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CLIMATE CHANGE LAW. CURRENT PERSPECTIVES.

Delivery Risk and Legal Challenges to the United Kingdom's Carbon Budget Delivery Plan

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This is the first blog post in a series which summarises the major developments in climate litigation in 2024, both in the United Kingdom and worldwide.

The Downstream Effects of Finch

In May 2024, Mr Justice Sheldon held that the then-Government's Carbon Budget Delivery Plan ("**CBDP**") failed to comply with its obligations under the Climate Change Act 2008 ("**CCA 2008**") in Friends of the Earth v Secretary of State for Energy Security and Net Zero [2024] EWHC 995 (Admin).

This was the second occasion on which the Government's plan to reduce the overall UK greenhouse gas emissions had been found unlawful. In 2022, the previous strategy (called the Net Zero Strategy or "**NZS**") was quashed on a similar basis in R (Friends of the Earth) v Secretary of State for Business, Energy and Industrial Strategy [2022] EWHC 1841 (Admin); [2023] 1 WLR 225.

Together, these two cases demonstrate the court's willingness to interrogate the evidential basis for the Secretary of State's decision-making.

Sections 13 CCA 2008

The CCA 2008 requires the UK Government to set 'carbon budgets', which restrict the total amount of greenhouse gas emissions which the UK can emit over a five-year period. Each carbon budget acts as a 'stepping-stone' towards the UK's ultimate target of achieving net-zero emissions by 2050. Section 13(1) CCA requires the relevant Secretary of State to prepare policies and proposals which "**will** enable the carbon budgets… to be met".

The NZS Challenge

The Government published the NZS in October 2021. This strategy set out the Government's policies to cut GHG emissions to meet its Sixth Carbon Budget ("**CB6**") of 965Mt of CO2, for the period 2023 to 2037.

In the first challenge to the NZS, Holgate J concluded at [202]-[204] that the risk of non-delivery ("**delivery risk**") of individual policies, and the effect of such delivery risk on achieving the carbon budgets, was an obviously material consideration for the Secretary of State to consider before adopting the strategy. The s.13(1) duty required that relevant policies "will" enable the budgets to be met: if the Secretary of State did not know or could not understand the delivery risk, any decision to adopt the policies would be irrational.

The advice given to the relevant Minister before adopting the NZS failed (among other omissions) to identify the relative contributions in cutting emissions made by individual policies. As a result, the Government was ordered to produce a compliant plan to achieve CB6. This was published as the CBDP in March 2023.

The CBDP Challenge

Once again, this challenge turned upon the advice given to the Secretary of State by civil servants. The first three grounds of challenge alleged that the Secretary of State had inadequate evidence about the delivery risk policies identified in the CBDP.

Sheldon J allowed these grounds on the primary basis that the Secretary of State had taken the decision on a mistaken assumption that the policies would be delivered in full. This was an orthodox application of R (Wells) v Parole Board [2019] EWHC 2710 (Admin): Wednesbury irrationality will be demonstrated where there is an unexplained evidential gap or a leap in reasoning which undermines the decision-maker's conclusion.

In the alternative, the judge found at [132] that the Secretary of State was not provided with sufficient information as to the obviously material consideration of delivery risk. They *"had no way of knowing which proposals and policies might not be delivered, or delivered in full"*.

Comment

The success of the claimants in both proceedings raises three points of wider interest for climate-related public law litigation.

First, as Catherine Higham and Joanna Setzer have noted elsewhere, statutory frameworks for policies which reduce GHG emissions can be framed and interpreted narrowly, such that mere compliance with a procedural step suffices, or purposively, such that the courts can enquire into the effectiveness of the substantive policies. The High Court has interpreted the duty under s.13(1) CCA 2008 purposively, such that the Secretary of State must demonstrate a minimum level of certainty that the proposed policies will meet the statutory targets in emissions reductions.

Second, over the last five years, climate-concerned litigants in the United Kingdom have initiated multiple public law challenges on the ground that a decision-maker failed to take into account a consideration which was so "obviously material" that the decision was irrational. As other members of Essex Court Chambers have previously explained here, many such challenges have failed. The claimants' success in these two challenges is attributable to the particular statutory framework of the CCA 2008 and Holgate J's interpretation of s.13(1) in the first case.

Third, there is a residual tension between (i) the inherent difficulties of predicting reductions in GHG emissions over long periods in a polycentric policy context and (ii) the minimum level of certainty demanded of the Secretary of State when they propose policies under s.13(1). In these two cases, irrationality was demonstrated because essential information was simply left out of the advice given to the Secretary of State. However, it remains to be seen how the Courts will treat circumstances where the Secretary of State relies on a more detailed quantitative or qualitative assessment of delivery risk. In short, what information or data is sufficient for a Secretary of State to consider that the budgets will be met?

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