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

Claim No CO/1587/2021

B E T W E E N:

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

Defendants

DEFENDANTS' SUBMISSIONS IN RESPONSE TO CLAIMANTS' ADDITIONAL EVIDENCE

Outline response

1. These brief submissions in response to the Claimants' further evidence are provided by the Defendants pursuant to the Order of Calver J dated 6 July 2021, prior to the determination of the Claimants' application for permission to apply for judicial review.

2. The Claimants' further evidence consists in the main of extracts from two recent reports published by the Committee on Climate Change ("the CCC"), namely:

   a. *Independent Assessment of UK Climate Risk* (16 June 2021) ("CCRA3 Advice Report"); and

   b. *Progress in reducing emissions: 2021 Report to Parliament* (24 June 2021) ("the Emissions Report").

3. The extracts are limited. Exhibited to the Fifth Claimant's second witness statement are 25 pages of the CCRA3 Advice Report, which totals 142 pages, and was published together with a Technical Report and other supporting information. Exhibited to the Fifth Claimant's third witness statement are 26 pages of the Emissions Report, which totals 224 pages and was published together with two other reports to Parliament – *Progress in adapting to climate change* ("the Adaptation Report") and *Joint Recommendations* – as well as other supporting information.

4. The reports in general – and the extracts relied upon by the Claimants in particular – do nothing to further the claim. All they demonstrate is that the legal and regulatory framework established under the Climate Change Act 2008 ("CCA 2008") is working, and that the Claimants' contentions (i) that certain provisions of the CCA 2008 (s.13 and s.58) have been breached and/or (ii) that the UK Government has failed to establish a *"legal and regulatory framework"* for climate change mitigation and adaptation are wrong.

5. The Claimants seek to make the Court the arbiter of the content of Governmental action on climate change, which would be wholly inappropriate, and would seek to draw the Court into complicated socio-economic analysis for which it is poorly equipped. The CCA 2008 instead entrusts that analytical role to the CCC, to Parliament and to the UK Government (and the Devolved Administrations). Moreover, as is set out 10-11, 44(5), 50 and 111 of the Defendants' Summary Grounds of Defence ("SGD"), the Government enjoys a wide margin of appreciation in this regard. The reports therefore undermine, rather than assist, the claim.

6. Moreover, while the reports contain some constructive criticism of the Government (to which it will respond in due course), they also contain much constructive support. The Fifth Claimant's witness statements present an imbalanced and impartial picture.

7. Therefore, while the Defendants do not object to the Court being referred to extracts of the reports (and they do not seek to burden the Court with any further extracts of the reports or other related documents at this stage), they submit that the reports do not help the Claimants' case. For the reasons set out in the SGD, permission should be refused

for the claim to proceed. If permission is granted, it may be necessary to refer to other parts of the reports, as well as a very large number of other documents (see SGD para.56).

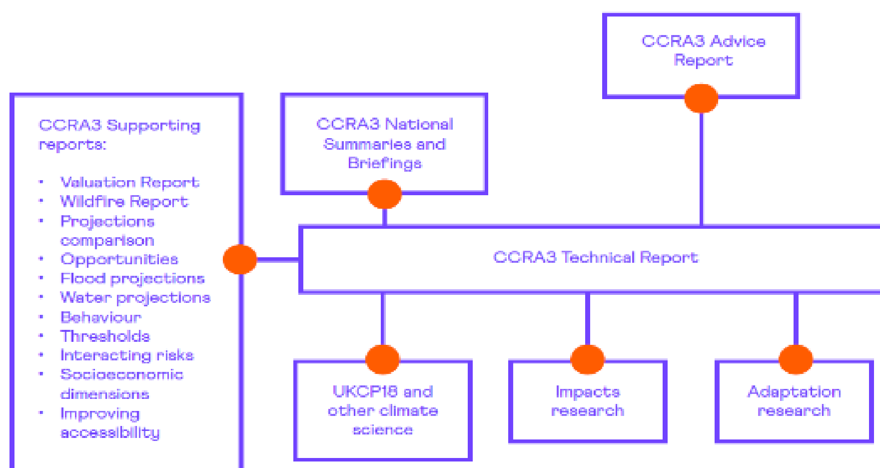
8. Despite that overarching position, a few comments are made on the Claimants' reliance upon each of the reports below.

9. The Claimants also seek to rely upon selected online news articles relating to the CCRA3 Advice Report and the Emissions Report. Those add nothing at all.

10. Finally, the Claimants seek to rely upon an online article reporting a recent judgment of a Brussels court of first instance in a climate change case.[1] The Defendants address this separately below, and also draw attention to an important recent judgment of the Supreme Court that the Court should be aware of in deciding whether or not permission should be granted as it affects the entire basis of the Claimants' judicial review claim.

CCRA3 Advice Report

11. The CCRA3 Advice Report is prepared as part of the context for the third Climate Change Risk Assessment ("CCRA3") and National Adaptation Programme – see SGD para.78. This is a statutorily controlled process under CCA 2008 ss.56-58. Simply as regards the CCRA3 Advice Report, the wide-ranging nature and complexity of the process may be seen from the below diagram (from the CCC's website):



[1] Exhibit TC/2 pp.39-41.

12. Under CCA 2008 s.59, the CCC also published the Adaptation Report in June 2021, to which the Government must respond to Parliament by 15 October 2021 (CCA 2008 s.59(4) and s.37(4)). The Government will carefully consider the recommendations in the CCRA3 Advice Report and the Adaptation Report, to which it will respond formally in due course. It would be inappropriate for Government to be required to respond sooner.

13. The Government is also engaging with key national stakeholders and over 90 organisations that have committed to report[2] on actions they are taking to strengthen preparedness for climate risks, including bodies responsible for water, energy, transport, environment, heritage, health and finance. For the first time, four UK financial regulators will be reporting on climate adaptation: the Prudential Regulation Authority (Bank of England), the Pensions Regulator, the Financial Conduct Authority and the Financial Reporting Council.

14. As is noted at SGD para.76, work on adapting to climate change is continuing. The CCRA3 Advice Report is part of that picture. It therefore does not demonstrate systematic failure, as the Claimants allege, but appropriate engagement with concerns. The Government will respond to the Adaptation Report in October 2021, will produce its third climate change risk assessment in early 2022 and then its third National Adaptation Programme. The process is working as it should. It is simply not possible to contend, as the Claimants do, that the CCRA3 Advice Report shows the UK Government *"failing"* to take action, when it is part of the on-going process of taking action.

15. The CCRA3 Advice Report identifies eight areas where it considers urgent additional action is needed: see pp.15-22[3]. However, in relation to each area it notes opportunities to address those matters in actions the Government is already planning to take – such as the Environment Bill, the Nature Recovery Network, the Environmental Land Management Scheme, the Nature for Climate Fund (etc.). These are matters that are therefore (i) subject to further consideration by Government and (ii) capable of being addressed.

[2] By the end of 2021 – under the CCA 2008 Adaptation Reporting Power.
[3] Exhibit TC/2 pp.21-28.

16. The Claimants grossly mis-characterise what the material says in any event. For example, at para.16 of the Fifth Claimant's second witness statement it is said that with 4ºC warming, which he alleges "*is the current trajectory*", there would be *"widespread threats to life"*. What is apparent from reading the CCRA3 Advice Report at p.30 is that this scenario is identified as a possibility to consider, but reflects the high end of the "*current uncertainty ranges*", and would not be reached until 2080 to 2100. It does nothing to support the claim actually made by the Claimants in this judicial review.

17. Moreover, the CCRA3 Advice Report does not support the Claimants' case on the issues arising in the current claim. The matters referred to in the Fifth Claimant's second witness statement relate to future risks and not to the current impacts of climate change in the UK. In relation to the victim test, the material does not have a bearing on whether the Claimants are currently directly and personally affected by climate change (see SGD paras.39-42). At most, the material refers to the risk of future violations, which is not enough to satisfy the victim test. The material does not show that there is a real and immediate risk to the life of the Claimants from climate change for the purposes of Article 2 (SGD para.44(4)) or that the Claimants are directly and seriously affected by climate change for the purposes of Article 8 (SGD para.48). The content of the CCRA3 Advice Report adds nothing to support the claim.

Emissions Report

18. The Emissions Report was laid before Parliament under CCA 2008 s.36(1) and, by s.37(4), the Government must respond by 15 October 2021. Paragraphs 8-15 of the Fifth Claimant's witness statement pick out certain selective quotes from the report, but fail to acknowledge the support in the Emissions Report for Governmental action to date. For example, the CCC expressly welcomes that the UK has legally committed to *"an ambitious path to Net Zero"* by the adoption of the Sixth Carbon Budget and notes *"the increase in the scale of Government's efforts"* over the last year.[4] The Government does not deny that the CCC sets out a challenge, but it is one to which the Government is

[4] Emissions Report p.16, Exhibit TC/3 p.27. The omitted sections of the Emissions Report contain many other positive references – see e.g. p.146 that notes material progress, significant policy announcements and strengthened commitments.

actively responding, and to which it is entitled to respond in accordance with the statutory framework. Exactly how the Government responds is a matter for it to judge – the CCC does not purport to be prescriptive.[5]

19. Moreover, the Emissions Report recognises that the appropriate way to address the issues identified is through a comprehensive Net Zero Strategy ("NZS"). A NZS is being prepared ahead of COP26 (see SGD para.62). The Fifth Claimant ignores this. However, it is obviously a critical part of the Government's action on climate change mitigation that is referred to many times in the Emissions Report. For example, the CCC states (in the extracts provided by the Claimants):

> *"We look forward to assessing the Government's Net Zero Strategy later this year and will aim to align our progress metrics and monitoring with the Government's proposals where we consider these to be credible."*[6]

20. The Emissions Report is a snapshot in time. It comes after the UK Government legislated for the 2050 net zero target and the sixth carbon budget, but before the Government has set out all the plans and strategies necessary to achieve them. Those plans and strategies are in hand. It is a product of the timing of the Emissions Report, and this judicial review, that some plans and strategies remain to be completed and implemented. That is simply a matter of timing into which nothing can be read. The CCC itself says in the Emissions Report (in a part not provided by the Claimants) that some *"key strategies and plans"* are underway and remain to be published so that it was *"reporting on a moving picture"*. The CCC expressly recognised that it is not possible to judge the Government's approach to meeting the 2050 net zero target and the sixth carbon budget until these currently-underway plans and strategies are published. In a passage quoted in the Fifth Claimant's third witness statement (at para.15), the CCC recommends the "*putting in place*" by the Government of "*a comprehensive policy framework this Parliament (i.e. to 2024)*". The Government's response to this recommendation cannot be pre-judged at this stage and the Claimants cannot seriously argue that the Court should do so (as para.9 of the Reply apparently attempts).

---

[5] See Emissions Report p.22, Exhibit TC/3 p.33: *"[t]he Government is not required to commit to the Committee's detailed sectoral pathways, nor to follow our policy advice."*
[6] Emissions Report p.33, Exhibit TC/3 p.44.

21. It is obvious, therefore, that the Emissions Report does not support the Claimants' case of systemic failure. Nor does it give rise to the need for the Defendants to make *"appropriate concessions"* (Fifth Claimant's third witness statement para.5(b)). The Defendants maintain the position in the SGD. The Emissions Report does not further any of the Claimants' legal arguments.

Case law

22. As the Fifth Claimant accepts, the ruling of a Belgian court is not binding on the courts of England and Wales.[7] Furthermore, no information about the case beyond a short Guardian article is provided. The factual circumstances in that case, however, appear to be entirely different to the position in the UK. The context for the case appears to be that the Belgian Government is on course to fail to meet its emissions reduction targets for 2030 under EU law. In the UK, the position is regulated by the CCA 2008 and domestic carbon budgets set under that Act have been met (see SGD para.58). For those various reasons, the Court cannot sensibly give any weight to the Brussels court's decision in determining the Claimants' application for permission.

23. The Defendants do however draw the Court's attention to the important and very recent judgment of the UK Supreme Court in R (SC, CB and 8 children) v Secretary of State for Work and Pensions [2021] UKSC 26 handed down on 9 July 2021. The case concerned the lawfulness of the two child limit for child tax credit in the Tax Credits Act 2002 (as amended) on human rights grounds. Relevant for the purposes of this claim is the discussion of the UK's obligations under the UN Convention on the Rights of the Child at [74]-[96]. Lord Reed (delivering the sole judgment of the Court) confirmed that it is a *"fundamental principle of our constitutional law that an unincorporated treaty does not form part of the law of the United Kingdom"* (at [77]), that the Human Rights Act 1998 has not given domestic legal effect to unincorporated treaties (at [79]), and that neither the Human Rights Act 1998 nor the case law of the European Court of Human Rights requires the domestic courts to depart from *"the rule that our domestic courts cannot determine whether this country has violated its obligations under international treaties"* (at [84]). Lord Reed concluded (at [91]):

[7] Third witness statement para.4.

> *"for a United Kingdom court to determine whether this country is in breach of its obligations under an unincorporated international treaty, and to treat that determination as affecting the existence of rights and obligations under our domestic law, contradicts a fundamental principle of our constitutional law".*

24. The claim in this case depends upon what is described by the Claimants as a *"modest proposition that, to discharge their ECHR obligations, the Defendants must, at a minimum honour their commitments under ... international law, including specifically, their commitments under the Paris Agreement ..."* (SFG para.286; see also SFG paras.4, 291, 293, 315 and 348). This is now clearly an argument that is not open to the Claimant in domestic judicial review proceedings on the authority of SC.

25. This is fundamental to the Claimants' claim. All the Claimants' grounds depend on praying the provisions of the Paris Agreement in aid as the basis for its contentions on what is necessary for the UK Government to meet the alleged positive obligations under the ECHR and the benchmark against which it asks the Court to assess whether the UK is meeting the alleged positive obligations. This applies to Ground 1 (SFG paras.256, 315 and 323), Ground 2 (SFG paras.259 and 315), Ground 3 (SFG paras.260-261, 315 and 333-334), and Ground 4 (SFG para.315). This approach is wholly impermissible in light of SC. In addition to the reasons in the SGD, it is clear that the Claimants' claim must fail as a result of this new judgment of the Supreme Court.

The permission decision

26. In their reply dated 4 June 2021, the Claimants sought to characterise the case as one which *"turns on disputed issues of fact"* (para.4). The new evidence is relied on for these purposes. But there are numerous points made by the Defendants – each of which constitutes a knock-out blow for permission purposes – before any of the factual matters relied on by the Claimants become relevant (see SGD para.5). Even if the Claimants' factual contentions are accepted at face value:

    (1) there is no basis for contending that there is non-compliance with the domestic obligations in the CCA 2008;

(2) the Claimants are not victims in relation to the matters about which they complain and are not therefore entitled to rely on ECHR rights (see SGD paras.92-96);

(3) no positive obligations under Articles 2 or 8 arise (see SGD paras.97-102);

(4) in light of SC, the Claimants cannot use compliance with the Paris Agreement as the benchmark for meeting any positive obligations arising under Articles 2 or 8 (despite this being the foundation of their entire case).

27. These are all points of principle, any one of which means that the Court must refuse permission.

28. The Claimants' interpretation of the facts is in any event substantially over-blown. This is exemplified in the suggestion in the Claimants' reply at para.39 that each of the Claimants have a 50% chance of dying due to climate change. This is absurd.

29. Beyond that, the Claimants' ultimate contention – that the UK Government *"has failed to implement a framework capable of delivering"* protection for the right to life and family life in relation to climate change (Claimants' reply para.9) – is hopeless in light of the material from CCC when read fairly and as a whole. This is apparent from the overall position explained in the Emissions Report at TC/3 pp.22-23, 27 and 33. Given the content of any positive obligation which arises and the wide margin of appreciation (SGD paras.105 and 110), on the basis of the evidence on which the Claimants rely, it is not arguable that the Government is not meeting any positive obligation which arises.

Conclusion

30. For all those reasons, while the Defendants have not opposed the admission of the additional materials on which the Claimants seek to rely, they submit that they do not make the claim arguable. The new material does not change the Defendants' position in this claim. The polycentric and multifaceted issue of climate change is one that falls to be addressed under the carefully calibrated provisions of the CCA 2008 (that have not

arguably been breached in this case), not through human rights litigation. That is fundamentally misconceived for the reasons set out in the SGD.

RICHARD HONEY QC

NED WESTAWAY

15 July 2021