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Conference for the Presidents of the Constitutional Courts of Europe, Berlin

"Recourse to Constitutional Courts in Climate Litigation Cases"

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Introduction

1. Litigants are increasingly turning to constitutional courts in climate change litigation. Globally, the number of climate change-related cases has more than doubled since 2015, the year of the Paris Agreement on Climate Change. This has been reflected in the UK. Since 2018 courts have handed down more than 20 judgments in climate change cases, including ten between June 2021 and July 2022. Of those cases only one concluded claim has ultimately succeeded, although there have been two dissenting judgments and one of the cases is shortly to be heard on appeal in the Supreme Court.

The UK constitution

2. There are specific features of the UK's constitution which mean that the context for public law claims involving issues of climate change differs from that in some other European countries.

3. First, the UK does not have a constitution in the sense of a body of legal norms which outrank legislation and are binding on all constitutional actors. We have no equivalent, for example, of article 20a of the Grundgesetz. There can therefore

be no direct equivalent in our domestic law of the First Senate's reasoning in *Neubauer and others v Germany*.[1] In addition, our constitutional law attaches great importance to the principle of political accountability of the Executive to Parliament, and to a corresponding principle that the Executive can be held accountable in the courts if it breaches the law, but not for political choices within the range which is lawfully available.

4. Secondly, it follows that UK courts recognise that judges are not policy makers and that the courts must respect democratic processes. Judicial review of decisions by public bodies is concerned with ensuring that public bodies act within the legal limits of their powers and in accordance with the procedures and legal principles governing the exercise of their functions. The court is not responsible for making political, social or economic choices. This has an obvious influence on the judicial approach to some of the cases in this area, as addressing climate change involves complex and difficult political, economic and social decisions, which Parliament has entrusted to ministers and other public bodies. In addition, it is a well-established principle of public law that the courts accord an enhanced margin of appreciation to decisions involving or based upon scientific, technical and predictive assessments by those with appropriate expertise. This includes the specialised agencies concerned with climate change and environmental protection.

[1] *Neubauer and others v Germany* (1 BvR 2656/18; 1 BvR 78/20; 1 BvR 96/20; 1 BvR 288/20). English translation available at: Bundesverfassungsgericht - Decisions - Constitutional complaints against the Federal Climate Change Act partially successful

5. Thirdly, we adopt a dualist approach to international law. That follows from the sovereignty of Parliament, since it is only Parliament that can change the law, and treaties are entered into not by Parliament but by the Executive. It means that the Executive's international obligations under treaties such as the Paris Agreement are not legally enforceable in our domestic courts. However, they can and do have an influence on the interpretation of domestic legislation implementing international obligations in relation to climate change.

Climate change litigation in the UK

6. Climate change litigation in the UK can be grouped under 4 main headings: (1) Statutory challenges; (2) Environmental Impact Assessment challenges; (3) Material consideration challenges; and (4) Human Rights challenges[2]. Each will be briefly addressed.

(1) Statutory challenges

7. The most significant domestic legislation is the Climate Change Act 2008, which was the first legislation in the world to set a mandatory target for the reduction of carbon emissions. The current target, set following the Paris Agreement, is for the net carbon account for the year 2050 to be at least 100% lower than the 1990 baseline. The Act lays down detailed machinery for successive five year carbon budgets. For each successive period of five years, at least 12 years in advance,

[2] *Joshua Kimblin – Climate Change, The Courts and The Constitution*, The Constitution Society Report (December 2022)

an amount for the net UK carbon account must be set by the relevant Minister, who must ensure that the actual net UK carbon account does not exceed that budget. The Act established a highly respected public body which is independent of government, the Climate Change Committee, to advise the UK and devolved executives and legislatures on tackling climate change. The Committee reports annually to Parliament on the progress made towards meeting the carbon budgets and the Minister is required to respond.[3] This legislative framework appears to meet the requirements which were considered necessary in Germany in the *Neubauer* case.

8. The courts will take action if the government breaches its obligations under the Climate Change Act. For example, in proceedings brought by Friends of the Earth, the court held that the Secretary of State had failed to comply with provisions of the Act bearing on the disclosure of information.[4] On the other hand, attempts to go beyond the domestic legislation by alleging breaches of the Government's obligations under the Paris Agreement have all been unsuccessful.[5] The standing of the claimants – normally charities and NGOs – has been accepted, following the broad approach to standing followed in English

[3] See sections 13-14, 33-34, 36-37 and 56-58 of the Climate Change Act 2008.
[4] *R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin); [2023] 1 WLR 225.
[5] See, for example, *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2021] PTSR 190; *R (Packham) v Secretary of State for Transport* [2021] JPL 323; *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin); *R (Elliott-Smith) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 1633 (Admin); and *R (Transport Action Network Ltd) v Secretary of State for Transport* [2021] EWHC 2095 (Admin).

law, but the claims have failed essentially because, as I have explained, international law is not domestically enforceable.

(2) Environmental Impact Assessment challenges

9. EU derived legislation obliges decision-makers to assess the environmental impacts of carbon-intensive schemes. In particular, developers are required to provide an Environmental Statement describing the likely significant effects of a development – both "direct" and "indirect". In two cases challenges were brought on the grounds that the Environmental Statements made did not take into account downstream effects. It was argued that indirect effects are not limited to the impact of constructing and running the sites but should include the environmental effects of the consumption or use of an end product (in these cases, oil) and the greenhouse gas emissions produced by subsequent processes involving the extracted oil (such as refining and burning the oil). To date those challenges have failed but one of the cases[6] will be heard on appeal in the Supreme Court in June 2023.

(3) Material consideration challenges

10. In a number of cases it has been alleged that a government or public authority decision was unlawful because it failed to take into account an obviously material consideration or took into account an irrelevant consideration.

[6] *R (on the application of Finch on behalf of the Weald Action Group) v Surrey County Council* [2022] EWCA Civ 187.

11. In climate-related challenges, litigants have so far focussed upon two main considerations.

12. The first consideration is the Paris Agreement. In a succession of cases, litigants argued that government decision-makers unlawfully failed to consider the Paris Agreement or some of its terms. These cases included challenges to the Government's decision to proceed with constructing the HS2 rail network and with a third runway at Heathrow Airport. These claims failed although the Heathrow claim succeeded in the Court of Appeal only to be overturned in the Supreme Court[7].

13. The second consideration is the necessity of quantified projections of climate impacts, in terms of both calculating total green house gas emissions of proposed government schemes and quantitatively assessing the overall impact of government policies in reaching the Net Zero target. Claims based upon the latter consideration succeeded in the *Friends of the Earth* case previously mentioned.

(4) Human Rights challenges

14. Our domestic law also includes legislation giving effect to the European Convention on Human Rights. We treat the European Court of Human Rights as

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

the authoritative arbiter of the Convention, but we do not always follow its decisions if we find the reasoning unconvincing. We can go ahead of the Strasbourg court where the principles it has laid down enable us to do so, but we do not go further than we can be confident that it would go in similar circumstances. As a result, rights-based climate litigation has been unsuccessful in the UK to date, as it has been in Strasbourg. There has been no equivalent of the Dutch *Urgenda* case,[8] where the Dutch court felt able to adopt a view of the Convention which went beyond the principles established by the Strasbourg court. In particular, in UK litigation claimants have had difficulties (i) in identifying an interference with any identifiable victim's rights; (ii) in identifying a specific interference as opposed to general effects of climate change and (iii) in justifying intervention on an issue in relation to which the executive has a wide margin of appreciation.

Conclusion

15. In conclusion, to date the response of the UK courts to climate change related claims has been cautious with deference being shown to the political, social and economic choices which have been entrusted to ministers and other public bodies and a wide margin of appreciation has been afforded. This is, however, an evolving legal landscape and one in which developments in other jurisdictions will be watched closely by litigants and advantage sought to be taken of any

[8] *Urgenda Foundation v The Netherlands* (Articles 2 and 8) Supreme Court of the Netherlands, 20 December 2019, ECLI:NL:2019: 2006, English translation ECLI:NL:HR:2019:2007.

justification for a more interventionist approach. There is no shortage in the UK of sophisticated and motived climate change litigants ready and willing to take every opportunity to push at legal boundaries. Regardless of outcome, they also see litigation as a means of raising awareness of issues and of exerting pressure on government to respond to the effects of climate change.