

## Strategic Climate Litigation on the Island of Ireland



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The island of Ireland represents a potentially influential staging ground for strategic climate litigation that could raise ambition and ensure implementation at both domestic level and internationally.

Due to the cross-border nature of climate matters and the applicable international law via the Espoo and Aarhus frameworks, there is also potential for transboundary, or multistate litigation to be used by both Irish and Northern Irish NGOs to hold Ireland and the UK governments to account for climate policy failures which impact the whole island. In 2023, [Environmental Justice Network Ireland](#) (EJNI) worked with partners from across the island of Ireland involved in climate litigation to explore barriers to collaboration across the border in Ireland, ways of overcoming these barriers and mechanisms through which litigation might be used in a strategic way to deliver better environmental and social justice outcomes. The results of this scoping study were published in a [project report](#), which considered developments in Ireland in light of broader [global trends in climate litigation](#), i.e. the use of international law and human rights law arguments in climate litigation, seeking increased climate mitigation ambition, further government framework litigation, the rise of 'routine' climate change litigation, integrating the principle of intergenerational equity and strategic climate litigation against corporations. The key findings of the report are set out below and will be explored further by EJNI as the project continues in 2024.

### Climate Litigation in Ireland

Ireland has already been the subject of high-profile government framework climate litigation, as demonstrated by [Climate Case Ireland](#) (discussed on this blog [here](#)). In this seminal case, the Supreme Court quashed Ireland's National Mitigation Plan because it failed to specify how the government intended to pursue and achieve the national transition objective of a low carbon, climate resilient and an environmentally sustainable economy by 2050 as required under Ireland's 2015 Climate Act. The lack of specificity in climate planning continues to be a recurring issue, with [ongoing litigation](#) commenced by Friends of the Irish Environment and Community Law and Mediation highlighting similar issues regarding the Climate Action Plan 2023.

Ireland has some key attributes that create the potential for impactful climate litigation. The Irish courts have long recognised as justiciable unenumerated or ‘derived’ constitutional rights including the right to bodily integrity. Furthermore, the Irish High Court has stood up for the rights of environmental defenders and demonstrated a high degree of respect for litigating NGOs ([An Taisce v An Bord Pleanála & Kilkenny Cheese](#)). Cost procedures are favourable: the Planning and Development Act 2000 as amended by the Environmental Miscellaneous Provisions Act 2011, which after the clarification in the recent [Heather Hill](#) judgment, leave environmental litigants only liable for their ‘own costs’. Additionally, current standing rules under s.50A(3) of the Planning and Development Act 2000 as amended, means that environmental organisations do not need to be incorporated/registered to take judicial review cases. In addition, the dual jurisdiction nature of the island offers an opportunity for litigation either side of the border to challenge/affect not only EU and Irish policy/legislative frameworks, but also UK frameworks. This offers environmental NGOs engaging in strategic litigation a high degree of influence above and beyond what would be expected for those based in a relatively small country like Ireland.

However, some important barriers to climate litigation in Ireland do exist, such as; the prohibition of crowdfunding or donations to cover legal costs which are known as the rules against “Champerty”, the tendency of the Irish judiciary to use the doctrine of the separation of powers to avoid contentious issues (the High Court judgment in Climate Case Ireland stated that it would be trespassing on the policy making function for the Court to declare the government’s climate policy unlawful/unconstitutional), environmental NGOs are viewed as lacking standing to assert human rights arguments and cost issues still exist in the exclusion of NGOs from legal aid provision in Ireland as established by [FIE v Legal Aid Board](#).

### **Climate litigation in Northern Ireland**

Similar issues arise in the context of Northern Ireland, with [historic poor implementation of environmental laws](#) exacerbated by the political instability, legal complexity and accountability gaps created by Brexit, not least the removal of the EU Commission enforcement and oversight mechanisms. The first case of its kind in Northern Ireland to raise climate issues in a strategic policy context was the [No Gas Caverns Ltd & Anor](#) [2023] case, which challenged the grant of consents for the construction of underground gas storage caverns to be built under Larne Lough. On the 31 August 2023 the High Court dismissed the judicial review, rejecting all seven grounds of challenge. Friends of the Earth Northern Ireland and the campaign group No Gas Caverns are currently [appealing the decision](#).

A further development is the [Diesel Emissions Case](#) – a landmark Clean Air judicial review concerning the almost unbelievable failure of the Department of Infrastructure to give legally compliant exhaust emissions tests to hundreds of thousands of diesel cars over a period of 17 years and therefore breaching its duties to protect public health, biodiversity and wildlife. This marks the first case in Northern Ireland to rely on the [NI Climate Change Act](#) adopted in 2022.

### **The Potential for Transboundary Litigation**

[Recent research](#) indicates that climate action is an issue with immediately obvious cross-border implications, and that there is [unexplored potential](#) for cross-border climate action between Northern Ireland and Ireland – including transboundary climate litigation. One potential route for cross-border climate action stems from the new obligations laid out in NI’s Climate Act. According to the section titled “Requirements for proposals and policies under section 29 (Carbon Budgets)”, article 30(1)(a) proposes that NI: “have regard to the desirability of co-ordinating those proposals and policies with corresponding proposals and policies in other parts of the United Kingdom, in the Republic of Ireland (recognising that the island of Ireland is a single biogeographic unit) or elsewhere”.

The EJNI report identified six areas of potential transboundary challenge:

1. Challenges to climate plans/strategies where they have transboundary impacts
2. Challenges to compel Irish/UK governments/Northern Ireland Executive to meet climate mitigation targets or to increase the level of ambition of their climate targets;
3. Challenges to compel remedial action where there has been a failure to manage transboundary pollution;
4. Challenges surrounding breaches of procedural rights;
5. Challenges on the basis of transboundary climate action failures e.g. challenge to the lack of mechanisms or policies to achieve alignment of climate policies and prevent regulatory divergence;
6. Challenges based on intra/intergenerational equity issues.

There are NGOs already exploring challenges in these areas. Given the problematic implementation of climate law (and environmental law more generally) on both sides of the border in Ireland it is likely that we will see further litigation in the near future. There is however a need for collaboration in exploring how litigation – which is expensive and time consuming – can be used strategically as a lever to ensure governments meet their domestic and international commitments on climate. There is also a need to carefully manage communications and the political strategy around climate litigation to avoid political backlash and ensure public buy in. The complexities of transboundary or multi-state litigation will require careful case management and cooperation between multiple organisations. These challenges are worth overcoming because litigation – especially litigation that has ripple effects beyond national borders – can deliver a powerful message that governments can and will be held to account if they do not meet their climate commitments.

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**Gregory Jones KC** and **Conor Fegan** were instructed on behalf of Friends of the Earth and No Gas Caverns Ltd in the 2023 judicial review, with Gregory Jones KC securing permission to apply for judicial review and Conor Fegan appearing in the High Court and in the subsequent appeal to the Court of Appeal on 6 and 7 February 2024 (in which judgment is awaited). They have not been involved in the drafting of this post.