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Climate Change Litigation

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Legislative context

The role of the courts in the UK has, to a large extent, be seen in the context of Climate Change Act 2008. The Act imposed a long-term legal duty on Government to secure an 80% reduction of greenhouse gases by 2050 from 1990 baseline (amended in 2019 to 100%). Coupled with the long-term goal, there is a duty on Government to set 5-year carbon budgets in legal orders approved by Parliament to ensure a smooth trajectory to the 2050 goal and a duty then to publish policies which will meet those budgets. The Act requires Government to publish annual reports to Parliament on progress in meeting the budgets.

The Climate Change Act established a powerful independent Climate Change Committee (with a staff of about 35) which provides expert advice to Government on the budgets and policies [1] and annual assessments to Parliament on Government's progress. The Government has recently agreed to follow the Climate Change Committee's advice on ambitious sixth carbon budget covering 2033-2037 requiring a 78% reduction of greenhouse gases from 1990 levels, and will bring forward the legal orders in June of this year.

Overall assessment to date

Given the overall commitments in law to achieve zero emissions by 2050, and the acceptance of the recent ambitious 6th carbon budget (to reduce emissions by 78% by 2035 compared to 1990 levels), the courts are unlikely to impose tougher targets, as has happened in the Netherlands and Ireland (and now it seems Germany for post 2030). The courts are also clearly conscious of the important role of the expert Climate Change Committee, and will refrain from interfering with its work and influence on government. Legal action is likely to continue to focus on how fast existing policies should change in the light of the new commitments, and where there are inevitable contradictions - in 2020, the Government announced investment of £27 billion to new and improved road building over the next five years, and a legal challenge is expected. But this will be in the context of the discretion of Government to choose its specific sectoral policies, and a reluctance of the courts to tread too deeply on the substance of policy.

Significant court cases

R (on the Application of London Borough of Hillingdon and others) v Secretary of State from Transport (High Court, 2010)

The first significant case raising the implications of the Climate Change Act. In 2003, the Government had published a policy paper on the future of air transport which indicated support for an expansion of Heathrow Airport. The court ruled that "*It is a trite proposition in administrative law that no policy can be set in stone…common sense demanded that a policy established in 2003 before the important changes in climate policy, symbolised by the Climate Change Act 2008, should*

[1] The Government is not legally bound by its advice on budgets but if it doesn't follow other advice must publish its reasons – to date, it has always followed the Committee's advice.

be subject to review in the light of those developments." But the court also noted that judicial review proceedings were not an appropriate forum to resolve technical issues of airport policy, and essentially the Government were ordered to reconsider its airport policy in the light of the developments in climate change obligations and policy.

R (Plan B Earth and others) v Secretary of State for Business, Energy and Industrial Strategy (2018, High Court)

The Climate Change Act 2008 contained a discretionary power of government to amend the 80% long duty by regulations. In this case, the applicants argued that in the light of scientific evidence since 2008 and in particular the UK's ratification of the Paris Agreement the Government now had a duty to exercise the power to amend the 80% target. Essentially the court noted that the Government was already seeking advice from the Climate Change Committee on whether it should amend the 80% figure, and before that process had been completed it would be inappropriate and premature for the courts to intervene. A year later the Government accepted the advice of the Climate Change Committee and amended the Climate Change Act to a 100% reduction duty by 2050.

Friends of the Earth and others v Heathrow Airport Ltd (2020, Supreme Court)

In 2018, the Government published under the Planning Act 2008 an Airports National Policy Statement which was approved by Parliament. Under the Act the Statement provides an overall policy context for individual planning applications for airport infrastructure, including expansion at Heathrow. The Planning Act 2008 provides that a National Policy Statement must explain how the Statement "*takes account of Government policy relating to the mitigation, of, and adaption to change change."* The applicants argued that the decision of government to ratify the Paris Agreement was 'Government policy' in this context and the Airport National Policy Statement has failed to take account of the implications of Paris.

The UK operates a 'dual system' of international law, meaning that international agreements, unless implemented in national law, are not legally binding in the domestic courts. The High Court held that the Paris Agreement did not impose an obligation on individual states to implement its global objective in any particular way, and that the relevant national policy commitment was that contained in the Climate Change Act (then 80%). The Court of Appeal held that 'policy' was a broad, common sense term and that the Government's commitments to the Paris Agreement were government policy in this context - the Airport National Policy should be revised in that light. The Supreme Court disagreed, and held that 'Government policy' as used in the Planning Act meant something much firmer, and normally a formal written statement of policy - statements by Ministers in Parliament endorsing Paris etc. were simply not yet formal policy in this sense. In any event, there was evidence that in drawing up the National Policy Statement that government has actually considered the Paris Agreement, and on advice from the Climate Change Committee at the time, had decided it did not yet require a change to airports policy – this was a legitimate exercise of government discretion. Since then, the Committee has advised that the 80% emissions reduction target should be revised to 100% reduction by 2050 (with that more ambitious target being brought into law in 2019). There is still a formal planning permission stage for any specific third runway development proposal, and environmental and climate change considerations will again be relevant at that stage of decision-making.

ClientEarth v Secretary of State for Business, Energy and Industrial Strategy (2021, Court of Appeal)

This case concerned the approval by government in 2019 of proposals to build two gas-fired generating stations which would be Carbon Capture Ready. Client Earth argued that in reaching its

decision the Government Minister has misinterpreted the relevant National Planning Policy Statement published in 2011 relating to energy infrastructure and how it dealt with greenhouse gases. The Statement had noted that *"[A] number of fossil fuel generating stations will have to close by the end of 2015. Although this capacity may be replaced by new nuclear and renewable generating capacity in due course, it is clear that there must be some fossil fuel generating capacity to provide back-up for when generation from intermittent renewable generating capacity is low and to help with the transition to low carbon electricity generation. It is important that such fossil fuel generating capacity should become low carbon, through development of CCS, in line with carbon reduction targets."*

On close examination of the Policy Statements and the decision-letter of Government, the Court concluded that the Minister has not misinterpreted the Policy Statement, and had exercised her discretion to grant the permission lawfully. But see the next case where the Government has conceded it must now revise the 2011 Policy Statement.

George Monbiot v Secretary of State for Business, Energy and Industrial Strategy (Administrative Court, 2020)

Judicial review proceedings were launched against the Government arguing that, in the light of the Paris Agreement and the 2019 introduction of a net zero target in the Climate Change Act, the Government was legally obliged to revise the 2011 Energy National Planning Policy Statement (which had been relevant in the previous decision). In Sept 2020, during pre-litigation procedures the Government conceded that the Statement would be reviewed, but not suspended pending the review. The applicant is reported to be continuing proceedings to force a suspension of what is a described as an outdated policy.

Packham v Secretary of State for Transport and the Prime Minister (Court of Appeal, 2020)

In 2011, the Government began consultation of proposals to build a high-speed railway between London and cities in the North of England. Following various unsuccessful challenges in the courts, the power to construct the first stage of the route between London and Birmingham was granted by a special Act of Parliament in 2017. But in 2019 the Government initiated an independent and non-statutory review panel to report on the overall cost and benefits of the principle of the project, which included the benefit of carbon reduction in line with net zero requirements. In February 2020, the Government accepted the recommendations of the Review that the project should proceed.

The claimant challenged the Government's decision on the grounds that decision and the review failed to consider in any depth the implications of the Paris Agreement and the new zero reduction obligation in the Climate Change Act, particularly in the light of CO2 emissions during construction stages of the railway. The court accepted – as did the parties – that where a decision was one of high political judgment on matters of national economic policy, the courts should only intervene on grounds of bad faith, improper motive or manifest absurdity – described as a 'light-touch' review.

The court held that that the statutory and policy provisions of the Climate Change Act provided a clear overall strategy for achieving net zero emissions but gave government considerable latitude in the action it takes to achieve the objectives. In its view, the Review Panel and the Government had clearly not ignored the implications of Paris and the zero-target in the Climate Change Act, and the decision to give the go-ahead to the railway was not legally flawed.

Other climate cases

In addition to the high-profile cases above, which concern overall climate policy or major infrastructure developments, there are many other cases which concern more specific areas of regulation or more local or individual disputes. Examples include challenges to adjustments to solar feed-in-tariff schemes (*Secretary of State for Energy & Climate Change v Friends of the Earth* [2012] EWCA Civ 28) (Government held not to have to power to retrospectively reduce tarrffis to existing consumers who had invested in photovoltaics assuming levels would continue) whether climate change strategies are relevant to individual planning decisions (*Kevin Stevens T/A KCS Asset Management v Blaenau Gwent County Borough Council v KS SPV53 Limited* [2015] EWHC 1606 (Admin)) (challenge to planning application for large solar farm in rural greenfield site on the basis that Government energy strategy favoured installation in brownfield site. Held that the Strategy was not planning policy as such, and in any event did not favour brownfield sites) and cases between private parties relating to carbon market transactions (*Armstrong DLW GmbH v Winnington Networks Ltd* [2013] Ch 156; *CF Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049 (Ch)) (a restitution claim following fraudulent transfer of EUA credits. Complex law requiring to determine what type of property were EUAs - held to be a form of intangible property and restitution succeeded).