IN THE COURT OF APPEAL
ON APPEAL FROM
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

APPELLANTS' SKELETON ARGUMENT IN SUPPORT OF AN APPLICATION FOR PERMISSION TO APPEAL AGAINST THE REFUSAL OF PERMISSION TO APPLY FOR JUDICIAL REVIEW

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27 DECEMBER 2021

A. INTRODUCTION

1. This is an application for permission to appeal against the judgment of Bourne J (**"the judge"**) dated 21 December 2021 (**"the judgment below"**) refusing permission to bring a claim for judicial review. The Appellants aim to challenge the Respondents' ongoing failure to implement a legislative and administrative framework, which provides effective deterrence against the exceptional threat from climate change, contrary to positive obligations arising under the Human Rights Act 1998 (**"HRA 1998"**), section 6.

2. The Appellants seek by way of remedy:

    a. a declaration that the Respondents' failure to take practical and effective measures to tackle the threat from climate change, breaches the Appellants' rights arising under the Human Rights Act 1998 (ECHR Articles 2, 8 and 14); and

    b. a mandatory order that the Respondents implement, with appropriate urgency, a legal and regulatory framework sufficient to remedy those breaches.

3. In refusing permission, the judge made the following errors:

    a. he wrongly held that the Appellants' reliance upon the 1.5˚C temperature limit as a benchmark for assessing the Respondents' obligations arising under the Human Rights Act 1998 contravened the Supreme Court's ruling in *R (SC) v Work and Pensions Secretary [2021] UKSC 26*, on the ground that it features in the Paris Agreement on Climate Change, which is an unincorporated international treaty (**"Ground 1"**);

    b. he wrongly held that the Climate Change Act 2008 (**"CCA 2008"**) satisfies the positive obligations on the Respondents arising under HRA 1998, without consideration as to whether that legislation provides practical and effective deterrence against interference with the Appellants' rights or a system of redress, contrary to the established case-law (**"Ground 2"**);

    c. he wrongly held that any failure on the part of the Respondents to implement practical and effective measures against climate change was incapable of interfering with the family life of the Appellants and, in particular, was wrong to treat as irrelevant the family and cultural ties of the 2nd to 4th Appellants to regions of the world exposed to extreme risks from the Respondents' inaction (**"Ground 3"**);

d. he wrongly held that the Appellants were not "victims" for the purposes of HRA s.7(1), improperly disregarding the evidence of current and future harm and of exposure to disproportionate and discriminatory risk (**"Ground 4"**);

e. he wrongly held that it was beyond the competence of the court to consider whether the Respondents have discharged their obligation to take practical and effective measures to tackle the threat from climate change ("**Ground 5"**).

B. THE CLAIM IN OUTLINE

B.1. Positive obligations arising under HRA 1998 and Convention Articles 2 and 8

4. The European Court of Human Rights summarised its case law concerning the positive obligation to safeguard the right to life in *Nicolae Virgiliu Tănase v Romania (2019)*.

5. It explains that the "primary duty" on the State is to establish a "legislative and administrative framework" to address threats to the right to life:

> **"This substantive positive obligation entails a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life … . It also requires the State to make regulations compelling institutions, whether private or public, to adopt appropriate measures for the protection of people´s lives …"**[1] (emphasis added)

6. It also highlights the procedural obligation to implement an appropriate framework to provide justice and compensation in the event of loss of life:

> **"Thirdly, the Court reiterates that the State's duty to safeguard the right to life must be considered to involve not only these substantive positive obligations, but also, in the event of death, the procedural positive obligation to have in place an effective independent judicial system. Such system may vary according to circumstances (see paragraph 158 below). It should, however, be capable of promptly establishing the facts, holding accountable those at fault and providing appropriate redress to the victim …"**[2] (emphasis added)

7. The positive obligations arising under Articles 2 and 8 require not only that governments implement a framework and a system, but also that the framework

[1] *Nicolae Virgiliu Tănase v Romania [GC], No 41720/13, 2019* [135]
[2] Ibid. [137]

and system provides protection and deterrence that is "practical and effective", not "theoretical or illusory" (see, for example, *Moreno Gomez v Spain*[3]).

8. The Respondents have failed to implement either a practical and effective framework to deter the threat to their rights arising from industrial and other activities, which exacerbate the threat from climate change, or a practical and effective system for holding accountable those at fault and providing appropriate redress to the victims of climate change.

9. Since climate change, arising primarily from the emission of greenhouse gases, in particular from fossil fuels, presents an extreme threat to life that is already causing substantial loss of life, it would be difficult to argue that positive obligations arising under HRA 1998 are not engaged at all. Indeed, the judge's reasoning proceeds from the unstated premise that they are so engaged.

B.2. The Respondents know that climate change is a threat to life and to family life

10. It is evident from the Respondents' public statements that they are well aware that climate change presents an urgent and grave threat to life.

11. On 1 May 2019, Parliament approved a motion to declare a climate and environmental emergency. On behalf of the Government, 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. We were the first country to industrialise, and the industrial revolution that was forged here and generated prosperity here was responsible for the carbon emissions that have driven global warming. The burden of that is borne, even now, by those in the global south, so we have a responsibility to show leadership."[4]** (emphasis added)

12. In December 2020, the Second Defendant published a report which began:

> **"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."[5]** (emphasis added)

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[3] *Moreno Gomez v Spain*; App no 4143/02, ECtHR 16 November 2004, §56

[4] Appellants' Statement of Facts and Grounds ("SFG"), §52

[5] SFG, §53

13. On 18 March 2021, Rt Hon Alok Sharma MP, President of COP26, said:

> **"<u>The climate crisis represents a clear and present danger</u> to people and our planet. Its real world consequences are now all too visible … <u>Unless we act now</u>, we will be out of time to hold back the worst impacts."**[6] (emphasis added)

14. On 23 February 2021, Sir James Bevan, Chief Executive, Environment Agency, said:

> **"The net effects will collapse ecosystems, slash crop yields, take out the infrastructure that our civilisation depends on, and destroy the basis of the modern economy and modern society."**[7]

15. On 23 February 2021, the First Defendant, the Prime Minister, addressed the UN Security Council as follows:

> **"If we don't act now, when will we act? That's my question. When are we going to do something if we don't act now?"**[8]

16. Such statements on behalf of the Defendants reflect the scientific evidence, which is summarised in the Claimants' SFG. Sir David King, the Government's former Chief Scientific Adviser, has said:

> **"What we do over the next three to four years, I believe, is going to determine the future of humanity. We are in a very, very desperate situation."**[9]

<u>B.3 The Respondents know what needs to be done</u>

17. There is a scientific and political consensus that to avert intolerable risks to life and to family life average global warming must be limited to 1.5˚C above pre-industrial levels. That consensus is reflected in the Paris Agreement on Climate Change (**"the Paris Agreement"**) and the literature of the Intergovernmental Panel on Climate Change (**"the IPCC"**), the body which provides scientific advice to governments on climate change.

18. The Respondents themselves summarise the reasons for that consensus in their recently published "Net Zero Strategy":

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[6] SFG §59
[7] SFG §56
[8] SFG §57
[9] SFG, p.1,

> **"People are rightly concerned, with the latest IPCC report showing that if we fail to limit global warming to 1.5°C above pre-industrial levels, the floods and fires we have seen around the world this year will get more frequent and more fierce, crops will be more likely to fail, and sea levels will rise driving mass migration as millions are forced from their homes. <u>Above 1.5°C</u> we risk reaching climatic tipping points like the melting of arctic permafrost – releasing millennia of stored greenhouse gases – meaning <u>we could lose control of our climate for good</u>."**[10]

19. Since climate change is a global threat, no country can tackle it on its own. The responsibility of all governments, however, is to align their national responses to the scientific consensus on what is necessary to avert intolerable risks of disaster, i.e. to maintain the 1.5˚C temperature limit. As the Respondents acknowledge, there is a particular responsibility on those countries, such as the UK, with a historic responsibility for climate change. Nor do the Respondents deny that tackling climate change requires practical and effective measures:

    a. to reduce a country's own greenhouse gas emissions in line with the 1.5˚C limit ("mitigation measures");

    b. to prepare for the impacts of climate change ("adaptation measures");

    c. to align finance flows and investment to the 1.5˚C limit ("finance measures"); and

    d. to internalise the costs of climate change loss and damage through compensation measures which make the polluter pay ("compensation measures").

20. The Climate Change Act 2008 (**"CCA 2008"**) addresses mitigation measures (in part) and adaptation measures, but neither finance nor compensation measures.

21. The imperative to adopt finance measures, however, was recognised by the Third Defendant in his formal response to the CCC's 2020 progress report:

> **"<u>In all sectors, we must align our public and private finance with the Paris Agreement</u>, accelerating the flow of finance from high to low-carbon and resilient investments, improving access to finance especially for developing countries, accelerating the development and transfer of technologies, enhancing long-term capacity building and ensuring the $100 billion climate finance goal is met."**[11]

[10] UK Government, *Net Zero Strategy: Build Back Greener,* Executive Summary, p. 14
[11] SFG, §224, CB, p.65

22. The imperative to adopt compensation measures, which is a specific obligation arising from Convention Article 2, is likewise emphasised by the Second Defendant:

> **"The most important market failure to address is the negative externality associated with the emission of greenhouse gases ..."**

B.4 But they are not doing it

The Government is failing to do enough to take appropriate mitigation and adaptation measures

23. The Respondents correctly identify the fundamental factual dispute between the parties concerning mitigation measures:

> **"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."**

24. The CCA 2008 establishes the Climate Change Committee (**"CCC"**) as independent statutory advisers to the Government on climate change. The CCC's independent evidence, however, delivered in accordance with its statutory functions under the CCA 2008, is clear and unequivocal: the Government is systematically failing to take appropriate mitigation or adaptation measures.

25. The Appellants rely on the findings of the CCC's most recent three progress reports to Parliament (for the years 2019, 2020 and 2021); and its latest statutory assessment regarding the threat to the public from climate change (published in June 2021, and current until June 2026).

CCC's 2019 Progress Report to Parliament

26. The headline messages of the 2019 report are summarised by Lord Deben and Baroness Brown, Chair and Deputy Chair of the CCC, in their foreword to the report:

> **"[T]ougher targets do not themselves reduce emissions …**
>
> **The Adaptation and Mitigation Committees have reviewed the UK Government's approach to climate change adaptation and emissions reduction. Our reports are published in parallel, as required under the Climate Change Act. We find a substantial gap between current plans and future requirements and an even greater shortfall in action ...**

> **Last June, we advised that 25 headline policy actions were needed for the year ahead. Twelve months later, only one has been delivered by Government in full. Ten of the actions have not shown even partial progress …**
>
> **The central premise of the Climate Change Act is that the Government of the day holds the responsibility to act to protect future generations. This principle is at risk if the priority given to climate policy is not substantially increased over the next year and the next Government spending review.**
>
> **The need for action has rarely been clearer. Our message to government is simple: Now, do it."**[12] (emphasis added)

CCC's 2020 Progress Report to Parliament

27. The Government failed to heed the warning of the CCC's 2019 progress report. Key findings from the CCC's 2020 progress report to Parliament were as follows:

> **"As future emissions reductions require action now, we also track 21 indicators of progress ... "**
>
> **"Progress is generally off-track in most sectors, with only four out of 21 of the indicators on track in 2019 ... This represents no change from the previous year where the same four of the 21 indicators were met."**
>
> **"Increasingly, all policy and infrastructure decisions will need to be checked against their consistency with the UK's Net Zero target and the need to adapt to the impacts of climate change."**
>
> **"In last year's Progress Report, we set out recommended actions for 2019 and 2020, focusing on enabling actions on the 'critical path' to achieving the Net Zero target … Overall the Government has only fully achieved two milestones out of the 31 set out in the 2019 Progress Report."**
>
> **"UK plans have failed to prepare for even the minimum climate risks faced"** (emphasis added)

CCC's 2021 Progress Report to Parliament

28. Again, the Government failed to heed the message of the CCC's 2020 progress report. In publicly presenting the 2021 report, Chris Stark, the CEO of the CCC, said:

> **"The targets (Britain) set are not going to be achieved by magic. Surprisingly little has been done so far to deliver on them."**

[12] CCC Progress Report to Parliament 2019, Foreword

29. In their joint Foreword to the 2021 progress report, Lord Deben and Baroness Brown say:

> **"We continue to blunder into high-carbon choices. Our Planning system and other fundamental structures have <u>not been recast to meet our legal and international climate commitments …</u>**
>
> **…. the Committee's advice to step-up the ambition and resourcing of adaptation continues to go <u>unheeded</u>. And the willingness to set emissions targets of genuine ambition contrasts with a <u>reluctance to implement</u> the realistic policies necessary to achieve them …"[13]** (emphasis added)

30. Key messages are set out from page 8 of the Progress Report, under the heading: *"Overall progress in climate policy: Net Zero and adaptation"*:

> **"Without a much stronger and urgent effort, we will breach 1.5°C of warming in the early 2030s and remain ill-prepared for the future …**
>
> **… <u>The UK is less prepared for the changing climate now than it was when the previous risk assessment was published five years ago</u> …**
>
> **… The UK has been a strong contributor to international climate finance … However, recent cuts to the UK's overseas aid are undermining these commitments …"**
>
> **"<u>Not one of the 34 priority areas assessed in this year's progress report on adaptation is yet demonstrating strong progress</u> in adapting to climate risk …"[14]** (emphasis added)

31. The Executive Summary states:

> **"Decisions on road building, planning, fossil fuel production and expansion of waste incineration are not only potentially incompatible with the overall need to reduce emissions but also send mixed messages and could undermine public buy-in to the Net Zero transition. We recommend <u>implementation of a 'Net Zero Test'</u> to ensure that all Government policy decisions are compatible with the legislated emissions targets."[15]**

32. Consistent with the CCC's assessment, the Appellants highlight a number of specific decisions taken (or not taken) by the Respondents, which highlight the absence of practical and effective mitigation measures, such as:

    a. the Respondents' position on a proposed new coal mine in Cumbria

[13] CCC Progress Report to Parliament 2021, Foreword
[14] Ibid. p.8
[15] Ibid. Executive Summary

b. support for aviation expansion

c. the grant of new oil and gas licences

d. emergency loans to carbon-intensive corporations without climate conditions

e. a commitment to invest £27.5 billion in the road network.

CCC's 2021 UK Threat Assessment

33. Pursuant to CCA 2008 s. 57, the CCC is obliged to advise the Government on the climate change risk assessment every five years.

34. Speaking publicly at the launch of the CCC's third such report on climate risk, Chris Stark, CEO of the CCC said:

> **"It's really troubling how little attention the government has paid to this. The extent of planning for many of the risks is really shocking. We are not thinking clearly about what lies ahead."**[16]

35. The report itself states:

> **"<u>Alarmingly,</u> this new evidence shows that the gap between the level of risk we face and the level of adaptation underway has widened. Adaptation action has failed to keep pace with the worsening reality of climate risk."**
>
> **"The UK has the capacity and the resources to respond effectively to these risks, yet it has not done so. Acting now will be cheaper than waiting to deal with the consequences. Government must lead that action."**
>
> **"The Government has <u>not heeded</u> our past advice on the importance of setting this framework and resourcing it adequately. Adaptation governance has weakened over the past ten years at the same time as the evidence of climate risk has grown. This must change."**
>
> **"The UK is not prepared for unprecedented extreme weather events that could occur <u>now</u> …"**
>
> **"… adaptation is a pressing priority <u>now</u>. It cannot wait for another year, or the next five-yearly assessment of risk."** [17] (emphasis added)

36. The report highlights the discriminatory impacts of the Government's inaction on members of society exposed to disproportionate risk, with specific reference to economically disadvantaged groups and intergenerational inequality:

[16] See Third Witness Statement of 5th Appellant
[17] CCC's Third UK Threat Assessment

> **"Climate change is likely to widen existing inequalities through its disproportionate effects on socially and economically disadvantaged groups. For example, lower income households are relatively more exposed to flood risk in the UK … Lack of action today stores up negative impacts for future generations, creating intergenerational inequalities …"**

37. In light of the above, it is difficult for the Respondents to dispute the evidence that they are failing to take practical and effective mitigation and adaptation measures, without calling into question the expertise of the CCC (which they have not done).

38. In the original formulation of their claim, the Appellants advanced in the alternative that this failure constituted a breach of provisions of the CCA 2008. The judge ruled that:

> **"In my judgment, the contention that the 2008 Act has been breached does not get off the ground".**[18]

39. The Appellants do not appeal this part of the judgment. To the contrary, they rely upon to demonstrate that the CCA 2008 does not provide a practical and effective legal and administrative framework to safeguard the Appellants rights, even in relation to the mitigation and adaptation measures to which it is confined, since the Respondents, according to the expert advice, can fail to take reasonable and necessary measures without legal consequence.

40. Shortly before the renewal application hearing, the Respondents applied to adduce into evidence their recently published *Net Zero Strategy*. The *Net Zero Strategy*, however, fails to address the Appellants' case because it is a strategy document, which as opposed to the legal and administrative framework which is required by HRA 1998. In its response to the *Net Zero Strategy*, the CCC states:

> **"The Government has not yet put forward plans for a Net Zero Test, as we had recommended, to ensure that all policy and planning decisions are consistent with the path to Net Zero. Such a test is still needed to avoid locking in high-carbon developments."**

The Government has failed to take practical and effective measures to align finance flows to the Paris Agreement

41. In December 2020, the CCC published its report The Road To Net-zero Finance, emphasising the need for a "more systematic approach" to finance flows:

[18] Judgment below [34]

> **"Making finance consistent with the delivery of a net-zero and resilient economy is the crucial third goal of the Paris Agreement. As the UK seeks to deliver its target of reaching net-zero emissions by 2050, a more systematic approach to financing is now needed."[19]**

42. As a post-industrial, service-based economy, the UK's real contribution to the climate crisis is currently less its own domestic emissions than its financing of the carbon economy around the world. As the judge acknowledged, it has been estimated that the City of London supports 15% of global carbon emissions.[20]

43. The consequences of breaching the Paris threshold of 1.5˚C, as the Respondents acknowledge, are likely to be devastating.

44. Yet the Bank of England has disclosed that its investments are financing 3.5˚C warming.[21] And the Chair of the Environment Agency, Emma Howard Boyd, has highlighted that:

> **"the FTSE 100 index as a whole is heading towards <u>3.9 degrees</u>."** (emphasis added)

45. Global warming on this scale would, in the academic language, be "incompatible with an organised global community".[22] It has been estimated, in such an eventuality, billions of lives would be lost.[23]

46. It is evident that the Respondents, and the Second Respondents in particular, have failed to implement the measures necessary to align finance flows to the Paris Agreement temperature threshold of 1.5˚C.

<u>The Government has failed to take practical and effective measures to ensure compensation for the victims of climate change loss and damage</u>

47. There are substantial impediments facing a victim of climate change in seeking redress, in particular the identification of an appropriate defendant. Consequently, those who profit from the production and consumption of fossil fuels, do not pay for the harm that they cause, with the consequence that market forces are not harnessed to alternatives.

48. The Second Respondent acknowledges the legal and administrative *lacuna* in stating:

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[19] SFG, §229
[20] Judgment below [45]
[21] SFG, §241
[22] SFG, §147
[23] SFG, §148

"The most important market failure to address is the negative externality associated with the emission of greenhouse gases ..."

49. The Second Respondent has, however, failed to address it.

50. In summary, there is compelling evidence that the Respondents have failed to implement a practical and effective legislative and administrative framework to safeguard the rights of the Appellants against the threat from climate change.

C. THE JUDGE'S ERRORS IN REFUSING PERMISSION

51. In refusing the Appellants permission to apply for judicial review, the judge made the following errors.

C.1 Wrongly holding that the Appellants' reliance on the 1.5˚C temperature limit as a benchmark contravened the guidance of the Supreme Court in *SC*

52. The judge held that the Appellants' reliance on the 1.5˚C temperature as a benchmark contravened the Supreme Court's direction in *SC*:

> **"The effect is that the Court is being asked to enforce the Paris Agreement, contrary to the guidance in *SC*."**[24]

53. The judge failed to apply correctly the distinction drawn by the Supreme Court in *SC* between:

    a. referring to an international treaty as evidence of a consensus relevant to the interpretation of Convention rights, which is good practice; and

    b. inviting the domestic courts to rule that a specific provision of an international treaty has been breached, which is inappropriate to the context of a dualist legal system.

54. The Supreme Court explains that distinction as follows:

> **"80. A misunderstanding appears to have arisen in this jurisdiction from the fact that the European court frequently has regard to international law, and to its interpretation by competent institutions, when interpreting the Convention, for reasons which were correctly identified in this case by the Court of Appeal. In the first place, article 31(3)(c) of the Vienna Convention on the Law of Treaties (1969) requires that, in the interpretation of treaties, "[t]here shall be taken into account, together with the context … any relevant rules of international law applicable in the relations between the parties" … International law also has a broader significance, along with the contents of the domestic law of the contracting states, Council of Europe**

[24] Judgment below [53]

> **texts and other relevant materials, as evidence of a European consensus, or at least of relevant developments or evolving principles, which can inform the interpretation of the Convention, the width of the national margin of appreciation, and the court's assessment of proportionality …**
>
> **83. On the other hand, the European court has not treated provisions of international treaties as if they were directly incorporated into the Convention itself, so as to impose specific obligations on the contracting states via the Convention …**
>
> **84. There is, accordingly, no basis in the case law of the European court, as taken into account under the Human Rights Act, for any departure from the rule that our domestic courts cannot determine whether this country has violated its obligations under unincorporated international treaties …"**[25]

55. The Appellants do not invite the court to rule that a specific provision of the Paris Agreement has been breached. That would indeed fall foul of the Supreme Court's guidance in *SC.* They simply refer to the Paris Agreement temperature limit of 1.5˚C as evidence of the international consensus on what must be done to avoid intolerable risks to life and to family life.

56. The logic of the judge's position is that the courts are bound to ignore the scientific consensus on what is required to safeguard life, simply because that consensus is referred to in an international treaty. On that logic, it would be possible to use the 1.5˚C limit as a benchmark only if it were <u>not</u> referred to in any treaty.

57. The correct approach has been adopted by the highest courts of other parties to the Convention. The Supreme Court of the Netherlands, for example, in finding that the Dutch Government had breached ECHR Articles 2 and 8, by failing to do enough to tackle climate change, invoked the 1.5˚C limit to define the scope of Convention rights:

> **"Climate science has ... arrived at the insight that a safe warming of the earth <u>must not exceed 1.5°C</u> 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 ...**
>
> **… <u>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</u>."**

[25] *R (SC) v SSWP [2021] UKSC 26; [2021] 3WLR 428, [80]-[84]*

58. In referring to the 1.5˚C limit, the Dutch court was not ruling that the Dutch Government had breached a specific provision of the Paris Agreement. It was referring to the scientific consensus on a line that is not to be crossed, just as the UK Government has done in its recent *Net Zero Strategy* (see para. 18 above).

C.2 Declining to consider whether the Climate Change Act 2008 provides practical and effective deterrence against interference with Appellants' Convention rights

59. The judge ruled that:

> **"The insuperable problem with the Article 2 claim (and with any Article 8 claim based on the physical or psychological effects of climate change on the Claimants) is that there is an administrative framework to combat the threats posed by climate change, in the form of the 2008 Act and all the policies and measures adopted under it."[26]**

60. The judge was wrong to hold that the positive obligations arising under the HRA 1998 are satisfied by the existence of CCA 2008, without consideration of its efficacy and irrespective of its limitations in scope. To the contrary, once Article 2 is engaged, it is a specific requirement that the legal and administrative framework provides "effective deterrence" against the relevant threat; and that a practical and effective system is implemented to ensure justice and compensation for loss of life.

61. CCA 2008 does not address finance flows at all. Nor does it establish compensation measures for loss of life. To the contrary, its scope is confined to mitigation and adaptation measures.

62. The judge noted at [25] the substantial body of independent evidence to the effect that the Respondents are failing to take the action necessary to meet the targets established by the CCA 2008:

> **"(1) The CCC's 2020 progress report to Parliament which stated that progress was "generally off-track in most sectors", representing "no change from the previous year".**
>
> **(2) A report published by the Institute for Government in September 2020, alleging that the Government had not confronted the scale of the task and complaining of a lack of sufficient strategies.**
>
> **(3) A report published by the Institute for Public Policy Research in November 2020, alleging a lack of sufficient spending commitments to achieve net zero emissions by 2050.**

[26] Judgment below [48]

(4) A report published by the National Audit Office on 4 December 2020, alleging that Government had not yet put in place the essential components for cross-government working to achieve the net xero target.

(5) A report published by the Public Accounts Committee on 5 March 2021, stating that Government had not set out how it planned to achieve net zero despite having set the target in 2019.

(6) The CCC's 2019 report to Parliament on "Progress in preparing for climate change" which found "a substantial gap between current plans and future requirements and an even greater shortfall in action" and the lack, at that time, of "a coherent and coordinated plan, nor the resources to enable the required actions to be carried out".

(7) The CCC's Progress Report to Parliament published in June 2020 which stated that "UK plans have failed to prepare for even the minimum climate risks faced …".

(8) The CCC's report, "The Road to Net-zero Finance", which stated that "a more systematic approach to financing is now needed", read in conjunction with comments by the Bank of England and others suggesting that without changes to global finance, the world may be on track for a temperature increase in the region of 3.5°C above preindustrial levels by 2100."[27]

63. However, the judge went on to hold at [37] that:

> **"The 2008 Act, as I have said, did not make the views of the CCC binding on Government. There is nothing in the 2008 Act to suggest that critical reports by the CCC should be a foundation for the Courts to declare that the Government's policies are unlawful."**

64. In other words, the 2008 Act, on the judge's assessment, does not oblige the Government to follow the expert advice on what is required to meet the targets under the Act. In such circumstances, it is evident that the CCA 2008 fails to provide effective deterrence against decisions, acts and omissions which increase the threat from climate change to an intolerable level, even in relation to mitigation and adaptation measures.

C.3 Wrongly concluding there could be no interference with the Appellants' rights to family life

[27] Judgment below [28]

65. In stating at [66] that *"it is only in exceptional circumstances that the Courts of the UK will hold a UK public authority liable for a breach of ECHR rights outside the UK"* it is evident that the judge misunderstood the Appellants' case.

66. The Appellants do not claim that the Respondents' failure to take practical and effective measures to tackle climate change constitutes a breach of ECHR rights outside the UK. To the contrary, all the Appellants are resident <u>within</u> the jurisdiction and consequently the breaches to their rights occur within the UK.

67. The Appellants case relates in part to the impact of the Respondents' inaction on their family life within the UK but also to the evidence that beyond 1.5˚C warming, the science predicts that whole regions of the world, including regions where the 2nd to 4th Claimants have strong family ties and cultural connections, will be rendered uninhabitable. The judge was wrong to consider this evidence irrelevant to the question of whether the Respondents' failure to take practical and effective measures constitutes an unlawful interference with the Appellants' rights to family life.

68. Given the extreme nature of the threat from climate change (acknowledged by the Respondents as an "existential threat" to humanity"), which the Appellants have summarised in detail in their SFG[28], the judge was wrong to hold that there was no evidence of a "significant impairment" family life.

69. Failing to take practical and effective measures to conserve the conditions which make the planet habitable, which denies the younger generation a responsible choice to raise a family is the most fundamental violation of the right to family life. Likewise, to permit activities which tend to the destruction of a person's cultural heritage is a clear violation of the right to family life.

<u>C.4 Wrongly holding the Appellants are not "victims" for the purposes of HRA 1998 s.7(1)</u>

70. For the purposes of HRA s. 7(1), the definition of "victim" expressly includes those who have not yet suffered harm, but who are at risk of harm in the future (as long as the risk is not remote or fanciful).

71. The position in relation to climate change is analogous to a situation in which a public authority failed to introduce an appropriate regulatory framework to deal with the risk from asbestos. It would not be necessary for a worker to contract mesothelioma in order to bring a claim under the HRA for breach of the right to life. The worker would need to show only that if the public authority failed to act on its safeguarding duty, by implementing appropriate regulations concerning

[28] See SFG, §§142ff

asbestos, he or she would be exposed to substantial risk of harm. The onset of mesothelioma may be decades after the exposure, such that the risk is not of "immediate" harm.

72. At [78], the judge stated:

> **"I am not convinced that any of the Claimants could arguably establish the necessary status as a "victim" of a breach of ECHR rights so as to qualify to bring a claim under section 7(1) of the HRA 1998 … it also does not seem to me that a generalised future risk of harm to the global community is arguably sufficient to establish victim status for the Second to Fifth Claimants in relation to Article 2."**

73. In ruling as he did, the judge made the following errors.

74. First, he disregarded the evidence of harm being experienced by the Appellants even now. The Second Appellant, for example, says in her witness statement:

> **"Partly in consequence of these concerns, and the impacts of food insecurity for my family in West Afrika, I developed an anxiety disorder and an eating disorder as a teenager. This was medicated without any real understanding of the underlying causes and drivers, it also seems that this disorder may have impacted my fertility and ability to have children."**[29]

75. Second, he disregarded the overwhelming scientific evidence, set out in the Appellants' Statement of Facts and Grounds, of the extreme risks of exceeding the 1.5˚C temperature limit (let alone the 3-4˚C warming that the City of London is currently financing)[30].

76. Thirdly, he disregarded the evidence that the the 2nd to 4th Appellants, as young people, with family in the Global South, are exposed to disproportionate and discriminatory risk.[31]

77. The logic of the judge's position is that even if the Respondents are in breach of their positive obligations arising under Convention Articles 2 and 8, no legal action can be taken to remedy that position other than by those within the jurisdiction who have already lost their lives or suffered some other form of extreme harm.

78. As the Strasbourg court has repeatedly emphasised, since *Tyrer*, the Convention must be interpreted in a manner that renders its rights "practical and effective, not theoretical and illusory".

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[29] Second Appellant, witness statement [25]
[30] See SFG §§122ff and 245ff
[31] See SFG §§64ff

79. The answer to the Claimants cannot be that they may only commence legal action to enforce the Government's safeguarding duty when it is already too late.

C. 5 Wrongly holding the claim to be beyond the competence of the court

80. The judge stated at [54]:

> **"[T]hese claims invite the Court to venture beyond its sphere of competence. In my judgment the framework established by the 2008 Act should be allowed to operate. It contains provision for debate, and that debate occurs in a political context with democratic, rather than litigious, consequences."**

81. The judge's position runs counter to the jurisprudence, which is that governments have a legal obligation, to be supervised by the courts, to implement practical and effective measures[32] to safeguard the rights to life and to family life in the context of activities which present a threat to those rights.

82. It is striking that a first instance judge has ruled as beyond the scope of the courts a form of claim considered justiciable by the highest courts internationally in numerous jurisdictions, and including jurisdictions which are also subject to the European Convention on Human Rights, such as Ireland, France, Germany, Belgium and the Netherlands.

83. The judge was wrong to hold that the Appellants invited the court *"to venture beyond its sphere of competence".*

D. CONCLUSION

84. Sir David King, the UK Government's former Chief Scientific Adviser, has said of climate change:

> **"What we do over the next three to four years, I believe, is going to determine the future of humanity. We are in a very, very desperate situation."**

85. The Respondents have themselves emphasised throughout COP26 the urgent imperative to take action to limit warming to 1.5˚C. Yet they knowingly permit the City of London to profit from investments consistent with 3-4˚C warming, an outcome which would inevitably result in gross violations of the rights of the Appellants and of so many others.

86. The judge implicitly acknowledged that the threat from climate change engages Convention rights. But he was wrong to hold that the adequacy of the

[32] See for example *Moreno Gomez v Spain; App no 4143/02, ECtHR 16 November 2004*, §56

Respondents' response to it falls outside the competence of the courts. He was wrong to hold that the courts are bound to ignore the overwhelming scientific consensus, not disputed by the Respondents, that average warming must be limited to 1.5˚C to avoid intolerable risks. He was wrong to hold that the Appellants must wait to experience irreversible harm before they count as "victims" competent to bring a claim in support of their fundamental rights.

87. The judge's suggestion that he was "*not … equipped*"[33] to assess the evidence before him betrays the political nature of his decision, since it is commonplace for judges to form judgments on the basis of technical evidence. In reality, there will seldom be a case in which it is easier to infer from the available evidence a dereliction of the Respondents' duties. The purpose of the Climate Change Committee, after all, is to bring transparency to decisions on climate change.

88. The Respondents know the climate crisis presents an extreme and potentially overwhelming threat to life and to family life. They know what needs to be done. But they are not doing it. It would be contrary to first principles of law if such a situation were, uniquely in England and Wales, without legal consequence.

89. If ever there is a time for the courts of England and Wales to consider the vital issues raised by this claim in full (as so many other courts have done), that time is now. The consequences of failing to confront these matters do not bear thinking about. Breach of the 1.5˚C limit heralds disorder and the end of the rule of law. The Appellants' claim is not only arguable. It is vital and compelling.

PLAN B. EARTH
ADETOLA STEPHANIE KEZIA ONAMADE
JERRY NOEL AMOKWANDOH
MARINA XOCHITL TRICKS
TIMOTHY JOHN EDWARD CROSLAND

27 DECEMBER 2021

[33] Judgment below [51].