ENERGY TRANSITION
GOVERNANCE & LAW
----- SUSTAINING -----
THE NECESSARY TRANSITION

TGL/MSCA Research Paper

01/2022

Epilogue

Important perspectives emerge from the current evolution of energy law and policy. There is no doubt that the diversity of actors, urging for the development of the discipline in phase with the current stakes, plays an important role. The same applies to the increasingly important role of case law in both energy and climate matters. Whatever the stated ambition of the laws on energy transition, energy or climate, the discipline now necessarily involves integrating into the analysis highly refined scientific complexities, but also jurisprudential developments that allow to feel the pulse of various considerations: ambition, realistic or unrealistic efforts, enforceability, legal certainty, etc.

On the one hand, the caselaw underlines the importance of energy transition or the share of renewable energy in the mix. Only recently, in a decision dated 13 March 2020 outlining the judge's reasons for not ruling, it was specifically noted that "renewable energy ... is of great public interest and concern." In this recent case, in which the applicant sought leave from the judge to challenge a decision of the UK Secretary of State for Business, Energy and Industrial Strategy, dated 1 May 2019. This decision favored applications for UK support for renewable energy generation made by electricity operators in the context of the operation of offshore or remote island wind turbines, while it did not take into account generators using onshore non-remote island wind turbines. In this respect, the question as it was brought before the judge was whether: European competition law prevents the UK government from honouring manifest commitments by political parties to reduce or eliminate public subsidies to onshore wind farms? The parties, having reached a compromise while the court proceedings were underway, asked the judge not to hand down judgment, but rather to hear them in a private hearing. The judge argued that the renewable energy issue was a matter of public interest and required the utmost attention and therefore should be heard in a public hearing.

> However, what is more important, in my view, is that this is a public law application for public law remedies, against a public authority on a subject, renewable energy, that is of very significant public interest and concern. Judicial review actions are neither private law disputes

> between individuals nor private law disputes between a citizen and a state agency. Rather, they are public law disputes which must, except in the most unusual circumstances, be heard and decided in public. Normally, no party or combination of parties should be able to prevent the publication of a court decision after the proceedings have concluded.

On the one hand, the British government was concerned about the inevitable impact that a court case would have on the U.K.'s efforts to achieve the ambitious target of zero net carbon emissions by 2050. It was felt that the proceedings would create uncertainty and doubt about the validity of contracts awarded under the Round 3 ("AR3") allocation of state support agreements, and more importantly, the unpredicted impact that the proceedings could have on the significant investment that the UK is promoting in renewable energy.

> ... The energy projects in question are said to involve billions of pounds of investment. These investments could be further delayed, perhaps significantly, while these proceedings are ongoing, even if the end result is not to invalidate the relevant CFD contracts. It is said that, beyond the immediate commercial consequences for actual businesses and third parties, this continued delay and uncertainty has significant implications for the UK's plans to achieve its net zero carbon emissions target.

The UK Secretary of State had relied on a public interest, including the maintenance of legal certainty and the proper functioning of the AR3 contracts regime. In granting this request, the judge therefore concluded that :

> However, it seems to me that there is an overriding factor here, namely that a withdrawal of this application by consent, and in the absence of a judgment being given, gives the parties, including the Secretary of State, legal certainty in relation to AR3. This, in my view, serves to improve the prospects for the development and deployment of renewable energy in this country, and puts the UK in a better position to deal with climate change. This is a factor of overwhelming public importance, out-

> weighing the commercial interests of individual participants, and even the public interest in accessing a judgment in a case like this. This consideration leads me to grant this request.

On the other hand, non-state actors continue to press through litigation, directly targeting energy or climate issues, for energy and climate law to have a dual materiality, to be adapted to current issues and to lead to the responsibility of the state and other private actors.

A topical example is the judgment of the Supreme Court of Ireland of 31 July 2020. The contribution of this case when it comes to climate issues is very significant. It underlines that climate change is one of the greatest concerns facing mankind. As a result, climate change issues must be addressed, and predominantly by governments, because states are in the first instance responsible of environment protection on their territory. Hence, it seems no longer enough for states to tackle climate change anyhow, including designing climate policies that are far from the realities on the ground, scientific realm or failing to vindicate the rights guaranteed by pertinent legal instruments.

The leave to appeal sought by the Friends of the Irish Environment (FIE) was in line with this approach. The facts, as acquired at trial, can thus be summarized as follows: pursuant to Article 3 of the Climate Action and Low Carbon Development Act (the "2015 Act"), the Government of Ireland published on the 19 July 2017, the National Mitigation Plan. The object of the plan was to provide a climate action policy framework for initiating and pursuing the transition to a low carbon, climate resilient and environmentally sustainable economy. First, the plan pointed out that the Irish climate action aimed at contributing to the global response to the climate challenge, which is based on the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement. In this regard, the plan pledges to pursue the objectives of restricting global temperature rise, and endeavour the collective effort to limit the temperature increase to 1.5°C. Then, the plan referred to the European Union (EU) action as to the objectives of reducing greenhouse gas emissions, and the contribution of the Republic of Ireland to the EU effort, supporting at the same the Irish approach of fostering climate resilience and low greenhouse gas emissions development.

In this context, FIE, a non-governmental organisation, actively involved in protection and promotion of the environment, instituted proceedings before Justice MacGrath. First, because the state failed to approve acceptable means to reduce greenhouse gas emissions in compliance with the objectives of the UNFCCC, the Kyoto Protocol and the Paris Agreement, the applicant contended that the Plan was unconstitutional. Accordingly, the Plan would violate the rights of the applicant, its members, and the public, namely the rights enshrined in the Charter of Fundamental Rights and Freedoms. Second, FIE argued that the plan was adopted in breach of the European Convention on Fundamental Rights. Finally, the applicant claimed that the plan was ultra vires the powers of the Minister under the 2015 Act. To sustain its contention, the applicant alleged that the decision of the Irish Government to approve the Plan should be abrogated, because it did not comply with the section 4 of the 2015 Act. It was also argued that the Plan did not contain any appropriate measures susceptible "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."

FIE raised the issue that the government plan would fail to achieve the desired objectives and the necessary steps for a better evaluation of the government action on mitigating concentrations throughout the period during which the reduction of emissions was made and supported. It was the responsibility of the government to prevent the irreversible damage that could occur from maintaining the current level of GHG emissions in the atmosphere. FIE also emphasised the necessity of reducing the emissions in a steep direction and in line with the projection need to support international regulation relating to climate issues. It argued that despite the effort of combating climate change, the planned trajectory of emissions and the level of concentration would still alter the atmosphere. As regards Government Plan, its objective of achieving a reduction by 2050 was sustained by mechanisms that do not prevent the risk of harm inherent to the short-term incautious reduction of emissions.

The applicant broadly emphasised that scientific evidence suggested that net negative carbon dioxide emissions should be maintain within 2°C. In this sense, it appeared indispensable that political efforts should be made in favour of scenarios that allow the development of carbon dioxide removal technologies such as bioenergy, extensive reforestation or

forest growth. Accordingly, FIE raised the point that the mitigation plan should be based on concrete calculations that can define a new trajectory of emission reductions in the short term in a serious and substantial way. To support this, it was argued that the government's focus on long-term targets would simply affect carbon budgets. In this regard, FIE contended that by developing and approving the plan, the government was not doing enough to combat climate change. As a result, the plan was approved in breach of law and of the applicant's rights, which it was for the courts to review and uphold.

After considering the arguments and conclusions reached by the parties, the judge held that, in light of the discretion exercised by the government in developing and adopting the Plan under the 2015 Act, it could not be decided that the government had breached the provisions of the Act in the manner alleged. Accordingly, it was concluded that the Plan referred to the state's obligations under European Union law and existing international agreements. In this regard, it could not be considered to contain any proposal to achieve the national objective of transition which, as provided for in Article 3(1), would lead to the transition by 2050. Moreover, the court noted that the Plan did indeed specify the policy measures that the government considers necessary to reduce greenhouse gas emissions. These reasons led the court to dismiss the FIE proceedings. Therefore, FIE sought leave to appeal to the Court.

FIE was granted leave to appeal by decision of 13 February 2020. This leave was substantial by the fact that there was a common understanding in the arguments of both applicant and defendant on the need for urgent action to combat climate change. It also appeared that the parties did not dispute the importance of understanding and putting in place the means to combat climate change, in particular with regards to the likely increase in greenhouse gas emissions during the duration of the plan. In this regard, the leave was granted on the basis of the Parties' common understanding of the seriousness of the likely effects of climate change.

In this case, the judge came to some interesting conclusions.

Firstly, the ruling focused on the standing of FIE. As it is a corporate body not enjoying in itself the right to life or the right to bodily integrity, the judgement concluded that FIE does not have standing in respect of the rights it seeks to assert under the Constitution or the ECHR. In support

of this, the judgement found that it was not necessary to grant FIE standing under the exception to the general rule.

Second, the judgement highlighted numerous considerations with respect to the merits of the case. At the outset, it was stressed that FIE should be allowed to make a broad range of arguments in support of its written submissions. Similarly, the justiciable nature of the issues raised did not allow for a finding of inadmissible encroachment by the courts into areas of policy, as the policy aspects of the issue were framed by the 2015 Act.

It was also held that the 2015 Act, by virtue of its Article 4, provided for a sufficient level of specificity in the measures identified in the plan with a view to achieving the national transition objective by 2050, which alone made it possible to make a reasonable assessment of the realistic nature of the plan and the policy options it contained. The judgement therefore recalled that the adoption of the 2015 Act has led to the use of certain mechanisms such as public participation in the process leading to the adoption of the plans and transparency regarding the government's official policy on the national transition objective. In this regard, it was noted that the plan advocated by the government should be sufficiently precise, even if it was not certain that the details of the evolution of the climate situation were known. To this extent, the plan should be able to define the policy to be followed over the entire period up to 2050. Consequently, it would not be sufficient to set up a five-year plan.

In view of these considerations, the judgement concluded that the plan should be quashed, as it "... [fell] far short of the level of specificity required to ensure such transparency and to comply with the provisions of the 2015 Law." The judgement strongly emphasized that a plan of such a nature could not be sustained in the future. These new trends will inevitably enrich energy law and policy but will also help rethink the way the discipline has been taught to date. This poses a new challenge to the teaching of energy law, since it is now necessary to draw all the consequences of the climate litigation that is developing before us.