

Climate Change Litigation in the United Kingdom

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This is the accepted version of the chapter published in: Birsha Ohdedar & Steven McNab, 'Climate Change Litigation in the United Kingdom' in Wolfgang Kahl & Marc-Philippe Weller (eds), *Climate Change Litigation: A Handbook* (CH Beck 2021) 304-323

Available from: <https://www.beck-shop.de/climate-change-litigation/product/29341697>

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****Please Note**** - this chapter was written before (and therefore does not incorporate into its analysis) the Supreme Court's judgement on Heathrow Airport: *R (on the application of Friends of the Earth Ltd and others) (Respondents) v Heathrow Airport Ltd (Appellant)* [2020] UKSC 52.

1. Introduction

In recent years, there has been a flurry of climate change litigation around the world provoking significant interests for lawyers and non-lawyers. The Courts in the United Kingdom have kept away from the global spotlight in many ways, not producing any of the high-profile litigation such as the *Urgenda*¹ case in the Netherlands, the Atmospheric Trust² litigation in the United States, or the rights-based litigation in Pakistan³. At the same time, there has been a growing suite of climate-related jurisprudence in the United Kingdom covering a breadth of different areas of law. In fact, as of 2019, the United Kingdom has the third most recorded climate litigation cases in the world.⁴ Perhaps because of the lack of ‘high profile’ cases, there is a gap in literature analysing climate litigation in the United Kingdom.⁵ However, the relatively high number of cases, among other reasons, means that there is a need to take stock of climate change litigation in this jurisdiction.

In this chapter, we analyse the emerging trends of climate litigation in the United Kingdom. We define climate litigation in this chapter as legal action brought before the Courts where climate change arguments are presented as part of the claimant’s or defendant’s case, or the subject and consequence of the litigation have an integral climate mitigation or adaptation impact. The types of litigation discussed in this chapter can be broadly categorised in three parts. First, public/administrative law litigation against the government’s climate targets and standards. Second, litigation stemming from a transition to a low-carbon society (that is, litigation against fossil fuel intensive projects and for low carbon projects). Third, criminal litigation against climate-related protests. We do not discount that there are other categories within the UK, but rather view these as currently the main categories. The cases discussed in this chapter provide an emerging jurisprudence that has provided both crucial wins, but also drawbacks for litigants.

There are several important reasons to take stock of the jurisprudential developments in the UK at the current juncture. First, to analyse the extent to which the surge of climate litigation around the world in recent years has had an impact on the Courts in the UK. Second, the Paris Agreement compliance period that begins from 2021 brings forward a new regime and era of climate governance that will see greater scrutinising of government climate actions both nationally and internationally. Third, the rise

¹ *Urgenda Foundation v The State of the Netherlands*, Rechtbank Den Haag [District Court of The Hague, Chamber for Commercial Affairs] (June 24 2015, Case No. C/09/456689/HA_ZA 13-1396) (*Urgenda*).

² Wood and Woodward, “Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last”.

³ *Ashgar Leghari v Federation of Pakistan* (W.P. No 25501/2015) Lahore High Court Green Bench.

⁴ Setzer and Brynes, “Global trends in climate litigation: 2019 snapshot”, July 2019, 3.

⁵ Some exceptions include: Kaminskaite-Salters, “Climate Change Litigation in the UK: Its Feasibility and Prospects”; Hilson, “UK Climate Change Litigation: Between Hard and Soft Framing”; Vanhala, “The Comparative Politics of the Courts and Climate Change”.

of activism on climate issues in the UK, most notably by the School Strikes and Extinction Rebellion, have raised climate change as a political issue and could pave the way for more public interest litigation. At the same time, these protests have resulted in disruptions that the state has sought to suppress through criminal prosecution, opening a nascent area of criminal litigation against climate activism, discussed in section 4 of this chapter.⁶ Finally, the UK's imminent exit from the European Union will see a new era of political and economic relations, with potentially significant impacts for the UK's climate and environmental standards and targets.⁷

a) Background to Climate Change Litigation in the UK

As mentioned above, to date, the UK has not seen many of the 'high profile' or 'holy grail'⁸ climate cases. Notwithstanding, there has been an increase of litigation with a direct climate element, on a variety of subjects and in different fronts. Hilson argues that one of the reasons for the high levels of climate litigation in the UK is because of the opportunities to push action via legal routes are perceived as stronger.⁹ Since the 1990s, the laws around standing in judicial review cases have become more favourable for environmental NGOs, allowing scope for public interest litigation. NGOs and community action groups in the UK also have a history of redressing claims through the courts in the UK for environmental matters. Until very recently, much of the legal mobilisation has concerned specific claims actions around particular industries, such as coal-fired power stations, airport expansion, waste incineration and windfarms. The inability to push for change politically meant that legal opportunities were much more desirable.

b) Early History of Climate Litigation in the UK: 1990s to the Mid 2000s

Climate litigation in the UK began in the early 1990s, with litigation around early wind farm development. The perceived negative visual impact of wind farms became a significant issue for local groups and councils. For example, in 1995, the Planning Inspector concluded in *City of Bradford Metropolitan Council v Gillson & Sons*¹⁰ that the contribution of renewable energy did not outweigh the harm to character and appearance of the surrounding landscape. The inspectorate often ruled this way during this period. Even in the mid-2000s, when climate change had become a much more prominent issue, the planning inspectorate often placed local concerns first. In 2007, in *Bradford v West Devon BC*¹¹ the planning inspectorate acknowledged the importance of global warming but

⁶ Dearden, "Extinction Rebellion Win High Court Challenge against Metropolitan Police as London Protest Ban Ruled 'unlawful'".

⁷ See for example: Scotford and Bowman, "Brexit and Environmental Law: Challenges and Opportunities".

⁸ Bouwer, "The Unsexy Future of Climate Change Litigation", 484.

⁹ Hilson, "UK Climate Change Litigation: Between Hard and Soft Framing".

¹⁰ *City of Bradford Metropolitan Council v. Gillson and Sons* [1995] 10 P.A.D. 255.

¹¹ *Bradford v. West Devon BC* [2007] PAD 45.

weighed this up against visual and landscape concerns and refused to give planning permission for two wind turbines. We discuss renewable energy development in section 3.1, below, and trace the shifting pattern of such decisions.

In the UK, many instances of climate litigation stem from judicial review, where the claimants ask the court to review the lawfulness of a decision or action made by a public body. There are different types of climate-related judicial review claims that can arise.¹² First, a review of decisions that implement or purport to implement regulations directly concerning climate change. This type of judicial review is the focus of section 2, below, regarding litigating climate targets. Second, a review of decisions in spheres of public body activity where it is alleged that climate change issues arise. Third, a review of decisions of public bodies in relation to some activity that will be carried out by the private sector, where the decision has failed to take into account climate change factors. These are often decisions around planning, licensing and permitting of a development (such as the extension of an airport) that have climate change implications. We focus on this in section 3. Fourth, challenges on ancillary matters such as the right to information and the right to protest.

2. Litigating climate targets: holding the government to account

A significant area of climate litigation globally has been to hold governments to account for climate change-related policies, standards or targets. In recent years, these have also been some of the most talked-about cases. For example, in *Urgenda*¹³, the Dutch Government was taken to Court because its existing pledges to reduce GHG emissions were not seen as ambitious enough. Similarly, in *Massachusetts v EPA*¹⁴, states and cities in the United States brought a suit against the Environmental Protection Agency, the federal level agency that set standards under the Clean Air Act. These cases, often strategic, can be influential in pressing national governments to take stronger climate action. They can also be influential in setting a precedent that can lead to future branches of litigation. For example, the *Massachusetts* precedent set on standing for climate suits paved the way for sub-national governments in the US to establish standing in future cases.¹⁵

In the UK, cases of this type are through judicial review, bringing legal action against a government law or policy directly concerning climate change. The enactment of the Climate Change Act 2008 (“CCA”) meant there was a legally binding target on the UK Government that was seen (at the time) as relatively ambitious. Bouwer suggests that the nature of the duties under the CCA on the

¹² Goldberg and Lord, “England”.

¹³ *Urgenda Foundation v Kingdom of the Netherlands* (fn 1)

¹⁴ *Massachusetts v EPA* 549 US 497 (2007).

¹⁵ Osofsky and Peel, “Litigation’s Regulatory Pathways and the Administrative State: Lessons from the U.S. and Australian Climate Change Governance”, 224.

government, if unfulfilled, still did not create scope for a ‘grand challenge’ against the state.¹⁶

However, in recent times there has been some interest in bringing such a challenge. In 2017, Plan B Earth, a charity that was established after the Paris Agreement, and eleven other claimants challenged the UK Government over failing to revise its 2050 carbon target under the Climate Change Act 2008 (“CCA”), after the Paris Agreement was signed in 2015.¹⁷

a) Plan B takes on the UK climate mitigation target

Plan B’s case focussed on the state’s obligations to update the climate mitigation goal under the CCA. Under the CCA the UK had a target to ensure that net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline (“2050 Target”).¹⁸ However, the Secretary of State has the power to amend the 2050 target and this power may be exercised if it appears that there are “significant developments” in scientific knowledge or European or international law or policy (section 2(2)). In exercising this power, the Secretary of State is required to obtain and take into account the advice of the Committee on Climate Change, an independent body established under the CCA that is composed of experts.¹⁹

After signing the Paris Agreement, the Secretary of State consulted the Committee. The Committee advised that the target should not be changed for the time being.²⁰ Specifically, the Committee wrote that the current 2050 Target was already stretching what was achievable; that the Government had indicated it does intend at some point to set a net-zero target; and that the Committee concludes that this is too early to do so now, however this should be kept under review. In other words, hold off for now, concentrate on shorter-term targets under an 80% GHG reduction by 2050, until we are in a position (or compelled to) scale up to net zero. In line with this, the Secretary of State did not revise the 2050 Target. It was this decision not to, as well as the advice given by the Committee, that the Claimant’s challenged in Court.

The Claimants presented five grounds in their claim to the High Court. These included that the Secretary should have revised the target under the legislative purpose of the CCA 2008, as well as human rights law-based arguments. The High Court rejected all of these, finding that the claims were not arguable and denied permission for the case to proceed. The Claimant’s also lost on appeal.

¹⁶Bouwer, “The Unsexy Future of Climate Change Litigation”, 488.

¹⁷ *Plan B Earth and Others v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 1892 (Admin) (*Plan B v BEIS*).

¹⁸ Section 1(1) Climate Change Act 2008.

¹⁹ Section 3(1)(a) Climate Change Act 2008.

²⁰ *Plan B v BEIS* (fn 17) [11].

The High Court found that the Secretary of State was correct in its understanding that the Paris Agreement does not impose a binding legal target on the UK.²¹ The Claimant's argued that the true purpose of the CCA 2008 was to commit the UK to make an "equitable contribution" to the global climate obligation that is consistent with prevailing scientific evidence and international agreement. Because of this purpose, the Secretary of State should have changed the 2050 Target. However, the High Court disagreed and found that CCA 2008 did not compel the Secretary of State to revise the target; this was an area where the Secretary had discretion. By having regard to the Committee's advice and deciding not to revise the target, he had followed all the legislative steps and not done anything unlawful. Overall, the Court found that the case could not proceed because none of the grounds was arguable.

b) Human rights and climate change in the Courts

A novel aspect of the claim was invoking human rights-based arguments via the Human Rights Act 1998 (and the rights under the European Convention on Human Rights that are incorporated within it). The Claimant's asserted breaches of the right to life, the right to respect for one's private and family life, and the right to protection of property. It was argued that if the Secretary of State continues to refuse to amend the 2050 Target, it will result in the violation of the human rights of the Claimants and others.²²

However, the High Court did not entertain this claim, stating that it was an area where the Secretary of state has a broad discretion to assess the advantages and disadvantages of any course of action.²³ It was not an unlawful decision by the Secretary of State. Accordingly, human rights challenges were not sustainable.²⁴ The Court of Appeal, while generally recognising the relationship between human rights and environment, upheld the decision of the High Court that as there was no error of law, there was no prospect of success on human rights grounds on an appeal.²⁵

Invoking human rights arguments were clearly spurred on by the successful ruling in *Urgenda* and other international claims where human rights were used. The Statement of Facts cites the *Urgenda* decision, among others, demonstrating the transnational dimension of climate litigation.²⁶ At the same time, the *Plan B v BEIS*, illustrates the limited scope of UK human rights and climate litigation under section 6 of the Human Rights Act. Section 6 places a duty on public authorities not to act

²¹ *Plan B v BEIS* (fn 17) [28].

²² Crow and Mackenzie, *Statement of Facts and Grounds for Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 1892 (Admin) [177].

²³ *Plan B v BEIS* (fn 17) [49].

²⁴ *Plan B v BEIS* (fn 17) [49].

²⁵ *Plan B v BEIS* (fn 17) [49].

²⁶ Crow and Mackenzie (fn 22).

incompatibly with certain rights and freedoms drawn from the European Convention on Human Rights (ECHR) (such as the right to life). Hence, a link was being made between the actions of the Secretary (to not change the 2050 Target in line with international policy and science) and the potential breaches to the right to life and other human rights. However, the Court only looked at whether the decision was unlawful and stated that the executive had a “wide discretion” to decide its course of actions. The Court did not go into whether the result of the decision (to not change the target) would result in breaches of human rights.

The reluctance of the Court, both on the point about human rights and more generally to substantively examine the target, reflects a general reluctance to broach into the executive’s broad area of discretion. The reluctance can also be seen in the judiciary in Ireland²⁷ and demonstrates that for now, *Urgenda* remains an exception in how the Court dealt with these points. Nevertheless, while the Court avoided having to examine human rights in this instance, putting forward rights-based arguments is significant. As we will see in *Heathrow Airport*²⁸ and other cases discussed later, rights-based arguments will continue to become more and more prevalent in climate litigation in the UK.

c) The Path to Net Zero: Winning the political battle, losing the legal battle

Plan B v BEIS was not successful in getting the UK Government to revise its 2050 Target post-Paris through litigation. However, in June 2019 the UK Government did revise its 2050 Target from 80% reduction of 1990 levels to a net-zero target. Accordingly, while Plan B lost the legal case, the goal of having the government revise the 2050 target was achieved.

The decision to revise the 2050 target eventually was upon a report in May 2019 by the Climate Change Committee that now recommended a net-zero target. Accordingly, the Committee had changed its position from 2016, where it advised that this was not necessary. It based this on the fact that existing pledges under the Paris Agreement illustrated an ‘emissions gap’. Hence the UK should ratchet up its ambition and send a strong signal to the rest of the world. It is also clear that the IPCC 1.5-degree report, published in October 2018, played an essential part in this decision. It is clear that the Committee took into account changes in both international law (as different commitments and pledges from countries that signed up to the Paris Agreement became clear) and understandings of scientific knowledge (through the IPCC’s 1.5-degree report) from 2016 to 2019, to update its recommendation that the 2050 Target should be revised. The changing position of international policy and science was fundamental to Plan B’s arguments in Courts.

²⁷ *Friends of the Irish Environment CLG v Government of Ireland and the Attorney General* [2019] IEHC 747.

²⁸ *R (on the application of Plan B Earth) v Secretary of State for Transport* [2021] EWCA Civ 214. (“Heathrow”)

Plan B claimed this as a victory, stating that there was no doubt that the legal action made an impact.²⁹ Undoubtedly, between 2016 and 2019, the rise in activism and consciousness around climate change in the UK provided the impetus for the revised target. Litigation in this sense is only one part of the larger project for organisations like Plan B. Vanhala observes that environmental NGOs in the UK (as in many other countries) tend to see the taking of a legal claim as merely one element of a multi-pronged approach to campaigning.³⁰ Even where there is a high likelihood of a loss, litigation strategies are pursued. Cases lost in the courts are not necessarily political losses. Moreover, new innovative arguments are introduced and tested, paving the way for future battles.

3. Litigating the transition to a low carbon society: clean energy, airports, and fracking

Although the *Plan B v BEIS* case was a rare example of litigation against the Government's mitigation targets, there is much more litigation over more discrete projects that affect the UK's overall greenhouse gas emissions. Energy systems will have to go through significant transitions to mitigate climate change. Given this fact, there has been a considerable amount of litigation around energy projects, airports and other activity that has a climate impact. This section surveys the trends in these types of cases. This section provides an overview of the

In 2011, the UK Government set a target of 15 per cent of energy use from renewables by 2020. In order to meet the target, there has been a surge of energy generation projects around the country. Nevertheless, the rise in solar, wind, hydro, waste-to-energy projects around the country has been controversial at both the local and national level for a variety of reasons. Furthermore, projects that intensify the use of fossil fuels, such as airports and fracking, have also been contentious and brought litigation in the Courts.

a) Litigation on wind and solar projects

As discussed earlier, some of the earliest climate litigation concerned wind projects in the 1990s. The litigation around wind and solar projects are similar. These projects have often been unpopular with residents or local governments and have hence been the subject of litigation. However, there has been litigation with more national level concerns too. For example, when energy companies have litigated against the state, following government incentives for these industries being withdrawn or reformed. All of these types of cases have an important climate dimension, because of the urgency of scaling up a low-carbon transition. While there are other types of technologies that are also relevant here (such as

²⁹ Stefanini, “‘End of the Road’ for UK Citizens’ Climate Case Rejected by Appeal Court”.

³⁰ Vanhala, “The Comparative Politics of the Courts and Climate Change”.

waste-to-energy and biomass) and energy efficiency projects, we have chosen to stick to wind and solar as two of the most popular renewable energy technologies.

aa) Local to Global: litigating localised concerns

Like many countries in the world, renewable projects in the UK have often faced local concerns and opposition that have spilled into the Courts. In the UK, many of the claims are in planning law. Planning law generally encompasses the use and development of land, such as the administrative regulation and permitting of land to be used for low-carbon energy generation activity. Planning law in the UK has brought the majority of climate litigation in the UK usually regarding energy generation activity, airports, incinerators, or roads and urban expansion.

The focus of objections varies for different renewable energy technologies. For wind energy, adverse visual impacts have been a significant source of litigation. Jones finds that wind energy opposition has seen much higher rates of litigation around visual impact than in other countries with similar legal systems.³¹ She argues that this is because of the importance English planning policy has placed on conserving heritage.³²

Early cases reflected strong concerns around protecting the visual benefits and the problematic planning framework for wind developers. In *West Coast Wind Farms v Secretary of State and North Devon DC*,³³ the Court of Appeal upheld the decision to refuse permission to build two wind farms. The Planning Inspector³⁴ had earlier stated, in reviewing the application, that:

while the greatest importance should be attached to the need to reduce CO₂ emissions and their adverse effects on global warming, these proposals are but 2 amongst many measures which would help in achieving that national policy aim. Accordingly, I do not accept that there is a national or local need for these particular proposals which could not be met elsewhere, and which would merit their being afforded the greatest weight.³⁵

The decision was controversial because it effectively allows planning authorities to refuse permission on any project because individual projects will do little to contribute to global greenhouse gases.³⁶

³¹ Jones, “Wind Energy and Adverse Visual-Impact Litigation”.

³² *Ibid.*, 351.

³³ [1996] JPL 767.

³⁴ In English and Welsh planning law, the Planning Inspectorate hears appeals and related case-work under the applicable planning and environmental legislation. Note, planning law is different in each of the different countries within the United Kingdom.

³⁵ *West Coast Wind Farms v Secretary of State and North Devon DC* (fn 33) [74] – [75].

³⁶ Holder and Lee, *Environmental Protection, Law, and Policy*, 701.

Fortunately, since those early years, policy has moved forward considerably. The case law reflects this. For example, in *Energiekontor*,³⁷ the Planning Inspectorate affirmed that the planning policy framework now has a “presumption of sustainable development” that meant that renewable projects should be approved as soon as possible, unless there is significant and demonstrable harm, and it does not matter if particular local areas had already “done its bit” in meeting climate targets.³⁸ In other words, there was a much broader concern for the need for renewable energy. Similarly, in *Macarthur v Secretary of State*³⁹, the High Court dismissed petitions by residents against a wind farm, placing a more favourable weighting on the need for renewable energy and the government policy on renewables. Thus, wind litigation has evolved, with Courts holding that policymakers should lend more weight towards the bigger picture of climate change.

Visual impacts are much less of an impediment for solar; however, the Courts do still have to weigh local and global concerns. In *Lark Energy*⁴⁰, a solar power generator challenged the decisions to refuse its application to install a solar farm. On the question of local concerns about the solar farm, the Court stated that local objections do not “compel the decision maker to accept those objections”.⁴¹ The decision-maker does need to pay attention to local views but can grant permission despite strong local opposition. It should not give views “a significance they would not have otherwise had”.⁴² Providing substantial scope for decision-makers to consider broader policy implications of climate change. More recently, in 2019, in a case challenging a residential solar project, the Court stated climate change and renewable energy was a material planning consideration.⁴³ The Court held that planning policy recognised the “positive contribution that could be made to climate change by even small-scale renewable energy schemes”.⁴⁴

In this way, the cases above highlight the changing trend for planning litigation around renewable energy in the UK, where earlier objections around localised (particularly visual) concerns are being given less weighting than the broader global concerns around climate. The cases demonstrate that this is because government policy itself has shifted on the matter, with the government bringing out clearer policy statements that compel planning decisions makers to encourage the development of low-carbon energy sources.

³⁷ *Energiekontor UK Ltd v East Lindsey DC* [2013] P.A.D 37.

³⁸ *ibid* [43].

³⁹ [2013] EWHC 3.

⁴⁰ *Lark Energy Limited v Secretary of State for Communities and Local Government* [2014] EWHC 2006 (Admin).

⁴¹ *ibid* [71].

⁴² *ibid*.

⁴³ *R (on the application of McLennan) v Medway Council* [2019] EWHC 1738 (Admin.)

⁴⁴ *ibid* 1739.

bb) Litigation regarding government incentive schemes

In order to encourage the investment and deployment of low-carbon energy, the UK Government introduced various support schemes. Two such schemes are the Renewables Obligations (RO) and the Feed-in Tariff (FiT) scheme. However, government tinkering with these schemes, including their early closure meant that investors and businesses who had invested in the renewables market turned to the Courts to try to seek redress.

The RO Scheme placed an obligation on all licensed electricity suppliers to produce a certain amount of electricity from renewable sources. This scheme was targeted at larger projects. The FIT scheme, on the other hand, was targeted at small solar installations, guaranteeing a generation tariff for each unit of electricity generated and an export tariff for any surplus energy sold back to the grid. It primarily provided an incentive for individuals to install solar panels. Both schemes became very popular in the early 2010s, coinciding with the growth of solar globally. The popularity of the scheme, however, became its downfall. By 2014, the government stated that the RO scheme had become too expensive and there would be an early closure of the RO. This created a rupture for the growing renewable energy industry at the time. The broader context for renewables in Europe had already seen retroactive withdrawals of incentive schemes in Spain and Italy.⁴⁵ Accordingly, this set a chilling effect on investment in solar in the UK.

In 2014, Solar Century and three other renewable energy companies took the Government to Court through a judicial review of its decision.⁴⁶ It was claimed that Government statements assured investors and the public that the scheme would run until 2017, and this amounted to an ‘admissible assurance’, as well as created a ‘legitimate expectation’. However, the claimant’s lost in the High Court and the Court of Appeal⁴⁷.

The specifics of the case concerning ‘assurance’ and ‘expectation’ are of less relevance to us. The relevant aspect for our purposes is that the High Court considered the “powerful public interest considerations” behind the decisions to reduce support to energy companies.⁴⁸ However, public interest was limited to the government’s austerity measures, budgetary disciplines as the “considerations of the highest order”.⁴⁹ The Court failed to consider the importance of the government’s statements and assurances that were the very foundation upon which many renewable

⁴⁵ Pekic, “Spain Publishes Retroactive PV FIT Cuts”; “Italian Parliament Okays Retroactive Solar FiT Cuts”.

⁴⁶ *Solar Century Holdings & Ors. v Secretary of State for Energy & Climate Change* [2014] EWHC 3677 (Admin).

⁴⁷ *Solar Century Holdings & Ors. v Secretary of State for Energy & Climate Change* [2016] EWCA 117.

⁴⁸ *Solar Century Holdings & Ors.* (High Court) (fn 46) [90].

⁴⁹ *Ibid* [86].

energy companies invested.⁵⁰ Moreover, there was scant attention to renewable energy generation and climate mitigation.

In *Friends of the Earth*⁵¹, a judicial review was successfully brought by the charity Friends of the Earth against the government on proposed retroactive changes to the FiT Scheme. Once again, the premise for the changes by the government was budgetary. The announcement (although merely at the consultative stage at the time) meant that many investors backed out of the scheme and left abandoned projects. In this instance, however, the claimant's won on the basis that that the proposal, if implemented, would be retrospective and beyond the scope of the Secretary of State's power. Nevertheless, by the time the ruling came, many projects had already been abandoned leading to severe losses.

Finally, in *Breyer Group*⁵², a group of claimants took the government to Court over losses they suffered as a result of proposed changes to the FiT scheme. The focus of the case was primarily related to property losses suffered (as a result of the losses). The case was significant because it brought into focus Article 1 of the First Protocol ("A1P1") of the European Convention on Human Rights (ECHR) that guaranteed a right to peaceful enjoyment of possessions. The claimant's asserted that their rights were breached as a result of the proposed government policy changes. The Court had to consider whether there was an unlawful interference with their rights and if so, whether they were justified.

Both the Court of Appeal and the High Court held that customer contracts that businesses had signed concerning solar PV installations were assets and therefore possessions. Accordingly, the Court of Appeal stated the government proposals to change the FiT Scheme, did interfere with the possessions of the claimants (thus affecting their rights under A1P1).⁵³ However, the Court went on to consider whether this interference was 'justified'. Here, the Court held that the proposals did not strike a fair balance between the public interest and the interests of the investors in the scheme. In weighing up the different factors, the Court considered the amount of budgetary saving for the government, the losses by the claimants, as well as statements by the government assuring investors that there would not be retrospective tariff changes⁵⁴.

⁵⁰ Muinzer, "'To PV or Not to PV'", 131.

⁵¹ *Secretary of State for Energy and Climate Change v Friends of the Earth* [2012] EWCA Civ. 28.

⁵² *The Department of Energy and Climate Change v Breyer Group PLC and Others* [2015] EWCA Civ 408. For the High Court judgement see: *Breyer Group Plc and Others v Secretary of State for Energy and Climate Change* [2014] EWHC 2257.

⁵³ *The Department of Energy and Climate Change v Breyer Group PLC and Others* [2015] EWCA Civ 408 [71]- [73]

⁵⁴ *Ibid* [88]-[100]. See also the High Court judgement: *Breyer Group Plc and Others v Secretary of State for Energy and Climate Change* (n 55) [144] – [149].

The cases discussed above show how the Court's balanced policy considerations. They demonstrate that the Court's definitions of public interest and policy were limited to government budgetary constraints. For the Court, public interest did not include the wider interest in developing renewables and decarbonising energy. In *Breyer*, the Court of Appeal expressly excluded considering the environmental effect in its balancing act.⁵⁵ These cases can be contrasted with the planning cases discussed earlier. Although the practical impact of both types of litigation is on the capacity of renewable energy generation in the UK, here, litigation was largely fought on narrow technical points regarding the binding nature of government statements. Public interest was narrowly conceived on budgetary terms. Although, unlike a negative decision in a planning litigation, the decisions in *Solar Century* and *Breyer* do not mean that the development of a particular renewable energy project has been prohibited (unlike a planning case which does focus on whether an individual project will go ahead or not). But, its practical effects in reality are the same.⁵⁶ On a separate note, *Breyer* is also significant because it also illustrates how a primarily commercial case can also invoke human rights. It provides an added dimension to how human rights can be relevant to climate change litigation.

The litigation discussed above, illustrates the wide variety of climate litigation in the UK. As demonstrated, judicial reviews brought largely on commercial grounds nonetheless have an essential climate change dimension. Investment into (and subsequent deployment of) renewable energy is vital to drive the societal transition required to respond to climate change. While the growth of renewables has been significant, the UK still consumes a significant amount of energy from gas and other fossil fuel sources. Accordingly, even though the cases were mainly brought based on financial losses, their knock-on effect on UK climate targets and clean energy transitions are significant and worthy of analysis.

b) Anti-Fracking Cases

Apart from the development of renewable energy, the transition away from carbon-intensive projects has also been contentious. Projects that involve accessing shale gas through hydraulic fracturing (or 'fracking') have been an area of much controversy in the UK. In the UK, fracking was carried out in 2011, but operations were halted due to an earthquake in the local area.⁵⁷ A temporary moratorium was placed on fracking until 2012.⁵⁸ Since then, there

⁵⁵ *The Department of Energy and Climate Change v Breyer Group PLC and Others* (fn 52) [93]. On the other hand, the High Court judgement did take this into account. See: *Breyer Group Plc and Others v Secretary of State for Energy and Climate Change* (fn 52) [146].

⁵⁶ Muinzer, "To PV or Not to PV", 131.

⁵⁷ "Fracking 'likely Cause' of Quakes".

⁵⁸ "Fracking Firm Ready to Press On".

has been concerted activism against new fracking, bringing to the fore local and global environmental and climate concerns.

Shale gas has often been purported as a ‘transition’ fuel away from fossil fuels because of lower carbon emissions. In the UK context, an influential report in 2013 (‘the MacKay and Stone Report’), found that UK shale gas would have much lower emissions than coal and slightly lower emissions than imported gas.⁵⁹ However, there were several assumptions to this study, including that there would need to be reductions in fossil fuels burned elsewhere and the capturing of fugitive methane emissions. The MacKay Report was influential on government policy and became a central part of recent anti-fracking litigation.

In *Claire Stephenson*⁶⁰, the UK Government’s planning policy framework was successfully challenged by an environmental campaigning group Talk Fracking. Specifically, the legality of adoption Paragraph 209a of the revised National Planning Policy Framework (NPPF)⁶¹ for England was challenged. Paragraph 209a (which was inserted in 2018) generally stated that there is a need to explore more shale gas in the context of energy security and transitions towards low-carbon futures. It was based upon the MacKay and Stone Report.

The Claimants argued that there were significant updates in science and international climate policy since the MacKay and Stone Report and the Government had failed to adequately consider these issues when they undertook the public consultation to revise the NPPF. Submissions by environmental groups during the consultation had highlighted new studies, as well as the updates in international law and policy (particularly the Paris Agreement and the ratcheting up of climate mitigation). The Court agreed, stating that these materials were “never in fact considered relevant or taken into account”, but that it was “obviously material” including because of its climate effects.⁶² *Claire Stephenson* was a major win for environmental groups, as Paragraph 209a essentially provided a planning policy ‘greenlight’ for fracking projects.

⁵⁹ MacKay and Stone, *Potential Greenhouse Gas Emissions Associated with Shale Gas Extraction and Use*.

⁶⁰ *Claire Stephenson v Secretary of State for Housing and Communities and Local Government* [2019] EWHC 519 (Admin) (“*Claire Stephenson*”).

⁶¹ The NPPF sets out the Government’s planning policies for England and how these should be applied.

⁶² *Claire Stephenson* (fn 60) [67].

The government now must reconsider whether it wants to include such a revision to the NPPF and if so, it would have to carry out a proper consultation considering the most up to date science. Given the ruling and subsequent coverage of the issue, there would undoubtedly be much opposition to such a provision. The Court stated that the Government must use the most up to date understanding from climate science and international policy. This included reports that environmental groups submitted to challenge the MacKay and Stone Report that showed more up to date climate impacts of fracking. The provided an example of how there is scope for groups to challenge the science that underpins government's policy.

Claire Stephenson was significant because in recent litigation against specific fracking exploration work, environmental groups have been unsuccessful in convincing the Court that Government decisions to do such work have been unlawful.⁶³ In such specific cases, the Court has been reluctant to enter into actually ruling on matters of policy and decision making. Accordingly, it is important that the NPPF's de facto endorsement of fracking, through paragraph 209a, was successfully challenged. With it being removed, local decision-makers would not be able to take it into consideration.

For anti-fracking groups generally, climate litigation can be again seen one of the strategies, along with more direct activism. Ultimately, the public pressure raised through litigation and broader activism has seen fracking continuing to be a political issue. Thus, in the 2019 parliamentary elections, all the major parties in the UK election calling for either a temporary or permanent ban to fracking. The multi-pronged approach means the Government would be reluctant to bring paragraph 209a (or anything similar) back into the NPPF for now.

c) Litigation against airport expansion

Like fracking, the expansion of air travel through building airport runways is a significant climate-related issue and has been subject to controversy and protest in the UK. From a regulatory point of view, because aviation emissions are yet to be adequately regulated by international or national climate policy, there are valid questions of undoing climate mitigation elsewhere through airport expansion. Under UK law, aviation emissions do not count as part of UK's greenhouse gas reduction targets under the Climate Change Act 2008. However, they "must be taken into account" (section 10(2)) leaving many open questions.

⁶³ See for example: *Preston New Road Action Group (Through Mrs Susan Holliday) v Secretary of State for Communities and Local Government & Ors* [2018] EWCA Civ 9.

The plans to expand Heathrow Airport have been a battleground for legal and political activism in recent years.⁶⁴ In *Heathrow Airport*⁶⁵ climate change specific arguments were brought by NGO's Plan B Earth, Friends of the Earth and WWF UK. The claims centred around the government's decision to include a third runway at Heathrow in its Airport National Policy Statement ("ANPS"). The ANPS sets the policy framework for decision making on the permitting of airport projects. In other words, its decision provided a high level 'green light' for the third runway, notwithstanding a more specific consent process would take place for the project. Under English planning law, national policy statements such as the ANPS must take into consideration the UK government's policy toward climate change. It was contended that government policies included not only the UK climate legislation (and its associated targets), but also the Paris Agreement. The Paris Agreement had a more aggressive temperature target that aims at holding the increase of global average temperatures to "well below" 2°C (above pre-industrial levels) and to pursue efforts to limit that increase to 1.5°C. The claimants argued, among other things, that if government policy is restricted to only domestic Climate Change Act, then the government's policies would be lagging behind the latest (international) scientific knowledge.

The case was heard on appeal at the Court of Appeal after the claimant's lost at the High Court.⁶⁶ At the High Court, it was held that 'government policy', for the purposes of the Act, did not include international climate change law and policy. Although international law may influence it, the Court ruled that UK government policy is the national carbon cap under the Climate Change Act 2008. Significantly, the Court of Appeal held that the Paris Agreement must be "taken into account" in the decision-making process of issuing a national policy statement.⁶⁷ The Court of Appeal stated that "even if the legal targets in the Climate Change Act were consistent with the Paris Agreement, it did not follow that, as a matter of law, the government was somehow precluded from taking into account the Paris Agreement".⁶⁸

⁶⁴ Aside from the case discussed in this chapter, see also: *R (London Borough of Hillingdon) v Secretary of State for Transport* [2010] EWHC 626 (Admin).

⁶⁵ *R (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214. ("Heathrow")

⁶⁶ *R (Spurrier and Others) v Secretary of State for Transport* [2019] EWHC 1070 (Admin). ("Spurrier")

⁶⁷ *Heathrow* [237].

⁶⁸ *Heathrow* [203].

The case is significant for several reasons. First, the Court of Appeal’s decision reflects the emerging importance of the Paris Agreement directly on domestic law and policy. To be sure, the impact of the decision is that the Paris Agreement will need to be ‘taken into account’ when the government decides on national planning policy statements in the future. National policy statements provide the high-level policy direction for domestic infrastructure and development projects (such as airports).

Second, the Climate Change Act was originally designed with a global temperature limit of 2°C. However, the Paris Agreement has a more stringent aim. The Court of Appeal took this seriously, stating “it is clear, therefore, that it was the government’s expressly stated policy that it was committed to adhering to the Paris Agreement to limit the rise in global temperature to well below 2°C and to pursue efforts to limit it to 1.5°C.”⁶⁹ Accordingly, the Court held that in the government’s decision making process, it needed to take the new global temperature target into consideration. It is an important reminder that the wording “1.5 degrees” only made it into the Paris Agreement after the tireless efforts of small island states and civil society activists.⁷⁰ In this judgement, the practical impact of those words on domestic law can be observed, as the Court expressly held the government must take this into consideration.

Third, as with *Plan B v BEIS* discussed earlier in section II, rights-based arguments were used by the claimants at. The High Court was not convinced of the rights-based claims. The decision to expand Heathrow at this stage was seen by the Court as a high-level one that supports its expansion in principle.⁷¹ The High Court commented that rights in question (the right to private life and the right to enjoy property) were not absolute and able to be curbed “in the public interest” in a proportionate manner.⁷² Accordingly, while not convinced of rights-based arguments at this stage, the High Court stated that they could be important the permitting stage when details of how parties will be adversely affected by the scheme will be more detailed.⁷³ At the Court of Appeal, WWF-UK argued that the impacts of Heathrow expansion would also impact the rights of a child.⁷⁴ The Court decided not to rule on this

⁶⁹ *Heathrow* [607].

⁷⁰ Benjamin and Thomas, “1.5 To Stay Alive?”

⁷¹ *Spurrier* [629].

⁷² *ibid* [664].

⁷³ *ibid*.

⁷⁴ *Heathrow* [240]

point, as the broader point that the designation of Heathrow's third runway needed to be reconsidered had already been won.⁷⁵ Although the rights-based arguments did not bring any conclusive victories for the claimants, what these arguments again demonstrate is the transnational nature of climate litigation, as these arguments drew inspiration from rights-based climate litigation around the world.⁷⁶

Nevertheless, it is important to note that effect of the Court of Appeal's ruling is that the Government must now consider the Paris Agreement, if it wishes to reissue the ANPS. But, it may indeed come to the same conclusion and expand Heathrow. The Court points this out stating that "again we would emphasize that it does not follow from this that the Secretary of State was obliged to act in accordance with the Paris Agreement or to reach any particular outcome. The only legal obligation, in our view, was to take the Paris Agreement into account when arriving at his decision."⁷⁷ And again in its final paragraph, clearly reflecting an acknowledgement of the separation of powers between the executive and the judiciary, stating:

"we have not decided, and could not decide, that there will be no third runway at Heathrow. We have not found that a national policy statement supporting this project is necessarily incompatible with the United Kingdom's commitment to reducing carbon emissions and mitigating climate change under the Paris Agreement, or with any other policy the Government may adopt or international obligation it may undertake. That is not the outcome here. However, the consequence of our decision is that the Government will now have the opportunity to reconsider the ANPS in accordance with the clear statutory requirements that Parliament has imposed."⁷⁸

The ruling is therefore procedural. The Government must follow the set procedure, if it wishes to reissue the ANPS. This is an important distinction between *Heathrow Airport* and cases like *Urgenda* and *Plan B v BEIS*, discussed above, that were more substantial challenges to overall climate policy. Although there was understandable media attention comparing these cases, this distinction remains vital for practitioners and climate activists to keep in mind, as the *Heathrow Airport* judgement is more conservative than activist.⁷⁹ In practice, it may indeed come to a different decision now as a result of litigation and political activism. As discussed in section 2, above, the UK Government revised its 2050

⁷⁵ *Heathrow* [241]

⁷⁶ Peel and Osofsky, "A Rights Turn in Climate Change Litigation?"

⁷⁷ *Heathrow* [238].

⁷⁸ *ibid* [285].

⁷⁹ Heyvaert, "Beware of Populist Narratives".

Target from 80% emissions reduction to a net-zero target. The original decision making for the ANPS, that were the subject of the litigation in *Heathrow*, was before the net-zero target was adopted in June 2019. But, any decision to reissue the ANPS now must consider both the Paris Agreement and the ‘net zero’ target under the Climate Change Act. These are more stringent measures which may mean a different decision is reached.

Therefore, the *Heathrow Airport* case demonstrates the multipronged nature of climate litigation. Activists in the UK fought battles on the streets, through parliament and the courts for many years regarding Heathrow. The increase in climate activism influenced the adoption of the net zero target by the government in 2019. The net zero decision also linked to international climate policy, particularly the IPCC’s 1.5° Report. The Court of Appeal in *Heathrow* placed importance on the Paris Agreement and the 1.5°C objective that was fought for by activists in Paris. Litigation is enmeshed in this wider context and climate litigation will remain one of several prongs to reach the goal of activists and NGOs to prevent the expansion of Heathrow.⁸⁰

4. Criminal prosecution of climate activism: an emerging area of climate litigation

An emerging area of climate litigation is criminal action against climate related protest and activism. In 2019, the UK saw the biggest climate protests in its history, coordinated together with global action.⁸¹ It can be expected that such activity will increase over time. The Courts in the UK have had to deal with ‘climate’ activism several times over the last 20 years. This section briefly outlines some of the main trends and cases.

A significant case in this area was *Kingsnorth 6*⁸², where six Greenpeace activists were charged with causing criminal damage at a coal-fired station in 2008. The activists had scaled the chimney of Kingsnorth power station and tried to shut it down. While charged with property damage, the activists successfully argued, based on the principle of ‘lawful excuse’ under section 5 Criminal Damage Act 1971, that they acted because the emissions of carbon would cause more significant

⁸⁰ Laville, “Fight against Heathrow Expansion on Verge of Victory, Says McDonnell”.

⁸¹ Taylor, “‘Enough Is Enough’: Biggest-Ever Climate Protest Sweeps UK”.

⁸² *R v Hewke* (Maidstone County Court, UK, No. T20080116, Sept 8 2008) [henceforth “*Kingsnorth 6*”]; Goldberg and Lord, “England”, 475.

damage to property than their actions. The case was a breakthrough, with much attention to the novel use of climate change as a legal defence for protest to block fossil fuel generating activity.⁸³

In the same year, in *R v Bard and Ors*⁸⁴, twenty-nine protesters executed a plan to stop, occupy and unload a coal train on its way to a large coal-fired power station in Yorkshire. The protestors were charged with obstructing a train contrary to the Malicious Damage Act 1861. The defendant's argued that their actions were necessary to stop on-going climate change. However, unlike in the case with the Criminal Damage Act, the Malicious Damage Act did not have a 'lawful excuse' provision. The necessity provision was much narrower in scope, moreover the judge refused to allow much of the climate change evidence the activists wanted to present in Court. Accordingly, the defendants were found guilty and convicted. As it turned out, the convictions were later quashed due to evidence being withheld by the police regarding improper undercover operations connected to the protests.⁸⁵ However, the case illustrated the difficulty faced with justifying actions based on climate change, despite the favourable judgement in *Kingsnorth*.⁸⁶ The scope for such an argument is very limited.

Apart from defending their actions, sentencing is important aspect given the protestors are often merely exercising a right to peaceful protest. In *R v Basto*⁸⁷, thirteen protestors were being sentenced for occupying Heathrow Airport, causing numerous delays and cancellations of flights. The activists had defended their actions on climate change grounds. At sentencing, the judge stated that the protestors had caused "excessive inconvenience" and gone too far with their actions.⁸⁸ Nevertheless, the judge refused to imprison the activists for non-violent protests, giving credit for genuinely held beliefs and the consideration of safety during the protests.⁸⁹ This reflects the long-running trend of judicial restraint at giving peaceful protestors prison sentences, despite having the power to do so.

While in general the Courts have resisted imprisonment sentences, in 2018 three anti-fracking protestors were given fifteen to sixteen-month sentences for occupying and halting fracking activities in the North of England.⁹⁰ The sentences were controversial, given the non-violent nature of the protest. On Appeal, it was argued that the sentences were inappropriate and breached Article 10, European Convention on Human Rights that guaranteed a right to freedom of expression.⁹¹ The

⁸³ Vidal, "Not Guilty: The Greenpeace Activists Who Used Climate Change as a Legal Defence".

⁸⁴ *R v Bard and Ors* [2009] Leeds Crown Court.

⁸⁵ *R v Bard and Ors* [2014] EWCA Crim 463.

⁸⁶ See also: Long and Hamilton, "The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases".

⁸⁷ *R v Basto* (2016), Uxbridge Magistrate Court.

⁸⁸ *R v Basto* (24 February 2016) (Sentencing) West London Magistrates Court.

⁸⁹ *ibid* [40].

⁹⁰ "Three Men Jailed over Fracking Protests".

⁹¹ *R v Roberts (Richard)* [2018] EWCA Crim 2739 [5].

appeal judge agreed, quashing the prison sentences. Although ultimately freed, large questions are raised by the initial judgement in relation to how protestors are treated, as well as the considerably heavy policing and prosecution of the activists.⁹²

Finally, the pre-emptive prevention of climate protests has also been an avenue of litigation. In *Heathrow Airport Ltd & Ors v Garman & Ors*⁹³, Heathrow Airport sought an injunction against a probable campaign to occupy the vicinity of Heathrow Airport and thereby disrupt the operation of one of the busiest airports in the world. The intention of the environmental group was to disrupt airport activity during a ‘climate camp’ that was to be held in the vicinity with workshops and educational activities alongside direct action. The Court was willing to grant injunctive relief for trespass, and nuisance that prevented the protesters from disrupting or impairing the operation of the airport. Unlike in *Kingsnorth 6*, the protesters here did not have any ‘necessity’ defence that they could avail to defend their actions based on preventing climate change. However, in a positive spin-off, the media attention over the case meant that there was considerable rise in publicity and attention for the camp.⁹⁴

Most recently, the widespread, decentralised Extinction Rebellion (“XR”) movement across the UK saw climate protests back in the Courts in a significant way. In October 2019, in the wake of continuous protests across London, the Metropolitan Police issued an order under section 14 of the Public Order Act 1986 to outlaw “any assembly linked to the Extinction Rebellion ‘Autumn Uprising’” across the city.⁹⁵ Such a widespread ban was controversial and immediately appealed.⁹⁶ The Police order was a blanket ban on all XR linked protests, without specifying a location or timing. The order treated the series of protests as one single ‘public assembly’. This was ostensibly because XR was a decentralised network, with protests of different sizes across town at different times of the day. But it was this broad-based approach to preventing peaceful protest that resulted in the Police order being deemed unlawful by the Court. The Court stated that “separate gatherings, separated both in time and by many miles, even if co-ordinated under the umbrella of one body, are not one public assembly within the meaning of [the Act].”⁹⁷

The cases discussed here demonstrated that the Courts in the UK are having to deal increasingly with climate-related protests. The discussion in earlier sections demonstrated how climate change policy changes (for example, the adoption of a net-zero target by the UK Government) was driven by not

⁹² Hawkins, “Case Comment – Fracking and the Scope for Public Dissent”, 131.

⁹³ [2007] EWHC 1957.

⁹⁴ Hilson, “Environmental SLAPPs in the UK: Threat or Opportunity?”, 259.

⁹⁵ Gayle, “Police Ban Extinction Rebellion Protests from Whole of London | Environment | The Guardian”.

⁹⁶ *Baroness Jenny Jones v Commissioner for Metropolitan Police* [2019] EWHC 2957 (Admin).

⁹⁷ *Ibid* [71].

only litigation on the subject (*Plan B v BEIS*), changes in international law, policy and science, but also shifts in public and political consciousness through protest action. In this context, protecting the right to protest is integral to driving climate action. The Courts in the UK have generally demonstrated strong protection of a fundamental right to peacefully protest. Prison sentences for such action remain rare. Climate-related defences are often used by the defendants, however are rarely successful. At the same time, the role of the police in cracking down on climate-related protests in the UK will mean litigation will continue in this area and test the Courts. Research has shown that anti-fracking protest in the UK has been subject to the heavy hand of the Police.⁹⁸ Recently, it was revealed that the counter-terrorism police had placed XR, Greenpeace and other climate-related protests groups in a list of ‘extremist ideologies’ alongside right-wing and neo-Nazi groups.⁹⁹ This is an expanding sub-area of climate change litigation that deserves more attention. Albeit, it needs to be analysed and understood with wider literature on political protest in the UK and internationally. That depth of analysis is beyond the scope of this chapter.

5. Conclusions and the future climate litigation in the UK

A few concluding points can be made to summarise the trends and challenges discussed above, as well as look ahead to the future of climate litigation in the UK.

First, a “grand challenge” to UK’s climate mitigation goal remains elusive and may be unlikely any time soon. The adoption of the net zero emissions target in 2019 will cool-off such litigation in the short term. Moreover, academic commentators have argued, and case law has so far proven, that such challenges are difficult under the UK’s Climate Change Act 2008. On the other hand, the urgency of bringing the date to achieve the net zero target forward from 2050 will increase in future years as the impacts of climate change increasingly materialise and if international pressure mounts. Holding the government to its newly adopted target will provide avenues for litigation in the future.

Second, most climate litigation in the UK will continue to be around the transitions to a low-carbon economy. The discussion in section three demonstrated that planning policy has changed over the last two decades to encourage the development of low-carbon energy. With the adoption of the net zero target, there needs to be a significant ramp up in policy across all sectors, accounting for both more low-carbon energy generation, but also carbon removal, and afforestation.¹⁰⁰ This will bring new forms of litigation, as new technologies (such as carbon capture and storage) and the scale of infrastructural change, will continue to test local to global tensions and challenge existing planning laws and

⁹⁸ Jackson, Gilmore, and Monk, “Policing Unacceptable Protest in England and Wales: A Case Study of the Policing of Anti-Fracking Protests”.

⁹⁹ Grierson and Scott, “Extinction Rebellion Listed as ‘key Threat’ by Counter-Terror Police”.

¹⁰⁰ Committee on Climate Change, *Net Zero: The UK’s Contribution to Stopping Global Warming*, 11–12.

regulations. Moreover, it will also challenge the approval of fossil fuel generating projects. For example, in early 2020 a claim has been brought against a gas fired power station in Yorkshire.¹⁰¹

Third, the role of the judiciary vis-à-vis the executive may well become more contentious. To date the judiciary in the UK has usually tried to steer clear of the politics of environmental decision making. Thornton, for example states, in relation to environmental litigation, the courts have “tended to adopt a relatively ‘hands off’ deferential approach” to decisions made by environmental decision-makers.¹⁰² As discussed earlier, *Plan B v BEIS*, illustrate the same. But the default position may be tested if the government falls behind the level of transition that is being demanded both by its own policies, the public, and international science and policy.

Fourth, this chapter also demonstrate that claimants are bringing rights-based arguments into Courts, in line with the broader trend of rights-based litigation.¹⁰³ However, as discussed earlier in relation to *Plan B v BEIS*, the judiciary in the UK so far has not been as receptive to these arguments. In section 3 it was also highlighting how these arguments were also relevant to commercial cases, where the right to possession was being challenged. Furthermore, as already discussed, criminal litigation related to climate protests will continue to rise with the increasing public consciousness around climate issues. The protection of a range of human rights related to the freedom of expression and right to protest will be tested in front of the Courts.

Fifth, litigation around climate adaptation has not featured prominently in relation to climate litigation in the UK to date. Like many countries in the Global North, adaptation is not yet a major issue unlike those in the Global South who have been dealing with adaptation for much longer. Yet, floods in recent years have illustrated that adaptation is becoming an issue. Government policies in this regard will be increasingly scrutinised. Moreover, already villages in Wales are scheduled to be “decommissioned” by 2050 and residents repopulated to different areas.¹⁰⁴ These sorts of issues will result in avenues of litigation against the government’s adaptation policies, as well as strengthen the possibility of new rights-based claims.

Finally, there is also the possibility that the UK Courts will be a forum for suing corporations for climate change. Internationally there is an expanding potential for claims against corporations due to the rapid changes discursive, scientific, institutional and constitutional context of climate change.¹⁰⁵ Specially, in the UK, there is potential for multinational corporations to be sued for their actions in other countries. In a landmark judgement in 2019, the UK Supreme Court recognised that UK parent companies could

¹⁰¹ Carrington, “UK sued for approving Europe’s biggest gas power stations”.

¹⁰² Thornton, “Twenty-Five Years of Domestic Case Law”, 538.

¹⁰³ See: Peel and Osofsky, “A Rights Turn in Climate Change Litigation?”

¹⁰⁴ “Sea-Threatened Villagers Call for Answers”.

¹⁰⁵ Ganguly, Setzer, and Heyvaert, “If at First You Don’t Succeed: Suing Corporations for Climate Change”.

be tried in English Courts for the activities of their subsidiaries overseas.¹⁰⁶ Accordingly, there is scope for litigation against UK based multinationals companies for environmentally harmful and carbon polluting activities by their subsidiaries in other countries.

As stated in the introduction of this chapter, the UK has had a steady range of climate litigation, without any high-profile litigation that has been in the global spotlight. The discussion above has illustrated the breadth of cases that are being litigated in the UK. Climate litigation in the UK will continue to provide such a breadth of cases, but we believe with much more intensity and scope for greater judicial scrutiny. Climate litigation in the UK provides lawyers, researchers and activists from outside the UK a rich jurisprudence of case law to examine, analyse and draw both lessons and opportunities from.

¹⁰⁶ *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20.

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