EUFJE ANNUAL CONFERENCE 2022 QUESTIONNAIRE – UK RESPONSE

1. How has judicial decision-making on climate change issues evolved in your country over the last decade?

1. In all the United Kingdom jurisdictions climate change has been, during the last 10 years, a matter of increasing significance and controversy in public law challenges to executive and administrative action, often in cases about decision-making on major infrastructure projects. Most prominently, there have been challenges to policy, and decisions on projects, for transport infrastructure, including, for example, the judicial review proceedings concerning the third runway at Heathrow Airport, which culminated in the Supreme Court (*R. (on the application of Friends of the Earth Ltd. and others) v Heathrow Airport Ltd.* [2020] UKSC 52), several challenges to the decision-making on "HS2" – the high-speed railway connecting London to the Midlands and the North of England (including *Packham v Secretary of State for Transport* [2020] EWCA Civ 1004 and [2020] EWHC 829 (Admin)), and the recent claim concerning national policy for road building in the review of the National Networks National Policy Statement (*Transport Action Network Ltd. v Secretary of State for Transport* [2022] EWHC 503 (Admin)). There have also been high-profile challenges to decisions concerning onshore and offshore mineral extraction projects, such as *R. (on the application of Finch) v Surrey County Council* [2022] EWCA Civ 187 and *Greenpeace v Advocate General* [2021] CSIH 53, both of which concerned the lawfulness of an environmental impact assessment that did not extend to the effects of "scope 3" or "downstream" greenhouse gas emissions.

2. There have been a growing number of challenges to measures of relevance to climate change in the form of delegated legislation, to relevant government strategy in the form of national planning policy, and to other executive action or failure to act in this sphere. Such challenges sometimes take the form of grievances about the procedures followed by the Government in initiating such legislation or making such policies, sometimes an assault on the substance of the legislation or policy itself. On several occasions such challenges have been successful (see, for example, *Secretary of State for Energy and Climate Change v Friends of the Earth* [2012] EWCA Civ 28, which

concerned the introduction of a tariff scheme to enable electricity supply companies to make payments to small-scale producers of low-carbon electricity; and *R. (on the application of Friends of the Earth) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin), in which the court had to consider whether the Secretary of State had failed to comply with the duty in section 13 of the Climate Change Act 2008 to "prepare such proposals and policies" as he considers will enable the carbon budgets set under that Act to be met, and the duty in section 14, "as soon as is reasonably practicable" after setting a carbon budget, to lay before Parliament a report setting out proposals and policies for meeting the current and future "budgetary periods" up to and including that budget).

3. Operating within the parameters set by public law principle, as they must, the courts have broadly sought to adhere to an orthodox approach to claims for judicial review in cases where climate change or other environmental issues arise, rather than expanding the scope and intensity of review, as they have occasionally been urged to do (see, for example, the judgment of the Court of Appeal in the Heathrow Airport third runway case, *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214, at paragraph 68 and 75 to 79). Although there have been attempts to use human rights legislation in climate change litigation, these attempts have been largely unsuccessful (see, for example, *R. (on the application of Plan B Earth) v The Prime Minister* [2021] EWHC 3469 (Admin)); *Friends of the Earth* [2022] EWHC 1841 (Admin), which was a challenge to the lawfulness of the Government's policies relating to climate change; and *Drax Power Ltd. v HM Treasury* [2016] EWHC 228 (Admin), in which the subject of the claim was the removal of the exemption for renewable source electricity from the Climate Change Levy; cf. *Department for Energy and Climate Change v Breyer Group PLC* [2015] EWCA Civ 408, concerning the Feed-In Tariffs scheme, which was intended to encourage low-carbon generation of electricity by specified types of technology, including solar photovoltaic).

2. Before which type of courts is this type of litigation brought and by which type of plaintiffs?

4. In England and Wales such cases now proceed before the Planning Court. The Planning Court was formed in 2014. It is a specialist court with particular expertise in

planning and environmental law, and functions through a separate list within the Administrative Court, which is itself a subdivision of the Queen's Bench Division of the High Court. It hears claims for judicial review and statutory review brought on public law grounds.

5. Planning inspectors, who are not judges, either determine or report to the Secretary of State upon appeals against decisions made by local planning authorities, on their substantive merits. Such appeals will often involve issues relevant to climate change. Legal challenges to decisions made by the Secretary of State or inspectors go to the Planning Court, on public law grounds.

6. Claimants in the Planning Court may be disappointed appellants, local planning authorities whose decision-making has not been supported on appeal, corporate or individual objectors to a proposed development, personally affected individuals such as neighbours or representatives of local action groups, other interested parties, and NGOs such as Friends of the Earth, ClientEarth or Plan B Earth.

7. Appeals from the High Court are heard in the Civil Division of the Court of Appeal, and appeals from the Court of Appeal go to the Supreme Court.

3. What are the opportunities to this type of litigation in your country?

8. The potential standing in claims for judicial review or statutory review before the Planning Court is broad (see paragraph 6 above).

9. Article 9 of the Aarhus Convention, which has effect in claims for judicial review in environmental matters through the arrangements in the Civil Procedure Rules (CPR r. 45.41-44 and CPR Practice Direction 45), provides a protective costs regime which allows claimants to bring environmental litigation more easily than they might otherwise be able to do. Under these arrangements, the limits on costs recoverable from parties in an Aarhus Convention claim are, for claimants, £5,000 where the claimant is claiming only as an individual, and £10,000 in all other cases; and for a defendant, £35,000.

4. What are the challenges to this type of litigation in your country?

10. The courts in the United Kingdom jurisdictions have, from time to time, come under pressure to expand the scope of judicial review and to intensify the scrutiny with which that review is conducted in climate change cases. That pressure has so far been resisted (see, for example, *Plan B Earth* [2020] EWCA Civ 214, at paragraphs 68 and 75 to 79, citing *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174 and *Craeynest v Brussels Hoofdstedelijk Gewest* [2020] Env. L.R. 4). The courts have also been careful to avoid being drawn into the intense political and social debates on climate change. And they have consistently been unwilling to carry out scientific analysis of their own. Such analysis is the task of experts. Judges sitting in claims for judicial review are not required to undertake it themselves.

5. What is the average length of proceedings (including on appeal and cassation)?

11. At first instance, hearings normally last one day, sometimes two days, only occasionally taking longer than that. On appeal, hearings seldom last more than one day.

6. Which type of remedies are being ordered by the courts? What are the arguments for not ordering such remedies?

12. In judicial review cases the courts have a broad discretion to grant a variety of different remedies – or no remedy at all in the rare case where to grant relief would serve no practical purpose.

13. There are three main remedies; first, quashing orders, which have the effect of nullifying the decision in question, so that the decision must be taken again by the primary decision-maker, without the legal error which caused the original decision to

be quashed; second, mandatory orders, which require decision-makers to make a specific decision; and third, declarations, which are statements of the correct legal position on a given issue. The effectiveness of quashing orders is limited by the fact that when the quashed decision is taken again, even if the legal error which led to that outcome is not repeated, the decision itself it may not be different, or materially different, in substance. Mandatory orders require care in their drafting if they are not to be unduly prescriptive and encroach on executive discretion. And the effectiveness of declarations is inherently limited by the nature of the relief itself.

14. In cases involving human rights, the court may also exercise its powers under sections 3 and 4 of the Human Rights Act 1998. Section 3 allows the courts to re-interpret primary legislation which is incompatible with Convention rights in a way which makes it compatible. If such re-interpretation is not possible, the court may issue a declaration of incompatibility under section 4. That declaration does not have mandatory effect; it is advisory only.

7. Do the courts have powers to ensure and follow-up the enforcement of judgements in climate cases? Are there specific difficulties in this regard?

15. The courts do have such powers. Breaches of court orders can lead to further proceedings, including – as in other kinds of case – proceedings for contempt of court.

16. The courts have been prepared to contemplate innovative and more flexible processes in environmental cases, such as granting claimants an "extended liberty to apply" (see, for example, *R. (on the application of ClientEarth) (No.3) v Secretary of State for Environment, Food and Rural Affairs* [2018] EWHC 315 (Admin), which concerned the third attempt by the Government to produce an Air Quality Plan which met its obligations in law).

8. What are the most useful norms, legal principles or practices available to judges to ensure effective climate action by governments and businesses?

17. The Aarhus Convention costs rules are important in ensuring effective participation in proceedings concerning decision-making on climate change issues. They enable individual claimants to hold the executive to account in such cases without excessive cost (see paragraph 9 above).

18. The comprehensive regimes of control under the EIA, SEA and Habitats Directives and the corresponding domestic legislation, reinforced by the jurisprudence in a growing body of case law, have established and refined the legal principles under which proposals, including major projects of infrastructure, are considered in decisions where climate change issues are engaged. This is an incremental phenomenon. But it reflects the limited scope of the court's jurisdiction in claims for judicial review.

19. The independence of the judiciary and the rule of law where the law regulates action affecting the environment, sometimes referred to now as "the environmental rule of law", are the foundation of the courts' responsibility for effective scrutiny of governmental decision-making on climate change.