

## Briefing

# Net Zero Strategy 2 Legal Challenge

### At a glance

- Following our landmark victory in July 2022 in relation to the Government’s Net Zero Strategy (“NZS”), Friends of the Earth, ClientEarth and Good Law Project (“GLP”) are taking the Government to court for the second time on the basis of breach of the Climate Change Act 2008 (“CCA”).
- Following its loss last year in the High Court, the Government was ordered to revise its NZS to correct the legal errors identified in the High Court’s [judgment](#). However, Friends of the Earth’s view is that the revised strategy, the [Carbon Budget Delivery Plan](#) (“CBDP”) adopted by the Secretary of State for Energy Security and Net Zero (The Rt Hon Grant Shapps; the “SoS”) and published on 30 March 2023, is inadequate, and still falls short of the requirements of the CCA. ClientEarth and GLP agree, and so we have once more each filed cases at the High Court.
- Friends of the Earth believes that once again, the SoS has acted unlawfully as he had legally insufficient information to enable him to adopt the CBDP, and the CBDP itself did not contain sufficient information to enable scrutiny by Parliament (respectively, in breach of the duties under s.13 and s.14 of the CCA).
- In the previous case, Justice Holgate concluded that “risk to delivery” and to the achievement of the carbon reduction targets was an “obviously material consideration” which the SoS must take into account.<sup>1</sup> However, there is a glaring lack of information in the CBDP on the risk associated with individual policies, both in terms of how high or low risk the policies themselves are, and also the level of uncertainty associated with them actually being delivered. Yet despite this lack of information, the Government’s assertion that the CBDP will enable carbon budgets to be met is based on all of these policies being delivered in full.

### Background and context

1. Friends of the Earth was the organisation that originally devised the CCA over 15 years ago and led the ‘Big Ask’ campaign to make it law. We believe that the successful implementation of the CCA’s provisions is of paramount importance in tackling the climate emergency, both for this country and across the world. The CCA was the first piece of legislation in any country to set a legally binding framework in domestic law towards a long-term carbon reduction target in 2050.
2. We are facing a climate crisis, and the Government is not taking this seriously. Last summer, this country experienced record-breaking temperatures of 40 °C, and an unprecedented number of wildfires was recorded<sup>2</sup>. Extreme weather events like

this will only increase in severity and frequency if urgent action is not taken to reduce carbon emissions.

#### The previous court case

3. The NZS was the Government's economy-wide decarbonisation plan for cutting UK carbon emissions in order to meet our upcoming carbon budgets. It was published following the adoption of the Sixth Carbon Budget (6CB), which covers the period 2033-2037 and requires the country's carbon emissions to be limited to a maximum of 965 million tonnes of CO<sub>2</sub>e in that period.
4. In July 2022, a landmark judgment was handed down by the High Court in relation to legal challenges brought by Friends of the Earth, ClientEarth and GLP. The High Court found that the Government had breached its duties under s.13 and s.14 of the breached the CCA when it adopted the NZS.
5. The Court found that the Minister had adopted the NZS with legally insufficient information to enable him to conclude that the policies and proposals would enable the upcoming carbon budgets to be met, and that the report itself to Parliament also lacked critical information which undermined the ability of Parliament and the public to scrutinise it. In particular, the NZS lacked information on what emissions reductions the policies were expected to achieve. Whilst the Minister was told that the total emissions savings expected from the policies added up to c.95% of the emissions reductions needed to meet the 6CB, he was not provided with a breakdown of what emissions savings the individual policies were expected to deliver. Meanwhile, Parliament was effectively kept in the dark, and was not informed that there was a 5% shortfall (amounting to approximately 75 million tonnes of CO<sub>2</sub>e)<sup>3</sup>, in what the quantified policies were expected to achieve. This shortfall only came out through the court case. Friend of the Earth's legal briefing on the judgment is [here](#).
6. The Government was ordered to produce a revised strategy to correct the legal errors identified in the judgment. It had 9 months to do this, with a deadline of 31 March 2023.

#### The Revised Plan

7. On 30 March 2023, the Government published its revised plan, the CBDP. Unlike its predecessor, the CBDP does contain information on both the total emissions savings that its policies are predicted to achieve, and the breakdown of the contributions of individual policies (with the exception of the power sector, which has a group total only). There has therefore been an improvement in transparency, as compared to the NZS.

8. The CBDP states that the quantified policies will achieve (assuming delivery in full) 97% of the emissions savings necessary to meet the 6CB, and 92% of the emissions savings necessary to meet the UK's Nationally Determined Contribution (NDC)<sup>4</sup>. The NDC is adopted under the Paris Climate Agreement<sup>5</sup> rather than the CCA, and requires a 68% reduction in emissions by 2030 as compared to the 1990 baseline. In Friends of the Earth's view, the large shortfall in terms of the NDC is particularly concerning, given that the deadline is in 7 years' time.
9. However, having carefully considered the CBDP and associated documents, Friends of the Earth's firm view is that it is inadequate and still does not comply with the SoS' duties under the CCA. We therefore made the decision to file a second court case against the Government. Details of our concerns over the policies in the CBDP are set out in this [blog](#) by Mike Childs, our Head of Science and Policy.

#### The CCC's view

10. The Committee on Climate Change (CCC) is the independent expert body appointed under the CCA to advise the UK on tackling climate change. In June 2022, the CCC issued its [Progress Report](#), which concluded that of the emissions savings needed to meet the 6CB, there were credible policies in place for 39% of those savings.<sup>6</sup>
11. In June 2023, the CCC's view in its [Progress Report](#) was that there were credible policies in place for just 19% of the emissions savings required to meet the 6CB, so less than previously. It is important to note that in our previous NZS case, the High Court placed "considerable weight" on the CCC's views when interpreting the duties under the CCA<sup>7</sup>.

## Legal Challenge

12. The procedural history on our new legal challenge so far, is as follows:
  - On 30 March 2023, the CBDP was published.
  - On 14 April 2023, Friends of the Earth sent a pre-action letter to the SoS.
  - On 15 June 2023, Friends of the Earth filed its claim at the High Court to challenge the CBDP.
13. ClientEarth and GLP have also filed legal challenges in relation to the CBDP. The three NGOs have coordinated with each other in preparing our respective cases. Friends of the Earth seeks to challenge the CBDP on three key grounds, which are summarised below.

#### Ground 1: A Breach of section 13(1)

14. Under s.13(1) CCA, the "...Secretary of State must prepare such proposals and policies as the Secretary of State considers will enable the carbon budgets that

have been set under this Act to be met.” (emphasis added). The SoS’ conclusion that its proposals and policies “will enable” the carbon budgets to be met for the purpose of s. 13 proceeds on the assumption that all proposals and policies will be delivered in full. Friends of the Earth believes that the statutory duty has been breached. In the previous NZS case, Justice Holgate found that delivery risks are an “obviously material consideration”<sup>8</sup>. Drawing on this, in relation to the CBDP, Friends of the Earth argues that the SoS was not provided with necessary information pertaining to delivery risks, including:

- Risk assessments by Government departments responsible for particular policies;
- Assessments of delivery risks relating to Devolved Administrations’ individual proposals and policies; and
- Delivery risks associated with the majority of the quantified proposals and policies in the CBDP (i.e. those policies for which emissions savings had been calculated).

15. Further, Friends of the Earth argues, as a result of the SoS unlawfully not being provided with the necessary information pertaining to delivery risks, there was no legally sufficient basis for the SoS to conclude that the CBDP’s proposals and policies “will enable” the carbon budgets to be met.

#### Ground 2: A Breach of section 14

16. S.14 CCA sets out the duty to report on proposals and policies for meeting carbon budgets. It requires that:

“ (1)As soon as is reasonably practicable after making an order setting the carbon budget for a budgetary period, the Secretary of State must lay before Parliament a report setting out proposals and policies for meeting the carbon budgets for the current and future budgetary periods up to and including that period.

(2)The report must, in particular, set out—

(a)the Secretary of State's current proposals and policies under section 13, and

(b)the time-scales over which those proposals and policies are expected to take effect...”

17. In our successful challenge of the NZS in 2022, Justice Holgate found that the s.14 report must include information that is obviously material to “the critical issue of risk to delivery of the carbon budgets”<sup>9</sup>. Friends of the Earth argues that the SoS has failed to do this in the following ways:

- The CBDP fails to include an assessment of risk to delivery of individual proposals and policies;
- The CBDP fails to include information on the delivery risks relating to Devolved Administrations’ individual proposals and policies; and

- The CBDP fails to include information about the delivery risk and delivery confidence of individual proposals and policies produced by individual government departments (such as that included in the DEFRA leak reported in the news)<sup>10</sup>.

Ground 3: A Breach of section 13(3)

18. Under s. 13(3) CCA, the SoS is under a duty to prepare proposals and policies for meeting carbon budgets, which “...taken as a whole must be such as to contribute to sustainable development” (emphasis added). However, the SoS has said in the CBDP that its “...overall contribution to sustainable development is likely positive”<sup>11</sup> (emphasis added). Friends of the Earth argues that “likely” is a different and a lower threshold than “must”, which is what is required by the CCA.
19. In addition, Friends of the Earth believes that there is a real and significant risk that the NDC deadline will not be met by the CBDP, and this is heightened by the lack of specificity in how the 8% shortfall will be made up. Friends of the Earth argues that the SoS lacked legally sufficient information to enable him to know whether the NDC (with a deadline 7 years from now) will actually be met by the proposals and policies. This is important for the s.13(3) duty, because a failure to meet the NDC risks compromising the ability of future generations to meet their own needs, and therefore undermines the core aspect of sustainable development.

ClientEarth and GLP

20. ClientEarth’s case focuses on the Government’s failure to have regard to considerations that are legally essential under s. 13 of the CCA, related to the risks of its plans not delivering the emissions savings required to meet the UK’s climate targets. ClientEarth also argues that the Government’s assumption that the projected emissions savings from its policies will be delivered ‘in full’ was not rational. In GLP’s case, they argue that the Government has acted unlawfully and breached s.14 CCA by failing to include a proper assessment of the delivery risk associated with each of the policies and proposals in the CBDP.

**Why are we bringing this case and what do we hope to achieve?**

21. June 2023 was the hottest June on record in this country. Last summer, the country experienced wildfires, and record-breaking temperatures of 40 °C. We need to see urgent action to address the climate crisis and to reduce our carbon emissions. But unfortunately, that is not what is happening. Of the emissions reductions needed to meet the 6CB, the assessment of the CCC is that there are currently credible policies in place for just 19%.
22. Friends of the Earth decided to take this case because we concluded that the CBDP is inadequate and falls short of the duties set out under the CCA. Our previous case showed that if the Government failed to comply with its duties, the

CCA could be enforced through the courts. We do not believe that this CBDP will deliver the emissions savings needed to meet our upcoming budgets. It is clear to us that the CBDP is an incredibly high-risk strategy, with reliance on technologies which are unproven at scale, such as carbon capture storage. And the Government's prediction that the necessary emissions will be achieved through the CBDP is premised on all these policies being delivered in full. In our view, that is simply not tenable.

23. We hope that the High Court will agree with our legal arguments and find that the Government has again acted unlawfully, so that they have to produce a revised decarbonisation plan that will enable our upcoming carbon budgets to be met.
24. By taking this second case, we are holding the Government's feet to the fire. We are showing them that compliance with the CCA is not something that is optional for them, or something for which they can be let off the hook.
25. We have strong policy criticisms of the CBDP, many of which are shared by other organisations too, including the CCC. Alongside the legal case, Friends of the Earth campaigners will be working to raise awareness amongst the public and politicians of the Government's failure to enact policies that will achieve our upcoming carbon budgets and put us on track for Net Zero, and the profound negative impacts that this failure will have on the climate, energy bills, energy security and jobs. Ultimately, Friends of the Earth's position is that we need a strategy with policies to achieve significant emissions reductions across all sectors of the economy.

## **Next Steps**

26. Friends of the Earth, ClientEarth and GLP will continue to coordinate with each other on this legal challenge to the CBDP going forwards.
27. We are all currently waiting for the Government's response to our claims. Following that, the Court will make a decision on whether our three cases can proceed to a full hearing. This normally takes a few months, so it may be that we have a permission decision in the Autumn.
28. Assuming we get permission to proceed, then the trial will likely take place some months after that, so possibly in Winter 2023 or Spring 2024.

**Katie de Kauwe and Acland Bryant, Lawyers**

**Friends of the Earth**

## Further Information

Friends of the Earth is represented in the proceedings by leading environmental barristers: David Wolfe QC of Matrix Chambers, Catherine Dobson of 39 Essex Chambers and Nina Pindham of Cornerstone Barristers, and by Rowan Smith at the law firm Leigh Day LLP.

Our joint press release with ClientEarth and GLP announcing the news of our cases is [here](#).

For further information, please contact Friends of the Earth's media team: [media@Friends of the Earth.co.uk](mailto:media@Friends of the Earth.co.uk) and 020 7566 1649

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<sup>1</sup> *R (oao Friends of the Earth Ltd & Others) v SoS BEIS* [2022] EWHC 1841 (Admin) at paras. 204 and 254

<sup>2</sup> See for example: <https://www.theguardian.com/world/2023/may/11/firefighters-in-england-called-to-record-number-of-serious-outdoor-blazes-last-summer>

<sup>3</sup> <https://friendsoftheearth.uk/climate/govts-climate-strategy-deemed-unlawful-historic-ruling>

<sup>4</sup> Carbon Budget Delivery Plan at paras 29 and 30.

<sup>5</sup> An international law treaty on climate change

<sup>6</sup> June 2022 CCC Progress Report to Parliament p100

<sup>7</sup> *R (oao Friends of the Earth Ltd & Others) v SoS BEIS* [2022] EWHC 1841 (Admin) at para. 215

<sup>8</sup> *R (oao Friends of the Earth Ltd & Others) v SoS BEIS* [2022] EWHC 1841 (Admin) at para. 204

<sup>9</sup> *R (oao Friends of the Earth Ltd & Others) v SoS BEIS* [2022] EWHC 1841 (Admin) at para. 254

<sup>10</sup> <https://www.thetimes.co.uk/article/ministers-were-warned-net-zero-schemes-wont-work-kk6xvb5m5>

<sup>11</sup> Carbon Budget Delivery Plan at p183