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CLIMATE CHANGE LAW. CURRENT PERSPECTIVES.

The European Convention on Human Rights in Climate Change Litigation

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Abstract

The State of Netherlands v Stichting Urgenda, Supreme Court of the Netherlands, 20 December 2019 (**Urgenda**) was a landmark case in the application of rights under the European Convention on Human Rights (**ECHR)** in the context of climate change litigation.

The Dutch Supreme Court held (upholding the District Court and Court of Appeal) that Articles 2 and 8 of the ECHR required the Dutch State to reduce the emissions of greenhouse gases originating from Dutch soil by 25% compared to 1990, by the end of 2020.

This Article considers the reasoning of the Dutch Supreme Court in *Urgenda* and considers some of the potential implications of this historic decision for climate change litigation in the English Courts.

The Urgenda Decision

Based on a 2007 programme, the Netherlands was working towards a 30% reduction target in 2020 compared to 1990. After 2011, the Dutch reduction target was adjusted to the EU-level of 20% in 2020. Urgenda sought an order directing the Dutch State to reduce its greenhouse gas emissions by 40% (or at least 25%) compared to 1990, by 2020. At first instance, the Dutch Court granted the order of a reduction by 25%. This was upheld by the Dutch Court of Appeal, and by the Supreme Court.

The Facts

The Dutch Courts placed great emphasis on the climate science evidence that was put before them, and the conventional and well-established understanding of the effects of greenhouse gas emissions on climate change. In particular, the Dutch Courts relied on the following sources.

First, the reports of the Intergovernmental Panel on Climate Change (**IPCC**). It cited the Fourth and Fifth IPCC Assessment Reports to establish that temperature increases above pre-industrial levels entailed the risk of a dangerous, irreversible change in the climate, and that climate change was the direct result of the increased concentration of carbon dioxide in the atmosphere. Importantly, the Dutch Courts drew on the finding of the IPCC that greenhouse gas emissions of certain countries (including the Netherlands) must be reduced by 25%-40% by 2020 relative to 1990 levels. Second, the periodic reports of the United Nations Framework Convention on Climate Change (**UNFCCC**). Third, the Paris Agreement. And fourth, the reports of the United National Environment Programme.

Accordingly, the Supreme Court stated that *"Climate science long ago reached a high degree of consensus that the warming of the earth must be limited to no more than 2°C and that this means that the concentration of greenhouse gases in the atmosphere must remain limited to a maximum of 450 ppm. Climate science has since arrived at the insight that a safe warming of the earth must not exceed 1.5°C and that this means that the concentration of greenhouse gases in the atmosphere must remain limited to a maximum of 430 ppm."* Drawing on the IPCC Assessment Reports and the UNFCCC conference reports, it added that *"exceeding these concentrations would involve a serious degree of danger"* that *"hazardous consequences which will jeopardise the food supply, result in loss of territory and habitable areas, endanger health, and cost human lives"* will *"materialise on a large scale"*

The Law

One of the key questions for the Dutch Courts was whether Articles 2 and 8 ECHR imposed an obligation on the Dutch State to counter climate change. The Dutch State submitted that they did not, and the danger from climate change was not sufficiently specific (i.e., it was a global threat, not a national threat) to fall within the scope of protection of Articles 2 and 8. Further, it was

argued by the State that the environment is not itself protected by the ECHR.

The Dutch Supreme Court rejected the State's arguments. Drawing on ECtHR jurisprudence, it noted that a State is obliged by Article 2 take appropriate steps if there exists a real and immediate risk to people's lives or welfare and the State is aware of that risk. 'Immediate' was held not to mean that the risk will materialise in the short term, but that the risk in question directly threatens relevant persons. It also held that Article 8 imposed a positive obligation on the State to take reasonable and appropriate measures to protect individuals against possible serious damage to their environment. The obligations imposed by the two Articles were said to overlap largely with each other, and also to encompass the duty of the State to take preventative measures to counter the danger.

The key passage of the Supreme Court's judgment was at paragraph 5.6.2 *et seq*. There, the Dutch Supreme Court held that the Dutch State was obliged to do its part in reducing emissions, notwithstanding that emissions reduction was a global problem.

"...no other conclusion can be drawn but that the State is required pursuant to Article 2 and 8 ECHR to take measures to counter the genuine thereat of dangerous climate change if this were merely a national problem. Given the findings above, after all, this constitutes a 'real and immediate risk'...and it entails the risk that the lives and welfare of Dutch residents could be seriously jeopardised. The same applies to...the possible sharp rise in the sea level, which could render part of the Netherlands uninhabitable....The question is whether the global nature of the emissions and the consequences thereof entail that no protection can be derived from Articles 2 and 8 ECHR, such that those provisions impose no obligation on the State in this case...The answer to the question [above] is in the opinion of the Supreme Court, that under Articles 2 and 8 ECHR, the Netherlands is obliged to do 'its part' in order to prevent dangerous climate change, even if it is a global problem".

Urgenda in the English Courts

Urgenda is a reasonably recent decision. It was handed down on 20 December 2019. In the time since then, it has been cited on two occasions in English proceedings.

First, in R *(oao Friends of the Earth Limited) v Secretary of State for International Trade* [2022] EWHC 568 (Admin), a challenge was made to the decision of the Secretary of State to provide up to USD 1.15 billion in export finance and support in relation to a liquefied natural gas project in Mozambique, on the basis that it was based on an error of law or fact, namely that the project and its funding was incompatible with the United Kingdom's commitments under the Paris Climate Change Agreement. *Urgenda* was cited in support of the propositions that it is now well-established that there is a direct correlation between the concentration of greenhouse gases, which retain the heat radiated by the earth, in the earth's atmosphere, and the rise in average global temperatures, and that the environmental and social impacts of the increase in global temperature are potentially catastrophic. *Urgenda* therefore served as useful authority for propositions of the scientific consensus on the facts. *Urgenda* also provides helpful indications of the kinds of evidentiary and documentary material (referred to above) that should be placed before the Court to establish the relevant facts.

Second, in R *(oao Plan B Earth) v the Prime Minister* [2021] EWHC 3469 (Admin), the claimants sought to challenge the lawfulness of the policies of the UK Government relating to climate change and submitted that the UK Government had failed to take practical and effective measures to align UK greenhouse gas emissions to the Paris Temperature Limit, including on the basis of Articles 2 and 8 ECHR. Bourne J refused permission to apply for judicial review. He said at [48] *et seq* that the administrative framework under the Climate Change Act 2008 consisted of high level economic and social measures involving complex and difficult judgments, and that in this case the claimants were inviting the Court to *"venture beyond its sphere of competence"*. The decision in *Urgenda* was cited to the Court, but Bourne J distinguished it on the basis that: (i) he had not been given any comparison of the constitutional laws in play and between the powers of the Dutch and English courts in such matters (the Netherlands has an essentially monist approach to public international law which contrasts with the UK's dualist approach); and (ii) the challenge in Urgenda was not to a framework of laws, but to a change in the State's reduction target. He expressly refused to answer the question of whether a challenge similar to *Urgenda* could have been viable in the English Court.

It follows that the door remains open for a more focussed *Urgenda*-type challenge in the English Courts to government emissions policy. It is clear from Bourne J's judgment that any such challenge would need to include a clear explanation/comparison of the constitutional laws in play in *Urgenda* and between the differing approaches to international law obligations. However, Bourne J's judgment exhibited a typically English reluctance of the judiciary to interfere in decisions which are the domain of politics. This stands in contrast to the *Urgenda* decision, where the Dutch Courts were content to dismiss the Dutch State's argument that the reduction of greenhouse emissions was exclusively a matter for the political domain.

The full implications of the decision in *Urgenda* in the English Courts are yet to be determined. It provides a fascinating blueprint for claimants seeking to use the ECHR to promote and enforce climate change action, but one which, on any view, will not be easy to replicate in the English Courts.

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