APPROVED **[2021] IEHC 177**

THE HIGH COURT
JUDICIAL REVIEW

2020 No. 76 J.R.

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT

AND

MINISTER FOR COMMUNICATIONS CLIMATE ACTION AND THE ENVIRONMENT
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

SHANNON LNG LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 30 March 2021

INTRODUCTION

1. The applicant in these judicial review proceedings seeks to challenge the establishment, by the European Commission, of a list of "projects of common interest" (as defined). More specifically, the applicant challenges the inclusion, on the list, of the proposed Shannon LNG terminal (and connecting pipeline).

2. The list of projects of common interest has been established pursuant to powers delegated to the European Commission under a basic legislative act, namely Regulation (EU) No 347/2013 on guidelines for trans-European energy infrastructure. This regulation is sometimes referred to as the "***Trans European***

Energy Networks Regulation" or the "***TEN-E Regulation***". The latter term will be used throughout the remainder of this judgment. The list of projects of common interest will be referred to as "***the EU list of projects***" or "***the delegated regulation***" where convenient.

3. The primary line of argument advanced in support of the legal challenge is to the effect that the European Commission exceeded the limits of the powers delegated to it. In particular, it is contended that the European Commission failed to ensure that only those projects that fulfil the criteria prescribed under the basic legislative act were included on the list of projects of common interest.

4. The applicant also advances a secondary line of argument to the effect that the failure of the Irish State to "veto" the inclusion of the Shannon LNG terminal on the EU list of projects represents a breach of the State's obligations under the Climate Action and Low Carbon Development Act 2015. This court is invited to make a reference to the Court of Justice of the European Union for a preliminary ruling on the implications of that alleged breach of *domestic law* for the validity of the list of projects of common interest. (This is the second attempt by the applicant to suggest that a reference should be made).

5. The primary line of argument has already been addressed in a detailed judgment delivered on 14 September 2020, *Friends of the Irish Environment v. Minister for Communications Climate Action and the Environment* [2020] IEHC 383 ("***the principal judgment***"). For the reasons set out therein, I concluded that the only justiciable issue in controversy in these proceedings is the validity of the delegated regulation made by the European Commission, and that a national court does not have jurisdiction to determine this controversy.

6. This present judgment now addresses the secondary line of argument advanced by the applicant.

7. The precise procedure, by which the list of projects of common interest came to be drawn up, has been set out in detail in the principal judgment and will not be repeated here. Instead, this judgment should be read in conjunction with the principal judgment.

PROCEDURAL HISTORY

8. The substantive hearing in these judicial review proceedings took place over four days towards the end of June and the start of July 2020. In circumstances where the applicant was inviting this court to make a reference to the Court of Justice for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union ("***TFEU***"), this court suggested that the question of whether a reference was appropriate should be addressed first and a judgment delivered on that issue. The parties agreed to this suggestion, but the respondents were careful to flag that there was not necessarily a clear-cut distinction between the EU law grounds and the domestic law grounds.

9. The balance of the issues in the case were to be deferred for consideration at a second hearing, following the delivery of a judgment by this court on the question of whether or not to make an Article 267 reference. It was agreed that, in the event of this court reaching a decision in principle that a reference to the Court of Justice was appropriate, the parties would then be afforded an opportunity to make submissions on the precise form of the reference.

10. The principal judgment was delivered on 14 September 2020. For the reasons set out therein, this court concluded that it did not have jurisdiction to make a

reference to the Court of Justice in the particular circumstances of this case. The parties were then invited to identify an agreed hearing date for the consideration of the balance of the issues in the proceedings.

11. To this end, the parties engaged in correspondence with each other. The applicant's solicitors indicated, in open correspondence, that it would serve no purpose for the remaining issues to be litigated, given that the court has found that the actions of the Irish State cannot be viewed in isolation and are incapable of being challenged independently of the European Union measure.

12. Thereafter, in submissions made to the court on 28 October 2020, counsel for the applicant, Mr. James Devlin, SC, confirmed that his client wished to pursue an appeal against the findings in the principal judgment, and suggested that any hearing by the High Court of the other issues in the proceedings should be adjourned generally to await the outcome of such an appeal.

13. The respondents disagreed with this suggested approach and submitted, in effect, that the applicant should be put to its election, i.e. it should either pursue the remaining grounds at a second hearing, or withdraw that aspect of its case. It was further submitted that the alternative course, i.e. an appeal against the principal judgment, followed by a hearing thereafter by the High Court in respect of the remaining grounds, would cause unnecessary delay in the ultimate resolution of the proceedings. The full case should instead be heard and determined at the High Court level prior to any appeal. The appellate court would then have seisin of all issues in the proceedings.

14. Having carefully considered the submissions of both sides, I ruled that it would be more satisfactory were all remaining issues to be heard and determined at the High Court level, in advance of the intended appeal. This seemed to me to be

more consistent with the approach flagged in the principal judgment. It should also ensure a more expeditious determination of the overall proceedings: the postponement of any consideration of the domestic law issues until after an appeal would simply have prolonged the case unnecessarily.

15. The parties had agreed that the conclusion of the case before the High Court would only require a short hearing (less than 2 hours), and thus a postponement would not have had any material benefit in terms of saving costs. For the reasons set out in my judgment on an earlier adjournment application in this case ([2020] IEHC 159), the High Court must have regard to its obligation to ensure that proceedings which have been admitted to the High Court's Strategic Infrastructure Development List are determined as expeditiously as possible consistent with the administration of justice.

16. The parties exchanged a further round of written submissions, and a hearing was held on 22 January 2021. During the course of that hearing, the following issue of domestic law came into focus: do the obligations under section 15 of the Climate Action and Low Carbon Development Act 2015 apply to the Government when it is exercising the executive power of the Irish State under Articles 28 and 29 of the Constitution of Ireland. At the conclusion of the hearing, the parties were given liberty to file supplemental written submissions addressing this issue. Three sets of submissions were filed, on 6 February; 5 March and 19 March 2021, respectively. The case was listed before me on 26 March 2021 on which occasion the parties both confirmed that they did not require the oral hearing to be reopened. Judgment was then reserved to today's date.

SUMMARY OF THE APPLICANT'S SECONDARY ARGUMENT

17. The applicant's case under the Climate Action and Low Carbon Development Act 2015 can be summarised as follows. The Irish State has a form of "veto" over the inclusion on the EU list of projects of any project which is located within its territory. This veto arises under Article 172 of the TFEU and is reflected under article 3(3)(a) of the TEN-E Regulation. The Irish State made a "decision" not to exercise this veto in the case of the Shannon LNG terminal. Indeed, it is said that, far from opposing its inclusion, the Irish State made a successful representation on 2 July 2019 to have the Shannon LNG terminal added to the list in circumstances where it had been *excluded* from the initial draft list.

18. The decision not to veto the inclusion of the project is said to have been reached in breach of the requirements of the Climate Action and Low Carbon Development Act 2015. More specifically, it is alleged that the Irish State, as a "relevant body", failed to have regard to a mandatory statutory consideration. Section 15 of the Act imposes an obligation on a "relevant body" to have regard to the furtherance of "the national transition objective" in the performance of its functions. The "national transitional objective" is defined earlier in the Act as the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050.

19. For the reasons explained under the next heading, this line of argument cannot succeed as it is inconsistent with the findings already reached by this court in its principal judgment to the effect that a national court does not have jurisdiction to entertain a collateral challenge to the validity of the delegated regulation adopting the list of projects of common interest.

DISCUSSION AND DECISION

20. The gravamen of the applicant's secondary argument is that an alleged breach of domestic law on the part of the Irish State has the legal consequence that the decision of the EU Commission to adopt the EU list of projects of common interest should be set aside insofar as it relates to the Shannon LNG terminal. This argument cuts across the finding in the principal judgment (at paragraphs 92 to 98) that a national court does not have jurisdiction to entertain a collateral challenge to the validity of the delegated regulation. The rationale for this finding is summarised as follows (at paragraphs 97 and 98 of the principal judgment).

> "97. The applicant, by inviting this court to review the validity of the decision-making procedures leading up to the adoption of the delegated regulation by the European Commission is, in truth, engaged in a collateral challenge to the validity of the delegated regulation itself. This court does not have jurisdiction to rule on the validity of the delegated regulation. This court cannot disregard the division of competences as between the national courts and the Court of Justice of the European Union, as prescribed under the TFEU, by purporting to rule on the validity of an earlier stage of the decision-making process. It would be entirely artificial to attempt to parse out the decision-making process in this way. Were this court to purport to find that the regional group (which included the Irish State and European Commission) had erred in its assessment of the projects, this would be to question the validity of the ultimate decision to adopt the delegated regulation. One cannot condemn the earlier procedural step without also condemning the ultimate decision which follows on from that step.
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> 98. The actions of the Irish State as a member of the regional group and as the Member State upon whose territory the proposed project is to be located cannot be viewed in isolation, capable of being reviewed separately from the ultimate decision to adopt the delegated regulation. These actions do not involve distinct national measures which implement a previously adopted European Union measure. Rather, the actions of the Member State are performed in advance of the adoption of the delegated regulation. As such,

> they are incapable of being challenged independently of the European Union measure."

21. This rationale applies irrespective of whether the actions of the Irish State, in the decision-making procedures leading up to the adoption of the delegated regulation by the European Commission, are challenged on domestic law grounds or on EU law grounds. As counsel for the respondents, Ms. Suzanne Kingston, SC, correctly submits, the legal characterisation and nature of the Member State's role in the decision-making procedures is a matter of EU law alone. This does not change depending on the grounds of challenge that an applicant seeks to raise (here, domestic law grounds).

22. Notwithstanding that the applicant's argument takes, as its starting point, an alleged breach of *domestic law*, it is inextricably tied-in with the EU law issues the subject-matter of the principal judgment. In truth, it is next to impossible to separate out the domestic law issues from the EU law issues. This is because the Irish State relies on the assessment carried out for the purposes of the TEN-E Regulation as sufficient for the purposes of the domestic climate action legislation. (See, in particular, paragraphs 28 to 36 of the second affidavit of Mr. Caoimhin Smith, where it is explained that climate and environmental considerations were considered by the Irish State in approving the inclusion of the Shannon LNG terminal in the Regional List at the Regional Group meeting of 4 October 2019).

23. The inescapable logic of the applicant's argument that the Irish State failed to discharge its duties under the domestic legislation is that the EU Commission must similarly have failed to discharge its assessment obligations under the TEN-E Regulation. The assessment obligation under the domestic legislation, i.e. the Climate Action and Low Carbon Development Act 2015, is less specific

than that under the TEN-E Regulation. A "relevant body" is merely required to "have regard to" certain matters. It follows—on the principle that the greater includes the lesser—that if the content of the assessment carried out by the Regional Committee, and, ultimately, the European Commission, would fail to pass muster were it to be measured against domestic law, then it must also fall short of the higher standard prescribed under the TEN-E Regulation. Were this court to purport to make a finding on compliance with the domestic climate action legislation, it would, by necessary implication, be trespassing on the merits of the decision-making under the TEN-E Regulation. Put shortly, it is not possible to consider the merits of the applicant's secondary argument without engaging in a collateral challenge to the assessment carried out at the EU level, which, in turn, amounts to an indirect attack on the validity of the delegated regulation.

24. The ambition of the applicant's secondary argument is the same as its primary argument, namely to set aside the delegated regulation which adopted the EU list of projects of common interest. This ambition cannot be achieved in these proceedings, taken as they are before a national court, for the jurisdictional reasons explained in detail in the principal judgment. Any challenge to the validity of the delegated regulation should have taken the form of a direct action before the General Court pursuant to Article 263 TFEU.

25. For the sake of completeness, I should add that the applicant has failed to identify any authority in support of the proposition that a delegated regulation, which has been adopted by the European Commission, can be invalidated because of what is said to have been an earlier breach of *domestic law* by a Member State. More specifically, the grounds upon which a delegated regulation, such as that

employed to adopt the EU list of projects of common interest, may be reviewed have been discussed at paragraphs 16 to 22 of the principal judgment. There is nothing in the case law discussed there which suggests that a delegated regulation could be set aside by reference to an alleged inconsistency with the *domestic law* of a Member State. Such a proposition would be difficult to reconcile with the principle of the supremacy of EU law.

26. Finally, it should be reiterated that if and insofar as the applicant disagrees with the findings in the principal judgment, it is fully entitled to pursue the matter on appeal to the Court of Appeal, or to seek leave to appeal from the Supreme Court. What it cannot do, however, is seek to reverse the principal judgment by stealth, by inviting this court to embark upon a collateral challenge to the delegated regulation under the guise of considering a breach of domestic law.

CLIMATE ACTION AND LOW CARBON DEVELOPMENT ACT 2015

27. For the sake of completeness, it is necessary to address briefly the question of statutory interpretation which arose under the Climate Action and Low Carbon Development Act 2015 ("***the CALCD Act 2015***"). The issue arose in the following way. Counsel for the applicant, very properly, recognised that the findings in the principal judgment presented difficulties for the secondary argument. Counsel suggested, however, that this court should endeavour to decide such issues of *domestic law* as it could, without trespassing on the jurisdictional issue. (This position is, of course, without prejudice to the applicant's contention that the principal judgment is incorrect on the jurisdictional issue).

28. The only issue of domestic law which can be considered in isolation from the applicant's primary challenge, and which avoids trespassing upon a consideration of the validity of the delegated regulation, concerns the following question of statutory interpretation: does section 15 of the Climate Action and Low Carbon Development Act 2015 apply to the Government when it is exercising the executive power of the Irish State.

29. This point of statutory interpretation has not been expressly raised in the pleadings. However, as explained by the Supreme Court in *Callaghan v. An Bord Pleanála* [2017] IESC 60, the proper interpretation of legislation is objective and is not necessarily dependent on the arguments put forward by the parties. See paragraph 4.4 of the judgment in *Callaghan* as follows.

> "Where an Irish court is considering the proper interpretation of a statutory measure it may well take into account any constitutional principles which might impact on the proper construction of the legislation concerned. Indeed, it is fair to say that a court might very well be reluctant to disregard such constitutional questions of interpretation even if they were not specifically raised by the parties. A court, and in particular a court of final appeal, is, as a matter of national law, required to give a definitive interpretation of a legislative measure which comes into question in the course of proceedings properly before it. It could not be ruled out, therefore, that a court in such circumstances would be reluctant to give a construction to legislation without having regard to any constitutional issues which might impact on the proper construction of the measure concerned in accordance with *East Donegal* principles. This might well be so where there would be a real risk that the Court would give an incorrect interpretation of the legislation in question if it did not itself raise the constitutional construction issue. It must be recalled that the proper interpretation of legislation is objective and is not dependent, necessarily, on the arguments put forward by the parties."

30. The question of the correct interpretation of section 15 of the CALCD Act 2015 is central to the applicant's domestic law arguments. It also requires consideration of the constitutional position of the Government under Article 29

of the Constitution of Ireland. The parties had an opportunity to address the question at the oral hearing on 22 January 2021, and were given leave to file supplemental written legal submissions. In the event, the parties exchanged three sets of written legal submissions on this point. The parties were then offered an opportunity to reopen the oral hearing, but both sides indicated that they were content to rest on the written submissions.

31. The applicant has used the opportunity of filing submissions to pivot its case away from an alleged breach of section 15 of the CALCD Act 2015 and to emphasise instead what it alleges is a failure by the respondent Minister to "have regard to" the national mitigation plan under section 4(12). This is not a submission which had been pressed at the hearing on 22 January 2021. Nevertheless, in the absence of any objection from the respondents, I propose to consider the case by reference to both section 4(12) and section 15.

32. The fundamental difficulty which the applicant faces is that the "function" which it seeks to impugn is that of the Government, not of the respondent Minister. It will be recalled that the applicant's complaint is that the failure of the Irish State to "veto" the inclusion of the Shannon LNG terminal on the list of projects of common interest represents a breach of its obligations under the CALCD Act 2015. Yet, the so-called power of "veto" which a Member State enjoys under Article 172 of the TFEU (and which is respected under article 3(3)(a) of the TEN-E Regulation) is one which is exercisable, in the case of the Irish State, by the Government and not by the Minister. Article 29 of the Constitution of Ireland provides that the executive power of the State in or in connection with its external relations shall, in accordance with Article 28, be exercised by or on the authority of the Government.

33. The CALCD Act 2015 does not purport to restrict the exercise, by the Government, of this executive power. Indeed, section 2 expressly provides that nothing in the Act itself shall operate to affect *inter alia* existing or future obligations of the State under the law of the European Union. The same exclusionary provision extends to a national mitigation plan, national adaptation framework or a sectoral adaptation plan.

34. There is no statutory obligation on the Government, in the exercise of its executive power under the Constitution of Ireland, to have regard to a national mitigation plan nor to the furtherance of the national transition objective. This follows from the fact that the definition of "relevant body" for the purposes of section 15 of the CALCD Act 2015 does not include the Government.

35. The definition is structured as follows. A "relevant body" is defined, for the purposes of the CALCD Act 2015, by way of cross-reference to the definitions of "prescribed body" and "public body" under the Freedom of Information Act 2014 ("***FOI Act 2014***"). The Government is not listed as a "public body" within the meaning of section 6 of the FOI Act 2014. This is consistent with the principle of cabinet confidentiality provided for under Article 28.4.3° of the Constitution of Ireland.

36. The omission of the Government from the definition of "relevant body" can only be understood as representing a deliberate choice by the Oireachtas in circumstances where the term "Government" is used elsewhere in the CALCD Act 2015. The statutory language confirms that the Oireachtas carefully distinguished between the Government, and individual Ministers, respectively, when addressing the various functions and obligations under the climate action legislation.

37. The applicant seeks to sidestep the statutory language by submitting that the CALCD Act 2015 cannot "be construed as applying to a Minister up to the door of the Cabinet room, ceasing to apply at the threshold and then re-attaching to the Minister on exiting the room".

38. What this rhetorical flourish overlooks, however, is that a particular Minister may well have a dual role. The Minister's principal role is, of course, as a member of the Government, exercising the executive power of the State as a collective authority. In addition, however, the holder of a particular Ministerial office may have been conferred with statutory powers as *persona designata*. For example, the Minister for the Environment, Climate and Communications is the designated decision-maker for certain categories of development consent. The exercise of such statutory powers will be subject to restraints different to, and distinct from, those applicable to the Government in the exercise of the executive power of the State. The Minister will be subject to the CALCD Act 2015 in this context. Crucially, however, such statutory powers are exercisable as *persona designata*, and do not have the character of the exercise of the executive power of the State. (See, by analogy, *Murphy v. Corporation of Dublin* [1972] I.R. 215).

39. It does not follow from the fact that the Minister, in deciding whether to grant a development consent, may be subject to section 15 of the CALCD Act 2015 that the same restriction must be read as extending to the Government in the exercise of external relations.

40. Ultimately, it comes down to a question of statutory interpretation as to the meaning and effect of the CALCD Act 2015. Relevantly, the "function" conferred on a Member State by Article 172 of the Treaty on the Functioning of

the European Union (and respected under article 3(3)(a) of the TEN-E Regulation) is one which is exercisable, in the case of the Irish State, by the Government pursuant to Article 28 and 29 of the Constitution of Ireland. In the absence of an express statutory provision which purports to regulate the Government's conduct, neither section 4(12) nor section 15 of the CALCD Act 2015 apply to this function. The Government is not caught by the definition of a "relevant body".

41. Given this finding that the Government is not subject to section 4(12) nor section 15 of the CALCD Act 2015 in deciding whether or not to exercise its function under Article 172 of the TFEU, it is unnecessary to address the "reasons" or the "participation" grounds pleaded at E.34 and E.35 of the amended statement of grounds.

CONCLUSION AND PROPOSED FORM OF ORDER

42. For the reasons set out in this judgment and in the principal judgment delivered on 14 September 2020, the applicant has not established any legal basis for the reliefs sought. The application for judicial review will, therefore, be dismissed in its entirety. These proceedings are to be listed for final orders on Friday 23 April 2021 at 10.30 am.

43. Insofar as the costs of these proceedings are concerned, the default position under Part 11 of the Legal Services Regulation Act 2015 ("***LSRA 2015***") is that a party who has been "entirely successful" in proceedings is *prima facie* entitled to costs against the unsuccessful party. The starting position, therefore, is that the respondents are *prima facie* entitled to an order for costs in their favour in

that they have been entirely successful, and the proceedings are to be dismissed. The court retains a discretion, however, to make a different form of costs order.

44. Section 169 of the LSRA 2015 provides that, in exercising its discretion, a court should have regard to the particular nature and circumstances of the case and to the conduct of the proceedings by the parties. Relevantly, the court should have regard to whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings.

45. Were the *default* position to be applied in the present case, then the respondents would be entitled to their costs as against the applicant. Such an order would be subject to a stay pending the hearing and determination of the intended appeal.

46. If the applicant wishes to contend for a different form of costs order, then this is to be addressed by oral submission at the hearing scheduled for 23 April 2021. Both parties have liberty, if they so wish, to file short written submissions on costs in advance.

Appearances

James Devlin, SC (with John Kenny) for the applicant instructed by FP Logue Solicitors
Suzanne Kingston, SC (with Patrick McCann, SC) for the respondents instructed by the Chief State Solicitor
No appearance on behalf of the notice party

Approved Garrett Simons