IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Claim No. CO/16/2018

In the matter of a claim for judicial review

BETWEEN

**THE QUEEN**

on the application of

**(1) PLAN B EARTH**
**(2) CARMEN THERESE CALLIL**
**(3) JEFFREY BERNARD NEWMAN**
**(4) JO-ANNE PATRICIA VELTMAN**
**(5) LILY MEYNELL JOHNSON**
**(6) MAYA YASMIN CAMPBELL**
**(7) MAYA DOOLUB**
**(8) PARIS ORA PALMANO**
**(9) ROSE NAKANDI**
**(10) SEBASTIEN JAMES KAYE**
**(11) WILLIAM RICHARD HARE**
**(12) MB (A CHILD) BY HIS MOTHER & LITIGATION FRIEND, DB**

Claimants

– and –

**THE SECRETARY OF STATE**
**FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY**

Defendant

– and –

**THE COMMITTEE ON CLIMATE CHANGE**

Interested Party

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# CLAIMANTS' REPLACEMENT SKELETON ARGUMENT
**for the relisted renewal**
**APPLICATION FOR PERMISSION TO APPLY FOR JR**
**FOR HEARING ON 4 JULY 2018**

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BINDMANS LLP
236 Gray's Inn Road
London WC1X 8HB

*References in square brackets are to the **[volume/tab/page]** of the three permission bundles. The third bundle consists of documents prepared since the claim was filed and has been updated to include documents filed since the renewal hearing was adjourned.*

## A. INTRODUCTION

**1.** This is the Claimants' renewed application for permission to bring a claim for judicial review. The Claimants wish to challenge the Defendant's refusal to revise the 2050 carbon target ("**the 2050 Target**") under the Climate Change Act 2008 ("**the 2008 Act**") [2/F/34].

**2.** Permission was refused on paper by Lang J on 14 February 2018 [3/7/195]. A hearing of the Claimants' renewed application was listed for 22 March 2018 ("**First Renewal Hearing**"). On that occasion, Nicola Davies J considered that the time-estimate of 1.5 hours (which had been requested by the Defendant) was a *"woeful underestimate"* of the time required to determine whether the claim is unarguable (which is the Defendant's contention). She therefore made an order [3/12]:

**(a)** adjourning the hearing of the Claimants' renewed application with a time-estimate of one day; and

**(b)** directing that the Committee on Climate Change ("**CCC**"), which was unrepresented at the First Renewal Hearing and had not put in any written submissions, should file a response to the points made by the Claimants in their Reply to the Defendant's Summary Grounds of Defence ("**Defendant's SGD**") and should be represented at the re-listed hearing.

**3.** This Skeleton Argument replaces the Skeleton filed by the Claimants prior to the First Renewal Hearing.[1]

**4.** The Claimants' argument on this application may be summarised under four headings:

**(a)** First, there is a glaring inconsistency in the Secretary of State's position, and his decision appears to have been taken on the basis of a misunderstanding of the CCC's advice. In his letter of 24 October 2017 [1/E/43] ("**the PAP Response**") responding to Plan B's Pre-Action Protocol letter ("**the PAP letter**") [1/E/1], and also in the Defendant's SGD [3/2], the Secretary of State's primary argument was that the CCC had advised that greater ambition for the 2050 Target was not feasible. However, it then emerged that the CCC's

[1] The Claimants consider that the perceived need for a day's permission hearing is indicative of the fact that permission ought to be granted. However, given Nicola Davies J's indication that this case needs to be given detailed consideration at the permission stage, this Skeleton Argument addresses the matters in issue in a level of detail that might not normally be expected for a permission hearing.

position was that it had advised a more ambitious target for 2050 was feasible. In response, the Secretary of State has now tried to align his own position with that of the CCC by seeking to argue, in both the Defendant's Skeleton Argument for the First Renewal Hearing ("**Defendant's First Skeleton**") [3/10] and in the first witness statement of Tim Lord ("**Lord 1**") [3/21], that he did not misunderstand the CCC: but his latest protestations are clearly inconsistent with the earlier statements made on his behalf, and it is apparent that his original decision was based on a misunderstanding. (This argument is developed further in Section C below).[2]

**(b)** Second, Lang J was wrong to find that the Claimants' five Grounds are unarguable: the true position is that each is at least arguable, and (with respect) the Judge has also misunderstood the basis on which some of the Grounds are being advanced. (This argument is developed further in Section D below.)

**(c)** Third, the fact that the Government has (since the First Renewal Hearing) announced that it intends to seek further advice from the CCC on the implications of the Paris Agreement for the UK's reduction targets is a tacit concession that the current 2050 Target is not consistent with the Paris Agreement, and therefore that this claim is at least arguable. (This argument is developed further in Section E below).

**(d)** Fourth, it is difficult to conceive of an issue of greater public importance than the Government's compliance with its legal obligations in relation to climate change, which it acknowledges to be an "*existential threat*".[3] In this particular case, perhaps more than any other in this court, it would be fundamentally wrong in principle to conduct a mini-trial at the permission stage, particularly where the Secretary of State's evidence is served late and is incomplete. However, the Secretary of State's response to this application has from the outset been to argue the case on the merits, without providing full evidence (or, until recently, any evidence at all). He has not raised a single knock-out point for the purposes of permission. The Claimants urge the court to resist any attempt to compress what would (and should) be a substantive trial of the issues with the benefit of full evidence into a permission hearing with incomplete evidence. (This argument is developed further in Section F below.)

[2] In their original Skeleton Argument for the hearing in March [3/9], the Claimants suggested that, when reaching her decision on the papers, Lang J may not have had an opportunity to consider the Claimants' Reply [3/4], which made the points developed in this section. However, Nicola Davies J confirmed that that was not the case.

[3] See Crosland 3 [3/17].

## B. THE CLAIM IN OUTLINE

### B.1 The 2008 Act

**5.** The 2008 Act imposes an express duty on the Secretary of State to ensure that the net UK carbon account for the year 2050 (*i.e.* the 2050 Target) is at least 80% lower than the 1990 baseline.[4] It also confers a discretion on the Secretary of State to alter the 2050 Target by (among other things) amending the 80% figure.[5] This JR claim is essentially concerned with the lawfulness of the Secretary of State's refusal to amend that target in light of relevant developments over the last ten years since the 2008 Act was passed.

**6.** The original target of 80% was fixed in 2008 in light of **(i)** the prevailing scientific knowledge about climate change, **(ii)** the UK's international commitments at that time, and **(iii)** an equitable and rational framework for deriving the UK's contribution from the global goal.[6] In 2008, there was an international policy and political consensus that, in order to avoid irreversible and uncontrollable climate change, it was sufficient to limit global warming below 2˚C above pre-industrial levels. Consequently, as the Secretary of State acknowledges, the 2050 Target "*was designed to keep the UK on a path consistent with a global 2°C pathway*".[7] In explaining the need to limit the increase to that level, the Secretary of State made clear that even with a 2°C average change "*it will not be uncommon to have 50°C in Berlin by mid-century*".[8]

**7.** It is important to emphasise that the 2050 Target specified in the 2008 Act was fixed by reference to what was (according to the then prevailing international policy and political consensus) necessary in order to avoid irreversible and uncontrollable climate change.[9]

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[4] See s. 1(1) [2/F/35].

[5] See s. 2(1)(a) [2/F/35].

[6] Eight years before that, when the Royal Commission on Environmental Pollution presented its 22nd Report in 2000 [1/D/1], the consensus had been that a 60% reduction would be sufficient. By 2008, the CCC was recommending a reduction of "*at least 80%*" (emphasis added): see p. 31 of its 2008 Report [1/D/51]. In both instances the model of Contraction & Convergence was used to derive the UK target from the global goal of the time.

[7] See §42 of the Government's PAP Response [1/E/50].

[8] See [2/H/13A–D].

[9] See the letter sent by the CCC to the then Secretary of State dated 7 October 2008 [1/D/45-50], cited in the SFG §78 [1/B/33], which stated that "*To determine a UK emissions reduction target, we first considered what a global target should be and then the UK's appropriate contribution. The global emissions target needs to be based on an analysis of the climate science. The crucial issue is what level of global temperature should the world seek to avoid, and what emissions path will keep us below this temperature*". By contrast, the rolling 5-year 'carbon budgets' under s. 4 are fixed with regard to (among other things) technological feasibility: see s. 10(1) & 10(2)(b). This distinction between the long-term target (in relation to which feasibility is immaterial) and the progressive realisation of that target in 5-year stages (in relation to which feasibility is relevant) is both logical and important.

**B.2 Developments since 2008**

**8.** Much has changed over the last decade:

**(a)** Scientific knowledge: The international scientific consensus, as reflected in the Report of the Structured Expert Dialogue, is that a 2˚C limit is inadequate, and indeed that serious, adverse impacts are occurring even at current levels of warming (*i.e.* approximately 1˚C).[10]

**(b)** International commitments: Prompted by the new scientific consensus, there is now also a new international policy and political consensus which is reflected in the Paris Agreement, to which the UK is a party, **(i)** that the target for global warming needs to be kept well below 2˚C above pre-industrial levels, and **(ii)** that efforts must be made to limit the temperature increase to 1.5˚C above pre-industrial levels.[11]

**9.** Notwithstanding the UK's commitment to the Paris Agreement, the Secretary of State has failed to amend the 2050 Target laid down in the 2008 Act.

**B.3 The Secretary of State's decision**

**10.** The Claimants have been left in a thoroughly invidious position in seeking to challenge the Secretary of State's conduct because it is unclear **(i)** when the Secretary of State took any relevant decision, **(ii)** what process he followed in reaching that decision, and **(iii)** what his reasons were for deciding not to amend the 2050 Target. Whilst the pre-action correspondence was conducted on the basis that no decision had been taken, it emerged, very late in the day and only in response to the Claimants' solicitors writing to the Government Legal Department ("**GLD**") in November 2017 seeking clarification [1/E/54], that the Secretary of State had apparently taken a deliberate decision not to amend the 2050 Target as long ago as October 2016 (see the GLD's letter of reply at [1/E/56]) – but there is no contemporaneous record of that decision (or at least, none that has been produced), and even the fact that the decision was taken has never been made public (or at least, not before this claim was issued).

**11.** The position seemingly now taken by the Secretary of State is that he took a deliberate decision not to amend the 2050 Target sometime in approximately October 2016 following the CCC's 2016 Report[12] and then did the same thing again in January 2018,[13] following the publication by the CCC of a report titled "*An independent assessment of the UK's Clean Growth Strategy*".[14]

[10] See [1/D/73–79].

[11] See Article 2(1)(a) [2/F/90].

[12] [1/D/96–150].

**12.** The Defendant's First Skeleton [3/10] seeks to downplay the significance of the fact that no decision has been published, saying, essentially, that there was no *"refusal"* to amend the 2050 Target: rather, it is said that the decision was taken not to amend it *"at this time"* and the Secretary of State is not obliged "*to publish a reasoned decision every time [he] decides not to exercise a power"*.[15] That line of argument ignores the fact that the conclusion of the Paris Agreement was a seminal, game-changing event in terms of climate change law and practice. In the circumstances, it is untenable for the Secretary of State to suggest that, when he actively decided (apparently in October 2016) to do nothing about the 2050 Target in light of the Paris Agreement, that was not an important public law decision which ought to have been published and explained, so it could be scrutinised.

**13.** Until very recently the Secretary of State had served no witness evidence supporting the contention that a decision was taken in October 2016, or explaining the reasons for it. However, on 21 June 2018 (after the First Renewal Hearing), the Secretary of State served Lord 1 [3/21]. Mr Lord has, since April 2017, been the Director for Clean Growth in BEIS and purports to give an account of the decision-making of the Rt Hon Nick Hurd MP, who was Minister of State for Climate Change and Industry in October 2016. The Claimants make four short points about this witness statement:

**(a)** First, it does not purport to contain a comprehensive explanation of the decision-making process, or a summary of the entirety of the reasons for the decision. Rather, it is intended to *"clarify two short points"* and to provide a factual update.[16] Accordingly, in order to identify the reasons for the decision (which is particularly important in relation to their rationality challenge), the Claimants still have to try piecing together different and inconsistent rationales put forward variously in the PAP Response, the Defendant's SGD, the Defendant's First Skeleton and now Lord 1.

**(b)** Second, Mr Lord has exhibited no documentary evidence to the witness statement. This is despite the fact that his statement is derived in part from *"departmental records"*. It is unclear whether Mr Lord was involved in the decision-making in 2016 and, if not, how he is able to explain Mr Hurd's state of mind at the time: for example that he *"accepted"* the

[13] Defendant's First Skeleton, §13 [3/10/229].

[14] [3/6/99–182].

[15] Defendant's First Skeleton, §11–14 [3/10/228].

[16] Lord 1, §2 [3/21/488].

CCC's recommendation, and that *"he was clear"* that the Government and CCC *"should keep the long-term ambition under review in the light of evidence"*.[17]

**(c)** Third, this witness statement repeats the assertion, which was made for the first time in the Defendants' First Skeleton [3/10], that the Secretary of State understood the CCC's advice to be that the 2050 Target is compatible with the Paris Agreement.[18] This serves to underline the inconsistency between what is now asserted on behalf of the Secretary of State and what was asserted on his behalf in the PAP Response and the Defendant's SGD. As explained in more detail in Section C below, in those documents no mention was made at all of consistency between the 2050 Target and the Paris Agreement: rather, the rationale given was primarily based on feasibility.

**(d)** For these reasons, the Claimants contend that the Secretary of State has not properly complied with his duty of candour.[19]

**B.4 Other developments since the First Renewal Hearing**

**14.** A number of other significant developments have occurred since the First Renewal Hearing in March. These are set out in detail in the third witness statement of Timothy Crosland ("**Crosland 3**") [3/17].

**15.** In particular, the Government has made a public announcement that it intends to seek further advice from the CCC on the implications of the Paris Agreement for the UK's emissions reduction targets.

**16.** The announcement was first made on 17 April 2018, when Claire Perry MP, the Energy Minister, told the Commonwealth Heads of Government Meeting that the Government *"will be seeking the advice of [the CCC] on the implications of the Paris Agreement for the UK's long-term emissions reduction targets"*. It was said that this would happen *"[a]fter the IPCC report later this year"*.[20] The Chair of the CCC, Lord Deben, said the following day that the request to the CCC *"is likely to be made"* following the IPCC report (emphasis added).[21]

[17] Lord 1, §5 [3/21/490].

[18] Lord 1, §4(a), & §9–10 [3/21/489 & 491]. Defendants' First Skeleton, §23 [3/10/232].

[19] See generally *R v Lancashire County Council ex. p. Huddleston* [1986] 2 All ER 941, at 945; *Belize Alliance of Conservation NGOs v the Department of the Environment* [2004] UKPC 6, at §86; and *Secretary of State for Foreign and Commonwealth Affairs v Quark* [2002] EWCA Civ 1409, at §50–52. As regards the duty of candour on an interested party, see *Belize Alliance of Conservation NGOs*, at §87.

[20] Crosland 3, §3 [3/17/271]. The same was repeated in answers to written Parliamentary questions on 1 May 2018: §6.

[21] Crosland 3, §5 [3/17/272].

**17.** It was unclear from the terms of this announcement **(i)** whether the Government had in fact formally commissioned further advice on this issue from the CCC, and **(ii)** if so, what the terms of reference to the CCC were, and **(iii)** what the timeline was. Accordingly, the Claimants' solicitors wrote to the Secretary of State on 1 June 2018 [3/14]:

> *"there remains significant uncertainty as to the formalisation, scope and timing of the request for advice from the CCC, the giving of that advice by the CCC and the subsequent decision by the Defendant. If such matters can be appropriately clarified, then it may be possible for the proceedings to be resolved without the expenditure of further costs by all parties and the Court."*

**18.** Meanwhile, on 4 June 2018, the IPCC announced that it had sent the final draft of its Special Report on Global Warming of 1.5°C to Governments for comment. In particular, it appears that the underlying report, including the scientific analysis, had already been finalised and it is now just the summary of the report that was subject to any possible changes.[22]

**19.** On 20 June, GLD wrote to Bindmans stating that the Secretary of State will seek the Committee's advice "*as soon as is reasonably practicable following publication of the final IPCC report*", but refusing to set a timeline for that [3/19]. The letter was accompanied by a draft of Lord 1, which states that the substantive part of the IPCC report is "*subject to amendment*" and so could not be "*acted upon immediately*".[23] As explained below, that is incorrect. In any event, there is no reason why the CCC review could not be commissioned now, allowing the CCC to consider the final version of the IPCC report in the course of their review.

**B.5 Non-issues**

**20.** Before turning to the specific arguments on which the Claimants rely, it may (in the interests of clarity) be convenient to mention briefly three arguments on which they do not rely:

**(a)** First, the Claimants are not suggesting that the Paris Agreement is, of itself, legally enforceable in domestic law[24] – any more than the UK's commitments under the UNFCC to take 'precautionary measures' "*to anticipate, prevent or minimise the causes of climate change*",[25] or to "*regularly update national … measures to mitigate climate change*",[26] are directly enforceable under domestic law. Rather, the Claimants seek to argue that the

[22] Crosland 3, §10; and Bindmans' letter to GLD of 21 June 2018 [3/22/494-495] enclosing Plan B's exchange with the IPCC [3/22/496-497]. On 28 June 2018 at around 6.20pm (after the revised hearing bundle had been filed) GLD responded to that letter. A copy will be provided to the Court at the 4 July hearing.

[23] Lord 1, §17–18 [3/21/493]. See further § 71 below.

[24] The Secretary of State has expended considerable effort in explaining why the Paris Agreement does not, of itself, impose any legal obligations on the UK generally, or on the Secretary of State in particular: see §17–28 of his SGD [3/2/20–24]. His arguments in this regard miss the point.

[25] See Article 3(3) [2/F/9].

[26] See Article 4(1)(b) [2/F/10].

lawfulness of the Secretary of State's refusal to amend the 2050 Target needs to be assessed in light of **(i)** the current international scientific consensus and **(ii)** the UK's commitments under the Paris Agreement, and its other international obligations. Indeed, this is explicit in the 2008 Act. Accordingly, although not legally enforceable, the proper interpretation of the Paris Agreement is highly relevant.

**(b)** Secondly, the Claimants do not suggest (because they do not need to suggest) that there is now a single 'correct' 2050 Target to which the UK should commit itself.[27] Rather, the Claimants' case is simply that, given the events which have happened over the last ten years since the 2008 Act was passed, the Secretary of State cannot lawfully refuse to amend the 2050 Target to make it, at a minimum, consistent with a global target of pursuing efforts to stay below 1.5˚C, in accordance with the Paris Agreement.

**(c)** Thirdly, the Claimants' case does not relate to the setting of a 'net zero' target. Section 2 of the 2008 Act provides for revision to the 2050 Target, expressed as a percentage reduction compared to a 1990 baseline. Despite the fact that the Claimants' case relates to s. 2 of the 2008 Act (and not, therefore, to the setting of a target at any date other than 2050) the Secretary of State expends much effort attempting to justify the Government's decision not to set now a target for net zero emissions for some point later in the second half of this century.[28] That is an irrelevant distraction, and it serves only to highlight the Secretary of State's conflation of two clearly distinct issues.

## C. THE SECRETARY OF STATE'S MISUNDERSTANDING

### C.1 Introduction

**21.** The Secretary of State's decision was taken on the basis of a misunderstanding of the advice given to him by the CCC (section C.2 below). In any event, both the Secretary of State's position and that of the CCC have shifted, and their attempts to explain away their change reveal that they have not properly interpreted the Paris Agreement (section C.3 below). Further, the Secretary of State's decision was taken on the basis of a further misunderstanding as to the effect of the 2008 Act (section C.4 below).

### C.2 The Secretary of State's misunderstanding of the CCC advice

**22.** Prior to the Defendant's First Skeleton [3/10] (*i.e.* in the PAP Response [1/E/43] and in the Defendant's SGD [3/2]), the Secretary of State's position was that the decision not to amend the

[27] Section 7 of the Claim Form [1/A/3] seeks only **(i)** a declaration that the Secretary of State has acted unlawfully and **(ii)** a mandatory order that he revise the 2050 Target.

[28] See the Defendant's SGD at §29–33 [3/2/24–26].

2050 Target was based upon advice from the CCC that it would not currently be feasible to meet a stricter target.[29] Further, neither the PAP Response nor the Defendant's SGD took issue with the premise of the claim, which was that the current 2050 Target is incompatible with the targets required by the Paris Agreement. In short, the Secretary of State's position at that stage was that a new 2050 Target would indeed need to be set, but that the time was not yet right to do so.

**23.** Since the filing of the CCC's Summary Grounds of Defence ("**CCC's SGD**") [3/3 and 3/11], it has become clear that the Secretary of State's understanding of the CCC's advice in that regard was entirely mistaken:

**(a)** The CCC's SGD states that it did not base its recommendation not to amend the 2050 Target on a lack of feasibility – that issue being *"more related"* to the question of setting a net zero target, whereas *"the primary basis for its advice was on the question, covered above, of consistency of the existing 2050 target with the Paris range of ambition"* (emphasis added).[30]

**(b)** The CCC Response to the Claimant's Reply to the CCC's SGD, served further to the order of Nicola Davies J, ("**CCC Response**") [3/13] reiterates the position set out in its SGD:

> "*[t]he CCC recommended no change to the existing UK 2050 target (at that time, October 2016), not because a more ambitious target was infeasible, but rather because the existing UK target was potentially consistent with more ambitious global temperature goals, including that in the Paris Agreement*" (emphasis added).[31]

**24.** Accordingly, it is clear that the Secretary of State misunderstood the CCC's advice and so his decision must be quashed.[32]

**25.** The CCC Response [3/13] is that it is *"very difficult to believe that anyone could misunderstand [its] advice"*. The CCC relies upon the fact that *"the SOS's Skeleton Argument makes clear that he does not rely on feasibility concerns as a reason not to amend the 2050 target"* and, similarly, that that Skeleton directly states that the Secretary of State *"has never accepted that maintaining the 2050 Target is inconsistent with "targets" set by the Paris Agreement."*[33]

[29] See the Defendant's SGD, at §25–29, §62, §63 & §65–67 [3/2/23-25; & 37-38].

[30] See the CCC's SGD, §24 [3/11/245-246].

[31] CCC Response, §11(v) [3/13/252-253].

[32] See Reply to the Defendant's SGD, §11-12 [3/4/59] and the Claimants' First Skeleton, §11-15 [3/9/211-212].

[33] CCC Response, §14–16, 18 [3/13/253-254].

**26.** That is indeed what the Defendant's First Skeleton says[34] (though, confusingly, later it suggests that he does consider feasibility to be relevant[35]), adding that he has never accepted that the 2050 Target is inconsistent with the Paris Agreement.[36]

**27.** However, importantly, when making these assertions the Defendant's First Skeleton [3/10] does not cross-refer to any previous similar statement, either in the PAP Response [1/E/43] or in the Defendant's SGD [3/2], and the CCC notably does not refer to those documents. That is because these contentions were advanced for the first time in the Defendant's First Skeleton [3/10]. They are now repeated in Lord 1 [3/21], but no documents evidencing the position in 2016 have been produced.

**28.** Worse still, these new assertions made in the Defendant's First Skeleton and in Lord 1 are plainly at odds with the position put forward previously in the PAP Response[37] and the Defendant's SGD.[38] In those earlier documents, the Secretary of State clearly stated that he took the decision not to amend the 2050 Target on the basis that a revised 2050 Target would not be feasible, and that that was understood to be the CCC's advice:

**(a)** The PAP Response said this (emphasis added):

> "*The Government does not agree that it would be a good policy to set a new target … which was not capable of being met on a plausible scenario (by reference to known and expected technology). In particular, so far as the 2050 Target under the 2008 Act is concerned, it would be wrong to place a statutory duty on the Secretary of State to "ensure" that an amended 2050 target was met, in circumstances where there were no known means by which he could comply with that duty*".[39]

The CCC and the Secretary of State now insist that, whenever feasibility was discussed, that was in relation to setting a net zero target: however, the above passage puts beyond doubt that the position taken in the PAP Response was that the justification for not amending the 2050 Target was that it was not considered feasible.

**(b)** Similarly, the Defendant's SGD stated (emphasis added):

> "*Thus, the Paris Agreement does not oblige a party, including the UK, to fix a target (still less, a 2050 target) and, in particular, it does not oblige the UK to amend an existing domestic target to something which is not currently*

[34] See the Defendant's First Skeleton, §23(a) [3/10/232].

[35] See the Defendant's First Skeleton, §40 [3/10/236].

[36] See the Defendant's First Skeleton, §23(a) [3/10/232].

[37] Especially §10–13, §22–26 and §40–41 [1/E/43].

[38] Especially §62–63 and §65–67 [3/2/37–38].

[39] PAP Response, §25 [1/E/47].

*recognised as achievable having regard to available technologies and the UK's circumstances*."[40]

And:

*"[n]othing in … the Climate Change Act requires the Secretary of State to set a new 2050 target despite any concerns as to the feasibility of meeting that target*".[41]

And:

"*It is accordingly wholly rational to decide not to amend the 2050 Target yet, at a time when no clear and new ambitious goal can be set with a real anticipation that it could be met or that it would accordingly make a real contribution to limiting global climate change. Whether or not a revised target would have that effect can be most effectively judged by taking into account technological developments and the ambition of other countries to tackling the global problem. That is precisely why the Committee on Climate Change has suggested that it be asked to report again after the 2018 IPCC Special Report*."[42]

And:

"*In short, the Secretary of State's decision not to amend the 2050 Target now is not even arguably irrational – nor is the advice from the Committee on Climate Change to that effect. A credible pathway to the achievement of any revised target is necessary, particularly where the effect of an amendment to the 2050 Target would be to place a legal duty on the Secretary of State to achieve it.*"[43]

**29.** It is therefore apparent from the Defendant's First Skeleton and Lord 1 that the Secretary of State has sought to shift his position, following the service of the CCC's SGD, to avoid the conclusion that he misunderstood the CCC's advice. The CCC has then seized on the words used in the Defendant's First Skeleton in an attempt to avoid the obvious conclusion (based on the PAP Response and the Defendant's SGD) that the Secretary of State misunderstood the CCC's advice.

**C.3 The CCC's change of position**

**30.** Contrary to the CCC's assertions in its SGD [3/11], its 2016 advice was plainly not premised on the contention that the current 2050 Target was compatible with the targets set by the Paris Agreement.

[40] See the Defendant's SGD, §26 [3/2/23] .

[41] See the Defendant's SGD, §63 [3/2/37-38].

[42] See the Defendant's SGD, §66 [3/2/38].

[43] See the Defendant's SGD, §67 [38].

**31.** The minutes of the CCC's own meeting in September 2016 [1/D/92] state clearly (and correctly) that the current 2050 Target is not consistent with the Paris Agreement:

> *"It was clear that the aims of the Paris Agreement, to limit warming to well below 2°C and to pursue efforts to limit it to 1.5°C, went further than the basis of the UK's current long-term target to reduce emissions in 2050 by at least 80% on 1990 levels (which was based on a UK contribution to global emissions reductions keeping global average temperature rise to around 2°C)*
> …
> *The Committee therefore agreed that whilst a new long-term target would be needed to be consistent with Paris, and setting such a target now would provide a useful signal of support, the evidence was not sufficient to specify that target now."*

**32.** The CCC Response seeks to explain away the apparent inconsistency between these statements and the CCC's latest assertion (in the context of this litigation) that the current 2050 Target is consistent with the Paris Agreement. As for the first extract above, the CCC suggests that it does not amount to saying that the 2050 Target is inconsistent with the Paris Agreement, and that the latest scientific evidence shows they are consistent.[44] As for the second extract above, the CCC suggests that it is clear from the full report that this related to the setting of a net zero target.[45] The Claimants disagree on all counts.

**33.** Moreover, the claim that the 2050 Target is compatible with Paris is based on an erroneous legal interpretation of the content of the Paris Agreement:[46]

**(a)** Both the CCC Response and the Defendant's First Skeleton claim that there is no 1.5°C temperature goal or limit in the Paris Agreement.[47] Rather, they say that it describes a "*range of ambition from "well below 2°C" to "efforts towards 1.5°C""*"[48] (emphasis added). Therefore, they say, the fact that the 2050 Target is not an "effort" to stay below 1.5°C is immaterial, provided it is consistent with staying below 2°C (although the Claimants would not accept that it is any longer consistent with even that goal, let alone the correct goal of "well below" 2°C).

**(b)** But that is simply not what the Paris Agreement says. The Agreement provides that the parties have committed to "*Holding the increase in the global average temperature to*

[44] CCC Response §30 [3/13/256].

[45] CCC Response, §31 [3/13/256].

[46] Further, it is clear that the CCC misunderstood the terms of the Paris Agreement when giving its 2016 advice, as set out in Ground 2 (see below).

[47] See the Defendant's First Skeleton, §23(b) [3/10/232-233]; CCC Response, §21–24 [3/13/254-255].

[48] CCC Response, §23(a) [3/13/254-255].

*well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C"* (emphasis added).[49]

**(c)** It is clear that both staying *"well below 2°C"* and *"pursuing efforts to limit the temperature increase to 1.5°C"* form part of the commitments under the Paris Agreement. It is wrong to suggest that signatories are free to choose where within the spectrum of those two goals the effort is pitched: the obligation is just what the Agreement says – namely, to stay well below 2°C and to pursue efforts to stay below 1.5°C.

**(d)** Indeed, elsewhere the CCC Response implicitly accepts this: *"The CCC's recommended approach … included waiting for more evidence on the levels of emissions implied by the Paris Agreement temperature goal (e.g. we knew that the IPCC 1.5°C report was due in 2018)"*[50] (emphasis added).

**34.** In any event, leaving aside the CCC's purely linguistic attempts to demonstrate that its statements can technically be read consistently, the point of real substance remains: there cannot be any real doubt that the CCC's advice not to amend the 2050 Target was not positively based on the assertion that the current target is consistent with the Paris Agreement, and therefore there was no need for change:

**(a)** That suggestion simply does not appear either in the minutes of the CCC's meeting of September 2016, or in the 2016 Report itself. If it had been the *"primary basis"* for the recommendation, as now asserted by the CCC, it would have been prominently and clearly explained.

**(b)** If it had featured in those documents, no doubt that would have been cited in the CCC's Response [3/13]: as it is, no such citation is given. All that the CCC Response says is that its October 2016 report *"shows the potential consistency of the existing 2050 target with the long-term temperature goal in the Paris Agreement"* (emphasis added). Likewise, if Mr Lord had been able to identify a passage in the CCC 2016 Report, he would have done so. As it is, he quotes only the following: *"The UK 2050 target is potentially consistent with a wide range of global temperature outcomes"* (emphasis added). That is not saying that the existing Target is compatible with the specific limits of the Paris Agreement. Indeed, it saying almost nothing: claiming that something is "potentially" consistent is really saying no more than that it might or might not be consistent.

[49] Art. 2(1)(a) [2/F/90].

[50] CCC Response, §11(vi) [3/13/252].

**(c)** To the extent that the assertion of compatibility is based on the CCC's finding that there are pathways that would permit a 66% likelihood of staying below 2˚C,[51] to say that that is consistent with the Paris Agreement betrays a misunderstanding of the effect of that Agreement, as explained above. Moreover, the CCC's 2016 Report claims only that the 2050 Target *"could be"* compatible with a 66% probability of limiting warming to 2˚C.[52] That is on the assumption of "*large-scale greenhouse gas removal*" which the CCC itself describes as "*highly uncertain*".[53]

**(d)** Equally, in none of the correspondence that Plan B had with the CCC since April 2017 was consistency of the 2050 Target with Paris ever raised by the CCC.

**35.** Rather, the point has all the hallmarks of having been identified by the CCC's legal team once these proceedings had been commenced and deployed as a *post hoc* rationalisation of the advice.

**36.** Indeed, in January 2018, the CCC published a report titled "*An independent assessment of the UK's Clean Growth Strategy*" [3/6/99-182], in which it stated:

> "*This [carbon target] currently set in legislation as a reduction of at least 80% on 1990 emissions. However, the Paris Agreement is likely to require greater ambition by 2050"* (emphasis added).[54]

**37.** This is irreconcilable with the position it takes in this litigation, namely that the current 2050 Target is compatible with the Paris Agreement and that this was the primary basis for its advice in 2016 not to amend the Target.

**38.** Further, as set out in Crosland 3 [3/17], two people who were members of the CCC when it gave its advice in 2016 (Lord Krebs and Professor Fankhauser) have recently published material which makes clear that, in their view, the current 2050 Target is not consistent with the Paris Agreement:

**(a)** In March 2018, Lord Krebs co-authored an article in which he called for greater ambition from the Climate Change Act to align to the Paris Agreement.[55]

**(b)** Also in March 2018, a report was published by the LSE titled *"10 years of the UK Climate Change Act"*, of which Professor Fankhauser was the lead author. That report explained that the 2050 Target was premised on a goal of *"maintaining around a 50:50*

[51] CCC 2016 Report, p.9 [1/D/99].

[52] CCC 2016 Report, p.16 [1/D/106].

[53] CCC 2016 Report, p.42 [1/D/132].

[54] CCC's 2018 Report, p.21 [3/6/120].

[55] Crosland 3, §19 [3/17/275].

*chance of keeping global mean temperatures below 2°C"*, which is *"less ambitious than the Paris objective of a temperature rise 'well below' 2°C"*.[56]

**C.4 The Secretary of State's misunderstanding of the effect of the 2008 Act**

**39.** As set out above, it is clear that the Secretary of State's decision not to amend the 2050 Target was influenced by the belief that meeting a more ambitious target was not feasible.

**40.** However, even if that was a valid justification (which it is not), there is no suggestion that, in forming that view, the Secretary of State (or, indeed, the CCC) considered using ss. 26–28 of the 2008 Act. Those sections provide a mechanism by which the UK can offset against its own carbon emissions 'carbon units' with which it has been credited. This means that, in terms of achieving the 2050 Target, it is not just the UK's emissions that are relevant but the 'net UK carbon account'.

**41.** This is defined in s. 27(1) as the amount of UK emissions reduced by the number of carbon units credited to the UK (and increased by the number of carbon units debited from the UK). Therefore, the Government can work towards achieving a target not only by reducing domestic emissions but also by investing in carbon-reduction programmes overseas. The net UK carbon account will be lower if the UK has invested in certified emissions-reduction programmes (*e.g.* protection of the rainforest). Section 27 requires regulations to be made, which will determine the circumstances in which the UK may be credited with 'carbon units' to offset against its carbon emissions.[57]

**42.** Therefore, if the Government considers that a target that is otherwise necessary cannot be met via domestic emissions-reduction measures alone, it can take steps so that carbon units can be credited to the UK to ensure that the UK is on track to meet the necessary target by fulfilling its equitable contribution to the reduction of global emissions. In short, the 2008 Act implicitly provides for a three-step process: **(a)** determining the 2050 target that would represent an equitable UK contribution to meeting the global temperature goal, **(b)** determining to what extent that target may be met through domestic action, and **(c)** making up for any shortfall through international carbon credits.

[56] Crosland 3, §21 [3/17/278]. At §22–24 it is explained that, although the report described the 2050 Target as *"technically consistent"* with the Paris Agreement, this referred to the fact that, because the 2008 Act requires emissions to be *"at least"* 80% lower than 1990 levels by 2050, that does not stop the Secretary of State requiring a greater than 80% reduction by 2050 (which is what is needed to be consistent with the Paris Agreement).

[57] The Carbon Accounting Regulations 2009 (as amended) were made under this section and provide a process by which carbon units are assigned to the UK's account.

**43.** No suggestion has been made that either the CCC or the Secretary of State had any regard whatsoever to the possibility that an amended target might be achieved by offsetting carbon emissions under s. 27. Accordingly, the Secretary of State's belief that he needs to have regard to what is feasible, rather than what is necessary, betrays a fundamental misunderstanding of the scheme of the 2008 Act and his decision must be quashed. (For the avoidance of doubt, this element of irrationality is not mentioned in the Claim Form [1/A/1]. If permission is granted to bring proceedings for JR, the Claimants will, so far as necessary, invite the court to grant permission in relation to this argument as well as those set out in the Claim Form.)

## D. THE CLAIMANTS' GROUNDS

### D.1 Introduction

**44.** Lang J was wrong in holding that the five Grounds set out in the Statement of Facts and Grounds ("**SFG**") **[1/A/9]** are unarguable. Each will be addressed briefly in turn.

### D.2 Ground 1: frustrating the legislative purpose[58]

**45.** It is trite law that the Secretary of State's statutory discretion to amend the 2050 Target must be exercised lawfully: in particular, it must be exercised consistently with the purpose of the legislation under which the power was conferred. The Claimants' case is that the discretion has been exercised unlawfully, because the Secretary of State's refusal to amend the 2050 Target frustrates the legislative purpose of the 2008 Act.

**46.** The legislative purpose: The first and most important step in the analysis is accordingly to identify the true purpose of the 2008 Act:

**(a)** At the highest level of generality, the answer is obvious: its purpose is to avoid the harmful effects of climate change. However, a proper understanding of its specific purpose is critical to the fair disposal of the Claimants' case.

**(b)** Their argument, in summary, is that the true purpose of the legislation is to commit the UK to making an equitable contribution to the global climate obligation (*i.e.* the global temperature limit) consistent with the prevailing scientific evidence and international agreements.[59] One of the Act's incidental purposes is also to set "*an international*

[58] The Claimants' argument under this heading is more fully developed in §168–182 of the SFG [1/A/61-65].

[59] As explained in more detail in the SFG [1/A/20–23] and the first witness statement of Timothy Crosland ("**Crosland 1**") [1/C/13–20], the UK cannot achieve this objective on its own, and that is precisely why the 2008 Act and the 2050 Target as originally set were derived from the 'Contraction & Convergence' model, which seeks to apportion the world's carbon budget equitably.

*precedent, reinforcing the UK's position as a consistent leader in the field of climate change and energy policy*".[60]

**(c)** By contrast, the Secretary of State argued in his SGD[61] that the purpose of the 2008 Act was to commit the UK to a reduction of greenhouse gas ("**GHG**") emissions which, at the time the target is formulated (or amended), is considered to be technologically achievable on the basis of domestic action alone.[62] In the Defendant's First Skeleton and Lord 1 it is suggested that the Secretary of State saw feasibility as explaining only "*why he has not moved to introducing a net zero emissions target or some other unachievable target now*".[63] As explained above, this contradicts the SGD[64] and, indeed, a later section of the Defendants' First Skeleton, in which it is asserted that the Secretary of State was not "*incorrect to regard the feasibility of any new target as relevant*".[65]

**(d)** There is accordingly a fundamental divergence between the Claimants and the Secretary of State as to the proper characterisation of the purpose of the legislation. In order to resolve that issue, the court will need to interpret the 2008 Act in its relevant context.

**47.** Frustrating the legislative purpose: The second step in the analysis is to ascertain whether the Secretary of State's refusal to amend the 2050 Target either serves, or frustrates, the true purpose of the legislation. The Claimants submit that, once the true purpose of the 2008 Act has been correctly identified, the Secretary of State's decision will be seen obviously to frustrate that purpose, for the following summary reasons:

**(a)** The Paris Agreement **(i)** was informed by the current consensus of scientific knowledge on climate change and **(ii)** sets the new international minimum standard for reducing carbon emissions.

**(b)** The 2050 Target is not sufficient to meet the ambition of the Paris Agreement, as the CCC rightly recognised at its meeting in September 2016.

**(c)** By refusing to amend the 2050 Target, the Secretary of State is failing to fulfil the true purpose of the 2008 Act.

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[60] See the Executive Summary in the Foreword to the Bill that became the 2008 Act [1/D/37-38].

[61] SGD §11–13, §15–16, §35–37, §48, §62 & §65–67 [3/2/18–38].

[62] SGD, §35–37 [3/2/29–30]

[63] Defendants' First Skeleton, §23(a) [3/10/232]; Lord 1, §12 [3/21/491-492].

[64] See the passages cited at fn 61.

[65] Defendant's First Skeleton, §40 [3/10/236].

**(d)** By delaying amendment to the 2050 Target, subsequent to the adoption of the Paris Agreement in 2015, the Secretary of State has put the objectives of the 2008 Act further out of reach.

**48.** In refusing permission on the papers, Lang J held that Ground 1 "*is unarguable*" because (she said) s. 2 of the 2008 Act "*confers a discretionary power, not a duty*".[66] This is also the position taken in the Defendant's First Skeleton.[67] With respect, it does not answer the Claimants' case. The Claim Form expressly recognises the discretionary nature of the power.[68] The Claimants' case is not that the 2008 Act imposes a duty, but rather that, in the events which have happened, the Secretary of State's refusal to amend the 2050 Target is an unlawful exercise of his discretion.

**D.3 Ground 2: error of law**

**49.** In reaching his decision, the Secretary of State relied on the advice of the CCC. That advice was flawed, because the CCC misunderstood the Paris Agreement. As a result, the Secretary of State's decision was also flawed.

**50.** The terms of the Paris Agreement are set out above, where the legal errors contained in the CCC Response are explained. It is also clear that the CCC misunderstood the Paris Agreement in its October 2016 Report. There, it said: "*We … consider the goal of pursuing efforts to 1.5˚C as implying a desire to strengthen and potentially overachieve on efforts towards 2°C*"[69] (emphasis added). That is plainly not what the Paris Agreement says. In particular, "*well below 2˚C*" does not mean "*efforts towards 2˚C*"; similarly, "*pursuing efforts to limit the temperature increase to 1.5˚C above pre-industrial levels*" means just that – not making efforts "*towards 2˚C*". Further, as explained above, if the CCC considered in its 2016 Report that the 2050 Target is compatible with the Paris Agreement because it "*could*", on an assumption that "*highly uncertain*" technologies emerge, be consistent with a 66% probability of keeping warming below 2˚C, that also betrays a misunderstanding of the meaning of the Paris Agreement.

**51.** In deciding the matter on the papers, Lang J said (without explanation) that "*The Claimants appear to have misread the advice given by the [CCC]*". With respect, that is manifestly incorrect: the Claimants have quoted the actual words used by the CCC in giving its advice. The Judge's misunderstanding of the position may have been caused by the CCC, which misquoted

[66] See Lang J's Reasons [3/7/196].

[67] §25–28 [3/10/233/234].

[68] See §15(a) and §168 of the SFG [1/A/14 & 61].

[69] [1/D/118–119].

the Claimants' submissions on Ground 2 in its SGD. In their SFG, the Claimants argued under Ground 2 that "*[it] is not reasonable to interpret a goal of limiting warming to 'well below 2˚C' as implying a desire only to strengthen efforts 'towards' 2˚C*" (underlining added).[70] In its SGD, the CCC wrongly described the Claimants' argument as being that it is not reasonable to interpret a goal of limiting warming to 'well below 2˚C' as "*implying a desire only to strengthen efforts 'towards' 1.5˚C*"[71] (underlining added). The CCC is thus able to go on to explain why that was not the basis of its advice, which the Claimants would accept: but the CCC's arguments do not actually address the Claimants' true grounds.

**52.** It is also worth noting in passing that the Secretary of State's own response to this argument demonstrates exactly why the issues raised by this claim cannot properly be determined at a permission hearing. In §57 of his SGD [1/2/36], the Secretary of State suggests that the Claimants have taken the CCC's words out of context "*within a detailed advice*". In other words, the Secretary of State expressly recognises that the issues raised by this claim can only properly be resolved when the court has time to consider all the relevant material in context.

**D.4 Ground 3: irrationality**[72]

**53.** As originally pleaded in the SFG, Ground 3 (irrationality) was based on an argument that the Secretary of State **(i)** failed to take into account relevant considerations and **(ii)** failed to make proper inquiries. For the reasons outlined above (the Secretary of State's misunderstanding of the CCC's advice), it has now emerged that a third strand can be added to the irrationality argument.

**54.** The Claimants' main argument under this heading proceeds on the following basis:

**(a)** When deciding whether to amend the 2050 Target, the Secretary of State must take into account any significant developments in **(i)** scientific knowledge about climate change and **(ii)** international law or policy.[73]

**(b)** The Paris Agreement was informed by current scientific knowledge (albeit that knowledge has developed even further since the Agreement was ratified), and constitutes current international law or policy – the two matters which the Secretary of State is required to take into account.

[70] SFG §186: the argument being that "towards" clearly means something different from "well below" [1/A/66].

[71] See the CCC's SGD, §18 [3/3/50].

[72] This argument is developed more fully in the SFG, §190–204 [1/A/67–74].

[73] Those would be necessary considerations to take into account even without express statutory enactment, but they are in any event specifically identified in s. 2(1) of the 2008 Act [2/F/35].

**(c)** The Decision [2/F/114] under which the Paris Agreement was adopted specifically recognises the need for "*accelerating the reduction of global greenhouse gas emissions*" (emphasis added) and expresses "*serious concern [about] the urgent need to address the significant gap between the aggregate effect of Parties' mitigation pledges … and aggregate emissions pathways consistent with holding the increase in the global average temperature to well below 2˚C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5˚C above pre-industrial levels*" (emphasis added).

**(d)** It is the case (and should be common ground) that the 2050 Target specified in the 2008 Act is inconsistent with the ambition of the Paris Agreement.

**(e)** In light of developments in scientific knowledge since 2008, the current 2050 Target is in any event no longer consistent even with the ambition of the 2008 Act as originally drafted, namely a 2˚C limit.[74]

**(f)** In the circumstances, it is irrational for the Secretary of State **(i)** to take a deliberate decision not to amend the 2050 Target, and **(ii)** to maintain that decision nearly 2½ years after the Paris Agreement was made, when that Agreement expressly recognised the urgent need to accelerate the reduction in GHG emissions and demanded that Parties set targets reflecting their 'highest possible ambition', and the CCC has advised that greater ambition would be possible.

**55.** The Claimants also submit that the Secretary of State's decision fails to take into consideration relevant and necessary factors, namely –

**(a)** The UK's legal obligations under the UNFCC[75] and under the Paris Agreement[76] **(i)** to show leadership in tackling climate change,[77] **(ii)** to maintain climate targets in accordance with equity and the precautionary principle, and **(iii)** to set targets reflecting a Party's 'highest possible ambition';

**(b)** The Government's obligations under the Human Rights Act 1998 ("**HRA 1998**"), as to which see Ground 4 (§58–66) below;

**(c)** The public sector equality duty, as to which see Ground 5 (§67–69) below; and

**(d)** The impact of delay, which compounds the feasibility challenge.

[74] See, for example, §66–67 of Crosland 1 [1/C/19] and the CCC's 2008 Report, which makes it clear that consistency with the 2˚C target was dependent on global emissions peaking in 2016 [1/D/51] – in fact global emissions increased in 2017 compared to 2016. See also the comments of Lord Stern in 2013, SFG at §11 [1/A/13].

[75] Articles 3 & 4 [2/F/9–5] as cited in the PAP Letter [1/E/2–4].

[76] Article 2 [2/F/90] and other provisions cited in the PAP Letter [1/E/11–13].

[77] See also Crosland 1, §13 [1/C/4].

**56.** Supposed compatibility with Paris Agreement aside, the Secretary of State has offered a number of supposed justifications in various documents submitted on his behalf, but these justifications do not withstand scrutiny:

**(a)** Feasibility: According to the PAP Response [1/E/43] and the Defendant's SGD [3/2] (as well as parts of the Defendant's First Skeleton[78]), the Secretary of State says that he took his decision on the basis that the current target is achievable and he ought not to revise it if there is no credible pathway to achieving a more ambitious target.[79] This is irrational for at least four reasons. **(i)** As explained above, it displays a misunderstanding of the CCC's advice. **(ii)** For the reasons outlined in §7 above, it is an irrelevant consideration when fixing the long-term target. **(iii)** In any event, the consequences of global warming at 2˚C or above are likely to be so catastrophic that it is irrational to choose not to amend the target, particularly when it is well recognised both that technological developments respond to necessity, and that greater ambition is in fact possible.[80] **(iv)** To the extent that what is necessary cannot be delivered through domestic action, s. 27 of the 2008 Act provides for international carbon credits to meet the deficit.

**(b)** Uncertainty as to the appropriate revised target: According to the PAP Response, the Secretary of State also took his decision on the basis that there was an inadequate evidential base to set a new target.[81] Although that argument now seems to have been abandoned, it is, in any event irrational for two reasons: **(i)** The CCC's own advice provides an appropriate basis for aligning the target to the 1.5˚C temperature goal;[82] **(ii)** alternatively, uncertainty is in any event an argument for a more, not a less, demanding goal.[83]

**(c)** Future opportunities: According to the PAP Response and SGD, the Secretary of State took his decision on the basis that there would be future opportunities to amend the 2050 Target when appropriate.[84] That was irrational, because **(i)** delay merely compounds the problem, as the Chairman of the CCC has himself so eloquently explained,[85] and **(ii)** this

[78] See at §40.

[79] Response to PAP letter, §10–13, 22–26, 40–41 [1/E/50]; Defendant's SGD, especially §62–63 and §65–67 [3/2/37-38].

[80] See the quotations from the 2007 report of John Gummer (now Lord Deben, Chair of the CCC) set out at §74 of Crosland 1, and that from the 2014 report of Lord Stern cited at §75 [1/C/21].

[81] See, Crosland 1 at §80–84 [1/C/23-24] and the PAP Response at §29 [1/E/48–49].

[82] See p. 24 of its 2016 Report [1/D/114].

[83] See p. xvii of the 2006 Stern Review [2/H/12], which is the report that informed the drafting of the 2008 Act.

[84] See the Clean Growth Strategy at [1/B/141–142], the PAP Response at §13–15 [1/E/44-45] and the SGD at §39 & §67 [3/2/30 & 38].

[85] See Lord Deben's 2007 report [1/D/26]. See also Lord Stern in 2014 [1/D/71–72].

consideration is inconsistent with the Secretary of State's first point: the longer the delay, the more challenging it will become to find the appropriate technology to achieve an increasingly rapid reduction in GHG emissions which would be required by delaying remedial action.

**(d)** Damage to international efforts: Finally (and surprisingly), according to the PAP Response (which argument again seems to have been abandoned), the Secretary of State took his decision on the basis that increasing the UK's ambition would damage global efforts towards reducing climate change and would set the wrong example to other countries.[86] This is irrational, because, as a self-proclaimed 'world leader'[87] in the combat against climate change, other countries are likely to have regard to the UK's approach in deciding what targets to set for themselves.[88] The Paris Agreement recognises the need to accelerate global efforts towards reducing GHG. The UK's refusal to do so can only reduce the likelihood of such accelerated efforts being adopted around the world.

**57.** In deciding the matter on the papers, Lang J simply said that "*the Secretary of State's position cannot properly be characterised as irrational*".[89] For the reasons outlined above, the Claimants respectfully submit that she was wrong.

**D.5 Ground 4: violation of the HRA 1998**[90]

**58.** The Claimants rely on the rights conferred by Articles 2 & 8 of the ECHR, and by Article 1 of the 1st Protocol, both individually and in conjunction with Article 14.

**59.** It has been expressly recognised, both at the level of the UN[91] and at the level of the ECHR,[92] that a government's response to the need for environmental protection engages human rights. This is, with respect, both obvious and important, in particular because of the potentially devastating effect of climate change on human life and property.

**60.** The engagement of human rights in relation to environmental issues has accordingly been reflected in the ECHR case-law in relation to the State's obligation to protect each of **(i)** the right

[86] PAP Response, §26 [1/E/47].

[87] See the Defendant's SGD, §2 [3/2/15]; see also the second witness statement of Timothy Crosland *("***Crosland 2***")* at §19 [2/5/66]

[88] [2/H/13A-D], cited in the SFG, §56 [1/A/27].

[89] See her written Reasons [3/7/196].

[90] This argument is developed more fully in the SFG, §205–233 [1/A/74–83].

[91] See the passage quoted from the UN Human Rights Council's Resolution 10/4 in §207 of the SFG [1/A/75].

[92] See the passages from **(i)** the Parliamentary Assembly of the Council of Europe's Recommendation 1614 (2003) quoted in §210 of the SFG [1/A/76], and **(ii)** the Council of Europe's Manual quoted in §212 [1/A/77].

to life,[93] **(ii)** the right to private and family life,[94] and **(iii)** the right to property.[95] It has also been cited in domestic proceedings in the Netherlands as a basis for legally requiring the government there to increase its ambition for reducing GHG emissions.[96]

**61.** By signing the Paris Agreement, the UK expressly acknowledged its obligation "*when taking action to address climate change, [to] respect, promote and consider [its] … obligations on human rights, the right to health, the rights of … children … and people in vulnerable situations*".[97]

**62.** The European Court of Human Rights has emphasised that a State's discretion in relation to its positive obligations to uphold Convention rights in this context is circumscribed by its international Treaty obligations and by general principles of international environmental law, such as the precautionary principle.[98] In so far as the Secretary of State is acting inconsistently with his Treaty obligations and with general principles of international law, he is accordingly in breach of his positive obligations to uphold the Claimants' Convention rights. In the circumstances, the proper interpretation of the Paris Agreement is highly relevant to delimiting the scope of any discretion to be afforded to the Government.

**63.** When dealing with this application on the papers, Lang J held that "*the UK Government enjoys a wide margin of appreciation on policy issues such as this one*".[99] That was, with respect, an error of law, because the concept of a 'margin of appreciation' has no application in domestic law.[100] Furthermore, in so far as the domestic courts in this country are willing to respect certain discretionary policy decisions of the executive, Lang J's decision does not address the fact that the Secretary of State's discretion in this context is constrained by the Paris Agreement and by the UK's other international obligations.

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[93] See for example *Budayeva & others v. Russia* App. № 15339/02 *et al* (22 March 2008) [2/G/151].

[94] See for example **(i)** *Taşkin v. Turkey* App. № 46117/99 (11 November 2004) [2/G/50]; **(ii)** *Moreno Gómez v. Spain* App. № 4143/02 (16 November 2004) [2/G/34]; **(iii)** *Fadayeva v. Russia*, App. № 55723/00 (9 June 2005) [2/G/79].

[95] See for example *Budayeva & others v. Russia* App. № 15339/02 *et al* (22 March 2008) [2/G/151].

[96] *The Urgenda Foundation v. Kingdom of the Netherlands*, District Court of The Hague [2015] HAZA c/09/00456689 (24 June 2015) [2/G/280].

[97] See the Preamble to the Paris Agreement [2/F/89].

[98] *Tatar v Romania* (App. No. 67021/01, Judgment of 27 January 2009), §112 (available only in French). The precautionary principle, which requires "*competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment*", has been held to be a general principle of EU law: Joined Cases T-74, 76, 83-85, 132, 137 and 141-00 *Artegodan v Commission* EU:T:2002:283, §184. See §218–219 of the SFG [1/A/79].

[99] See her Reasons in relation to Ground 4 [3/7/196].

[100] See the recent decision of the Supreme Court in *R (Steinfeld & Keidan v Secretary of State for International Development* [2018] UKSC 32, at §28.

**64.** Against that background, the individual Claimants submit that the Secretary of State's refusal to amend the 2050 Target constitutes a violation of their human rights[101] because:

**(a)** it amounts to a failure to take the reasonable preventative measures necessary to uphold the Claimants' rights to life, to property and to family life;

**(b)** it increases the likelihood of unprecedented climate change, occasioning mass loss of life in the long term, and increased health risks in the meantime;[102]

**(c)** it adversely impacts on the willingness of the 5th and 10th Claimants to begin families;[103]

**(d)** it adversely impacts on property, especially those in vulnerable areas;[104]

**(e)** it impacts in a discriminatory manner against the young and the old.[105]

**65.** The Claimants accept that this situation has not yet been confronted in the case-law under the HRA 1998. But that is absolutely no basis for suggesting that the Claimants' case is unarguable: the ECHR (and hence the HRA 1998) is a living instrument, which must continually adapt to the changing challenges faced by governments and individuals. Indeed, recently the Supreme Court has *"firmly reject[ed] the suggestion that the decision of this court on whether the respondents enjoy a right under the HRA to claim compensation against the appellant should be influenced, much less inhibited, by any perceived absence of authoritative guidance from ECtHR"*.[106]

**66.** Moreover, in other situations the Courts have interpreted positive obligations under the HRA 1998 as imposing a duty to take reasonable and necessary preventative measures, whether or not specific individuals can be identified as victims in advance. In this respect, positive obligations under the HRA 1998 may be distinguished from the duty of care in tort.[107] It is difficult to conceive of any issue that would be of greater significance to each member of the British public than the threat of climate change, which the Government has acknowledged as constituting an 'existential threat'. In this context, the Government's delay is inexcusable.[108]

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[101] As to their status as victims, see *Dudgeon v. UK* (1981) 4 EHRR 149, at §41 [2/G/12].

[102] See §223(c) of the SFG [1/A/80] & the evidence of Dr Veltman [1/C/56].

[103] See the witness statement of the 5th Claimant [1/C/68] & the 10th Claimant [1/C/92]. Article 8 includes the right to respect for the decision to become or not to become a parent: *Evans v United Kingdom* (2008) 46 EHRR 34, at §71; *Ternovszky v Hungary* (App. No. 67545/09, Judgment of 14 December 2010).

[104] See the witness statement of the 11th Claimant [1/C/97].

[105] See §223(c) & (f) of the SFG [1/A/80].

[106] See *Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents)* [2018] 2 WLR 895, at §79.

[107] *Ibid*, at §96.

[108] See, by analogy, the recent decision of the Supreme Court in *Steinfeld & Keidan*, at §33, 40 & 50.

### D.6 Ground 5: breach of the public sector equality duty[109]

**67.** In deciding whether to amend the 2050 Target, the Secretary of State was under an express statutory duty to have due regard to the need **(i)** to eliminate discrimination and other conduct prohibited by or under the Equality Act 2010, **(ii)** to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it, and **(iii)** to foster good relations between persons who share a relevant protected characteristic and those who do not.[110] None of the material filed on behalf of the Secretary of State, including Lord 1 [3/21], mentions this duty.

**68.** In the circumstances, there is no evidence that the Secretary of State had any regard to any of the specified issues under s. 149 when deciding not to amend the 2050 Target.

**69.** When considering the matter on the papers, Lang J concluded that the Claimants "*have not established any arguable case that the public sector equality duty has been breached*".[111] With respect, it is difficult to understand the basis for that finding. The Secretary of State has offered no evidence to show that the specific impact on persons with protected characteristics was considered at all in the context of the decision under challenge. This is despite the fact that the Government acknowledged in its 2017 Risk Assessment that climate change will affect people differently depending on their social, economic and cultural background.[112] In the circumstances, the Claimants' argument under this heading is not only arguable: it is unanswered.

## E. RELEVANCE OF GOVERNMENT ANNOUNCEMENT

**70.** It is anticipated that the Secretary of State may say that this judicial review is rendered otiose by the announcement, described above, that the Government intends to seek advice from the CCC sometime after the IPCC publishes its special report later this year ("t**he Announcement**"). That would be incorrect for the following reasons:

**(a)** The terms of reference for any review are entirely uncertain. Indeed, §33(b) of the Defendant's SGD [3/2/29] implies that a review might be confined to setting a net zero target in the second half of the century. A review conducted on such a basis would not address the subject of this judicial review, which is based on the Government's legal obligation under the 2008 Act to revise the 2050 Target so that it reflects an equitable UK contribution to staying within the revised global temperature limit.

[109] This argument is set out more fully in §234–239 of the SFG [1/A/83–85].

[110] See s. 149 of the Equality Act 2010 [2/F/84].

[111] See her written Reasons [3/7/196].

[112] See at p. 10 [1/D/169].

**(b)** The relief sought by the Claimants in its Claim Form [1/A/3] was:

**(1)** a declaration that the Secretary of State has acted unlawfully: the Claimants remain entitled to such relief even if it were the case that the Announcement put an end to such unlawful behaviour;

**(2)** a mandatory order that the Secretary of State revise the 2050 Target: the Announcement does not commit the Secretary of State to revising the Target.

**(c)** Moreover, the Announcement is a tacit acknowledgement by the Government that it knows that the Paris Agreement does require the 2050 Target to be revised.

**(d)** Furthermore, this claim raises points of law that **(i)** remain live, notwithstanding the Announcement, **(ii)** are fundamental to determining the proper scope of any future review, and **(iii)** ought therefore to be resolved in order to avoid vitiating any subsequent advice or decision. In particular:

**(1)** as explained above, the CCC's Response [3/13] demonstrates that it has erred in law in its interpretation of the meaning of the Paris Agreement, and neither the Secretary of State nor the CCC appear to accept that the 2050 Target must reflect a fair UK contribution to the 1.5°C goal: in the circumstances, even though the Government has now indicated that it will seek further advice from the CCC, there is likely to be disagreement between the parties as to what the request to the CCC must contain in order to be lawful;

**(2)** the Claimants' Ground 1 asserts that the CCC and/or Secretary of State have misconstrued the purpose of the 2008 Act;

**(3)** in relation to the Claimants' human rights ground, the scope of the Secretary of State's positive obligations are delimited by his obligations in international law, so the proper interpretation of those obligations is crucial.

Where there are arguable questions of law to be determined that are fundamental to the scope of a future review, there is a compelling public interest in resolving those questions in advance of the review. An expensive and time-consuming review conducted on an incorrect interpretation of both the purpose of the 2008 Act and the objective of the Paris Agreement would clearly not be in the public interest.[113] If guidance is not given by a court on these points then, should these errors of law be perpetuated in the CCC's advice

[113] See, by analogy, the Divisional Court's decision granting permission in *R (The Good Law Project) v Electoral Commission* [2018] EWHC 602 (Admin), at §31. See also *R v Secretary of State for the Environment* (1987) 19 HLR 161, which makes clear that it may be appropriate for a court to intervene during an inquiry where to fail to do so might lead to the inquiry having to be conducted again.

and/or the Secretary of State's subsequent decision, the parties will be back in court debating this issue once that decision is taken – having lost even more valuable time meanwhile. That would not only be inefficient but would lead to delay which, as set out below, is inimical to tackling climate change.

**(e)** In any event, there is a world of difference between a party being asked to rely on the fact that the Government has made a political announcement that it intends to take a course of action, and that party being able to rely on a court order compelling the Government to take a particular course of action. Mere political announcements are vulnerable to changing political moods, priorities and personnel.

**(f)** Furthermore, the Government has, to date, not formally commissioned the CCC's advice, nor committed to any particular timeframe for doing so, let alone set a date by which that advice should be received and a decision made as to whether to amend the 2050 Target. As the Claimants have repeatedly emphasised,[114] delay in tackling climate change is irrational and compounds the challenge faced. As the draft IPCC report itself states:

> "*Delayed action or weak near-term policies increase mitigation challenges in the long-term and increase the risks associated with exceeding 1.5°C global warming temporarily*."[115]

**71.** This point is particularly acute, given that the Government already has the underlying IPCC report. Whilst the Claimants did not agree with the Secretary of State's purported rationale in waiting for the IPCC report, namely that "*it will provide a firmer evidence base on the appropriate levels of such targets than presently exists*",[116] that evidence base is now in existence. Accordingly, there is no rational reason to delay requesting advice from the CCC until the final IPCC report it is formally published later this year. Whilst Lord 1 states that "*until the report and its summary for policy makers are approved by the IPCC, the findings are draft and subject to amendment*",[117] that gives a misleading impression. As confirmed by the IPCC to Plan B, the draft currently under circulation is the "*final draft*", and governments "*will accept the underlying report*". It is only the "Summary for Policymakers" that remains to be finally settled.[118]

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[114] Crosland 1, Part III [1/B/8-29]; Crosland 2, §23–31 [3/5/67-70]; Crosland 3, §11–13 [3/17/274-275].

[115] [3/18/305].

[116] See the Defendant's First Skeleton, §9 [3/10/228].

[117] Lord 1, §18(b) [3/21/493].

[118] Letter of 21 June 2018 from Bindmans to GLD [3/22].

**72.** Accordingly, unless and until the Secretary of State commits himself, in a way that is binding in a public law sense, to amending the 2050 Target in a manner that is lawful, this judicial review remains relevant and, indeed, necessary.

## F. THE RELEVANT TEST

**73.** It is sometimes worth stating the obvious. At this stage, the only question is whether the Claimants have an arguable case. By emphasising this point, the Claimants are not implying any diffidence about their ultimate prospect of success at trial – far from it: but, for the purpose of the oral renewal hearing, it is crucially important to keep in mind the true nature of the exercise in which the court is engaged.

**74.** This is not a trial – it is a permission application. In order to persuade the court to refuse permission where no knock out point is raised, the Secretary of State must accordingly show that all of the Claimants' Grounds are unarguably bad. For the reasons outlined above, the Claimants submit that all of their Grounds are (at the very least) arguable.

**75.** Although the matter has been listed for a day, the Court is respectfully urged not to be diverted from its true function, and to avoid any attempt to resolve the merits. Indeed, the Claimants submit that the fact that it was considered necessary to have a full day's hearing to debate the arguability of the merits of the claim strongly suggests that those merits are arguable and deserve to be ventilated at a substantive hearing, with full evidence from the Secretary of State and the CCC.

**76.** Furthermore, it is important to recognise that, in order to dispose fairly of the claim, the court would need to be fully familiar with a long list of materials, including the UNFCC,[119] the Royal Commission on the Environment's 22nd Report (2000),[120] the First Report of the Joint Committee on the Draft Climate Change Bill (2007),[121] the Stern Review (2007),[122] the CCC's 2008 Report,[123] the 2008 Act,[124] the report to the UNFCC on the structured expert dialogue

[119] [2/F/1]: this is the first of the UK's major international commitments, which forms an important part of the context in assessing **(i)** the reasonableness of any exercise of the discretion under the 2008 Act, and **(ii)** the breadth of the Secretary of State's margin of appreciation under the HRA 1998.

[120] This and the three references that follow form a significant part of the context against which the true purpose of the 2008 Act must be construed. Extracts are at [1/D/1], but the full report is 312 pages long.

[121] Extracts are in the Permission Bundle [1/D/11–24], but the full report is 168 pages long, with an additional 420 pages of evidence.

[122] Extracts from the Review are in the Permission Bundle [2/H/6], and the full report is 662 pages long.

[123] Extracts are in the bundle [1/D/51], but the full report is 511 pages long.

[124] [2/F/34].

2013–2015,[125] the Paris Agreement,[126] the position in Scotland,[127] the minutes of the meeting of the CCC of 16 September 2016,[128] the CCC 2016 Report,[129] the UK Climate Change Risk Assessment 2017,[130] the Clean Growth Strategy,[131] the Government's recently published plan *A Green Future: Our 25 Year Plan to Improve the Environment (January 2018)*, in which the Government commits to "*provide international leadership and lead by example in tackling climate change*",[132] and the 2018 Report from the LSE *10 Years of the Climate Change Act*.[133]

**77.** It is wholly unrealistic of the Secretary of State to suggest that the court can reach a properly informed decision on the merits of this claim without taking account of all these materials; and it is wrong in principle to suggest that the court can take proper account of them in the context of a permission hearing.

## G. CONCLUSION

**78.** The Secretary of State's continuing refusal to amend the 2050 Target means that the UK is (to borrow Lord Stern's expression) playing Russian roulette with two bullets, instead of one.[134] The court is respectfully invited to grant permission so that the issues raised in the Claim Form can be fully tested at a substantive hearing.

**Jonathan Crow QC**
**Emily MacKenzie**

**Bindmans LLP**
*29th June 2018*

[125] This was one of the principal steps towards the Paris Agreement. Extracts are at [1/D/73]: the full report is 182 pages.

[126] [2/F/86].

[127] See SFG §125–132 [1/A/46], the Climate Change (Scotland) Act 2009 [2/F/82] is in substantially identical terms to the 2008 Act, but **(i)** the advice given by the CCC to the Scottish Government in March 2017 [2/H/32] was different from its advice to the Defendant in October 2016, and **(ii)** the response of the Scottish Government to that advice [2/H/48] has been different from that of the Defendant. Those differences do not, of themselves, prove that the CCC's advice to the Defendant was wrong, or that the Defendant's decision was irrational: but they demand proper scrutiny.

[128] [1/F/92–95].

[129] [1/F/96–150].

[130] Short extracts are at [1/D/158–80], but the full report is 86 pages long.

[131] [1/B/1].

[132] Short extracts are at [3/6/75–93], and the full report is 151 pages long.

[133] [3/18/337-379].

[134] See p. 2 of *The Guardian's* report of Lord Stern's presentation to the World Economic Forum in Davos, 2013 [1/D/66]. Lord Stern was the author of the 2006 Stern Review, which informed the 2008 Act.