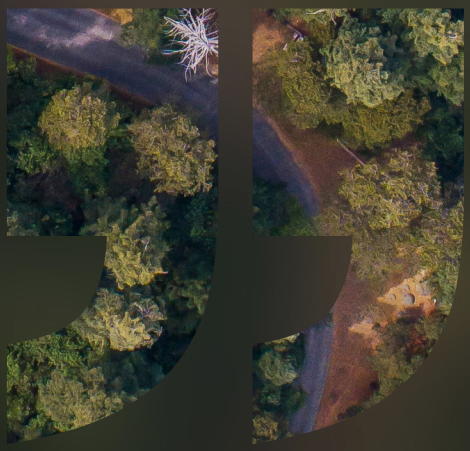
CLIFFORD
CHANCE

UK NET ZERO STRATEGY RULED UNLAWFUL LEAVING UNCERTAINTY OVER UK CLIMATE POLICY



— THOUGHT LEADERSHIP

JULY 2022

UK NET ZERO STRATEGY RULED UNLAWFUL LEAVING UNCERTAINTY OVER UK CLIMATE POLICY

On 18 July 2022, the High Court declared that the UK's Net Zero Strategy is, in part, unlawful and ordered the Secretary of State to revise it by March 2023. In this briefing we consider the judgment[1] and its implications for future climate policy and, more generally, for UK climate litigation.

Key issues

- The High Court has declared the UK Net Zero Strategy (NZS) to be partially unlawful on the basis that:
  - (i) the briefing given to the Secretary of State to assist him in determining whether the Sixth Carbon budget could be met by policies and proposals under the NZS was legally deficient in various respects (under Section 13 of the Climate Change Act 2008 (CCA 2008)); and
  - (ii) information provided to Parliament, in the form of the NZS, to enable it to scrutinise whether carbon budgets would be met was also deficient in some respects (under Section 14 CCA 2008).
- The Court rejected an additional human rights ground to the claim, in seeking to extend the interpretation of these Sections of the CCA 2008, as being 'too ambitious', and declined to intervene on climate policy made within the limits of the law.
- The NZS has not been quashed but the Court ordered an amended NZS to be published by March 2023.
- Policies in the NZS will need to be further assessed and may need to be strengthened, although this is unlikely to lead to a major change in direction in climate policy. However, there is some uncertainty in how the NZS will develop in view of the ongoing Conservative Party leadership campaign.
- It is possible the Courts will scrutinise private sector 'transition plans' in future and these should be based on robust evidence and analysis where possible.

Context – the Climate Change Act 2008 and the Net Zero Strategy

The UK Government announced its high profile 'net zero' policy in June 2019 and swiftly made it legally binding through an amendment to the Climate Change Act 2008 (CCA 2008). The successive 5 year binding 'carbon budgets' under the Act were also strengthened, and the sixth budget, for 2033-2037, (CB6) was the first to be amended as part of the new trajectory towards net zero.

Stakeholders called for a robust UK Net Zero Strategy (NZS) to provide the detailed policies and measures needed to achieve these targets. A NZS was also seen as crucial to the Government's credibility in its role as COP26 President (which took place in November 2021) and to its success in persuading other countries to ramp up their commitments and action on climate change. The NZS was published shortly before COP26 in October 2021.

The NZS contains a wide range of policy proposals across multiple sectors. Given uncertainty about energy and technology solutions to climate change in the years to come, the NZS featured a number of modelled '2050 scenarios' showing the contributions of different technologies in different sectors to the emission reduction effort (e.g. the use of hydrogen or electrification in the building and transport sectors). The NZS then set out an indicative 'delivery pathway' for emissions reductions to 2037 (the end of the CB6) which was said to be consistent with these scenarios and was based on the understanding of each sector's potential to reduce emissions.

While the NZS delivery pathway and the modelling involved suggested that the reductions required by CB6 would be achieved by a slim margin, it emerged during the preliminary stages of the present case that the proposals and policies in the NZS whose impact had been *quantitatively* (i.e. numerically) analysed would only meet 95% of the reductions necessary for CB6. The remaining 5% reductions (the 5% Shortfall) would be secured from future "planned policy work" referred to in the NZS but whose predicted effects had been subject only to *qualitative* analysis and judgement. These included for example, the impacts of cross-cutting measures which would help to develop the transition to a low carbon economy, such as innovation through research funding, and green investment. Information as to which policies and proposals had been subject to quantitative analysis and the fact that there was a 5% Shortfall was not mentioned in the NZS, and this ultimately formed a key aspect of the legal challenge to the NZS brought in the High Court by Friends of the Earth, ClientEarth and Good Law Project, NGOs that are increasingly focusing their efforts on seeking to make governments globally move more quickly on climate action through legal action. Given the overlapping nature of the challenges, the High Court delivered a single judgment on the conjoined claims brought on a number of grounds.

CCA 2008 Ground 1

Ground 1 related to the duty of the Secretary of State for Business, Energy and Industrial Strategy (SoS) under Section 13 of the CCA 2008 to prepare

1 The Queen (on the application of (1) Friends of the Earth Limited (2) ClientEarth (3) Good Law Project and Joanna Wheatley v Secretary of State for Business, Energy and Industrial Strategy [2022] EWHC 1841 (Admin)

proposals and policies necessary to enable carbon budgets to be met. Ground 1 had two parts.

Firstly, it was claimed that the SoS could only satisfy its Section 13 duty where quantitative analysis had been conducted into the effects of policies or proposals that would deliver 100% of the reductions necessary to meet CB6 (and not only 95%). ***This part of Ground 1 did not succeed***. Significantly, the judge felt that, although there was a need for a certain level of quantitative analysis, it was inevitable that qualitative judgement would also be required given that predictive assessment many years into the future would be involved, and given uncertainties about future economic growth, energy, prices, population growth, the impact of investment in technological innovation and policy implementation. The judge rejected the claimants' concerns that this could enable the SoS to rely on qualitative impact analysis for 50% or more of the required reductions, stating that the SoS "*would need to be satisfied that the meeting of that shortfall by qualitative analysis is demonstrated to him with sufficient cogency. As that shortfall increases, so that task would be likely to become increasingly challenging for the Secretary of State and his officials*." The judge also pointed to the mechanisms of the Climate Change Committee (CCC) and Parliamentary review and, ultimately Judicial Review, which would act as controls on the SoS in complying with this duty. The judge also rejected the claim that a certain degree of certainty was needed as to the effect of the policies, stating that the SoS simply needed to exercise his judgement to determine whether the policies, taken together, would be effective.

Secondly, it was claimed that the material provided to the Minister of State (acting on behalf of the SoS) for sign off on the NZS (the Briefing), was legally insufficient for him to be satisfied under Section 13 that the proposals and policies would enable CB6 to be met, because the following information was not provided:

a. The **contribution** each quantifiable proposal or policy would make to meeting carbon budget; and

b. Identification of the **proposals and policies that would ensure** that the **5% Shortfall** will be met.

Although department officials had conducted quantitative analysis identifying the extent to which individual policies contributed to the carbon budgets, this was not included in the Briefing (which considered only the combined effects of the policies). ***This part of Ground 1 was successful***[2]. Applying established principles, the Court held that the contribution of each policy / proposal to meeting CB6, and the identification of those policies and proposals that would make up the 5% Shortfall, both needed to be taken into account by the SoS in complying with his Section 13 duty, particularly in light of the assumption made in the Briefing that the quantified policies would be implemented in full. Without that information, there was no way the SoS could weigh up the quantitative assessment made by his officials, the contribution of each policy to reducing greenhouse gas (GHG) emissions, and officials' approach to making good the 5% Shortfall, and thereby assess the risk of statutory targets not being met.

CCA 2008 Ground 2

Ground 2 related to the SoS's duty under Section 14 CCA 2008 to report to Parliament on proposals and policies for meeting carbon budgets. Under this ground, the claimants argued that certain information (much of which overlaps with information mentioned above in Ground 1) was missing from the NZS, being numerical explanations for his conclusion that the NZS proposals and policies would meet the carbon budgets, and the extent that each proposal or policy (insofar as quantifiable) contributed to required emissions reductions.

Ground 2 was successful in part[2] The Court dismissed the SoS's suggestion that all Section 14 required him to do was set out the proposals and policies in its report to Parliament without any

2 Aspects of Grounds 1 and 2 claiming lack of information relating to timing over which individual policies and proposals would have effect did not succeed.

explanation. The judge felt fuller explanation of how the targets would be met was required by the statutory scheme and warranted, in particular, by the CCC's need for information to perform its expert role in determining whether carbon budgets and targets are likely to be met. It was also necessary from the perspective of achieving public transparency (a point adopted from the decision of the Supreme Court of Ireland in *Friends of the Irish Environment CLG v The Government of Ireland [2020] IESC 49*), meaning essentially that the public are entitled to know how the government intends to meet its national climate objectives and the potential effects on different sectors. The Court felt that the NZS was deficient in a number of ways that were obviously material to satisfying its Section 14 duty, including that it did not:

- Contain any quantitative assessment of the contribution of individual (or interacting) policies to the targets, although it recognised that the SoS may need to use its judgement as to how much detail to publish in relation to quantitative analysis that was not yet fully developed;
- Mention that the policies which had been subject to quantitative assessment of their effects would only achieve 95% of the reductions required for CB6 (not 100%);
- Explain how the 5% Shortfall would be made up; nor
- Explain that tables in the NZS showing detail of its modelling of the 2037 delivery pathway did not result from its quantitative analysis of emissions reductions and how these two types of analysis differed.

The Human Rights Ground 3

Finally, the Human Rights Ground addressed whether the Court should alter the ordinary interpretation of Sections 13 and 14 CCA 2008 to make these provisions more conducive with, or more effective for, the protection of the rights to life, quality of life and property under the European Convention on Human Rights (ECHR) as is required under section 3(1) of the Human Rights Act 1998 (HRA).

The ECHR is incorporated into English law through the HRA (which is set to be replaced by a new UK Bill of Rights, introduced in June 2022). Section 3(1) of the HRA requires, so far as is possible, primary legislation and subordinate legislation to be read and given effect in a way which is compatible with the ECHR. This includes ECHR Article 2 (right to life), ECHR Article 8 (right to respect for private and family life) and Article 1 of the First Protocol to the ECHR (protection of property).

The claimants' argument was premised on the fact the UK has obligations to uphold the Convention rights, and that a failure to take effective action against climate change represents a real and imminent threat to basic human rights under the Convention. Accordingly, the claimants argued that the greater and more effective the action taken by the state to reduce emissions and safeguard against climate action, the greater the effect will be in minimising the risk in the future to life, quality of life and property. On the claimants' case, only a more stringent interpretation of Sections 13 and 14 CCA 2008 could be compatible with the ECHR.

The court deemed this argument as "too ambitious" in a number of respects, not least because:

- The HRA does not give the court a free rein to adopt an interpretation of a provision which is different from that which would otherwise apply, just to make it "more conducive" or "more effective" to minimise the impact of climate change or enhance the protection of Convention rights.
- The claimants' argument introduces the question of degree, but without a proper test for interpreting the legislation. Absent such a test, the claimants' approach means there remains a possibility that there might be another interpretation of the legislation which would be even "more conducive" or "more effective" to the point where the ordinary meaning of the language used by Parliament could become unrecognisable or cease to apply.
- The European Court of Human Rights (ECtHR) has not yet determined that

the impact of climate change falls within the scope of the rights to life, quality of life and property under ECHR Articles 2 and 8 and Article 1 of the First Protocol to the ECHR.

The human rights angle of the claim resonates with a growing trend of cases internationally, in which claimants have sought to frame climate change as a human rights issue, most notably in the landmark *Urgenda* case in which the Dutch Supreme Court commented that ECHR Articles 2 and 8 should be interpreted to require contracting states to "*do their part*" to counter climate danger and found that the Dutch State had a positive obligation under ECHR to reduce GHG emissions by at least 25% relative to 1990 levels by the end of 2020.

The *Urgenda* decision has since led to a number of similar claims globally which seek to challenge the perceived inaction of governments in relation to climate policy, with the present case being the first of its kind in the UK to follow this trend. The *Urgenda* decision is not, however, binding on other ECHR member states (including the UK) and the right to a healthy environment is yet to be enshrined under the ECHR. Nevertheless, there are currently at least four climate cases before the ECtHR, meaning the status quo could be set to change soon. If so, whilst the HRA does not require the English courts to follow the decisions of the ECtHR, the HRA requires them to take account of the decisions of the ECtHR (and similarly the English courts will not be bound by the jurisprudence of the ECtHR if the UK Bill of Rights replaces the HRA).

In the present case, *Urgenda* was cited briefly in the judgment as a case relied upon by the claimants in support of the Human Rights Ground. However, whereas the present case concerned a question of interpretation of the SoS's duty to formulate policy in circumstances where he had a wide scope to do so, the *Urgenda* case concerned a very specific challenge regarding the legality of the Dutch State's decision in 2011 to reduce its GHG reduction targets to levels that were inconsistent with international consensus.

For all these reasons the Human Rights Ground failed, signalling a clear reluctance by the English courts to intervene with climate change policy made within the limits of the law.

Implications of the judgment

Significantly, the Claimants viewed much of the content of the NZS positively, and they had therefore sought only a declaration that the NZS was unlawful, rather than for the NZS to be quashed in its entirety. As a result, the Court ordered the Secretary of State to lay a fresh (compliant) NZS before Parliament before the end of March 2023. It is also worth noting that these claims did not challenge the ambition of the CCA 2008 targets or the carbon budgets. To this extent, the judgment is unlikely to lead to a major change in direction of climate policy.

However, this is more than a merely technical judgment. The fact that the SoS will now need specifically to consider how the unquantified policies will reach the 5% shortfall in emission reductions, may mean that individual policies and proposals (whether previously quantified or not) need to be strengthened to give the SoS sufficient confidence that CB6 can be met (i.e. by 2037). The fact that a certain level of the quantitative analysis undertaken will now need to be included within the NZS itself, will give the CCC and Parliament (and of course, NGOs) greater opportunity to determine whether the SoS has got that judgement right, and potentially for stakeholders to challenge the NZS again if they think he has not.

The court's comments in relation to the Human Rights Ground of the claim are noteworthy in that they indicate a reluctance by the domestic courts to alter the meaning of existing policy to conform with human rights principles that are not yet enshrined in the ECHR. This is in contrast to the approach we have seen in The Netherlands, where the Dutch Courts have voiced a more political stance.

The judgment also highlights just how complex the process is to determine a strategic path towards net zero to be played out over several decades, given the technological, economic, social and

political uncertainties at play. The judgment should give some comfort to the Government and officials that uncertainty of policy effect is not an obstacle to a lawful NZS, but that must be counter-balanced by allowing the Parliament, the CCC and the public the ability to properly scrutinise the political judgement involved in addressing that uncertainty.

Co-incidentally, an added layer of political uncertainty has recently come into play in the form of the Conservative Party leadership contest. The remaining candidates Liz Truss and Rishi Sunak (one of whom is expected to become Prime Minister in September), while signalling their commitment to the Net Zero target, have raised concerns about 'going too fast' or 'harming people and businesses' in implementing the target. How this plays into the amendment of the NZS will be of concern to businesses seeking certainty of the direction of climate policy, and anyone anxious about whether Net Zero will be reached before it is too late. Recent days' record temperatures across the UK and Europe, and accompanying major expansion of wildfires, should only act as a greater clarion call for businesses to make their views known loudly at this stage and continue their preparations for a net zero world.

In November 2021, the UK Government confirmed its intention to require listed companies, asset managers and regulated asset owners to publish 'transition plans'. Although the Government currently does not intend for these to be *net zero* transition plans, the FCA has already introduced guidance encouraging businesses headquartered in the UK and other countries with *net zero* targets, to consider national net zero commitments when making disclosures on transition plans as part of their TCFD disclosures. While work is still ongoing under HM Treasury's Transition Task Force to determine what a transition plan should look like in the private sector, it is likely that the Courts will in the future be called to assess company transition plans (or disclosures on them); it will be interesting to see the extent to which the Courts will wish to investigate the granular detail of boardroom analysis and processes, to the same extent they are prepared to do in relation to the Government's transition plans. More broadly, companies should be thinking about their plans for transition to a low carbon economy, and basing their transition plans on robust evidence and analysis as far as possible.

CONTACTS

Michael Coxall
Knowledge Director
London
T: +44 207006 4315
E: michael.coxall@cliffordchance.com

Nigel Howorth
Practice Area Leader
Real Estate
London
T: +44 207006 4076
E: nigel.howorth@cliffordchance.com

Stephanie Heimark
Senior Associate
London
T: +44 207006 6208
E: stephanie.heimark@cliffordchance.com

Roger Leese
Partner
London
T: +44 207006 8710
E: roger.leese@cliffordchance.com

Kirsty Souter
Senior Associate
London
T: +44 207006 4178
E: kirsty.souter@cliffordchance.com

Anneke Theelen
Senior Associate
London
T: +44 207006 3045
E: anneke.theelen@cliffordchance.com

Anna Kirkpatrick
Senior Associate
London
T: +44 207006 2069
E: anna.kirkpatrick@cliffordchance.com

Carla Lewis
Senior Associate
London
T: +44 207006 4323
E: carla.lewis@cliffordchance.com

CLIFFORD

CHANCE

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

2207-002022