IN THE COURT OF APPEAL
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Before The Hon Mr Justice Supperstone

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

Appellants

- and -

THE SECRETARY OF STATE
FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Respondent

- and -

THE COMMITTEE ON CLIMATE CHANGE

Interested Party

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

INTRODUCTION

1. This is an application for permission to appeal against the judgment of Supperstone J ("**the judge**") dated 20 July 2018 ("**the judgment below**") refusing permission to bring a claim for judicial review. The Appellants wish to challenge the Secretary of State's repeated refusals ("**the impugned decisions**") to revise the 2050 carbon target ("**the 2050 Target**") under the Climate Change Act 2008 ("**the 2008 Act**"). The 2050 Target was originally set in the 2008 Act on the basis of limiting global warming to 2˚C above pre-industrial levels, the limit that was at the time considered to be tolerable for humanity.

2. In 2015, in light of significant developments in the science, the 2˚C limit was rejected by the international community as inadequate. The Paris Agreement on Climate Change was adopted, committing its 195 signatories (including the UK) both to limiting warming to "*well below*" 2˚C and to pursuing efforts towards a 1.5˚C limit. The underlying issue in this case is whether it is consistent with the purpose of the 2008 Act, and with his other legal obligations, for the Secretary of State to maintain a carbon target in the knowledge that it aims at a temperature limit which has been rejected by the international community as inadequate and dangerous.

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

(a) he misunderstood the legislative purpose for which the discretion under s. 2 of the 2008 Act to amend the 2050 Target was conferred on the Secretary of State, and as a result the impugned decisions are (at least arguably) inconsistent with that purpose ("**Ground 1**");

(b) he misunderstood the Paris Agreement, wrongly accepting the Secretary of State's argument that it embodies two, alternative levels of ambition, when in truth there is only one target ("**Ground 2**");

(c) he failed to recognise that (at least arguably) the Secretary of State misunderstood the advice given by the statutory consultee, the Committee on Climate Change ("**the CCC**"), and as a result he took the impugned decisions on a false basis ("**Ground 3**");

(d) he failed to recognise that the impugned decisions (at least arguably) violate his duties under s. 6 of the Human Rights Act 1998 ("**the HRA 1998**") ("**Ground 4**");

(e) he failed to recognise that the impugned decisions (at least arguably) fail to take account of the public sector equality duty ("**the PSED**") ("**Ground 5**");

(f) he failed to recognise that the impugned decisions were (at least arguably) irrational ("**Ground 6**");

(g) he failed to recognise that, in a case of this momentous importance, where the claim is based partly on irrationality and the grounds on which the Secretary of State and the CCC have sought to resist the claim have altered significantly over time, it is wrong in principle for permission to be refused in the absence of full compliance by the Secretary of State and the CCC with their duty of candour ("**Ground 7**").

THE CLAIM IN OUTLINE

The 2008 Act

4. The 2008 Act imposes an express duty on the Secretary of State to ensure that the net UK carbon account for the year 2050 (*i.e.* the 2050 Target) is at least 80% lower than the 1990 baseline. It also confers a discretion on the Secretary of State to alter the 2050 Target by (among other things) amending the 80% figure. This judicial review claim is essentially concerned with the lawfulness of the Secretary of State's refusal to amend that target in light of relevant developments over the last ten years since the 2008 Act was passed.

5. The original target of 80% was fixed in 2008 in light of **(i)** the prevailing scientific knowledge about climate change, **(ii)** the UK's international commitments at that time, and **(iii)** an equitable and rational framework for deriving the UK's contribution from the global goal. In 2008, there was an international policy and political consensus that, in order to avoid irreversible and uncontrollable climate change, it was sufficient to limit global warming below 2˚C above pre-industrial levels. Consequently, the 2050 target "*was designed to keep the UK on a path consistent with a global 2°C pathway*" (see §42 of the Secretary of State's response to the Appellants' Pre-Action Protocol letter

("**the PAP Response**")). However, that international policy and political consensus has now changed.

6. It is important to emphasise that the 2050 Target specified in the 2008 Act was fixed by reference to what was (according to the then prevailing international policy and political consensus) necessary in order to avoid irreversible and uncontrollable climate change (not by reference to what was then believed to be achievable by 2050).

Developments since 2008

7. Much has changed over the last decade:

(a) **Scientific knowledge**: The international scientific consensus is that a 2˚C limit is inadequate, and indeed that serious, adverse impacts are occurring even at current levels of warming (*i.e.* approximately 1˚C).

(b) **International commitments**: Prompted by the new scientific consensus, there is now also a new international policy and political consensus which is reflected in the Paris Agreement, to which the UK is a party, that the target for global warming needs to be kept well below 2˚C above pre-industrial levels, and that efforts must be made to limit the temperature increase to 1.5˚C above pre-industrial levels.

8. Notwithstanding the UK's commitment to the Paris Agreement, the Secretary of State has failed to amend the 2050 Target laid down in the 2008 Act.

The impugned decisions

9. In response to this legal challenge, the Secretary of State has now disclosed that he took a deliberate decision not to amend the 2050 Target sometime in approximately October 2016, and then took the same decision again in January 2018. Neither decision was announced at the time, and no contemporaneous documents have ever been produced to explain the basis on which either decision was taken. Furthermore, in the course of correspondence before the claim was issued, the Appellants sought a full explanation of the Secretary of State's reasons for reaching the impugned decisions, but the Government Legal Department ("**GLD**") declined to provide one. Finally, after the claim was issued, and after the first permission hearing (which was adjourned), the Secretary of State adduced an exiguous witness statement from a departmental official (Mr Lord), which did not purport to provide a full explanation of the reasons underlying

the decisions, instead saying that its purpose was simply to "*clarify two short points*" and provide an update of certain recent developments. As a result, the entire legal argument has been conducted in ignorance of the Secretary of State's real reasons.

GROUND 1: INCONSISTENCY WITH THE LEGISLATIVE PURPOSE

Introduction

10. It is trite law that the Secretary of State's statutory discretion to amend the 2050 Target must be exercised lawfully: in particular, it must be exercised consistently with the purpose of the legislation under which the power was conferred. The Appellants' case is that the discretion has been exercised unlawfully because the impugned decisions were taken on the basis of a misunderstanding of that purpose, and as a result they are inconsistent with it.

The legislative purpose

11. The true purpose of the legislation is to commit the UK to making an equitable contribution to the global climate obligation (*i.e.* the necessary global temperature limit) consistent with the prevailing scientific evidence and international agreements. The discretion under s. 2 to alter the 2050 Target can only lawfully be exercised by reference to the same criteria – *i.e.* necessity, and an equitable contribution by the UK to the global target.

The Secretary of State's breach

12. The impugned decisions are unlawful because they were taken **(i)** by reference to what the Secretary of State perceived to be achievable (rather than what was necessary), and **(ii)** without taking into account the question whether the existing 2050 Target is compatible with the UK's equitable contribution to the global target as laid down in the Paris Agreement.

13. Although there has never been a public statement setting out the basis on which the impugned decisions were taken, the grounds on which the Secretary of State seeks to justify them can be taken from his Summary Grounds of Defence ("**SGD**") which repeatedly display his misunderstanding: see in particular §11–13, §15–16, §35–37, §48, §62 & §65–67. His position is that the purpose of the 2008 Act was to commit the UK to a reduction of greenhouse gas ("**GHG**") emissions which, at the time the target

is formulated (or amended), is considered to be technologically achievable on the basis of domestic action alone.

The judge's errors

14. The judge rejected the Appellants' argument under this heading (see §38 of his judgment) on the basis that the Appellants were (he said) seeking to turn the discretion under s. 2 into a statutory duty. There are two main objections to the judge's decision in this regard:

(a) First, it misrepresents the Appellants' argument. Their argument is founded on the proposition that the statutory discretion must be exercised consistently with the purpose for which it was conferred, and the Secretary of State's impugned decisions are unlawful because they fail to pursue that purpose. The argument under this heading is not that the Secretary of State is legally compelled to amend the 2050 Target as such, but that in deciding whether or not to do so he must apply the correct legal considerations. He has manifestly failed to do so.

(b) Secondly, as a result of the judge's mistaken approach, his judgment does not address the critical question – namely, the requirement for the discretion under s. 2 to be exercised on the basis of the twin criteria of **(i)** necessity and **(ii)** the UK making an equitable contribution to the global target.

15. The judge's wrongful rejection of this argument was compounded by the following further errors in his judgment:

(a) He wrongly held (in §34 of his judgment) that the Appellants' argument under this heading was in some way dependent on an entirely separate argument (addressed in Ground 3 below) – namely, that the Secretary of State had misunderstood the advice of the CCC. As a result, the judge wrongly held that his rejection of that separate argument somehow undermined the Appellants' case on Ground 1. The true position is that the Appellants' argument under Ground 1 is entirely distinct from Ground 3.

(b) The judge also conflated the setting of a 'net-zero' target with the fixing of the 2050 Target (see §27 of his judgment). The two are entirely distinct: indeed the criteria by reference to which the Secretary of State is legally obliged to set the 2050 Target may in practice require an ambition greater than net-zero. Accordingly, the whole question of setting a net-zero target is an irrelevant

distraction, and the judgment below displays a fundamental misunderstanding of the 2008 Act.

Conclusion on Ground 1

16. The impugned decisions were taken on the basis of a misunderstanding of the purpose for which the discretion under s. 2 of the 2008 Act was conferred on the Secretary of State. The judge below was wrong to reject that argument.

GROUND 2: MISUNDERSTANDING THE PARIS AGREEMENT

Introduction

17. The ambition of the Paris Agreement is expressed in Article 2(1)(a) as "*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*" (emphasis added). This is a single, composite target: the word 'and' is plainly conjunctive.

The judge's error

18. The judge misunderstood this core provision in the Paris Agreement by interpreting Article 2(1)(a) as creating "*two levels of ambition*" (see §30 of his judgment) to be read as alternatives (see §25 of his judgement: "*... one end of the Paris ambition, 1.5°C probably implies a greater than 80% reduction by 2050 in the UK; the other part, well below 2°C, does not*"). The judge was wrong to assume that the 2050 Target could be compatible with the Paris Agreement on the basis of compatibility with "*one end of the Paris ambition*" (emphasis added). On that basis, he wrongly rejected the Appellants' argument because (he said) it rested "*on an incorrect interpretation of the terms and implications of the Paris Agreement*" (see §39 of his judgment).

The position of the Secretary of State & the CCC

19. There was confusion and contradiction in the positions taken by the Secretary of State and the CCC on this point. On the one hand, the Secretary of State's Skeleton Argument in the court below expressly recognised that it is "*uncontroversial*" that the current 2050 Target "*is not sufficient to meet the full ambition of the Paris Agreement*" (see §37). On the other hand, the CCC's case was that "*the primary basis for its advice*" to the Secretary of State in October 2016 not to amend the 2050 Target was the

"*consistency of the existing 2050 target with the Paris range of ambition*" (see §24 of its Summary Grounds of Defence, emphasis added).

20. The Secretary of State claims to have acted on the basis of the advice given to him by the CCC (see for example §60 of his SGD). In the circumstances, he must have taken the impugned decision on the basis that the Paris Agreement expresses a "*range of ambition*". Furthermore, the "*two levels of ambition*" identified by the judge appear to represent an acceptance by him of the CCC's interpretation of the Paris Agreement as embodying a "*range of ambition*" (see §45 of his judgment, where he said that the CCC "*did not misunderstand the Paris Agreement*").

Conclusion on Ground 2

21. In all the circumstances, there is at least an arguable case that the CCC, the Secretary of State and the court below have all proceeded on the basis of an erroneous interpretation of the core provision in the Paris Agreement – namely, the ambition expressed in Article 2(1)(a).

GROUND 3: MISUNDERSTANDING THE CCC'S ADVICE AND/OR THE FACTS

Introduction

22. Even assuming (contrary to the Appellants' argument under Ground 1) that the Secretary of State was entitled (consistently with the 2008 Act) to exercise his discretion whether to amend the 2050 Target in light of his understanding of what was achievable (rather than what was necessary), nevertheless in taking the impugned decisions **(i)** he has fundamentally misunderstood the advice of the CCC, and/or **(ii)** in any event he has taken the decisions on an erroneous basis, in that he believed greater ambition for the 2050 Target was not achievable.

23. The Judge wrongly rejected this argument (see §26–28 of his judgment) without analysing or even quoting the extensive evidence on which the Appellants relied to demonstrate the Secretary of State's misunderstanding. Instead, the judge chose to quote at length from the CCC's advice (see §20–25 of his judgment), rather than considering any of the evidence which demonstrated how the Secretary of State, as the relevant decision-maker, had misinterpreted (or ignored) that advice.

The evidence demonstrating the Secretary of State's misunderstanding

24. In his PAP Response, the Secretary of State repeatedly made clear that he took the impugned decisions, and was seeking to defend them after the event, on the basis that "*it is wholly lawful when setting any target to take into account what can realistically be expected to be achieved within the relevant timeframe*" (§22). This was not an isolated remark: the same point was repeated numerous times. Further, it clearly concerned the 2050 Target rather than a net-zero target: : "*In particular, so far as the 2050 Target under the 2008 Act is concerned, it would be wrong to place a statutory duty on the Secretary of State to 'ensure' that an amended 2050 target was met, in circumstances where there were no known means by which he could comply with that duty*" (§25). The same point appeared again in §39–40, §46(c) and §49 of the PAP Response.

25. The Secretary of State repeated the same argument at length in his SGD, at §26, §35–36 and §50. His position was summarised in §66–67, where he said this: "*There is no duty on the Secretary of State to commit to a new legally binding target now, without a recognised route to meeting it … It is accordingly wholly rational to decide not to amend the 2050 Target yet, at a time when no clear and new ambitious goal can be set with a real anticipation that it could be met*".

The judge's error

26. The judge below failed to consider, or even to quote in his judgment, any of the numerous passages in which the true basis of the Secretary of State's decision was laid bare. Instead, the judge quoted extensively from the CCC's advice (see §20–25 of the judgment below), which showed that the CCC considered (rightly, and contrary to the Secretary of State's understanding) that greater ambition for the 2050 Target is achievable. The judge's approach was, with respect, misguided: in order to assess the basis on which the Secretary of State took his decisions, it is essential to see what the Secretary of State himself said, not what the adviser may have said.

Conclusion on Ground 3

27. As a result, the judge below failed to recognise that there was compelling evidence to show that the impugned decisions were taken on the basis of a fundamental misunderstanding on the Secretary of State's part.

GROUND 4: VIOLATION OF THE HRA 1998

Summary of the claim

28. The Appellants rely on the rights conferred by Articles 2 & 8 of the European Convention on Human Rights ("**ECHR**"), and by Article 1 of the 1st Protocol, both individually and in conjunction with Article 14.

29. It has been expressly recognised, both at the level of the UN and at the level of the European Court of Human Rights ("**ECtHR**") that a government's response to the need for environmental protection engages human rights: as to the UN, see the UN Human Rights Council's Resolution 10/4; as to the ECHR, see the Parliamentary Assembly of the Council of Europe's Recommendation 1614 (2003), and the Council of Europe's Manual. This is, with respect, both obvious and important, in particular because of the potentially devastating effect of climate change on human life and property.

30. The engagement of human rights in relation to environmental issues has accordingly been reflected in the ECtHR case-law in relation to the State's obligation to protect each of **(i)** the right to life (see for example *Budayeva & others v. Russia* App. № 15339/02 *et al* (22 March 2008)), **(ii)** the right to private and family life (see for example *Taşkin v. Turkey* App. № 46117/99 (11 November 2004); *Moreno Gómez v. Spain* App. № 4143/02 (16 November 2004); *Fadayeva v. Russia*, App. № 55723/00 (9 June 2005)), and **(iii)** the right to property (see for example *Budayeva v. Russia*). It has also been cited in domestic proceedings in the Netherlands as a basis for legally requiring the government there to increase its ambition for reducing GHG emissions (see *The Urgenda Foundation v. Kingdom of the Netherlands*, District Court of The Hague [2015] HAZA c/09/00456689 (24 June 2015)).

31. In particular, by signing the Paris Agreement, the UK expressly acknowledged its obligation "*when taking action to address climate change, [to] respect, promote and consider [its] … obligations on human rights, the right to health, the rights of … children … and people in vulnerable situations*" (see the Preamble).

32. The ECtHR has emphasised that a State's margin of appreciation in relation to its positive obligations to uphold Convention rights in this context is circumscribed by its international Treaty obligations and by general principles of international environmental law, such as the precautionary principle (see *Tatar v Romania* (App. No.

67021/01, Judgment of 27 January 2009), §112; see also Joined Cases T-74, 76, 83-85, 132, 137 and 141-00 *Artegodan v Commission* EU:T:2002:283, §184.). Insofar as the Secretary of State is acting inconsistently with his Treaty obligations and with general principles of international law, he is accordingly in breach of his positive obligations to uphold the Appellants' Convention rights.

33. Against that background, the individual Appellants submit that the Secretary of State's refusal to amend the 2050 Target constitutes a violation of their human rights because:

(a) it amounts to a failure to take the reasonable preventative measures necessary to uphold the Appellants' rights to life, to property and to family life;

(b) it increases the likelihood of unprecedented climate change, occasioning mass loss of life in the long term, and increased health risks in the meantime;

(c) it adversely impacts on the willingness of the 5th and 10th Appellants to begin families (as to which, see their respective witness statements);

(d) it adversely impacts on property, especially those in vulnerable areas (as to which, see the witness statements of the 7th & 11th Appellants);

(e) it impacts in a discriminatory manner against the young (see the witness statement of the 12th Appellant and the 3rd witness statement of Mr Crosland for the 1st Appellant) and the old (see the witness statements of the 2nd & 3rd Appellants).

34. The Appellants accept that this situation has not yet been confronted in the case-law under the HRA 1998. But that is absolutely no basis for suggesting that their case is unarguable: the ECHR (and hence the HRA 1998) is a living instrument, which must continually adapt to the changing challenges faced by governments and individuals. Indeed, recently the Supreme Court has "*firmly reject[ed] the suggestion that the decision of this court on whether the respondents enjoy a right under the HRA to claim compensation against the appellant should be influenced, much less inhibited, by any perceived absence of authoritative guidance from ECtHR*" (see *Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents)* [2018] 2 WLR 895, at §79).

35. Moreover, in other situations the courts have interpreted positive obligations under the HRA 1998 as imposing a duty to take reasonable and necessary preventative measures,

whether or not specific individuals can be identified as victims in advance. It is difficult to conceive of any issue that would be of greater significance to each member of the British public than the threat of climate change, which the Government has acknowledged as constituting an "*existential threat*". In this context, the Government's delay is inexcusable.

The judge's errors

36. The judge below appears to have rejected this argument for two reasons:

(a) First, he said that "*the executive has a wide discretion*" (see §49). In saying this, he failed to recognise that ECtHR case-law expressly shows that, even in Strasbourg, a government's margin of appreciation in relation to human rights issues with an environmental dimension is constrained by the State's international obligations: the position must be *a fortiori* in relation to the latitude granted by the domestic courts to the national government in comparable situations. As a result, the judge failed to address the necessary question – which was whether the Appellants have at least an arguable case that the discretion under s. 2 of the 2008 Act must be exercised so as to give effect in domestic law to the UK's international obligations under the Paris Agreement.

(b) Secondly, the judge also held (again in §49 of his judgment) that the Appellants "*do not identify any interference to which the decision gives rise, but only to the effects of climate change generally*". This ignores that the Appellants' case was that the Secretary of State had breached his positive obligation to deal with climate change, which does not require a finding of interference. Nor did he have regard to the specific issues identified or the evidence outlined in §33 above (which were drawn to his attention in §64 of the Appellants' Skeleton Argument in the court below).

Conclusion on Ground 4

37. For the reasons outlined above, the judge below was wrong to conclude that the claim based on the HRA 1998 is unarguable.

GROUND 5: BREACH OF THE PUBLIC SECTOR EQUALITY DUTY

Summary of the claim

38. In deciding whether to amend the 2050 Target, the Secretary of State was under an express statutory duty, pursuant to s. 149 of the Equality Act 2010, to have due regard to the need **(i)** to eliminate discrimination and other conduct prohibited by or under that Act, **(ii)** to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it, and **(iii)** to foster good relations between persons who share a relevant protected characteristic and those who do not.

39. The Appellants introduced specific evidence of the discriminatory impact on the younger generation of postponing correction of the UK's emission reductions trajectory (see §33(e) above).

40. There was no evidence before the court that the Secretary of State took this public sector equality duty ("**PSED**") into account when he took the impugned decisions.

The judge's errors

41. The judge appears to have rejected the Appellants' argument under this heading for two reasons:

(a) First, he rejected it on the basis of a generalised observation (in §51 of his judgment) that "*the impact of climate change has been the subject of investigation and assessment, most recently in the UK climate risk assessment of 2017*". With respect, that does not meet the Appellants' argument, which is that the Secretary of State has taken a deliberate decision not to adduce any evidence that he did in fact take the PSED into account when he took these impugned decisions in October 2016 and January 2018. That argument is unanswered. Furthermore, the fact that the second of the impugned decisions was taken earlier this year, whereas the judge expressly held that the issue was "*most recently*" assessed in 2017, indicates that the claim under this heading ought to have been allowed to proceed.

(b) The judge also said (in §52 of his judgment) that he was "*not persuaded that it is arguable that any public sector equality duty arose*" (emphasis added). With respect, that conclusion is wrong on the face of the legislation. Section 149(1) of

the Equality Act 2010 is in mandatory terms: it provides that a public authority "*must*" have due regard to the PSED.

Conclusion on Ground 5

42. For the reasons outlined above, the judge below was wrong to conclude that the claim based on a breach of the PSED is unarguable.

GROUND 6: IRRATIONALITY

Summary of the claim

43. In summary, the Appellants' argument is that the impugned decisions were irrational because –

(a) the Secretary of State misunderstood the purpose of the s. 2 discretion (this overlaps with Ground 1 above);

(b) he misunderstood the Paris Agreement (this overlaps with Ground 2 above);

(c) he misunderstood the CCC's advice (this overlaps with Ground 3 above);

(d) he failed to take into account his obligations under the HRA 1998 (this overlaps with Ground 4 above);

(e) he failed to take into account his PSED duties (this overlaps with Ground 5 above);

(f) he failed to take properly into account the UK's international leadership obligations;

(g) he failed to take into account the adverse impacts of delay;

(h) he failed to take into account the fact that the 2050 Target is inconsistent with the Paris Agreement.

44. Nothing needs to be added to the argument in relation to the first 5 points. The remaining 3 points will be addressed briefly in turn.

International leadership obligations

45. One of the purposes of the 2008 Act (as explained in the Executive Summary to the Bill) is to set "*an international precedent, reinforcing the UK's position as a consistent leader in the field of climate change and energy policy*". By signing the Paris

Agreement, but then failing to implement in domestic law the necessary measures to give that agreement effect, the UK is failing in its international leadership obligations. That is an irrational exercise of the discretion under s. 2.

46. The judge rejected this argument without giving any reasoned explanation. All he said (in §47 of his judgment) was that the evidence showed that "*the Secretary of State is well aware of the UK's legal obligations under the UNFCC and the Paris Agreement*" but that comment is, with respect, irrelevant for two reasons:

(a) First, the fact that the Secretary of State may have been 'aware' of the UK's international obligations does not provide any logical basis for concluding that the impugned decisions properly took the leadership obligation into account in any rational manner. The Appellants' argument is that the Secretary of State has acted irrationally by abdicating international leadership, because the UK is not currently committed as a matter of domestic law to achieving even the minimum ambition of the Paris Agreement.

(b) Second, the judge's observation is irrelevant, because the Appellants' argument is not founded on the content of the UK's 'international obligations' in any event. The legal argument based on irrationality is that, as a matter of domestic law, the Secretary of State's discretion under s. 2 can only lawfully be exercised in proper discharge of the UK's leadership obligations; and those leadership obligations arise not as a matter of international law, but by virtue of the statutory purpose underlying the 2008 Act.

Delay

47. The Appellants' argument is that delay only compounds the problem: the more the government procrastinates, the more dramatic the reductions will need to be in GHG emissions.

48. The judge dismissed this ground of claim, saying (in §47 of his judgment) that "*The impact of delay is said to compound 'the feasibility challenge', which, for the reasons I have given, is not arguable.*" It is unclear which earlier passage in the judgment he was referring to. In any event, the Appellants submit that it is a matter of irresistible logic that, the longer the delay, the greater becomes the feasibility challenge: the judge was wrong to reject the argument.

Inconsistency with the Paris Agreement

49. Finally under this heading, the Appellants submit that the impugned decisions are irrational because they fail to recognise that the current 2050 Target is inconsistent with the ambition required under the Paris Agreement. (For the avoidance of doubt, the focus of this argument is different from that under Ground 1: there, the focus is on a point of principle as to whether consistency with the Paris Agreement reflects the statutory purpose; here, the question is one of fact and/or of scientific assessment as to whether the existing 2050 Target is indeed consistent with the Paris Agreement.)

50. The Appellants' clear and compelling evidence is that the current 2050 Target is not compatible with the ambition required by the Paris Agreement: see Mr Crosland's 1st witness statement, §64–67, and his 3rd witness statement, §19–28. That evidence has never been challenged by the Secretary of State. Indeed, as noted in §19 above, the Secretary of State's Skeleton Argument below expressly recognised that the existing target is not consistent with the Paris Agreement. Nevertheless, none of this was mentioned in the judgment below. In the circumstances, there is a powerful argument for saying that the impugned decisions are unlawful because they maintain in place a 2050 Target which is incompatible with the Paris Agreement, and the judge below was wrong to overlook the argument.

51. Instead, he spent some time considering the separate question whether the Secretary of State and/or the CCC had changed their position in relation to the question whether they believed that the current 2050 Target is compatible with the Paris Agreement: however, that is an issue which arises only in relation to Ground 7 below. The point of substance, which is not addressed in the judgment below, is whether the existing 2050 Target is in reality compatible with the Paris Agreement, and on that issue the Appellants' evidence is compelling and unanswered.

Conclusion on Ground 6

52. For the reasons outlined above, there is at the very least an arguable case that the impugned decisions were irrational in that they failed to take into account a considerable number of highly relevant factors.

GROUND 7: SHIFTING DEFENCES, INCONSISTENCY & THE DUTY OF CANDOUR

Introduction

53. In summary, the Appellants submit that permission to apply for judicial review should be granted in circumstances where **(i)** the issues at stake are of the widest public importance, **(ii)** neither of the impugned decisions was announced at the time it was taken, **(iii)** there is no contemporaneous documentary record of the basis on which either decision was taken, **(iv)** before the proceedings were issued the Appellants asked for a definitive account of the reasons for the decisions, but that was refused, **(v)** the responses given by the Secretary of State and the CCC have shifted over time to the point where there are now serious inconsistencies, **(vi)** since the proceedings were issued, the Secretary of State has put forward an extremely slight witness statement from a departmental official who does not purport to give a full and frank account of the decision-making process or the grounds for the decisions, **(vii)** the CCC has put in no evidence at all, and **(viii)** a credible case has been advanced based on irrationality.

The Secretary of State's changes of position & lack of candour

54. There are three issues on which the Secretary of State appears to have shifted his position significantly:

(a) As noted in §24–25 above, the position taken by the Secretary of State in his PAP Response and his SGD was that it was entirely rational not to alter the 2050 Target because greater ambition was not achievable. It then emerged from the CCC's Summary Grounds of Defence that the CCC considered that greater ambition was achievable (see §24). As a result, the Secretary of State claimed (or seemed to claim) that feasibility was not the basis of the impugned decisions (see §30 of the Skeleton Argument submitted on his behalf dated 3 July 2018). That is a very significant change of position.

(b) As noted in §49–50 above, it is the Appellants' case that the current 2050 Target is inconsistent with the ambition required by the Paris Agreement. The Appellants believed initially that the Secretary of State shared this view, and that the only disagreement between them was when the 2050 Target should be amended: nothing said in the PAP Response suggested in any way that the impugned decisions were taken on the basis that the existing 2050 Target did not need to be altered in light of the Paris Agreement, merely that the Secretary of State "*should*

not set 2050 Target now" (see §7 of the PAP Response, emphasis added: see also the use of the word 'yet' in the passage from the SGD quoted in §25 above). However, it later emerged from his response to this claim that the Secretary of State is now seeking to contend that the 2050 Target is (or might be) consistent with the ambition required under the Paris Agreement (see §36 of his Skeleton dated 3 July 2018). That is another very significant change of position.

(c) The Secretary of State submitted a Skeleton Argument dated 15 March 2018 for the abortive permission hearing on 20 March, and another Skeleton dated 3 July for the adjourned permission hearing the next day. In both Skeletons (§16 of the former, and §21 of the latter), a legal argument was advanced on his behalf to the effect that the Paris Agreement embodied 2 separate targets, which addressed different time periods – the first being the aim of keeping the increase in the global average temperature well below 2°C above pre-industrial levels, and the other being a goal of pursuing efforts to limit the global average temperature increase to 1.5°C above pre-industrial levels, which would require a move to net-zero emissions only "*in the second half of this century*" (emphasis in the original). At the oral hearing on 4 July, counsel for the Secretary of State conceded that this argument was "*wrong*": it was not apparent from this concession whether he was telling the court **(i)** that the interpretation set out in the Skeletons had indeed formed part of the Secretary of State's actual decision, which was accordingly flawed, or **(ii)** that the argument set out in the Skeletons was a lawyers' construct, and the legal team was making a concession that their argument was wrong. In either event, it is apparent that the Secretary of State is again not seeking to sustain the basis on which his decision was originally justified.

55. The Secretary of State has also taken a deliberate decision not to be forthcoming about the reasons for the impugned decisions. Before receiving the PAP Response, the Appellants did not even know that the impugned decisions had been taken, and the PAP Letter was written on the basis that the Appellants were challenging the Secretary of State's failure to take a decision. Once it emerged that the Secretary of State had taken a decision back in October 2016, the Appellants sought to ascertain in correspondence the reasons for that decision, but in response the GLD refused to answer: see the letter from Bindmans LLP dated 8 November 2017, and the GLD response of 17 November.

The CCC's position

56. After the Paris Agreement had been signed, the CCC considered its implications for the 2050 Target under the 2008 Act. The minutes of its meeting on 16 September 2016 contain a clear (and correct) recognition "*that the aims of the Paris Agreement … 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*" and accordingly "*a new long-term target would be needed to be consistent with Paris*" (emphasis added). The same point was repeated in the CCC's 2016 Report (p.8), which stated that the UK's "*current emissions targets are not aimed at limiting global temperature to as low a level as in the [Paris] Agreement*", and in response to the Government's Clean Growth Strategy, where it said (p. 21) that "*the Paris Agreement is likely to require greater ambition by 2050*".

57. In its response to this claim, there was then a *volte face*. In §24 of its Summary Grounds of Defence, the CCC claimed for the first time that "*the primary basis for its advice*" given to the Secretary of State in October 2016 not to amend the 2050 Target "*was on the question … of consistency of the existing 2050 target with the Paris range of ambition*" (emphasis added). This was not only an abrupt change of tack, but it was also inexplicable: the Appellants can see nothing in the CCC's October 2016 Report to suggest that its advice at the time was based (let alone based primarily) on the premise that there was no need to amend the 2050 Target because it was compatible with the UK's obligations under the Paris Agreement. The Judge's finding to the contrary (see §25 of his judgment) fails to identify where in the October 2016 Report it is made clear that this is the primary basis for the CCC's advice.

Conclusion on Ground 7

58. In light of the various factors listed in §53 above, the Secretary of State owes a duty of candour which is engaged before the grant of permission to apply for judicial review. In the absence of a full and frank explanation from him of the grounds on which he took the impugned decisions, the judge below ought to have granted permission to apply for judicial review. In particular, if the reason why the Secretary of State has been so coy about explaining the grounds for his decisions is that he did not in truth apply his mind to the exercise of the discretion under s. 2 of the 2008 Act at all, but merely rubber-stamped the CCC's advice, then both the court and the Appellants should be told; and in that event the Appellants would wish to add to their grounds of challenge an

allegation that the Secretary of State has failed to exercise his discretion, and has instead abdicated it in favour of the CCC.

TIMING

59. As the Appellants have repeatedly emphasised above, delay compounds the problems posed by climate change. Accordingly, they respectfully request the court to deal with this application for permission and any subsequent hearing as quickly as is possible within the constraints of the court's diary.

OVERALL CONCLUSION

60. The effect of the Secretary of State's decisions is to maintain in place a 2050 Target which is tied to a temperature limit that has been rejected by the international community as inadequate and dangerous. He has provided no coherent explanation for his position. For the reasons outlined above, the judge was wrong to refuse permission, and this court is respectfully invited to grant the Appellants permission to apply for judicial review on all or any of the above grounds.

Jonathan Crow QC
Emily MacKenzie

Bindmans LLP
26th July 2018