

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

RESPONDENTS

JUDGMENT of Mr. Justice MacGrath delivered on the 18th day of December, 2018.

1. In the substantive and underlying proceedings, the applicant seeks an order for judicial review quashing the government's decision to approve the National Mitigation Plan, which was published on 19th July, 2017 and was made pursuant to s. 4 of the Climate Change and Low Carbon Development Act 2015. The purpose of this plan is stated to be to ensure compliance with the State's obligations regarding climate change. The applicant maintains that the plan fails to comply with the requirements of that Act and that the respondents have failed to comply with national law, EU law, and the provisions of the Charter of Fundamental Rights and Freedoms, particularly Article 3 thereof. Proceedings are now at an advanced stage and a hearing date has been allocated to the case.

2. This is an application in which the parties seek an order in advance of trial regarding the admissibility of certain documents including a statement entitled "*Statement on the human rights obligations related to climate change, with a particular focus on the right to life*", the author of which is a Mr. David R. Boyd, UN Special Rapporteur on Human Rights and Environment.

3. By way of background, on 26th October, 2018, the applicant served upon the respondents, without leave of the court, an affidavit sworn by Ms. Orla Clarke on 25th October, 2018. Ms. Clarke is a partner in the firm of solicitors representing the applicant. She avers that since the initial affidavits were prepared, further developments have occurred in respect of which the court of trial requires to be updated. She states that both parties accept that it is necessary for the court to have regard to issues of national and international scientific relevance which underpin the proceedings. Ms. Clarke refers to a replying affidavit which was sworn on behalf of the respondents by Mr. Frank Maughan on 15th February, 2018 in which he accepted that it was necessary to set out the basic framework and road map within which Ireland's national climate change policy had developed. Ms. Clarke states that it is therefore necessary to update the court in relation to that framework and road map; and to ensure that the court of trial has the most up to date information available.

4. In this regard Ms. Clarke avers that the respondent has identified part of the framework and road map as being the UN Framework Convention on Climate Change (hereafter referred to as "*the UNFCCC*"). This is described as an instrument designed to "*evolve over time within the context of the international climate change regime*". She exhibits four documents which the applicant wishes to have admitted and considered at the substantive hearing. They are as follows:-

(i) A special report prepared by the Intergovernmental Panel on Climate Change, an international body for assessing the science related to climate change and which provides a scientific basis for the development of policies under the UNFCCC. Ms. Clarke avers that this report updates the scientific evidence before the court.

(ii) The Annual Review and Report 2018 of the Climate Change Advisory Council. Ms. Clarke states that this report contains the most recent climate change assessment by the Council.

(iii) A 2018 report from the Environmental Protection Agency providing updated emission projections.

(iv) A statement which has been prepared by the UN Special Rapporteur on Human Rights, Mr. Boyd, dated 25th October, 2018.

5. On 7th November, 2018, the respondents wrote to the solicitor for the applicant objecting to the late introduction of the material exhibited in Ms. Clarke's affidavit and protesting that the affidavit had been filed in the Central Office without leave of the court or without any court direction in this regard. Specific reliance was placed on O. 40, r. 19 of the Rules of the Superior Courts, which provides:-

"Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used, unless by leave of the Court."

6. The respondents requested the applicant to apply to court for leave to file and serve any additional affidavit. The applicant maintains that no special time limits have been fixed by the court for the filing of affidavits and therefore leave of the court is not specifically required. In any event, the applicant's position is that if leave of the court is required, they wish such application to be considered at this hearing.

7. On the hearing of this application, the only document about which there was significant contention is that which was authored by Mr. Boyd. In essence, the parties informed the Court that a *modus operandi* had been agreed between them regarding the manner in which the first three documents might be treated at the hearing.

8. Having regard to the manner in which the parties have addressed the issues and given the broad consensus of the parties regarding the first three documents, the consideration of the Court, therefore, is confined to Mr. Boyd's statement.

The purpose and intent of the admission of Mr. Boyd's report for consideration by the Court

9. At para. 8 of her affidavit, Ms. Clarke avers that the applicant is making the argument that the inadequacy of the government's National Mitigation Plan will have serious human rights implications for the applicant, its members and the population at large. She points out that the respondents have denied that the national mitigation plan will have such impacts or that there is any frailty in the

plan in that regard. Her affidavit continues as follows:-

"In respect of same I beg to refer to a Statement by the UN Special Rapporteur on Human Rights and the Environment dated 25 October 2018 at Tab 4 of the booklet of exhibits. I say, believe and am advised that this constitutes a cogent expert statement from an authoritative source in a matter central to the within proceedings." (emphasis added).

10. From the outset, therefore, it is the applicant's position that the Court should consider the statement of Mr. Boyd because it is an expert statement. He is described as an authoritative source in a matter which is central to the proceedings. The respondents object to its admissibility and submit as follows:-

(i) While Mr. Boyd canvasses matters of national, European and comparative and international human rights law, it is unclear in what capacity he purports to do so. His qualifications and expertise are nowhere set out.

(ii) Mr. Boyd has not sworn an affidavit. This became somewhat less of a contentious issue during the hearing.

(iii) Regarding Mr. Boyd's observations on comparative law (his report deals with the legal situation in Pakistan, USA, Colombia and the Netherlands), the respondents submit that it is only where an issue of foreign law arises for determination in proceedings, that expert evidence as to law may be required by the court. Significant reliance is placed on the decision in *O'Brien v. the Clerk of Dáil Éireann* [2016] IEHC 597 in this regard. It is submitted that as no issue arises in the proceedings concerning foreign law, no evidence is required relating to the laws of those countries. Further, and in any event, foreign law must be given by way of expert evidence before an Irish court, proven as a fact in a particular case and by the testimony and opinion of a competent expert witness who is shown to possess the appropriate skill and knowledge, scientific or empirical, required for stating, expounding and interpreting that law. The respondents protest that Mr. Boyd does not identify his qualifications or expertise to opine on the law of the various jurisdictions discussed in his statement. In so far as matters of national law are concerned, the respondents maintain that Mr. Boyd's statement is also inadmissible as it is well established that expert evidence is not admissible in respect of any matter of domestic law. Similar considerations apply in respect of matters concerning European Court of Human Rights and international law. It is the respondents' contention that matters of legal argument in this regard are matters for submission to and determination by this Court.

(iv) It is also submitted that Mr. Boyd, in his statement, does not demonstrate that he has complied with the rules regarding the independence of expert witnesses as stipulated in O. 39, r. 57.

(v) Finally, it is contended that Mr. Boyd's statement is wholly irregular, has an unclear purpose, and his role is unclear. The statement does not comply with the rules of evidence and therefore it is inadmissible.

Mr. Boyd's statement

11. In the light of the application and the stated grounds of objection to its admissibility, it is appropriate to consider Mr. Boyd's statement which is divided into a number of parts. In the introductory section, Mr. Boyd outlines that he has worked as an environmental lawyer for 25 years, served as an adviser to many governments on environmental policy, and has published nine books and more than 100 articles, reports and book chapters. He was appointed to the role of United Nations Special Rapporteur on the human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment on 1st August, 2018. However, it is made clear that the views expressed by him are without authorisation from the United Nations, including the Human Rights Council, or the Office of the High Commissioner for Human Rights. The statement is made on a voluntary basis and it advises that it should not be considered as a waiver of the privileges and immunities of the United Nations, its officials and experts.

12. The statement is described as an expert statement and is specifically made in relation to the within proceedings. It appears that Mr. Boyd has had access to and has considered the pleadings.

13. At para. 5, he describes the purpose of the statement as being the analysis of the question: *"Does the Government of Ireland have positive human rights obligations to mitigate climate change?"*. Within the same paragraph, he answers that question, by stating that his conclusion is that climate change clearly and adversely impacts the right to life, a right which the government of Ireland is legally obligated to respect, protect and fulfil. Thus he concludes that the government of Ireland has positive human rights obligations to mitigate climate change by rapidly reducing its greenhouse gas emissions.

14. The paper thereafter addresses a number of issues including the following:-

(a) Growing recognition of the impacts of climate change on human rights.

(b) The foreseeable impacts of climate change upon the right to life.

(c) Climate change and human rights obligations related to the right to life.

(d) The climate change and human rights jurisprudence of international courts. In this section of the paper Mr. Boyd considers various decisions of the European Court of Human Rights, and of the Inter-American Court of Human Rights.

(e) The climate change and human rights jurisprudence of national courts are then addressed. In this section, he considers the law as interpreted in a number of states including Pakistan, the United States of America, Ireland, Colombia and the Netherlands.

(f) The next heading is *"Climate change and the human rights obligations of the Government of Ireland"*, and finally there is a conclusion.

15. While objection is taken to the entire report, the main objection is to Mr. Boyd's consideration of the right in question as interpreted by both international and national courts. This includes Irish courts. The earlier parts of the report are discursive and historical and consider developments which, from an international perspective, recognise and expound upon human rights in the context of climate change and climate change obligations. Mr. Boyd observes that states must begin to move beyond their current commitments in order to close the gap between what is promised and what is necessary, and in so doing they must take care to protect the rights of the most vulnerable. The statement considers the foreseeable impacts of climate change upon the right to life.

He considers a number of international reports, particularly those of the Intergovernmental Panel on Climate Change ("IPCC") and also the World Health Organisation. Thereafter, he addressed the right to life and the recognition which that right enjoys worldwide. He concludes that certain principles expounded in the final report to the Human Rights Council, 2018, by his predecessor, Prof. John Knox, apply in the context of climate change, requiring states to establish, implement and enforce effective laws and policies to reduce greenhouse gas emissions. Three pages of the report are dedicated to consideration of both international and national law and decisions of those national and international courts in that regard.

16. In the final section, Mr. Boyd discusses the obligations of the government of Ireland under various international agreements and commitments to which it is party. He expresses the view that, problematically, Ireland does not appear to be on track to meet its current commitments to reduce greenhouse gas emissions and refers to Ireland's Climate Change Advisory Council's 2018 that the National Mitigation Plan will not do enough to reach the targets of the Paris Agreement or Ireland's own emission reduction targets.

17. At para. 57 of his statement, Mr. Boyd observes:-

"From a human rights perspective, it is necessary for the Government of Ireland not only to take additional actions on an urgent basis to implement its current nationally determined contribution, but also to seek to strengthen that contribution as part of the collective effort to meet and/or exceed the targets set out in article 2 of the Paris Agreement and ensure that global temperatures do not rise to levels that would inflict catastrophic damage on the right to life and other human rights."

At para. 59 (the concluding paragraph) of his statement, the following appears:-

"The Government of Ireland has clear, positive and enforceable obligations to protect against the infringement of human rights by climate change. It must reduce emissions as rapidly as possible, applying the maximum available resources. This conclusion follows from the nature of Ireland's obligations under international human rights law, and international environmental law."

18. On consideration of the entirety of the report, it appears to me that its main thrust is to express an opinion in relation to Ireland's obligations under international human rights law and environmental law. While Mr. Boyd also expresses the view that the government has positive human rights obligations to mitigate climate change by rapidly reducing its greenhouse gas emissions, I must consider the report in its entirety, in the context of the objections which have been raised. In that regard, it seems to me that particular significance ought to be placed on the statement of the purpose of Mr. Boyd's paper as described in para. 5 and his conclusion as set out in para. 59.

19. On one view, it might be preferable if the trial judge, who will have a more expansive view of the issues in the case, was asked to make a decision on the admissibility of this statement. Nevertheless, for good practical reasons, the parties believe that this matter should be dealt with at this point in time, lest the late admission or non-admission of the statement might have a disruptive effect on the proceedings which have been allocated a hearing date in the near future. It is on that agreed basis that I consider this application.

20. Although the parties cannot point to any specific time limits which may have been ordered in respect to the filing of the affidavits, it is understandable that the late filing of an affidavit is likely to cause concern and in this regard, it appears to me that I must in the first instance consider whether to permit the admission of the affidavit at this stage of the proceedings. Given that the parties have come to an arrangement in relation to how the first three reports and documents should be considered, as a matter of principle, in my view it is proper that the applicant be permitted to file an affidavit regardless of whether leave is strictly required in accordance with the provisions of O. 40, r. 19. In the event that such leave is required, I am of the opinion that the interests of justice dictate that the applicant be given leave to apply to have this affidavit admitted pursuant to O. 40, r. 19, subject to my ruling hereunder.

21. I have considered the documents and the arguments of the parties both in oral and written submissions and I must conclude that the statement prepared by Mr. Boyd is not admissible in evidence in accordance with principles of Irish law, as those principles are understood. While it was debated at the hearing of this application whether if the report had been produced in affidavit form, it might be less objectionable, the clear thrust of the respondent's submission is that regardless of whether it is presented in statement or in affidavit form, fundamental objection is taken to its admissibility.

22. In my view, the author of the report has not set out any particular expertise to entitle him to express a view on international or national law and that in any event, the legal principles applicable to the admission of such evidence, in Irish law, have not been complied with. I do not believe that it has been displayed that Mr. Boyd has the necessary expertise or that the expression of opinion by him is in accordance with the principles outlined in the authorities and in particular the decision in O'Brien. In a passage upon which the respondents rely, Kelly P. stated:-

"28. There can be no doubt but that if an Irish court were called upon to decide an issue of American constitutional law Prof. Tribe would be admirably qualified to give evidence in respect of it and furthermore his evidence would be admissible. But there is no issue of American constitutional law which falls for determination in these proceedings. On the contrary, this Court will be asked to adjudicate upon the plaintiff's rights under the law of this State."

29. In many cases involving a consideration of the Irish Constitution it is by no means unusual to have cited, as persuasive authorities, decisions of the courts of other states. In many instances decisions of the United States courts are called in aid. In such cases the relevant passages from such judgments are drawn to the attention of the trial judge for consideration as a persuasive authority. In such an instance it has never been permissible to adduce evidence from an expert from such jurisdiction to give his opinion as to what the law in that jurisdiction might be."

30. In the course of his draft proof, Prof. Tribe goes far beyond the small number of American cases cited in the plaintiff's written submissions. Indeed, it is also his intention to refer to decisions from the United Kingdom, Australia, New Zealand and South Africa. No issue of law from those jurisdictions arises to be decided as a matter of fact in this case either."

31. It is also to be noted that although Prof. Tribe admits that he is not in a position to give evidence of Irish law he does make observations about it in the course of his draft proof of evidence."

32. Counsel on behalf of the plaintiff was unable to cite any authority in support of the proposition that Prof. Tribe's evidence was admissible. He sought to argue that this is a 'unique and important' case raising issues of Irish law which

have never fallen to be decided before. All cases are unique to their own facts and important to the litigants. This case does raise interesting and important questions and the court may well have to decide issues not adjudicated on before, but that does not provide any justification for admitting this evidence. On the question of principle I hold that Prof. Tribe's evidence is inadmissible."

23. In so far as it has been suggested that certain parts of the report may be unobjectionable, it does not appear to be appropriate for this Court to enter upon a dissection of the report to determine what parts should be admitted and what parts should not be admitted. Ultimately, the report in its entirety is designed to express a particular conclusion on which Mr. Boyd does not have sufficient expertise, as explained and expounded in *O'Brien*. It is therefore not admissible as a statement of an expert. Mr. Boyd has not otherwise set out his expertise in relation to the proof of foreign law, which in any event has to be proven as a matter of fact and once again the basis for this has not been specifically established.

24. In all the circumstances, I conclude that the statement of Mr. Boyd under consideration is not one which is admissible in evidence in Irish law for the reasons outlined above.