



# Litigating for the future

The battle for environmental justice: **David Greene** reports on efforts to hold governments & corporations to account for the climate crisis

We need little reminding of the effects of climate change. There may be some who still argue the cause or the solutions, but a shrinking minority suggests that change results in the main from anything other than human activity. The world community has sought to respond, and later this year in Sharm el-Sheikh COP27 will again address the causes of and solutions to the climate emergency.

COP21 (2015) (Conference of the Parties to the 1992 United Nations Framework Convention on Climate Change) in Paris established the Paris Agreement, a legally binding international treaty on climate change, which COP oversees. The UK ratified the agreement in 2016. It has been the source of a growing phenomenon of climate change litigation across the globe, including here in the UK. *R (on the application of Friends of the Earth Ltd and others) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin) is the latest in what will be a long-running litigation campaign by activists on climate change and more generally on environmental, social and governance (ESG) issues.

Article 2 of the Paris Agreement seeks to hold the increase in global average temperature to 2°C above pre-industrial levels, and to seek to limit that increase to 1.5°C. Article 4(1) lays down the basis for the objective of achieving the 'net zero target' by 2050; this is satisfied if the global level of any residual greenhouse gas emissions is at least balanced by sinks, such as forests, which remove carbon from the atmosphere.

The UK implemented the agreement through the Climate Change Act 2008 (CCA 2008) (as amended post-COP21), including specific obligations for the government. CCA 2008 requires the creation of the Climate Change Committee to advise the

government on emissions targets. Further, it imposes a duty on the secretary of state 'to prepare proposals and policies for meeting carbon budgets' (s 13, CCA 2008) and 'to report on proposals and policies for meeting carbon budgets' (s 14, CCA 2008). In 2020, the committee recommended that the government accelerate emissions reductions.

Campaigners said that the government was in breach of those obligations and sought judicial review. Mr Justice Holgate agreed in part. First, he concluded that the secretary of state was not provided with sufficient data to properly exercise the obligations under ss 13 and 14, CCA 2008. Importantly, however, he rejected the applicants' argument that there was a requirement for the government to be satisfied that its estimate of emissions reductions from quantifiable policies would enable 100% of the target to be met. The secretary of state is left with much discretion.

The applicants also sought to argue that the government's policy was in breach of its obligations under Art 2 (right to life), Art 8 (right to private life, family life, home, and correspondence) and A1P1 (right to property) of the European Convention for Human Rights (ECHR) to take effective action against climate change because it represents a real and 'imminent threat' to 'life, quality of life and to property'. In this argument, the applicants sought to rely on the momentous decision of the Supreme Court of the Netherlands in *The State of the Netherlands v Urgenda* (20 December 2019). The Dutch courts determined that that by failing to reduce greenhouse gas emissions by at least 25% by end-2020, the Dutch government is acting unlawfully in contravention of its duty of care under Arts 2 and 8 of the ECHR.

Similar claims followed in Ireland, France, Belgium and Italy. In Guyana, citizens recently settled a claim that Guyana's

approval of an ExxonMobil-led oil and gas offshore plant violates the government's legal duty to protect the rights to a healthy environment, sustainable development, and the rights of future generations. In Australia, the Federal Court recognised the obligation of government to ensure children are not harmed by future coal projects.

In rejecting the applicants' argument, Holgate J said that while the court should follow, and perhaps incrementally develop, the Strasbourg jurisprudence, the line of reasoning in *Urgenda* did not assist when considering obligations under CCA 2008. This does not rule out challenges under the ECHR, but the jurisprudence will have to develop some in Strasbourg and here before the ECHR starts being regularly applied in climate change litigation.

## On behalf of future generations

It is not only governments which are the targets of litigation. In the Netherlands, 17,000 Dutch citizens and seven NGOs filed proceedings against Shell, seeking a declaration that Shell had 'best-efforts' obligations under Dutch tort law to reduce CO2 emissions to assist in meeting Paris Agreement obligations. The claims were brought on behalf of 'current and future generations of the world's population'. The court determined them admissible only with respect to Dutch residents. While the court did not find Shell in breach of obligations, it nonetheless found that there was danger of imminent breach because the court did not regard Shell's policies as sufficient to avoid a breach. Consequently, the court ordered that based on the Paris 1.5°C limit, Shell must cut its CO2 emissions to 45% by 2030 (compared with 2019). The ruling is under appeal.

One may think that the growth in class actions in Europe might give rise to many more ESG cases being brought. This may be true in groups with assessable losses that may attract funders. A recent example is the London litigation against Shell brought by Nigerian communities suing over oil spills. But climate change litigation against corporations or governments will be difficult to monetise and thus difficult to fund. Without funding, substantial litigation battles are likely to falter faced with the rigours of well-funded defendants, such as the oil giants.

The Aarhus Convention may give individuals some assistance in seeking environmental justice, but in the meantime the main climate change litigation is likely to be the ground for NGOs, campaign groups and charities with their own funding, such as Friends of the Earth or ClientEarth.

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