

Planning for Change: Climate Change Legislation and Litigation and the Role of Planning Law

Valerie Fogleman

Introduction

Climate change litigation is proliferating throughout the world including the UK. A major focus of the litigation involves challenges to governments, and to a lesser but growing extent private companies, to increase measures to reduce emissions of greenhouse gases (“GHGs”). In many countries, actions against governments include allegations that domestic legislation has not taken account of the Paris Agreement and domestic legislation to reduce emissions of GHGs and that actions taken by the government breach challengers’ rights under the European Convention on Human Rights (“ECHR”) and national constitutions. Activities specified in litigation often include those to which planning legislation applies, especially in the UK.

This article discusses UK legislation to reduce GHG emissions, followed by an overview of some key cases involving challenges to governments to reduce such emissions, focusing on planning legislation in the UK. The second section provides a background for the article by tracing the position of the UK on climate change as that position has evolved since the late 2000s, in particular the Climate Change Act 2008. The third section discusses progress made by the UK in reducing GHG emissions and analyses whether further progress will continue at the same pace as its initial progress to meet climate change commitments.

The fourth section briefly describes landmark climate change cases against governments in the Netherlands, Ireland, Germany, and Australia to illustrate how such cases have resulted in societal shifts in climate change policy towards increased measures to reduce GHG emissions. The fifth section then describes and analyses climate change cases in the UK as they affect—and illustrate—the UK Government’s position on climate change. Most of these cases have planning legislation aspects to them.

Finally, the last section concludes that measures carried out and proposed by the UK Government to reduce the UK’s GHG emissions do not match its ambitions for reducing them or its commitments to do so. The UK Government has prevailed in judicial actions challenging large projects that will lead to increases in GHG emissions by arguing that the Paris Agreement and the Climate Change Act do not mandate measures that the UK must carry out to reach the UK’s ambitious climate change commitments. Whilst this is true, it demonstrates the absence of effective legislation in the UK to meet the challenges of climate change. Unless the UK Government revises its legislation—especially planning legislation—and establishes and carries out measures to meet its ambitious targets, the UK will fail to meet them.

Position of the UK

In the late 2000s, the UK was a world leader in climate change legislation, most notably in its enactment of the Climate Change Act. The Act established “legally binding” commitments for the UK to reduce emissions of GHGs. Section 1 of the Act stated that “it is the duty of the Secretary of State to ensure that the net UK carbon budget for the year 2050 is at least 80% lower than the 1990 baseline”. The 1990 baseline, which is also referenced in the UN Framework Convention on Climate Change (“UNFCCC”)¹

¹ UN Framework Convention on Climate Change art.4(2)(b).

and which applies to climate change legislation in many countries around the world,² is commonly used as a benchmark against which to compare and evaluate GHG emissions in future years. In the Climate Change Act, the 1990 baseline is defined as the aggregate amount of net UK emissions of carbon dioxide (“CO₂”) and other targeted GHGs for that year.³

The reference to other targeted GHGs reflects the fact that CO₂ is not the only gas that is causing climate change. Whilst CO₂ is the most common GHG and is responsible for approximately 80% of global GHG emissions, another five gases are also causing climate change. These gases are methane, nitrous oxide and the three fluorinated-gases (F-gases); hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride.⁴ The six GHGs are often referred to collectively as CO₂ equivalent.⁵

The effectiveness of the six GHGs in trapping heat and the length of time that they remain in the atmosphere differ substantially. There is no single value for the length of time that CO₂ remains in the atmosphere because it is not destroyed over time but moves between the atmosphere, land, and ocean. Some CO₂ is absorbed quickly; other CO₂ remains in the atmosphere for thousands of years.⁶ Methane is 25 times as effective as CO₂ in trapping heat and remains in the atmosphere for approximately 12 years;⁷ nitrous oxide is nearly 300 times as effective as CO₂ in trapping heat and remains in the atmosphere for approximately 114 years;⁸ the F-gases are up to 22,800 times as effective as CO₂ in trapping heat and remain in the atmosphere for up to 50,000 years.⁹

The other “legally binding” commitment in the Climate Change Act is s.4(1), which directed the Secretary of State to set “carbon budgets” for five-year periods beginning in 2008,¹⁰ and “to ensure that the net UK carbon account for a budgetary period does not exceed the carbon budget”.¹¹ The Government sets the level of metric tonnes of carbon dioxide equivalent (“MtCO₂e”) for each period.¹² The first five carbon budgets set challenging reductions in emissions of GHGs from 1990 levels. The budgets, together with the levels of MtCO₂e and percentage reductions from 1990 levels are as follows:

- **2008-2012:**
3,018 MtCO₂e; 25% reduction;

² See, e.g. *Stichting Urgenda v State of the Netherlands (Ministry of Infrastructure and the Environment)* (C/09/456689/HA ZA 13-1396), ECLI:NL:RBDHA:2015:7145 (24 June 2015) (English translation), para.2.6 available at <http://climatecasechart.com/climate-change-litigation/non-us-cases/urgenda-foundation-v-kingdom-of-the-netherlands/> [accessed 11 October 2021].

³ Climate Change Act s.1.

⁴ Climate Change Act s.24(1). The Secretary of State may designate other GHGs but has not done so to date. Nitrogen trifluoride is sometimes included as an F-gas. See United States Environmental Protection Agency, Overview of Greenhouse Gases available at <https://www.epa.gov/ghgemissions/overview-greenhouse-gases> [accessed 11 October 2021].

⁵ Climate Change Act s.93 defines a “tonne of carbon dioxide equivalent” as “one metric tonne of carbon dioxide or an amount of any other greenhouse gas with an equivalent global warming potential (calculated consistently with international carbon reporting practice)”. See also Eurostat, Glossary: Carbon dioxide equivalent, which defines “carbon dioxide equivalent” as “a metric measure used to compare the emissions from various greenhouse gases on the basis of their global-warming potential ... by converting amounts of other gases to the equivalent measure of carbon dioxide with the same global warming potential” available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Carbon_dioxide_equivalent#:~:text=A%20carbon%20dioxide%20equivalent%20or,with%20the%20same%20global%20warming [accessed 11 October 2021].

⁶ United States Environmental Protection Agency, Climate Change Indicators: Greenhouse Gases available at <https://www.epa.gov/climate-indicators/greenhouse-gases> [accessed 11 October 2021].

⁷ United States Environmental Protection Agency, Overview of Greenhouse Gases available at <https://www.epa.gov/ghgemissions/overview-greenhouse-gases> [accessed 11 October 2021].

⁸ United States Environmental Protection Agency, Overview of Greenhouse Gases. The effectiveness of the five GHGs other than CO₂ in trapping heat is calculated by applying Global Warming Potentials, which allows a comparison of the effectiveness of different GHGs. See United States Environmental Protection Agency, Understanding Global Warming Potentials available at <https://www.epa.gov/ghgemissions/understanding-global-warming-potentials> [accessed 11 October 2021]. The above comparisons were calculated over a 100-year period. See United States Environmental Protection Agency, Overview of Greenhouse Gases available at <https://www.epa.gov/ghgemissions/overview-greenhouse-gases> [accessed 11 October 2021].

⁹ United States Environmental Protection Agency, Overview of Greenhouse Gases available at <https://www.epa.gov/ghgemissions/overview-greenhouse-gases> [accessed 11 October 2021].

¹⁰ Climate Change Act s.4(1)(a).

¹¹ Climate Change Act s.4(1)(b).

¹² See, e.g. Carbon Budget Order 2021 (SI 2021/750) art.2 (setting the carbon budget for 2033–2037 at 965,000,000 MtCO₂e).

- **2013-2017:**
2,782 MtCO₂e; 31% reduction;
- **2018-2022:**
2,544 MtCO₂e; 37% reduction by 2020;¹³
- **2023-2027:**
1,950 MtCO₂e; 51% reduction by 2025; and
- **2028-2032:**
1,725 MtCO₂e; 57% reduction by 2030.¹⁴

The term “legally-binding” in the Climate Change Act ss.1 and 4(1) is a misnomer. The Secretary of State does not face any sanctions if s/he fails to ensure that the UK’s emissions of GHGs stay within the amount specified in a carbon budget. Indeed, there are no sanctions concerning the failure to meet the targets of any of the carbon budgets or the specified reduction by 2050. Crucially, as will be seen from judicial challenges against the UK Government described below, there is nothing in the Climate Change Act that specifies any measures that the Secretary must take—or even considering taking—to ensure that emissions of GHGs do not exceed the amount specified in a carbon budget.

The Climate Change Act also established the Committee on Climate Change (“CCC”) as an independent statutory body.¹⁵ Among other things, the CCC advises the UK and devolved governments on preparing for and adapting to climate change. In addition, the CCC reports on progress in reducing GHG emissions to the UK, Scottish and Welsh Parliaments and the Northern Ireland Assembly,¹⁶ with reports to the Northern Ireland Assembly being made on request.

Despite the UK’s commitment to reducing GHGs in 2008, by 2011, its commitment had begun to wane. In late 2011, the Chancellor of the Exchequer, George Osborne, told the Conservative party conference that the UK would cut “carbon emissions no slower but also no faster than our fellow countries in Europe”.¹⁷ At about the same time, the Climate Change Minister, Greg Barker, stated that the UK was committed to reducing emissions by 50% by 2025 but would review that goal in 2014.¹⁸ In response, the House of Commons Audit Committee commented that there was:

“fundamentally, an inconsistency in the government’s position of trumpeting its acceptance of a recommended carbon budget for 20 or so years hence, while at the same time envisaging the possibility of overturning that commitment just three years from now.”¹⁹

As described in this article, the UK Government’s climate change commitments are frequently not supported by measures to achieve them.

¹³ The reduction of GHG emissions in the third carbon budget was changed to 37% by 2020. Climate Change Act s.5(1)(a), as amended by Climate Change Act 2008 (2020 Target, Credit Limit and Definitions) Order 2009 (SI 2009/1258) art.2.

¹⁴ Committee on Climate Change, Advice on reducing the UK’s emissions available at <https://www.theccc.org.uk/about/our-expertise/advice-on-reducing-the-uks-emissions/> [accessed 11 October 2021]; see S. Fankhauser, “What are Britain’s carbon budgets?” London School of Economics and Political Science, Grantham Research Institute on Climate Change and the Environment, 30 April 2020 available at <https://www.lse.ac.uk/granthaminstitute/explainers/what-are-carbon-budgets-and-why-do-we-have-them/> [accessed 11 October 2021].

¹⁵ Climate Change Act s.32.

¹⁶ See Climate Change Act s.36.

¹⁷ See D. Carrington, “George Osborne reveals his true colours on emissions—and they aren’t green” *The Guardian* 3 October 2011 available at <https://www.theguardian.com/environment/damian-carrington-blog/2011/oct/03/george-osborne-carbon-emissions-conservatives> [accessed 11 October 2021].

¹⁸ See D. Carrington, “George Osborne and the Treasury attacked for hostility to green policies” *The Guardian* 11 October 2011 available at <https://www.theguardian.com/environment/2011/oct/11/osborne-treasury-attacked-green-policies> [accessed 11 October 2021].

¹⁹ House of Commons Environmental Audit Committee—Seventh Report of Session 2010–12, Carbon Budgets (HC 1080, 14 September 2011), 20.

In early 2015, in preparation for the Conference of the Parties 21 (COP 21) to be held in Paris in December of that year, the EU notified the UNFCCC that the Nationally Determined Contribution (“NDC”) for the EU and each of its Member States was at least a 40% reduction in GHG emissions from 1990 levels by 2030.²⁰ The Paris Agreement subsequently provided for the continued application of NDCs by stating that:

“Each party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.”²¹

The intention of NDCs is to hold “the increase in the global average temperature to well below 2 C above pre-industrial levels and [to pursue] efforts to limit the temperature increase to 1.5 C above pre-industrial levels”.²² The United Nations has thus described NDCs as being “at the heart of the Paris Agreement and the achievement of ... long-term goals”.²³ As indicated above, however, the Paris Agreement does not mandate any measures to be taken by parties to achieve their NDCs; instead it provides that each party shall determine the mitigation measures to pursue in order to meet their NDC on a domestic basis.

On 18 November 2016, the UK re-instated its earlier commitments to reduce GHG emissions by ratifying the Paris Agreement,²⁴ having signed it on 22 April 2016.²⁵ Ratification was effected by laying the Paris Agreement before the two houses of Parliament for 21 days under the negative resolution procedure. Under that procedure, an international treaty enters into force if no objections are made to its ratification²⁶; there are no debates on whether the treaty should be ratified. No objections were raised to ratification of the Paris Agreement.

On 1 May 2019, the UK Parliament declared a climate and environmental emergency.²⁷ The declaration followed similar declarations by local authorities, universities and various organisations.²⁸ Although overall progress in following up such declarations has been slow, due in particular to lack of funding available to local authorities,²⁹ some local authorities have been proactive. For example, Hackney upgraded street lighting to LED, switched to fully electric vehicles, and introduced a £2 million programme to make the residences of low income people more energy efficient.³⁰ London set a net zero carbon target of 2030, created an ultra-low emission zone, and created low-traffic neighbourhoods.³¹

²⁰ Submission by Latvia and the European Commission on behalf of the EU and its Member States, “Intended Nationally Determined Contribution of the EU and its Member States” 6 March 2015 available at <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20Kingdom%20of%20Great%20Britain%20and%20Northern%20Ireland%20First/LV-03-06-EU%20INDC.pdf> [accessed 11 October 2021]. Latvia held the presidency of the EU when the submission was made.

²¹ Paris Agreement art.4(2) available at <https://unfccc.int/process/conferences/pastconferences/paris-climate-change-conference-november-2015/paris-agreement> [accessed 11 October 2021].

²² Paris Agreement art.2(1)(a).

²³ United Nations Climate Change, Nationally Determined Contributions (“NDCs”) available at <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs> [accessed 11 October 2021].

²⁴ See UK ratifies the Paris Agreement, 18 November 2016 available at <https://www.gov.uk/government/news/uk-ratifies-the-paris-agreement> [Accessed 11 October 2021].

²⁵ United Nations Climate Change, “United Kingdom of Great Britain and Northern Ireland” available at <https://unfccc.int/node/61229> [accessed 11 October 2021].

²⁶ Constitutional Reform and Governance Act s.20.

²⁷ See “UK Parliament declares climate change emergency” *BBC News* 1 May 2019 available at <https://www.bbc.co.uk/news/uk-politics-48126677> [accessed 11 October 2021].

²⁸ See C. Howarth and S. Fankhauser, “We’ve declared a climate emergency—now what?” London School of Economics and Political Science, 4 May 2021 available at <https://www.lse.ac.uk/research/research-for-the-world/sustainability/weve-declared-a-climate-emergency-now-what> [accessed 11 October 2021].

²⁹ See C. Howarth and S. Fankhauser, “We’ve declared a climate emergency—now what?” London School of Economics and Political Science, 4 May 2021.

³⁰ See Hackney, “Rebuilding a Greener Hackney: £26m to tackle climate emergency over next three years” 22 July 2021 available at <https://news.hackney.gov.uk/rebuilding-a-greener-hackney-26m-to-tackle-climate-emergency-over-next-three-years/> [accessed 11 October 2021].

³¹ See S. Khan, “The floods show London is now on the frontline of the climate emergency” *The Guardian* 27 July 2021 available at <https://www.theguardian.com/commentisfree/2021/jul/27/floods-london-frontline-climate-emergency-defences-traffic> [accessed 11 October 2021].

In June 2019, the Government announced that the UK had become “the first major economy in the world to pass laws to end its contribution to global warming by 2050”.³² The law in question was an amendment to the Climate Change Act s.1 that replaced the reference to a reduction in GHG emissions of “at least 80% lower than the 1990 baseline” to substitute 100% for 80%.³³ The amended provision thus directed the Secretary of State “to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline”. In other words, the UK Government established 2050 as the year in which the UK would achieve net zero emissions by reducing GHG emissions together with taking GHGs out of the atmosphere by, for example, carbon sinks and carbon capture and storage.

On 12 December 2020, the UK Government notified the UNFCCC that “the UK is committing to reduce economy-wide [GHG] emissions by at least 68% by 2030, compared to 1990 levels”.³⁴ The new NDC, which does not include emissions from international aviation or shipping,³⁵ is a significant increase from the NDC of 40% notified in 2015 by the EU on its behalf and on behalf of its Member States (then including the UK).

The UK Government is not the only government in the UK that can legislate on climate change. Environment is a devolved matter. This means that the Governments of Scotland, Wales and Northern Ireland can legislate on some, but not all, aspects of climate change. For example, energy is a reserved matter. Thus, emissions trading involves the mixed competencies of energy (reserved) and environment (devolved). International relations is a reserved matter. Only the UK, therefore, may notify an NDC to the UNFCCC. This does not prohibit any of the devolved governments from establishing targets for reductions of GHG emissions in their jurisdictions, enacting climate change litigation, or setting out climate change strategies.³⁶

In 2019, Scotland confirmed its net zero target for GHG emissions by 2045; set by Scotland in January 2017.³⁷ The Climate Change (Emission Reduction Targets) (Scotland) Act 2019 s.1 added a new s.1A in the Climate Change (Scotland) Act 2009 that states that “Scottish Ministers must ensure that the net Scottish emissions account for the net-zero emission target [by 2045] is at least 100% lower than the baseline”. In October 2020, the CCC commented that Scotland had reduced its GHG emissions by 31% between 2008 and 2018, faster than any other nation in the UK and any G20 country over the same time period.³⁸ In July 2021, Scotland notified an indicative NDC of its commitment to reduce GHG emissions by at least 75% by 2030 compared to a 1990/1995 baseline and to achieve net zero by 2045.³⁹

In March 2021, the Welsh Senedd approved a net zero target for 2050, with a target of a 63% reduction in GHG emissions by 2030, and a reduction of 89% by 2040.⁴⁰ The Environment (Wales) Act s.29 states

³² Department for Business, Energy & Industrial Strategy, “UK becomes first major economy to pass net zero emissions law” 27 June 2019 available at <https://www.gov.uk/government/news/uk-becomes-first-major-economy-to-pass-net-zero-emissions-law> [accessed 11 October 2021].

³³ Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019/1056) art.2(2).

³⁴ UK Government, “United Kingdom of Great Britain and Northern Ireland’s Nationally Determined Contribution” 1 available at <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20Kingdom%20of%20Great%20Britain%20and%20Northern%20Ireland%20First/UK%20Nationally%20Determined%20Contribution.pdf> [accessed 11 October 2021].

³⁵ See Committee on Climate Change, “2021 Progress Report to Parliament” 24 June 2021, 52 available at <https://www.theccc.org.uk/publication/2021-progress-report-to-parliament/> [accessed 11 October 2021].

³⁶ See, e.g. A. Brown, “Devolution, climate change and the climate emergency” Centre on Constitutional Change 8 August 2019 available at <https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/devolution-climate-change-and-climate-emergency> [accessed 11 October 2021].

³⁷ See “Scotland to become a net-zero society” 25 September 2019 available at <https://www.gov.scot/news/scotland-to-become-a-net-zero-society/> [accessed 11 October 2021].

³⁸ See “Scotland can become the first UK nation to deliver a net-zero roadmap” 7 October 2020 available at <https://www.theccc.org.uk/2020/10/07/scotland-can-become-first-uk-nation-to-deliver-net-zero-roadmap/> [accessed 11 October 2021].

³⁹ See “Scotland’s contribution to the Paris Agreement: indicative Nationally Determined Contribution” 23 July 2021 available at <https://www.gov.scot/publications/scotlands-contribution-paris-agreement-indicative-ndc/> [accessed 11 October 2021]. Scotland cannot formally submit an NDC because it is part of the UK.

⁴⁰ See “Welsh Government, Climate change targets and carbon budgets” 23 March 2021 available at <https://gov.wales/climate-change-targets-and-carbon-budgets> [accessed 11 October 2021].

that “The Welsh Ministers must ensure that the net Welsh emissions account for the year 2050 is at least 100% lower than the baseline”,⁴¹ the 100% target having been substituted for the former 80% target.⁴²

The Northern Ireland Assembly has been slower than Scotland and Wales. Two climate change Bills were in the Northern Ireland Assembly when this article was written in October 2021. The Executive Bill calls for net zero by 2050; the Private Member’s Bill calls for net zero by 2045.⁴³

Most GHGs in the UK, however, are emitted in England. Together, Scotland, Wales, and Northern Ireland account for approximately 21% of the UK’s GHG emissions. In 2017, they accounted for 9.3%, 7.6% and 4.2% respectively, for a total of 21.1%.⁴⁴

Meanwhile, the UK Government continued to commit to further reductions of GHG emissions. On 20 April 2021, on the advice of the CCC,⁴⁵ the Government announced that it would “set the world’s most ambitious climate change target” to reduce GHG emissions by 78% by 2035 as part of the sixth carbon budget. The budget would include international aviation and shipping for the first time.⁴⁶ Accordingly in June 2021, the sixth carbon budget for the period of 2033 to 2037 was set at 965,000,000 MtCO_{2e} to reflect the 78% reduction in GHG emissions from 1990 levels by 2035.⁴⁷

Progress made by the UK in reducing greenhouse gas emissions

The UK has met the 25% and 34% reductions in GHG emissions set by the first and second carbon budgets for 2008–2012 and 2013–2017, respectively. By 2020, the UK was on track to meet the 34% reduction set by the third carbon budget for the period of 2018–2022. The UK is not, however, on track to meet the fourth or fifth carbon budgets⁴⁸ or, necessarily, the target of net zero by 2050.

The issue thus arises as to how the UK met the first and second carbon budgets and is on track to meet the third carbon budget, and whether the UK can carry out the same or similar measures to meet the fourth and subsequent carbon budgets. As discussed below, the UK’s ability to do so has been reduced due to the role played by reductions in the use of coal in meeting those budgets.

In 1950, coal was used to generate 97% of electricity in the UK.⁴⁹ Since that time, its use has fallen dramatically. In 1990, coal accounted for 65.3% of electricity generation.⁵⁰ By the early 2010s, coal was

⁴¹ Environment (Wales) Act Pt 2 sets out provisions on climate change, including carbon budgets and proposals and policies for meeting them.

⁴² Environment (Wales) Act 2016, as amended by Environment (Wales) Act 2016 (Amendment of 2050 Emissions Target) Regulations 2021 (SI 2021/333) reg.2.

⁴³ See S. Mulholland, “Second Climate Change Bill for Northern Ireland” 7 July 2021 available at <https://www.tltsolicitors.com/insights-and-events/insight/second-climate-change-bill-for-northern-ireland/> [accessed 11 October 2021].

⁴⁴ See Energy & Climate Intelligence Unit, *Around the UK* available at <https://eciu.net/analysis/briefings/uk-energy-policies-and-prices/around-the-uk/> [accessed 11 October 2021].

⁴⁵ Climate Change Committee, “Advice on reducing the UK’s emissions” available at <https://www.theccc.org.uk/about/our-expertise/advice-on-reducing-the-uks-emissions/> [accessed 11 October 2021].

⁴⁶ The Climate Change Act did not require emissions of GHGs from international aviation and shipping to be included in carbon budgets. Section 30(3)(b) of the Act, however, required the government to explain to the UK Parliament its reasons for not including them by 31 December 2012 if it had not issued regulations to include them by that time. On 19 December 2012, the Government announced that it was deferring a decision whether to include them due to uncertainty concerning the international reduction of aviation emissions. See Climate Change Committee, “CCC statement on Government’s latest International Aviation and Shipping announcement” 19 December 2012 (commenting that emissions from international aviation and shipping are included in the 2050 target) available at <https://www.theccc.org.uk/2012/12/19/ccc-statement-on-governments-latest-international-aviation-and-shipping-announcement/> [accessed 11 October 2021].

⁴⁷ Carbon Budget Order 2021 (SI 2021/750) art.2; see UK enshrines new target in law to slash emissions by 78% by 2035, 20 April 2021 available at <https://www.gov.uk/government/news/uk-enshrines-new-target-in-law-to-slash-emissions-by-78-by-2035> [accessed 11 October 2021]; Committee on Climate Change, “The Sixth Carbon Budget: The UK’s path to Net Zero” December 2020, 38 available at <https://www.theccc.org.uk/publication/sixth-carbon-budget/> [accessed 11 October 2021]; Committee on Climate Change, “Advice on reducing the UK’s emissions” available at <https://www.theccc.org.uk/about/our-expertise/advice-on-reducing-the-uks-emissions/> [accessed 11 October 2021].

⁴⁸ Committee on Climate Change, “Advice on reducing the UK’s emissions” available at <https://www.theccc.org.uk/about/our-expertise/advice-on-reducing-the-uks-emissions/> [accessed 11 October 2021].

⁴⁹ Department of Energy & Climate Change, 60th Anniversary Digest of United Kingdom Energy Statistics, 40; see D. Vetter, “UK To End All Coal Power in 2024, Accelerating Emissions Goal” *Forbes* 30 June 2021 available at <https://www.forbes.com/sites/davidrvetter/2021/06/30/uk-to-end-all-coal-power-in-2024-accelerating-emissions-goal/?sh=25552f423129> [accessed 11 October 2021].

⁵⁰ See Department for Business, Energy & Industrial Strategy, “2020 UK greenhouse gas emissions, provisional figures” 25 March 2021, 8 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972583/2020_Provisional_emissions_statistics_report.pdf [accessed 11 October 2021].

used to generate approximately 40% of electricity.⁵¹ By 2020, coal accounted for only about 2% of electricity generated in the UK.⁵²

Largely as a result of the reduction in the use of coal to generate electricity, the UK was able to make dramatic strides in the reduction of GHG emissions. The main cause of the reduction in emissions up the end of 2019 was the reduction of emissions from power stations, accounting for a reduction of approximately 45% of GHG emissions from 1990 levels.⁵³ Indeed, since 1990, approximately half of the reductions in GHG emissions in the UK have been due to the substitution of gas for coal as the main source of energy to generate electricity and increases in renewables, in particular wind.⁵⁴

The end of the large reductions in GHG emissions resulting from phasing out the use of coal to generate electricity means that the UK will need to focus on other areas, such as energy efficiency initiatives, renewables and carbon capture and storage, by which to reduce emissions. Or as an article in the Economist stated: “That was the easy bit. Now the hard stuff starts.”⁵⁵ The Government’s track record in doing so, however, is not good.

For example, in 2010, the Government introduced the “feed-in tariff” in order to encourage individuals, communities, businesses and organisations to install small-scale (below 5 megawatt) installations, mainly solar power. On 31 October 2011, the Department of Energy and Climate Change (“DECC”) (now part of the Department for Business, Energy and Industrial Strategy; “BEIS”) brought forward the date from April 2012 to 12 December 2011 by which installations were required to be commissioned or registered in order to qualify for the highest rate of subsidies. DECC’s actions meant that the subsidy to householders from solar generation fell from 43.3 pence per kilowatt hour of electricity generated to 21 pence.⁵⁶ DECC’s proposed changes were viewed by many in the solar photovoltaic (“solar PV”) industry as “catastrophic”,⁵⁷ resulting in a steep drop in new installations of solar panels and the loss of many jobs. Some of the solar PV businesses affected by the change brought a judicial review against DECC’s decision, alleging that it had unlawfully interfered with the peaceful enjoyment of their possessions (existing contracts and marketable goodwill) in breach of art.1 of the first protocol of the ECHR.⁵⁸ The High Court found for the claimants.⁵⁹ The Court of Appeal agreed, concluding that although the proposal to reduce the feed-in tariff was not in itself unlawful, it was an unjustified interference with the claimants’ possessions because it had a disproportionate effect on the claimants when balanced against the public interest.⁶⁰ The case subsequently settled for £132 million after the UK Supreme Court refused DECC permission to appeal.⁶¹

⁵¹ See S. Schonhardt, “UK Will Stop Using Coal Power in Just Three Years” [2021] *Scientific American* available at <https://www.scientificamerican.com/article/u-k-will-stop-using-coal-power-in-just-three-years/> [accessed 11 October 2021].

⁵² See Department for Business, Energy & Industrial Strategy, “2020 UK greenhouse gas emissions, provisional figures” 25 March 2021, 8 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972583/2020_Provisional_emissions_statistics_report.pdf [accessed 11 October 2021]. The UK has committed to stop using coal-fired power plants to generate electricity by October 2024, whilst continuing to use them for the steel industry and other sectors. See S. Schonhardt, “UK Will Stop Using Coal Power in Just Three Years” [2021] *Scientific American* available at <https://www.scientificamerican.com/article/u-k-will-stop-using-coal-power-in-just-three-years/> [accessed 11 October 2021].

⁵³ Department for Business, Energy & Industrial Strategy, “2019 UK greenhouse gas emissions, provisional figures” 26 March 2020. The emission of GHGs in 2020 was affected by the pandemic which resulted in substantial reductions in emissions by transport and business. See Department for Business, Energy & Industrial Strategy, “2020 UK greenhouse gas emissions, provisional figures” 25 March 2021.

⁵⁴ See P. Bolton, “UK and global emissions and temperature trends” House of Commons Library 2 June 2021 available at <https://commonslibrary.parliament.uk/uk-and-global-emissions-and-temperature-trends/> [accessed 11 October 2021].

⁵⁵ “How Britain decarbonised faster than any other rich country” *The Economist* 18 February 2021 edn available at <https://www.economist.com/britain/2021/02/15/how-britain-decarbonised-faster-than-any-other-rich-country> [accessed 11 October 2021].

⁵⁶ *Breyer Group Plc v Department of Energy and Climate Change* [2014] EWHC 2257 (QB) at [1]; [2014] J.P.L. 1346.

⁵⁷ *Breyer Group Plc v Department of Energy and Climate Change* [2014] EWHC 2257 (QB) at [25].

⁵⁸ *Breyer Group Plc v Department of Energy and Climate Change* [2014] EWHC 2257 (QB) at [4].

⁵⁹ *Breyer Group Plc v Department of Energy and Climate Change* [2014] EWHC 2257 (QB) at [160]–[161].

⁶⁰ *Department for Energy and Climate Change v Breyer Group Plc* [2015] EWCA Civ 408 at [99]; [2015] 1 W.L.R. 4559.

⁶¹ See Prospect Law, “DECC held liable to compensate the solar PV supply chain industries for its unlawful acts in Prospect Law’s claim for £132 million brought under Human Rights legislation” 4 August 2014 available at <https://prospectlaw.co.uk/decc-held-liable-to-compensate-the-solar-pv-supply-chain-industries-for-its-unlawful-acts-in-prospect-laws-claim-for-132-million-brought-under-human-rights-legislation/> [accessed 11 October 2021].

In 2009, DECC had approved a competition for a pilot scheme for carbon capture and storage projects, subsequently approving four projects. Bidders for the projects however withdrew due to unfavourable economics. In 2012, the Government re-launched the project, announcing that it was still committed to spending £1 billion to encourage carbon capture and storage. The Government short-listed four out of the eight proposed projects. The projects did not however progress. On 25 November 2015, the Government withdrew funding for carbon capture and storage projects.⁶²

In January 2013, the UK Government introduced the Green Deal to provide loans to improve the energy efficiency of existing buildings in England and Wales by authorising private energy businesses to provide residential and commercial customers with structural energy efficiency improvements. The cost was to be recouped in energy bills. The Government stopped supporting the scheme in 2015.⁶³

In September 2020 (subsequently postponed to November 2020), the Government launched a £1.5 billion scheme called the Green Homes Grant. The scheme offered vouchers of between £5,000 and £10,000 to householders to provide up to two-thirds of the cost of energy efficiency improvements to their homes. The Government set the deadline for applying for the vouchers, receiving approval and having the work finished as 31 March 2021, subsequently extending it to 31 March 2022 in view among other things of the large interest by homeowners in receiving the vouchers. On 27 March 2021, the Government abruptly cancelled the scheme effective 31 March 2021.⁶⁴

The absence of successful measures to reduce GHG emissions to meet the UK's carbon budgets and other targets is being increasingly criticised.

In September 2020, a report by the Institute for Government stated that:

“In June 2019, the UK government committed itself to cutting [GHG] emissions to ‘net zero’ by 2050, meaning the UK would emit no more than it takes out of the atmosphere. In doing so it became the first major economy to enshrine such a commitment in law.

This raised the ambition of the UK's legislative target, first established by the Climate Change Act ...

Yet there is little evidence that the government, and the politicians who waved the new target through with little debate, have confronted the enormous scale of the task ahead.”⁶⁵

In March 2021, a report by the House of Commons Public Accounts Committee concluded among other things that “Government has not set out how it plans to achieve net zero despite having set the target in 2019”.⁶⁶ The report continued:

“The Department [for Business, Energy and Industrial Strategy] has not sufficiently engaged with local authorities on their role in the achievement of net zero across the UK ... local government representatives report a lack of clarity from central government on the role local authorities should play in achieving net zero, what will be expected of them or how they will be supported. The Local Government Association's Climate Change Survey 2020 found that nine out of 10 councils have declared a climate emergency and 80% have set a carbon neutral target. But local authorities face a

⁶² See generally E. White, “Carbon capture and storage” House of Commons Library, SN/SC/5086, 24 July 114 available at <http://researchbriefings.files.parliament.uk/documents/SN05086/SN05086.pdf> [accessed 11 October 2021]; D. Carrington, “UK cancels pioneering £1bn carbon capture and storage competition” *The Guardian* 25 November 2015 available at <https://www.theguardian.com/environment/2015/nov/25/uk-cancels-pioneering-1bn-carbon-capture-and-storage-competition> [accessed 11 October 2021].

⁶³ See The Green Deal, “Which Home & garden” 22 June 2021 available at <https://www.which.co.uk/reviews/home-grants/article/home-grants/the-green-deal-afMjP3S8hrgc> [accessed 11 October 2021]. In 2017, the green deal scheme re-opened with private funding for loans.

⁶⁴ See “Goodbye Green Homes Grant: What Now?, Green Square” 12 April 2021 available at <https://www.greensquare.co.uk/blog/goodbye-green-homes-grant-what-now> [accessed 11 October 2021]; House of Commons Library, “Green Homes Grant” 31 March 2021 available at <https://commonslibrary.parliament.uk/green-homes-grant/> [accessed 11 October 2021].

⁶⁵ Institute for Government, “Net Zero: How government can meet its climate change target” (2020), 5 available at <https://www.instituteforgovernment.org.uk/sites/default/files/publications/net-zero-government-climate-change-target.pdf> [accessed 11 October 2021].

⁶⁶ House of Commons Public Accounts Committee, “Achieving Net Zero” 46th Report of Session 2019–2021 (HC 935, 5 March 2021), Conclusions and recommendations, 5, para.1.

wide range of barriers to tackling climate change. Ninety-six per cent of local authorities report that funding is a barrier to them tackling climate change, and 93% that legislation or regulation is a barrier.”⁶⁷

The Local Government Association has criticised building regulations as “not being environmentally rigorous”⁶⁸ and the National Planning Policy Framework (“NPPF”) and planning regulations as “insufficiently ambitious”.⁶⁹

On 27 May 2021, during a short debate on climate change targets in the House of Lords, Baroness Sheehan (who led the debate) asked the Government “what plans they have to ensure that legislation aligns with their ambition for the [UK] to be a global leader in achieving its climate change targets”.⁷⁰ In respect of planning, she stated that bringing existing planning laws into line with net zero legislation was urgent, adding that “national planning policy statements, which cover large projects, are a gaping hole and urgently need to be updated”.⁷¹ Lord Whitty commented that the “contribution to net zero should be written into all planning legislation and planning procedures, decisions and appeals. At the moment, it is a very low priority”.⁷²

In June 2021, the CCC echoed criticisms of the lack of measures to achieve the ambitious climate change targets set by the UK. The CCC commented on the lack of “any comprehensive strategy in the [UK Government’s] climate change plans”,⁷³ stating that:

“There are gaps and ambiguities. Climate resilience remains a second-order issue, if it is considered at all. We continue to blunder into high-carbon choices. Our Planning system and other fundamental structures have not been recast to meet our legal and international climate commitments.”⁷⁴

The CCC further commented that “The current Planning Bill does not ensure that developments and infrastructure are compliant with Net Zero and appropriately resilient to climate change”.⁷⁵ Still further, the CCC stated that less than one-fifth of emissions saving measures for the sixth carbon budget had policies that were “potentially on track” or “fully on track” for delivery, such as renewable electricity generation.⁷⁶

The UK’s carbon budgets and its net zero target of 2050 are recognised for their ambition. As indicated above, however, measures to attain them have not—at least to date—been recognised for their adequacy.

Landmark climate change cases

The UK is not the only country in which climate change is a major issue for government. As in the UK, questions have been raised as to whether other governments have put adequate measures in place to achieve their commitments. By 31 May 2021, there were 1,841 climate change cases, of which 1,387 were US cases,⁷⁷ but with a growing number of non-US cases. One of the two main categories of cases involves

⁶⁷ House of Commons Public Accounts Committee, “Achieving Net Zero” 46th Report of Session 2019–2021 (HC 935, 5 March 2021), Conclusions and recommendations, 5 para.6.

⁶⁸ See House of Commons Public Accounts Committee, “Achieving Net Zero” 46th Report of Session 2019–2021 (HC 935, 5 March 2021), Conclusions and recommendations 15, para.22.

⁶⁹ See House of Commons Public Accounts Committee, “Achieving Net Zero” 46th Report of Session 2019–2021 (HC 935, 5 March 2021), Conclusions and recommendations.

⁷⁰ *Hansard* vol.812 col.123GC, 27 May 2021 available at <https://hansard.parliament.uk/Lords/2021-05-27/debates/AD4DB51F-A5EC-4574-8730-4875EB3479BB/ClimateChangeTargets> [accessed 11 October 2021].

⁷¹ *Hansard* vol.812 col.125GC, 27 May 2021.

⁷² *Hansard* vol.812 col.133GC, 27 May 2021.

⁷³ Committee on Climate Change, “2021 Progress Report to Parliament” 24 June 2021, 6 available at <https://www.theccc.org.uk/publication/2021-progress-report-to-parliament/> [accessed 11 October 2021].

⁷⁴ Committee on Climate Change, “2021 Progress Report to Parliament” 24 June 2021.

⁷⁵ Committee on Climate Change, “2021 Progress Report to Parliament” 24 June 2021, 149.

⁷⁶ Committee on Climate Change, “2021 Progress Report to Parliament” 24 June 2021, 152.

⁷⁷ See J. Setzer and C. Higham, “Global trends in climate change litigation: 2021 snapshot” 2 July 2021, 10 available at <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-litigation-2021-snapshot/> [accessed 11 October 2021].

cases against governments in order to force a societal shift in climate change policy towards sufficient measures to reduce GHG emissions. The other main category of cases involves consideration of climate change in decision-making processes such as planning.⁷⁸ 58% of climate change cases have had outcomes favourable to climate change action.⁷⁹

The following briefly describes four landmark cases against the governments of the Netherlands, Ireland, Germany and Australia. It also describes, as applicable, measures taken by those governments following judicial rulings.

The Netherlands

In 2012, Urgenda Foundation (short for Urgent Agenda Foundation) wrote to the Prime Minister of the Netherlands to request the Dutch Government to reduce CO₂ emissions at a faster rate than the reduction of 17% by 2020 compared to 1990 levels indicated by the Government.⁸⁰ Urgenda subsequently filed an action against the Dutch Government based on the Dutch Constitution art.21 that requires the Dutch Government to have due care for its citizens.⁸¹ Urgenda alleged that the Netherlands had recognised, by signing international climate change conventions, that a failure to reduce GHG emissions would harm its citizens.

On 24 June 2015, the Hague District Court, in *Urgenda Foundation v State of the Netherlands (Ministry of Infrastructure and the Environment)*, applied principles of the ECHR to interpret the Government's duty of care. The court stated that "[a]most all COP's [Conference of the Parties'] decisions are not legally binding", but commented that they "can directly affect obligations of the signatories to the convention or the protocol".⁸² The court further stated that the State did not have a legal obligation to Urgenda derived from the Dutch Constitution art.21 or other legislation but stated that the legislation still had meaning in determining whether the State had failed to meet its duty of care to Urgenda.⁸³ The court ruled that the State had a "serious duty of care to take measures to prevent [climate change]"⁸⁴ and to carry out mitigation measures "as quickly and as much as possible".⁸⁵ Consequently, the court ordered the Dutch Government to take more measures to reduce GHG emissions to ensure that emissions in 2020 would be reduced by at least 25% compared to 1990 levels.⁸⁶ The Dutch Government appealed the decision, raising 29 grounds of appeal.

On 9 October 2018, the Court of Appeal dismissed the Government's appeal. The court concluded that the Government's failure to carry out more ambitious measures was a breach of the claimants' rights under art.2 (right to life) and art.8 (right to respect for private and family life) of the ECHR,⁸⁷ ruling that Urgenda

⁷⁸ J. Setzer and C. Higham, "Global trends in climate change litigation: 2021 snapshot" 2 July 2021, 12–13.

⁷⁹ J. Setzer and C. Higham, "Global trends in climate change litigation: 2021 snapshot" 2 July 2021, 19.

⁸⁰ *Stichting Urgenda v State of the Netherlands (Ministry of Infrastructure and the Environment)* (C/09/456689/HA ZA 13-1396), ECLI:NL:RBDHA:2015:7145 (24 June 2015) (English translation), paras 2.1, 2.6 available at <http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/> [accessed 11 October 2021].

⁸¹ *Stichting Urgenda v State of the Netherlands (Ministry of Infrastructure and the Environment)* (C/09/456689/HA ZA 13-1396), ECLI:NL:RBDHA:2015:7145 (24 June 2015) (English translation) para.4.36. The Constitution of the Netherlands art.21 provides that: "It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment."

⁸² *Stichting Urgenda v State of the Netherlands (Ministry of Infrastructure and the Environment)* (C/09/456689/HA ZA 13-1396), ECLI:NL:RBDHA:2015:7145 (24 June 2015) (English translation) para.4.38.

⁸³ *Stichting Urgenda v State of the Netherlands (Ministry of Infrastructure and the Environment)* (C/09/456689/HA ZA 13-1396), ECLI:NL:RBDHA:2015:7145 (24 June 2015) (English translation) para.4.52.

⁸⁴ *Stichting Urgenda v State of the Netherlands (Ministry of Infrastructure and the Environment)* (C/09/456689/HA ZA 13-1396), ECLI:NL:RBDHA:2015:7145 (24 June 2015) (English translation) para.4.65.

⁸⁵ *Stichting Urgenda v State of the Netherlands (Ministry of Infrastructure and the Environment)* (C/09/456689/HA ZA 13-1396), ECLI:NL:RBDHA:2015:7145 (24 June 2015) (English translation) para.4.73.

⁸⁶ *Stichting Urgenda v State of the Netherlands (Ministry of Infrastructure and the Environment)* (C/09/456689/HA ZA 13-1396), ECLI:NL:RBDHA:2015:7145 (24 June 2015) (English translation) para.4.85.

⁸⁷ *State of the Netherlands (Ministry of Infrastructure and the Environment) v Stichting Urgenda* (200.178.245/01), ECLI:NL:GHDHA:2018:2591 (9 October 2018) (English translation), para.43 available at <http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/> [accessed 11 October 2021]. ECHR art.2(1) provides in pertinent part that "Everyone's right to life shall be protected by law". Article 8 provides: "Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no

had the right to invoke arts 2 and 8 directly on behalf of individuals.⁸⁸ The court ordered the Dutch Government to carry out measures to reduce GHG emissions by at least 25% from 1990 levels by the end of 2020.⁸⁹

On 20 December 2019, the Dutch Supreme Court affirmed the Court of Appeal's decision. The court ruled that the Dutch Government had breached its obligations under the ECHR arts 2 and 8 due to the risk of "dangerous climate change" that could seriously affect the rights to life and well-being of Dutch residents.⁹⁰ The court ordered the Government to reduce GHG emissions by a minimum of 25% by the end of 2020 compared to 1990 levels.⁹¹ In its judgment, the Dutch Supreme Court referred to the Paris Agreement and the view of an independent research institute that is part of the Ministry of Infrastructure and the Environment (Netherlands Environmental Assessment Agency) that "Dutch policy should be tightened in the short term in order to align it with the Paris Agreement".⁹²

Since the Dutch Supreme Court's judgment, the Dutch Government has introduced new climate initiatives at an estimated cost of €3 billion. The initiatives include the following: scaling back the Netherlands' three coal-fired power stations that were all opened within the previous five years (75% reduction in capacity and the potential closure of one power station); installing solar panels on all school roofs; providing subsidies to homeowners to use less concrete and more plants in their gardens; reducing cattle and pig herds; with compensation to farmers; lowering speed limits to control emissions of nitrous oxide; introducing more sustainable forestry; and alternatives for some polluting processes in industrial facilities.⁹³

Ireland

Friends of the Irish Environment CLG ("FIE"), an environmental NGO and corporate entity, brought an action against the Irish Government on the basis that the Government's 2017 National Mitigation Plan did not meet requirements of the Climate Action and Low Carbon Development Act 2015.⁹⁴ The Act set out measures to reduce emissions of CO₂ and to transition Ireland to a low carbon, climate resilient and environmentally sustainable economy by 2050.⁹⁵ FIE also argued that the Irish Government had breached the ECHR arts 2 and 8.⁹⁶ Further, FIE argued that the government had breached the right to an environment consistent with human dignity under the Irish Constitution.⁹⁷

On 19 September 2019, the High Court dismissed the action. The court held that FIE had standing to bring constitutional and human rights claims⁹⁸ but the 2015 Act did not require the National Mitigation Plan to achieve specific intermediate targets because the plan was only a "piece of the jigsaw".⁹⁹

FIE appealed to the Irish Supreme Court under the leapfrogging procedure on the basis of exceptional circumstances. The Irish Supreme Court agreed to hear the appeal.¹⁰⁰

interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

⁸⁸ *State of the Netherlands (Ministry of Infrastructure and the Environment) v Stichting Urgenda* at [36].

⁸⁹ *State of the Netherlands (Ministry of Infrastructure and the Environment) v Stichting Urgenda* at [76].

⁹⁰ *State of the Netherlands (Ministry of Infrastructure and the Environment) v Stichting Urgenda* (19/00135 (judgment of 20 December 2019) (English translation), para. 5.6.2 available at <http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/5> [accessed 11 October 2021]; see also para.5.9.2.

⁹¹ *State of the Netherlands (Ministry of Infrastructure and the Environment) v Stichting Urgenda* (19/00135 (judgment of 20 December 2019) (English translation), para.8.3.4.

⁹² *State of the Netherlands (Ministry of Infrastructure and the Environment) v Stichting Urgenda* (19/00135 (judgment of 20 December 2019)

(English translation), para.7.4.4.

⁹³ See J. Watts, "Dutch officials reveal measures to cut emissions after court ruling" *The Guardian* 24 April 2020 available at <https://www.theguardian.com/world/2020/apr/24/dutch-officials-reveal-measures-to-cut-emissions-after-court-ruling> [accessed 11 October 2021].

⁹⁴ *Friends of the Irish Environment CLG v Ireland* [2019] IEHC 747 at [12]–[13].

⁹⁵ See *Friends of the Irish Environment CLG v Ireland* [2019] IEHC 747 at [15]–[16].

⁹⁶ *Friends of the Irish Environment CLG v Ireland* [2019] IEHC 747 at [71].

⁹⁷ *Friends of the Irish Environment CLG v Ireland* [2019] IEHC 747 at [73].

⁹⁸ *Friends of the Irish Environment CLG v Ireland* [2019] IEHC 747 at [132].

⁹⁹ *Friends of the Irish Environment CLG v Ireland* [2019] IEHC 747 at [133].

¹⁰⁰ *Friends of the Irish Environment CLG v Ireland* [2020] IESCDT 13.

On 31 July 2020, the Irish Supreme Court unanimously quashed the National Mitigation Plan.¹⁰¹ The court concluded that the plan fell “well short of the level of specificity required ... to comply with the provisions of the 2015 Act”.¹⁰² The court also concluded that a reasonable and interested member of the public could not know how the Government intended to meet the national transition objective of net zero emissions by 2050, and that some policies in the plan were “excessively vague or aspirational”.¹⁰³

The court did not address human rights issues because it concluded that FIE did not have standing to bring them because it does not enjoy the right to life or the right to bodily integrity.¹⁰⁴ The court also stated that the right to a healthy environment argued by FIE cannot be derived from the Irish Constitution.¹⁰⁵

On 23 July 2021, the Irish Government responded to the Irish Supreme Court’s ruling by enacting the Climate Action and Low Carbon Development (Amendment) Act 2021. Among other things, the Act established five-year carbon budgets beginning 1 January 2021; the first two with a 51% reduction target in GHG emissions by 31 December 2030 compared to reported emissions for the year ending 31 December 2018.¹⁰⁶ The Act also requires the Government to produce a national long-term climate action strategy every five years to achieve the “national climate objective” by transitioning to a “climate resilient, biodiversity rich, environmentally sustainable and climate neutral economy” by 2050,¹⁰⁷ and to update the plan annually to focus on short and medium term objectives.¹⁰⁸ Further, the Act requires the Minister for the Environment, Climate and Communications to report on overall progress, with other Ministers to report on progress in their areas of responsibility.¹⁰⁹

Still further, the Act requires local authorities to prepare and adopt individual five-year climate action plans.¹¹⁰ In addition, the Act amended the Planning and Development Act 2000 to require local authorities, when making development plans, to include objectives to reduce GHG emissions and the necessity to adapt to climate change, taking their climate action plans into account.¹¹¹

Germany

In February 2020, various teenagers and young adults, Fridays for Future, Greenpeace, Friends of the Earth and other NGOs brought an action against the German Government to request the court to require the government to amend provisions in the Federal Climate Protection Act 2019.¹¹² The aim of the Act was to implement Germany’s obligations under the Paris Agreement by providing for a gradual reduction in GHG emissions by at least 55% by 2030 compared with 1990 levels, with a target of net zero emissions by 2050.¹¹³

The challenge was based in large part on the Basic Law (Germany’s Constitution), especially art.20a, which states that:

¹⁰¹ *Friends of the Irish Environment CLG v Ireland* [2020] IESC 49 at [9.3].

¹⁰² *Friends of the Irish Environment CLG v Ireland* [2020] IESC 49 at [9.3].

¹⁰³ *Friends of the Irish Environment CLG v Ireland* [2020] IESC 49 at [6.43].

¹⁰⁴ *Friends of the Irish Environment CLG v Ireland* [2020] IESC 49 at [7.21]–[7.24], [9.4].

¹⁰⁵ *Friends of the Irish Environment CLG v Ireland* [2020] IESC 49 at [9.5].

¹⁰⁶ Climate Action and Low Carbon Development (Amendment) Act 2021 s.9 (adding s.6A to the Climate Action and Low Carbon Development Act).

¹⁰⁷ Climate Action and Low Carbon Development (Amendment) Act 2021 s.5 (substituting a new s.3 in the Climate Action and Low Carbon Development Act).

¹⁰⁸ Climate Action and Low Carbon Development (Amendment) Act 2021 s.6 (substituting a new s.4 in the Climate Action and Low Carbon Development Act).

¹⁰⁹ Climate Action and Low Carbon Development (Amendment) Act 2021 s.15 (adding s.14A to the Climate Action and Low Carbon Development Act).

¹¹⁰ Climate Action and Low Carbon Development (Amendment) Act 2021 s.16 (adding s.14B to the Climate Action and Low Carbon Development Act).

¹¹¹ Climate Action and Low Carbon Development (Amendment) Act 2021 s.19 (substituting a new s.10(2) to the Planning and Development Act 2000).

¹¹² *Neubauer v Germany* (21 April 2021) (English translation) available at <http://climatecasechart.com/climate-change-litigation/non-us-case/neubauer-et-al-v-germany/> [accessed 11 October 2021].

¹¹³ See *Neubauer v Germany* (21 April 2021) at [3]–[6].

“Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.”¹¹⁴

The German Supreme Constitutional Court unanimously ruled that the 2019 Act was partially unconstitutional because it did not specify reductions in GHG emission targets after 2030.¹¹⁵ The court stated that the Act was potentially incompatible with fundamental rights due to the risk of serious burdens.¹¹⁶ The court further stated that the Act did not provide sufficient reduction targets to comply with Germany’s obligations to reduce GHG emissions as set out in the Paris Agreement.¹¹⁷ The court ruled that the Act did “not meet the constitutional requirements for a structuring mechanism aimed at providing sufficient orientation for further development going forward” because it was not sufficiently detailed to indicate how reductions would be met.¹¹⁸

The court ordered the German Government to amend the Act by December 2022 to ensure that Germany meets its 2030 GHG emission reduction goals and to specify how reduction targets for GHG emissions would be adjusted after 2031.¹¹⁹

The German Government responded quickly to the court’s ruling. On 25 June 2021, the Government amended the Climate Action Law to establish a deadline for achieving net zero emissions of 2045 instead of 2050 and to reduce GHG emissions to 65% by 2030 compared to 1990 levels instead of 55%. The amendments established further specific targets for each year after 2030.¹²⁰

Australia

On 8 September 2020, 8 applicants under 18 years old, on behalf of themselves and other children who ordinarily reside in Australia, brought a putative class action under the Environment Protection and Biodiversity Conservation Act to seek an injunction against the Federal Environment Minister approving an extension of the Whitehaven Vickery coal mine in New South Wales. The claimants alleged that burning coal extracted from the mine would exacerbate climate change and harm them and other young people in the future.¹²¹

On 27 May 2021, the Federal Court of Australia considered the nature and extent of the harm likely to be suffered by the claimants including premature death from bushfires,¹²² and established a new duty of care based on the law of negligence to avoid causing personal harm to children.¹²³

On 8 July 2021, the court concluded that it was reasonably foreseeable that heatwaves and bushfires would harm all children.¹²⁴ The court issued an order that the Minister “has a duty to take reasonable care ... to avoid causing personal injury or death to persons who were under 18 years of age and ordinarily

¹¹⁴ See European Union Agency for Fundamental Rights, “Basic Law for the Federal Republic of Germany” available at <https://fra.europa.eu/en/law-reference/basic-law-federal-republic-germany-33#:~:text=Article%2020a%20Mindful%20also%20of,framework%20of%20the%20constitutional%20order> [accessed 11 October 2021].

¹¹⁵ *Neubauer v Germany* (21 April 2021) at [247].

¹¹⁶ *Neubauer v Germany* (21 April 2021) at [245].

¹¹⁷ *Neubauer v Germany* (21 April 2021) at [242].

¹¹⁸ *Neubauer v Germany* (21 April 2021) at [256].

¹¹⁹ *Neubauer v Germany* (21 April 2021) at introductory [2], [4].

¹²⁰ See C. Nijhuis, “Germany passes new Climate Action Law, pulls forward climate neutrality target to 2045” [2021] *Clean Energy Wire* available at <https://www.cleanenergywire.org/news/germany-passes-new-climate-action-law-pulls-forward-climate-neutrality-target-2045> [accessed 11 October 2021].

¹²¹ Complaint, *Sharma v Minister for the Environment* available at <http://climatecasechart.com/climate-change-litigation/non-us-case/raj-seppings-v-ley/> [accessed 11 October 2021]; see J. Peel and R. Markey-Towler, “A Duty to Care: The Case of *Sharma v Minister for the Environment* [2021] F.C.A. 560” (2021) *Journal of Environmental Law* 1, 3.

¹²² *Sharma v Minister for the Environment* [2021] F.C.A. 560 at [234]–[235].

¹²³ *Sharma v Minister for the Environment* [2021] F.C.A. 560 at [490]–[491].

¹²⁴ *Sharma v Minister for the Environment (No.2)* [2021] F.C.A. 774 at [48].

resident in Australia at the time of the commencement of this proceeding arising from emissions of carbon dioxide into the Earth's atmosphere".¹²⁵

The court rejected arguments by the Minister to limit the declaration to the claimants and ruled that the Minister's duty applies to all Australian children because they have the same interests as the claimants.¹²⁶

On 13 September 2021, the Minister filed a notice of appeal.¹²⁷

Climate change litigation in the UK

As will be seen, the UK does not follow the prevailing trend in the majority of other countries in successful challenges against the government's policies and climate change legislation as illustrated by the Dutch, Irish, German, and Australian cases described above. Rather, the reverse is true. A major reason for the lack of success in such challenges is: (1) the absence of plans and legislation—such as the National Mitigation Plan under the Climate Action and Low Carbon Development Act 2015 in Ireland or the Federal Climate Protection Act 2019 in Germany—that set out measures to achieve commitments to reduce GHG emissions; and (2) the absence of a written constitution—as in the Netherlands and Germany.

There were 73 climate change cases in the UK as of 31 May 2021.¹²⁸ They include cases involving applications for, and decisions granting, planning permission, mostly concerning wind turbines.¹²⁹ Other cases involve:

- demonstrations by protestors;
- challenges against the UK Emissions Trading Scheme;
- protests against and challenges to fracking;
- flood risks from proposed developments; and
- a challenge to the government's consultation process for a report into the construction of new nuclear power plants.¹³⁰

Still other cases include challenges to oil production in the North Sea. One case involves an application for judicial review, that has been granted by the court, challenging the legality of the UK Government's support for oil and gas production.¹³¹ The case is scheduled to be heard by the end of 2021.¹³² The other case is an action by Greenpeace against the grant of a permit by the Oil and Gas Authority to BP Exploration Operating Company to carry out drilling for oil, and the decision by the Secretary of State for Business, Energy and Industrial Strategy that agreed to the grant of the permit. Greenpeace has challenged the grant of the permit on the basis that the Government: (1) failed to assess climate impacts because it did not take into account emissions from the consumption of the extracted oil; (2) failed to comply with public consultation requirements; and (3) did not assess the quantity of flaring that would occur.¹³³ The Inner House of the Court of Session refused the challenge on 7 October 2021.¹³⁴

¹²⁵ *Sharma v Minister for the Environment (No.2)* [2021] F.C.A. 774 at [58].

¹²⁶ *Sharma v Minister for the Environment (No.2)* [2021] F.C.A. 774 at [11].

¹²⁷ *Minister for the Environment v Sharma* Notice of Appeal available at <http://climatecasechart.com/climate-change-litigation/non-us-case/raj-seppings-v-ley/> [accessed 11 October 2021].

¹²⁸ See J. Setzer and C. Higham, "Global trends in climate change litigation: 2021 snapshot" 2 July 2021, 10 available at <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-litigation-2021-snapshot/> [accessed 11 October 2021].

¹²⁹ See Sabin Center for Climate Change, "Browse by Jurisdiction, United Kingdom, Planning Inspectorate" available at <http://climatecasechart.com/climate-change-litigation/non-us-jurisdiction/planning-inspectorate/> [accessed 11 October 2021].

¹³⁰ See summaries of the cases and related documents at Sabin Center for Climate Change, "Browse by Jurisdiction; United Kingdom" available at <http://climatecasechart.com/climate-change-litigation/non-us-jurisdiction/united-kingdom/> [accessed 11 October 2021].

¹³¹ See Paid to pollute, "Press Release: Court to rule on legality of government support for North Sea oil and gas" July 2021 available at <https://paidtopollute.org.uk/news/paid-to-pollute-going-to-the-high-court/> [accessed 11 October 2021].

¹³² See Paid to pollute, "Press Release: Court to rule on legality of government support for North Sea oil and gas" July 2021

¹³³ *Greenpeace v United Kingdom* (appeal to the Court of Session under the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 (SI 1999/360) reg.16) available at <http://climatecasechart.com/climate-change-litigation/non-us-case/greenpeace-v-united-kingdom/> [accessed 11 October 2021].

¹³⁴ *Greenpeace Ltd v Advocate General* [2021] CSIH 53.

Cases that are described in more detail in this section are mainly challenges against the UK Government to force a societal shift in climate change policy towards increased measures to reduce GHG emissions. Many of these cases include issues involving planning legislation. This is due, in particular, to their nature in challenging the government's proposals for billion pound development projects such as a third runway at Heathrow Airport, High Speed 2 ("HS2") (the high speed railway project being carried out in phases to link London, Birmingham, Manchester, and Leeds), and highway improvements, as described below. Claimants have argued that the projects will increase emissions of GHGs and will thus prevent the UK honouring its commitments under the Climate Change Act, the Paris Agreement, and the UK's NDC pursuant to the Paris Agreement. In addition, as in other countries, some claimants have argued that the projects and their consequent increases in the emission of GHGs breach the ECHR arts 2 and 8.

Before discussing these cases, this section describes the high profile case concerning the proposed coal mine in Cumbria, which is referred to in one of the cases.

Proposed coal mine in Cumbria

In May 2017, West Cumbria Mining submitted an application to develop a new metallurgical coal mine in Whitehaven, Cumbria. The application has had a troubled history. West Cumbria Mining received three resolutions from Cumbria CC to approve the application. The Secretary of State for Housing, Communities and Local Government (now the Department for Levelling Up, Housing and Communities) formally considered whether to "call in" the application under the Town and Country Planning Act 1990 s.77 but decided not to do so. His most recent decision not to call in the application was February 2021 after he had received representations concerning the CCC's report concerning the sixth carbon budget and the UK's path to net zero.¹³⁵ The report recommended that the UK establish a sixth carbon budget to reduce its GHG emissions by 78% compared to 1990 levels by 2035.¹³⁶

On 9 February 2021, Cumbria CC notified West Cumbria Mining that it had decided to refer the application to committee for a fourth time. West Cumbria Mining applied for judicial review of that decision.¹³⁷ In March 2021, the Secretary of State called in the application and decided to hold a local inquiry.¹³⁸ The letter from the Ministry states that the Minister's decision was based on publication of the CCC's recommendations for the sixth carbon budget (referred to directly above) and his decision that the application raised "planning issues of more than local importance".¹³⁹ The local enquiry began on 7 September 2021 over a five-week period.¹⁴⁰

Proposed third runway at Heathrow Airport

The first major climate change case by NGOs and others against the UK Government involved the proposed third runway at Heathrow Airport. Five London boroughs, the Mayor of London, Friends of the Earth, Plan B Earth, Greenpeace and a member of the public brought an application for judicial review to challenge the issuance on 26 June 2018 by the Secretary of State for Transportation of the "Airports National Policy

¹³⁵ See West Cumbria Mining Statement: 5 March 2021 available at <http://climatecasechart.com/climate-change-litigation/non-us-case/west-cumbria-mining-v-cumbria-county-council/> [accessed 11 October 2021].

¹³⁶ Committee on Climate Change, "The Sixth Carbon Budget—The UK's path to Net Zero" December 2020 13; available at <https://www.theccc.org.uk/publication/sixth-carbon-budget/> [accessed 11 October 2021].

¹³⁷ See *West Cumbria Mining v Cumbria CC* available at <http://climatecasechart.com/climate-change-litigation/non-us-case/west-cumbria-mining-v-cumbria-county-council/> [accessed 11 October 2021].

¹³⁸ Letter from the Decision Officer, Planning Casework Unit, Ministry of Housing, Communities and Local Government to the Manager, Development Control and Sustainable Development, Environment and Regulatory Services, Cumbria CC 11 March 2021, para.7 available at <http://climatecasechart.com/climate-change-litigation/non-us-case/west-cumbria-mining-v-cumbria-county-council/> [accessed 11 October 2021].

¹³⁹ Letter from the Decision Officer, Planning Casework Unit, Ministry of Housing, Communities and Local Government to the Manager, Development Control and Sustainable Development, Environment and Regulatory Services, Cumbria CC 11 March 2021, para.6.

¹⁴⁰ See *Cumbria CC, West Cumbria Mining Ltd ("WCM") Planning Inquiry; West Cumbria Mining Planning Application 4/17/9007* available at <https://www.cumbria.gov.uk/planning-environment/wcm.asp> [accessed 11 October 2021].

Statement: new runway capacity and infrastructure at airports in the South East of England” (“ANPS”). The ANPS favoured the development of the third runway. The claimants alleged, among other things, that the Secretary of State had breached the Planning Act 2008 ss.5(8) and 10, and the Strategic Environmental Assessment Directive (SEA Directive) art.5¹⁴¹ in designating the ANPS.¹⁴²

The Planning Act s.5(8) provides that the reasons for the policy set out in national policy statements (which include the ANPS) “must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change”. In essence, the claimants argued that the UK’s ratification of the Paris Agreement and statements by government ministers, including Andrea Leadsom and Amber Rudd, concerning that agreement were “Government policy”.

The Planning Act s.10(2) provides that the Secretary must exercise his functions under s.5 (and in reviews of national policy statements under s.6) “with the objective of contributing to the achievement of sustainable development”. Section 10(3) provides that “For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of (a) mitigating, and adapting to, climate change ...”. The claimants argued that s.10 requires the Secretary, at a minimum, to address:

- the fact that the 2050 net zero target is aimed at the discredited 2 C limit for the increase in temperature;
- the Government’s commitment to the limit of 1.5 C and the limit being “well below” 2 C, as set out in the Paris Agreement;
- the Government’s commitment to a process of aligning the 2050 target to the Paris Agreement in view of the report by the Intergovernmental Panel on Climate Change; and
- the Government’s commitment and its legal obligation to provide leadership on implementation of the Paris Agreement.¹⁴³

The SEA Directive art.15 requires, among other things, “an outline of the contents, main objectives of the [proposed] plan or programme and [its] relationship with other relevant plans and programmes”. In this case, art.15 required an outline of the proposed runway with local authority plans. The claimants argued that the Secretary of State had considered local authority plans cumulatively when he should have considered each plan individually.

The Divisional Court dismissed the claims.¹⁴⁴

The Court of Appeal rejected most grounds of appeal except those involving the Paris Agreement.¹⁴⁵ In respect of the term “Government policy” in the Planning Act s.5(8), the court stated that the words are words of the ordinary English language and do not have any specific technical meaning. Accordingly, the court stated that “[t]hey should be applied in their ordinary sense to the facts of a given situation”,¹⁴⁶ and should not be interpreted to mean only the legal requirements of the Climate Change Act.¹⁴⁷

The Court of Appeal ruled that the Secretary should have taken account of “its own firm policy commitments on climate change under the Paris Agreement” when it prepared the ANPS,¹⁴⁸ and that a failure to do so was “legally fatal to the ANPS in its present form”.¹⁴⁹ The court stated that the Paris

¹⁴¹ Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ 197/30.

¹⁴² *R. (on the application of Plan B Earth) v Secretary of State for Transport*, Amended Statement of Facts and Grounds available at <http://climatecasechart.com/climate-change-litigation/non-us-case/plan-b-earth-v-secretary-of-state-for-transport/> [accessed 11 October 2021]. Other grounds included an alleged breach of Council Directive 92/43 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7 art.6.

¹⁴³ *R. (on the application of Plan B Earth) v Secretary of State for Transport* Amended Statement of Facts and Grounds para.71 available at <http://climatecasechart.com/climate-change-litigation/non-us-case/plan-b-earth-v-secretary-of-state-for-transport/> [accessed 11 October 2021].

¹⁴⁴ *R. (on the application of Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin) at [657]–[668]; [2019] J.P.L. 1163.

¹⁴⁵ *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214; [2020] J.P.L. 1005.

¹⁴⁶ *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 at [224].

¹⁴⁷ *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 at [224].

¹⁴⁸ *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 at [283].

¹⁴⁹ *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 at [284].

Agreement was “so obviously material” to the Secretary’s decision, that he should have taken it into account in designating the ANPS.¹⁵⁰ It was undisputed that the Secretary of State had not taken the Paris Agreement into account in designating it.¹⁵¹

Although the UK did not appeal the Court of Appeal’s judgment, Heathrow Airport Ltd (the airport operator) and Arora Holdings Ltd (which represented a group of companies that own land within the boundaries of Heathrow and intended to build and operate a new terminal at Heathrow) appealed.¹⁵²

The UK Supreme Court granted them permission to appeal on the four grounds set out by the Court of Appeal in its decision, as follows:

- alleged breach of the Secretary of State’s duty under the Planning Act s.5(8);
- alleged breach of his duty under the Planning Act ss.10(2) and 10(3);
- alleged failure of the appraisal of sustainability that accompanied the ANPS, as required by the SEA Directive art.5(3), to refer to the Paris Agreement; and
- alleged breach of the Secretary of State’s duty under the Planning Act s.10 to have regard to the effect of GHG emissions created by the third runway after 2050, and the effect of non- CO₂ emissions.¹⁵³

On 16 December 2020, in *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd*, the UK Supreme Court unanimously reversed the Court of Appeal.¹⁵⁴ The court interpreted the term “Government policy” in the Planning Act s.5(8) narrowly, stating that the “epitome of ‘Government policy’ is a formal written statement of established policy”.¹⁵⁵ The court concluded that ratification of the Paris Agreement and statements by UK Government officials concerning the development of policy involving the Paris Agreement are not Government policy for purposes of the Planning Act.¹⁵⁶ The court commented that ratification of an international treaty is an act that gives rise to the UK’s obligations in international law; it is not a commitment under domestic law to carry out obligations under an international treaty because such obligations continue regardless of whether a particular government remains in office.¹⁵⁷ The court further stated that if obligations under a treaty are to be given effect in domestic law, they would require law-making steps that are not certain or specified at the time of ratification.¹⁵⁸

The court further concluded that the Secretary of State did not breach the Planning Act ss.10(2) and 10(3) by failing to have proper regard to the Paris Agreement in designating the ANPS. Rather, the court stated that the Secretary had taken it into account and had lawfully exercised his discretion concerning the weight to attribute to it.¹⁵⁹

The court also concluded that the Secretary of State had not breached the SEA Directive art.5. The court stated that the Secretary had followed the advice of the CCC in compiling the assessment of sustainability “to the effect that the UK’s obligations under the Paris Agreement were sufficiently taken into account in the UK’s domestic obligations under the [Climate Change Act]”.¹⁶⁰

Still further, the court stated that the Secretary of State had taken into account the fact that there would be carbon emissions from the new runway after 2050 and the quantification of those emissions. The court

¹⁵⁰ *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 at [237].

¹⁵¹ *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 at [186].

¹⁵² *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport* Order granting permission to appeal (6 May 2020) available at <http://climatecasechart.com/climate-change-litigation/non-us-case/plan-b-earth-v-secretary-of-state-for-transport/> [accessed 11 October 2021].

¹⁵³ *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 at [15]; [2021] J.P.L. 905.

¹⁵⁴ *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 at [167].

¹⁵⁵ *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 at [106].

¹⁵⁶ *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 at [105]–[108].

¹⁵⁷ *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 at [108].

¹⁵⁸ *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 at [108].

¹⁵⁹ *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 at [129]–[132].

¹⁶⁰ *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 at [149].

concluded that it was not irrational for the Secretary of State not to attempt to assess these post-2050 emissions in the ANPS by reference to undecided future policies.¹⁶¹

Finally, the court concluded that the Secretary of State had not acted irrationally when he did not address the effect of non-CO₂ emissions from the proposed third runway because, among other things, the Government was developing its aviation strategy which would include a review of those emissions and also because the Secretary of State would have powers at the development consent order (“DCO”) stage for the third runway to address those emissions.¹⁶² In this respect, the ANPS set the framework for the determination on whether to grant a DCO.

High Speed 2

The second major UK climate change case that challenged the Government’s commitment to reducing GHG emissions involved HS2. In 2019, the Government had commissioned a review to consider whether and if so how to continue with HS2.¹⁶³ On 11 February 2020, the Government decided to proceed with it.¹⁶⁴

The decision to proceed with HS2 was challenged by way of judicial review by Chris Packham, a television personality and environmental campaigner. On 3 April 2020, the High Court denied the application for judicial review.¹⁶⁵

Mr Packham appealed the decision on the grounds that the Government had failed to take account of the effect of HS2 on emissions of GHGs up to 2050 in view of its obligations under the Paris Agreement and the Climate Change Act,¹⁶⁶ and that the Government had failed properly to consider the implications of the Paris Agreement and the Climate Change Act.¹⁶⁷

On 31 July 2020, the Court of Appeal dismissed the appeal. The court stated that there was nothing to show that the Government had misunderstood or ignored legal obligations concerning climate change related to its decision to proceed with HS2, including obligations arising from the Paris Agreement and the Climate Change Act.¹⁶⁸ The court further stated that there was also nothing to show that the Government was not aware of its commitments under the Paris Agreement and its responsibilities under the Climate Change Act or that it had not taken them into account in its decision.¹⁶⁹ The Government had argued that it had “a good deal of latitude” in how it attained the reduction of GHG emissions in the carbon budgets and the target of net zero emissions in order to make the transition to net zero.¹⁷⁰

The court referred to its judgment in *Friends of the Earth* by stating that the Paris Agreement as “an unincorporated international obligation”, qualified in the context of the Planning Act s.10(3) as an “obviously material” consideration.¹⁷¹ (The UK Supreme Court had not issued its judgment in *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport* when the Court of Appeal issued its judgment.) The court stated, however, that the case brought by Mr Packham was “markedly different” from the Heathrow Airport case.¹⁷² Whereas the Planning Act ss.5(8) and 10(3) set out clear duties for decision making in respect of national policy statements, the Government was not constrained by the Climate

¹⁶¹ *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 at [154]–[156].

¹⁶² *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 at [166].

¹⁶³ See HS2 update: 3 September 2019 available at <https://www.gov.uk/government/speeches/hs2-update-3-september-2019> [Accessed 11 October 2021] (announcing release of the HS2 review).

¹⁶⁴ See PM statement on transport infrastructure: 11 February 2020 available at <https://www.gov.uk/government/speeches/pm-statement-on-transport-infrastructure-11-february-2020> [accessed 11 October 2021].

¹⁶⁵ *Packham v Secretary of State for Transport* [2020] EWHC 829 (Admin) at [89].

¹⁶⁶ *R. (on the application of Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004 at [11]; [2021] J.P.L. 323.

¹⁶⁷ *R. (on the application of Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004 at [83].

¹⁶⁸ *R. (on the application of Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004 at [92].

¹⁶⁹ *R. (on the application of Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004 at [98]–[102].

¹⁷⁰ *R. (on the application of Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004 at [87].

¹⁷¹ *R. (on the application of Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004 at [102].

¹⁷² *R. (on the application of Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004 at [103].

Change Act in making a decision to proceed with HS2.¹⁷³ Further, the court stated that it could be taken that the Government was not fully aware of the UK’s commitments under the Paris Agreement and its responsibilities under the Climate Change Act when it decided, in February 2020, to proceed with HS2 and that it had taken those commitments and responsibilities into account.¹⁷⁴

A38 Derby Junctions expansion

One climate change action in which the claimants prevailed concerns the A38 Derby Junctions expansion. On 8 January 2021, the Secretary of State granted a DCO for the expansion of part of the A38 in Derby to six lanes, including improvements to three junctions. An application for judicial review was brought by a local resident on the basis, among other things, of an alleged breach of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 reg.21.¹⁷⁵ Regulation 21 provides that the Secretary of State must “reach a reasoned conclusion on the significant effects of the proposed development on the environment” when making an order to grant development consent.

The applicant alleged that the Secretary of State had failed to issue a reasoned conclusion that included cumulative climate change impacts, consideration of GHG emissions, and the net zero target of 2050. On 8 July 2021, the High Court agreed and quashed the DCO.¹⁷⁶

The victory will however be short-lived. On 21 July 2021, Highways England issued a statement that included the following:

“We’re confident that the scheme remains the best solution for improving congestion along the A38 in Derby, and we’re still planning to deliver the project. We will however need to slow down with our planned activities and work whilst our DCO application is being reviewed.

Subject to our DCO being re-granted in summer 2022, we expect to start construction work on the project in early winter 2022.”¹⁷⁷

Road Investment Strategy

A further climate change case also involves highway construction. The Transport Action Network (“TAN”), a not-for-profit company, brought a judicial review against the Secretary of State for Transport in which it challenged the Secretary’s decision on 11 March 2020 to adopt the £27.4 billion “Road Investment Strategy 2: 2020–2025” (“RIS 2”) under the Infrastructure Act 2015 s.3.¹⁷⁸ RIS 2 sets out how Highways England will develop and construct 45 road schemes rolled over from RIS 1 and five new schemes. The Infrastructure Act s.3(5) requires the Secretary, in setting or varying an RIS, to have regard in particular of its effect on “the environment, and ... the safety of users of highways”.

TAN argued that the Secretary had failed to take into account the objective of the Paris Agreement to reduce emissions of GHGs as soon as possible, the UK’s net zero target for 2050 in the Climate Change Act s.1, and the fourth (2023–2027) and fifth (2028–2032) carbon budgets in the Climate Change Act s.4.¹⁷⁹ Counsel for TAN accepted that the Infrastructure Act 2015 does not require the above matters to be taken into account. He also accepted that to prevail, TAN must show that the considerations were “obviously material” to the Secretary of State’s decision to set RIS 2 such that it was irrational for him

¹⁷³ *R. (on the application of Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004 at [103].

¹⁷⁴ *R. (on the application of Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004 at [103].

¹⁷⁵ Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572).

¹⁷⁶ See M. Golden, “A38 Derby Junctions DCO Quashed” 28 July 2021 available at <https://www.ftbchambers.co.uk/news/a38-derby-junctions-dco-quashed> [accessed 11 October 2021]; see also “National Infrastructure Planning: Highways: A38 Derby Junctions” available at; <https://infrastructure-planninginspectorate.gov.uk/projects/east-midlands/a38-derby-junctions/> [accessed 11 October 2021].

¹⁷⁷ Highways England, “Latest updates; Development Consent Order update” 21 July 2021 available at <https://highwaysengland.co.uk/our-work/east-midlands/a38-derby-junctions/> [accessed 11 October 2021].

¹⁷⁸ *R. (on the application of Transport Action Network) v Secretary of State for Transport* [2021] EWHC 2095 (Admin).

¹⁷⁹ *R. (on the application of Transport Action Network) v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at [8].

not to have taken them into account.¹⁸⁰ The Secretary argued that he had taken the considerations into account and, even if he had not, they were not “obviously material considerations” to which he was legally obliged to have regard in his decision on RIS 2.¹⁸¹

On 26 July 2021, the High Court ruled for the Secretary of State. The court referred to *Friends of the Earth* by stating that “the Paris Agreement did not impose an obligation on any state to adopt a binding domestic target to ensure that the objectives of the Agreement were met”,¹⁸² and that “[t]he specific legal obligation imposed was to meet any NDC communicated by the state in question”.¹⁸³ As indicated above, the UK’s NDC was a reduction of GHG emissions of 68% by 2030 compared to 1990 levels, excluding emissions from international aviation and shipping.

The court further stated that the Secretary of State must have been aware of obligations under the Climate Change Act, which reflected the UK’s NDC when he set RIS 2.¹⁸⁴ The court also stated that, following *Friends of the Earth*, the Paris Agreement was not an “obviously material” consideration.¹⁸⁵ Further, the court stated that the Secretary of State had plainly taken the net zero target into account when he set RIS 2.¹⁸⁶ The court continued that “the real issue raised” by the challenge was whether the Secretary of State failed to take account of implications for the net zero target in the Climate Change Act s.1 and carbon budgets that led towards that target, “in the sense that these were obviously material considerations to which he was legally obliged to have regard”.¹⁸⁷ Further, the court stated that RIS 2 was essentially a high-level investment strategy; it was not an environmental decision-making document.¹⁸⁸

The court ruled that there was no legal basis for the Secretary to take account of a numerical assessment of how predicted carbon emissions from RIS 2 related to the fourth and fifth carbon budgets or a cumulative assessment of carbon emissions over a longer period.¹⁸⁹ Still further, the court concluded that there was no reason to question the Department for Transport’s judgement that the effect on carbon emissions from the five new schemes in RIS 2 would be de minimis.¹⁹⁰

Oil and gas licences, road and aviation programmes, and Cumbria coal mine

The next case discussed in this article involves a challenge against multiple large projects initiated or participating in by the UK Government including, as indicated previously, the proposed coal mine in Cumbria.

On 1 May 2021, three young British citizens (Jerry Amokwandoh, Adetola Onamide and Marina Tricks, supported by Plan B Earth) filed a petition for judicial review against the Prime Minister, the Chancellor of the Exchequer and the BEIS.¹⁹¹ The complainants alleged that the UK Government had failed to honour its commitments under the Paris Agreement, had breached the claimants’ rights to life and family life under the ECHR arts 2 and 8 and had breached the prohibition of discrimination in the enjoyment of those rights under the ECHR art.14 as enacted through the Human Rights Act 1998 by its ongoing support of fossil fuels. They further alleged that the UK Government was making a “dishonest” claim to climate leadership and adherence to the Paris Agreement because, instead of urgently reducing GHG emissions,

¹⁸⁰ *R. (on the application of Transport Action Network) v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at [10].

¹⁸¹ *R. (on the application of Transport Action Network) v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at [11].

¹⁸² *R. (on the application of Transport Action Network) v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at [41].

¹⁸³ *R. (on the application of Transport Action Network) v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at [41].

¹⁸⁴ *R. (on the application of Transport Action Network) v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at [82].

¹⁸⁵ *R. (on the application of Transport Action Network) v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at [112].

¹⁸⁶ *R. (on the application of Transport Action Network) v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at [114].

¹⁸⁷ *R. (on the application of Transport Action Network) v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at [117].

¹⁸⁸ *R. (on the application of Transport Action Network) v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at [121]–[122].

¹⁸⁹ *R. (on the application of Transport Action Network) v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at [142].

¹⁹⁰ *R. (on the application of Transport Action Network) v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at [159].

¹⁹¹ See “Young People v UK Gov: Right to Life & the Paris Agreement” available at <https://planb.earth/plan-b-v-government-bailouts-for-polluters> / [accessed 11 October 2021].

it was granting new oil and gas licences in the North Sea, investing billions of pounds in new roads, expanding aviation capacity, and had backed the opening of a new coal mine in Cumbria.¹⁹²

On 21 May 2021, the UK Government filed summary grounds of defence.¹⁹³ Those grounds illustrate the Government's approach to its executive powers concerning the effect of the Paris Agreement, the ECHR, and the Climate Change Act. The summary grounds of defence include the following statements:

- “[t]he Paris Agreement imposes no obligation on individual states to implement [its] goals in any particular way”,¹⁹⁴
- “provisions of the Paris Agreement on adaptation to climate change ... are even less prescriptive”,¹⁹⁵ and
- except for “certain exceptional circumstances and with special justification (which does not apply in this case), the ECHR confers a responsibility on states to safeguard [ECHR] rights only within their own territories”.¹⁹⁶

The summary grounds of defence noted, in particular, the claimants' references to the planning system, and rejected them.¹⁹⁷ It referred to the Cumbria coal mine case by commenting that the Secretary of State's decision to call in the application and to hold a public inquiry:

“shows that the planning system works to ensure that (i) climate change impacts are assessed when planning applications are considered and (ii) the exceptional safeguard of calling-in applications for determinations by the Government may be used for applications of particularly sensitivity or controversy for climate change.”¹⁹⁸

In other words, the Government argued among other things that the Paris Agreement does not mandate measures that the UK (or any other party to it) must take to reduce GHG emissions and to meet its NDC. This is true. The arguments miss the point however. In effect, the UK Government has proposed, and is carrying out, projects that will increase rather than reduce the UK's GHG emissions. The UK will not meet the reductions specified in the fourth and subsequent carbon budgets and the net zero target unless it carries out, not only measures to reduce GHG emissions from current activities, but further measures to compensate for the increased GHG emissions from those projects. The longer the UK Government takes to put into effect measures to reduce GHG emissions, the harder—and more expensive—it will be for it to do so.

Mozambique offshore deep water gas production facility

The UK Government has also facilitated projects that will increase the GHG emissions of other countries in breach of the Paris Agreement. In September 2020, the High Court granted an application by Friends of the Earth for judicial review of the decision of UK Export Finance, approved by the Secretary of State for International Trade and the Treasury, to invest approximately \$1 billion in a liquefied natural gas development 50km from the coast of Northern Mozambique. The facility, which is being developed by Total, will extract up to four billion cubic feet of gas per day.

¹⁹² *R. (on the application of Plan B Earth) v The Prime Minister* Statement of Facts and Grounds paras 315–339; available at <http://climatecasechart.com/climate-change-litigation/non-us-case/plan-b-earth-and-others-v-prime-minister/> [accessed 11 October 2021]. ECHR art.14 provides that: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

¹⁹³ *R. (on the application of Plan B Earth) v Secretary of State for Business, Energy and Industrial Strategy* Summary Grounds of Defence available at <https://planb.earth/plan-b-v-government-bailouts-for-polluters/> [accessed 11 October 2021].

¹⁹⁴ *R. (on the application of Plan B Earth) v Secretary of State for Business, Energy and Industrial Strategy* Summary Grounds of Defence para.30.

¹⁹⁵ *R. (on the application of Plan B Earth) v Secretary of State for Business, Energy and Industrial Strategy* Summary Grounds of Defence para.31.

¹⁹⁶ *R. (on the application of Plan B Earth) v Secretary of State for Business, Energy and Industrial Strategy* Summary Grounds of Defence para.36.

¹⁹⁷ *R. (on the application of Plan B Earth) v Secretary of State for Business, Energy and Industrial Strategy* Summary Grounds of Defence para.24.

¹⁹⁸ *R. (on the application of Plan B Earth) v Secretary of State for Business, Energy and Industrial Strategy* Summary Grounds of Defence para.70.

Friends of the Earth alleged that the construction phrase by itself will increase Mozambique’s GHG emissions by up to 10% by 2022, and that GHG emissions from the end use and burning of gas will equate to all emissions from the aviation sector for all EU Member States combined and that the UK Government had not calculated the emissions.¹⁹⁹

In April 2021, the High Court granted permission to Friends of the Earth to challenge the decision in respect of its arguments that: (1) the decision to invest incorrectly found that the project was consistent with the UK’s and Mozambique’s commitments under the Paris Agreement; and (2) the UK Government failed properly to analyse the project’s consistency with the UK’s obligations under the Paris Agreement.²⁰⁰

In September 2021, the House of Commons International Trade Committee noted that the project had been approved before the UK Government announced that it was ending support for fossil fuel projects overseas.²⁰¹ The policy, which has limited exceptions such as gas power and directly related infrastructure, and carbon capture and storage projects, is effective from 31 March 2021.²⁰²

Conclusion

As indicated above, planning law in England and Wales includes climate change considerations. The key provisions from a practical perspective are the Planning Act ss.5(8), 10(2) and 10(3) and the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 regs 15 and 21.²⁰³ The UK Government has, however, strongly opposed challenges to halt proposed major development projects on the basis of planning law, as well as the Climate Change Act, the Paris Agreement, and the ECHR. In essence, the Government has argued that the domestic legislation and the UK’s commitments under international legislation do not provide a basis to halt the proposed development projects. Courts have upheld the UK Government’s position. The issue, therefore, is not the courts’ rulings but rather the absence of legislation—and policies—that establish measures to ensure that the Government makes progress to meet the UK’s commitments to reduce GHG emissions. As indicated in this article, other countries have such legislation and policies to ensure that their governments make progress in meeting their commitments. Without such legislation and policies in the UK, there is an ever-increasing risk that the UK will fail to meet its commitments.

Planning guidance, as well as legislation, in the UK includes climate change considerations. For example, the NPPF s.14, entitled “Meeting the challenge of climate change, flooding and coastal change”, states that “[t]he planning system should support the transition to a low carbon future in a changing climate, taking full account of flood risk and coastal change”,²⁰⁴ and that “[p]lans should take a proactive approach to mitigating and adapting to climate change . . .”.²⁰⁵ The NPPF further states that avoiding increased vulnerability to the impacts of climate change should be considered in planning new developments as well as reducing GHG emissions by location, orientation and design of buildings.²⁰⁶ Guidance by the

¹⁹⁹ Friends of the Earth Briefing, “UK Export Finance—climate litigation” June 2021 available at https://cdn.friendsoftheearth.uk/sites/default/files/downloads/UKEF_Briefing_updated_June_2021.pdf?_ga=2.107086466.1225136202.1624656475-1553641798.1624656475 [accessed 11 October 2021] and “Climate litigation briefing: Friends of the Earth vs UK Export Finance” 10 December 2020 available at <https://friendsoftheearth.uk/system-change/climate-litigation-briefing-friends-earth-vs-uk-export-finance> [accessed 11 October 2021].

²⁰⁰ “Friends of the Earth v UK Export Finance” available at <http://climatecasechart.com/climate-change-litigation/non-us-case/friends-of-the-earth-v-uk-export-finance/> [accessed 11 October 2021]; “Friends of the Earth, Friends of the Earth given permission to take UK government to court over Mozambique gas mega project” 22 April 2021 available at <https://friendsoftheearth.uk/climate/friends-earth-given-permission-take-uk-government-court-over-mozambique-gas-mega-project> [accessed 11 October 2021].

²⁰¹ House of Commons International Trade Committee, UK Export Finance Second Report of Session 2021–22, HC 126, 20 September 2021, 35, para. 116 available at <https://publications.parliament.uk/pa/cm5802/cmselect/cmintrade/126/report.html> [accessed 11 October 2021].

²⁰² Department for Business, Energy & Industrial Strategy, “Aligning UK international support for the clean energy transition; guidance” March 2021 available at <https://www.gov.uk/government/publications/how-the-government-will-implement-its-policy-on-support-for-the-fossil-fuel-energy-sector-overseas> [accessed 11 October 2021].

²⁰³ Other provisions include the Infrastructure Act s.3(5) and the Planning and Compulsory Purchase Act s.19(1A).

²⁰⁴ National Planning Policy Framework para. 152.

²⁰⁵ National Planning Policy Framework para. 153.

²⁰⁶ National Planning Policy Framework para. 154.

Ministry of Housing, Communities and Local Government (now the Department for Levelling Up, Housing and Communities) sets out mitigation and adaptation measures to be considered in planning to address the impacts of climate change.²⁰⁷

The above guidance, however, is just that: guidance. It is not legislation. Further, the guidance is directed at local authorities; it is not directed at central government.

The CCC reported that spatial planning is one of the biggest opportunities that local authorities have to deliver net zero. It stated that local planning authorities have the potential to ensure that new developments are sustainable, well-adapted, and have low emissions by, for example, connecting them to bus routes and walking and cycling networks. The CCC noted, however, that there is “a policy intention and delivery gap”.²⁰⁸ This gap is caused by the NPPF, the method of calculating housing targets and viability rules. Taken together, the CCC stated, these undermine the ability of local authorities to build high quality and low carbon developments in sustainable locations, particularly in areas with low land values.²⁰⁹

The CCC commented that although local authorities are increasingly ambitious in their plans to tackle climate change and many are developing plans to achieve net zero targets, their ability to attain net zero is unlikely to succeed “due to gaps in powers, policy and funding barriers, and a lack of capacity and skills at a local level”.²¹⁰

The onus, therefore, is on central government, both in facilitating local authorities in measures to reduce GHG emissions, and in ensuring that central government meets its commitments under the Paris Agreement, including the UK’s ambitious NDC. As stated by Lord Deben, Chairman of the CCC, and quoted by Lord Carnwath CVO in his lecture, hosted by the Center for International Dispute Resolution of Bucerius Law School in Hamburg in March 2021, “The UK’s international credibility is on the line”.²¹¹

²⁰⁷ Ministry of Housing, Communities and Local Government, “Climate Change” updated 15 March 2019 available at <https://www.gov.uk/guidance/climate-change> [accessed 11 October 2021].

²⁰⁸ Committee on Climate Change, “Local Authorities and the Sixth Carbon Budget” 9 December 2020, 33 available at <https://www.theccc.org.uk/publication/local-authorities-and-the-sixth-carbon-budget/> [accessed 11 October 2021].

²⁰⁹ Committee on Climate Change, “Local Authorities and the Sixth Carbon Budget” 9 December 2020, 33.

²¹⁰ Committee on Climate Change, “Local Authorities and the Sixth Carbon Budget” available at <https://www.theccc.org.uk/publication/local-authorities-and-the-sixth-carbon-budget/> [accessed 11 October 2021].

²¹¹ Lord Carnwath, Bucerius School—Luther Lecture—Hamburg 22 March 2021; Climate Change and the Rule of Law (quoting Committee on Climate Change, Reducing UK emissions Progress Report to Parliament (July 2020), Foreword) available at <https://www.lse.ac.uk/granthaminstitute/publication/climate-change-and-the-rule-of-law/> [accessed 11 October 2021].