



# Government Legal Department

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Your ref: N/A  
Our ref: Z2013556/MKC/JD3

14 January 2021

Dear Mr Crosland

## **Proposed claim for judicial review: Plan B & Ors v (1) Secretary of State for Business, Energy & Industrial Strategy and (2) Her Majesty's Treasury**

This letter is the response of the Secretary of State for Business, Energy & Industrial Strategy (“**the Secretary of State**”) and Her Majesty's Treasury (“**HM Treasury**”) to your pre-action letter dated 12 December 2020 and addressed to the Prime Minister, the Chancellor of the Exchequer and the Secretary of State. It is sent in accordance with the *Pre-Action Protocol for Judicial Review*.

We wrote to you on 16 December 2020 to confirm that we would respond to the pre-action letter by 14 January 2021 (rather than by 30 December 2020). You acknowledged receipt by email on the same day and did not object to that course.

For the reasons set out below, the grounds of challenge set out in your letter are totally without merit. The Secretary of State and HM Treasury will resist any claim that Plan B or others seek to bring, and will seek their costs of so responding. The basic allegation that Government has no plan or strategy to deal with climate change is completely without foundation. The proposed claim seems to be a pure merits challenge, which is not permissible in judicial review. Moreover, the proposed claim is pointless, given that Government has published plans and is in the process of developing further plans to meet the UK's net zero greenhouse gas target by 2050 (see below).

Your letter is overly long and discursive and does not comply with the letter or the spirit of the *Pre-Action Protocol*. In particular, it does not clearly identify the date or details of the decision(s), act(s) or omission(s) being challenged. The proposed claim appears to be a pure campaigning tool rather than a precursor to credible litigation.

This letter responds to the main legal allegations in your letter, but not all of the commentary. A failure to respond to commentary does not mean it is accepted. For the avoidance of doubt, the often strongly advanced but unsubstantiated opinions, such as that the City of London is providing “*terrorist funding*” and that Government is responsible for “*treasonous betrayal*”, are firmly denied.



As was pointed out in our letter of 7 August 2020, climate change is a threat that requires a global response. The Government remains committed to delivering the long-term changes necessary to meet the UK's 2050 net zero target, and is harnessing its incoming COP and G7 presidencies to drive global climate ambition. As host of COP26, the UK is calling on all nations to come forward with more ambitious climate plans and will continue to work with all involved to increase climate ambition and deliver on the Paris Agreement.

## 1. The Claimants

1.1. You have identified the claimants as:

- a. Plan B, a charitable incorporated organisation;
- b. Jerry Amokwandoh, an individual;
- c. Adetola Onamade, an individual; and
- d. Marina Tricks, an individual.

1.2. You have stated that correspondence and service of documents will be accepted by email at [tim@planb.earth](mailto:tim@planb.earth). It is unclear whether you hold yourself out to be legally representing the proposed claimants named at paragraphs (b) to (d) above, and if so in what capacity. Nor do you confirm whether you intend to accept correspondence and service on their behalves. Please confirm these matters by return.

## 2. The Defendants

2.1. As your proposed claim is articulated, we do not consider that the Prime Minister is an appropriate party to the proposed litigation. The Prime Minister is the head of Her Majesty's Government, whose decisions and policies are carried out by relevant Ministers and their departments. Responsibility for the relevant decisions and policies complained of (insofar as they can be identified) rest with either the Secretary of State or HM Treasury. We consider that the proper defendant would be the Secretary of State as he has lead policy responsibility for climate change matters. HM Treasury would be an appropriate defendant only in relation to a challenge connected to the 2017 Memorandum of Understanding, as suggested by para.148 of your letter.

2.2. The Government Legal Department acts for both the Secretary of State and HM Treasury. Our address is Government Legal Department, 102 Petty France, Westminster, London, SW1H 9GL. The reference for this matter is Z2013556/MKC/JD3 and the solicitor with its conduct is [REDACTED].

## 3. Details of the matter being challenged

3.1. The main allegation pursued in your letter is a purported failure by Government in three respects "to take practical and effective measures to":

- "a. meet its legally binding targets for reducing domestic greenhouse gas emissions;*
- b. adapt to the impacts of climate change and to support vulnerable communities in adapting to the impacts of climate change;*
- c. prevent UK-based financing from driving catastrophic levels of global warming."*

3.2. The proposed challenge appears to relate to a purported generalised failure to act, rather than any specific action or decision which has been taken, or any specific failure to act in relation to the exercise of a particular public function.

- 3.3. The letter is extremely wide-ranging and lacks focus. It also refers to processes that are ongoing, such as the actions identified in the Government's formal October 2020 Response to the 2020 report of the Climate Change Committee ("CCC"). The October Response summarises achievements to date and ambitious actions to come, both generally and across key sectors, to mitigate and adapt to climate change across the United Kingdom.

#### 4. Response to the proposed claim

##### Factual basis of proposed claim

- 4.1. The proposed claim is based upon a factual assertion that the UK Government has failed and is failing to develop plans or strategies to meet its climate change obligations. That is manifestly false. It ignores the huge amount of work being done in UK, which does not bear repeating here, but which is referred to in Government's October 2020 Response to the CCC. In the last few months, Government has among other things issued a Ten Point Plan for the Green Industrial Revolution (12 November 2020), published *The Path to Sustainable Farming: An Agricultural Transition Plan 2021 to 2024* (30 November 2020), committed to ending direct support to overseas fossil fuels (12 December 2020) and published the Energy White Paper (14 December 2020). Those and other actions all build upon the October 2017 Clean Growth Strategy and will support the UK's ambitions to remain a global leader in taking action on climate change.
- 4.2. Consistent with that position, on 12 December 2020 the UK communicated a new Nationally Determined Contribution ("NDC") to the UNFCCC Secretariat with a commitment to reduce greenhouse gas emissions by at least 68% by 2030 on 1990 levels. The Communication summarily outlines, among other things, the policies and measures that it is anticipated will be relied upon to achieve the commitment. The UK also communicated at the same time an Adaptation Communication and Finance Communication. Accordingly, in the three areas covered by the "aims" set out in Art.2 of the Paris Agreement and referred to in your letter (mitigation, adaptation and financing), the UK is taking active and positive steps and has communicated those to the UNFCCC Secretariat.
- 4.3. Your letter places considerable reliance on the Government Legal Department's response of 7 August 2020 to your earlier pre-action letter of 21 July 2020. You infer from para.21 of that response that "*the Government had no plan or strategy whatsoever for delivering [the net zero] target*". That is a hopeless inference. All that para.21 says is that policy is evolving and will need to evolve further. Para.22 of the response added that "*[p]olicy development with a view to meeting the [Climate Change Act 2008] targets continues*". That remains the position (albeit that further steps have been taken).
- 4.4. There is no missing strategy. The Climate Change Act 2008 as amended ("CCA 2008")<sup>1</sup> provides the "road map" to net zero. The processes under CCA 2008 have been and continue to be followed. The Government is complying with its obligations under CCA 2008, including as to proposals and policies under ss.13 and 58. The UK over-achieved against the first two carbon budgets set under CCA 2008 and is on track to meet the third (2018-2022). By the end of June 2021 Government will set the sixth carbon budget (2033-2037), which will ensure that the UK keeps to a trajectory consistent with meeting the 2050 net zero target. To inform that task, the CCC issued advice to Government on the sixth carbon budget in December 2020.
- 4.5. In addition, ahead of the UK chairing the 26<sup>th</sup> UN Climate Change Conference ("COP26"), Government has committed to publishing a comprehensive Net Zero Strategy. As is indicated in the October Response:

*"Leading up to COP26 - in addition to ambitious plans across key sectors of the economy, including an Energy White Paper, Transport Decarbonisation Plan and Heat and Buildings Strategy - we will publish a comprehensive Net Zero Strategy, setting out the Government's vision for transitioning to a net zero economy, making the most of new growth and employment opportunities across the UK.*

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<sup>1</sup> See also Part 2 of the Environment (Wales) Act 2016, the Climate Change (Scotland) Act 2009 and Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 for the position in Wales and Scotland.

*These will raise ambition as we outline our path to hit our 2050 target”* (p.75; see also p.9 of the December 2020 NDC Communication).

- 4.6. The factual premises of the proposed claim are therefore ill founded. The UK is taking steps to meet the 2050 net zero target. The UK is also taking steps to adapt to climate change and to improve finance flows, as set out in its Adaptation and Finance Communications, respectively. The UK Climate Change Risk Assessment, National Adaptation Programme, and adaptation programmes across Devolved Administrations provide further detail on the action being taken to assess and prepare for climate change. HMT’s Green Finance Strategy provides further detail on the UK’s approach to greening financial systems and mobilising finance for clean and resilient growth.

#### Merits challenge

- 4.7. In reality, the content of your letter is not a legal analysis at all, but a series of merits arguments (often based upon selective quotations) suggesting that Government should be doing more and/or acting more quickly. Government’s position is that it is acting appropriately in a complex area to meet climate change objectives. The substance and merits of how that is done are not a matter for judicial review by a court.
- 4.8. As the Court of Appeal held in R (Packham) v SST [2020] EWCA Civ 1004, the statutory and policy arrangements for net zero “*leave the Government a good deal of latitude in the action it takes to attain those objectives*” (para.87). Merits challenges are even less appropriate in the macro-political arena of climate change.

#### Human rights

- 4.9. You allege a breach of the Human Rights Act 1998 (“HRA 1998”). However, the arguments you pursue at paras.86-104 of your letter appear to be effectively a re-hash of points submitted to the Supreme Court in the Heathrow litigation (see para.92 of your letter referring to “*this Court*”). The Supreme Court rejected them at para.113 of its judgment in R (Friends of the Earth Ltd) v Heathrow Airport Ltd [2020] UKSC 52.
- 4.10. It is not accepted that the circumstances of climate change affecting the UK are sufficient to engage positive obligations under Article 2 or Article 8 of the European Convention on Human Rights. In any event, it is not accepted that Government has acted in breach of human rights. Nor is any such breach particularised.<sup>2</sup> It is simply claimed that Government should act differently with regard to climate change mitigation, adaptation and/or financing. Even if that point is made good, it is not accepted that you have demonstrated – or could demonstrate – that the failure to act differently interferes with any individual’s Article 2 or Article 8 rights. Even if interference could be demonstrated, it is necessary to have regard to the public interest (and the rights of others) that will be affected by any measures to be introduced. It is for that reason that the courts afford States a wide margin of appreciation, including in cases involving environmental issues: see e.g. Hatton and Others v United Kingdom (Application No. 36022/97) (2003) 37 EHRR 28.
- 4.11. We also remind you of the rejection of Plan B’s equivalent human rights challenge in litigation in 2017-2019,<sup>3</sup> that was rejected as unarguable by the High Court (twice) and the Court of Appeal. In refusing permission in the Court of Appeal, Asplin LJ emphasised “*the margin of appreciation*”.

#### Climate Change Act 2008

- 4.12. It is next suggested that there has been a breach of CCA 2008 ss.13, 56 and 58. However, it is not disputed that the Government has properly prepared and laid before Parliament proposals and policies for meeting carbon budgets, reports on the impact of climate change and programmes for adaptation

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<sup>2</sup> Any such breach would have to relate to an individual victim; Plan B has no standing to bring a claim for the violation of human rights under HRA 1998 s.7 as it cannot claim to be a “*victim*” of any unlawful act in the terms required: see e.g. R (Christian Concern) v SSHSC [2020] EWHC 1546 (Admin) per Singh LJ and Chamberlain J at para.76.

<sup>3</sup> CO/16/2018 and C1/2018/1750.

to climate change under those provisions.<sup>4</sup> Moreover, as noted above, Government has committed to publishing a comprehensive Net Zero Strategy in 2021 ahead of COP26, as well as further policies and proposals.

- 4.13. There is therefore no substance in this point. The Secretary of State has met, and continues to meet, his obligations under CCA 2008. The allegation that there has been a systemic failure to act in respect of the CCA 2008 is patently wrong.

#### International law

- 4.14. The claim that the UK Government has failed to take into account its international legal obligations on climate change (especially the Paris Agreement) is devoid of merit, as is the suggestion at para.3 of your letter that Government's actions are somehow "*inconsistent with*" those obligations. However, you have not identified any decision or action to which the allegation relates. It is clear that the various measures being brought forward by Government that aim for net zero are taken in light of the UK's international commitments – see especially the recent NDC Communication. In any event, the Supreme Court held in Friends of the Earth, that the Paris Agreement itself is not Government policy, and the treaty obligations are not part of UK law and do not give rise to legal rights or obligations in domestic law (para.108).
- 4.15. Arguments about whether acts of the UK Government are inconsistent with the Paris Agreement are not matters which can be adjudicated upon by a court in domestic judicial review proceedings. The Paris Agreement does not provide for any mechanism of enforcement by which the provisions are construed and applied by a court. On the contrary, Articles 14 and 15 provide for the facilitation of implementation by a non-adversarial and non-punitive committee, and for "global stocktakes" at 5-year intervals.

#### Memorandum of Understanding

- 4.16. At paras.19-22 and 73-84 of the letter, you reprise a point raised in your pre-action letter of 21 July 2020 about the 2017 Memorandum of Understanding ("MoU") between the Bank of England and HM Treasury on resolution planning and financial crisis management. The primary challenge you had appeared to be contemplating on that occasion was to the Covid Corporate Financing Facility ("CCFF"), and your assertion that the reference in para.48 of the MoU to "*international obligations*" included the Paris Agreement was made in that context. HM Treasury maintains the response to that assertion in para.34 of his response of 7 August 2020: the MoU was prepared pursuant to ss.64-65 of the Financial Services Act 2012 which deals with financial crisis management. Thus, when read properly and in context, para.48 refers to international obligations relating to financial matters only (such as those under the Basel Framework), and it does not go wider to encompass climate change or any other non-financial matters.
- 4.17. In any event, the point is irrelevant to any current claim. The CCFF opened in March 2020 and, by a notice given on 9 October 2020, it will close for new purchases with effect from 23 March 2021. Any judicial review challenge to it would be significantly out of time. As far as wider measures are concerned, Government policy – and CCC advice – is that climate and pandemic recovery measures be pursued together (see e.g. the October Response on *Building Back Greener*).
- 4.18. HM Treasury's November 2020 Spending Review contains considerable commitments towards the mitigation of and adaptation to climate change and emphasises that "*[t]he recovery from Covid-19 must be green*" (Executive Summary para.29). The suggestion that the Treasury is "*systematically ignoring*" climate change (letter para.85) is therefore wholly unfounded.

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<sup>4</sup> See the Government's response to the CCC's 2020 progress report to Parliament (October 2020), the Clean Growth Strategy (October 2017), the National Adaptation Programme (July 2018) and the UK Climate Change Risk Assessment 2017 (January 2017).

## Relief

- 4.19. There is no sensible basis on which a court could or would grant the relief set out in your letter.
- 4.20. Moreover, the relief sought would serve no practical purpose. While it is not accepted that it is a strict legal requirement, Government is planning to produce a “*whole-of-government*” plan in the form of a comprehensive Net Zero Strategy ahead of COP26. There is therefore no need for a mandatory order requiring one.
- 4.21. Similarly, a declaration that “*international obligations*” in the MoU includes international obligations relating to climate change would serve no purpose. Aside from the now historic CCFF, which is now far too late for you to challenge, you do not identify any decision or action for which a declaration would be relevant.

## Conclusion

- 4.22. For all the above reasons, the grounds of claim set out in your letter are totally without merit.

## Parliamentary privilege

- 4.23. Your letter quotes statements by Ministers made in Parliament, therefore forming part of parliamentary proceedings. Were such statements to be relied upon in any subsequent claim for judicial review they would amount to potential breaches of Parliamentary privilege as given effect to by Article 9 of the Bill of Rights. Our clients reserve the right to argue that such material would be inadmissible.

## **5. Alternative dispute resolution proposals**

- 5.1. We do not consider that the claim is appropriate for alternative dispute resolution, and note that no specific proposals have been made in any event.

## **6. Response to requests for information and documents**

- 6.1. You have made no requests for information.

## **7. Aarhus Convention**

- 7.1. Para.153 of your letter asserts that the proposed claim would be an Aarhus Convention claim within the meaning of CPR 45.41 without explaining why. We assume that you do not contend that the claim falls within the scope of Arts.9(1) or 9(2) of the Aarhus Convention. Art.9(3) of the Convention only applies to challenges to acts and omissions “*which contravene provisions of its national law relating to the environment*”. The only respect in which the proposed claim may potentially constitute a contravention of national law relating to the environment is the (extremely weak) allegation of non-compliance with CCA 2008 ss.13, 56 and 58.
- 7.2. It is also noted that, if a claim is brought by multiple claimants, the costs caps in CPR 45.43(2) apply to each claimant individually, not cumulatively (CPR 45.43(4)).

## **8. Address for further correspondence and service of court documents**

- 8.1. The address for further correspondence and service of court documents is: Government Legal Department, 102 Petty France, Westminster, London, SW1H 9GL, reference: Z2013556/MKC/JD3.

8.2. During the present Covid-19 crisis, the Government Legal Department accepts service of originating process by email. Please send any claim, should it be brought, to the principal email address: [newproceedings@governmentlegal.gov.uk](mailto:newproceedings@governmentlegal.gov.uk). At the same time, please send a copy the claim to: [REDACTED].

8.3. Please ensure any enclosures are of sufficiently small data size to be sent. We also request that you list all enclosures in your covering email or letter and to telephone us to check that they have been received.

Yours faithfully

[REDACTED]

**For the Treasury Solicitor**

D [REDACTED]  
F [REDACTED]  
E [REDACTED]

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