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4 October 2021

Dear Sir or Madam

Proposed claim for judicial review:
Aghaji & Garforth v Secretary of State for Business, Energy and Industrial Strategy

1. This letter is the response of the Secretary of State for Business, Energy & Industrial Strategy ("**the Secretary of State**") to your pre-action letter dated 6 September 2021. Your letter was also addressed to the Prime Minister, the Chancellor of the Exchequer and the President-designate for COP26. This response is sent in accordance with the *Pre-Action Protocol for Judicial Review*.

2. We wrote to you on 16 September 2021 confirming that we would respond to your letter by 4 October 2021.

3. For the reasons set out below the Secretary of State's position is that the grounds identified in your letter are unarguable. He will resist any claim brought in reliance upon them and will seek his costs of doing so from the proposed claimants. Moreover, the essential allegation, that the Government should be publishing further proposals and policies on climate change mitigation and adaptation serves no purpose, as that is something that the Government is doing in any event – in accordance with the Climate Change Act 2008 ("**CCA 2008**"). That work is substantial and is proceeding in accordance with (or ahead of) the statutory requirements. It is not arguable that the Secretary of State may be compelled by law to act more quickly.

4. Climate change is a threat that requires a global response. The Government remains committed to delivering the long-term changes necessary to meet the UK's 2050 net zero target, and is harnessing its COP26 and G7 presidencies to drive global climate ambition. As host of COP26, the UK is calling on all nations to come forward with more ambitious climate plans and will continue to work with all involved to increase climate ambition and deliver on the Paris Agreement.

5. We also draw your attention to the recent permission decision of the High Court in R (Plan B and Others) v Prime Minister (and Others) CO/1587/2021 where, among other things, an attempt to argue that the Government's failure to do more on climate change was contrary to CCA 2008 s.13 and s.58 and/or unlawfully infringed the claimants' human rights was rejected as unarguable. We understand that the claimants are seeking to renew their permission application, but consider that it is appropriate to draw your

attention to the Court's robust – and we say plainly correct – conclusions. We enclose a copy of the decision for your information.

6. This letter responds to the main legal allegations in your letter, in so far as they are articulated, but not all of the extensive commentary. The absence of a response to such commentary does not mean it is accepted.

The proposed claimants

7. You have identified the proposed claimants as Daze Aghaji and Peter Garforth, individuals about whom you provide limited information at paragraph 8 of your letter.

The proposed defendants and interested party

8. Responsibility for policy and action on climate change, including under CCA 2008, rests primarily with the Secretary of State, who would be the appropriate defendant for any claim. There is no need to commence proceedings against any defendant other than the Secretary of State and to do so would be inappropriate. There is no tenable basis to argue that any other proposed defendant has erred in law in relation to the matters raised in the proposed claim.

9. The Prime Minister is the head of Her Majesty's Government, whose decisions and policies are carried out by relevant Secretaries of State and their Departments. There is no need for the Prime Minister to be named as a defendant in addition to the Secretary of State. The proposed claim does not relate to any decision or action of HM Treasury and there is no basis on which it could properly be a defendant either.

10. The COP26 President-designate is not a Secretary of State and has no role under CCA 2008. Again, the proposed claim does not relate to any decision or action of the COP26 President-designate and there is no basis on which he could properly be a defendant.

11. Paragraph 10 of your letter suggests that the Committee on Climate Change ("**CCC**") might be an interested party. We disagree that this would be appropriate. The proposed claim does not seek to challenge anything said or done by the CCC. The CCC has specific roles under CCA 2008 to advise the Secretary of State and national authorities and to report to Parliament. The CCC has no role in the delivery of climate mitigation and adaptation. It has no separate interest in the proposed legal challenge. It would not be appropriate for it to take part.

Details of the matter being challenged

12. The primary allegations pursued in your letter are what you say is a *"failure to close the policy gap"* on climate change mitigation and adaptation. This, you allege, breaches ss.13, 14 and 58 of the Climate Change Act 2008 ("**CCA 2008**") and is in violation of the proposed claimants' rights under Articles 2 and 8 of the European Convention on Human Rights ("**ECHR**"), taken together with Article 14. You also allege that the claimants' human rights would be breached *"if the Government fails to limit its reliance on negative emissions technologies"*.

Response to the proposed claim

Background

13. It is neither appropriate nor necessary here for the Secretary of State to set out a detailed response to the factual background set out at **paragraphs** 14-72 of your letter. You refer to various reports and responses from the CCC and the Government published under CCA 2008 over the last few years. An obvious general conclusion that should be drawn from the commitments in CCA 2008 and the dialogue between Government and the CCC is that there is an overarching statutory framework in the UK on climate change which is operating as Parliament intended.

14. Indeed, the UK is a global leader in having legally binding targets on greenhouse gas emission reductions.[1] Also, on 12 December 2020 the UK communicated a new Nationally Determined Contribution to the UNFCCC Secretariat with a commitment to reduce greenhouse gas emissions by at least 68% by 2030 on 1990 levels. The Communication summarily outlines, among other things, the policies **and** measures that it is anticipated will be relied upon to achieve the commitment. The UK also communicated at the same time an Adaptation Communication and Finance Communication.

15. The latest CCC documents were published in June 2021; these are (i) Independent Assessment of UK Climate Risk - Advice to Government for the UK's third Climate Change Risk Assessment (16 June) and (ii) Progress Report to Parliament on both reducing emissions and in adapting to climate change (24 June).

16. The first of these was given under CCA 2008 s.57. It is not, as you suggest in paragraph 64 of your letter, a *"Climate Change Risk Assessment"*, but advice to Government to inform the production by the Secretary of State of the next assessment of the risks for the UK of the current and predicted impacts of climate change under s.56. The most recent (second) Climate Change Risk Assessment ("**CCRA**") was published in 2017. Under CCA 2008 s.56(3) the Secretary of State must lay the third CCRA before Parliament by 2022. The Secretary of State is on track to do that, and in doing so will be informed by the CCC's advice. An updated National Adaptation Programme under s.58 will be laid before Parliament as soon as reasonably practicable after the next CCRA, in accordance with the statutory framework.

17. The CCC's Progress Report was laid before Parliament under CCA 2008 s.36 (and s.59). By s.37(4), the Secretary of State (having consulted the Devolved Administrations) must respond by no later than 15 October 2021.

18. Moreover, as you acknowledge in your letter, the Government is working upon, and will publish ahead of COP26, commencing on 31 October 2021, a Net Zero Strategy. This will be an economy-wide strategy setting out a cost-effective approach to how net zero will be reached by 2050. It is the Secretary of State's intention that the Net Zero Strategy will also set out proposals and policies for meeting the carbon budgets for the fourth, fifth and sixth periods (2023-2027, 2028-2032 and 2033-2037) (hereafter "**CB4",** "**CB5**" and "**CB6**"), drawing on some of the recently published documents identified below. On that basis, the Net Zero Strategy would meet the Secretary of State's obligations under CCA 2008 ss.13 and 14. The CCC has indicated that it looks forward to assessing the policies and proposals set out in the Net Zero Strategy.

19. It is denied that there has been a *"monumental"* failure of policy-making as you allege at paragraph 45 of your letter. Nor is the Government depending upon *"miraculously"* stopping emissions for three whole years in the future. Instead it is introducing sustainable but ambitious policies across the UK economy. For England, this includes for example the Agriculture Transition Plan (November 2020), the Energy White Paper (December 2020), the Industrial Decarbonisation Strategy (March 2021), the England Trees Action Plan 2021-2024 (May 2021), the England Peat Action Plan (May 2021) and, most recently, the Transport Decarbonisation Plan (14 July 2021) and the UK Hydrogen Strategy (17 August 2021). This, plus other steps such as the commitment to end coal power (recently brought forward to October 2024), represents a package of increasingly ambitious action on climate change mitigation. Work is also on-going on other policies, such as a Heat and Buildings Strategy, which will be published in due course.

20. Similarly, on adaptation, it is denied that the UK is in a *"dire position"*. Action taken by the Government includes the publication by Public Health England of a Heatwave Plan (most recently in April 2021) and by the Environment Agency of an updated National Flood and Coastal Erosion Risk Management Strategy (July 2020). The latter strategy is relevant to the apparent concern of the second proposed claimant, who lives at Skipsea in East Yorkshire that suffers from coastal erosion. As of April 2021, the Government is investing £5.2 billion in a six-year capital investment programme that will deliver around 2,000 flood defence schemes, better protecting 336,000 properties, including 290,000 homes in England by 2027. That is in addition to work on Shoreline Management Plans and coastal erosion mapping. The Secretary of State is now preparing the next CCRA and National Adaptation Programme.

[1] While the Secretary of State takes his international commitments under the 2015 Paris Agreement extremely seriously, for the avoidance of doubt, the analysis at paragraph 27 of your letter is simply incorrect – as was held by the Supreme Court in R (Friends of the Earth Ltd) v Heathrow Airport Ltd [2020] UKSC 52; [2021] 2 All ER 967 at §71: *"the Paris Agreement did not impose an obligation on any state to adopt a binding domestic target to ensure that [its climate change mitigation] objectives were met"*.

Proposed ground 1: CB4 and CB5

21. Your first argument is that the Secretary of State's failure to publish policies and proposals to meet CB4 (2023-2027) and CB5 (2028-2032) breaches CCA 2008 s.13(1) and the proposed claimants' human rights.

22. The contention is unarguable. As far as CB4 is concerned, as you acknowledge at paragraph 42 of your letter, the CCC's advice is that this does not require adjustment. There is no *"policy gap"*. The Secretary of State's intention is that the Net Zero Strategy will set out updated proposals and policies for meeting CB4 and CB5 (as well as CB6). Projections, such as those that you refer to in your letter, are updated regularly to incorporate new evidence and policy developments. Many new proposals in separate areas, such as energy, manufacturing and transport, have already been published, especially in recent months (see above). In particular, since the publication in October 2020 of the BEIS 'Updated energy and emissions projections: 2019' to which you refer at paragraphs 43-44, 47 and 51 of your letter, ambitious new plans across key sectors of the economy to meet carbon budgets and the 2050 net zero target have been produced. The projections published in October 2020 do not and could not take these new plans into account.

23. There is no arguable requirement in s.13(1) (or elsewhere) for the Secretary of State to act more quickly. Insofar as you suggest at paragraph 55 of your letter that consultation periods should be cut or curtailed, that is strongly resisted: mitigation measures will only work if they are accepted by the public and carefully designed, which can take time.

24. Moreover, this is transparently an area of policy development, which is not suitable for judicial adjudication. Predictive assessments as to the efficacy of future Government policy are dependent upon a wide variety of complex matters – in such a field the court will afford the Government an enhanced margin of appreciation (see e.g. R (Plan B Earth) v SST [2020] EWCA Civ 214; [2020] PTSR 1446 at §68). As the Court of Appeal held in R (Packham) v SST [2020] EWCA Civ 1004, [2021] Env LR 10, the statutory and policy arrangements for achieving net zero carbon by 2050 *"leave the Government a good deal of latitude in the action it takes to attain those objectives"* (§87) and *"it is the role of Government to determine how best to make that transition"* (ibid.).

25. Your allegation that there has been a breach of human rights is a bare assertion. It is wholly unparticularised. While you recite certain provisions and case law at paragraphs 73-82 of your letter, you fail to explain how they do – or arguably could – apply to the proposed claim. For present purposes, the Secretary of State points only to a few headline problems with any human rights claim:

    a. First, neither of the proposed claimants are *"victims"* for the purpose of s.7(1) of the Human Rights Act 1998. They have not been directly and personally affected by climate change in general or by the policies of the Government on climate change in particular. The ECHR does not allow for the institution of an *actio popularis* (see e.g. Zakharov v Russia (2016) 63 EHRR 17 at §39).
    b. Second, there is no causal link between the failure to act alleged and the impact upon the proposed claimants' rights. It could not be argued, for example, that any failure on the part of the Government to act more quickly is having or will have a direct effect upon them personally.
    c. Third, no evidence has been provided that could establish that ECHR Articles 2 or 8 (or 14) are engaged in this case. For Article 2 to be engaged, it must be demonstrated that there is a *"real and immediate risk"* to life (see e.g. Öneryildiz v Turkey (2005) 41 EHRR 20 at §101). That does not appear to be even arguably the case for either of the proposed claimants. For Article 8 to be engaged in an environmental case, the hazard must have attained *"a level of severity resulting in significant impairment of the applicant's ability to enjoy his home, private or family life"* (see Dubetska and Others v Ukraine (2015) 61 EHRR 11 at §105). Again, that threshold has not even arguably been reached in this case.
    d. Fourth, even were it arguable that climate change gave rise to a positive obligation under Article 2 or Article 8 on the state to act, the Government has met that obligation by putting in place (and complying with) a legislative framework to address climate change in CCA 2008. Moreover, the Government indisputably has a wide margin of appreciation in these matters (see Öneryildiz at §107 and Dubetska at §141).
    e. Fifth, Article 14 has no independent existence and only applies if the facts of a case fall within the ambit of one or more of the other substantive ECHR articles (see e.g. Burden v United Kingdom (2008) 47 EHRR 38 at §58). Moreover, it is entirely unclear from your letter what difference in treatment you

allege. You appear to rely upon the first proposed claimant's age – but she is not being treated differently now as a result of her age. Further, Article 14 does not prohibit differences in treatment that pursue a legitimate aim or strike a balance – a matter again on which a state must be afforded a wide margin of appreciation (Schwizgebel v Switzerland Application no. 25762/07; 10 June 2008 at §76-79).

26. These basic thresholds for the applicability of ECHR Articles 2 and 8 were recently affirmed by the High Court in R (Richards) v Environment Agency [2021] EWHC 2501 (Admin) at §42-43. It is not arguable that they are satisfied in this case. The position of the proposed claimants in relation to climate change in the UK is very far removed from the circumstances where the European Court of Human Rights has previously found a positive duty to arise, which is essentially where people live close to a dangerous or hazardous installation which causes a real and immediate risk of an acute disaster or serious pollution which directly causes a severe impairment of the ability to enjoy home or family life.

Proposed ground 2: CB6

27. Your next contention is that the Secretary of State has failed to comply with CCA 2008 s.14(1) as he has not laid the Net Zero Strategy before Parliament *"[a]s soon as reasonably practicable after"* the making of the Carbon Budget Order 2021 ("**the 2021 Order**"). The complaint is of no possible merit. The 2021 Order was made on 23 June 2021 and the Secretary of State's intention is to lay a report under CCA 2008 s.14 before Parliament by COP26. For comparison, the Clean Growth Strategy was published on 12 October 2017, over a year after the Carbon Budget Order 2016 was made (on 20 July 2016).

28. It takes time to agree, set out and formulate economy-wide policies on a complex matter such as climate change. It is nothing to the point that the CCC sought even earlier publication (paragraph 87 of your letter). 'Reasonably practicable' is an entirely general term that has regard, among other things, to the scale and complexity of the task (see e.g. the recent discussion in R (WWF-UK and Others) v SSEFRA [2021] EWHC 1870 (Admin) at §41-47 and 69-71). It is therefore unarguable that the Secretary of State was required by s.14 to publish the Net Zero Strategy by 20 September 2021 – as you demand – rather than by November 2021 as he intends, and has been planning for.

Proposed ground 3: adaptation

29. Your next contention is that the Secretary of State has failed to comply with CCA 2008 s.58 and that this is also a breach of the proposed claimants' human rights.

30. Again, that is unarguable. It is clear that the Secretary of State has met and will continue to meet his duties under CCA 2008 ss.56 and 58. He is working on the third CCRA that will inform the third National Adaptation Plan. He has obviously not *"patently failed"* in this regard.

31. The allegation that the failure to publish further policies amounts to a breach of human rights is again a bare and unsubstantiated assertion. The Secretary of State repeats the points set out above in relation to proposed ground 1. It is not arguable that ECHR Articles 2, 8 or 14 are engaged. As far as coastal erosion is concerned, which is said to affect the second proposed claimant, the Government has taken and continues to take concerted action – none of which is challenged by him in this claim.

32. Paragraph 92 of your letter is a subsidiary point about the importance of integrating adaptation into proposals and policies to meet net zero. The Secretary of State recognises this and officials are working to ensure alignment between adaptation and mitigation. There is no reason to think that this will not be done. In fact, it is a legal requirement that proposals and policies for meeting carbon budgets and the 2050 net zero target, taken as a whole, *"must be such as to contribute to sustainable development"* (CCA 2008 s.13(3)). The extent of integration and how it is to be achieved, however, are matters for the Secretary of State's judgement, that will not give rise to human rights issues – contrary to the suggestion at paragraph 92 of your letter.

Proposed ground 4: negative emissions technologies

33. The last proposed ground is obviously premature, as it only arises *"if the Government fails to limit its reliance on negative emissions technologies"* (paragraph 13(d), emphasis added). Moreover, it is unsustainable. It is in the nature of net zero that greenhouse gas removal ("**GGR**") technology may be

factored in and it is generally accepted that GGR methods will be required to balance residual emissions from some of the most difficult to decarbonise sectors, such as agriculture and aviation. Indeed, GGRs are recognised as one of the essential elements of the transition to net zero by the CCC in the report referred to at paragraph 54(g) of your letter:

"Enabling domestic engineered greenhouse [gas] removals to contribute to UK carbon budgets and Net Zero, and establishing support mechanisms and monitoring verification and reporting structures."

34. Even your pre-action letter, by speaking of limiting reliance on GGR technology, recognises that reliance on GGR technology is not in some way prohibited by law but rather is a question of degree, which must be matter of judgement for the Secretary of State.

35. The precautionary principle does not prevent reliance on GGR technology if the Secretary of State is reasonably satisfied that it can be relied upon (see e.g. Preston New Road Action Group v SSCLG [2018] EWCA Civ 9; [2018] Env LR 18 at §94) and, in any event, the principle is not separately enforceable as a matter of domestic law (see e.g. R (Friends of the Earth Ltd) v Heathrow Airport Ltd [2020] UKSC 52; [2021] 2 All ER 967 at §95; see also R v SSTI Ex p Duddridge [1996] 2 CMLR 361).

Action the proposed defendants are expected to take

36. For the above reasons, there was no legal obligation on the Secretary of State to publish the Net Zero Strategy by 20 September 2021. He will publish it in due course and ahead of COP26. Nor is the Secretary of State required to publish further adaptation policies before the third CCRA has been laid before Parliament in 2022.

37. The proposed claim is misconceived and pointless because it alleges failures to do what the Secretary of State is in the process of doing and, indeed, where the main outcome sought in the judicial review – the publication of the Net Zero Strategy – is about to happen in a matter of weeks. There is no inaction or failure or refusal to act as alleged in Grounds 1 and 3. Moreover, it is well-established that the courts can decline to entertain anticipatory judicial review claims, including where the underlying process is continuing and the court would have to consider the issues on incomplete material.

38. The suggestion that policies are deficient ignores what is currently in hand but is in any event an impermissible merits point. Moreover, it is not the function of the courts to enter into scientific debate and issues which require analysis of scientific opinion are not appropriate for judicial review proceedings. The courts will accord an enhanced margin of respect to decisions involving or based upon scientific, technical and predictive assessments. Arguments that policies and proposals in the field of climate change are deficient are not appropriate for judicial review, as the field is complex and multi-faceted, where the development of policies and proposals requires a range of judgements across a wide spectrum of policy areas, involving questions of political, policy, economic and scientific judgement.

39. As regard paragraph 98 of your letter, the extent to which the Net Zero Strategy relies upon negative emissions technologies is a matter for the judgement of the Secretary of State.

40. As regards paragraph 99 (and also paragraphs 58-61), there is nothing in CCA 2008 that prevents the carrying forward of surplus emissions from one budgeting period to the next. Indeed CCA 2008 s.17(3) expressly permits it, although before doing so the views of the CCC, among other things, must be taken into account. In any event, no decision has been taken to carry forward any surplus emissions from CB3 into CB4.

Aarhus Convention

41. Paragraph 100 of your letter asserts that the proposed claim would be an Aarhus Convention claim within the meaning of CPR 45.41 without explaining why. We assume that you do not contend that the claim falls within the scope of Arts.9(1) or 9(2) of the Aarhus Convention. Art.9(3) of the Convention only applies to challenges to acts and omissions *"which contravene provisions of [a state's] national law relating to the environment"*. The only respect in which the proposed claim may potentially constitute a contravention of national law relating to the environment is the allegation of non-compliance with CCA 2008 ss.13, 14 and 58.

42. In any event, the Secretary of State is unable to agree to a cap for each potential claimant of £5,000 liability without seeing a schedule of financial resources as required by CPR 45.42(1)(b).

Alternative dispute resolution proposals

43. We do not consider that the claim is appropriate for alternative dispute resolution, and note that no specific proposals have been made.

Response to requests for information and documents

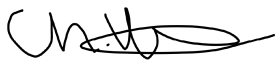
44. You have made no specific requests for information.

Address for further correspondence and service of court documents

45. Due to COVID-19 and the current circumstances, any correspondence should be addressed using the reference at the head of this letter and sent via email to Claire.Wills@governmentlegal.gov.uk and Robert.Andrews@governmentlegal.gov.uk to limit the handling of materials by post.

46. We are willing to accept service of documents by e-mail to NewProceedings@governmentlegal.gov.uk. See https://www.gov.uk/government/organisations/government-legal-department for more information. Please also copy in Claire.Wills@governmentlegal.gov.uk and Robert.Andrews@governmentlegal.gov.uk.

Yours faithfully



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