

Climate Change litigation in the UK - the perspective of an Advocate

1. A recent UN report on the state of climate change litigation (May 2017) listed the number of climate change cases in countries around the world. The US came first with 654 cases, followed by Australia with 80 cases. To my surprise the UK was third with 49 cases, followed by the European Court with 40 cases. The report does not provide any detail about the cases but it does indicate that the types of case include those focussed on specific development projects ranging from the expansion of airports and coal mines to the development of renewable energy generation. This may explain why the UK numbers seemed high to me. As far as I am aware, the UK has not seen any high profile climate change litigation like the Urgenda case in Holland. Instead the cases have tended to be technical challenges to environmental assessments or notice periods.
2. The effect is that, from a practitioner's perspective, climate change litigation in the UK resembles a broad spectrum of a, relatively few, cases with varied causes of action and often with no obvious unifying feature other than the subject matter backdrop. Moreover, it is fair to say that there is a degree of scepticism amongst both practitioners and academics as to whether there is merit or purpose in treating climate change cases as a distinct category of litigation.
3. In a legal challenge in 2010 objectors challenged a pollution permit on the grounds the Environment Agency had failed to deal lawfully with carbon dioxide emissions and global warming. The Agency was held not to have acted unlawfully in expressing its view that carbon was different from other pollutants from the installation because the effect of carbon is global not local. Hence the Agency was not required by legislation to set a limit on its emissions. On the one hand, the case could be said to illustrate the constitutionally necessary limits to the role of the Courts, as described by Ian Dove, a Judge of the High Court. On the other hand,

others may say it demonstrates judicial scepticism and restrictive thinking about climate change.

4. I am however aware of one example of creative legal thinking. I am told by those present that an Innu from Easter Greenland gave evidence on the impacts of climate change at a public inquiry several years ago into an additional runway at Stansted airport.
5. Given the constitutional limits on the role of the Courts it may be unsurprising that the most ‘direct’ or ambitious climate change challenges have come from litigants in person.
6. A litigant in person challenged the grant of consent for the construction of a large sewer under the River Thames. One of the grounds of challenge was that construction of the sewer was incompatible with the UK’s obligations under the Climate Change Act. The Court dismissed the challenge.
7. Even more ambitiously, a litigant in person challenged the decision by the United Kingdom to adopt the international Paris Climate Change Agreement on the basis that the Paris Agreement does not do enough to combat climate change and the consequences of climate change are catastrophic. There may be many people who agree entirely with the merit of the views expressed. The legal position is however clear.
8. The Government’s decision to adopt the Paris Agreement is an exercise of the prerogative power of the Crown to make international treaties and is not suitable for judicial review. In hearing the case, a judge of the High Court declined to exercise the Court’s jurisdiction to review the decision. The courts have traditionally adopted the view that as a general rule neither the making of a treaty nor the performance of the obligations under the treaty can be reviewed by the courts. The doctrine of non justiciability was considered recently by the Supreme Court in Shergill v Khaira [2015] AC 359:

Properly speaking, the term non-justiciability refers to something different. It refers to a case where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter. Such cases generally fall into one of two categories.

The first category comprises cases where the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers.

The basis of the second category of non-justiciable cases is quite different. It comprises claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law. Examples includeissues of international law which engage no private right of the claimant or reviewable question of public law. Thus, when the court declines to adjudicate on the international acts of foreign sovereign states or to review the exercise of the Crown's prerogative in the conduct of foreign affairs, it normally refuses on the ground that no legal right of the citizen is engaged whether in public or private law

9. The Court also considered the rationale for non justiciability:

"The issue was non-justiciable because it was political. It was political for two reasons. One was that it trespassed on the proper province of the executive, as the organ of the state charged with the conduct of foreign relations. The lack of judicial or manageable standards was the other reason why it was political" (para 40).

10. In Court in the Paris Climate change case, the Government argued that the Paris Agreement is a paradigm example of political considerations, which the Court is ill equipped to assess. Negotiating a common agreement between 195 countries was an extraordinary undertaking which has taken several years. In order to reach consensus it was necessary to take account of the views of all Parties and the final deal reflects a careful compromise between the Parties. In deciding to enter into the Agreement, the UK Government took account of a number of highly political considerations, including the risk of the COP failing to secure any Agreement. There are no judicial or manageable standards by which a Court can assess the Government's decision to agree to the adoption of the terms of the Paris Agreement. The Court accepted the Government's arguments.

11. Climate change is however widely acknowledged as the single biggest global environmental concern. Given what is at stake, there are those who will criticise the Courts treating climate change cases as no more than a series of disparate technical disputes. After all, litigation is not only a practical means of resolving disputes. It has symbolic importance for political and legal communities, as can be seen from the US climate case of EPA v Massachusetts or the Dutch Urgenda case.

12. For legal practitioners seeking to bring climate change cases, the advantages of treating them as a distinct category of litigation may include the following:

1. judicial awareness is likely to be raised. This is arguably central to the development of climate change jurisprudence. In an article many years ago Lord Woolf queried whether the judiciary were environmentally myopic. They are no longer environmentally myopic but they may be said to suffer from climate change myopia. A recent example of a successful exercise in raising judicial awareness is with heavier fines for environmental crime.
 2. to make use of leading caselaw from around the world - the Urgenda judgment is a Dutch judgment with considerable focus on the Dutch constitution. It is likely to be easier to cite to an English judge if the judiciary are aware of an umbrella category of climate change cases
 3. common themes underlying the disparate cases can emerge. An obvious example is the precautionary principle.
 4. to encourage academic input in legal argument before the judiciary. Relationships between the bar and academia are invaluable. The bar can alert academics to novel issues to be tested in forthcoming hearings. This gives academics the opportunity to publish articles addressing the issues, which can be used in Court
 5. practical considerations; do climate change cases deserve special procedural treatment beyond existing protection for environmental claims (eg more costs protection)?
13. Change may however be afoot. Over the last 18 months or so, air pollution has started to emerge as a category of first instance litigation. To my mind the right to clean air is the forerunner to climate change litigation.
14. The upsurge of litigation in this area may have arisen because of the high profile nature of the ClientEarth litigation, which Ian Dove has described in his paper. It may also be due to a general consensus that air pollution is a serious health issue, especially for children and the elderly. Save for the Clientearth litigation, the claims have not tended to be successful but they may be said to demonstrate that the Courts are prepared to take the issue seriously.

1. In *R(Birchall Gardens LLP) v Hertfordshire County Council*¹ the Court rejected an argument that an air quality report in support of a planning argument used an incorrect baseline.
2. In *R (on the application of Carlyle) v Hastings Borough Council*², the Court was prepared to take a close look at the air quality methodology and in particular the modelled traffic data for an air quality impact assessment in relation to a road project. The challenge was ultimately unsuccessful on the facts.
3. The case of *PS v Greenwich RBC & (1) Enderby Wharf Ltd (2) Enderby Riverside Ltd (3) Enderby Isle Ltd*³ concerned the grant of planning permission for enlarging a jetty. The claimant contended that the local authority's decision failed to require, or take into account the need for an assessment of the total cumulative and combined effects on air quality as required by the core strategy policy and the National Planning Policy Framework. Collins J acknowledged the concerns but in effect said the point should have been raised in the previous grant of permission for the jetty.
4. The decision in *Wealden District Council v Secretary of State for Communities & Local Government, South Downs National Park Authority & Natural England*⁴ is a rare example of Natural England getting its advice wrong and concerned air quality. The European protected site in question had extensive areas of lowland heath which were vulnerable to nitrogen dioxide pollution from cars. Natural England had advised that planned development would not have a significant impact on the SAC in consequence of increased traffic flows. The Judge found that the advice was erroneous in its assessment of in combination effects.
15. To date, air pollution claims have tended to be technical claims. For example there appear to have been no attempts to put forward

¹ [2016] EWHC 2794 (Admin).

² [2016] EWHC 1482 (Admin).

³ [2016] EWHC 1967 (Admin).

⁴ [2017] EWHC 351 (Admin)

overarching principles about the right to clean air. However, this may be about to change.

16. A report in the English newspaper, the Guardian on 16 September 2017 is headed

“UK legal claims grow over exposure at work to toxic diesel fumes”.

Unions warn effects of exposure to diesel pollution is ticking time bomb for business, likening situation to ‘early days of asbestos’

17. The article details claims against Royal Mail and at least one local authority by employees who were exposed to diesel fumes in their work environment. Unions are backing the test case. It remains to be seen whether the precise legal mechanism (the Control of Substances Hazardous to Health Regulations 2012) proves fruitful for the employees. However, personal injury claims by employees, with union funding, looks, on its face, like a more compelling recipe for success in the Courts than pure environmental claims. Dr Ludwig Kramer a renowned EU law expert who used to work for the European Commission has often said that the environment suffers from the fact that ‘it has no voice’. In contrast, personal injury claims by workers backed by unions may prove to have a loud voice. This litigation has the hallmarks of asbestos litigation in the UK arising from the widespread use of asbestos in the early 20th century, with devastating health effects. The Courts showed they were prepared to mould the rules of causation and jurisdiction so achieve justice for those affected.

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