Claim No. [ ]

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

In the matter of a claim for judicial review

BETWEEN

THE QUEEN

on the application of

(1) PLAN B EARTH
(2) CARMEN THERESE CALLIL
(3) JEFFREY BERNARD NEWMAN
(4) JO-ANNE PATRICIA VELTMAN
(5) LILY MEYNELL JOHNSON
(6) MAYA YASMIN CAMPBELL
(7) MAYA DOOLUB
(8) PARIS ORA PALMANO
(9) ROSE NAKANDI
(10) SEBASTIEN JAMES KAYE
(11) WILLIAM RICHARD HARE
(12) MHB (A CHILD) BY HIS LITIGATION FRIEND DHB

Claimants

- and -

THE SECRETARY OF STATE FOR
BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Defendant

- and -

THE COMMITTEE ON CLIMATE CHANGE

Interested Party

STATEMENT OF FACTS AND GROUNDS

CONTENTS

LIST OF ESSENTIAL READING[1]

The Court is invited to read, in particular:

- The claim form **[PB/A/1-8]**;
- This statement of facts and grounds;
- The Claimants' witness statements **[PB/C]**;
- Pre-action correspondence **[PB/E]**.

A. INTRODUCTION AND SUMMARY

Summary of the Claim

1. This is an application for judicial review, brought by Plan B Earth ("**Plan B**") and 11 other Claimants. The Claimants seek:

   (a) a declaration that the Secretary of State has acted unlawfully by failing to revise the 2050 carbon target (**"the 2050 target"**) under the Climate Change Act 2008 ("**the 2008 Act**"); and

   (b) a mandatory order that the Secretary of State revise the 2050 target in accordance with the purpose of the 2008 Act and the UK's international law obligations, ensuring, *at a minimum*, that the 2050 target commits the UK to an equitable contribution the Paris Agreement objective and that it conforms to the precautionary principle.

2. The over-riding purpose of all climate change policy, domestically and internationally was simply expressed by the Committee on Climate Change **("CC Committee")** in 2008[2]:

   > "*The ultimate aim … is to avoid harmful impacts on human welfare which could arise from an increase in global mean temperature and associated changes in regional climates around the world.*"

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[1] References to documents cited (other than those contained within the First Claimant's exhibit) take the form "**[PB/x/y]**" where "x" is the tab number and "y" is the page number within the accompanying permission bundle. References to documents in the First Claimant's exhibit take the form "**[TJEC/1/x]**", where "x" is the page number within exhibit "**TJEC/1**". **TJEC/1** is at **[PB/D]**.

[2] December 2008, Committee on Climate Change's First Report, *Building a low-carbon economy – the UK's contribution to tackling climate change* **[TJEC/51-58]**.

3. Lord Stern, author of the 2007 Stern Review, which informed the 2008 Act, intimated the nature of these harmful impacts in 2013[3]:

> *"This is potentially so dangerous that we have to act strongly. Do we want to play Russian roulette with two bullets or one? These risks for many people are existential."*

4. The heart of the case for the Claimants is that the 2008 Act obliges the Secretary of State to maintain a 2050 Target that gives effect to the UK's obligations under international law, and which has reasonable prospects of keeping people safe. It is apparent that the current target does neither. By maintaining such a target the Secretary of State is acting contrary to the purposes of the 2008 Act, which is unlawful.

Summary of the international and UK legal position

5. The UN Framework Convention on Climate Change ("**UNFCCC**") **[PB/F/1-5]** was ratified by the UK in December 1993. By ratifying the UNFCCC, the UK accepted that, as a developed country Party with a historic responsibility for climate change, it had an obligation to take the lead in combatting and containing it (Article 3(1)). More specifically, by virtue of Article 4(1)(b) it assumed an obligation to "*formulate ... and regularly update national ... measures to mitigate climate change*", and to do so on the basis of equity (Article 3(1)) and the precautionary principle (Article 3(2)).

6. Domestically, years of deliberation and dialogue took place about what commitments the UK should enter into, some of which is summarised below. The result of this dialogue was the 2008 Act, which was based principally on:

   (a) the scientific evidence of the time regarding the global temperature limit; and

   (b) a model for the rational and equitable apportionment between countries of the 'global carbon budget' associated with that limit ('Contraction and Convergence' or similar).

   This Act imposes a duty on the Secretary of State to ensure that the UK's "net carbon account" for the year 2050 is at least 80% lower than the aggregate amount of UK emissions of carbon dioxide and other gases as they stood in 1990 (ie, the 2050 Target).

[3] Lord Stern presentation to World Economic Forum, 2013, (see article published in the Guardian, 26 January 2013) **[TJEC/65-66]**.

7. The 2050 Target was tied to a global emissions pathway with an approximately 50% probability of keeping average warming below 2°C above pre-industrial levels. The scientific consensus at the time was that it was necessary to limit warming only to 2°C to avoid dangerous climate change. That position has now changed as set out below.

The need to keep the 2050 target aligned science and international law

8. Section 2 of the 2008 Act **[PB/F/35]** empowers the Secretary of State to revise the 2050 Target to reflect significant developments in climate change science or in international law or policy, facilitating compliance with the UK Government's obligation under the UNFCCC to 'regularly update' its climate change policy.

9. Crucially, section 2 must be interpreted in light of the international law obligations to maintain climate targets on the basis of equity and the precautionary principle.

Summary of changes in science and law since 2008

10. Since the 2008 Act, the scientific evidence has very significantly shifted. In consequence, so has international law and policy.

11. Lord Stern summed things up in 2013[4]:

> *"Looking back, I underestimated the risks. The planet and the atmosphere seem to be absorbing less carbon than we expected, and emissions are rising pretty strongly. Some of the effects are coming through more quickly than we thought then …"*

12. From 2009 onwards, the Parties to the UNFCCC began to question the adequacy of the 2°C temperature goal. In 2012 they commissioned a 'Structured Expert Dialogue' to consider the issue in depth. This provided clear support for a more ambitious goal. Thus, in late 2015, the 195 State parties to the UNFCCC agreed the Paris Agreement on Climate Change ("**Paris Agreement**") **[PB/F/86-112]**. This replaced the prior international consensus that warming must be limited to 2°C above pre-industrial levels with a revised target of limiting warming to "well below 2°C" *and* pursuing "efforts to

[4] Lord Stern's presentation to the World Economic Forum, as reported in the Guardian, 26 January 2013 **[TJEC/1/65-66]**.

limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change."[5]

Summary of the Defendant's response to these changes

13. The Committee on Climate Change ("**CC Committee**"), a statutory body established under the 2008 Act, met for 75 minutes on 16 September 2016 to discuss the UK's response to the Paris Agreement. The minutes of that meeting **[TJEC/1/92-95]** record the CC Committee's acknowledgement that the Paris Agreement commitment went further than the 2050 Target. However, the CC Committee concluded that, although a new "long term target" would need to be set at some point, the 2050 Target should not be revised yet because there was no evidence that the UK could achieve a target consonant with the Paris Agreement. This formed the basis of the Committee's recommendation in a paper published on 13 October 2016 **[TJEC/1/96-150]** that the 2050 Target should not be revised now.

14. Although, as set out below, it is unclear precisely when and how the Secretary of State adopted this recommendation, it is clear that he has in fact done so. In pre-action correspondence, the Secretary of State has further refused to revise the 2050 Target.

15. The Claimants allege that the Secretary of State's failure to revise the 2050 Target, which is an ongoing failure, is unlawful. In particular:

    (a) it is *ultra vires*, because it frustrates the legislative purpose of the 2008 Act;

    (b) it is based on an error of law regarding the meaning of the Paris Agreement;

    (c) it is irrational, because it fails to take into account relevant considerations and / or to give them adequate weight including, most notably:

        (i) the fact that the Paris Agreement requires parties to take steps to limit global temperature to 1.5˚C or "well below" 2˚C, which is a significant development in international law and policy and which is inconsistent with the current 2050 Target;

[5] Paris Agreement, Art. 2(1)(a) **[PB/F/82].**

(ii) the fact that the Paris Agreement is based on, and there have in any event been, significant developments in scientific knowledge about climate change necessitating a strengthening of the 2050 target; and

(iii) other international law obligations that must inform exercise of section 2 of the 2008 Act, specifically the principles of equity and precaution;

(d) it violates the Human Rights Act 1998 ("**HRA 1998**"), in particular by disproportionately interfering with the right to life, the right to property, the right to a private and family life and the rights of those with certain protected characteristics to be free from discrimination; and

(e) it breaches the public sector equality duty set out in s. 149 of the Equality Act 2010 ("**the 2010 Act**") **[PB/F/84-85]**.

16. These are the Claimants' five grounds for judicial review, which are set out in more detail below.

B. THE PARTIES

17. Plan B is a charitable incorporated organisation, constituted in June 2016. It was established in response to the call from the governments that negotiated the Paris Agreement for civil society to support the realisation of the goals set out in that Agreement. Further detail about Plan B and the reasons it was set up are set out in the witness statement of Tim Crosland, the Founder and Director of Plan B ("**Crosland 1**") §§ 1-22 **[PB/C/1-42]**.

18. The 2nd to 12th Claimants are all individuals who are affected by climate change in different ways. They include:

(a) young people, who bear a disproportionate burden of the impact of climate change (the 5th, 6th and 10th Claimants and the 12th Claimant, who is a child);

(b) young people for whom the threat of climate change is a deterrent to having children (the 5th and 10th Claimants);

(c) older people, who are particularly vulnerable to the health effects of climate change (the 2nd and 3rd Claimants);

(d) a person whose property on Tortola was destroyed by Hurricane Irma (the 11th Claimant);

(e) a person whose disadvantaged social and economic circumstances leave her and her child disproportionately vulnerable to the impacts of climate change (the 9th Claimant);

(f) persons whose national origin derives from, or who live in, Small Island Developing States, whose existence is threatened by climate change, or other States where extreme weather can portend humanitarian disaster (the 6th, 7th, 9th and 11th Claimants); and

(g) those whose work has demonstrated to them the impacts of climate change on others, including a doctor, who has seen the health problems that climate change is causing (the 4th Claimant) and a person who has worked in humanitarian and disaster relief (the 8th Claimant).

19. As set out below, the Secretary of State is the person entrusted with a legal duty under the 2008 Act to ensure that the 2050 Target is met and that it continues to support the 2008 Act's overriding purpose.

20. The CC Committee is a statutory body established pursuant to Part 2 of the 2008 Act. The Committee consists of a Chairman and eight members, who are supposed to be independent.[6] The Claimants consider that the CC Committee is an interested party pursuant to CPR rule 54.1(2)(f).

C. LEGAL FRAMEWORK AND FACTUAL BACKGROUND

(i) The International Legal Framework

The UNFCCC

21. The UNFCCC **[PB/F/1-33]** was ratified by the UK in December 1993. It came into force in March 1994. The objective of the UNFCCC is set out in Article 2 (our emphasis):

[6] Although it is notable that several members of the CC Committee have links to the fossil fuel industry, including Dr Heaton, the first appointment to the CC Committee by the current Secretary of State (Crosland 1, §§ 95 **[PB/C/26]).**

"*The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.*"[7]

22. The Preamble to the UNFCCC notes:

> *"… that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs …"*.[8]

23. Article 3 sets out the principles that shall guide the actions of the State parties to achieve this objective. These include the following:

> *"(1) The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof …*
>
> *(3) The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.*"[9]

24. Article 4 then sets out the specific commitments of the State parties.

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[7] UNFCCC **[PB/F/9].**

[8] *Id* **[PB/F/2].**

[9] *Id* **[PB/F/9].**

"*1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall …*

(b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases …

2. The developed country Parties [which includes the UK] and other Parties included in Annex I commit themselves specifically as provided for in the following:

(a) Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention."

3. The developed country Parties … shall also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing measures … The implementation of these commitments shall take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among the developed country Parties …

7. The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology …"[10]

[10] *Id* **[PB/F/10-11]**.

25. The UK thus accepted in 1993:

(a) that climate change required an urgent and effective response, and that a lack of "full scientific evidence" regarding its impacts should not be used as a reason for postponing that response;

(b) that all countries had to make a contribution to that response based on equity and the precautionary principle, taking into account their respective positions both historically and for the future;

(c) that developed countries, including the UK, had to lead the response;

(d) that developed countries, including the UK, had to provide developing countries with adequate and predictable finance and technology transfer as part of that response; and

(e) that each country's response was to be regularly updated.

The duty to prevent harm

26. Under international law, States have the sovereign right to exploit their own resources. They have a corresponding responsibility to ensure activities within their control do not cause substantial damage to other states or areas beyond the limits of national jurisdiction (such as the high seas or outer space). This is described as the 'principle of prevention' or the 'no-harm rule'. The International Court of Justice has held that:

> *"A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."*[11]

27. The UNFCCC directly invokes the principle in its Preamble, removing all doubt regarding its application to climate change:

> *"Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the*

[11] Pulp Mills on the River Uruguay (2010) ICJ, para 101 **[PB/G/237].**

environment of other States or of areas beyond the limits of national jurisdiction."[12]

28. States including the UK, therefore, have an obligation, under general principles of international law, to take all appropriate measures to anticipate, prevent or minimize the causes of climate change, in particular through effective measures to reduce greenhouse gas emissions to a level consistent with the temperature goal.

(ii) The "contraction and convergence" model for the 2050 carbon target

29. There are three elements to determining a national emissions reductions target:

    (a) the global temperature limit;

    (b) total global emissions (the total carbon budget) consistent with maintaining that limit; and

    (c) the relevant country's fair share of that budget.

30. The Paris Agreement specifies the global temperature limit. The Intergovernmental Panel on Climate Change ("**IPCC**") provides global carbon budgets consistent with that limit. Countries are left only to determine their contributions (or shares) on the basis of equity and the precautionary principle. Fundamentally that is a conceptual exercise rather than a scientific one (equivalent to dividing up a pie or a cake).

31. It is important that the principles deployed facilitate international co-operation in respecting the limit, enabling countries to interrogate the combined effect of their commitments.

32. That is only possible if national targets are set on the basis of transparent and replicable assumptions and principles, a point made by Lord Deben (current Chair of the CC Committee) in 2007[13]:

    "The Climate Change Committee should also be asked to give an early opinion on the adequacy of the 2020 and 2050 statutory targets. This should flow from judgments formed on the appropriate stabilisation target for concentration of

[12] UNFCCC **[PB/F/2]**

[13] September 2007, Blueprint for a Green Economy, Submission to the Shadow Cabinet, Chair, John Gummer, pp 384-385 **[TJEC/29-30]**.

greenhouse gases that is compatible with 2°C and ***transparent assumptions on an equitable share for the UK and other developed economies …***

This makes it all the more important that assumptions underlying the targets must be made public in a way that has not happened with past targets.*"* [emphasis added]

33. Likewise the Stern Review emphasised the importance of different countries perceiving 'the distribution of effort to be fair'[14]:

> *"In the end what matters is that total global effort matches the scale of the problem, that the parties perceive the distribution of effort to be fair …"*

34. "Contraction and convergence" ("**C&C**") is a model, developed by Aubrey Meyer and the Global Commons Institute in the early 1990s for determining equitable national shares of the global carbon budget, in such a way that the sum of all national shares does not exceed the allocated budget. Countries may trade their allowances to provide flexibility and efficiency without compromise to the global carbon budget as a whole.

35. At the heart of the model lies a simple concept: the fairest way to divide the global carbon budget equitably between countries is to assume equal rights to the budget for all people, that is to assume equal *per capita* emissions.

36. In 2016 the Global Commons Institute collaborated with Plan B to publish *The Paris Agreement Implementation Blueprint: a practical guide to bridging the gap between actions and goal and closing the accountability deficit* (the "**Blueprint**").[15] The Blueprint applies the Contraction & Convergence model to the IPCC global carbon budget consistent with the Paris Agreement, identifying shares of the budget for all countries on the basis of equal *per capita* emissions.

37. Additionally by comparing a country's past actual emissions to past equal *per capita* emissions the Blueprint derives a past carbon 'credit' or 'debit', that may be used to quantify a country's finance obligations and entitlements. The Blueprint Chart for the UK is presented below[16]. The Blueprint applies the C&C model to the IPCC global

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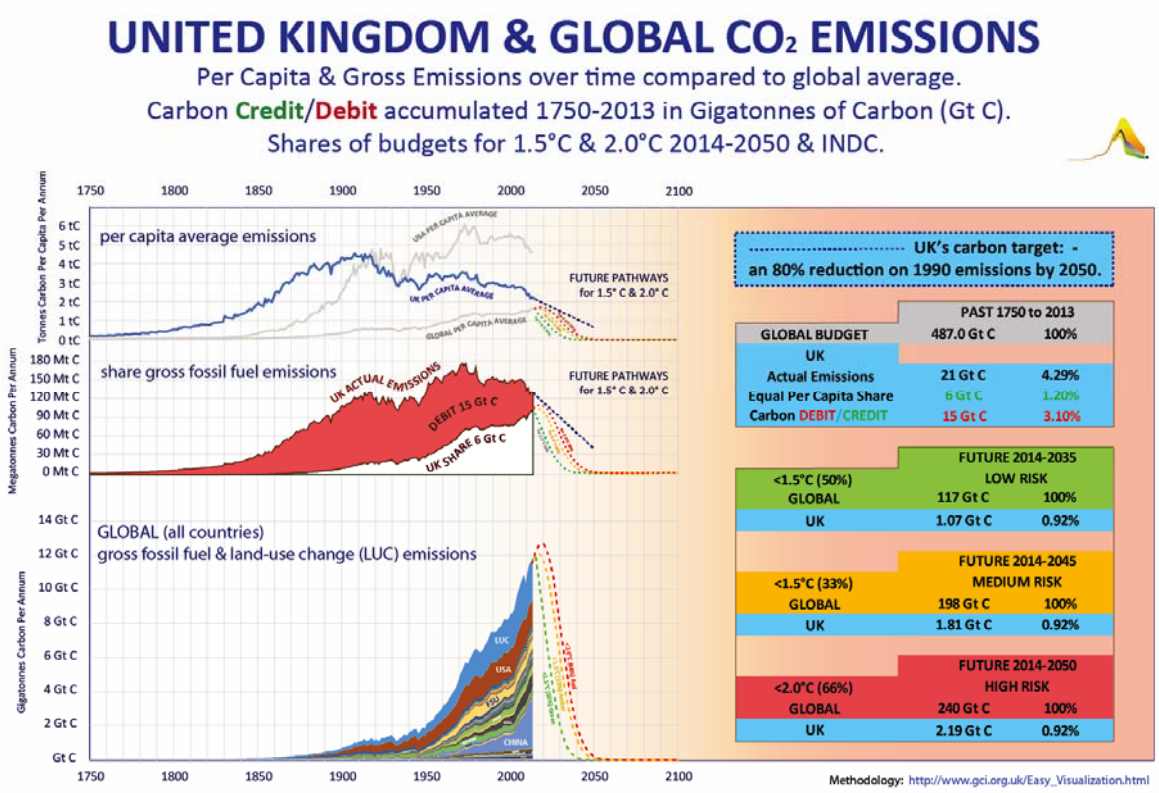
[14] Stern Review, *The Economics of Climate Change*, p. 474 **[PB/H/12]**.

[15] Environmental Liability: Law, Policy and Practice [2016] 3/4 Env. Liability, 114 **[TJEC/80-91]**.

[16] Accessible here: http://www.gci.org.uk/images/NEW/UNITED_KINGDOM_Global.png (accessed on 8 December 2017).

carbon budget consistent with the Paris Agreement, identifying shares of the budget for all countries on the basis of equal *per capita* emissions.



38. The middle section of the chart shows that when the UK's historic emissions between 1750 and 2013 are compared to the global equal per capita average, the UK has accrued a global carbon 'debit' of 15 Gt Carbon (ie it has used 15 billion tonnes of carbon more than a *per capita* distribution model would allow).

39. The bottom part of the chart shows the exponential rise in global emissions of carbon since 1950. On the right hand side of the chart, three dotted coloured lines show the need to reverse this trend rapidly if the commitments set out in the Paris Agreement are to be met on a low to high risk basis.

40. In particular, the green line describes the IPCC budget for a 50% probability of limiting warming to 1.5˚C (which gives an 80% probability of limiting it to 2˚C). The amber line is the budget for a 33% probability of limiting warming to 1.5˚C. The red line is the budget for 66% probability of limiting warming to 2˚C.

41. Returning to the middle section of the chart, equivalent lines are shown in respect of the UK's emissions. The dotted blue line represents the trajectory of the 2050 Target. The scale of the inconsistency with the Paris goal is immediately apparent.

(iii) The dialogue in the UK leading up to the 2008 Act more generally

42. From at least 2000, the UK executive and legislature embarked upon an extensive and rigorous process of determining what should be the UK's response to the threat of climate change and how the UK's commitments under the UNFCCC should be met. The model of C&C, described above, was at the heart of this dialogue throughout.

The 2000 Royal Commission Report: the 60% target

43. In 2000, the Royal Commission issued a report on climate change which emphasised three reasons why "*the UK should strive, at home and abroad, to ensure that an effective international response to the threat of climate change is mounted, beginning now and extending far into the future.*"[17] Those reasons were as follows:

    (a) "*First, there is the moral imperative ... which requires developed nations to take the lead in addressing the threat (as does UNFCCC, which the UK has ratified).*"

    (b) "*Second, the more nations there are which hesitate, the less chance there is of concerted global action. Even if only a minority of nations adopt a 'wait and see' stance, this could jeopardise progress in future negotiations.*"

    (c) "*Third, the UK is very likely to be harmed by climate change.*"

44. These reasons for urgent action remain as valid today as they were at the time (with the urgency only increasing in light of the substantial developments since 2000).

45. The Royal Commission also recommended that by the year 2050 the UK ought to have reduced its net carbon emissions to at least 60% below their level in 1990, explaining its reliance on C&C as follows[18]:

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[17] Environmental Pollution's 22nd Report, Energy – the Changing Climate Page 59, paragraph 4.58 **[TJEC/1-8]**.

[18] The Royal Commission on Environmental Pollution's 22nd Report, 'Energy – the Changing Climate', 2000 **[TJEC/1-8]**.

"The most promising, and just, basis for securing long-term agreement is to allocate emission rights to nations on a per capita basis – enshrining the idea that every human is entitled to release into the atmosphere the same quantity of greenhouse gases …

… we have applied the contraction and convergence approach to carbon dioxide emissions, and calculated what the UK's emissions quotas would be in 2050 … If 550 ppmv is selected as the upper limit, UK carbon dioxide emissions would have to be reduced by almost 60% from their current level by mid-century."

46. The Royal Commission's recommendations were accepted in the 2003 Energy White Paper.

The 2006 Stern Review

47. A similar conclusion to that reached by the Royal Commission was reached in the *Stern Review, The Economics of Climate Change* (the "**Stern Review**") **[PB/H/6-12]**, commissioned by Gordon Brown, then Chancellor, in 2006. The Stern Review concluded:

"*There is still time to avoid the worst impacts of climate change, if we take strong action now.*

The scientific evidence is now overwhelming: climate change is a serious global threat, and it demands an urgent global response.

This Review has assessed a wide range of evidence on the impacts of climate change and on the economic costs, and has used a number of different techniques to assess costs and risks. From all of these perspectives, the evidence gathered by the Review leads to a simple conclusion: the benefits of strong and early action far outweigh the economic costs of not acting …"[19]

48. The Review also noted:

"Uncertainty is an argument for a more, not less, demanding goal, because of the size of the adverse climate-change impacts in the worst-case scenarios"[20]

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[19] Summary of Conclusions, page vi **[PB/H/7]**.

[20] Ibid, page xviii **[PB/H/11A]**.

49. Variations to the contraction and convergence model described above were also considered by the Stern Review, but it was noted that these produced broadly similar results:

> "*The correlation between income or wealth and current or past emissions is not exact, but it is strong. This means that equity criteria tend to lead to fairly similar policy approaches: as Ringius et al note, 'we are in the fortunate situation that all the ...equity principles to a large extent point in the same direction'.*"

The Climate Change Bill

50. The Stern Review led to the proposal for the introduction of what would become the 2008 Act. In its response to pre-legislative scrutiny and consultation on the Climate Change Bill in 2007, the sponsoring Minister acknowledged in the Foreword:

> "*Climate change is the greatest challenge facing our generation. It is the ultimate expression of our interdependence and its effects will be felt by all of us, in every corner of this small and fragile planet.*
>
> *This Climate Change Bill demonstrates the UK's strong leadership on climate change, both at home and abroad.*
>
> *... Other countries have been following the progress of the draft Bill with interest, and I hope it will encourage all of us as we tackle the greatest challenge we face as a world.*"[21]

51. One of the primary purposes of the Bill, as set out in the Executive Summary of that response, was to:

> "[set] *an international precedent, reinforcing the UK's position as a consistent leader in the field of climate change and energy policy.*"[22]

52. The response was also explicit that the 2050 Target was the centre-piece of the legislation:

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[21] *Taking Forward the UK Climate Change Bill: The Government Response to Pre-Legislative Scrutiny and Public Consultation*, Foreword **[TJEC/1/36]**.

[22] *Taking Forward the UK Climate Change Bill: The Government Response to Pre-Legislative Scrutiny and Public Consultation*, Foreword Executive Summary **[TJEC/1/37-38]**.

"*The central focus of the Climate Change Bill is the long-term target to reduce the UK's carbon dioxide (CO2) emissions by at least 60% by 2050. This target was established in the 2003 Energy White Paper in response to a recommendation from the* Royal Commission on Environmental Pollution, in their 2000 report Energy – the Changing Climate."[23]

53. The proposed 60% target was based on a commitment to limiting warming to 2˚C, reflecting international agreement and scientific evidence as it stood at the time of the 2000 Royal Commission and the 2003 White Paper.

The Environmental Audit Committee Report (2007)

54. The commitment to keeping warming below 2˚C was confirmed by the then Secretary of State when appearing before the House of Commons Environmental Audit Committee (the "**EA Committee**"), as noted in its July 2007 report, *Beyond Stern: From the Climate Change Programme Review to the Draft Climate Change Bill*:

> "*The Secretary of State for Environment, Food and Rural Affairs confirmed to us that the Government was still completely committed to limiting global warming to a rise of 2˚C. By stressing the dangers even of this level of warming, he emphasised the reasons why the UK and EU were committed to holding a rise in temperature at no more than 2˚C:*
>
> > 'Just to put that in perspective, I was told … that with a two-degree average change it will not be uncommon to have 50˚C in Berlin by mid century, so associated with a two-degree change is something that is pretty unprecedented in northern Europe, and I think that is quite a sobering demonstration because 50˚C is beyond our experience.'" **[PB/H/13A-D]**

55. The EA Committee further highlighted the unique nature of the threat from climate change:

> *"9. Climate change is on a different scale from any other political challenge. Its potential effects could be both physically and economically devastating. It is not just the size but the timing of these effects that poses such a challenge. The lag*

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[23] *Taking Forward the UK Climate Change Bill: The Government Response to Pre-Legislative Scrutiny and Public Consultation*, Foreword **[TJEC/1/40A].**

between emitting CO2 and experiencing the resulting rise in temperatures means we must take bold action today in the hope of preventing dangerous climate change occurring in the future, the impacts of which could be irreversible. Timing is also an issue given the long term planning and investments required to roll out new technologies and infrastructure, and thereby decarbonise the economy." **[PB/H/xx]**

56. The EA Committee also emphasised the potential influence of the 2008 Act on global action beyond the UK:

> *"3. The UK cannot, of course, tackle global warming on its own. Ultimately—and sooner rather than later—other countries must adopt similar policy frameworks and levels of effort. However, the UK can do much by leading by example, and the measures proposed in the draft Bill represent a large step forward. As we heard from Climate Change Capital, the rest of the world is watching the UK's "experiment" with an independent Committee on Climate Change, and this could be a model which is replicated in many other countries."* **[PB/H/13A-D]**

57. Finally, the EA Committee recommended the endorsement of C&C or a similar model:

> "*72. In terms of the way in which this cumulative global budget is divided up among individual nations, we recommend that the Government explicitly endorses, and promotes internationally, the Contraction and Convergence method, or a method similar to it.* **[PB/H/13A-D]**

Parliamentary Joint Committee on the Draft Climate Change Bill, First Report (2007)

58. The Joint Committee considering the Bill again emphasised C&C as the basis for the 2050 Target:

> "*The 60% target which the RCEP recommended was based on the adoption of the 'contraction and convergence' approach first advocated in 1990 by the Global Commons Institute. Contraction and Convergence involves calculating the maximum global level of emissions which could be regarded as 'safe', and apportioning these emissions to countries on an equal* per capita *basis ...*".[24]

[24] 2007, Joint Committee on the Draft Climate Change Bill, First Report, paras. 39, 40 **[TJEC/1/19].**

59. It noted, however, that changes in the science since 2000 implied a more ambitious target was now necessary:

> *"40. Since the RCEP made this recommendation in 2000, understanding of climate change has increased significantly. Research carried out in recent years, most notably, as far as many of those submitting evidence are concerned, the Tyndall Centre, has indicated that the risks of climate change are greater than previously assumed, and that the 'safe' level of carbon dioxide in the atmosphere is lower than previously thought."*[25]

60. The Secretary of State acknowledged to the Joint Committee that greater ambition was likely to be necessary:

> *"The Secretary of State told us* 'the science has gone only in one direction since 2000, which is to say that the situation is more grave and that the need is more urgent, and it is absolutely right, therefore, that we say *"at least 60%"* to signal that we know that, frankly, if the target is going to change it is only going to change in one direction, and that is upwards.*"*[26]

61. Significantly the Joint Committee spoke in terms of revision to the target being 'necessary' on the basis of the science:

> *"45. Bearing in mind however the weight of scientific evidence before the Committee that a target of more than 60% is likely to be necessary ..."*[27]

62. That evidence was linked specifically to the risk of "irreversible events" beyond 2˚C warming:

> "*Climate science suggests that above [2˚C] of warming there would be increased risks of triggering irreversible events - such as the melting of the Greenland ice cap, and the burning of the Amazon rainforest - which would not just have very serious consequences in themselves but would also accelerate further climate change.*"[28]

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[25] **[TJEC/1/19]**.

[26] **[TJEC/1/20]**.

[27] **[TJEC/1/21]**.

[28] **[TJEC/1/21]**.

Blueprint for a Green Economy, Submission to the Shadow Cabinet, Chair, John Gummer (2007)

63. Cross party support for the Bill is apparent from the report prepared by John Gummer (now Lord Deben, Chair of the CC Committee) in 2007 for the Shadow Cabinet.

64. The report emphasises the importance of early action:

> *"But why act now? Why not wait until the scientists can give us more conclusive information on the risks and the economists can give us a more reliable cost benefit analysis? The reality is simple. We know that every molecule of CO2 that we add to the atmosphere will stay there for at least 100 years. Therefore with every year that passes we may be locking ourselves into a potentially bigger and more expensive problem even it were not to become utterly disastrous."*[29] (underlining added)

65. Lord Deben in his Report continued, making a powerful case for taking whatever action is necessary on the basis of the science, however challenging:

> "*New political leadership has to deliver a step change in ambition and the 2°C threshold is a strong signal of intent. Faced with the risks attached to further slippage in ambition, we argue that it is premature to give up on 2°C on grounds of practicality. We should consider what is necessary to be what is practical. On current trends, it won't be long before we are being told that we are too late to stabilise at 550ppm, at which point we are in very dangerous territory. We must not encourage the view that if the target proves too hard, we just move it. The climate won't wait*."[30] (underlining added)

66. Lord Deben also set out his definition of "leadership" in the context of climate change:

> *"**9.5.2. Leadership by example***
>
> *Leadership is not just about saying the right thing and pointing the right way. It is also about being seen to lead by example."*[31]

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[29] p. 377 **[TJEC/1/26].**

[30] p.380 **[TJEC/1/28].**

[31] p. 424 **[TJEC/1/31].**

The revision of the 2050 Target from 60% to 80%

67. As set out above, from the pre-legislative scrutiny of the Bill emerged a consensus that the science demanded a 2050 Target more ambitious than that originally proposed. As a result, the Prime Minister announced in September 2007 that the CC Committee would be asked to report on whether the 2050 Target needed to be strengthened from the proposed 60% figure.

68. The CC Committee issued a report in 2008 ("**2008 CC Committee Report**"), concluding that the target did indeed need to be revised upwards, based on developments in the science regarding climate change and measurements of actual emissions to that point:

> "*There is a very strong case for the UK to adopt a significantly more ambitious target than the 60% objective set in the 2003 Energy White Paper. There have been two key changes since this objective was set:*
>
> - *Recent developments in climate science and in the analysis of potential impacts mean that the whole world should now be aiming for deeper reductions in GHG emissions than previously seemed appropriate.*
> - *Latest evidence on emissions and atmospheric concentrations suggests that these are higher than was projected at the time that the 60% target was set. More radical and earlier action is therefore needed to achieve climate objectives.*"[32]

69. The 2008 CC Committee Report further acknowledged:

> *"… <u>The challenge is not the technical feasibility of a low-carbon economy but making it happen</u>. Ensuring action will require strong leadership from government and a concerted response from individuals and businesses.*" (underlining added)

70. Consequently, the CC Committee advised that the 2050 Target should be increased to an 80% reduction on 1990 emissions ("**2008 CC Committee Recommendation**"). This was, in part, premised on a rule of reducing the probability of "extreme danger" at

[32] CC Committee report p.xiv **[TJEC/1/55].**

all times to less than 1% (which the Committee considered, in 2008, to be 4˚C warming):

> "*The aim should be at any time to keep the probability of exceeding a defined 'extreme danger' threshold in the future below a very low level (e.g. less than 1%).*"[33]

71. The CC Committee's basis for deriving the 80% target was again C&C or a similar model. In determining the UK's share of the global emissions budget, the CC Committee stated as follows[34]:

> "***Equal per capita emissions****: The simplest approach is to assume that in the long-term every person on the planet is entitled to an equal share of GHG emissions …This implies cuts of* ***between 78% and 82%*** *versus the 1990 baseline.*" [emphasis added].

72. Lord Turner, the Original Chair of the CC Committee, gave evidence to the EA Committee in 2009 to clarify the basis of the 2050 target:

> "*When we proceed from the global target to the UK target we are suggesting something which is reasonably pragmatically close to Contract and Converge …*
>
> *It's very difficult to imagine a long-term path for the world which isn't somewhat related to a Contract and Converge approach."*[35]

73. Moreover, the CC Committee emphasised that "cumulative emissions" rather than emissions at a particular date are what really matter:

> "*It is important to note, however, that while discussion of a global deal tends to focus on emissions in 2050 … [t]he climate impact of our preferred trajectories depends primarily upon the cumulative emissions profile."*[36]

74. It is evident from the above, that throughout the eight years of pre-legislative analysis and scrutiny leading up to the implementation of the 2008 Act, both Executive and

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[33] CC Committee Report 2008 p31**[TJEC/1/58B].**

[34] CC Committee Report, 2008, p. 29 **[TJEC/1/58].**

[35] **[TJEC1/60-61].**

[36] CC Committee Report, 2008, p. 26 **[TJEC/1/57].**

Legislature paid detailed attention to the principles for determining the 2050 Target. A clear consensus emerged that given the gravity of the risks, the 2050 Target should:

(a) conform to the dictates of science;

(b) represent an equitable UK contribution to maintaining the global climate obligation; and

(c) be based on the principles of C&C or a similar model.

75. The Secretary of State now contends that the 2008 target was based on the IPCC's 4th Assessment Report[37]. This is, in part, correct. That report recommended that Annex 1 countries (which included the UK) reduce their emissions by 80 to 95% by 2050 to achieve a 2°C limit. It likewise referred to C&C as one of the bases for the recommendation. It is notable that on the basis of the IPCC Report, referenced by the Secretary of State, the 2050 Target was at the very bottom of the range of ambition even in 2007.[38]

76. In respect of future revision of the 2050 Target, the CC Committee observed the following (underlining added):

> *"… Our recommendation that the UK's 2050 objective should be to reduce emissions by at least 80%, therefore, reflects the best judgement based on imperfect information and analysis available today. Over time, more information and analysis will become available which may suggest the need to adjust the target. In particular:*
>
> - *Estimates of the probability that the world will exceed a point of 'extreme danger' (e.g. 4˚C) could increase or decrease, <u>or judgements on where a point of 'extreme danger' lies could change</u> …*
> - *Estimates of the likely adverse global and local human welfare impacts of different levels of temperature increase may also change as more information becomes available …*

[37] PAP Response, § 42 **[PB/E/43-53]**.

[38] Crosland 1, § 120 **[PB/C/32]**.

- *Actual achieved emissions could diverge from our modelled trajectories. If, for instance, emissions do not peak in 2016 but continue to rise, or if emissions increase at a faster rate than anticipated before the peak, then the probability of keeping below a given temperature will be reduced. To maintain these probabilities cumulative emissions from now to 2050 will need to be in line with those implied by the recommended targets, and overshoots in the early years will need to be matched by more rapid reduction later …*"[39]

77. Accordingly, the CC Committee recognised that it would be necessary to adjust the target upwards if the projections it forecast in 2008 did not materialise.

78. The 2008 CC Committee Recommendation was communicated to the then Secretary of State by Lord Adair Turner in a letter of 7 October 2008. In that letter, after setting out the developments in the science that the CC Committee had taken into account in recommending that the target be revised, Lord Adair Turner wrote (underlining added):

> "*To determine a UK emissions reduction target, we first considered what a global target should be and then the UK's appropriate contribution. The global emissions target needs to be based on an analysis of the climate science. The crucial issue is what level of global temperature should the world seek to avoid, and what emissions path will keep us below this temperature …*
>
> *… we believe that it is difficult to imagine a global deal which allows the developed countries to have emissions per capita in 2050 which are significantly above a sustainable global average.*"[40]

79. Again, it is clear from this letter that, in 2008, the CC Committee considered that the warming limit should be set principally by reference not to a subjective assessment of what was feasible, but by reference to an objective assessment of what was necessary. Further, the goal was for the UK to make a fair contribution to the global target, reflecting the principles of equity and precaution.

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[39] CC Committee Report, 2008, p. 31 **[TJEC/1/58B].**

[40] **[TJEC/1/45-50].**

80. The Bill was revised in accordance with the Committee's recommendation. Importantly, the proposed target was not based on what was considered to be politically and technically feasible at the time. Rather, it was recognised that setting a target that was considered necessary would provide the incentives for technologies to be developed.

81. The 2008 Act was passed into law with overwhelming cross-party support (only five Members of the House of Commons voted against the Bill at Second Reading). It received Royal Assent on 26 November 2008. Further information regarding the mechanics of the 2008 Act is set out below.

(iv) Developments in science and international law/policy after 2008

82. Since 2008 there have been very significant developments both in terms of the science and international law and policy.

83. From 2009 onwards, parties to the UNFCCC began to question the adequacy of the 2˚C global temperature goal.

84. In parallel, in 2011, experts argued before the EA Committee that the 2050 Target was not even compatible with the 2˚C goal:

> "*Some have expressed concerns that the approach to setting the carbon budgets and targets is* 'exceptionally risky'. *The carbon budgets and targets set are premised on a* 'greater than 50% chance of exceeding 2°C, when Governments have agreed the goal is to not exceed 2°C ... If the goal is to not exceed something, then a greater than 50:50 chance is not compatible with this goal'."[41]

85. In 2012, the parties to the UNFCCC (including the UK Government), commissioned a "Structured Expert Dialogue", to review the adequacy of the 2˚C goal.

86. In 2013, Lord Stern, author of the Stern Review, reflected on his original work and reached a similar conclusion:

> "*Looking back, I underestimated the risks. The planet and the atmosphere seem to be absorbing less carbon than we expected, and emissions are rising pretty*

[41] EA Committee - Seventh Report Carbon Budgets (2011), paragraph 13 **[PB/H/13-15]**.

strongly. Some of the effects are coming through more quickly than we thought then …

This is potentially so dangerous that we have to act strongly. Do we want to play Russian roulette with two bullets or one? These risks for many people are existential."[42]

87. The UNFCCC Structured Expert Dialogue reported in 2015 as follows:

"*The 'guardrail' concept, in which up to 2°C of warming is considered safe, is inadequate and would therefore be better seen as an upper limit, a defence line that needs to be stringently defended, while less warming would be preferable …*"[43]

"*Experts emphasized the high likelihood of meaningful differences between 1.5°C and 2°C of warming regarding the level of risk from ocean acidification and of extreme events or tipping points, because impacts are already occurring at the current levels of warming; risks will increase with further temperature rise … They added that in the light of the difficulties in predicting the risks of climate change, there is value in taking a precautionary approach and adopting a more stringent target.*"[44]

The 2015 Paris Agreement

88. Following the Structured Expert Dialogue report, the UK Government was particularly active in securing the Paris Agreement through its permanent Special Representative on Climate Change, Sir David King. The Paris Agreement has been signed by all Governments, and ratified by 170, under the auspices of the UNFCCC. It entered into force on 4 November 2016.

89. Parties have specifically recognised the inadequacy of the 2˚C temperature goal in light of relevant scientific developments, and have committed in Article 2(1)(a) to:

"*Holding the increase in the global average temperature to <u>well below 2°C</u> above pre-industrial levels and to <u>pursue efforts to limit the temperature increase to</u>*

[42] *Nicholas Stern: 'I got it wrong on climate change – it's far, far worse',* The Guardian **[TJEC/1/65-66]**.

[43] Report of the Structured Expert Dialogue (2015), page 18 **[TJEC/1/76]**.

[44] Ibid, page 31 **[TJEC/1/79]**.

1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change". (underlining added)[45]

90. The UK Government was instrumental in convincing the international community that a more ambitious temperature goal was both necessary and feasible.

91. The Paris Agreement does not specify particular targets for different countries, as it is based on the concept of 'nationally determined contributions'. However, it does specify the *principles* on which national targets should be based (and must be read also in conjunction with the principles set out in the UNFCCC). In particular:

(a) The Preamble acknowledges that Parties should "*promote and consider their respective obligations on human rights*" in taking action to address climate change.

(b) Article 2(2) states that the Agreement must be implemented to reflect "equity and the principle of common but differentiated responsibilities".

(c) Article 4 provides that:

> "*1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.*
>
> *2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.*
>
> *3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting*

[45] **[PB/F/90]**.

its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances." (underlining added)[46]

92. The Paris Agreement, in other words, allows Parties to determine their own emission reduction targets, as long as they accord with the principles set out above.

93. It is clear that the 2050 Target does not accord with these principles. In particular it does not accord with equity. On the basis of equal *per capita* shares of the global budget, implementing the Target would involve the UK consuming three times its share of the remaining carbon budget (on the basis of equal *per capita* emissions). Other countries will have to compensate for that excess if the global budget is to be respected. Given that the UK has an obligation to show leadership, it is far from certain that others will be inclined to do so.

94. The Paris Agreement is supported by an accompanying Decision **[PB/F/113-148]**, which explains the relevant, and agreed, context in the preamble:

"*Recognizing that climate change represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries, and their participation in an effective and appropriate international response, with a view to accelerating the reduction of global greenhouse gas emissions …*

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights …

Emphasizing with serious concern the urgent need to address the significant gap between the aggregate effect of Parties' mitigation pledges in terms of global

[46] **[PB/F/91]**.

annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent with holding the increase in the global average temperature to well below 2°C above pre- industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre- industrial levels …

Emphasizing the enduring benefits of ambitious and early action, including major reductions in the cost of future mitigation and adaptation efforts …".[47]

95. Similar matters are identified in the preamble to the Paris Agreement itself.

96. In light of this context, and alongside the relevant temperature targets, the parties of the Paris Agreement agreed to discuss in the future what had been done to achieve the target, stating in paragraph 20 of the Decision that they would:

"*convene a facilitative dialogue among Parties in 2018 to take stock of the collective efforts of Parties in relation to progress towards the long-term goal referred to in Article 4, paragraph 1, of the Agreement…*".[48]

97. They also agreed that:

"…developed countries intend to continue their existing collective mobilization [of finance] goal through 2025 … ; prior to 2025 the Conference of the Parties … shall set a new collective quantified goal from a floor of USD 100 billion per year, taking into account the needs and priorities of developing countries …".[49]

98. Whilst the Paris Agreement is ground-breaking in recognising that a temperature limit of 2°C is inadequate, it also has serious limitations.[50] In particular:

(a) although a common temperature goal was agreed, there was no agreement on the relative responsibilities of each State to achieve it. Rather, the Paris Agreement provides for each State to determine its own contribution based on the principles set out above, which will be reviewed in due course; and

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[47] Preamble of Paris Decision **[PB/F/114].**

[48] Para 20 of Paris Decision **[PB/F/116].**

[49] Para 53 of Paris Decision [**PB/F/120].**

[50] See the discussion of the limitations of the international political process at §§ 16-22 of Crosland 1 **[PB/C/5-6].**

(b) although, there is a "review process", there is no international law mechanism to compel States to alter their targets.

99. These limitations are serious because the obligation to limit warming to 1.5˚C and "well below" 2˚C is not an aspirational goal. It is the threshold beyond which the scientific evidence establishes that the risks of crossing critical tipping points in the climatic system become intolerably high, potentially leading to runaway climate change. Lord Deben, now chair of the CC Committee, explained the concept of "the tipping point" in his report to the Shadow Cabinet in 2007:

> "*This refers to the point at which these changes in the climate system lead to runaway global warming. At this stage, what little influence we had on the climate system will no longer have any effect on the outcome. Runaway global warming could lead to mass extinction.*"

100. The net effect of these limitations was summed up by the UN Environmental Programme, which produces an annual "Emissions Gap Report" on the gap between the global obligation and the actions necessary to achieve it. The Foreword to its 2016 Report states:

> *"Make no mistake; the Paris Agreement will slow climate change … But not enough: not nearly enough and not fast enough. This report estimates we are actually on track for global warming of up to 3.4 degrees Celsius. Current commitments will reduce emissions by no more than a third of the levels required by 2030 to avert disaster."* (underlining added) [51]

101. In other words, global compliance with the Paris Agreement is necessary to ensure the stability and viability of human civilisation on this planet. Current actions are insufficient and it is "not sensible" to remain stuck on autopilot. Consequently, the rational approach is to determine what is necessary to ensure compliance, and to plan accordingly. The plan must drive the necessary technological innovation and not *vice versa*.

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[51] Emissions Gap Report' **[TJEC/1/157].**

(v) The 2016 CC Committee Recommendation following the Paris Agreement

102. In stark contrast to the lengthy debates leading up to the adoption of the 2050 Target, it would appear that the CC Committee discussed the "UK long-term ambition after the Paris Agreement" in a 75-minute session during its meeting on 16 September 2016.[52]

103. The minutes of that meeting expressly acknowledge the inconsistency between the Paris Agreement and the 2050 Target:

> "*It was clear that the aims of the Paris Agreement, to limit warming to well below 2°C and to pursue efforts to limit it to 1.5°C, went further than the basis of the UK's current long-term target to reduce emissions in 2050 by at least 80% on 1990 levels (which was based on a UK contribution to global emissions reductions keeping global average temperature rise to around 2°C) ...*". (underlining added)[53]

104. However, the CC Committee concluded that no action should be taken because "*the evidence was not sufficient to specify that target now*", and because they considered the "priority" to be action in relation to existing targets:

> "*The Committee therefore agreed that whilst a new long-term target would be needed to be consistent with Paris, and setting such a target now would provide a useful signal of support, the evidence was not sufficient to specify that target now. Further actions to strengthen the achievement of existing targets should be prioritised (which would leave open options to push further in future).*" (underlining added)[54]

105. On 13 October 2016, the CC Committee recorded its conclusions in a report entitled *UK climate action following the Paris Agreement* ("**2016 CC Committee Report**") [TJEC/1/96-150].

106. In that Report, the CC Committee interpreted the Paris temperature obligation as follows:

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[52] Crosland 1, §45, 89 **[PB/C/11-12]** and **[PB/C/25].**

[53] Minutes of meeting of the Committee on Climate Change **[TJEC/1/92]**

[54] Minutes of meeting of the Committee on Climate Change **[TJEC/1/93]**

"We therefore consider the goal of pursuing efforts to 1.5°C as implying a desire to strengthen and potentially to overachieve on efforts towards 2°C."[55]

107. This is a misinterpretation for the reasons set out below. However, even with this misinterpretation, the CC Committee accepted that the 2050 Target was inconsistent with the Paris Agreement:

"*While relatively ambitious, the UK's current emissions targets are not aimed at limiting global temperature to as low a level as in the [Paris] Agreement, nor do they stretch as far into the future.*"[56]

108. It also noted that delayed action would only substantially increase the overall challenge:

"*Table 2.1 shows the global CO2 budgets provided by the IPCC, consistent with a 50% likelihood of staying below 1.5°C and 66% likelihood of staying below 2°C (the range of temperature ambition in the Paris Agreement) …*

These budgets can be used to infer simple, indicative timescales for reaching net zero global CO2 emissions. If global emissions are reduced starting now on a linear path to zero, the budgets imply zero would need to be reached in the 2030s for a 50% likelihood of 1.5°C and the 2040s to 2070s for a 66% likelihood of 2°C …

Delays to emissions reductions will hasten the deadline for zero emissions, making the credibility of meeting the global CO_2 budgets very questionable. For example, if global emissions remain flat the entire CO_2 budget for 2°C would be used up in 15 to 30 years, after which time emissions would need to be eliminated immediately."[57] (underlining added)

109. However, the CC Committee still concluded that the target should not be revised (ie the 2016 CC Committee Recommendation). It described this conclusion as follows:

"*Do not set new UK emissions targets now. The UK already has stretching targets to reduce greenhouse gas emissions. Achieving them will be a positive contribution to global climate action. In line with the Paris Agreement, the*

[55] 2016 CC Committee Report p 24 **[TJEC/1/119]**.

[56] 2016 CC Committee Report p 8 **[TJEC/1/98]**.

[57] *Id.*, p. 24. **[TJEC/1/114].**

Government has indicated it intends at some point to set a UK target for reducing domestic emissions to net zero. We have concluded it is too early to do so now, but setting such a target should be kept under review. The five-yearly cycle of pledges and reviews created by the Paris Agreement provides regular opportunities to consider increasing UK ambition."[58] [underlining added]

110. In line with the minutes of its meeting, in the 2016 CC Committee Report the main reasons the CC Committee put forward for its Recommendation that the target should not be revised were (a) that achieving the more ambitious target is not feasible using current technologies, (b) it is not certain what target would need to be set to meet the Paris Agreement levels, and (c) that now was not the time, as there would be "regular opportunities" for raising ambition at a later date.

111. Chapter 3 of the 2016 CC Committee Report was dedicated to exploring the feasibility of the UK taking more ambitious domestic action. The Committee concluded that the current target "*can be met in various ways using currently known technologies*", whereas:

> "[a]*chieving net zero domestic emissions…would require a combination of further breakthroughs in hard-to-reduce sectors…and greenhouse gas removal technologies beyond those already in our scenarios.*"[59]

112. In the Executive Summary, the Report stated:

> "*Given current uncertainties around domestic feasibility, inclusion of non-CO_2 emissions and ambition of other countries to reach zero, it makes sense at this point to remain flexible on how best to reflect the aim of global net zero emissions in a UK target. Addressing these uncertainties will help in setting a robust target which provides the right incentives.*"[60]

113. The CC Committee recognises in its 2008 report, that it is cumulative emissions that impact on temperature. The longer it takes the UK to reach net zero emissions, the fewer emissions it may emit annually in the meantime. In so far as the CC Committee highlighted in 2016 a difficulty in reaching net zero emissions, that argues only for

[58] *Id.*, p. 7. **[TJEC/1/97]**

[59] *Id*., p. 35.**[TJEC/1/125]**

[60] *Id*., p. 10.**[TJEC/1/100]**

more radical cuts in the meantime: see graphic below at paragraph 141. Contrary to the Secretary of State's assertions, the thrust of the Claimants' case is not about setting a net zero emissions target. The thrust of the Claimants' case is that the UK should consume no more than its fair share of the overall global carbon budget, in line with the purpose of the 2008 Act.

114. Further, it is notable that in neither the September 2016 minutes nor the 2016 CC Committee Report did the CC Committee make reference to the matters set out in the 2008 CC Committee Report that it considered would justify a revision to the target.

(vi) Correspondence from Plan B about the 2016 CC Committee Recommendation

115. On 13 April 2017, Plan B wrote urging the Secretary of State to **[PB/D/181-188]**:

    (a) exercise his power to revise the 2050 Target, aligning it to the global climate obligation and the Paris Agreement; and

    (b) take reasonable and proportionate measures to safeguard the right to life.

116. Also on 13 April 2017, Plan B wrote to the CC Committee urging it to revise the 2016 CC Committee Recommendation **[TJEC/1/189-194**]. The CC Committee responded on 2 May 2017 asking Plan B to provide some further analysis in support of its case **[TJEC/1/195].** Plan B responded to that request on 19 May 2017 **[TJEC/1/196-201].**

117. Plan B chased a response from the Secretary of State and received a brief acknowledgement on 28 June 2017 indicating a substantive response would be received "shortly" **[TJEC/1/208].** Plan B responded the next day to highlight the urgency of the matter **[TJEC/1/209-210]**. No further response has been received.

118. On 7 August 2017, the CC Committee again acknowledged in a letter to Plan B that:

> *"... the Paris Agreement describes a higher level of ambition than the one that formed the basis of the UK's existing legislated emission reduction targets.*" **[TJEC/1/214]**

(vii) The publication of the Clean Grown Strategy

119. On 12 October 2017, the Secretary of State published the Clean Grown Strategy **[PB/B].** This sets out the domestic plan for combatting climate change for the period.

120. This Strategy implicitly adopts the CC Committee's recommendation, stating:

> "*The UK's current target is to reduce its greenhouse gas emissions by at least 80 per cent by the year 2050, relative to 1990 levels. This 2050 target was set to be consistent with keeping the global average temperature to around 2°C above pre-industrial levels with a 50 per cent likelihood. In October 2016 the Committee on Climate Change (CCC) said that the Paris Agreement target "*is more ambitious than both the ambition underpinning the UK 2050 target and previous international agreements*", but that the UK should not set new UK emissions targets now, as it already has stretching targets and achieving them will be a positive contribution to global climate action. The CCC advised that the UK's fair contribution to the Paris Agreement should include measures to maintain flexibility to go further on UK targets, the development of options to remove greenhouse gases from the air, and that its targets should be kept under review.*"[61]

121. Thus, the strategies set out in the document are premised upon seeking to achieve the (unaltered) 2050 Target.

122. This is despite explicit recognition in the Clean Growth Strategy that "*ambitious action*" on climate change is needed, given that:

> "*Without significant reductions in emissions, <u>the world is likely to be on course for average temperature rise in excess of 2°C above pre-industrial levels, and possibly as much as 5°C for the highest emissions scenarios, by the end of this century</u> ...*
>
> *This growing level of global climate instability poses great risks to natural ecosystems, global food production, supply chains and economic development. It is likely to lead to the displacement of vulnerable people and migration, impact water availability globally, and result in greater human, animal and plant disease. Climate change can indirectly increase the risks of violent conflicts by amplifying drivers of conflicts such as poverty and economic shocks…*

[61] Clean Growth Strategy, p. 139 **[PB/B/141].**

The UK is likely to feel the impact of climate change both directly and through impacts in other parts of the world which will affect our food and materials prices, trade, investments and security. In its recent UK Climate Change Risk Assessment the Government endorsed the six key climate change risks for the UK identified in an independent review by the Adaptation Sub-Committee308: flooding and coastal change; shortages in public water supply; risks to health, wellbeing and productivity from high temperatures; risks to natural capital and our ecosystems; risks to food security and trade; and new pests and diseases."[62] (underlining added)

123. The decision to maintain a 2050 Target that does not accord with the Paris Agreement is reiterated despite acknowledgement that it would be necessary to meet that Agreement's targets in order to avoid unacceptable risks:

"*Scientific evidence shows that increasing magnitudes of warming increase the likelihood of severe, pervasive and irreversible impacts on people and ecosystems. These climate change risks increase rapidly above 2°C but some risks are considerable below 2ºC. This is why, as part of the Paris Agreement in 2015, 195 countries committed to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change". The Agreement recognised that in order to achieve this goal, global emissions of greenhouse gases would need to peak as soon as possible, reduce rapidly thereafter and reach a net zero level in the second half of this century.*

As part of the Paris Agreement countries also committed to reduce or limit their greenhouse gas emissions. These are contained in their 'Nationally Determined Contributions' (NDCs). A number of studies consider how close these commitments bring us to staying below 2°C, and estimate that if they were met we would be on a path to a global temperature rise of 2.7 to 3.7 °C above pre-industrial levels by 2100."[63] (underlining added)

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[62] *Id.*, pp. 137-138 **[PB/B/139-140]**.

[63] *Id.*, p. 139 **[PB/B/141]**.

124. However, the Clean Growth Strategy also misrepresents the conclusions of the CC Committee:

> "*The UK is already playing its part, with the CCC confirming that there is presently no need for the UK to change its targets in light of the Paris Agreement* …"[64]

(vii) The Scottish Government's response to the Paris Agreement

125. The Scottish Government's approach to implementation of the Paris Agreement is of relevance by way of background because it (and the CC Committee recommendations on which it is based) lie in such stark contrast to the process and decisions in respect of the 2050 Target.

126. The Climate Change (Scotland) Act, passed by the Scottish Parliament in 2009, established for Scotland a 2050 target of reducing emissions by 80% from a 1990 baseline, linked to meeting the global obligation of limiting warming to 2˚C[65].

127. In October 2016, following the Paris Agreement, the Scottish Government requested advice from the CC Committee on the appropriate level of targets under their Act.

128. Presumably because Scottish Government made a positive request for advice on action following the Paris Agreement (whereas the Secretary of State did not), the CC Committee appears to have adopted a more considered and consultative approach to that taken in preparing the 2016 CC Committee Recommendation on action following the Paris Agreement for the UK as a whole. In particular, it put out a call-for-evidence in December 2016 to gather views from stakeholders, experts, and individuals. It also held an evidence session for stakeholders in Edinburgh in January 2017.

129. In March 2017, the CC Committee published its advice to the Scottish Government.[66] The Executive Summary states:

> "*Following the commitment under the Paris Agreement to limit warming to well below 2°C and to pursue efforts to limit it to 1.5°C, there is a case - whether now*

[64] *Id.*, p. 143. **[PB/B/145]**.

[65] s.1 The Climate Change (Scotland) Act 2009 **[PB/F/82-83]**.

[66] Advice on the new Scottish Climate Change Bill, CC Committee, March 2017 **[PB/H/32-42]**.

or at a future date - for ambition that goes beyond Scotland's existing 2050 target for a reduction of at least 80% on baseline levels (effectively 1990 emissions). Scotland could either enact more ambitious long-term emissions targets now or wait until the evidence base has been strengthened over the coming years. We set out two options for the level of long-term ambition but urge that these are considered in light of the wider explanation and considerations set out in this advice ... :

Option 1: Keep the target for a reduction in greenhouse gas emissions of at least 80% by 2050 with subsequent reviews to increase ambition.

This maintains the same level of ambition as the existing Act in Scotland and the UK Climate Change Act, consistent with limiting global temperature rise to around 2˚C ...

Option 2: Set a 'stretch' target for a reduction in greenhouse gas emissions of 90% by 2050, potentially accompanied by a net-zero CO2 target for 2050.

A 90% reduction in greenhouse gas (GHG) emissions would be more consistent with the temperature limits set out in the Paris Agreement. Our scenario that achieves such a low level of GHG emissions does so by reducing CO2 emissions to around zero (non-CO2 emissions would remain greater than zero). Setting a target now to reach net-zero CO2 emissions by 2050 would be consistent with a GHG target for a 90% reduction by the same date and would reflect the acknowledgement in the Paris agreement of the necessity for zero global GHG emissions in the second half of the century ..." [67]

130. In June 2017, the Scottish Government published its "*Climate Change Bill: Consultation Paper*"[68]. The Ministerial Foreword states:

> "*The Paris Agreement has strengthened global climate change ambition and aims to keep global temperature rise this century well below 2°C, with efforts to limit this to 1.5°C. Meeting this aim will significantly reduce the risks and the global impacts of climate change, but it also represents a significant economic opportunity ...*

[67] *Id. p.9* **[PB/H/37]**.

[68] *Climate Change Bill: Consultation Paper* **[PB/H/48-80]**.

The focus of our proposals is therefore on updating Scotland's framework of emission reduction targets … to increase ambition in line with an appropriate contribution to limiting temperature rise to 1.5°C …".[69]

131. Further, the Consultation Paper emphasises the importance of regular revision to targets in line with changing science:

"*Experience of the 2009 Act, particularly regarding revisions to the greenhouse gas inventory, shows the importance of having flexibility to respond to changing science … In light of this, it is proposed that a duty should be put on Scottish Ministers to seek advice from the CCC on a regular basis regarding the levels of the interim and 2050 targets.*"[70]

132. A section titled "Assessing Impacts on People" highlights the centrality of human rights obligations to the Scottish Government's approach:

"*The Scottish Government is a champion of climate justice as an approach to tackling climate change internationally. This approach focuses on equality and human rights, as the adverse effects of a changing climate are expected to disproportionately impact vulnerable groups across the world. By showing leadership on climate ambition, the Scottish Government intends to encourage other countries to make similar commitments.*"[71]

(viii) The latest scientific evidence

133. A recent "Comment" piece, published in the leading scientific journal, *Nature*,[72] and signed by numerous eminent scientists, diplomats and policy-makers, sets out the scale of the global challenge:

"*The magnitude of the challenge can be grasped by computing a budget for CO2 emissions — the maximum amount of the gas that can be released before the temperature limit is breached. After subtracting past emissions, humanity is left*

[69] *Id* **[PB/H/50-51]**.

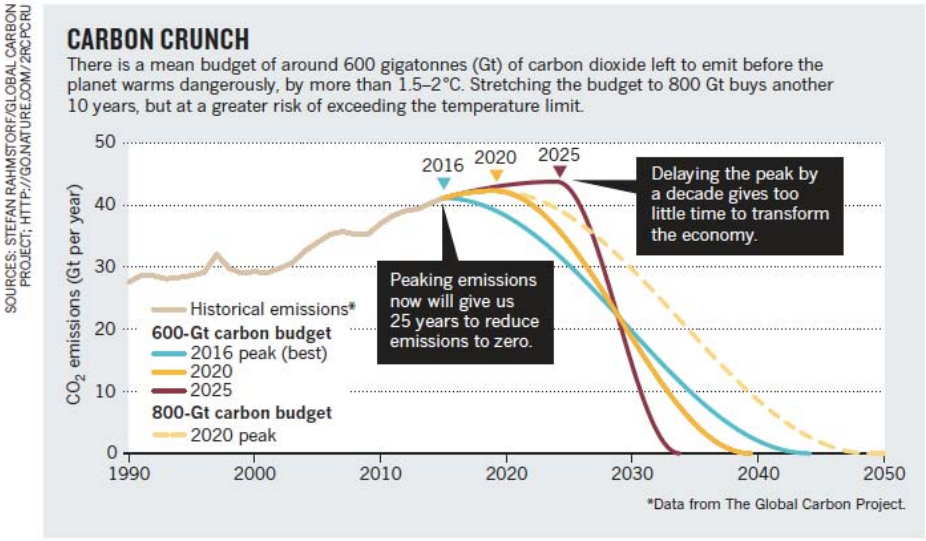
[70] *Id* **[PB/H/66]**.

[71] *Id* **[PB/H/69]**.

[72] **[TJEC/1/211-213].**

with a 'carbon credit' of between 150 and 1,050 gigatonnes of CO2 to meet the Paris target of 1.5 °C or well below 2 °C."

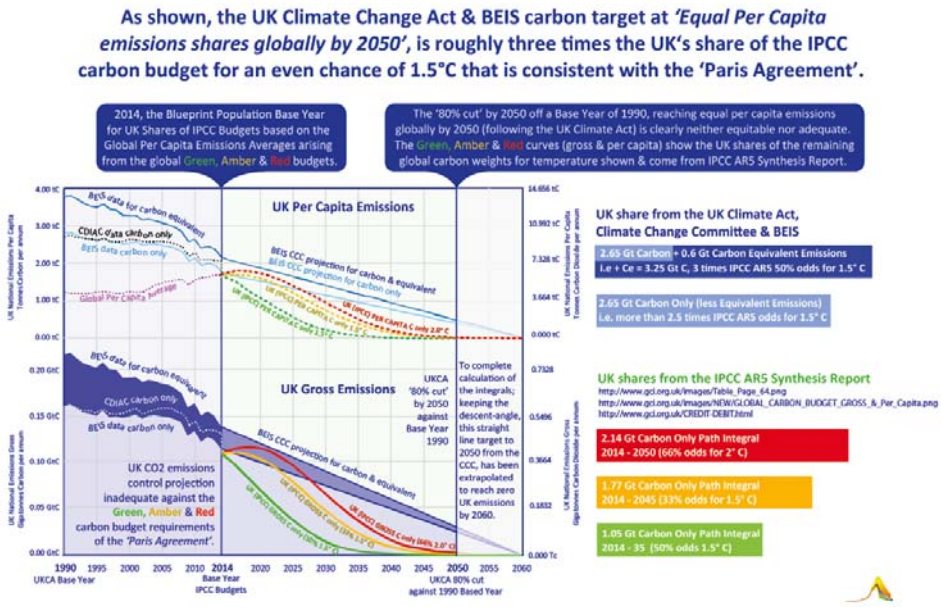
134. The authors conclude that for reasonable prospects of conforming to the global climate obligation, global emissions of carbon dioxide must peak no later than 2020 and collapse to zero by 2040. The position is visualised in the graphic below:



135. The Comment is consistent with the global carbon budgets set out in the *Fifth Assessment Report* of the IPCC from 2014, which itself is one of the bases for the Paris Agreement.

136. As noted (in paragraph 113) above, the graphic also highlights that it is cumulative emissions that matter – the longer the delay in reaching net zero emissions, the more radical earlier cuts will need to be for budgetary compliance. Delay in bending down the curve of emissions means only that subsequently those emissions must be reduced more sharply.

137. The graphic below, prepared by the Global Commons Institute in 2017, whose C&C model provided the basis for the 2050 Target, exposes the scale of the variance between the current 2050 Target and the UK's equitable share of the global carbon budget (see the Annexure to the PAP Letter for a larger version of the graphic **[PB/E/42]**):



138. As demonstrated in the graphic, the 2050 Target would entail the UK consuming more than three times its share of the budget for a 50% probability of limiting warming to 1.5˚C if its CO_2 equivalent emissions are taken into account; and more than two and a half times its share on the basis of CO_2 emissions alone.

139. It is important to be aware that climate change is already causing loss of life in the UK. Research has been conducted into the 2003 heat-wave, associated with the loss of 70,000 lives across Europe, and concluded that loss of lives in London can be attributed to climate change.[73] The last three years (2014, 2015, 2016) have been the three hottest years on record.[74]

140. According to the Environment Agency more than a million homes in the UK risk becoming uninsurable due to flood risk.[75] The trend can only get worse, risking collapse in property prices in affected parts of the country. In addition, melt rates and

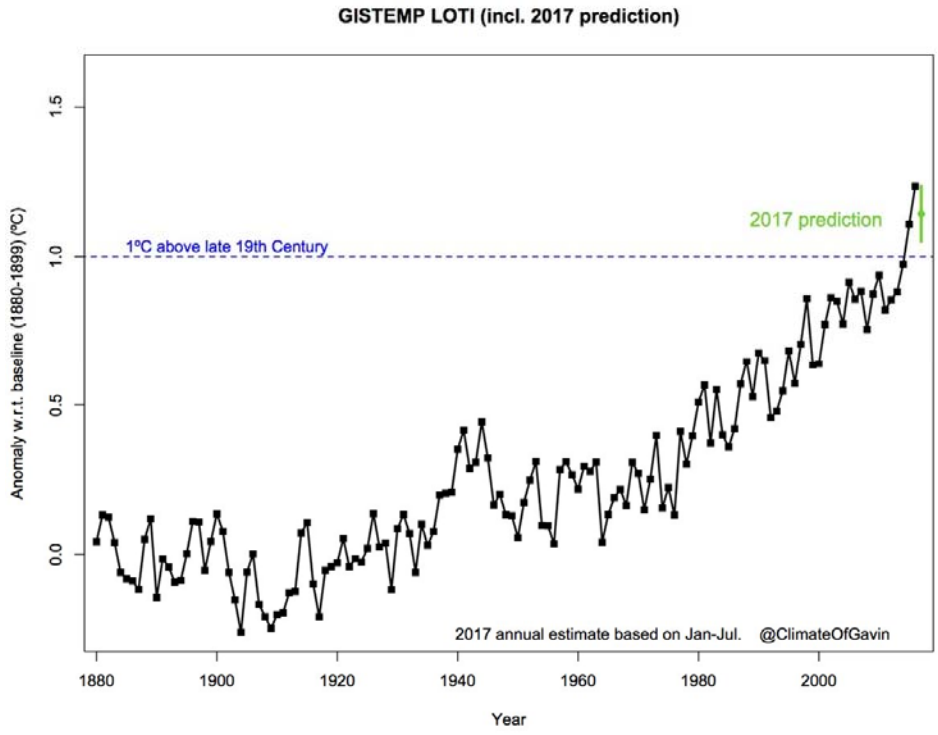
[73] Mitchell et al. Attributing human mortality during extreme heat waves to anthropogenic climate change (July 2016) **[PB/H/18-26].**

[74] U.S. scientists officially declare 2016 the hottest year on record. That makes three in a row: Washington Post, 18 January 2017 **[PB/H/27-31].**

[75] *Rise in flood risk could make one million homes uninsurable,* The Independent **[PB/H/16-17].**

temperature rises in the Arctic are running significantly ahead of the modelling, implying that critical tipping points are already being crossed.[76]

141. The scale of such impacts will rise exponentially if the Paris Agreement obligation is not met and the crossing of critical tipping points cannot be averted. The graphic below reveals the speed at which global warming is approaching the 1.5˚C limit:



142. Although some have questioned the feasibility of limiting warming to 1.5˚C, recent research suggests it remains in reach. The well-publicised recent article in Nature Geoscience, "*Emission budgets and pathways consistent with limiting warming to 1.5˚C*", concludes:

> "*Our analysis suggests that* 'pursuing efforts to limit the temperature increase to 1.5˚C*' is not chasing a geophysical impossibility, but is likely to require a significant strengthening of the NDCs at the first opportunity in 2020*".[77]

[76] Alaska's Sea Ice Is Melting Unusually Early, 'Another Sign Arctic Is Unraveling': Inside Climate News (26 May 2017) **[PB/H/43-47].**

[77] Richard Millar et al, published online (18 September 2017, DOI: 10.1038/NGEO3031) **[PB/H/81-88].**

143. Given the need for a reduction in global emissions to begin by 2020, the UNFCCC review process (known as the "Facilitative Dialogue"), which will take place in late 2018, assumes critical significance. The UK should enter those talks as part of the solution, rather than part of the problem. If the UK Government fails to make an appropriate contribution to implementing the Paris Agreement (and so preventing climate change crossing critical tipping points), it will be in a weak position to influence others to increase their ambition.

(ix) International case law

144. Further, there is an expanding body of precedent in foreign courts for this type of challenge of which the claimants consider the Court should take account.

145. In 2007, in the case of *Environmental Protection Agency v Massachusetts*[78], the US Supreme Court found that the refusal of the Environmental Protection Agency to regulate the emission of greenhouse gases was "arbitrary, capricious or otherwise not in accordance with law".

146. In 2015, in the case of *Urgenda Foundation v. Kingdom of the Netherlands*[79], a Dutch Court ruled that the Dutch government was acting negligently towards *Urgenda* in setting an emission reduction target falling short of what was required for a 2˚C limit (the case was heard prior to the Paris Agreement):

> *"4.42. From an international-law perspective, the State is bound to UN Climate Change Convention ... and the "no harm" principle. However, this international-law binding force only involves obligations towards other states ...*
>
> *4.43. This does not affect the fact that a state can be supposed to want to meet its international-law obligations. From this it follows that an international-law standard – a statutory provision or an unwritten legal standard – may not be explained or applied in a manner which would mean that the state in question has violated an international-law obligation, unless no other interpretation or application is possible. This is a generally acknowledged rule in the legal system. This means that when applying and interpreting national-law open standards and*

[78] *Environmental Protection Agency v Massachusetts* 549 U.S. 497 (2007) **[PB/G/119-150].**
[79] Urgenda Foundation v. Kingdom of the Netherlands, District Court of the Hague [2015] HAZA c/09/00456689: **[PB/G/280-334]**.

concepts, including social proprietary, reasonableness and propriety, the general interest or certain legal principles, the court takes account of such international-law obligations. This way, these obligations have a "reflex effect" in national law.

4.73. Based on its considerations here, the court concludes that in view of the latest scientific and technical knowledge it is the most efficient to mitigate and it is more cost-effective to take adequate action than to postpone measures in order to prevent hazardous climate change. The court is therefore of the opinion that the State has a duty of care to mitigate as quickly and as much as possible …

4.76. Due to this principle of fairness, the State, in choosing measures, will also have to take account of the fact that the costs are to be distributed reasonably between the current and future generations. If according to the current insights it turns out to be cheaper on balance to act now, the State has a serious obligation, arising from due care, towards future generations to act accordingly. Moreover, the State cannot postpone taking precautionary measures based on the sole reason that there is no scientific certainty yet about the precise effect of the measures. However, a cost-benefit ratio is allowed here. Finally, the State will have to base its actions on the principle of "prevention is better than cure" …

4.83. If, and this is the case here, there is a high risk of dangerous climate change with severe and life-threatening consequences for man and the environment, the State has the obligation to protect its citizens from it by taking appropriate and effective measures. For this approach, it can also rely on the aforementioned jurisprudence of the [European Court of Human Rights] …

Due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring – without mitigating measures – the court concludes that the State has a duty of care to take mitigation measures. The circumstance that the Dutch contribution to the present global greenhouse gas emissions is currently small does not affect this. Now that at least the 450 scenario is required to prevent hazardous climate change, the Netherlands must take reduction measures in support of this scenario."[80]

[80] Urgenda **[PB/G/318-328].**

147. More recently in the US, another foundation, *Our Children's Trust,* has commenced legal action alleging that US Government actions on climate change breach constitutional requirements and the public trust doctrine. In November 2016, upholding the dismissal of the Government's application for strike out of, a Federal Appeal Court ruled as follows:

> "*Plaintiffs argue defendants' actions violate their substantive due process rights to life, liberty, and property, and that defendants have violated their obligation to hold certain natural resources in trust for the people and for future generations*[81] *...*
>
> *At its heart, this lawsuit asks this Court to determine whether defendants have violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary ...*[82]
>
> *Exercising my "reasoned judgment," ... I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the "foundation of the family," a stable climate system is quite literally the foundation "of society, without which there would be neither civilization nor progress ..."*[83]
>
> *This lawsuit may be ground-breaking, but that fact does not alter the legal standards governing the motions to dismiss. Indeed, the seriousness of plaintiffs' allegations underscores how vitally important it is for this Court to apply those standards carefully and correctly."*[84]

148. In June 2017, the High Court of New Zealand heard a judicial review of, *inter alia*, the Minister's refusal to review New Zealand's 2050 target, following developments in the scientific knowledge (specifically the publication of the IPCC's Fifth Assessment Report). As with the 2008 Act, the Minster's power to revise the 2050 target under the New Zealand Climate Change Act is expressed in discretionary terms. In October 2017, prior to judgement being issued, the Prime Minister of New Zealand made a

[81] Youth v US, US District Court for the District of Oregon, Eugene Division, Case No. 6: 15-cv-01517-TC, 10 November 2016 (Youth v US). p.2 **[PB/G/336]**.

[82] Youth v US. p.16 **[PB/G/350]**.

[83] Youth v US p.32 **[PB/G/366]**.

[84] Youth v US p.52 **[PB/G/386]**.

commitment to reduce emissions to zero by 2050, rendering the issue moot. Nevertheless the High Court ruled that the publication of the IPCC report would otherwise have required the Minister to exercise his discretionary power to review the 2050 goal:

> "*As the new Government has announced an intended new 2050 target, this cause of action has been overtaken by subsequent events. I will nevertheless consider the cause of action because I heard full argument on it and it may have some utility going forward ...*
>
> *Is the Minister required to exercise her discretionary power under s 224?*
>
> *[84] Section 224(1) required the Minister to set a target. The Minister complied with this requirement by setting the 2050 target ... In addition the Minister was permitted to set, amend or revoke a target "at any time". This gave the Minister the power to review the 2050 target at any time. …*
>
> *[88] A statutory discretionary power is to be exercised in accordance with its purpose. It is also to be interpreted consistently with New Zealand's international obligations where that interpretation is available. The purpose of the Act is to enable New Zealand to meet its international obligations under the Convention and the Protocol. Further, the Paris Agreement has been entered into in "pursuit of" the Convention's objective and guided by its principles. As a matter of statutory interpretation, s 224(2) can and therefore must be interpreted consistently with New Zealand's international obligations under these instruments. I consider s 224(2) is also to be interpreted consistently with matters that New Zealand has recognised and accepted in these instruments, as these aid in interpreting our obligations. The question is therefore whether our agreement to these instruments required the Minister to exercise her power under s 224(2) to review the 2050 target following the AR5 ...*
>
> *[94] In my view, what is express under s 225(3)(a), is implicit in s 224(2). The IPCC reports provide the most up to date scientific consensus on climate change. New Zealand accepts this. To give effect to the Act and what New Zealand has accepted, recognised and committed to under the international instruments, and in light of the threat that climate change presents to humankind and the*

environment, I consider the publishing of a new IPCC report requires the Minister to consider whether a target set under s 224 should be reviewed. That is, it is a mandatory relevant consideration in whether an existing target should be reviewed under s 224(2). The Minister must therefore consider whether information in an IPCC report materially alters the information against which an existing target was set. If it does, a review of the target must be undertaken. That review may or may not lead to a decision to amend an existing target or to set additional targets, depending on the outcome of the review process undertaken.

[95] The 2050 target was set over six years ago. At that time the last IPCC report was the AR4 which was issued in 2007. The AR5 has superseded the AR4 as the most up to date scientific consensus on climate change. It is clear from the evidence that the Minister did not consider whether the 2050 target needed to be reviewed in light of the AR5. At that time the Minister was considering an appropriate target for its INDC and NDC in light of the AR5 but a potential review of the 2050 target was not part of that consideration."[85]

D. THE DECISION UNDER CHALLENGE

149. As set out above, Plan B corresponded with the CC Committee and the Secretary of State from April 2017 about the 2016 CC Committee Recommendation and the fact that the Secretary of State had not revised the 2050 Target. Those letters largely did not evince a substantive response.

150. As far as Plan B was aware, the Secretary of State had reached no formal decision as to whether or not to adopt the 2016 CC Committee Recommendation, as no such decision had been published or communicated, despite Plan B's specific requests for such a decision to be made. However, Plan B considered that the Secretary of State had acted unlawfully by failing to revise the 2050 Target to date, which failure was ongoing. Accordingly, Plan B sent a letter before claim in accordance with the Pre-Action-Protocol on 26 September 2017 ("**PAP Letter**") **[PB/E/1-42].** In the PAP Letter, Plan B asserted that the Secretary of State had acted, and was acting, unlawfully by virtue of "*the ongoing failure to revise the 2050 carbon target…both generally and specifically*

[85] *Thomson v New Zealand* [2017] NZHC 733, § 72 **[PB/G/389-463].**

in response to the report of the Committee on Climate Change…dated 13 October 2016" **[PB/E/1].**

151. The next that Plan B heard about the matter was the publication by the Secretary of State of the Clean Growth Strategy on 12 October 2017, which implicitly adopts the 2016 CC Committee Recommendation **[PB/B]**.

152. After the publication of the Clean Growth Strategy, the Government Legal Department ("**GLD**") responded to Plan B's PAP Letter on behalf of the Defendant on 24 October 2017 ("**PAP Response**") **[PB/E/43-53]**. In the PAP Response GLD did not comment on Plan B's assertion that the "decision under challenge" was the ongoing failure described above.

153. However, as the Clean Growth Strategy was the first published response to the 2016 CC Recommendation, Plan B assumed that this document evidenced a recent decision of the Secretary of State to adopt the 2016 CC Committee Recommendation and not to amend the 2050 Target in light of the Paris Agreement.

154. Accordingly, Plan B wrote to GLD to confirm this on 8 November 2017 **[PB/E/54-55].** On 17 November 2017, GLD replied stating that the decision not to adopt the 2050 Target was in fact taken "*around the time that the Committee on Climate Change's report dated 13 October 2016 was published*" **[PB/E/56-57]**.

155. The letter further stated that Plan B could not assume that the Clean Growth Strategy combined with the response to Plan B's pre-action letter could be taken to represent the totality of the Secretary of State's rationale for his decision, as Plan B had assumed. However, no further reasons were given or documents disclosed.

156. If it is indeed the case that the Secretary of State purported to take a decision not to amend the 2050 Target in response to the 2016 CC Committee Recommendation in around October 2016, the following points are of note:

    (a) That decision was not published or, to Plan B's knowledge, communicated to any external party, even when Plan B specifically raised the matter across a number of letters;

    (b) The Secretary of State relies upon that decision but is not able or willing to give a precise date when such a decision was taken; and

(c) Nor has the Secretary of State provided Plan B with any explanation or evidence as to the decision-making process or the reasons that underpinned it, beyond stating that they have not been entirely communicated to Plan B or the public to date. This is contrary to both the pre-action protocol and the duty of candour.

157. To describe this as unsatisfactory is an understatement. Not only does it mean that Plan B must issue its application for judicial review in ignorance of the precise position relating to the decision under challenge[86] but, more fundamentally, it means that the Secretary of State purports to have taken a decision of the most profound importance for not only the Claimants but the entire population of the United Kingdom (and, indeed, the international community) without subjecting that decision to the scrutiny that results from the publication or communication of such a decision. There could hardly be a more striking contrast with the extensive and open process leading up to the original setting of the 2050 Target.

158. It is a fundamental requirement of the rule of law that governmental decisions and policies affecting individuals and/or that are of public importance must be published or communicated in order that they can be subject to the proper scrutiny. Indeed, as Sedley LJ put it in *R (on the application of B) v Secretary of State for Work and Pensions* "…[i]*t is the antithesis of good government to keep it in a departmental drawer"*. He made clear that communication is required *"so that the conformity of the policy and its application with principles of public law can be appraised.*"[87]

159. It is evident that the publication of the Clean Growth Strategy includes a decision taken by the Secretary of State and his reasons for it. Indeed, to the extent that GLD's letter of 17 November 2017 presages an attempt by the Secretary of State to rely upon reasons justifying his decision that do not appear in the Clean Growth Strategy or the PAP Response, Plan B invites the Court to treat that sort of *post-hoc* rationalisation with the degree of scepticism that it deserves. It ought not to be open to the Secretary of State to rely upon a secret, unsubstantiated, reasoning to bolster or nuance his published policy.

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[86] In this regard, Plan B reserves its right to amend this Statement of Facts and Grounds and/or to file further submissions in the event that the Secretary of State provides further information in due course and to seek the costs of doing so from the Secretary of State.

[87] [2005] 1 WLR 3796.

160. Accordingly, this judicial review is filed on the basis that the Secretary of State has taken a challengeable decision, for the reasons set out in the Clean Growth Strategy and the PAP Response, to adopt the 2016 CC Committee Recommendation not to amend the 2050 Target. Further, the failure to revise the 2050 Target is an ongoing one. Accordingly, the remainder of this Statement of Facts and Grounds will refer to the Secretary of State's "**Ongoing Failure**" to revise the 2050 Target.

161. The Secretary of State has not suggested in correspondence that he will take a delay point against the Claimants. Were such a point to be taken, the Claimants would submit that it must fail: first, because, as set out above, there was evidently a challengeable decision taken in October 2017 and, second, because to find otherwise would permit the Secretary of State to avoid the scrutiny of the courts simply by declining to publish his decisions and policies.

E. THE MECHANICS OF THE 2008 ACT

162. The preamble to the 2008 Act provides the following:

> "*An Act to set a target for the year 2050 for the reduction of targeted greenhouse gas emissions; to provide for a system of carbon budgeting; to establish a Committee on Climate Change; to confer powers to establish trading schemes for the purpose of limiting greenhouse gas emissions or encouraging activities that reduce such emissions or remove greenhouse gas from the atmosphere; to make provision about adaptation to climate change; to confer powers to make schemes for providing financial incentives to produce less domestic waste and to recycle more of what is produced; to make provision about the collection of household waste; to confer powers to make provision about charging for single use carrier bags; to amend the provisions of the Energy Act 2004 about renewable transport fuel obligations; to make provision about carbon emissions reduction targets; to make other provision about climate change; and for connected purposes.*"[88]

163. Section 1 of the 2008 Act imposes on the Secretary of State a duty to ensure that the UK's "net carbon account" for the year 2050 is at least 80% lower than the aggregate

[88] Climate Change Act 2008 **[PB/F/34].**

amount of UK emissions of carbon dioxide and other gases, as they stood in 1990.[89] This is the 2050 Target.

164. Importantly, section 2 empowers the Secretary of State to revise the 2050 Target where there have been significant developments in the science or in international law or policy:

> "***Amendment of 2050 target or baseline year***
>
> *(1) The Secretary of State may by order—*
>
> *(a) amend the percentage specified in section 1(1);*
>
> *(b) amend section 1 to provide for a different year to be the baseline year.*
>
> *(2) The power in subsection (1)(a) may only be exercised—*
>
> *(a) if it appears to the Secretary of State that there have been significant developments*
>
> *in—*
>
> *(i) scientific knowledge about climate change, or*
>
> *(ii) European or international law or policy, that make it appropriate to do so …*
>
> *(3) The developments in scientific knowledge referred to in subsection (2) are—*
>
> *(a) in relation to the first exercise of the power in subsection (1)(a), developments since the passing of this Act;*
>
> *(b) in relation to a subsequent exercise of that power, developments since the evidential basis for the previous exercise was established.*
>
> *(4) The power in subsection (1)(b) may only be exercised if it appears to the Secretary of State that there have been significant developments in European or international law or policy that make it appropriate to do so.*
>
> *(5) An order under subsection (1)(b) may make consequential amendments of other references in this Act to the baseline year.*

[89] Some of the less significant greenhouse gases are in fact tied to a different baseline year.

(6) An order under this section is subject to affirmative resolution procedure."[90]

165. Section 3 of the 2008 Act specifies the consultation process to be followed prior to amendment to the target, which requires the Secretary of State to take into account the advice of the CC Committee and the other national authorities within the United Kingdom.

F. SUMMARY OF GROUNDS FOR JUDICIAL REVIEW

166. The Claimants have five grounds for seeking judicial review of the Secretary of State's Ongoing Failure to revise the 2050 Target, as follows:

(a) It is *ultra vires*, because it frustrates the legislative purpose of the 2008 Act;

(b) It is based on an error of law regarding the objective of the Paris Agreement;

(c) It is irrational, because it fails to take into account relevant considerations and / or gives such considerations inappropriate weight (most notably the catastrophic nature of the risks consequent on the global climate obligation being breached); and takes into account irrelevant considerations and / or gives such considerations inappropriate weight (including the CC Committee's predictions on what technical innovation may or may not occur between now and 2050);

(d) It violates the HRA 1998, in particular by disproportionately interfering with the right to life, the right to property, the right to a private and family life and the rights of those with certain protected characteristics to be free from discrimination.

(e) It breaches the public sector equality duty set out in s. 149 of the 2010 Act.

167. Each of those grounds is explained below.

G. GROUND 1: IMPROPER PURPOSE

168. Section 2 of the 2008 Act confers a statutory discretion on the Secretary of State as to the amendment of the 2050 Target. It is implicit in that statutory discretion that the

[90] *Id* **[PB/F/35].**

Secretary of State keeps the question of whether to exercise his discretion under regular review and that a failure to do so is *ultra vires*.[91]

169. Moreover, when exercising a statutory discretion (or indeed not exercising such a discretion), it is, of course, well-established that the decision-maker must act:

> "*...in accordance with the statutory purposes for which the discretion was given which it is to be presumed must be as a mechanism to promote the overall policy and objects of the statutory scheme.*"[92]

170. Accordingly, the discretion conferred by the 2008 Act must be exercised consistently with the purposes of that Act. It is clear that the fundamental purpose of the 2008 Act is to avoid the harmful impacts of climate change.

171. The UK Government, along with every other government, has signed the Paris Agreement, specifying the limit of tolerable climate change. Maintaining a target inconsistent with that limit is patently inconsistent with the purpose of the 2008 Act.

172. More specifically the pre-legislative history of the 2008 Act, as rehearsed above, makes it abundantly clear that the purposes of the 2008 Act would only be fulfilled if the UK:

(a) implements the UK's obligation, as a developed country Party to the UNFCCC, to show leadership in tackling climate change, which

(b) requires, at a minimum, that the 2008 Act gives full effect to the UK's obligations under international law, and that

(c) the 2050 Target supports the global target on the basis of clear, replicable principles that others might follow, demonstrating, in the words of Lord Deben, "*leadership by example*".

173. Indeed the Secretary of State acknowledges that the 2050 Target was originally based on a fair contribution to the global obligation of the time, ie to limit warming to 2˚C. Similarly, section 2 of the 2008 Act is intended to ensure that the 2050 Target, continually commits the UK to an equitable contribution to the global goal. It also gives

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[91] That delay can be *ultra vires* is well established: see, for example, *R (Rycroft) v Royal Pharmaceutical Society of Great Britain* [2010] EWHC 2832 (Admin) at §38.

[92] Per King J in *R (Haworth) v Northumbria Police Authority* [2012] EWHC 1225 (Admin) at §4.

effect to the UNFCCC obligation on the UK to "regularly update" its national measures against climate change.

174. In 2009 the House of Commons Energy and Climate Change Committee expressed a concern that the Government might use the CC Committee to frustrate the purpose of the Act[93]:

> *"*Q15 Colin Challen*: We can see what is going to happen, and this will be true of any Government, not just this one. They will say, "We have this committee to guide us". There are other people who are obviously very active in this field. Let us take one example, Lord Stern, who gave his name to a report that went to Davos in January, saying that global emissions should be reduced by 80 per cent by 2050, not 50 per cent by 2050. That report was backed up by other scientists and renowned experts in the field. That will have a significant impact on what you are able to recommend; but any Government could say, "*That's fine. That's what they are saying, but we will just listen to the committee*". This responsibility is therefore very significant, is it not?*
>
> Lord Turner of Ecchinswell*: I take that point. Obviously it would not be sensible for us to observe that scientific evidence had very significantly shifted and then to proceed on autopilot, as if nothing had occurred.*"

175. For the Secretary of State to refuse to exercise, or to delay in exercising, that discretion is irrational and frustrates the purposes of the 2008 Act[94] in circumstances where:

(a) international law/policy has developed, via the Paris Agreement, such that it is clear that the 2050 Target is out of step with international law/policy;

(b) the scientific evidence has evolved, such that the 50% probability of exceeding 2˚C, on which the 2050 Target was based in 2008, must now be understood as implying more than a 50% probability of catastrophic harm to the people of the UK; and

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[93] 2009, House of Commons, Energy and Climate Change Committee, Minutes of Evidence, Examination of Lord Turner, Chair CCC **[TJEC/1/61-62].**

[94] That delay can itself frustrate legislative purposes has been clearly established: see, for example, *R v Tower Hamlets London Borough Council,* ex parte *Khalique* (1994) 26 HLR 517 at 522; and *R (Webster) v Swindon Local Safeguarding Children Board* [2009] EWHC 2755 at [34]-[35].

(c) the 2050 Target no longer conforms to the legal requirements on the Government to set targets in accordance with the principles of equity and precaution.

176. In the PAP Response **[PB/E/10-11]**, the Secretary of State points to the fact that section 2(2)(a) requires that it must "*appear to the Secretary of State*" that there have been significant developments in international law/policy and scientific knowledge that make it "*appropriate*" to amend the 2050 Target. However, the Secretary of State accepts (or, at the very least, it would be irrational of him to deny) that the Paris Agreement, and the evolution of the scientific evidence that it represents, is a "*significant development*".[95] Accordingly, he could not legitimately claim that it does not "appear to him" that there have been developments that *could* merit the exercise of the power. As to whether the Secretary of State considers it "appropriate" in those circumstances, to exercise the power, that exercise of judgment must be constrained by the purpose of the legislation and rationality. For the reasons set out above and below, it would frustrate the purpose of the 2008 Act and/or be irrational for the Secretary of State to reach any conclusion other than that it *is* appropriate, on the facts before him, to exercise the power.

177. This conclusion is reinforced by the fact that, for the reasons set out under the fourth ground below, if the Secretary of State does not exercise the power, there will be profound human rights implications both in respect of the Claimants and more generally. These consequences ought to be borne in mind by the Court, both when construing the purpose of the 2008 Act and the principles that constrain the Secretary of State's role in fulfilling that purpose. Parliament ought to be presumed not to have intended an interpretation of section 2 that would permit the Secretary of State to exercise his discretion in a way that frustrates the protection of human rights.[96]

178. It is also a principle of statutory interpretation that the UK Parliament will be taken to have legislated compatibly with the UK's international commitments unless a clear intention appears to the contrary.

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[95] See *inter alia*, paragraphs 103, 109 and (vii)-124 above.

[96] Likewise in the Dutch *Urgenda* case, discussed in more detail at paragraph 146 below, the Dutch Court held that Article 2 and Article 8 ECHR can serve as a "source of interpretation" when detailing and implementing other legal standards. As to the hard-edged effect of s. 3 of the HRA 1998, see paragraphs 230-231 below.

179. While neither the UNFCCC nor the Paris Agreement impose a legal requirement upon any State to set any particular target,[97] both instruments demand that targets are set on the basis of certain principles, in particular the principles of equity and precaution. There is also a requirement on developed country Parties, which have contributed most historically to the problem, to demonstrate leadership, which implies *at a minimum* acting in a way that is consistent with the Paris Agreement objective. Further, the Paris Agreement explicitly requires States to have regard to human rights obligations in taking measures against climate change. All such obligations have been breached:

(a) it is evident that the Ongoing Failure to amend the 2050 Target is inconsistent with the Paris Agreement and is a failure of the leadership requirement;

(b) it is evident that a 2050 Target that would entail the UK consuming three times its fair share of the remaining carbon budget and is therefore a failure of the equity requirement;

(c) it is evident that a 2050 Target linked to a 50% probability of catastrophe is a failure of the requirement to observe the precautionary principle; and

(d) the Secretary of State has given no indication that he has properly considered human rights obligations in reviewing the 2050 Target.

180. Additionally the Paris Agreement requires that national targets reflect a Party's "highest possible ambition". Given the CC Committee's acknowledgement that a 93% reduction by 2050 would be possible, the UK is currently in breach also of this requirement.

181. There are additional reasons that the UK Government should wish to comply with its international law obligations in this context. In particular, the Claimants rely on the fact that the UK Government was instrumental in achieving the Paris Agreement on the basis that (i) a strengthened 2050 Target was required in order to prevent unacceptable risks, and (ii) the UK would set an example to other countries.[98]

182. For all of these reasons, the Ongoing Failure is unlawful.

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[97] Contrary to the suggestion in the PAP Response **[PB/E/45],** the Claimants are clearly not arguing that the Paris Agreement created a legally binding obligation on the Secretary of State to fix a target at a certain level.

[98] The Secretary of State positively asserts in this in the PAP Response, § 8(c) **[PB/E/89].**

H. GROUND 2: ERROR OF LAW

183. The Secretary of State has relied upon the recommendation of the CC Committee in refusing to revise the 2050 Target. The CC Committee's recommendation is based on a clear error of law regarding the interpretation of the Paris Agreement. It follows that the Secretary of State's decision inherits the same fault.

184. The objective of the Paris Agreement, is set out in Article 2(1)(a):

> "*Holding the increase in the global average temperature to <u>well below 2°C</u> above pre-industrial levels <u>and</u> to pursue efforts to limit the temperature increase <u>to 1.5°C</u> above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change*"[99]. (underline added)

185. The CC Committee reinterpret this objective as follows:

> *"Some experts already state that 2°C is no longer feasible in reality because model scenarios are too optimistic about global co-operation and technology availability. <u>We therefore consider the goal of pursuing efforts to 1.5°C as implying a desire to strengthen and potentially to overachieve on efforts towards 2°C."</u>*[100] (underlining added)

186. It is not reasonable to interpret a goal of limiting warming to *"well below 2˚C"* as implying a desire only to strengthen efforts "*towards"* 2˚C. "Towards", quite clearly, means something different from "well below". Even without a reference to 1.5˚C, the CC Committee's interpretation of the Paris Agreement is flawed.

187. Even more clearly, the CC Committee is mistaken in interpreting the unambiguous objective of the Paris Agreement "to pursue efforts to limit the temperature increase to <u>1.5%</u>" as meaning only a desire to strengthen or overachieve on efforts towards 2˚C. The point is straightforward. 1.5˚C and 2˚C warming are two different things. The CC Committee's confusion on this point is hard to fathom [our emphasis].

188. The CC Committee quotes just one source, from *2014*, in support of its observation that: "*Some experts already state that 2°C is no longer feasible in reality"*[101]. The UK

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[99] Paris Agreement **[PB/F/90].**

[100] CC Committee Report, 2016, p. 29 **[TJEC/1/119].**

[101] CC Committee Report, 2016 **[TJEC/1/118].**

Government, along with all other governments, signed the Paris Agreement in December *2015*, on the basis of extensive expert evidence that a more ambitious goal was both necessary and achievable.

189. The CC Committee's recommendation proceeds from a premise regarding the Paris Agreement that is fundamentally flawed. In adopting its recommendation, the Secretary of State's Ongoing Failure is subject to the same error of law.

I. GROUND 3: IRRATIONAL POLICY

190. It is trite law that a public decision-maker must not act irrationally, including by ensuring that she or he takes into account relevant considerations, and properly informs herself or himself regarding all decisions. The Ongoing Failure is irrational and demonstrates a failure on the Secretary of State's part to take into account relevant considerations and/or to make proper inquiries regarding relevant matters.

191. The 2008 Act establishes, at the highest legislative level, the two matters that the Secretary of State must take into account in exercising his discretion regarding amendment of the 2050 Target. These are significant developments in (i) international law or policy, and (ii) scientific knowledge (section 2(2)(i)-(ii)). The Ongoing Failure demonstrates a complete failure on the Secretary of State's part to take into account and/or make relevant inquiries about:

    (a) the fact that the Paris Agreement requires parties to take steps to limit global temperature to 1.5˚C or "well below" 2˚C, which is a significant development in international law and policy and which is inconsistent with the current 2050 Target;

    (b) the fact that the Paris Agreement is based on, and there have in any event been, significant developments in scientific knowledge about climate change necessitating a strengthening of the 2050 Target; and

    (c) the international law obligations to maintain a target that accords with the principles of equity and precaution.

192. It appears[102] that the Secretary of State has prioritised above these factors, to which he is required to have regard, factors that are not listed in the statute, namely:

(a) that achieving a more ambitious target appears to the CC Committee, given the current and anticipated technology, not to be feasible;[103]

(b) that there is a supposed lack of evidence on what an appropriate limit should be in order to limit warming to 1.5˚C; and

(c) that there will be opportunities to align the 2050 Target to the Paris obligation at some later date.

193. As for the first factor, the priority given to technical feasibility in the 2016 CC Committee Recommendation and in the decision-making of the Secretary of State represents a *volte face* from the position in the lead up to the adoption of the 2008 Act and the 2050 Target. The pre-legislative dialogue makes abundantly clear that the legislature did *not* regard feasibility as a factor that could override the necessity to avoid climate disaster.[104] Rather, the 2008 Act was premised on the notion that the only rational way to combat climate change is to aim to achieve what is *necessary* to avoid disaster, and by aiming for it, and investing in it, to make it feasible.

194. To fail to amend the 2050 Target on the basis that a higher target is infeasible is irrational because:

(a) the consequences of breaching the global climate obligation are so serious it is not sensible or responsible to resign to them;

(b) even on the basis of the CC Committee's existing modelling, UK pathways could achieve a 93% reduction by 2050, as opposed to an 80% reduction, so a higher target *is* feasible, even on the Government's case;

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[102] Taking the 2016 CC Committee Report, the Clean Growth Strategy and the PAP Response as evidence of the reasons for the Ongoing Failure. See paragraphs 149-161 above.

[103] To the extent that footnote 1 in the PAP Response intends to suggest that the inclusion of "technology relevant to climate change" in s. 10(2) of the 2008 Act as a factor relevant to the setting of carbon budgets undermines this argument, that is incorrect because carbon budgets are separate, and subordinate, to the 2050 Target. Indeed, the fact that "technology" is not listed in section 2 tends to suggest that Parliament did not consider it to be of particular relevance in the setting of the 2050 Target, as it was clearly a matter under consideration, but was not included.

[104] See paragraphs 112 above.

(c) although in the PAP Response the Secretary of State suggests that he had regard not only to currently available technologies but also to "expected technological capabilities",[105] no one can accurately determine in 2017 what technical innovation may be available by 2050 (or earlier);

(d) by not aiming for what is necessary, what is necessary is rendered unfeasible; and

(e) in the very act of setting the 2050 Target, the Government provides the incentive to industry to develop and fund technologies that assist the Government in meeting that target.[106]

195. As for the second factor, it is directly contradicted by the CC Committee's own report at page 24, which refers to the IPCC's global carbon budgets for 1.5˚C:

> "*Table 2.1 shows the global CO2 budgets provided by the IPCC, consistent with a 50% likelihood of staying below 1.5°C and 66% likelihood of staying below 2°C (the range of temperature ambition in the Paris Agreement) …*
>
> *These budgets can be used to infer simple, indicative timescales for reaching net zero global CO2 emissions. If global emissions are reduced starting now on a linear path to zero, the budgets imply zero would need to be reached in the 2030s for a 50% likelihood of 1.5°C and the 2040s to 2070s for a 66% likelihood of 2°C*"[107]

196. IPCC reports are recognised by the international community as "*the best available science*". Since there is IPCC evidence on the global carbon budget for 1.5˚C, it is clearly incorrect to suggest there is no evidence from which to derive the UK contribution towards a 1.5˚C goal.

197. Moreover, in 2007 Lord Deben issued a warning on the dangers of waiting for further evidence:

> *"But why act now? Why not wait until the scientists can give us more conclusive information on the risks and the economists can give us a more reliable cost benefit analysis? The reality is simple. We know that every molecule of CO2 that*

[105] PAP Response, § 46(c) **[PB/E/15].**

[106] See Crosland 1, §§ 74 **[PB/C/20]**.

[107] **[TJEC/1/114].**

we add to the atmosphere will stay there for at least 100 years. Therefore with every year that passes we may be locking ourselves into a potentially bigger and more expensive problem even it were not to become utterly disastrous." (underlining added).

198. Given the CC Committee's conclusion that the available evidence for 1.5˚C implies zero emissions by the 2030s, it is evident that time is not on our side. By the time better evidence is available the goal will be out of reach.

199. Even accepting a lack of certain scientific evidence to determine precisely what the global pathway should be, that cannot properly be a relevant consideration in determining whether the 2050 Target should be amended, when it is clear that the current Target is inadequate. To treat it as such is inconsistent with the precautionary principle.

200. As for the third factor, the self-defeating strategy of postponing necessary action was widely acknowledged in the dialogue leading up to the 2008 Act. Again, this was a point made by Lord Deben in 2007:

> *"The science is clear. The problem is only going to get bigger and more expensive.*
>
> *There are some who argue that we should wait before taking action to cut emissions vigorously, because the cost of the technology that will make a difference will fall. But for costs to fall, technology needs to be developed and deployed. Given the long timescales involved, our innovators and financiers need the policy framework and incentives to get to work now."*

201. In 2014 Lord Stern referred to the false economy of delay:

> *"There are some who try to argue that they recognise the basic science but that we cannot go as fast as a 2°C target requires and that it should be relaxed. Such arguments usually, deliberately or otherwise, embody three assumptions: that the dangers of delay are modest; that learning processes are slow; and that policy can or should proceed gradually. In my view all three are mistaken. I have explained the dangers of delay above. The story of discovery, learning and growth is set out in section. The argument that policy can proceed gradually not only overlooks the dangers of delay but also risks giving mixed signals about the*

strength of policy commitment, creating additional uncertainty and reducing investment.

The window to limit temperature increases to 2°C is still open, but is closing rapidly. Urgent and strong action in the next two decades, with global, deep and economy-wide progress this decade, is necessary if the risks of dangerous climate change are to be radically reduced. Indeed strong, clear policies are likely to lead to strong investment and innovation and rapid learning and discovery. Until now, the overall pace of emissions reductions has been dangerously slow."[108]

202. Moreover it is evident that the CC Committee's third factor directly contradicts its first factor. The longer the Government waits to bend the curve of UK emissions, the steeper it will have to bend it down later. If aligning the 2050 target to the Paris Agreement is challenging (as it no doubt is), that argues strongly for bending the curve of UK emissions down as far as possible now rather than later.

203. In prioritising these three factors over all others, the Secretary of State acted irrationally. There were other relevant considerations to which the Secretary of State was bound to have regard. Had the Secretary of State properly taken account of the following factors, he would have decided to amend the 2050 Target:

(a) the Paris Agreement, to which the UK is party (and indeed was instrumental in concluding) reflects the scientific and political consensus on the absolute limit of tolerable climate change;[109]

(b) the 2050 Target is not consistent with the Paris Agreement commitments. The CC Committee has expressly confirmed this and it is further acknowledged in the Clean Growth Strategy;

(c) given the deterioration of the situation since 2008, the 2050 Target is no longer consistent even with its original aim at the time of the passage of the 2008 Act to limit warming to 2˚C and to keep the probability of crossing the "extreme danger" threshold to a very low level;

[108] Growth, climate and collaboration: towards agreement in Paris 2015, Nicholas Stern, Policy paper, December 2014

[109] Just as the UK's international obligations inform the Court's task in interpreting the 2008 Act (as set out above), so too must they inform the Court's assessment of what is rational decision-making in this area.

(d) the factors the 2008 CC Committee Report identified as necessitating an amendment to the 2050 Target have *all* materialised. These factors, none of which is referred to in the 2016 CC Committee report, are:

(i) an increase in the estimate of the probability that the world will exceed a point of "extreme danger" and/or changes in the identification of extreme danger;

(ii) an increase in the estimates of the likely adverse global and local human welfare impacts of particular levels of temperature increase (eg the impact of a 2°C warming being more harmful than previously thought); and

(iii) divergence of actual achieved emissions from our modelled trajectories;

(e) the fact that the Paris Decision, supported by the UK Government, emphasises "*with serious concern the urgent need to address the significant gap*" between collective action and goal;

(f) the consequent requirement for all countries, including the UK, to increase their ambition as a matter of urgency;

(g) the requirement to take into account obligations arising from the HRA 1998;

(h) the legal obligation on the UK, deriving from the UNFCCC and the Paris Agreement, to show leadership in tackling climate change;

(i) the legal obligation on the UK, deriving from the UNFCCC and the Paris Agreement, to develop its emission reduction plans on the basis of equity;

(j) the legal obligation on the UK, deriving from the UNFCCC and the Paris Agreement, to develop its emission reduction plans on the basis of the precautionary principle;

(k) delay in combatting climate change only serves to exacerbate the problem. The fact that the Secretary of State's position is that he intends to amend the 2050 Target "in due course"[110] demonstrates that he has failed to recognise that every moment of delay in plotting the trajectory towards the necessary target only puts

[110] PAP Response, § 23 **[PB/E/43-53]**.

that target further out of reach because a steeper descent of emissions becomes required the longer we wait to reduce them;[111]

(l) the UK is not aiming to reduce its emission in accordance with its equitable *per capita* share.

(m) the UK has accrued a substantial historic "carbon debt", when its past emissions are compared to others on an equal *per capita* basis.

(n) the UK is failing, therefore, to set an example to other countries. This is contrary to the UK's acceptance of a global leadership role in the fight against climate change.[112] The 2008 Act was passed to demonstrate "the UK's strong leadership on climate change, both at home and abroad".[113] That leadership role is also consistent with the UK's rational self-interest. The UK cannot influence other countries around the world and seek to ensure compliance with the Paris Agreement if it is not complying with its own obligations. The point was well made by the House of Commons EA Committee in 2007:

> "*The UK cannot, of course, tackle global warming on its own. Ultimately—and sooner rather than later—other countries must adopt similar policy frameworks and levels of effort. However, the UK can do much by leading by example, and the measures proposed in the draft Bill represent a large step forward. As we heard from Climate Change Capital, the rest of the world is watching the UK's 'experiment'...*".[114]

(o) the consequences of exceeding the Paris Agreement limit will inevitably be catastrophic for current and future inhabitants of the UK and abroad (whether in terms of life expectancy, the economy, international security or any other relevant metric);

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[111] Crosland 1, §140 **[PB/C/140]**.

[112] That the UK exercises considerable influence internationally when it comes to combatting climate change is attested to by Tim Crosland in his experience of negotiating international agreements: Crosland 1, §13 **[PB/C/4]**.

[113] See paragraph 50 above.

[114] In its PAP Response, the Secretary of State suggests that the 2050 Target "remain[s] world leading". This is simply incorrect. Following the Paris Agreement, a substantial number of countries have committed to complete decarbonisation of their economies by or before 2050: the details are set out in Crosland 1, § 127 **[PB/C/33-34]**.

(p) the failure to amend the 2050 Target, accordingly, has profound human rights implications, both for the Claimants and more widely (see Ground 1 above and Ground 4 below);

(q) the UK has a duty in international law to prevent harm to other countries: see paragraph 26 *et seq* above. Inaction on the Secretary of State's part puts the UK in breach of its commitments under international law, exposing the UK to potentially vast damages claims from other countries. It is notable in this context that a number of climate-vulnerable Parties have lodged declarations to the UNFCCC revealing that such litigation is within their contemplation; and

(r) the leadership deficit resulting from US's intended withdrawal from the Paris Agreement, requiring other countries to pull together more strongly if disaster is to be avoided.

204. Accordingly, no reasonable decision-maker would conclude that there is no need to amend the 2050 Target now.

J. GROUND 4: HUMAN RIGHTS

205. The Claimants rely upon the HRA 1998 and the rights under the European Convention on Human Rights ("**ECHR**") incorporated by that instrument: in particular, Article 2, Article 8 and Article 1 of Protocol 1 ("**A1P1**"). The Claimants rely upon these both individually and read in conjunction with Article 14.

206. It is generally accepted that unconstrained climate change will have an unprecedented effect on human life, leading to a significant loss of life, serious impacts on health for those who survive and substantial property damage. It is already having a significant effect on the health of those impacted by the rising temperatures, flooding, droughts and other extreme weather events caused or exacerbated by climate change, and/or in respect of decisions people are making about their futures, including decisions on whether to commit to having children in light of the potential risks of climate change.[115]

[115] See, for example, paragraph 18(b) above.

ECHR and climate change

207. The link between climate change and human rights has long been recognised. For example, the UN Human Rights Council resolution 10/4 on Human Rights and Climate Change acknowledged that:

> *"…climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including,* inter alia*, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence*".

208. The Resolution further recognised that:

> *"…while these implications affect individuals and communities around the world, the effects of climate change will be felt most acutely by those segments of the population who are already in vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous or minority status and disability*".

209. The view that climate change is inextricably linked to the protection of human rights was explicitly acknowledged by the Office of the High Commissioner for Human Rights ("**OHCHR**"), which stated as follows in a submission to the 21st Conference of the Parties to the UNFCCC in 2015 (underlining added):

> "*It is now beyond dispute that climate change caused by human activity has negative impacts on the full enjoyment of human rights. Climate change has profound impacts on a wide variety of human rights, including the rights to life...*
>
> *The human rights framework also requires that global efforts to mitigate and adapt to climate change should be guided by relevant human rights norms and principles including the rights to participation and information, transparency, accountability, equity, and non- discrimination. Simply put, climate change is a human rights problem and the human rights framework must be part of the solution. ...*

In the context of climate change, extreme weather events may be the most visible and most dramatic threat to the enjoyment of the right to life but they are by no means the only one. Climate change kills through drought, increased heat, expanding disease vectors and a myriad of other ways … In order to uphold the right to life, States must take effective measures to mitigate and adapt to climate change and prevent foreseeable loss of life."

210. It is clear that the European Court of Human Rights ("**ECtHR**"), too, recognises that environmental issues are necessarily bound up with human rights protection. On 27 June 2003, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1614 (2003) on environment and human rights. The relevant part of this recommendation states:

"*9. The Assembly recommends that the Governments of member States:*

(i) ensure appropriate protection of the life, health, family and private life, physical integrity and private property of persons in accordance with Articles 2, 3 and 8 of the European Convention on Human Rights and by Article 1 of its Additional Protocol, by also taking particular account of the need for environmental protection;

(ii) recognise a human right to a healthy, viable and decent environment which includes the objective obligation for states to protect the environment, in national laws, preferably at constitutional level;

(iii) safeguard the individual procedural rights to access to information, public participation in decision making and access to justice in environmental matters set out in the Aarhus Convention …".

211. In *Taşkın v. Turkey*[116] the Court referred to Recommendation 1614 and stated:

"*The Court points out that Article 8 applies to severe environmental pollution which may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health …*

[116] 2004, Application no. 46117/99 **[PB/50-78].**

The Court points out that in a case involving State decisions affecting environmental issues there are two aspects to the inquiry which it may carry out. Firstly, the Court may assess the substantive merits of the national authorities' decision to ensure that it is compatible with Article 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual."

212. In 2005, the Council of Europe published a "manual on human rights and the environment" ("**the Manual**"). Part II of the Manual describes the environmental principles that can be derived from the ECtHR's rulings. In particular, the manual states:

> "*… the Court has emphasised that the effective enjoyment of the rights which are encompassed in the Convention depends notably on a sound, quiet and healthy environment conducive to well-being. The subject matter of the cases examined by the Court shows that a range of environmental factors may have an impact on individual convention rights, such as noise levels from airports, industrial pollution, or town planning.*
>
> *As environmental concerns have become more important nationally and internationally since 1950, the case-law of the Court has increasingly reflected the idea that human rights law and environmental law are mutually reinforcing. Notably, the Court is not bound by its previous decisions, and in carrying out its task of interpreting the Convention, the Court adopts an evolutive approach. Therefore, the interpretation of the rights and freedoms is not fixed but can take account of the social context and changes in society. As a consequence, even though no explicit right to a clean and quiet environment is included in the Convention or its protocols, the case-law of the Court has shown a growing awareness of a link between the protection of the rights and freedoms of individuals and the environment.*"[117] (underlining added)

213. This is, of course, subject to an appropriate margin of appreciation.[118]

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[117] Council of Europe, Manual on Human Rights and the Environment, pp. 30-31 **[PB/H/3-4].**

[118] *Id*., p. 31 **[PB/H/4].**

214. More specifically, the responsible authorities may owe positive obligations to take action to combat climate change in order to satisfy the right to life enshrined in Article 2. Article 2 places a positive obligation on the Secretary of State to safeguard lives, including where a risk to life is created by environmental matters. Such obligations include a requirement to take active measures, such as establishing an appropriate legislative and administrative framework to address the particular features of a relevant situation and to implement policies within that framework that sufficiently safeguard lives. In this respect, the Manual states:

> "*Given the fundamental importance of the right to life and the fact that most infringements are irreversible, this positive obligation of protection can apply in situations where life is at risk. In the context of the environment, Article 2 has been applied where certain activities endangering the environment are so dangerous that they also endanger human life.*"

215. For Article 2 to be engaged, it is not necessary that loss of life has actually occurred. Thus, the State can be under a positive obligation to safeguard life in the event of a natural disaster.[119] In 2015, as referenced above, a Dutch Court ruled in *Urgenda* that the Dutch Government must increase the ambition of its emission reduction plans, stating:

> "*If, and this is the case here, there is a high risk of dangerous climate change with severe and life-threatening consequences for man and the environment, the State has the obligation to protect its citizens from it by taking appropriate and effective measures. For this approach, it can also rely on the aforementioned jurisprudence of the* [European Court of Human Rights]."[120]

216. Likewise, Article 8 can be engaged (and can impose positive obligations)[121] where environmental factors "*directly and seriously affect private and family life or the home*".[122]

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[119] *Budayeva and Others v. Russia*, Application. nos. 15339, 21166, 20058, 11673 and 15343/02, 22 Mar 2008 **[PB/G/151-199].**

[120] *The Urgenda Foundation v Kingdom of the Netherlands*, District Court of the Hague [2015] HAZA c/09/00456689, June 2015 **[PB/G/280-334].**

[121] *Moreno Gómez v Spain*, Application no. 4143/02, 16 Nov 2004 **[PB/G/34-49].**

217. A1P1 will be engaged if there is an interference with peaceful enjoyment of possessions engendered by environmental factors.[123]

Relevance of international commitments

218. The ECtHR has held that a State's international environmental law obligations help determine the scope of Convention rights. In *Tatar v. Roumanie*,[124] the Court held that the Romanian Government should have applied norms of international law, as well as national law, but had failed to do so, and that accordingly there had been a breach of Article 8.

219. Likewise, in *Urgenda*, the Dutch Court had regard to the Netherlands' international obligations, in conjunction with its ECHR obligations, in holding that there had been a breach of the duty to protect citizens from harm.

220. This Court should also consider the international commitments into which the UK has entered, as set out above, in delimiting the scope of the Secretary of State's human rights obligations. Those international obligations are relevant not just to the question of whether the Secretary of State is under a positive obligation to safeguard rights, but also to the question of the margin of appreciation that should be accorded to him.[125]

Specific violations relied upon in this case

221. Plan B accept that under the case law of the ECtHR and the domestic courts, it would not traditionally be considered to be a "victim" for the purposes of s. 7(1) of the HRA 1998 because it is not "directly affected" by any breach of rights.

222. However, all of the other co-Claimants <u>are</u> capable of being victims because they are directly affected by the human rights interferences that have occurred and will continue to occur as a result of the Secretary of State's Ongoing Failure. It is well-established that it is not necessary to be a "victim" of a human rights violation that the individual has themselves suffered any damage. Nor does it matter that a person is no more

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[122] As in the case of severe pollution: *Fadeyeva v Russia,* Application no. 55723/00, 9 Jun 2005 **[PB/E/79-118].**

[123] *Budayeva*, footnote 9 above.

[124] 2009, Application no. 67021/01

[125] See paragraph 228 below.

affected by a policy/decision than everyone else to whom the policy/decision applies, provided that it also engages that person's individual rights.[126]

223. In particular:

(a) As set out above, the Ongoing Failure increases the risk that unprecedented effects of climate change will materialise, including mass loss of life. Accordingly, by the Ongoing Failure, the Secretary of State is failing to safeguard the rights to life of the 2nd to 12th Claimants in breach of his positive obligations under Article 2.

(b) Further, the Ongoing Failure constitutes an interference with the 2nd to 12th Claimants rights to respect for their private life, family life and home pursuant to Article 8. It is of particular note that certain of the Claimants feel unable to decide to begin a family because of the uncertain futures of children given the threats caused by climate change.[127] These interferences cannot be justified, largely for the reasons set out under Grounds 1 and 3 above.

(c) The Ongoing Failure is leading to higher levels of pollution than would otherwise be seen. The 2nd Claimant, Dame Callil, is particularly affected by the pollution levels in London, given her older age and the fact that she has suffered from lung cancer. Accordingly, the Ongoing Failure constitutes a violation of the Secretary of State's duty to take positive measures to safeguard Dame Callil's right to life. Further, the Ongoing Failure constitutes an interference with Dame Callil's right to respect for her private life pursuant to Article 8. That interference cannot be justified, largely for the reasons set out under Grounds 1 and 2 above. Still further, the fact that Dame Callil suffers greater effects from the Ongoing Failure than someone of a younger age or state of health means that she is suffering unlawful discrimination contrary to Article 14, within the ambit of Article 2 and Article 8.

(d) The Ongoing failure is leading to a greater risk that extremely high temperatures will be reached in the UK in the future, which will be the cause of many

[126] *Dudgeon v UK* (1981) 4 EHRR 149, § 41 **[PB/G/1033].**

[127] See the witness statements of Lily Johnson (5th Claimant) **[PB/C/68-71]** and Sebastien Kaye (10th Claimant) **[PB/C/92-96]**.

deaths.[128] The 2nd Claimant, Dame Callil, and the 3rd Claimant, Mr. Newman, are particularly affected by this as persons over the age of 65. Accordingly, the Ongoing Failure constitutes a violation of the Secretary of State's duty to take positive measures to safeguard these Claimants' right to life, as well as discrimination contrary to Article 14, within the ambit of Article 2.

(e) The 11th Claimant, Mr Hare, has suffered significant losses as a result of damage caused by Hurricane Irma to his property on Tortola, the British Virgin Islands, a British Overseas Territory. It is widely recognised that climate change was a significant factor in the Hurricane Irma[129]. A1P1 requires the Government to take all reasonable and necessary action to prevent such losses to property.

(f) The 2nd Claimant, MHB, is only 9 years old. The Secretary of State's Ongoing failure will have a disproportionate and discriminatory impact on his and the other young claimants' enjoyment of their human rights, as the impacts of climate change intensify and progress.

224. As recognised by the Government, the threat posed by climate change is in a category of its own. The worst case scenarios for *this century* (the upper boundary of the IPCC projected range is *7.8˚C*), imply loss of life on an unimaginable scale and the complete collapse of the order on which civilisation depends.

225. No equivalent situation has as yet been confronted by the case-law. However the HRA 1998 must be interpreted flexibly. It would be surprising if the HRA 1998 did not impose on the Government an obligation to take reasonable and rational measures to preserve the conditions on which the effective enjoyment of all human rights must depend. If the Convention is to serve its purpose it must adapt, and do so quickly.

226. Moreover the Government, by signing and ratifying the Paris Agreement, has specifically undertaken "*to promote and consider [its] obligations on human rights*" in taking action to address climate change[130].

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[128] See the evidence of Dr. Veltman that the EU heat wave of 2003 was reported as causing between 35,000 and 70,000 excess deaths **[PB/C/56-67].**

[129] See the Statement of the William Hare (11th Claimant) **[PB/C/97-103].**

[130] Paris Agreement Preamble **[PB/F/88-89]**.

227. In relation to these rights, the Secretary of State should be accorded a narrower margin of discretion than might sometimes be the case when he is reaching a decision of this type. That is so for the following reasons:

(a) the scientific consensus is overwhelming and the Secretary of State accepts that the consequences of climate change are potentially devastating;

(b) the Secretary of State himself accepts that the Paris Agreement constitutes a significant development in international law and policy;

(c) the UK Government has committed internationally to taking action that surpasses the 2050 Target and, indeed, was instrumental in securing the agreement of other States to do likewise via the Paris Agreement; and

(d) the Secretary of State has professed a desire to set an example to other countries by his action in this regard.

228. For all of these reasons, the Ongoing Failure constitutes a violation of the HRA 1998 and the Claimants are entitled to a declaration to that effect.

Interpretive duty

229. Section 3 of the HRA 1998 requires this Court to interpret the 2008 Act in a manner that is compatible with ECHR rights so far as it is possible to do so.

230. It is clear from the analysis above that, if section 2 of the 2008 Act is interpreted so as to permit the Secretary of State to continue to refuse to amend the 2050 Target, that will result in violations of the human rights of the Claimants and others. Accordingly, section 3 HRA 1998 requires that section 2 of the 2008 Act be read so as to compel the Secretary of State to amend the 2050 Target to avoid infringements of human rights unless that reading is "plainly impossible".[131] In so doing, the Court need not be constrained by the particular form of words adopted by the Parliamentary draftsman and, indeed, may be required to adopt an interpretation that is inconsistent with the provision's unambiguous meaning.[132]

[131] *Re A (No. 2)* [2002] 1 AC 45, §45.

[132] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, §§39, 106.

231. The Claimants submit that it is possible for the Court to read section 2 as *requiring* the Secretary of State to exercise the power conferred in s. 2(1) so as to avoid infringements of human rights.

232. The only feature of s. 2 which the Court would be required to "read down" would be the provision in s. 2(1) that the Secretary of State "may" amend the 2050 Target. As for this, it is open to the Court to find that there are certain situations in which, in order to comply with his human rights obligations, the Secretary of State *must* exercise the power.

233. In relation to this, the following points are of note:

(a) the Secretary of State accepts (or, at the very least, it would be irrational of him to deny) that the Paris Agreement, and the evolution of the scientific evidence that it represents, is a "significant development";[133]

(b) the Court is not required to specify *what* amendment the Secretary of State must make to the 2050 Target: how he chooses to exercise the power is constrained only by the boundaries of rationality, the purpose of the Act, and the international law and human rights obligations to which the UK Government is subject. Thus, the Court would not be overstepping its permissible constitutional role.

(c) The Court is not being required to read section 2 in a manner which is inconsistent with a fundamental feature or the overriding purpose of the 2008 Act (which would be impermissible[134]). Indeed, as set out under Ground 1, the Court would be *forwarding* the cause of the 2008 Act.

K. GROUND 4: PUBLIC SECTOR EQUALITY DUTY

234. Pursuant to s. 149 of the 2010 Act, when the Secretary of State[135] is exercising his functions by setting/amending the 2050 Target, he must have:

> *"...due regard to the need to—*

[133] See *inter alia*, paragraphs 176 above.

[134] *Ghaidan v Godin-Mendoza*, §§ 33, 68

[135] Who is a "public authority" for the purposes of s. 149 by virtue of being listed in Schedule 19.

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

235. In particular, the Secretary of State ought to have had due regard to the following:

(a) the fact that climate change has disproportionate impacts on the health of those of older age and those who are disabled;[136] and

(b) the fact that the young disproportionately bear the burden of climate change.[137]

236. Climate change frustrates equality of opportunity[138] between these groups and those who do not share those protected characteristics. It is further liable to lead to poor relations between, in particular, the young, who bear the burden of climate change, and older generations, whom the young blame for having caused the problem and failing to tackle it in time. Further, as set out above, it is clear that the Ongoing Failure is the cause of discrimination.[139]

237. The guiding case of *R (Brown) v Secretary of State for Work and Pensions*[140] sets out six principles which provide guidance to the Court to when the s. 149 duty has been fulfilled. These are:

(a) the authority must be aware of the duty;

(b) the duty must be fulfilled before and at the time that the relevant function is exercised;

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[136] See paragraphs 224(c) and 237 above.

[137] See paragraph 224(f) above.

[138] Which is different to an absence of discrimination: *R (Baker) v Secretary of State for Local Government and Communities* [2008] EWCA Civ 141 (on s. 71 of the Race Relations Act 1976, which was a predecessor of s. 149).

[139] See paragraph 224 above.

[140] [2008] EWHC 3158 (Admin)§§ 90-96. Approved *inter alia* in *R (Rajput) v Waltham Forest LBC* [2011 EWCA Civ 1577, § 31.

(c) the duty must be exercised "*in substance, with rigour and with an open mind*";

(d) the duty is non-delegable;

(e) the duty is a continuing one; and

(f) it is good practice for the authority to keep a record of its consideration.

238. Applying these to the present case, there is no evidence that the Secretary of State had due regard to the above factors at all at any stage of deciding whether to amend the 2050 Target. Nothing the Claimants have seen to date suggests that the public sector equality duty was considered as relevant to the decision whether or not to amend the 2050 Target, or that any equality impact assessment has been conducted.[141]

239. For this reason also, the Ongoing Failure is unlawful.

L. REMEDY SOUGHT

240. On the basis of general principles of statutory interpretation, section 2 of the 2008 Act should be interpreted in light of the 2008 Act's purpose, and the UK's international law obligations. Consequently section 2 imposes on the Secretary of State a requirement to maintain a carbon target that respects the principles of equity and precaution. It is clear that he is failing in that regard, and that the situation must be corrected urgently.

241. The Claimants accordingly seek:

(a) a declaration that the Secretary of State has acted unlawfully by failing to revise the 2050 Target under the 2008 Act, and

(b) a mandatory order that the Secretary of State revise the 2050 target in accordance with the purpose of the 2008 Act and the UK's international law obligations, ensuring, *at a minimum*, that the 2050 Target commits the UK to an equitable contribution the Paris Agreement objective and that it conforms to the precautionary principle.

242. In the PAP Response, the Secretary of State suggests that the "*thrust*" of the Claimants' challenge is that the 2050 Target should be amended to adopt now a "net zero"

[141] Such references are, notably, missing from the Clean Growth Strategy, for example.

emissions target for 2050.[142] However, that is *not* the Claimants' case. The Claimants simply argue that the Secretary of State is required to amend the target (upwards) and that it be rooted in the correct principles, as set out above.[143] The Court is not being asked to specify *what* amendment the Secretary of State must make to the 2050 Target: how he chooses to exercise the power is constrained only by the boundaries of rationality, the purpose of the Act, the obligations of international law to which the UK is subject and the minimum actions necessary to safeguard human rights. Thus, the Court would not be overstepping its permissible constitutional role.

M. AARHUS CONVENTION

243. This claim falls within the scope of the Aarhus Convention. This has been agreed by the Secretary of State.[144] Accordingly, the costs limits set out in CPR 45.3 apply. The Claimants and the Defendant have agreed that they will not apply to vary those limits absent a significant change in circumstances.

N. CONCLUSION

244. For all of the reasons set out above, the Claimants contend that the Ongoing Failure is unlawful.

245. The Claimants accordingly seek permission to apply for judicial review and the substantive relief set out above. The criteria for the grant of such permission are clearly met in this case:

    (a) the Claimants have a sufficient interest in the matter to which the claim relates;

    (b) the application has been brought promptly; and

[142] PAP Response, § 6 **[PB/E/43-53]**.

[143] Crosland 1, §114 *et seq* **[PB/C/30]**.

[144] PAP Response, § 59 **[PB/E/43-53]**.

(c) there is an arguable case that the grounds for judicial review exist which merit a full investigation at an oral hearing with the parties and relevant evidence.

JONATHAN CROW Q.C.

EMILY MACKENZIE

8 December 2017