

**Alex Goodman**

**Rising Sea Levels and Climate Change**

## Climate Change: Judicial View of the Evidence

The Divisional Court held in *Spurrier* [2020] PTSR 240 at §559:

*“(i) concentration of GHGs in the earth’s atmosphere is directly linked to average global temperatures, (ii) the concentration of GHGs has been rising steadily —and, with it, mean global temperatures—since the start of the Industrial Revolution and (iii) the most abundant GHG, accounting for at least two thirds of all GHGs, is CO2 which is largely the product of burning fossil fuels. The increase in global temperature has resulted in (amongst other things) sea level change; a decline in glaciers, the Antarctic ice sheet and Arctic sea ice; alterations to various ecosystems; and in some areas a threat to food and water supplies. It is potentially catastrophic.”*

## Sea Level Rise in the UK

- Environment Agency estimates a 1.55m rise over the next 100 years

[Flood risk assessments: climate change allowances - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/flood-risk-assessments-climate-change-allowances)

- Need to also add in surface water- more rain and river flooding in terms of threats in the UK
- Extensive flooding in Hull in June 2007

[The Shorelines Project - A city wide community art project.](#)- Rights Community  
Action

- Flooding global annual bill currently \$100bn
- 5 million people in UK at risk from flooding and coastal erosion.
- EA estimates £1bn per year investment required in UK to mitigate flood impacts.

## Limits of litigation in the UK

“It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully”.

***R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government*** [2020] EWHC 3073 (Admin) at [6]

## Some UK Planning Legislation on Climate Change

- Section 19(1A) of the Planning and Compulsory Purchase Act 2004 has for 12 years required local plans to contribute to the mitigation of climate change.
- Climate Change Act 2008 has committed to carbon budgets; established the committee on climate change; the Emissions Trading Scheme and other high-level policy interventions.
- Section 1 of the CCA 2008 set an emissions reductions target of 80% now increased to “netzero”: emissions of greenhouse gases being 100% lower than 1990 levels by 2050.
- Sections 5 and 10 of the Planning Act 2008 - require NPSs to mitigate climate change.

*R (Friends of the Earth) v Transport Secretary*  
[2021] PTSR 190 (Airports NPS case)

- The Supreme Court gave a judgment of the court delivered jointly by Lord Hodge and Lord Sales in which they reversed the Court of Appeal.
- Held at [122], that the UK's obligations under the Paris Agreement were given effect in domestic law, in that the existing carbon target under s.1 of the CCA 2008 and the carbon budgets under s.4 of that Act already meet and go beyond the UK's obligations under the Paris Agreement.
- The duties under the CCA 2008 clearly were taken into account when the Secretary of State decided to issue the ANPS. The reference to "government policy" in section 5(8) of the Planning Act 2008 as referring to a published policy cleared by a government department and did not include the ministerial statements in question, nor did it include the UK's ratification of the Paris Agreement which did not (as the time of designating the Airports NPS) give rise to legal rights or obligations in domestic law. It also held that the Secretary of State had taken account of the Paris Agreement.

## *Netherlands v Stichting Urgenda*

20 December 2019 (Sup Ct) (Netherlands)

- Supreme Court of the Netherlands confirmed that the failure of the Dutch government to act to reduce climate change by at least 25 per cent amounted to a failure to protect the rights to life and to a home under Articles 2 and 8 of the ECHR of Dutch citizens.
- That conclusion, while bold, is perhaps less surprising to a UK lawyer than the translation of it to a specific requirement on the Dutch government to reduce specific emissions. For this the Court drew on international norms established by resolutions at successive COPs, and adopted in reports by the IPCC.
- Litigation based in part on Urgenda seeking a declaration as to insufficiency of the 55% reduction by 2030 target in Germany:

[https://climate-laws.org/geographies/germany/litigation\\_cases/neubauer-et-al-v-germany](https://climate-laws.org/geographies/germany/litigation_cases/neubauer-et-al-v-germany).

- Claim from 6 Portuguese citizens against 33 European countries (Global Action Network), *Duarte Agostinho et al v Portugal and 32 other States* no. 39371/20:

[Coordinated effort by 33 countries to overturn 'urgent' status of youth climate change case rejected by Strasbourg Court | News | Garden Court Chambers | Leading Barristers located in London, UK](#)

*R (Plan B and others) v Secretary of State for BEIS*  
[2019] Env L.R. 13

- Contrast to *Urgenda*, the Plan B challenge to alleged failure of the Secretary of State to amend the emission reduction target of the Climate Change Act 2008 (which has subsequently been amended), relying among other points on the argument that the failure to do so would violate the claimant's human rights under Articles 2 and 8 ECHR.
- Supperstone J held at [49] that “this is an area where the executive has a wide discretion’, echoing the spirit of the margin of appreciation as applied by the ECtHR and the traditional deference of UK Courts to administrative decision-makers.
- See discussion in: *The networks of human rights and climate change: The State of the Netherlands v Stichting Urgenda, Supreme Court of the Netherlands, 20 December 2019* (19/00135) Env I. Rev 2020 22(3), 227-234



# R (ClientEarth) v SSBEIS [2020] PTSR 1709 (High Court) <sup>Landmark</sup> Chambers

Drax Power Limited applied for permission for a gas-fired power station. The examining authority recommended refusal of consent because the development would undermine the government's commitment to cut greenhouse gases. The Secretary of State did not accept the recommendation, holding that a presumption in favour of fossil fuel development applied and was not displaced by climate change considerations.

ClientEarth applied under section 118 PA 2008 for judicial review of the decision by the Secretary of State to grant the application made by Drax Power Limited for a development consent order for a NSIP under the PA 2008 for the construction and operation of two gas-fired generating units situated at the existing Drax Power Station near Selby in North Yorkshire.

Holgate J held

- SS had not erred in approach to a qualitative “need” for fossil fuels.
- There was no possibility of challenging the merits of a NPS by way of a challenge to a development consent order under section 118 PA 2008.

## R (ClientEarth) v SSBEIS [2021] EWCA Civ 43 – Court of Appeal

On Appeal Sir Keith Lindblom giving the judgment of the court held:

- The Secretary of State proceeded on the basis of a correct interpretation of the policies which establish a “need” for fossil fuels and that there is a presumption in favour of granting consent (70-71)
- By ground 2 ClientEarth argued that the Secretary of State had erred in treating En-1 (energy policy) as requiring him to treat greenhouse gases as having no weight in her decision. The Court held (88) that the SS had lawfully concluded that the presumption in favour of fossil fuels set out in national policy applied and that the suite of policy statements themselves took account of climate change and GHG emissions targets. The SS properly acknowledged that GHGs could weigh against a development, but was entitled to disagree with the examining authority that such impact should have determinative weight.

## Four Successful Claims in UK:

- ***R (Vince, Monbiot, Good Law Project) v SSBEIS***  
(Energy National Policy Statements)
- **Manston Airport DCO- Dawes**  
(Consent for Airport infrastructure)
- ***R (McLennan) v Medway*** [2020] Env. L.R. 5  
(Impact of development on sun received by Solar Panels material)
- ***R. (on the application of Stephenson) v Secretary of State for Housing, Communities and Local Government*** [2019] P.T.S.R. 2209  
(Challenge to National Planning Policy Framework on Fracking)

*R (Vince, Monbiot, Good Law Project) v SSBEIS*

Challenge to Energy National Policy Statements.

Argued that irrational and frustrates statute not to exercise power to review the 2011 statements in light of:

a. The amendment to section 1 to the Climate Change Act 2008 so that the UK's *net carbon account for the year 2050 is now* required to be 100% lower than the 1990 baseline rather than 80% lower, the target on which the Energy NPSs were premised on 27 June 2019;

b. Developments in the latest scientific understanding as to the urgency and scale of action needed on climate change; the UK's revised international commitments to the global effort to reduce temperature rises under the Paris Agreement; and

c. the unanimous parliamentary declaration of a "climate emergency" on 1 May 2019.

Government conceded the need to review the policy in December 2020 and the claim settled.

## Manston Airport DCO- Dawes

- Claim brought by a Ms Dawes to a Development Consent Order.
- Inspectors recommended consent not be granted, but Minister overruled. Examining Authority said:

*“... the Applicant has failed to demonstrate sufficient need for the Proposed Development, additional to (or different from) the need which is met by the provision of existing airports.”*

- In December 2020, the Secretary of State conceded that his decision letter did not give adequate reasons and on 15 February 2021, Mr Justice Holgate approved a Consent Order quashing the Manston Airport Development Consent Order 2020
- Consent order here: [Microsoft Word - Consent Order 18.12.20 \(crowdjustice.com\)](#)

# *R (McLennan) v Medway* [2020] Env. L.R. 5 Lane J

A next-door neighbour objected to an extension on grounds it would overshadow his solar panels, compromising his contribution to renewable energy and mitigating climate change. The planning officers advised that was not a material consideration because it was a purely private interest. Lane J quashed the planning permission holding that mitigation of climate change was a material planning consideration pursuant to the local plan; the NRPF and section 19(1A) of the Planning and Compulsory Purchase Act 2004 (which requires the local plan as a whole to contribute to the mitigation of climate change) and the failure to have regard to it was in fact irrational in the *Wednesbury* sense: the local planning authority was not entitled to reject the mitigation of climate change as *immaterial* (para 36)

*R. (on the application of Stephenson) v Secretary of State for  
Housing, Communities and Local Government* [2019] P.T.S.R. 2209

- Talk Fracking challenged the adoption of paragraph 209(a) of the NPPF
- Court held the government had failed to take into account scientific evidence put forward by the Claimant.
- Such evidence, submitted in relation to a consultation response was obviously material.

## *R (Packham) v SST* [2020] EWCA Civ 1004

This claim alleged that the government, when conducting a review of whether to proceed with HS2 had failed to take proper account of the Paris Agreement. The CoA held on the facts the government had neither ignored nor misunderstood its obligations in relation to Climate Change.



*R (Finch) v Surrey County Council* [2020] EWHC 3566  
Holgate J

- Main issue was whether Environmental Impact Assessment Regulations required assessment of the effects of a development on greenhouse gas emissions resulting from the use of an end product emanating from the development: that is to say whether in granting planning permission for expansion of an oil well the local planning authority had to consider the impacts of the development by virtue of the impact the oil would have on climate change when burned in cars etc, rather than simply from emissions from the development itself.
- The judge accepted that it goes without saying that when the end product is used GHG emissions will result.
- Held that the inevitable indirect consequences for GHG emissions of drilling for oil were not material to EIA
- Rejected reliance on *Abraham v Wallonia* [2008] Env LR 32 at §43; *Ecologistas ev Accion-CODA v Ayuntamiento de Madrid* [2009] PTSR 458 (“**Ecologistas**”) at §39 and *R (Squire) v Shropshire Council* [2019] Env LR 36 at §73ff.
- Judge held at 105 that the overall responsibility for the economy-wide transition to a low carbon society is the responsibility of the UK Government (*Packham* at [87]).

*R Abbotskerswell Parish Council) v SSHCLG*  
[2021] EWHC 555 (Admin) Lang J

- Challenge to planning permission for a housing scheme. Ground 1 challenged a failure to take proper account of GHG emissions. The SS considered the Claimant's submissions, but rejected them. The Court would not intervene.
- Further, the local plan strategy dictated housing numbers and that had itself been subject to strategic environmental assessment including of GHG emissions.
- Held at [103] that the Secretary of State was only required to consider the adequacy of such information on climate change in the ES as "may reasonably be required".

*R (Hewitt) v Oldham MBC* [2020] EWHC 3405 (Admin); Knowles J

- Alleged a failure to take account of the need to mitigate the impacts of a housing development on climate change.
- The Claim was rejected on the basis that the impacts had in fact been considered (235).

## Plan B Earth – proposed claim

- Proposes to bring a claim which it is calling the "*Young People vs Government*" case on behalf of three young co-claimants, Marina, Jerry and Ade, with family in Latin America, Ghana, Nigeria and the Caribbean, who will argue breaches of their rights under Article 2 & 8 ECHR. They want the court to declare that what it calls a government *de facto* policy of disregarding its climate obligations in its financial interventions in response to COVID-19 is unlawful and commissions an actionable plan to comply with its obligations under the Human Rights Act 1998.
- Govt response to PAP in "*Young People v Government*" (*Plan B & Ors v (1) Secretary of State for Business, Energy & Industrial Strategy and (2) Her Majesty's Treasury*) <https://planb.earth/gov-denies-it-is-responsible-for-treasonous-betrayal/>

## More Cases in the Pipeline

- Transport Action Network challenge to decision not to review National Networks National Policy Statement: press release <https://www.leighday.co.uk/latest-updates/news/2020-news/transport-action-network-challenges-refusal-to-review-national-transport-strategy/> and further docs here including grounds <https://transportactionnetwork.org.uk/nps-legal-case-2/>.
- Friends of the Earth Challenge against the Chancellor, Department for International Trade and UK Export Finance to their use of taxpayer money to part fund a new Liquid Natural Gas mega-project in Mozambique : <https://www.theguardian.com/business/2020/sep/07/legal-challenge-uk-1bn-grant-mozambique-gas-project> ; <https://www.energyvoice.com/oilandgas/africa/263818/mozambique-lng-uk-emissions/> ; <https://friendsoftheearth.uk/climate-change/your-money-funding-fossil-fuel-projects>
- West Cumbria Coal Mine challenge and govt calling in application: <https://cornerstonebarristers.com/news/after-jr-threat-secretary-state-calls-cumbrian-coal-mine/> and <https://www.leighday.co.uk/latest-updates/news/2021-news/public-inquiry-announced-into-plan-for-cumbrian-coal-mine/> and see latest <https://friendsoftheearth.uk/climate/very-compelling-reasons-not-open-coal-mine-minister>
- Permission granted in challenge to post-Brexit emissions trading scheme – Paris Agreement ground <https://www.leighday.co.uk/latest-updates/news/2020-news/permission-won-for-judicial-review-of-post-brexit-emissions-trading-scheme/>

# Thank you for listening

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