The Rise of Climate Change Litigation

Recent years have shown a rapid increase in climate change litigation. Globally, the cumulative number of climate change-related cases has more than doubled since 2015 with one-quarter of these being filed between 2020 and 2022.[1] While climate change actions have been brought against both public and private sector institutions, the majority of cases thus far have been brought against governments (national and sub-national), typically by companies, NGOs and individuals, with 73 'framework' cases concerning the enforcement or enhancement of climate commitments made by governments[2]. In this article, we take a closer look at recent cases of litigation brought against public authorities for failure to take climate actions and their impact in shaping climate policy.

The prevalent UK approach

Until recently, UK courts were willing to afford a large degree of discretion to public bodies. For example, in *Friends of the Earth Ltd and others v Heathrow Airport Ltd*[3], the Supreme Court was asked to consider whether the Secretary of State's alleged failure to take account of the UK's climate change commitments under the Paris Agreement should render the designation of the Airports National Policy Statement as national policy (the "**ANPS**") favouring the development of a third runway at Heathrow Airport unlawful. The Supreme Court found that the Secretary of State had given proper regard to Government policy when designating the ANPS as the ANPS complied with the relevant emissions targets set out in the Climate Change Act 2008 (the "**CCA**"). The Supreme Court determined that *"Government policy"* is not an aspirational statement made by an MP in their line of duty, as this would create a *"bear trap"* for civil servants and ministers. Therefore, MPs' statements on the formal ratification of the Paris Agreement do not mean that the Government's commitment to the Paris Agreement itself constitutes *"Government policy"* and accordingly, there was no need for the Secretary of State to consider the Paris Agreement as *"Government policy"*. This case highlighted the difficulty for claimants in challenging the decisions of public authorities based on compatibility with international law and the willingness of the courts to grant decision-makers discretion in these circumstances.

Similarly, in *R (On the Application of) v The Oil And Gas Authority*[4], three climate change campaigners argued that the new strategy adopted by the Oil and Gas Authority (the "**OGA**") and the Secretary of State for Business, to achieve the statutory objective of *"maximising the*

[1] Grantham Research Institute on Climate Change and the Environment at the LSE and The Centre for Climate Change and Economics and Policy annual report on global trends in climate litigation: "Global Trends in Climate Change Litigation: 2022 Snapshot" (June 2022).
[2] As above.
[3] *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] UKSC 52.
[4] *R (On the Application Of) v The Oil And Gas Authority & Ors* [2022] EWHC 75 (Admin).

economic recovery" of UK petroleum was unlawful and irrational due to its inconsistency with the UK Government's net zero target. In rejecting the claimants' arguments, the High Court acknowledged that there are instances where the court may rely on its own assessment of complex economic issues, however in this case the court would defer to the expertise of the Secretary of State on matters of economic assessments. The Hight Court found in favour of the OGA and Secretary of State. Cockerill J concluded that the OGA has the discretion to define *"maximising the economic recovery"* and implement policies based on the OGA's definition, therefore the three climate change campaigners failed to demonstrate that the OGA had acted irrationally under public administrative law. The High Court demonstrated it was prepared to offer a significant margin of discretion to public bodies in their decision making – particularly where the exercise of judgment is required.

A different approach

The decision of UK courts to afford such discretion to public bodies contrasts with landmark European cases such as *Urgenda*[5], where the Dutch Supreme Court voiced a more political stance by holding the state accountable for climate change inaction. In 2019, the Urgenda Foundation, a small NGO, sought an order requiring the Dutch Government to reduce greenhouse gas ("**GHG**") emissions in accordance with international obligations. Specifically, a report produced by the United Nations Framework Climate Change required developed nations, such as the Netherlands, to make reductions of 25 – 40% by 2020 in comparison to 1990 levels. The Dutch Government committed itself to this target in 2007, however they later reduced this target to 14 – 17%. On appeal, the Dutch Supreme Court issued a decision confirming that the Dutch Government had acted unlawfully by contravening its duty of care under Articles 2 and 8 of the European Convention on Human Rights ("**ECHR**"), involving the right to life and the right to a private and family life, by failing to pursue a more ambitious GHG reduction target for the end of 2020. The Dutch Government was ordered to accelerate its actions to reduce its GHG emissions to 25% by 2020. This ground-breaking judgment established that governments have a legal duty to their citizens to prevent dangerous climate change. In order to comply with the judgment, the Dutch Government has implemented a number of measures including restricting the operations of coal power stations in the country.

Similarly in South Africa, the High Court of South Africa, Gauteng Division, Pretoria in 2017 ruled in favour of Earthlife Africa Johannesburg on the basis that when granting an environmental authorisation to the coal fired Thabametsi Power Project, the Department of Environmental Affairs did not properly consider the climate change impacts of the project. The High Court cited several reasons for its decision including South Africa's commitments under the Paris Agreement. Following the High Court's decision, the Minister of Environmental Affairs again approved the plant's authorization in January 2018 under a new environmental impact assessment but in March 2018, Earthlife Africa and Trustees for the Time Being of the Groundwork Trust, challenged the Minister's decision by asking the court to set aside the decision for failing to consider site-specific climate change impacts associated with the project. In November 2020, the High Court, following

[5] *The State of the Netherlands v Urgenda Foundation*.

an agreement between applicants and defendants, issued an order setting aside all governmental authorisations for the project.

A new approach from the UK courts?

Recent case law relating to climate change in the courts of England and Wales indicates a change in the courts' willingness to interrogate the climate change strategies of the UK Government. In a recent legal challenge brought by ClientEarth, Friends of the Earth, Good Law Project and Jo Wheatley[6] (the "**Claimants**"), the High Court ruled that the UK Government's Net Zero Strategy ("**NZS**") was in breach of the CCA, which requires the UK Government to demonstrate how its legally-binding carbon budgets will be met. The Hight Court ruled that the briefing given to the Secretary of State to assist him in determining whether the Sixth Carbon budget could be met by policies and proposals under the NZS was legally deficient in various respects under the CCA. Moreover, it was held that information provided to Parliament, in the form of the NZS, to enable it to scrutinise whether carbon budgets would be met was also deficient in some respects under the CCA. The Court ordered an amended NZS to be published by the Department for Business, Energy and Industrial Strategy by March 2023.

It is worth noting that the Claimants in the *ClientEarth* case had also attempted to rely on *Urgenda* on the grounds that the Secretary of State's actions were less than conducive to the protection of Human Rights. The Claimants argued that, by failing to take effective action against climate change, the UK government had breached its obligations to protect the rights to life, quality of life and property under Articles 2, 8, and A1P1 of the ECHR (and section 3(1) of the Human Rights Act 1998). The High Court rejected the human rights argument on the basis that the European Court of Human Rights had not yet determined that the impact of climate change falls within the scope of Articles 2, 8, and A1P1 of the ECHR. Holgate J's rejection of the human rights argument suggests that UK courts are not willing to challenge government policy on climate change where such policy has been made within the confines of the law.

The impact of climate change litigation against UK public bodies is by no means restricted to the UK but also affects decisions relating to international investment made by UK public bodies. An example of this can be seen in *Friends of the Earth Limited v The Secretary of State for International Trade*[7], in which the High Court was asked to overturn a decision of UK Export Finance ("**UKEF**") to provide up to USD 1.15 billion export credit support in relation to a USD 20 billion Area 1 liquefied natural gas ("**LNG**") facility in Mozambique on the basis that UKEF's decision to provide the funding was based on an error of law that it would be compatible with the UK's commitments under the Paris Agreement. The High Court dismissed the application for judicial review and found that UKEF was entitled to a significant margin of appreciation in its decision making - again demonstrating a willingness to afford discretion to public authorities. In his judgment, Stuart-Smith LJ viewed the language in the Paris Agreement as a combination of broad political and aspirational statements and deemed it as too opaque to create "*hard-edged*"

[6] *R (Friends of the Earth Ltd and Ors) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin).
[7] *R (on the application of Friends of the Earth Limited) v (1) The Secretary of State for International Trade / Export Credits Guarantee Department (UK Export Finance) (2) Chancellor of the Exchequer* [2022] EWHC 568 (Admin).

legal obligations; therefore, a less strict approach to interpretation should be applied where the language of a treaty is aspirational. Thornton J gave a dissenting judgment noting that the Paris Agreement should have been a relevant consideration in the decision-making process, and that "in order for UKEF to demonstrate compliance with Article 2(1)(c), it had to demonstrate that funding the project is consistent with a pathway towards limiting global warming to well below 2°C and pursuing efforts to 1.5°C". An appeal was heard in the Court of Appeal in early December, with judgment expected to be handed down in 2023. The appeal is undoubtedly set to raise important questions on what compliance with the Paris Agreement looks like in the context of public bodies making investments both domestically and internationally and, should the Court of Appeal follow the approach in the *ClientEarth* case, will signify a change in approach to climate change litigation from the UK courts.

The sharp increase of climate change litigation against public sector bodies and the number of cases producing favourable outcomes for climate actions will undoubtedly play a key role in influencing government decision-making and the implementation of policy responses to climate change. It follows also that this will lead to an acceleration of climate change mitigation strategies deployed by investors, funders, companies and company boards.[8]

Any Questions?

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[8] On March 15, 2022, ClientEarth announced that it was bringing a claim against the Board of Directors of Shell under the UK Companies Act 2006, sections172 and 174 alleging that the Board of Shell failed to implement a climate strategy that is in-keeping with the Paris Agreement goal. This is thought to be the first UK case of its kind that has taken direct action against a board of directors for failing to consider efforts towards achieving net zero.