 19th March, 2018. Under this phase, which runs for the period 2021 – 2030, Mr. Maughan says that the sectors covered by the ETS must reduce their emissions by 43% by 2030, compared to 2005 levels. Further changes in the design of the system are therefore required to be implemented from 2021 to stabilise and to further increase the price of carbon and incentivise emissions reductions. With regard to non – ETS emissions, he refers to the introduction in July, 2016 by the European Commission of a proposal for a regulation to limit post - 2020 national emissions in sectors which were not covered by the ETS, including transport, buildings and agriculture. This proposed regulation is part of the EU's efforts to reduce its greenhouse gas emission by at least 40% below 1990 levels by 2030. This Effort Sharing Regulation (Regulation No. 2018/842) on binding and greenhouse gas emission reductions by member states from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, came into force on the 9th July, 2018. Ireland's national contribution is set at a 30% reduction in non – ETS emissions compared to 2005 levels by 2030 and Mr. Maughan states that a new approach has been employed by the Commission when calculating national contributions. He continues at para. 11 of his affidavit:-

> *"This approach is not simply based on gross domestic product per capita, but also includes a "cost effectiveness" analysis. This takes into account the relative cost to each Member State to reduce emissions, having regard to the manner in which emissions are generated in each Member State. Ireland's national target for the period 2030 will therefore be lower than it would have been on the basis of GDP per capita only. On a purely GDP per capita (which was the sole basis for the previous efforts sharing decision) Ireland's contribution would have amounted to a 39% reduction."*

49. Mr. Maughan outlines what he describes as the updating and implementation of the national public policy response to climate change, since the Plan came into force. The government published the National Adaptation Framework on 18th January, 2018. In February, 2018, the State published the National Planning Framework which coordinates key areas such as housing, jobs, health, transport, environment, energy and

communications into an overall coherent strategy. The development and publication of this National Planning Framework provided a timely and key opportunity to ensure that the climate implications of spatial choices are fully considered and addressed. He states that climate considerations were considered extensively during the drafting of the framework and he outlines a number of commitments which will, he says, support the achievement of Ireland's climate policy objectives. These include for example, the integration of climate considerations in statutory plans and guidelines, more energy efficient development with the location of housing and employment, the promotion and protection and enhancement of carbon pools, matters such as the construction of sea walls in response to sea level rises and green adaptation which seeks to use ecological properties to enhance the resilience of human and natural systems to include green spaces and parks. In addition, the National Development Plan for 2018 – 2027 was published in February, 2018 and sets out the investment priorities that will underpin the implementation of the National Planning Framework. It will guide national, regional and local planning and investment decisions in Ireland over the next two decades, to cater for an expected population increase of over one million people. Mr. Maughan says that this Plan will build on the National Mitigation Plan. The Plan has also identified areas of propriety for public investment. At para. 20 of his affidavit Mr. Maughan states that almost €22BN will be directed, between exchequer and non – exchequer resources to address the transition to a low carbon and climate resilient society. Further, the National Development Plan has allocated €8.6BN for investment in sustainable mobility and he states:-

"This means that well over one Euro in every five Euro spent under the National Development Plan will be on climate mitigation and this capital investment will enable Ireland to deliver a significant reduction in greenhouse gas emissions in the period to 2030."

50. Mr. Maughan also outlines what he describes as new ambitious commitments on climate action which are outlined in the National Development Plan and that these will go beyond the measures adopted for the Plan in 2017. These matters include:-

(a) Energy efficient upgrades for a considerable number of homes;
(b) Energy upgrades in all public buildings;
(c) Implementing the new renewable electricity support scheme to deliver a quantity of renewable energy;
(d) The roll-out of support schemes for renewable heat and national smart metering programme;
(e) The transitioning of the Moneypoint plant away from coal by the middle of the next decade;
(f) Having at least 500,000 electric vehicles on the road by 2030 with additional charging structure to cater for planned growth;
(g) Providing that no new non – zero emission cars will be sold in Ireland post 2030 and no NCT certificates will be issued for non – zero emission cars post 2045;

(h) A climate action fund of at least €500 million.

51. On the 19th December, 2018, the Department published the draft National Energy and Climate Plan 2021 – 2030 which was required to be submitted to the European Commission and this represents an updated set of greenhouse gas emission projections to 2020 and 2030 taking into account the range of new commitments set out in the National Development Plan. Mr. Maughan avers:-

"These projections indicate that, in relation to 2030, emissions from sectors covered by the EU Effort Sharing Regulation are projected to reduce by 6.3% below 2005 levels in 2030. This contrasts with the position as set out in the EPA's 2018 emissions projections, published in May 2018, which indicates that emissions in 2030 could remain at 2005 levels. Therefore, the projected impact on relevant emissions of the commitments included in the National Development Plan will make a significant contribution to Ireland's ability to meet its non – ETS targets for the 2021 – 2030 period, though it is acknowledged that further efforts will be required."

52. Mr. Maughan also refers to a further EPA report published in December, 2018 *"Ireland's provisional greenhouse gas emissions 1990 – 2017"*. For 2017, the national greenhouse gas emissions are estimated to be 0.9% lower in 2017 than 2016, although he does acknowledge that the decrease is mainly due to mild weather conditions. In November, 2018, the government agreed to the development of a new "*All of Government Climate Plan*". This will prioritise cross – government action from 2019 onwards to ensure that Ireland can become a leader in response to climate change. This plan has strong focus on implementation, including actions with specific timelines and steps needed to achieve each action, assigning clear lines of responsibility for delivery and will build on previous actions of Government outlined above. Mr. Maughan's evidence is that this all of government climate plan will prioritise cross government actions from 2019 onwards to ensure that Ireland can become a leader in responding to climate change. The new Plan will have a strong focus on implementation.

53. Mr. Maughan also outlines in detail the contents of the Annual National Transition Statement ("*ANTS*") which accompanied the publication of three associated documents detailing and recording the implementation of existing mitigation measures and actions contained in the plan and National Adaptation Framework and also detailing and recording the development and implementation of new mitigation measures and actions which were not contained in the Plan. Mr. Maughan states that these documents together with ANTS, demonstrates the living document nature of the Plan.

54. In particular, he refers to a number of updated reports on the implementation of the plan and the National Adaptation Framework. These include the following:-

(i) The update report on the National Mitigation Plan measures – this includes an up to date list of policies and measures in place to reduce emissions in the four main sectors covered by the plan. These are electricity generation, the built environment, transport and agriculture, forestry and land use.

(ii) The update report on the National Mitigation Plan actions. This contains details on the implementation of actions committed to by government departments under the 2017 National Mitigation Plan. Twenty-two of the committed 106 actions covering the five – year period for the plan, have now been completed. A further 14 new actions are being committed to for delivery in 2019.

(iii) The update report on sectoral adaptation plans. This is a report updating the sectoral adaptation plans essentially outlining progress in the development of sectoral plans in advance of the statutory deadline of September, 2019.

55. These reports detail a variety of new measures adopted by the Government since the publication of the Plan relating to the approval of a renewable electricity support scheme, offshore renewable energy developments, national policy statement of interconnection and increased funding for energy efficiency programmes. It includes details in respect of the issuing of a first sovereign green bond. Mr. Maughan states that Ireland is one of the first countries in the World to do so. The objective of the bond is to broaden the funding base for Ireland's debt and in future, may allow for the financing of climate related expenditure at a lower rate of interest than other expenditures. Reference is also made to regulations made by the Minister to increase the rate of biofuels in the transport fuel mix, a Teagasc report on the opportunities for cost effective emissions reduction in the Irish agricultural sector, the proposal to amend building regulations to ensure that all new houses will meet the net-zero energy building standard. The government has also established four climate action regional offices to support local authorities in meeting their climate obligations. All of this, Mr. Maughan states, demonstrates the living document nature of the Plan.

56. Further, Mr. Maughan states that the IPCC special report on Global Warming of 1.5°C was presented in December, 2018. It represents a scientific process. It is not part of international law. He states that this report will likely inform discussion between Framework Convention members in future international negotiations. It does not form part of, or inform, EU law at this time.

57. Mr. Maughan also states that Ireland has made contributions to the Framework Convention. Developed country parties under the UNFCCC provide financial support to assist developing countries to undertake ambitious climate action and Ireland has made a financial contribution to this effort. He observes that Ireland is in fact on track to deliver on a commitment to provide public climate finance support of €175 million from 2016 to 2020.

58. As for the future, Mr. Maughan avers that in 2019 Ireland will launch a new policy on international development which will take a whole of government approach to delivering internationally sustainable development goals, within which climate change will be a policy priority. Ireland in fact assisted in the drafting of key texts on gender and human rights in the Paris Agreement.

59. Regarding the 25% to 40% reduction in non-ETS sectors by 2020, Mr. Maughan points out the importance of distinguishing and comparing the level of emission reductions with Ireland's legally binding targets within the EU framework of the EU Effort Sharing Decision, which is a 20% reduction by 2020 relative to 2005 levels for relevant sectors of the economy. He states that the difference in these base year points between 1990 and 2005 is of importance to the understanding of the level of effort implied by the IPCC recommendations. Thus, Ireland's total national emissions have increased by the order of 25% between 1990 and 2005. In order to reduce national emissions by 40% relative to 1990 levels by 2020, this would require national emissions to be reduced to approximately 55% of their levels in 2017 by 2020. To take such measures would have significant economic impacts both for specific sectors and for the economy as a whole. Indeed, Ms. Hyland S.C. in presenting this aspect of the case on behalf of the respondents, and by reference to a chart detailing the contribution of the emissions by various sectors of the economy, points out that almost the entire agricultural sector would have to go to zero contribution in order to achieve this type of target. She submitted that this would have to be done in a short period, if the applicant is correct in its analysis of the legal situation.

60. Mr. Maughan also refers to the Climate Change Advisory Council 2018 report which was published in July, 2018. The most recent emissions inventories published by the EPA related to 2016 whereas the most recent emissions projections were those published in May, 2018.

General

61. First, a fundamental plank of the respondent's objection to the applicant's case is that it is contented that what the applicant in reality seek is an order from this Court requiring the respondent to introduce a plan which would result in a particular level of lowering of emissions and therefore, essentially the case is about the request of the applicant to this Court to prescribe the manner in which that should be done. The applicant rejects this. It is submitted that the respondent is wrong to characterise the proceedings as non – justiciable or to say that the claim is based on a misconception as to the purposes of the Plan or to suggest that the applicant is asking the court to substitute the applicant's or the court's view for that of the respondent.

62. Second, and perhaps in addition to the uneasy interaction between law and science, is the interaction which necessarily raises its head whenever an action of the Executive is challenged before the courts, namely the separation of powers. This uneasy interaction is at its most potent when it is claimed by the Executive that what is under challenge is a matter of policy of government, and that under the Constitution, this court, not being democratically elected, has no role in the formulation of policy or the direction in which policy should or should not proceed. Significant emphasis in this regard is placed on the decision of *T.D. v. Minister for Education* [2001] 4 I.R. 259 to which I will return later in this judgment. In essence, this is part of a more general argument that the making of this plan is an activity of government which is non – justiciable.

63. Third, reference has been made to the decision in *Urgenda*. There, the Court of Appeal in the Netherlands, having considered the evidence and arguments, concluded that the State had done too little to prevent a dangerous climate change, and was doing too little to catch up, or at least in the short term (up to the end of 2020). The court stated:-

> *"Targets for 2030 and beyond do not take away from the fact that a dangerous situation is imminent, which requires interventions being taken now. In addition to the risks in that context, the social costs also come into play. The later actions are taken to reduce, the quicker the available carbon budget will diminish, which in turn would require taking considerably more ambitious measures at a later stage, as is acknowledged by the State (Statement of Appeal 5.28), to eventually achieve the desired level of 95% reduction by 2050. In this context, the following excerpt from AR5 (cited in legal ground 2.19 of the judgment) is also worth noting: "(…) Delaying mitigation efforts beyond those in place today through 2030 is estimated to substantially increase the difficulty of transition to low-longer-term emissions levels and narrow the range of options consistent with maintaining temperature change below 2º C relative to pre-industrial levels.""*

The court found that the State had failed to fulfil its duty of care pursuant to Article 2 and Article 8 of the European Convention on Human Rights by not wanting to reduce emissions by at least 25% by the end of 2020.

Applicant's Submissions

64. The applicant claims that the Plan is ultra vires the Act. A fundamental aspect of the applicant's claim is that it is not sufficient to achieve reductions over the short to medium-term and the State will not reach a 25% to 40% reduction from 1990 levels by 2020. While these are not being put forward as legal standards to be met, nor is the applicant proposing any particular set of measures, it seeks to demonstrate that the plan is not calculated to achieve substantial emission reductions in the short term and this creates an unacceptable risk of contributing to warming in excess of 2°C over preindustrial levels. Mr. McCullough S.C. submits that that is what lies at the heart of the case. Under the Constitution and the Convention, it is a breach of the applicant's rights to have in place a Plan, the characteristics of which are not calculated to achieve substantial emission reductions in the short term or even in the medium-term.

65. The applicant rejects the respondent's contention that the claim is not a justiciable controversy. While there may be judicial reluctance to review decisions involving utilitarian calculations of social and economic preference, involving policy choices; the applicant maintains that it is not requesting the court to accept a particular policy and while it may be that the court shows deference to the other arms of government when it comes to expenditure of public funds or where the decision is polycentric, this is a matter upon which the court has jurisdiction to intervene. It points to the non-mandatory negative nature of the relief sought and to the fact that it does not require the production of a particular policy. It is submitted that it is simply requesting the court to quash an unlawful policy. That the striking down of a piece of legislation may have knock on financial implications, does not necessarily involve an infringement of the separation of

powers. The third leg of the applicant's argument relates to unreasonableness. The applicant maintains that it is not asking to measure the States calculations of policy in this area against other similar policy calculations, particularly in relation to expenditure. The issue is whether proper account was taken of a particular value that is required to avoid a serious risk following from an increase in temperatures globally. The court is entitled to review State actions and in this regard the applicant relies on the decision of the Supreme Court in *T.D.*, in particular *dicta* of Murray C.J. at p. 284:-

> *"If it was established in any proceedings that the Government had acted in a manner which was in contravention of the Constitution, then the exclusive role afforded to them in the exercise of the executive power of the state would not prevent the court from intervening with a view to securing compliance by the Government with the requirements of the Constitution."*

It is suggested that the applicant's case does not involve the court being required to engage in distributive justice as described by Costello J. in *O'Reilly v. Limerick Corporation* [1998] I.L.R.M. 181. In summary, it is submitted that there is no court free area where it is established that constitutional rights have been impacted by the actions of the Executive and that the authorities establish a different proposition namely that the separation of powers prohibits the court from directing particular policies to be implemented at particular public expense; and if the court is satisfied that the applicant's constitutional rights have been breached, it is a matter for the Government to produce a mitigation plan that is in accordance with law.

66. With regard to the Act of 2015, it is the applicant's contention that the respondent has failed to discharge a number of specific statutory obligations in the making and adoption of the Plan. It is contended that the Plan does not fulfil the requirements of s. 4 (2)(a) of the Act because the respondent has not specified the manner by which the National Transition Objective will be achieved. It is argued that that the provisions of s. 4(2)(b) have been breached because the respondent has failed to identify mitigation measures that would further the achievement of the National Transition Objective. In this regard, the applicant relies, inter alia, on the report and review of the Advisory Council that such measures are absent from the Plan. It is argued that no mitigation measures have been identified for the purposes of s. 4 (2)(b), as opposed to mitigation measures generally.

67. It is contended that s. 4(2)(d) has also been breached in that the respondent has failed to specify sector mitigation measures for the purposes of reducing greenhouse gas emissions and enabling the achievement of the National Transition Objective. The criticism of the Plan in this regard is that it does not contain any or any adequate sector mitigation measures but instead designates responsibility for those measures to various respondent Ministers. It is suggested that the Act requires that the measures are included in the Plan.

68. It is argued that the Plan does not take into account adequately or at all, the factors which are identified in s. 3 and s. 4(7) of the Act. Thus, the respondent has failed to have regard to the achievement of a National Transition Objective by the implementation of

cost-effective measures, the objective of the UNFCCC, the national climate policy position of 2014 or the concept of climate justice which requires that countries act in accordance with a common but differentiated responsibility. Further, it is submitted that in failing to specify within the plan any or any adequate measures to reduce greenhouse gas emissions urgently, the respondent has failed to take adequate account of the matters referred to as identified in s. 4(7) of the Act with particular reference to the requirement to have regard to relevant scientific or technical advice, and the protection of public health. It is submitted that the respondent could not have had regard to the identified factors because all of these counsel the requirement to take immediate and dramatic steps to reduce greenhouse gas emissions, rather than permitting emissions to rise over the life of the plan.

69. Finally, it is submitted that the respondent was not entitled to approve a Plan that will do little or nothing to reduce greenhouse gas emissions in circumstances where the State's emissions are projected to have increased between 1990 and 2020. It is argued that it was unlawful for the respondent to approve a Plan which was equivocal and aspirational and devoid of adequate measures to achieve the National Transition Objective and that therefore, as the State's contribution to climate changes is disproportionate, the states per capita emissions which are the third highest in the EU, it was manifestly unreasonable and disproportionate for the respondent to approve such a plan. This is particularly so in light of the criticisms of the plan by the Advisory Council.

70. This, it is submitted, involves the identification of the standard of review and in this regard, it is submitted that the standard of proportionality outlined in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 is applicable, because we are here concerned with constitutional and fundamental rights. It is acknowledged in this regard that the Supreme Court in *AAA v Minister for Justice* [2017] IESC 80, observed that the concept of proportionality should operate within the confines of the irrationality test. Nevertheless, reliance is placed on *dicta* of Charleton J. that each case remains fact specific and it is submitted that the court did not consider the impact of international environmental norms, such as the Aarhus Convention and pursuant to s. 8 of the Environment (Miscellaneous Provisions) Act, 2011, judicial notice must be taken of the Convention. In this regard, the applicant relies on the decision of the Aarhus Convention Compliance Committee in case ACCC/C/2008/33. The Committee expressed the opinion that it was not convinced that the United Kingdom met the standards for review required by the Convention as regards substantial legality in the light of the very high threshold for review imposed by the *Wednesbury* test. It is submitted that in the context of environmental cases, a proportionality test must be applied. The decision to adopt the Plan was so unreasonable as to require it to be quashed. It is therefore suggested that the court should apply a standalone, structured form of proportionality as suggested by Murray C.J. in *Meadows* that "*the effects on or prejudice to an individual's right by an administrative decision [must] be proportional to the legitimate objective or purpose of that decision."*

71. In this regard, it is contended that the constitutional rights at issue include the right to life, the right to bodily integrity and the rights to the environment. Rights also arise under the Convention being the right to life under Article 2, the right to respect for private and family life and home under Article 8. It is submitted that the nature of the right to life imposes a strong presumption in favour of taking all steps capable of preserving it; and that the right to life has a wider meaning including a right to maintain a life at a proper human standard in matters of food, clothing and habitation. Greenhouse gas emissions have a profound consequence for human life. It is submitted that the respondent has not demonstrated that it has taken all steps capable of preserving the right to life. The applicant refers to a number of decisions of the ECtHR which it is submitted creates positive obligations to protect the lives of citizens within its jurisdiction, particularly where it is established that the State knew or ought to have known of the existence of threat to life, and where the State fails to take measures within the scope of their powers which judged reasonably might have been expected to avoid that risk (see *Mikayil Mammodov. Azerbaijan* (App no. 4762/05)). Reliance is also placed on *Osman v. UK* (App No. 87/1997/871/1083) that the authorities should do all that could be reasonably expected of them to avoid a real and immediate risk of life to which they have or ought to have acknowledged. The court was also referred to the decision in *Budayeva and Others v. Russia* (App Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02). However, the respondent suggests that this is not directly relevant because its facts were considerably different because there had been proven impacts. The respondent also relies on *Kyrtatos v. Greece* (App No 4166/98) and contends that Article 8 is not engaged every time pollution occurs.

72. Reliance is placed in this regard in *In re a Ward of Court (withholding medical treatment)(No.2)* [1996] 2 I.R. 123. It is therefore submitted that if the present plan is not adequate to address the risk, being a real threat to life, there has been a breach of that right on its face. It is argued that the right to bodily integrity has been infringed. Reliance is placed on *dicta* of Finlay P. in *State (C) v. Frawley* [1976] 1 I.R. 365, and this applies not only the context of the constitutionality of a statute but also in the context of acts of the Executive.

73. It is also submitted that there is a constitutional right to an environment consistent with human dignity and reliance is placed in this regard on the decision of Barrett J. in *Merriman v. Fingal County Council & Ors*. [2017] IEHC 695. The existence of this right is much debated and disputed by the respondent.

74. With regard to those aspects of the claim which might be interpreted as standalone claims, divorced from the Plan, counsel for the respondent, Ms. Hyland S.C. suggests that the Plan is essentially being employed as a vehicle within which to maintain the challenge. She submits that that the applicant has "*stitched the Plan into its case*" that the prescribed reduction should be done via the Plan and that there is an obligation to have the prescribed policy in the Plan. Therefore, she submits, that the applicants claim is that because the Plan does not contain the policy objective or obligation, that the State has acted unlawfully. She maintains that there was no statutory basis for such claim.

75. In an exchange with the court, counsel for the applicant observed that the Plan provides the applicant with a clear framework. There is a statutory obligation under s. 4 to formulate a plan which encapsulate how the State will meet the challenge of greenhouse gas emissions and to specify the manner in which it should do so. He accepts that if there was no statutory framework, the case would be more complex. The court has taken both of these arguments into account in its approach to its decision.

Decision

76. This has been a complex case involving very difficult issues of law and science. The threats posed by climate change and the international and national response thereto have been outlined in detail in the affidavits sworn in these proceedings by Mr. Lowes, director of the applicant and Mr. Frank Maughan, principal officer in the Department of Communications, Climate Action and Environment, on behalf of the respondent. In the course of the hearing the court was referred to a ruling of 9th October, 2018 in Urgenda a decision of the Court of Appeal of the Netherlands, in which the development and response to the challenge of climate change was summarised. The court adopts that summary in which it was observed that since the beginning of the Industrial Revolution, mankind has consumed energy on a large scale. Such energy was predominantly generated by the combustion of fossil fuels which process produces carbon dioxide, some of which is released into the atmosphere where it remains for hundreds of years or perhaps longer. Some of the carbon dioxide is absorbed by the oceanic and forest ecosystems. The capacity for absorption has declined due to deforestation and rising sea water temperatures. While carbon dioxide is the main greenhouse gas, there are other contributory greenhouse gases, such as methane, nitrous oxide and fluorinated gases, which produce a different warming effect and degrade at a different rate. The greenhouse effect occurs when carbon dioxide, together with the other gases, traps the heat emitted by the earth in the atmosphere. The more carbon dioxide emitted into the atmosphere, the more global warming becomes exacerbated. The climate system shows a delayed response to the emissions of greenhouse gases. Thus, the full warming effect of gases which are emitted today will only become apparent 30 to 40 years from now. At the time of the decision in *Urgenda*, in October 2018, the level of global warming was at approximately 1.1°C higher relative to the beginning of the Industrial Revolution. The concentration of greenhouse gases, which is measured in parts per million ("*ppm*"), was approximately 401ppm. Global carbon dioxide emissions have increased by 2% annually. Thus, global warming has continued. It was noted that for some time there had been a general consensus in the climate science and world communities that the rise in global temperature should not exceed 2°C. This is referred to as a safe temperature rise target. However, since the Paris Agreement, current scientific thinking is heading in the direction of a lower figure, perhaps somewhere in the region of 1.5°C. As was noted in *Urgenda*, if the concentration of greenhouse gases has not exceeded 450ppm in the year 2100, there is a reasonable chance that the 2°C target will be achieved. A safe temperature rise target, not exceeding 1.5°C comes with the lower part per million level, 440ppm. Thus, with such a starting point in mind there is now limited room, or budget, known as a carbon budget, for greenhouse gas emissions. While the court in Urgenda observed the acknowledgement by the worldwide community that action is required to reduce the

emission of such greenhouse gases, it also noted that urgency is differently assessed within the global community.

77. It is not disputed that the applicant has *locus standi* to pursue a claim that the decision to approve the Plan, or to argue that the Plan itself, is *ultra vires* the Act. It is disputed, however, that the Plan is justiciable. Insofar as it is alleged that the Plan breaches Constitutional and Convention rights, on the other hand, it is maintained by the respondent that the applicant does not enjoy *locus standi*, primarily because of its incorporeal nature. A dispute also arises in relation to the standard of review which is applicable in a case such as this.

78. This is an application for judicial review of the National Mitigation Plan. Therefore, on previously established principles the court cannot involve itself in a merit-based review of the actions of the respondent in the creation and approval of the Plan. Nevertheless, it is contended that this court should apply a test of proportionality, given the nature of the rights alleged to have been infringed, and that involves fundamental rights and environmental considerations.

79. Developed jurisprudence suggests that the test of irrationality or unreasonableness set out in *O'Keeffe v. an Bord Pleanála* [1993] 1 I.R. 39 remains largely unaltered. Where fundamental rights are at stake, it may be that it is legitimate to consider the nature of the rights alleged to be affected and the nature of the duties and obligations being performed or discharged by the decision-making body. In *Donegan v. Dublin City Council* [2012] IESC 18, having referred to *dicta* of Murray C.J. in Meadows, McKechnie J. observed at para. 131 as follows:-

> *"It is clear from this statement, that although some extension of judicial review for reasonableness is envisaged so as to take account of the proportionality of the action, it is to be done on the basis of Keegan and O'Keeffe, rather than as an entirely novel criterion."*

Later, McKechnie J. stated:-

> *"Thus although some consideration of fundamental rights may be entered into in judicial review, this in no way affects the traditional position that such remedy cannot be used as a rehearing or otherwise to determine conflicts of fact."*

At para. 132, the court continued:-

> *"In light of the comments already made as to the adequacy of judicial review, I would not find that Meadows has substantially altered that position in this regard."*

He stated at para. 131 that:-

> "although some consideration of fundamental rights may be entered into in judicial review, this in no way affects the traditional position that such remedy cannot be used as a rehearing or otherwise to determine conflicts of fact."

80. In *AAA*, the Supreme Court expressed the view that the concept of proportionality operates within the confines of the irrationality test. It is suggested, however, that the court did not consider the impact of international environmental norms and argues that Article 9(2) of the Aarhus Convention requires members of the public to have access to a review procedure to challenge the substantive and procedural legality of any decision, act or omission subject to public participation pursuant to Article 6 of the Convention. The applicant contends therefore that the Plan is both so unreasonable as to require it to be quashed and so lacking in proportion to the evidence presented, as to fail to be reasonable in itself.

81. Having considered the arguments of the parties, it seems to me on the authorities, that at least where an issue of fundamental rights is agitated it is not inappropriate to apply the *O'Keefe test* viewed through the prism of a *Meadows* type proportionality analysis. This is not inconsistent with a greater level of scrutiny than enunciated in *O'Keeffe* which is said to apply in planning and environmental cases. Nevertheless, the court's review must be accommodated within the existing judicial review regime. For all practical purposes, this suggests that the level of scrutiny required is perhaps greater than the no evidence standard required by *O'Keeffe*, but at the same time recognising that the review must be within the tenets of those principles and cannot be a merit-based review. I approach the assessment of the applicant's claims on this basis.

82. While it is accepted that the applicant enjoys standing to challenge the *vires* of the plan against the provisions of the Act, it does not, it seems to me, necessarily follow that it enjoys *locus standi* to agitate claims in respect of all or any particular personal rights under the Constitution or Convention.

83. In the circumstances, I believe that it is appropriate as a first step that I should consider those aspects of the applicant's challenge which are based on the allegation that the Plan is ultra vires, or is not consistent with the requirements of the Act. The decision on this issue may affect the approach of the court to other aspects of the applicant's claim.

84. The National Mitigation Plan of July 2017 is the State's first National Mitigation Plan. It is a whole of Government plan. In the foreword to the Plan, it is stated that it reflects the central roles of key ministers responsible for the sectors covered by the Plan which include electricity generation, the built environment, transport and agriculture and also draws on the perspectives and responsibilities of a range of other government departments. It states that the choices available to achieve the decarbonisation required are neither straightforward nor cost free, but that the measures implemented through the Plan will lay the foundations for transitioning Ireland to a low carbon, climate resilient and environmentally sustainable economy by 2050. The Plan includes over 100 individual actions for various ministers and public bodies to take forward. It is described as a living document, with progress to be reported on by Government on an annual basis in its Annual Transition Statement, supplemented as necessary by further actions and measures each year. In the foreword, it is recognised that the first plan does not provide a complete roadmap to achieve the 2050 objective but begins the process of development

of medium to long-term mitigation choices for the next and future decades. This is described as an ongoing process which will include the preparation of successive National Mitigation Plans at least every five years as required by the Act. Nevertheless, the applicant maintains that simply because the Plan is described as a living document does not mean it is immune from challenge and that it could not be the case that with large-scale conversion of plans into internal rolling plans that they would individually be immune from scrutiny by the court.

85. The applicant maintains that it is not seeking to prescribe a policy that the State must achieve a particular level of reduction by a particular date. It does not require the court to direct the State to achieve specific measures or proposals but seeks negative relief in the form of the quashing of the Plan. It is submitted that it is not lawful to have in place a plan that is not calculated to achieve substantial emission reductions or various targets in the short to medium term. It is therefore submitted that any mitigation plan has to be one that is calculated to achieve substantial emission reductions in the short term and that the State is failing to do this. To a significant extent, the applicant relies in this regard on the criticisms of the plan made by the Advisory Council and also the analysis of the EPA in its emissions reports.

86. It is the respondent's contention that the Plan is not justiciable. Reliance is placed on the wording of the Act and the Plan to illustrate that both are heavily orientated towards policy considerations and the implementation of Government policy.

87. In passing it ought to be observed that it may be that issues of justiciability and locus standi become conflated. In T.D. Murray J. observing that in order to maintain a challenge, the applicant must have *locus standi* stated at p. 337:-

> *"much of what I have said in dealing with the principal issue concerning the separation of powers has implications for the locus standi of the applicant in this case and in particular whether they have sufficient interest and standing to seek declarations as to national policy, rather than such orders and reliefs as they may be entitled to have in regard to their individual situations."*

To that extent it may be said that the two concepts, as they apply to particular circumstances, are not entirely mutually exclusive.

88. Central to the arguments on the issue of justiciability is the doctrine of the separation of powers. The authorities on this issue establish a number of general propositions. It is fundamental to the separation of powers that no one of the three organs of Government is paramount in the exercise of State power. Each must respect the powers and functions of the other. The court's jurisdiction can only be exercised in deciding on justiciable matters and the courts have no general supervisory or investigatory functions. The doctrine of separation of powers has nothing to do with the merits or otherwise of the separate question of whether it is desirable that the provision in question should be made. The Government, and the Government, alone may exercise the executive powers of Government. The courts have the right and duty to interfere with the activities of the

Executive in order to protect or secure the constitutional rights of individual litigants where such rights have been, or are being, invaded by those activities; or where activities of the executive threaten an invasion of such rights. If it is established that the Executive has acted in a manner which is in contravention of the Constitution then the Exclusive role afforded it in the exercise of the executive power of State will not prevent the court from intervening with a view to securing compliance with the requirements of the Constitution.

89. It has also been reiterated on many occasions that courts should not assume a policymaking role, as to do so would offend the separation of powers required by the Constitution and would lead the courts into taking decisions in areas for which they have no special qualification, experience or democratic responsibility. Thus, it is not part of the function of the Court to adjudicate as to what is the best method by which the State can carry out one of its Constitutional duties. Adopting a policy or a program and deciding to implement it is a core function of the Executive, and not for the courts, although the court may determine whether such policy or actions to implement such policy are compatible with the law or the Constitution or fulfil obligations. That is not deciding policy. (See Murray J. in T.D. at p. 333).

90. If the exercise of the power in question concerns, what Costello J. described in *O'Reilly*, as matters of distributive justice, as opposed to commutative justice, the courts should not intervene as a general principle. Although it was suggested in argument that the distinction was more relevant to the nature of the reliefs being claimed than the courts entitlement to intervene.

91. If and when a court decides that a matter is justiciable, when considering the nature of any order to be made, respect for the separation of powers dictates that great care ought to be exercised in the framing of any such order, whether it be a declaration, a suspended declaration or an order quashing a measure requiring the taking of certain action. There may be circumstances in which a court may make a mandatory order against an organ of State, but only when there is a clear disregard by the State for its constitutional obligations. (See Murray J. in *T.D*. at p. 337). Disregard means a conscious and deliberate decision by the organ of the State to act in breach of its constitutional obligations to other parties.

92. I must accept that a consequence of the separation of powers doctrine is that the court should avoid interfering with the exercise of discretion by the legislature or executive when its aim is the pursuit of policy. Courts are and should be reluctant to review decisions involving utilitarian calculations of social, economic and political preference, the latter being identifiable by the fact that they are not capable of being impugned by objective criteria that a court could apply. In *Moore*, Hogan J. observed:-

"55. All of this demonstrates that the choice of these particular political and cultural traditions is ultimately a political and policy choice which lies outside the realm of judicial determination and competence. On this point the system of separation of powers provided by the Constitution is quite clear, namely, that matters involving

policy and political choices of this nature are matters for elected representatives and must therefore by definition be either executive or legislative powers which cannot appropriately be discharged by an unelected judiciary. There are, in particular, no legal standards which can guide the judicial branch in any determination of this question of what monuments should as a matter of national importance be preserved." (emphasis added)

93. In *Garda Representative Association v. Minister for Finance* [2010] IEHC 78, Charleton J. observed that:-

"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."

This is particularly so in the context of expenditure of public funds and where a range of factors and competing interests have to be taken into account.

94. I also accept that, even if the court concludes that a matter or issue is justiciable, nevertheless, because of the nature, extent and wording of a statutory obligation, it may be the case that a wide margin of discretion ought to be afforded to the Executive in discharging its obligations. In my view, while the court should be vigilant in ensuring that it does not trespass upon the Executive power of State, nevertheless, consistent with its constitutional functions, the court should also be slow to determine that an issue is not justiciable and therefore excluded from review.

95. In contending that the Plan is not justiciable, the respondent emphasises the wording of the Act and the wording of the Plan to illustrate that it is heavily orientated towards policy considerations and the implementation of Government policy. To this end it is instructive to consider the provisions of the Act and in particular, the wording employed in imposing duties and obligations.

96. The long title of the Act states that it is to provide for the *approval* of plans for the *purpose* of pursuing the transition to low carbon. Section 3 employs wording such as "*enabling the State*" and the "*Government shall endeavour to achieve*" the National Transition Objective within the period to which the objective relates. Section 4(2) states that the plan shall "*specify the manner in which it is proposed*" to achieve the National Transition Objective. Section 4(2)(b) of the Act imposes a requirement, inter alia, that the Plan should specify the policy measures *in the opinion of the government* 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. Section 4(2)(d) states that the plan shall "*specify the mitigation policy measures*" to be adopted by each responsible Minister of the Government for the purposes of reducing greenhouse gas emissions and "*enabling the achievement of the national transition objective*." Section 4(4) provides that the Government "*may*" approve a National Mitigation Plan submitted to them under the section. Section 4(7) states that the Minister and the Government shall *take into account* numerous matters when performing functions

under the section including "*the need to have regard to*" existing obligations of the State in EU law and under international agreements, and the need to do certain matters, including the need to achieve the objectives of the Plan at the least cost to the national economy and to adopt measures that are cost effective and do not impose an unreasonable burden on the exchequer.

97. It appears to me that the sections of the Act under consideration are couched in terms of policy measures and considerations. I accept the submission of the respondent, that even if the Act and the Plan are justiciable, given the wording of each, a considerable margin of discretion is conferred on the Government as to how it should achieve the National Transition Objective. I also accept that it is not part of the function of the court to second-guess the opinion of Government on such issues.

98. This was a whole of Government plan which required input from a number of different sectors. I must accept that consistent with its obligations and duties under the Act, it is the function of Government not simply to adopt measures in an abstract sense, but to take into account and to balance relevant factors, particularly those which have cost implications for the State and thus each citizen, and as to how best to manage such implications. It seems to me that this much is acknowledged in s. 4(7) of the Act whereby, when performing functions under the section the Minister and the Government are obliged to take into account:-

> *"the need to achieve the objectives of a National Mitigation Plan at the least cost to the national economy and adopt measures that are cost effective and do not impose an unreasonable burden on the Exchequer."*

99. It is important to recall that the applicant does not seek to challenge the constitutionality of the Act. It also seems to me to be correct, as counsel for the respondent has submitted, that there is no dispute or challenge to the National Transition Objective or indeed to the National Policy Position. Indeed, the essential theme of the challenge is that the Plan and its approval are not consistent with the provisions of the Act.

100. The Plan is self-described as an initial step to set the country on a pathway to achieve the level of de-carbonisation required. It is divided into six chapters, which include chapters dealing with climate action policy framework, de-carbonising electricity generation, decarbonising the building environment and transport. A further chapter concerns the approach to carbon neutrality for agriculture, forest and land use sectors.

101. The introduction section contains a message from An Taoiseach that Ireland is committed to concentrated multilateral action to tackle climate change through the Paris Agreement, which represents the international community's best hope for collectively ensuring the very survival of the planet. Ireland's commitment to the Paris Agreement requires the State to take action at home while acknowledging the scale of the challenge overall. The statement continues:-

"Ireland's first National Mitigation Plan sets out this Government's shared approach to reducing our own greenhouse gas emissions. It is a first step, but one which we are committed to building on in the years ahead. As a Government and a society, we must become fully engaged with climate change, alter our behaviours, and work collaboratively to bring about the required transformation. We will only succeed if each of us fully plays our part."

Later in the same message, An Taoiseach states:-

"The Government does not underestimate the scale of what this entails. It will require fundamental societal transformation and, more immediately, will require allocation of resources and sustained policy change, as well as the ongoing engagement with wider society. Equally, we must embrace the economic opportunities decarbonisation presents. We will be taking a number of further steps in the coming months, including the National Dialogue on Climate Action, the National Planning Framework and the 10 Year Capital Investment Plan"

102. In its foreword, which was signed by the Ministers with particular responsibility for the sectors concerned, it is stated that the Plan is a very important first step by the Government in enabling transition in a long journey with many different and complex elements to consider. Later in the introduction the Minister states that the choices available to achieve the decarbonisation required are neither straightforward nor cost-free. The foreword continues:-

"In this way the measures that we implement through this National Mitigation Plan will lay the foundations for transitioning Ireland to a low carbon, climate resilient and environmentally sustainable economy by 2050."

103. The plan includes over 100 individual actions for various Ministers and public bodies "*to take forward as we move to implementation of what will be a living document*." It is also stated that:-

"Progress will be reported on by Government annually in its Annual Transition Statement, and will be supplemented as necessary by further actions and measures each year."

The next paragraph in the introduction is important, it states as follows:-

"Importantly, the Government recognises that this first Plan does not provide a complete roadmap to achieve the 2050 objective, but begins the process of development of medium to long term mitigation choices for the next and future decades. This will be an ongoing process, including the preparation of successive National Mitigation Plans at least every five years as provided for in the Climate Action and Low Carbon Development Act, 2015."

104. In chapter 2 the climate action policy framework is addressed, as is the Paris agreement, and how Ireland's contribution to the Paris agreement will be made *via* the National Determined Contributions tabled by the EU on behalf of its member states is described

committing the EU as a whole to reduce greenhouse gas emissions by at least 40% by 2030, compared with 1990 levels. Action at European Union level is addressed including the EU overall targets for 2020 and 2030. Further consideration is given to the European Commission's publication proposals concerning the allocation of individual targets for EU member states in the non-ETS sector. The national policy framework and national policy position are considered and the fundamental national objective of achieving transition by 2050 is addressed. Tables are produced setting out the different scales of reduction effort required to achieve the vision in the National Policy Position of an aggregate reduction in the carbon dioxide emissions of at least 80%, compared to 1990 levels, by 2050 across the electricity generation, built environment and transport sectors.

105. These effort levels are stated to be based on historic and projected emissions for these three sectors, as compiled by the EPA and the stated importance of earlier action to reduce Ireland's emissions is underlined. Other domestic measures such as the Act of 2015, and the 2015 Energy White Paper are addressed. At para. 2.4 of the Plan, there is a discussion as to how Ireland is contributing to the EU effort, including EU emissions trading system and its breakdown in Ireland. It also discusses non-ETS effort sharing and the parallel Effort Sharing Decision (2009) which set individual member states targets, including those in agriculture. It is noted that for year 2020, the target set for Ireland that emissions should be 20% below their level in 2005 is described as demanding. It is acknowledged that the likely shortfall in terms of reaching Ireland's target of a 20% reduction in respect of non-ETS by 2020, reflects both the States reduced investment capacity over the period of economic downturn, and that the target itself was, as described in the Plan, being misinformed and not consistent with what was achievable on an EU wide cost-effective basis. The Plan acknowledges that Ireland expects to make use of mechanisms to trade allowances in order to meet its compliance requirements under the Effort Sharing Decision. It also acknowledges that reliance on such flexibilities cannot be sustainable over the longer term. Further policies and measures will be required, and importantly, it is acknowledged that the projected increase in emissions in both the agriculture and transport sectors gives rise to greater challenge for the State. The proposals for non-ETS targets to 2030 are described as presenting an enormous challenge for Ireland. Further, it is acknowledged that additional measures may have to be brought forward, requiring very substantial investment by both the public and private sectors and refer to a broad range of nonfinancial policy tools, including regulations, standards in education initiatives and targeted information campaigns. The Plan also acknowledges that work is ongoing on the analysis and cost of various suites of measures that could meet the 2030 target as cost effectively as possible. Issues such as the national carbon tax and fossil fuel subsidies are considered. It is stated that while early action to find the most cost efficient and cost-effective solutions is imperative, finding the appropriate and most equitable manner to address this issue will not be easy, particularly given the economic circumstances of recent times and where finances are still continuing to stabilise and recover. At p. 32 of the Plan it is stated:-

"Ultimately, decisions on whether or not to proceed with exchequer supported measures can only take place in the context of government prioritisation as part of

expenditure planning including as part of the current spending review, the midterm review of capital plan Building on Recovery…, the 10 year capital plan and the budgetary and estimates processes. A whole of government approach, through these processes, is essential in terms of identifying an optimal mix of public, private societal and taxation mechanisms to enable an effective transition."

106. It records that the Plan will require a targeted balance between exchequer supported expenditure and fiscal, taxation policies and regulation.

107. The remaining chapters address issues in specific areas of electricity generation, the built environment and transport. The Plan addresses the important area of agriculture, forestry and other land use which makes a significant contribution to the country's greenhouse gas emissions and acknowledges the challenges facing this sector while responding to an increased need for food in a growing global population. Thirty separate actions are identified in this sector.

108. It is therefore made clear that the current Plan is but an initial step in achieving targets for making the country a low-carbon and climate resilient and environmentally sustainable economy by 2050. It is the case of the applicants that the Plan has essentially no hope of achieving this because the trajectory taken is inadequate. In essence, therefore, the essential difference of approach between the parties is one of immediacy – what measures are required to be taken immediately in order to maintain a trajectory which will result in the achievement of the objective of a low-carbon country by 2050.

109. To this extent the applicant relies significantly on the review conducted by the Advisory Council. It also highlights the conclusions contained in the Greenhouse Gas Emissions Projections Reports produced by the EPA in 2017 and 2018, the latter recording 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."*

110. It is important to recognise that the Advisory Council's role, as provided for in s. 11 of the Act, *inter alia*, is to advise and make recommendations to the relevant Ministers and the Government in connection with the preparation and approval on the Plan and Government policy on greenhouse gas emissions. It is also required, pursuant to s. 12, to conduct annual reviews of the progress made in each preceding year in achieving greenhouse gas reductions and furthering transition to low carbon, climate resilient and environmentally sustainable economy and in such reports to include recommendations of the most cost effective manner of achieving reductions in emissions in order to enable the achievement of the national transition objective.

111. The Advisory Council Periodic Review Report, 2017 was submitted to Government on 12th July, 2017. In its executive summary it observed that while the draft Plan identified a range of policy options, the introduction of, and commitment to new cost-effective emission reduction policies and measures are essential. It observed that official greenhouse gas emission projections indicate that Ireland will fail to meet its 2020 targets by a substantial margin and additional policies and measures, even if implemented

rapidly, may not be enough to ensure that the 2020 emissions reduction target is met. It also noted that while compliance with the 2020 targets could be achieved through the purchase of emission units, this was not a cost-effective long-term solution and would not generate any co-benefits. Delaying action would make the required adjustment in the period to 2030 more costly. It considered that the Plan should provide specific details on how the anticipated mitigation to 2020 will be addressed and outline pathways for the achievement of the low carbon transition to 2050. It also identified gaps in the Plan.

112. On the face of it, therefore, in my view, the Act is concerned with matters which have a significant policy content and the duties and obligations imposed upon the respondent by the Act are couched in such terms as to confer upon relevant ministers and the Government as a whole, considerable latitude, as to how best it should go about achieving the objects of the Act and also in respect of the adoption of the Plan. Therefore, it seems to me that even if the court were to conclude that the Plan is justiciable, it must be the case that in its preparation and approval the respondent enjoys a considerable discretion.

113. I have considered the arguments and submissions of the parties and it seems to me that, given the measure of discretion which must be afforded to the respondent in relation to the making and adoption of the plan under the Act, I could not conclude that the respondent has been in breach of the provisions of the Act in the manner contended. It cannot be said that the Plan does not contain a proposal to achieve the national transition objective, which by virtue of the provisions of s. 3(1) is to achieve transition by 2050 (emphasis added). Nor, in my view, can it be said that the Plan does not specify policy measures which in the opinion of the Government would be required in order to manage greenhouse gas emissions. (emphasis added) The plan refers to the State's obligations under existing EU law and international agreements and cannot, in my view, be said not to have taken them into account, as that term has been interpreted in decisions such as *Tristor v. Minister for Environment, Heritage and Local Government* [2010] IEHC 397 where it was stated by Clarke J. (as he then was):-

> *"As was pointed out in Glencarr Explorations Plc v. Mayo County Council (No.2) [2002] 1 I.R. 84 (by Keane C.J. at p. 142) it may be inferred that, if the Oireachtas intended that there be an obligation to comply with a particular matter rather than simply have regard to it, it might be expected that the Oireachtas would have said so in the legislation concerned."*

114. It is clear that a sectoral analysis is contained in the Plan and that relevant Government ministers have been allocated responsibility for certain actions. Again, bearing in mind the wording of s. 4(2)(d) and the wide discretion which I believe must be afforded to the respondent in the implementation of the provisions of the Act, I am unable to conclude that this section has been breached.

115. That the Advisory Council may have been critical of the Plan in my view cannot be determinative of whether the obligations of the respondent to prepare and approve the Plan, has been breached. The Advisory Council is obliged to review the plan and nothing

less than a full, robust and critical appraisal of this or any plan is to be expected. However, it seems to me that its conclusions and recommendations cannot be equated with the imposition of a legal obligation within the statutory framework.

116. Further, I am unable to conclude that there is anything in the Plan which resiles from that national transition objective. While it acknowledges the challenges and problems facing the State in achieving this objective, nevertheless, it is clear that the Plan does make proposals in respect of the State's pursuit of the national transition objective by 2050. Section 2 provides that the Act or the Plan shall not operate to affect any existing or future obligations under EU law or international agreement. Further, the obligation under s. 3(2) is to have regard to such existing obligations (emphasis added). It seems to me that this is what the Plan in fact does and it also provides an explanation for Ireland's likely non-compliance with its 2020 targets, primarily based on economic considerations and the method by which national contributions were calculated.

117. In my view, on the evidence, it would also be inappropriate to view the Plan in isolation from what is intended by the structure of the Act, which includes the making of a Plan not less than once in every period of five years. The Plan must be interpreted as being a living document. The measures therein prescribed are not set in stone, nor are they intended to be the State's once and for all response to the need for urgent action to tackle climate change. The further measures proposed and adopted by the State, as referred to by Mr. Maughan, including those published since the commencement of these proceedings, such as the National Planning Framework, are evidence of this. The intention is that prescribed measures to achieve mitigation should respond to future developments, including scientific and technical learning and advancement. Further National Mitigation Plans will be required. The Plan outlines national mitigation actions to be taken by the respondent and relevant Government departments. A range of specific emission reducing measures is identified in the Plan. The case which the applicant makes is that essentially, not enough is being done, quickly enough. Nevertheless, it must be borne in mind that it is the Act, and not the Plan which provides for transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050. On the court's interpretation of the Act, it does not prescribe or impose on the respondent a statutory obligation to achieve particular intermediate targets.

118. In the circumstances, bearing in mind the standard of review and the considerable degree of latitude which must be afforded to the respondent, I must conclude that the applicant has failed to establish that the plan or the decision by the respondent to approve the plan is in breach of the provisions Act.

119. This gives rise to a secondary point as to whether, the applicant having failed in its claim that the Plan is *ultra vires* the Act and where it is not alleged that the Act or National Policy is unconstitutional, is it open to the applicant to maintain that the Plan is in breach of the Constitutional or Convention rights of the applicant.

120. Before considering the issue of the *locus standi* of the applicant to maintain those parts of the challenge based on breach of Constitutional or Convention rights, I believe that I

should consider whether if the Plan is *intra vires* the Act, as I have found, and the constitutionality of the Act is not challenged, is it open to the applicant to maintain a separate challenge in those circumstances.

121. It seems to me as a matter of logic that if a measure is undertaken or adopted in accordance with the provisions of primary legislation, the constitutionality of which is not challenged and therefore which must be presumed to enjoy constitutionality, then it is inconsistent to suggest that the measure undertaken or adopted, divorced from the statutory basis of its enactment, might be open to a freestanding challenge on the basis that it is unconstitutional. One would have thought that if the measure in its own right operates in an unconstitutional manner then it cannot be said to have been one which has been taken or adopted in a manner which was *intra vires* the enabling legislation.

122. But I am willing to accept that I may be incorrect in this analysis and that I should therefore consider whether the plan and the decision to adopt it, are such as to breach the constitutional and convention rights of the applicant and whether such an action is maintainable by the applicant. This to a certain extent this entails a consideration of the applicant's contention that there should be a separate freestanding proportionality review.

123. The issue of the applicant's *locus standi* in respect of the Constitutional and Convention challenge must now be considered. The respondent argues that the applicant does not have *locus standi* as it does not enjoy the rights contended for and while there may be exceptions which enable a party to maintain a claim in respect of rights enjoyed by others, because it is difficult if not impossible for individual citizens or group to establish that the individual rights are affected, the applicant does not come within such exception. The respondents accept that ultimately the test for *locus standi* ought to be determined in accordance with the requirements of justice in each individual case, consistent with and in accordance with the principles outlined in *Cahill v Sutton*. It is further submitted that there is no reason why individual members of the applicant company could not have brought the challenge themselves. It is submitted that there is no impossibility or permissible difficulty such as being based on the issue of costs. On the other hand, the applicant's state that they enjoy such *locus standi*, particularly in the context of an environmental case and that such locus standi was acknowledged in the decision of Barrett J. in *Merriman v. Fingal County Council* [2017] IEHC 695.

124. Since the conclusion of the hearing in this case, the court's attention has been drawn to the decision of the Supreme Court in *Mohan v Ireland and the Attorney General* [2019] IESC 18. The court was there concerned with *locus standi* in the context of a constitutional challenge to s.17(4B) of the Electoral Act, 1997, as inserted by s. 42(c) of the Electoral (Amendment) (Political Funding) Act 2012, legislation which was designed to address the historic underrepresentation of female candidates in the Dail, with particular regard to a reduction in funding if the percentage of female candidates does not achieve a certain threshold. The court was not concerned with the merits of the claim, rather the appellants' *locus standi*. In the High Court, Keane J. concluded that the appellant did not have *locus standi* to challenge the section in that he had not demonstrated that his

interest had been adversely affected by the operation of the section because he had failed to establish a sufficient causal nexus between the direction of the party excluding his nomination from consideration and the operation of the section. The appeal was dismissed by the Court of Appeal. On appeal to the Supreme Court, O'Donnell J. stated at para. 11:-

"Standing is not, as a general rule, established by a simple desire to challenge legislation, no matter how strongly the putative claimant believes the provision to be repugnant to the Constitution. It is now clear that there is no actio popularis (a right on the part of the citizen to challenge the validity of legislation without showing any effect upon him or her, or any greater interest than that of being a citizen) in Irish constitutional law, although, of course, some jurisdictions do permit such claims. Rather, in Irish law, it is necessary to show some adverse effect on the plaintiff either actual or anticipated"

125. Observing that part of the rationale for this rule is that public general legislation exists because a majority of the members of the Oireachtas considered, at some stage, that the legislation was in the public interest, O'Donnell J. noted that a declaration of invalidity is a very significant disruption of the legal order which operates in a blunt, and essentially negative way. It removes a law or an aspect of a law but can put nothing in its place. Therefore, the step of permitting a challenge to the constitutional validity of a piece of legislation should not be taken lightly, simply because someone wishes, however genuinely, to have the question determined, rather should only be taken when a person can show that he or she is adversely affected in reality. He continued at para 12:-

"Courts do not exist to operate as a committee of wise citizens providing a generalised review of the validity of legislation as it is enacted, nor should courts become a forum for those who have simply lost a political argument in the legislature to seek a replay of the arguments in the courts, re-packaged in constitutional terms. On the contrary, the question of the validity of legislation is treated by Article 34.3.2 as part of the jurisdiction of the Superior Courts only, under article 34.1, whose function it is to administer justice between the parties. This normally requires a real case or controversy which the parties require (rather than simply desire) to be resolved, in order to establish and justify the court's exercise of jurisdiction, and the possibility of the invalidation of legislation. Accordingly, it is necessary to show adverse effect, or imminent adverse effect, upon the interests of a real plaintiff. This has the further benefit, as Henchy J observed in Cahill v Sutton [1980] I.R. 269, at p. 282,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 must otherwise be an abstract or hypothetical legal argument"

126. Thus, what he described as the primary rule established that it was sufficient to show that a plaintiff's interest had been adversely affected or is in imminent danger of being adversely affected by the operation of the statute. What remained for consideration was

what was precisely meant by a person's interests being "*adversely affected*." He noted that in *Cahill v. Sutton*, Henchy J. spoke of a person's interests, rather than his or her rights. Describing this as a deliberate broad term, extending beyond constitutional or even legal rights, he accepted that it was sufficient if a person is affected in a real way in his or her life. If so, they normally have standing, at least, to contend that the operation of the Act upon them breaches of some constitutionally protected right.

127. O'Donnell J. accepted that if, on hearing evidence, the court was satisfied that the impugned provisions had no effect upon a person, let alone on their interests or rights, that would be fatal to the claim proper and also to his standing to bring the claim, unless one of the exceptions to the primary rule of standing could be established.

128. He further concluded that as the appellant had standing under the primary rule in *Cahill v. Sutton* and it was not necessary to go further and consider whether, if such standing could not be established, the appellant might be able to bring himself within one of the exceptions contemplated in that case. Those matters only arose if it was not possible to establish "*prejudice or injury peculiar to the challenger*". The case was therefore remitted to the High Court for the determination of the substance of the challenge.

129. It seems to me that the effect of this decision is that the court should approach the issue of *locus standi* with particular reference to whether there is an affect on the plaintiff's interests as opposed to his or her rights. As O'Donnell J. pointed out, this is a deliberately broad term, extending beyond constitutional or even legal rights. It is sufficient therefore if a person is effected in a real way in his or her life. Nevertheless, it is of relevance to consider the nature of the constitutional rights which are suggested to have been infringed as it is perhaps in this context only that one can consider whether interests relevant to the case being made have been affected.

130. I do not understand the applicant to argue that as an incorporeal body it enjoys certain of the personal rights contended for. Mr. Mulcahy S.C. on behalf of the respondent submits that the applicant cannot justify a relaxation of the rules ordinarily applicable which would prevent it from asserting third party's rights. No such difficulty is suggested in this case perhaps with the exception of the question of costs.

131. In *Digital Rights Ireland Ltd v. Minister for Communications* [2010] 3 I.R. 251, McKechnie J. held that in principle, a plaintiff should not be prevented from bringing proceedings to protect the rights of others, where without otherwise being disentitled, it had a *bona fide* concern and interest, taking into account the nature, extent, importance and application of the right which it sought to protect or invoke, and where the plaintiff was not a cranky, meddlesome or a vexatious litigant. He accepted that where it was clear that a particular public act could adversely affect a plaintiff's constitutional, European, or European Convention on Human Rights rights, or society as a whole, a more relaxed approach to standing might be called for in order for the court to uphold that duty and to vindicate those rights. Analysing the rights which were sought to be protected he concluded that the plaintiff company could enjoy a right to privacy in business under Article 8 of the Charter of Fundamental Rights, but corporate persons because of the very nature may

not be capable of holding certain rights, such as the right to marital privacy. Having referred to the decision in *Lancefort Limited v. An Bord Pleanala* (No 2) [1999] 2 I.R. 270, which related to a planning matter where a liberal approach was applied to standing, he stated that *"it must be the case that they apply with equal, if not greater, force in circumstances where the impugned actions involve constitutional rights and Acts of the Oireachtas".* While counsel for the respondent, Mr. Mulcahy S.C. accepts that an interest in the environment is clearly a public interest in the proceedings, nevertheless he submits that case law does not suggest simply because the case is about the environment that no standing rules apply; and in balancing the question of the interests of justice, the applicant has not justified why the company, rather than individual members thereof, is bringing the proceedings.

132. There must be a question over the applicant's standing to maintain these proceedings, at least insofar as the fundamental constitutional rights which can only be innate to humans are concerned, nevertheless, bearing in mind the decision of Barrett J. in *Merriman* and being satisfied that the *bona fides* of the applicant is not called in question, I am satisfied to accept for the purpose of these proceedings, that the applicant has established that it has *locus standi*. Adopting and adapting *dicta* of McKechnie J. in *Digital Rights*, the applicant seeks to agitate important issues, including those of a constitutional nature, affecting its members and indeed the public at large, it raises significant issues in relation to environmental concerns which is a factor that ought to be taken into account by this Court in deciding, whether in the interests of justice, that the applicant has such standing.

133. The constitutional rights which are stated to be infringed are the rights to life, the right to bodily integrity and the right to an environment consistent with human dignity. Even if I were to accept that these rights are in some way engaged, which I do for the purposes of this case, the difficulty which I perceive in the applicant's claim is that it is seeking to have the court declare that it is the Plan which is impacting upon those constitutional rights. I am not satisfied that it has been established that the making or approval of the Plan by the respondent has the effect of breaching those rights. 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. As I previously stated, I could not reasonably conclude that the Plan resiles from the national transition objective as specified in the legislation nor could I reasonably conclude that the plan runs contrary to the national policy on climate change. The Plan is but one, albeit extremely important, piece of the jigsaw.

134. It should be recorded that a case is not made that the State is in breach of its obligations under EU law. Counsel for the respondent suggests that the reason for this for this is that Ireland can purchase credits from other member states to achieve compliance.

135. In *Urgenda* the Dutch Court of Appeal considered a claim that the State had acted unlawfully under the Dutch Civil Code and was in breach of Article 2 and 8 of the European Convention on Human Rights. As part of this analysis, it considered the relationship of the State's obligations with EU policies. The State argued that it was acting

in compliance with EU laws and policies and therefore should not be required to do more, given that within the EU, climate laws were significantly harmonised. This was rejected by the Court of Appeal which found that the State could not hide behind the reduction target of 20% at EU level. It seems that the reason for its conclusion in this regard is that the EU target lacked scientific support, the EU deemed a greater reduction in 2020 was necessary from a climate science point of view that the EU as a whole was on track to achieve a reduction of between 26% and 27% in 2020. Further, that the State had argued that it planned to do more than required under EU law to the period 2030 did not mean that it could not do the same up to the period 2020. It did not accept that the State had substantiated its claim that stricter policies than those required by the EU would harm "*the level playing field*" set for Dutch companies. The court also considered that in the past the Netherlands as an Annex I country acknowledged the severity of the climate situation and, mainly based on arguments from climate science, assumed a reduction of 23% to 25% by 2020, with a concrete policy objective of 20% by that year. After 2011, this policy objective was adjusted downward to 20% by 2020 at the EU level, without any scientific substantiation and despite the fact that more and more became known about the serious consequences of greenhouse gas emissions from global warming. Based on this, the court expressed the opinion that the State had failed to fulfil its '*duty of care'* pursuant to Articles 2 and 8 of the European Convention on Human Rights by not wanting to reduce emissions by at least 25% by the end of 2020. This was considered by the court to be a minimum, given the recent insights about an even more ambitious reduction in connection with the 1.5°C target which had not been taken into consideration. The Court observed at para. 73 of its judgment:-

> "*... In forming this opinion, the Court has taken into consideration that based on the current proposed policy the Netherlands will have reduced 23% by 2020. That is not far from 25%, but a margin of uncertainty of 19-27% applies. This margin of uncertainty means that there is real chance that the reduction will be (substantially) lower than 25%. Such a margin of uncertainty is unacceptable. Since moreover there are clear indications that the current measures will be insufficient to prevent a dangerous climate change, even leaving aside the question whether the current policy will actually be implemented, measures have to be chosen, also based on the precautionary principle, that are safe, or at least as safe as possible. The very serious dangers, not contested by the State, associated with a temperature rise of 2° C or 1.5° C – let alone higher – also preclude such a margin of uncertainty. Incidentally, the percentage of 23% has become more favourable because of the new calculation method of the 2015 NEV, which assumes higher greenhouse gas emissions in 1990 than those which the district court has taken into consideration. This means that the theoretical reduction percentage can be achieved sooner, although in reality the situation is much more serious"*

136. Acknowledging that the percentage of 23% had become more favourable because of new calculation methods which assumed higher greenhouse gas emissions in 1990 than those which the District Court had taken into consideration, the court accepted that this meant that the theoretical reduction percentage could be achieved sooner. On these grounds the

State's reliance on its margin of appreciation argument also failed because in the court's opinion the State did have such margin in choosing the measures it takes to achieve the target of a minimum reduction of 25% in 2020.

137. This court knows little of the duty of care under Dutch tort law or how that is assessed but it is noted that the Court of Appeal had regard for the importance of the precautionary principle in response to State argument that climate change impacts were too uncertain a basis to substantiate the applicant's claims. In the Court of Appeals' view it was precisely the uncertainty, especially with regard to the existence of dangerous tipping points that require the State to adopt proactive and effective climate policies. Further, the court did not accept the State defence based on the lack of causal link. Part of its reasoning for this was the proceedings concerned a claim proposing an order and not a claim for damages, thus causality played a limited role. It sufficed that there is a real risk of the danger for which measures have to be taken, to give the order. Further, it expressed the view that if the States opinion were to be followed and effective legal remedy for a complex global problem would be lacking. It was unacceptable for the State to argue that it could not be made accountable if other States did not take measures.

138. The plaintiff had sought an order that the State achieve a level of reduction of greenhouse gas emissions by the end of 2020 that was more ambitious than that which was envisaged by the State in its policy (emphasis added). No particular statutory framework was impugned and this court has heard no evidence as to the nature of the constitutional order which pertains in that jurisdiction, particularly in relation to the separation of powers. Nevertheless, it is instructive to note that the court acknowledged that the State had a positive obligation to protect the lives of citizens within its jurisdiction under Article 2, while Article 8 creates the obligation to protect the right to home and private life. These obligations apply to all activities which could endanger the rights protected in those articles and "*certainly in the face of industrial activities which by their very nature are dangerous"* and that if the Government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible. It was accepted that there was a real threat of dangerous climate change resulting in the serious risk that the current generation of citizens would be confronted with loss of life and/or disruption of family life. It followed from Articles 2 and 8 ECHR that the State had a duty to protect against such real threat and it had failed to fulfil its "*duty of care under the convention*" by "*not wanting*" to reduce emissions by at least 25% by the end of 2020. Measures had to be chosen, based on the precautionary principle, that were safe or at least as safe as possible.

139. No authority has been opened to this court to suggest that European Court on Human Rights has addressed this issue, and that being the case, this court ought to be mindful of the decision of Fennelly J. in *McD (J) v. L (P) & M (B)* [2009] IESC 81 that it is not for the domestic court to declare rights under the Convention, but that this is a matter for the European Court.

140. In *McD*, Fennelly J. stated at para. 95:-

95. The form in which the matter arises on the appeal is whether, through the mechanism of the Act of 2003, an Irish court may anticipate further developments in the interpretation of the Convention by the European Court in a direction not yet taken by the Court.

96. Section 2 of the Act of 2003 is the material provision. It reads:

2 2.-(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

(2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter.

97. To assist courts in that interpretative task, section 4 provides that judicial notice is to be given to a wide range of materials, including, of course, the Convention provisions, but, inter alia, also "any declaration, decision, advisory opinion or judgment of the European Court of Human Rights…" and that courts shall "take due account of the principles" they lay down."

Fennelly J. later in his judgment, states:-

"99. The Convention is an instrument of international law. It imposes obligations in international law on the contracting states. It does not require domestic incorporation of its terms into the law of the contracting states. Its judgments, as this court has repeatedly stated, do not have direct effect in our law. The contracting states are under an obligation in international law to secure respect for the rights it declares within their domestic systems. The European Court has the primary task of interpreting the Convention. The national courts do not become Convention courts.

100. Lord Bingham correctly outlined the respective tasks of the European Court and the domestic courts in the following passage from his speech in R. (Ullah) v. Special Adjudicator [2004] 2 AC 323:

> *"In determining the present question, the House is required by Section 2(1) of the Human Rights Act, 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that Courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg Court… This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg Court. From this it follows that a national Court subject to a duty such as that imposed by Section 2 should not without strong reason, dilute or weaken the effect of the Strasbourg case law……It is of course open to Member States*

to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national Courts, since the meaning of the Convention should be uniform throughout the States party to it. The duty of national Courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less".'"

At para. 104 Fennelly J. observed:-

> *"104. It is vital to point out that the European Court has the prime responsibility of interpreting the Convention. Its decisions are binding on the contracting states. It is important that the Convention be interpreted consistently. The courts of the individual states should not adopt interpretations of the Convention at variance with the current Strasbourg jurisprudence."*

141. If, as the applicant contends, the Plan is an inadequate response and does not propose to do enough, quickly enough, then in my view that is not a legal deficiency or inadequacy of the Plan, which as I have found is not inconsistent with the legislation by which it has been adopted, but of the provisions and objectives outlined in the Act, and possibly national policy, which are not challenged in these proceedings and upon which the court makes no observation.

142. The free standing reliefs which the applicant claims, and which are divorced from reference to the Plan, are contained at paras. 12 and 13. The first relates to a declaration that the approval of the Plan was unconstitutional and more importantly for the consideration of the issue that there has been a breach of the Convention, a declaration that in breach of the provision of s. 3 of the European Convention on Human Rights Act 2003, the respondent has failed to perform its functions in a manner compatible with the State's obligations under the provisions of the European Convention on Human Rights.

143. All of this must be seen against the backdrop of the manner in which the case comes before the court. This is an application for judicial review. In essence it is an application for review of executive action and the only express executive action that is expressly called into question is the creation and adoption of the Plan. Insofar as the claim concerns the Plan and its adoption, the sentiments which I previously expressed in relation to the finding that the Plan is intra vires the Act and the absence of a challenge to that Act, apply with equal force to this aspect of the plaintiff's claim. To the extent that it is contended that the State has a positive obligation to take positive measures, it is clear from *Budayeva* that the State had the choice of means and is in principle a matter that falls within the contracting State's margin of appreciation, to which previous reference has been made. Given that margin of appreciation, insofar as the challenge to the plan is concerned, I am not satisfied that it can be said that it has exceeded the margin of appreciation which it enjoys, in the creation and adoption of the Plan.

144. With regard to the provisions of Article 8, the decisions to which reference has previously been made in this judgment, in my view, supports the proposition that the Plan is a

measure which falls within the scope of the respondents' discretion pursuant to Article 8. In this regard, it is to be noted that in *Fadeyeva v. Russia* (Application no. 55723/00), one of the factors which was taken into account in determining whether there was a violation of Article 8 rights was the domestic legality of the impugned situation.

145. In the light of the approach which the court has taken in respect of the test for review; in the absence of any express authority relied upon by the applicant to suggest that there is a free standing cause of action to have executive action assessed on the basis of proportionality; and bearing in mind the factors which had to be taken into account in the creation and adoption of the Plan, even if such a free standing cause of action or grounds for challenge exists, once again given the wide discretion which is available to the Executive, particularly in the context of the wording of the Act, it is difficult to conclude that it has been established by the applicant that the State has acted in a disproportionate manner in the creation and adoption of the Plan when the Plan, as I have found, is not *ultra vires* the Act which provides the basis upon which the State should achieve a low carbon transition without prescribing the requirement to achieve intermediate targets or trajectories.

146. In the circumstances and for the reasons expressed above, I must refuse the reliefs sought.