Climate Change in the UK Courts: Perspectives of a Judge

Introduction

1. The purpose of this paper is to provide some personal perspectives in relation to climate change litigation from a UK judge of the Planning Court of the High Court of England and Wales ("the High Court"). It is a particular perspective both because of the common law tradition of that jurisdiction, and also as a result of of the specific legislation which the UK has enacted.

2. At present the number of cases which have been brought which engage specifically with this issue is somewhat limited. There is an inevitable interrelationship between cases directly engaged with climate change and those which are concerned with air quality and so these cases are also reviewed. Both these types of cases involve the atmosphere in which we live. Having introduced the context of the UK jurisdiction, this paper then considers UK legislation in relation to climate change and the way in which that legislation has been considered in the courts. The paper then goes on to consider cases which have been concerned with air quality.

3. The themes which emerge from the High Court experience can be identified as follows. Firstly, although there is undoubted widespread public concern in relation to the issues both of climate change and air quality in the UK, the extent of the role of the judge in the High Court is necessarily limited by the scope and nature of the legislative instruments which are in place, and the scope of the court's powers in scrutinising decisions. Secondly, it is evident from the cases that there are limitations on the role of the court as a consequence of the way in which legislation, both at a national and an EU level, has been framed.

4. Thirdly, of particular importance in the context of the High Court, is the need to have regard to the proper constitutional role of the judiciary.

Whilst within the UK the judiciary is the branch of the state which ensures the upholding of the rule of law, the judges in exercising their jurisdiction have to properly recognise and respect the role of the legislature as the branch of the state which provides the laws which are in point, and the role of the executive in making policies and providing the framework for actions to address concerns about climate change and air quality.

The Jurisdiction of the Planning Court

5. Public law cases in England and Wales are heard within the branch of the High Court known as the Administrative Court. Within the Administrative Court there is a separate list or category of environmental cases which are heard in the Planning Court. The Planning Court is staffed by judges who have been identified as being experienced in dealing with environmental litigation. They are therefore a specialist branch of the judiciary.

6. In a recent speech the Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, identified and emphasised the importance of the independence of the judiciary as the branch of State with the responsibility for impartially upholding the rule of law. Whilst the UK constitution is essentially unwritten, this important role is long established[1]. The Lord Chief Justice was however also keen to emphasise the clear need for the judiciary to exercise its role showing proper respect for the supremacy of Parliament as the legislature with responsibility for creating legislation, and appropriate respect for the executive with its responsibility for running government, setting policy and regulating activity.

7. These constitutional arrangements, broadly speaking, provide a backdrop to one of the cardinal principles of the common law in relation to public

[1] "The Judiciary within the State – the relationship between the branches of the State" Michael Ryle Memorial Lecture, River Room, Palace of Westminster, 15th June 2017

law decision-making, namely that the court does not exercise a full merits review of the decision. The court's role is to examine whether or not there has been an error of law in the way in which the decision has been made but not to remake the decision.

8. This cardinal principle can be seen illustrated in the seminal case of Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 KB 223. The case is about to celebrate its 70th birthday, on 10th November, but nonetheless remains central to an understanding of how the public law operates.

9. The claimants (or plaintiffs as they were known at that time) were the proprietors of a cinema in the Black Country town of Wednesbury. Under the Sunday Entertainments Act 1932 a local authority had powers in relation to imposing conditions on a licence permitting a cinema to open on a Sunday. The power to impose the conditions was expressed in general terms. The defendants and local authority, the Wednesbury Corporation, imposed a condition on the cinema's licence prohibiting any child under the age of 15 from attending the cinema on a Sunday. The claimants complained that the condition was not within the power of the Act and that the Wednesbury Corporation were not competent to impose such a condition.

10. Giving the leading judgment of the Court of Appeal, with which the other two Judges agreed, Lord Greene MR summarised the principles applying to the court's jurisdiction in the following terms:

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the

matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override the decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them."

11. Whilst this is far from being a complete statement of the various public law grounds upon which the court can interfere (which include, for instance, violations of the principle of fairness, a misinterpretation of the legislation or policy which the public body was applying, or the failure to honour a legitimate expectation given by the public body) it nevertheless accurately summarises the common law jurisdiction which is confined to examining "whether the authority have contravened the law by acting in excess of the powers which Parliament has confided in them" rather than remaking the decision. These broad principles are set out to provide an understanding of the operation of the court and the extent to which judicial intervention in executive action can be justified.

Climate change

12. In response to concerns in relation to climate change the UK Parliament enacted the Climate Change Act 2008. The stated intention of the Act was to set a target for the year 2050 for the reduction of targeted greenhouse gas emissions and to provide for a system of carbon budgeting to achieve that end. Section 1 of the 2008 Act provided as follows:

> "1 The target for 2050
> (1) It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline."

13. Subsequent provisions of the Act enabled the Secretary of State to amend the percentage comprised in the target and provide for procedures to do so.

14. Sections 4 and 5 of the 2008 Act provided for a duty on the Secretary of State to set carbon budgets for successive periods of five years starting from 2008 so as to achieve the reductions necessary over the course of time to meet the target. The 2008 Act contains provisions requiring reporting annually in relation to UK emissions. Section 32 of the 2008 Act set up a Committee on Climate Change with a duty to advise the Secretary of State on whether or not the percentage identified in section 1(1) of the Act should be amended and if so to what. The Committee is also charged with providing advice in relation to the setting of carbon budgets in accordance with the obligations in the Act.

15. Shortly after the Act came into force local authorities opposed to a third runway being built at Heathrow Airport mounted a challenge to decisions reached in relation to that project in the case of Hillingdon London Borough Council and Others v Secretary of State [2010] EWHC 626. They relied upon the obligations which had been created within the 2008 Act, subsequent to the decisions which had been reached to pursue the third runway proposal. Ultimately, the arguments based on the 2008 Act (and a range of other matters which were relied upon) did not prove fruitful. Carnwath LJ (as he then was) reached the overarching conclusion that the decisions which were the subject of the judicial review were only a part of a wider process of decision-making which would require further stages and fresh consideration to be given to, amongst other matters, the implications of the 2008 Act. He concluded[2] that none of the matters raised in relation to climate change, including the points made about the implications of the 2008 Act, operated as a "show-stopper" in the sense that the only rational response to the points would have been to

[2] See paragraphs 77 and 78

abandoned the whole project at that stage. Thus the application for judicial review failed.[3]

16. The Climate Change Act 2008 was also deployed as part of the argument in the case of R (on the application of People and Planet) v HM Treasury [2009] EWHC 3020. This case concerned the policy adopted by HM Treasury for handling its investment in the Royal Bank of Scotland ("RBS"). The Government's shareholding in RBS was held through a company which was itself 100% owned by HM Treasury. The investment policy which HM Treasury operated through the independent company called for a commercial approach to be taken to its investments. The claimant argued that the policy should require RBS to change its commercial lending practices and policies, and adopt practices and policies which did not support ventures or businesses harmful to the environment by reason of either carbon emissions or a failure to properly respect human rights.

17. As part of their argument the claimant contended that the Climate Change Act 2008 created a legitimate expectation that the Government's investments would be administered so as to advance the objective of reducing greenhouse gasses and their impact on the environment. The case came before Sales J (as he then was) as an oral renewal of an application for permission to apply for judicial review. He regarded the point as unarguable and in the course of his judgment stated as follows:

> "Section 1 of that Act [the 2008 Act] creates a broad duty on the Secretary of State but does not support the legitimate expectation pleaded."

18. Whilst therefore there has been academic discussion in respect of the court directly enforcing and creating remedies using the duty established

[3] The controversy in relation to the creation of a third runway continues notwithstanding further decision-making stages since this case

by the Climate Change Act 2008[4] the experience hitherto in the courts is that the 2008 Act has not given rise directly enforceable remedies thus far.

19. Of course, concerns in relation to climate change are an important influence upon the policies dealing with development projects and energy generation. The generation of greenhouse gasses will also be an environmental effect which may need to be addressed as part of the environmental impact assessment process.

20. These issues arose in <u>Preston New Road Action Group and Frackman v Secretary of State for Communities and Local Government and Others</u> [2017] EWHC 808. This case concerned two challenges to decisions in relation to exploratory rigs to examine whether it would be economical to exploit natural gas contained within a geological formation known as the Bowland Shale in Lancashire. One of the challenges proceeded on the basis that there had been a failure to properly evaluate the generation of greenhouse gases during the course of the project. The claimant's case was ultimately unsuccessful[5]. In this context it is important to note that this ground of challenge was advanced deploying well known and essentially uncontroversial principles of law, and applying them to the particular environmental effect in question namely that associated with greenhouse gas generation. Thus, the issues of greenhouse gas emissions and climate change were addressed within the case in precisely the same manner as might have applied to any other relevant environmental effect to be taken into account as part of the environmental impact assessment process. Familiar principles of environmental law were, therefore, perfectly capable of being adapted and deployed in support of arguments related to climate change.

[4] See Church: Enforcing the Climate Change Act UCL Journal of Law and Jurisprudence

[5] The case is currently the subject of an unresolved appeal

Air Quality

21. The majority of the cases considered within the UK in relation to air quality have been brought within the framework of the EU Directive 2008/50/EC. In particular, the Supreme Court in the case of R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs [2015] UKSC 28, having originally referred questions to the CJEU, granted mandatory relief to the claimants, ClientEarth, requiring the Secretary of State to prepare new air quality plans under Article 23(1) of the Directive not later than 31st December 2015.

22. This, essentially procedural, relief was followed by further action taken by ClientEarth in ClientEarth (No 2) v Secretary of State for the Environment, Food and Rural Affairs and Others [2016] EWHC 2740 in which ClientEarth contended that in a variety of ways the air quality plans which were published subsequent to the Supreme Court's decision were unlawful. This required a more substantive rather than procedural examination of the plans and the principles under pinning their preparation.

23. Garnham J concluded that the Secretary of State had fallen into legal error and misapplied the requirements of Article 23 of the Directive in fixing on a projected compliance date of 2020 (and 2025 for London) for "little more than administrative convenience" and had thereby deprived herself of the opportunity to discover whether an earlier date should be taken to enable a faster route to lower emissions being devised. He further concluded that the Secretary of State had fallen into legal error by deploying within the modelling assumptions as to likely emission rates which were "markedly optimistic", which in turn led to the air quality plan to fail to identify measures ensuring exceedance periods would be kept as short as possible in accordance with the requirements of the Directive.

24. As with climate change issues, questions relating to air quality can become engaged in challenges to individual development consents. The case of PS v Royal Borough of Greenwich and others [2016] EWHC 1967 is an example of a claim brought on air quality grounds in relation to a failure to take account of cumulative and combined effects on air qualities as a consequence of the development proposed. In that instance the development was a cruise ship terminal on the River Thames.

25. The claim ultimately failed on the basis that Collins J was satisfied that in fact many of the effects had already been addressed as part of an earlier development consent which was capable of being implemented and accommodating cruise ships. What, for present purposes, is of note is that the application proceeded deploying familiar legal principles associated with environmental impact assessment and the legal requirements for that process to have been adequately and legally followed.

Conclusions

26. The case law which has been reviewed illustrates the self-restraint which necessarily has to be observed within a common law jurisdiction in respect of administrative decision-making. The substantive task of tackling the issues related to climate change and exceedances of air quality thresholds has principally to be addressed either through the creation by the legislature of an appropriate legal framework or, most directly, by policy makers within the executive. It is for the executive, if persuaded of the need to do so, to devise and secure regulatory methods to ensure that both greenhouse gas emissions and air quality thresholds are appropriately controlled.

27. That is not to say that there is not scope within the existing legal frameworks for the courts to take action where there have been breaches of the specified legal requirements or the public law principles giving the

High Court jurisdiction. Legal action can operate through the specific remedies envisaged, for instance, within the Air Quality Directive or by the application of well understood principles in relation to environmental impact assessment.

28. In particular, it remains to be seen whether there is within either the executive or legislature appetite for recognition of any wider fundamental right or rights to a safe and healthy environment. Hitherto the reach of Article 8 has not been thought or held to extend that far. It is undoubted that the provision of a healthy and safe environment is one of the important facets of sustainable development. Further recognition of that as a right would require actions which are probably beyond the scope or jurisdiction of the High Court.