Claim No. CO/1587/2021

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

In the matter of a claim for judicial review

BETWEEN

THE QUEEN

on the application of

(1) PLAN B. EARTH
(2) ADETOLA STEPHANIE KEZIA ONAMADE
(3) JERRY NOEL AMOKWANDOH
(4) MARINA XOCHITL TRICKS
(5) TIMOTHY JOHN EDWARD CROSLAND

Claimants

- and -

(1) THE PRIME MINISTER
(2) HM TREASURY
(3) THE SECRETARY FOR STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Defendants

CLAIMANTS' REPLY TO DEFENDANTS' SUMMARY GROUNDS OF DEFENCE

CONTENTS

A. INTRODUCTION

1. On 27 May, the Defendants served the Claimants with a 47 page Summary Grounds of Defence (**"SGD"**). In this brief Reply, the Claimants a) highlight the evidence from the SGD that their claim should proceed to full trial; and b) respond to certain specific matters raised by the Defendants including regarding costs protection and the completion of the Claim Form.

2. In case the Court considers it to be necessary, the 2nd to 4th Claimants have signed a supplemental statement of truth, annexed to this Reply. Correspondence between the Defendants and the 1st Claimant regarding the financial position of the 1st and 5th Claimants is also annexed.

B. DISPUTED ISSUES OF FACT

3. Contrary to their overt position, it is implicit in the Defendants' lengthy SGD that this claim should proceed to a full trial.

4. The Defendants' repeatedly indicate that the case turns on disputed issues of fact, which cannot properly be resolved at the permission stage of proceedings. A substantial part of the SGD (pages 17-30) is dedicated to *"Factual Context"*.

B.1 Is the Government doing enough to meet its climate obligations?

5. The Defendants state at §54 of their SGD:

> **"The basic factual contention underlying the claim – that the Government is not doing enough to meet its own net zero target under the CCA 2008**

and/or to meet its international obligations under the Paris Agreement – is misconceived and wrong." (emphasis added)

6. The Defendants are correct that that is one of the "basic factual contention[s]" underlying the claim.

7. The Claimants have presented overwhelming evidence in support of that contention, which it is not necessary to repeat in this Reply.

8. The evidence comes from a multiple, authoritative sources including, the Government's own statutory adviser, the Committee on Climate Change (**"CCC"**), which, as the Defendants note[1], was established under the Climate Change Act 2008 (**"CCA 2008"**), to provide specialist, independent advice to the Government on climate change policy. Other evidence comes from bodies including the National Audit Office and the Public Accounts Committee.

9. The message from these diverse sources is clear and consistent: it is not just that the Government is failing to meet its own climate change targets; it is that it has failed to implement a framework *capable of delivering* the urgent and fundamental changes required. The consequences of that failure, if not urgently corrected, will be devastating for the Claimants, for the country as a whole, and for the wider international community.

10. Further evidence comes from the acts and decisions of the Defendants, including their support for aviation expansion, the grant of new oil and gas licences, and the cutting of overseas financial support: it is readily apparent that such acts and decisions are inconsistent with the urgent and radical decarbonisation the UK's commitments require.

11. In relation to Ground 1 of the claim, the evidence that the Government is not doing enough to meet its carbon reduction targets, is set out in the Statement of Facts and Grounds (**"SFG"**), at §§154ff. It includes damning evidence from the Committee on Climate Change (**"CCC"**), such as the Government's failure to meet 29 out of 31 milestones set in the CCC's Progress Report of 2019.

12. In relation to Ground 2 of the claim, the evidence that the Government is failing to prepare for the impacts of climate change, is set out at SFG, §§206ff. It includes more damning evidence from the CCC, such as the following:

> **"We find a substantial gap between current plans and future requirements and an even greater shortfall in action …"**
>
> **"The need for action has rarely been clearer. Our message to government is simple: Now, do it"[2]**

[1] SGD, §14
[2] SFG, §211

"UK plans have failed to prepare for even the minimum climate risks faced"[3]

13. In relation to Ground 3, evidence that UK finance flows are inconsistent with the Paris Temperature Limit of 1.5˚C and "well below" 2˚C, on which our collective survival depends, is set out at SFG, §§223 ff.

14. On 13 October 2020, for example, Emma Howard Boyd, Chair of the Environment Agency stated:

"But, distressingly, [Aviva's] analysis .... said the FTSE 100 index as a whole is heading towards 3.9 degrees."[4]

15. Such evidence reveals a systematic failure to align finance flows and investment to the Paris Temperature Limit[5]. Permitting the profiteering from such a catastrophic outcome is a clear violation of the Claimants' Convention rights.

16. In relation to Ground 4, the evidence that the Government has failed to implement a framework to ensure compensation for the victims of climate change is set out at SFG, §245ff. That evidence comes from, among others, the Second Defendant, HM Treasury, which has recently stated:

"<u>The most important market failure to address</u> is the negative externality associated with the emission of greenhouse gases ..."[6] (emphasis added)

17. It is implicit in that statement that:

    a. those profiting from CO2 emissions do not currently bear the cost of the resulting loss and damage, and hence are not properly incentivised to avoid such damage;

    b. that situation (ie "*the negative externality associated with the emission of greenhouse gases*") can be corrected by an appropriate legislative and regulatory framework; and therefore

    c. that situation must be corrected to avoid breaches to the Claimants Convention rights.

18. That is precisely the position of the Claimants on Ground 4.

19. In summary, there is compelling evidence in relation to all four grounds of the claim, from sources it will be difficult for the Defendants to challenge, that the Government is failing to meet its climate commitments.

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[3] SFG, §215
[4] SFG, §237
[5] SFG, §§142ff
[6] SFG, §245

20. If the Defendants wish to dispute that evidence, that is self-evidently a matter for trial, and not a reason to refuse the Claimants permission to proceed.

B.2 Is the nature of the risk from climate change sufficient to engage Articles 2 & 8?

21. The Defendants deny that the threat from climate change is sufficiently serious to engage positive obligations arising under ECHR Articles 2 and 8 (see SGD, §5(3)).

22. Such an unlikely position should be subjected to a full hearing for three reasons.

23. First, no UK Court has previously ruled that the threat from climate change is insufficiently serious to engage ECHR Article 2 and 8.

24. Second, the courts of other ECHR member states have ruled to the contrary (and the European Court of Human Rights has recently fast-tracked a climate change case). In 2019, for example the Supreme Court of the Netherlands concluded that:

> **"Climate science has ... arrived at the insight that a safe warming of the earth must not exceed 1.5°C and that this means that the concentration of greenhouse gases in the atmosphere must remain limited to a maximum of 430 ppm. Exceeding these concentrations would involve a serious degree of danger that the consequences referred to in 4.2 [which includes the loss of human life] will materialise on a large scale ...**
>
> **the Supreme Court finds that Articles 2 and 8 ECHR relating to the risk of climate change should be interpreted in such a way that these provisions oblige the contracting states to do 'their part' to counter that danger."**[7]

25. Third, the Defendants and others have publicly recognised the exceptional and extreme nature of the threat from climate change (see SFG, §§51ff and §§146ff).

26. On 1 May 2019, for example, the Rt Hon Michael Gove MP said:

> **"I make it clear that the Government recognise the situation we face is an emergency. It is a crisis, and it is a threat that we must all unite to meet ... We in the United Kingdom must bear that moral and ethical challenge particularly heavily"**.[8]

27. Sir David Attenborough has said:

> **"Please make no mistake: climate change is the biggest threat to security that modern humans have ever faced ...."**[9]

28. In December 2020, the Second Defendant said:

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[7] SFG, §296
[8] SFG, §52
[9] SFG, §58

> **"Climate change is an existential threat to humanity. Without global action to limit greenhouse gas emissions, the climate will change catastrophically with almost unimaginable consequences for societies across the world."**[10]

29. On 18 March 2021, the Rt Hon Alok Sharma MP said:

> **"The climate crisis represents a <u>clear and present danger</u> to people and our planet. Its real-world consequences are now all too visible."**[11] (emphasis added)

30. Clearly, it is arguable that a threat on this scale is sufficient to engage ECHR Articles 2 and 8, as has been recognised by the courts in other jurisdictions.

31. If the Defendants wish to contend that the threat from climate change is insufficiently serious to engage Article 2 and 8, then, given the profound implications for the Claimants and wider society, that is a matter that should be subjected to proper analysis and scrutiny.

<u>B.3 Are the Claimants "victims" for the purposes of HRA 1998, s. 7(1)?</u>

32. The Claimants have provided witness testimony of the impacts they and their families are already experiencing as a result of the climate crisis.

33. The primary purpose, however, of positive obligations arising under the Human Rights Act 1998 (**"HRA 1998"**) is to prevent harm occurring in the future - to prevent future loss of life and to prevent future interference with private and family life. In so far as the Defendants imply at §44 of their SGD, that the Claimants have no cause of action under ECHR Article 2 before their lives are actually lost, that implication should be firmly rejected: the Strasbourg Court has repeatedly ruled that the protection afforded by Convention rights should be real and not illusory.

34. Moreover, the wording of HRA s.7(1) clearly indicates that "victim status" may relate to future harm as well as past injury:

> **"if he is <u>(or would be)</u> a victim of the unlawful act"** (emphasis added)

35. The Claimants endorse the Defendants' statement at SGD, §42 that *"mere assertion of risks is insufficient"* for victim status on the basis of prospective harm and recognise the authority of *Tauira and Others v France*, referred to by the Defendants, which states:

> **"[The Claimants] must have an arguable and detailed claim that, owing to the authorities' failure to take adequate precautions, the degree of probability that damage will occur is such that it may be deemed to be a**

[10] SFG, §53
[11] SFG, §59

violation, on condition that the consequences of the act complained of are not too remote"[12].

36. The Claimants have advanced compelling evidence that that test is met in this case. They have highlighted:

    a. the devastating consequences of breach of the Paris Temperature threshold of 1.5˚C (see SFG, §§122ff).

    b. evidence from the Defendants themselves that current trajectory is for 3-4˚C warming (see SFG, §§139ff)

    c. overwhelming evidence that the impacts of such warming would be devastating to all (see SFG, §§145ff).

    d. evidence of their exposure to disproportionate and discriminatory levels of impact and risk (see SFG, §§64ff).

37. That evidence includes the CCC's assessment that:

> **"The Committee's judgement, on the basis of the IPCC AR4 report, is that ... if a 4°C rise were reached, <u>extreme consequences potentially beyond our ability to adapt</u> would arise"[13].** (emphasis added)

38. It includes the Second Defendant's statement that:

> **"Climate change is an <u>existential threat to humanity</u>. Without global action to limit greenhouse gas emissions, the climate will change catastrophically with <u>almost unimaginable consequences</u> for societies across the world."** (emphasis added)

39. And it includes the grim assessment from Professor Johan Rockstrom, that with 4˚C warming, which is the current trajectory, only half the world's population will survive. Crudely and simplistically, that implies a probability of survival of no more than 50% for each Claimant (even before consideration is given to their exposure to disproportionate risk by virtue of their age, ethnic background and gender).[14]

40. If playing Russian Roulette with the Claimants lives, with three bullets in the chamber, does not meet the test in *Tauira*, then it is difficult to imagine any circumstance which would meet the test.

41. As set out by the Claimants in their witness statements, the issue is not simply whether they survive the climate crisis individually; it is the impact on them now, both in terms of their mental health and the impact on their family life.

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[12] SGD, §42
[13] SFG, §146
[14] SFG, §148

42. The Claimants have not just an arguable case, but a compelling case that they are "victims" of the Defendant's failure to take practical and effective measures to tackle the climate emergency, for the purposes of HRA s.7(1), interpreted in light of the relevant jurisprudence. In so far as the Defendants wish to dispute that the test in *Tauira* is satisfied in this case, that is an issue of fact to be resolved at trial, but not a reason for permission to be refused.

B.4 Evidence of the Claimants family ties overseas

43. Surprisingly, the Defendants have chosen to dispute the strength of the 2nd to 4th Claimants' ties to their family overseas: "*The evidence is far from sufficient to establish that any of the Claimants enjoy family life with relatives overseas*"[15]. The Defendants note at SGD §51(2) that:

> **"The existence or non-existence of family ties is a question of fact, depending upon the "real existence in practice of close personal ties"."** (emphasis added)

44. As set out in their witness statements, the 2nd to 4th Claimants' ties to family overseas are not just close, but fundamental to their sense of family and identity.

45. Again, the Defendants' intention to dispute the nature of the Claimants' ties to their family overseas may be an issue for trial, but is not a reason to refuse the Claimants permission to proceed with their claim.

C. UNTESTED QUESTIONS OF LAW OF SUBSTANTIAL PUBLIC SIGNIFICANCE AND CONCERN

46. This is the first occasion on which the UK courts have been asked to confront directly the question of whether the threat from climate change engages ECHR Articles 2 and 8.

47. The Defendants suggest that the Claimants are repeating arguments previously raised by the 1st Claimant and rejected by the Courts. That is not correct.

48. The Supreme Court's recent ruling on the HRA 1998 argument raised by the 1st Claimant in the case of *R (Friends of the Earth Ltd)* was as follows:

> **"Finally, Mr Crosland sought to raise an argument under section 3 of the Human Rights Act 1998 that interpreting section 5(8) so as to preclude consideration of the temperature limit in the Paris Agreement would tend to allow major national projects to be developed and that those projects would create an intolerable risk to life and to people's homes contrary to articles 2 and 8 of the European Convention on Human Rights ("ECHR"). This argument must fail for two reasons. First, as Lord Anderson for HAL**

[15] SGD, §99

submits, the argument was advanced as a separate ground before the Divisional Court and rejected, that finding was not appealed to the Court of Appeal, and is therefore not before this court. Secondly, even if it were to be treated as an aspect of Plan B Earth's section 5(8) submission and thus within the scope of the appeal (as Mr Crosland sought to argue), it is in any event unsound because any effect on the lives and family life of those affected by the climate change consequences of the NWR Scheme would result not from the designation of the ANPS but from the making of a DCO in relation to the scheme."[16]

49. In other words, the Supreme Court rejected the First Claimant's argument in that case on the grounds that i) the argument was not properly before the court; and ii) on the basis that any breach of the HRA would arise only following the grant of a development consent order for Heathrow expansion. It is notable that, contrary to the position of the Defendants, the Supreme Court did not suggest that the threat from climate change was insufficient to engage ECHR Articles 2 and 8.

50. It is also notable in this context that the Supreme Court of Ireland recently ruled as follows:

> **"It can, however, safely be said that the consequences of failing to address climate change are accepted by both sides as being very severe with potential significant risk both to life and health throughout the world but also including Ireland ..**
>
> **Had standing been established or had similar proceedings been brought by persons who undoubtedly had standing, then it would have been necessary for this Court to consider the circumstances in which climate change measures (or the lack of them) might be said to interfere with the right to life or the right to bodily integrity."**[17] (emphasis added)

51. It is not in dispute that the threat from climate change is urgent and exceptional and a matter of profound public concern, nationally and internationally.

52. In the context of the climate and environmental emergency, recognised by Parliament on 1 May 2019, now is the moment to consider fully the scope of the Government's legal obligations to take practical and effective measures to confront that emergency.

D. THE DEFENDANTS' "MEASURES"

53. Over pages 18-30 of the SGD, the Defendants list the *"Measures being taken by Government on climate change"*.

[16] *R (Friends of the Earth Ltd)*, para. 113
[17] SFG, §§283-284

54. The implication is that since the Government is doing something rather than nothing, any legal challenge should be rejected as an impermissible "merits challenge".

55. But that cannot be right. On the assumption that the Defendants are bound by positive obligations to take practical and effective measures to address the threat from climate change, arising under Articles 2 and 8 of the ECHR, they do not discharge that obligation simply by adopting some measures in response. If that were the case, positive obligations arising under HRA 1998 would have no real substance - the Government could defeat any such claim, simply by showing that it was doing something rather than nothing.

56. Accepting that the Defendants enjoy considerable discretion in relation to the precise measures to be adopted, they must nevertheless show that taken as a whole, those measures are a reasonable and proportionate response to the threat - sufficient to safeguard the Claimants' Convention rights.

57. The Defendants conspicuously fail to explain the sufficiency of the measures they are taking with reference to their legally binding commitments, whether in terms of meeting the net zero target (Ground 1); preparing for the projected impacts and risks of climate change (Ground 2) or making an appropriate contribution to limiting warming to 1.5˚C and "well below" 2˚C (Grounds 1, 3 and 4). And they fail to address the many criticisms from the CCC and others to the effect that the measures they are taking are fundamentally and systematically inadequate to meet their obligations.

E. THE ROLE OF THE PRIME MINISTER

58. The Defendants contend that *"The Secretary of State for Business, Energy and Industrial Strategy ("the Secretary of State") is responsible for climate change policy and is the appropriate lead defendant in this matter ...There is no need for the Prime Minister to be named as a defendant in addition to the Secretary of State."*[18]

59. It was, however, the Secretary of State himself who stated:

> **"The Government has taken other broader enabling steps, including the announcement in October 2019 that the Prime Minister would chair a Cabinet committee on climate change. <u>The PM-chaired Climate Action Strategy Committee (CAS) determines the UK's overarching climate strategy, both domestically and internationally</u>."**[19] (emphasis added)

60. Unlike the Prime Minister, the Secretary of State is not in a position to ensure the requisite cooperation and compliance from all Government departments, including the 2nd Defendant, and is not therefore in a position to drive the whole-of-government response that is required.

[18] SGD, §1
[19] SFG, §44

61. The Institute for Government, among others, has highlighted the central role of the Prime Minister in meeting the Government's legally binding climate commitments:

> **"In several speeches, Boris Johnson has reiterated his personal commitment to net zero. But in his actions, he has not prioritised it. In October 2019, he announced that he would personally chair a new cabinet committee on climate change: it did not meet until 5 March 2020, three months after the election and five months after its creation. Even before the coronavirus crisis hit, no one we spoke to felt that net zero was a top three or four priority for the prime minister …**
>
> **...it will be impossible to get on track for an economic transformation as enormous as net zero if it remains only middle ranking on the prime minister's priority list. Net zero will need to be embedded in the UK's recovery from coronavirus."**[20]

62. Given the Prime Minister's assumption of responsibility for the UK's "overarching climate strategy, both domestically and internationally", and given his critical role in meeting the Government's climate commitments, he is properly joined to these proceedings.

F. STATEMENT OF TRUTH

63. The Defendants contend that the Statement of Truth on the N461 Claim Form should have been signed by all of the Claimants.

64. The Claimants are all litigants-in-person: in completing the Claim Form, they were guided by the Claim Form itself. The Claim Form provides space for only one signature and gives no indication that the signatures of all Claimants are required. For the avoidance of doubt, the 2nd to 4th Claimants have now signed a supplementary statement of truth (see Annex 1).

G. COSTS PROTECTION

65. The Defendants contend that the claim falls outside the scope of the Aarhus Convention. That is a surprising position to take. It is clear that this is fundamentally a case concerning protection of the environment and thus squarely within the scope of the Convention.

66. The Defendants assert that the provisions of the HRA 1998 "do not relate to the environment", for the purposes of Article 9(3) of the Aarhus Convention, while acknowledging that there is no direct authority to support that unlikely proposition.[21]

[20] SFG, §158
[21] SGD, §142

67. That contention is plainly incorrect. It is well established that ECHR rights, as incorporated into national law via the HRA 1998, do relate to the environment.

68. Indeed the President of the Committee of Ministers, the President of the Parliamentary Assembly, and the President of the European Court of Human Rights said, referring to the "living instrument" doctrine, in their joint statement of 29 January 2020 at the launch of the 70th anniversary of the ECHR, that:

> **"The Convention … has repeatedly proved itself capable of adapting to new human rights challenges …**
>
> **This adaptability will be crucial in helping the continent to face emerging challenges to individuals' rights linked to … threats to the natural environment."**[22]

69. Further, this claim relates also directly to breaches of the CCA 2008.

70. Finally, the Defendants also allege a failure to comply with CPR 45.42(1)(b). The Claimants' dispute that allegation. Each Claimant has submitted a confidential financial annex to their witness statement, which provides more than sufficient information for the Defendants to consider whether any variation to the standard Aarhus limits could be argued for.

71. It is notable in this context that the Claimants consist of:

    a. A small volunteer-based charity (the 1st Claimant)

    b. Three students (the 2nd to 4th Claimants)

    c. One full time volunteer (the 5th Claimant).

72. It is also relevant that on 20 May, the Defendants wrote to the First Claimant requesting further financial information (see Annex 2):

> **"We refer to the confidential annex to your witness statement dated 30.4.21, which lists your personal financial resources and those of Plan B. Pursuant to CPR 45.42(1)(b), a schedule of financial resources should list 'significant assets, liabilities, income and expenditure' and the amount of any 'financial support which any person has provided or is likely to provide'. In order that we may further consider our position regarding Aarhus costs, would you please confirm that the annex to your witness statement is complete, and that nothing has been omitted.**
>
> **We are asking for clarification because we would normally anticipate, for example, that a pension might appear among the assets/income. We also query whether Plan B may have relevant income, on the basis of its**

[22] SFG, §280

financial history published by the Charity Commission, and note that crowd funding is ongoing. The annex appears to refer only to Plan B's assets (an existing lump sum), without estimating future income or support."

73. The Defendants requested a response by 24 May.

74. On 24 May the First Claimant responded to say:

> **"Most of Plan B's funding is generated through Crowdfunding (ie multiple, small donations from members of the public). To itemise these donations individually would be:**
>
> - **difficult and time-consuming**
> - **inconsistent with the overriding objective, and**
> - **contrary to data protection principles.**
>
> **I will summarise the position so far as appears proportionate, in accordance with the overriding objective, and provide such further information as the Court may direct."**

75. The First Claimant proceeded to list all substantial (non crowd-funded) donations made to Plan B (see Annex 3).

76. The 1st Claimant responded in detail to the questions from the Defendants, within the time-frame requested by the Defendants, and offered to provide such further information as was reasonably required by the Defendants to assess the position. The Defendants, appear to have proceeded as if this correspondence did not take place at all.

H. CONCLUSION

77. The climate emergency, as declared by Parliament on 1 May 2019, presents a serious and substantial threat to the lives and family lives of the Claimants, as well as to the future of this country and of the wider international community. Indeed the 2nd Defendant has recently described the situation as an "existential threat".

78. That threat is not something naturally arising. It is the consequence of human actions and decisions, either funded or permitted by governments, including by the UK Government, with an estimated 15% of global carbon emissions supported through the City of London (see SFG, §236).

79. It is inherent in the social contract and fundamental to the protections of the HRA 98 that the Government should take practical and effective measures to address such a threat, safeguarding the rights of those within the jurisdiction. Courts internationally have recognised the same, and now is the moment for the issues to be given full consideration by the UK courts, before it is too late.

80. For the reasons set out in the SFG, the 2nd to 4th Claimants are exposed to disproportionate and discriminatory impacts and risk.

81. The Defendants resist the claim on the basis of factual disputes concerning:

    a. The adequacy of the measures taken by the Government;

    b. Whether the risk from climate change is sufficiently serious to engage positive obligations arising under ECHR Articles 2 and 8; and

    c. Whether the impacts and risks for the Claimants are sufficiently serious to afford them “victim status” for the purposes of HRA 1998 s. 7(1).

82. These are matters that can only be resolved through a full trial of the issues.

Tim Crosland
On behalf of the Claimants
4 June 2021

Annex 1 - Supplementary Statement of Truth

Statement of Truth

I believe (The claimant believes) that the facts stated in the N461 claim form (Claim No. CO/1587/2021) are true.

SECOND CLAIMANT:
Adetola Stephanie Kezia Onamade

THIRD CLAIMANT:
Jerry Noel Amokwandoh

FOURTH CLAIMANT:
Marina Xochitl Tricks