

Climate Change Litigation in the UK: An Explanatory Approach (or Bringing Grievance Back In)

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Abstract

This paper explores the increasing use of climate change litigation in the UK. The paper begins by exploring what is meant by climate change litigation and by setting out the different types that exist, including pro-, anti-, proactive and reactive. Adopting a social movement perspective, it then sets out to examine why it is that the UK has experienced growing levels of such litigation. Although considering a range of likely social movement variables including political and legal opportunity and resources, the paper argues that the often ignored aspect of 'grievance' is also an important factor in helping to explain the pattern of UK climate change litigation.

Introduction

Climate change litigation (CCL) has developed a rapidly expanding profile in certain jurisdictions such as the US and Australia, and also within international law. However, its use within Europe has been less noticed. Is that because it does not really exist as a significant phenomenon in Europe, or because, while it exists, it has so far received little in the way of academic attention in the English language literature? In identifying the healthy existence of climate change litigation in the UK, the current chapter suggests that the answer is partly the latter. Whether that is also true of other European states must await further research, which is beyond the scope of the current chapter. Nevertheless, the chapter will tentatively seek to identify some factors which might help to explain the UK's high levels of CCL.

The chapter begins with a discussion of what counts as climate change litigation before moving on to consider the types of litigant, the difference between proactive and reactive litigation and the different types of proactive litigation. In doing so, it will argue that the scope of UK CCL takes one beyond what many would first think of

when contemplating such litigation: for many people, CCL will conjure up images of judicial review or perhaps tortious claims brought by the environmentalist pro-climate change movement; however, UK experience of CCL reveals not just claims of this nature, but also, for example, judicial review challenges brought by industry and the climate change denial movement and, more uniquely perhaps, instances of reactive litigation where those in the climate change movement are prosecuted for direct action-style protesting and end up as defendants rather than claimants.

The chapter then moves on to consider some of the factors which might help to explain the UK's significant levels of CCL. In doing so, it draws on the literature relating to law and social movements and argues that 'grievance', which has received little attention in that literature, is a key factor in the context of CCL.

What is Climate Change Litigation?

For the purposes of the current chapter, climate change *litigation* is taken to involve legal action which is brought before the courts (though not necessarily, as will be seen below, to the stage of a final hearing), whether civil or criminal. This means, for example, that complaints made in October 2009 to the UK Advertising Standards Authority (ASA) about a Department of Energy and Climate Change (DECC) television advertisement's claims that climate change is man-made¹ – many of which appear to have been made by the climate change denial counter-movement – will not be included within the scope of the chapter (despite the quasi-judicial nature of the ASA).

However, while it may be relatively straightforward to decide what counts as litigation, it is more difficult to decide what counts as *climate change* litigation. The reason for this is because climate change is the consequence of billions of everyday human actions, personal, commercial and industrial. To that extent, virtually all litigation could be conceived of as CCL: after all, even the average contract dispute is likely to have a carbon implication somewhere within it if ones looks hard enough.

¹ <http://www.guardian.co.uk/media/2009/oct/21/climate-change-advertising-standards>.

However, that would of course make the identification and study of CCL extremely difficult: for that reason, CCL is taken in this chapter as requiring some sort of deliberate framing in climate change terms. In other words, litigation will amount to CCL if a climate change argument is explicitly presented as part of the claimant's or defendant's case. This climate change framing of claims is a relatively new phenomenon: in previous times, many of the legal challenges involving, for example opencast coal mines or airports would have been centred on other environmental impacts of these activities such as habitat loss and noise; climate change has thus provided another key weapon in the activist's legal armoury, with a failure to take account of greenhouse gas emissions (in particular CO₂) constituting a new basis for judicial review.

Next, it is worth noting that, to count potentially as CCL, the necessary climate change framing need not necessarily appear on the face of the parties' submissions or indeed in the final judgment of the court. In the UK, there are examples of cases where one finds little or no evidence of greenhouse gases or climate change in the official reports, but where environmental NGOs have made capital of the climate change implications of the case in accompanying press releases.²

In addition, not all examples of UK CCL proceed as far as a final court ruling: in a number of instances, litigation proceedings have been commenced but have been settled before they reach the stage of a full judicial hearing and judgment.

Methodologically, this of course makes such cases quite hard to track (even more so that those mentioned in the previous paragraph) as they do not generally appear in official law reports or legal databases. One is, instead, dependent on press searches or NGO contacts to unearth such examples. Several cases are worth mentioning in this respect. First, there is *R (Porsche Cars Great Britain) v Mayor of London* (2008),³ which involved Porsche bringing judicial review proceedings against the Mayor of

² See eg *R (Lewes District Friends of the Earth) v East Sussex CC* [2008] EWHC 1981 (Admin); [2009] Env LR 11. For the press release, see http://www.foe.co.uk/resource/press_releases/newhaven_incinerator_15072008.html. Last visited 29 January 2010. Although the case itself contains very little if anything on greenhouse gas emissions or climate change, the surrounding publicity material draws explicit attention to a preference for recycling over incineration, in part on climate change grounds. See also the Friends of the Earth fuel poverty case, below nn 16-17.

³ See <http://www.porschejudicialreview.co.uk/>.

London, challenging his plans to change the London congestion charge to an emissions-based scheme which would hit drivers of powerful cars like Porsches particularly hard. Porsche argued that the proposed climate change basis for the new charging scheme would actually increase CO₂ emissions (through encouraging drivers to drive greater distances to avoid the fee). Eventually, the new scheme was dropped and the case settled because of a change in Mayor from Labour's Ken Livingstone to Conservative Boris Johnson, who had campaigned against the proposed scheme during the Mayoral election.

Next, there have been two judicial review challenges to incinerators which have relied, in part, on climate change arguments.⁴ The first of these, *R (Day) v Environment Agency* (2007), involved a challenge to the Environment Agency's grant of a pollution permit to an incinerator in Newhaven, Sussex, on the grounds that the Agency had failed properly to assess CO₂ emissions from the plant. This case was settled, with the Agency effectively conceding that there had been such a failure.⁵ The second, *R (HOTI) v Environment Agency* (2008), involved a very similar climate change challenge to an incinerator in Hull and was, again, settled by the Agency.⁶

Who is Bringing Cases?

Before discussing types of litigant – both claimant and defendant – it is first necessary to distinguish briefly between types of climate change litigation in the shape of proactive versus reactive versions.⁷ Proactive litigation involves civil proceedings – whether judicial review (public law) or tort-based (private law) – which, as we shall see, may be brought by a range of different litigants. Reactive litigation, in contrast, involves criminal proceedings brought by the Crown against climate change activists involved in allegedly unlawful direct action.

⁴ I am grateful to Phil Michaels of Friends of the Earth for bringing these cases to my attention.

⁵ See the press report of the case, 'Incinerator Pollution Permit Withdrawn', *Sussex Express*, 6 December 2007.

⁶ For details, see <http://www.39essex.co.uk/resources/cases.php?id=1382>, last visited 10 July 2010.

⁷ C Harlow and R Rawlings, *Pressure Through Law* (Routledge, London 1992) 162; L Vanhala, 'Anti-discrimination Policy Actors and their use of Litigation Strategies: The Influence of Identity Politics' (2009) 16 *Journal of European Public Policy* 738, 741; C Hilson, 'Framing the Local and the Global in the Anti-Nuclear Movement: Law and the Politics of Place' (2009) 36 *Journal of Law & Society* 94, 100.

Further consideration of reactive litigation will be left to a later section. However, suffice it to say here that, as noted above, such cases are brought by the Crown, with activists as the defendants. With proactive litigation, although examples of tort-based actions abound in the US (none of which, so far, have been successful), the UK has only seen judicial review (or equivalent⁸) type challenges and also a contractual, employment law action. In discussing these, it is important to distinguish anti-climate change claimants from pro-climate change claimants.

Proactive Anti-Climate Change Cases

Anti-climate change claimants in the UK have, so far, fallen into three categories. First, there have been actions brought by the UK state or public authorities. The UK's successful challenge to the Commission's rejection of its request to amend its national allocation plan (NAP) under the EU Emissions Trading Scheme (ETS) is one of a number of such cases brought by EU Member States against the Commission.⁹ There is also a case in which two local authorities – Derbyshire Dales District Council and the Peak District National Park Authority – unsuccessfully contested the grant of planning permission to a climate friendly wind farm in the Peak District National Park, inter alia on the grounds that the planning inspector had unlawfully determined an individual planning application by reference to strategic regional targets on renewable energy.¹⁰

Second, there are cases brought by industry, which typically seek to challenge new climate change regulation which will affect its economic interests. The Porsche judicial review mentioned above provides one example of such a case. Another is *R (Air Transport Association of America, Inc and Others) v Secretary of State for Energy and Climate Change*,¹¹ in which the Air Transport Association of America

⁸ Eg statutory appeal – see *Barbone*, below n 24.

⁹ Case T-178/05 *United Kingdom v Commission* [2005] ECR II-4807. See also eg Case T-183/07, *Poland v Commission*, 23 September 2009, nyr; and see further N Singh Ghaleigh, 'Emissions Trading Before the European Court of Justice: Market Making in Luxembourg' in D Freestone & C Streck (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen and Beyond* (OUP, Oxford 2009).

¹⁰ *Derbyshire Dales DC v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin); [2010] 1 P & CR 19. The judge, Carnwath LJ, upheld the inspector's approach on the basis that it would be odd for individual planning decisions not to have regard to regional policies.

¹¹ [2010] EWHC 1554 (Admin).

(ATA) and a number of US airlines sought judicial review of the UK Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2009¹² and, underlying these, to challenge Directive 2008/101/EC¹³ which will bring aviation within the scope of the EU ETS by 2012. From that date, emissions from all flights arriving at and departing from EU airports will be included within the ETS regime. Because the case involves a challenge to the validity of the EU Directive, a reference will be made by the English High Court to the Court of Justice of the European Union (CJEU).

And finally, in relation to ‘anti’ cases, there are those brought by the climate change denial movement who are sceptical, in particular about the science behind climate change. Unlike the industry cases, these cases are not premised on economic interests surrounding climate change regulation, but rather involve an ideological antipathy to such regulation and/or the science underlying it. There is, currently, only one significant case falling into this category – *Dimmock v Secretary of State for Children, Schools and Families*.¹⁴ Stuart Dimmock, a lorry driver, parent and school governor brought judicial review proceedings, arguing that sections 406-7 of the Education Act 1996 had been breached because of a lack of political neutrality in showing the Al Gore film, *An Inconvenient Truth*, in UK schools. Although Al Gore failed to get the showing of the film stopped altogether, he was partially successful insofar as the High Court ruled that there had to be guidance accompanying the film to compensate for those aspects of it where Gore had moved beyond the views of the majority science on climate change.

Proactive Pro-Climate Change Cases

With pro-climate change litigation, cases in the UK have been brought by individuals, NGOs and also by local authorities. Beginning with individuals, in *Grainger Plc v Nicholson*,¹⁵ the claimant, Tim Nicolson, brought proceedings in the employment tribunal following dismissal by his employer, claiming discrimination under the Employment Equality (Religion or Belief) Regulations 2003.¹⁶ The regulations

¹² SI 2009/2301.

¹³ [2009] OJ L8/3.

¹⁴ [2007] EWHC 2288 (Admin); [2008] 1 All ER 367.

¹⁵ [2010] 2 All ER 253.

¹⁶ SI 2003/1660.

prohibit discrimination on the grounds of religion or belief, with belief defined as ‘any religious or philosophical belief.’ The preliminary question for the tribunal was whether a strong belief in anthropogenic climate change reinforced by what one might call ‘observant’ behaviour,¹⁷ could amount to a philosophical belief for the purpose of the regulations. The employment judge found for the claimant and this decision was upheld by the Employment Appeal Tribunal: a belief in man-made climate change was indeed capable of constituting a philosophical belief for the purposes of the regulations.

*R (Littlewood) v Bassetlaw DC*¹⁸ is another case brought by an individual – here, a judicial review challenge brought by a local resident to the grant of planning permission for a pre-cast concrete manufacturing facility. One of the grounds of challenge was that the environment statement had failed to consider the climate change impacts of the concrete works. However, the application failed, with the judge holding that the absence of consideration of climate change in the statement did not make the statement so deficient that it could not be described as a statement. He also stated that because of the last-minute raising of the matter by the claimant, even if wrong on the deficiency of the statement, he would, in any event, have used his discretion to refuse relief. Although both lines of reasoning were confirmed by the Court of Appeal in refusing leave to appeal,¹⁹ the case must be placed in its context and should not be regarded as authority for allowing climate change impacts to be ignored in current environmental statements within the Environmental Impact process. That context is that, at the time the planning decision was made, there was little in the way of specific planning guidance requiring climate change to be considered, and also that no full representations on climate change had been made to the Council prior to it making its decision. Today, not only is planning guidance on

¹⁷ Akin to religious observance, practice or ‘manifesting’ one’s religion (as opposed to mere belief). The claimant’s witness statement was as follows: ‘I have a strongly held philosophical belief about climate change and the environment. I believe we must urgently cut carbon emissions to avoid catastrophic climate change. It is not merely an opinion but a philosophical belief which affects how I live my life including my choice of home, how I travel, what I buy, what I eat and drink, what I do with my waste and my hopes and my fears. For example, I no longer travel by airplane, I have eco-renovated my home, I try to buy local produce, I have reduced my consumption of meat, I compost my food waste, I encourage others to reduce their carbon emissions and I fear very much for the future of the human race, given the failure to reduce carbon emissions on a global scale.’

¹⁸ [2008] EWHC 1812 (Admin); [2009] Env LR 21.

¹⁹ [2008] EWCA Civ 1611.

climate change more developed, but also it is increasingly hard to conceive of cases where objectors to energy-intensive developments such as concrete works will not bring forward timely climate change arguments in the planning process.

With NGO cases (including those brought by individuals closely associated with pressure or campaign groups), it is difficult to discern a distinct pattern among the increasing number of climate change challenges being brought. There have been judicial review proceedings brought by Friends of the Earth (FoE) and Help the Aged in relation to Government action on fuel poverty, with its failures on energy efficiency providing the (extra-judicial)²⁰ link with climate change.²¹ There has also been a challenge brought by the World Development Movement, PLATFORM and People & Planet against the UK Treasury for allowing the bailed-out and thus part publicly owned Royal Bank of Scotland to invest in climate unfriendly projects in breach of Government policy requiring the consideration of climate change impacts.²² However, in October 2009, Sales J refused permission to bring judicial review proceedings in this case.²³

However, most of the cases so far have involved either incineration or airports. It is also worth noting that, with both of these types of case, NGOs have often been joined by local authorities. Indeed, there has been little, if any, pro CCL in which local authorities have acted alone as claimants.

There has been a number of cases challenging incineration. Two of these were mentioned above when discussing settled cases²⁴ – one involving a climate-based challenge to the grant of a pollution permit to the Newhaven incinerator brought by

²⁰ There is very little in either the High Court or Court of Appeal judgments about climate change, greenhouse gas emissions or global warming. However, FoE press releases relating to the case reveal the climate change aspect to the proceedings, pointing to Government failures on energy efficiency (http://www.foe.co.uk/resource/press_releases/fuelpoverty_courtcase_06102008.html).

²¹ *R (Friends of the Earth and Others) v Secretary of State for Energy and Climate Change* [2009] EWCA Civ 810; [2010] PTSR 635. The High Court judgment is reported as *R (Friends of the Earth, Help the Aged) v Secretary of State for Business Enterprise and Regulatory Reform, Secretary of State for Environment, Food and Rural Affairs* [2008] EWHC 2518 (Admin); [2009] Env LR D6.

²² <http://peopleandplanet.org/ditchdirtydevelopment/legalchallenge>.

²³ *R (People & Planet) v HM Treasury* [2009] EWHC 3020 (Admin);

<http://peopleandplanet.org/ditchdirtydevelopment/legalchallenge/legaldocuments>.

²⁴ (nn 5-6).

Nicola Day, a local resident and campaigner for DOVE²⁵ 2000 Ltd, a local pressure group; and the other involving a similar challenge to an incinerator in Hull brought by the local campaign group HOTI (Hull and Holderness Opposing the Incinerator).²⁶ The Newhaven incinerator also attracted a further judicial review action.²⁷ This was brought by DOVE 2000 Ltd, Newhaven Town council and the Lewes branch of Friends of the Earth against East Sussex County Council's grant of planning permission on the grounds that it should not have been granted while the Environment Agency's pollution permit had been withdrawn and was under reconsideration. However, permission to proceed with judicial review was denied by Sullivan J (as he then was), on the basis that, inter alia, a pollution permit could not be regarded as a pre-condition to a grant of planning permission in this situation.

A number of challenges has also related to airport expansion. Judicial review claims or statutory appeals have been brought in relation to planned expansion at Stansted, Heathrow, and City Airports. Beginning with Stansted, *Barbone*²⁸ involved a statutory appeal under section 288 of the Town and Country Planning Act 1990 brought by the local campaign group Stop Stansted Expansion (SSE). The application against the decision to grant planning permission for an expansion of Stansted Airport was based, inter alia, on the failure to take proper account of its effect on greenhouse gas emissions as a material consideration. However, the application, on this (and other grounds), was dismissed, with the judge ruling that climate change implications had been properly taken into account.

*Hillingdon*²⁹ involved a judicial review challenge to the third runway at Heathrow airport brought by a range of pro-climate environmental NGOs including Greenpeace and WWF and also a number of local authorities. The measured nature of the judgment in the case meant that both sides could, in effect, regard the case as a success. On the one hand, Carnwath LJ, found against the Government for relying on the 2003 White Paper when its climate policy had clearly changed since that point; however, on the other hand, he was not willing to quash the decision to confirm

²⁵ Which stands for 'Defenders of the Ouse Valley and Estuary'.

²⁶ HOTI were assisted in this case by Phil Michaels of the Friends of the Earth Rights and Justice Centre.

²⁷ (n 2).

²⁸ *Barbone v Secretary of State for Transport* [2009] EWHC 463 (Admin); [2009] Env LR D12.

²⁹ *R (London Borough of Hillingdon) v Secretary of State for Transport* [2010] EWHC 626 (Admin).

policy support for the third runway given that the procedures contained in the new 2008 Planning Act would inevitably address the salient issues.

Finally on proactive litigation related to airports, a judicial review claim involving London City Airport in Docklands, has been brought by Fight the Flights, a local campaign group, supported by Friends of the Earth legal expertise within its Rights and Justice Centre.³⁰ The claim (due to be heard in November 2010) is based, inter alia, on the failure by Newham council, in allowing expansion of London City Airport, to take into account Government policy on climate change and aviation.

Reactive Litigation

Although the above sections demonstrate that there is a significant and developing amount of proactive, judicial review-type CCL in the UK, it has tended to receive less media coverage than reactive litigation. With reactive litigation, protestors engage in what the police are likely to regard as unlawful criminal activity such as aggravated trespass and criminal damage. They typically invite arrest so that they can then have a 'day in court' to seek to defend their action on climate change grounds and, win or lose, thereby secure publicity for the climate change movement cause.

As will be seen, all of the cases so far have involved coal-fired power stations or airports – perhaps not surprisingly given their significant carbon footprints. The relevant activity undertaken is typically spectacular in nature, thus guaranteed to attract media attention. The first such spectacular protest took place in October 2007 at the Kingsnorth coal-fired power station in Kent, where activists (later to become known as the 'Kingsnorth 6'), scaled the chimney and painted 'Gordon' on it as a message to the UK Prime Minister Gordon Brown about climate change.³¹ The activists were charged with causing £30,000 of criminal damage to the chimney but, in September 2008, were acquitted by a jury at Maidstone Crown Court after raising a defence of lawful excuse under section 5 of the Criminal Damage Act 1971. Their

³⁰ <http://fighttheflights.com/>.

³¹ The full message was intended as 'Gordon Bin It', but the protestors were interrupted.

defence was that although they had caused damage to the chimney, this was needed in order to protect property all around the world which was at immediate risk of damage from climate change.

In a subsequent protest against airport expansion at Stansted, London's third airport, climate activists cut through the perimeter fence and caused an obstruction close to the runway. This led to the airport being closed for five hours, with delays caused for a further three days. The protestors were prosecuted for aggravated trespass and, again, sought to use the court proceedings to bring attention to climate change. However, given that their case was heard in a magistrates' court rather than a Crown Court with a jury, it was perhaps no surprise that the protestors failed to achieve another, Kingsnorth-style acquittal.³² Previous history of reactive litigation involving the anti-nuclear (weapons) movement shows that the authorities typically tried to steer cases away from the Crown Court and towards magistrates' courts where possible because of the unpredictability of juries.³³

A further incident occurred at the Drax coal-fired power station in North Yorkshire in June 2008, where climate change protestors hijacked a coal train en route to the power station, shovelling coal off the wagons and hoisting a banner saying 'Leave it in the ground'. In their subsequent jury trial in July 2009,³⁴ the 'Drax 22' attempted to raise a climate change-based defence of necessity to the charge brought against them of obstruction of the railway.³⁵ However, this defence and evidence of climate change were ruled out in a pre-trial hearing by the judge in the case, HHJ Spencer.³⁶

³² 'Stansted protesters sentenced to community service amid threat of £2m damages claim', *The Guardian*, Thursday 8 January 2009.

³³ S Roseneil, *Disarming Patriarchy: Feminist and Political Action at Greenham* (Open University Press, Buckingham 1995) 108; Hilson (n 7) 100-101.

³⁴ *R v Bard* (2009).

³⁵ On the difference between the defences available in the Kingsnorth and Drax cases, see further M Schwarz, 'The Drax 29 and the Kingsnorth 6: Different Defences, Different Outcomes' ELFlne Spring/Summer 2010.

³⁶ After the embarrassing Kingsnorth acquittals, the Government's Attorney General was considering making a reference to the Court of Appeal to appeal the point of law involving the use of justification defences by protestors (<http://www.greenpeace.org.uk/tags/kingsnorth-six>). However, in the end, no reference was made. The judge's own initiative in the Drax case essentially achieved much the same result, if only on a one-off, non-precedent setting basis.

... evidence concerning the burning of fossil fuels and global warming is inadmissible. To rule otherwise would allow these defendants to hijack the trial process just as surely as they hijacked the coal train ...³⁷

As a result, unlike at the Kingsnorth trial, the Drax defendants were unable to call expert scientific witnesses on climate change such as Professor James Hansen.³⁸ Neither were they meant to mention climate change during their defence, though in fact it appears that the judge did not in the end prevent all such comment.³⁹ Nevertheless, they were eventually found guilty of obstruction.⁴⁰

Finally, in April 2009, there was an arrest of 114 protestors at a school near to the E-ON owned coal-fired power station at Ratcliffe-on-Soar in Nottinghamshire.⁴¹ This arrest was controversial at the time for its pre-emptive, night time nature: unlike the other direct action cases mentioned above, this one, although it still attracted considerable publicity, had not reached the actual protest stage. However, the authorities considered there was sufficient evidence of planned criminality involved to warrant arrest and subsequent prosecution.

At the trial, twenty out of the twenty seven protestors pleaded not guilty to conspiracy to aggravated trespass, since they intended to raise climate change-based defences of necessity and, in addition, the use of reasonable force to prevent crime under section 3 of the Criminal Law Act 1967. In a pre-trial hearing,⁴² Flaux J cast doubt on the approach adopted by HHJ Spencer in the Drax case, preferring instead to leave relevant defences as matters for the jury. Although the case is yet to go to full trial, it signals a return to the possibility of more Kingsnorth-like acquittals in the future.

Explaining UK CCL

³⁷ <http://www.guardian.co.uk/commentisfree/2009/jul/03/drax-trial-climate-change-injustice>.

³⁸ The well known climate scientist.

³⁹ <http://www.guardian.co.uk/environment/2009/jul/03/drax-coal-train-trial-guilty>.

⁴⁰ Ibid.

⁴¹ <http://www.guardian.co.uk/environment/2009/apr/18/climate-protestors-arrest-nottingham> .

⁴² 21 May 2010.

In this section, we move on to consider why it is that we have seen significant levels of CCL in the UK in recent years. Here, it helps to refer to the literature on law and social movements which, in recent years, has explored why it is that social movement actors have turned, in a number of instances, towards litigation and the courts instead of, or in addition to, other strategies such as political lobbying and protest and direct action.⁴³

One way of accounting for high levels of CCL in the UK is by reference to concepts of political opportunity (PO) and legal opportunity (LO). It has been suggested that litigation is likely to be resorted to when political opportunities are weak but legal opportunities are perceived as stronger.⁴⁴ Such an argument does appear applicable at first sight in both a US as well as a UK context: in the US, one might, at least in part, attribute the significant level of ‘pro’ climate change litigation there to the lack of political opportunity during the presidency of George W. Bush, whose administration’s attitude to climate change was most notably indicated by its failure to ratify the Kyoto Protocol. Similarly in the UK, the degree of climate change litigation involving airports and coal fired power stations might be said to reflect, to some degree, the lack of political opportunity in these areas given the then Labour Government’s pro-coal and pro-aviation stance. In both the US and the UK, legal opportunities offered by climate change litigation have, in contrast, been perceived as more favourable.

It is worth probing the concept of legal opportunity more closely at this point. LO is taken here to include *both* structural or procedural issues concerning access to justice – typically the laws on standing or locus standi, but also the law on costs as these too can significantly affect legal opportunities – *and* also more substantive issues of ‘legal stock’ and judicial receptivity/successful rulings. ‘Legal stock’⁴⁵ involves the idea of identifying a particular legal peg or cause of action on which to hang one’s legal claim: with climate change, one might, for example, point to a failure to take into

⁴³ See eg C Hilson, ‘New Social Movements: The Role of Legal Opportunity’ (2002) 9 JEPP 238; Vanhala (n 7); E Andersen, *Out of the Closets & into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (University of Michigan Press, Ann Arbor 2005); L Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (CUP, New York, forthcoming).

⁴⁴ Hilson (n 43).

⁴⁵ Andersen (n 43) 12.

account CO2 as a pollutant within pollution legislation, or a failure to consider climate change impacts as a factor within a legally mandated environmental impact assessment. The point is that one cannot just throw climate change into a case: it must sit within a particular legal requirement. Judicial receptivity/successful rulings largely speak for themselves: in essence, legal opportunities are likely to be seen as stronger where judges have demonstrated some sympathy with the cause at hand and/or where direct legal outcomes have been successful. While this is not strictly necessary (in that litigation may secure valuable indirect publicity success despite poor judicial receptivity and a lack of direct judicial success), LO is undoubtedly stronger with a degree of direct success.

So how then does the UK picture on LO appear in relation to the above? Procedural LO in the UK in terms of the laws on standing or *locus standi* within judicial review has been good for environmental NGOs for some time: liberalisation of standing requirements in the UK came in the early 1990s,⁴⁶ well before the signature of the Aarhus Convention⁴⁷ in 1998 and its entry into force in 2001. However, if one turns to look at the other, costs element of the structural, access to justice aspect of LO, the UK picture here is far less rosy. Although there have been some improvements to UK cost rules such as the introduction of ‘protective costs orders’,⁴⁸ UK costs provisions still put judicial review out of reach of many because of the significant costs threat they face and, in draft findings, the UK’s costs rules have been found to be in breach of Aarhus by the Convention’s Compliance Committee.⁴⁹ In that respect, it is perhaps a surprise to find as many proactive ‘pro’ judicial review cases as there have been in the UK; and in other EU Member States, many of which have more favourable costs

⁴⁶ See C Hilson and I Cram, ‘Judicial Review and Environmental Law – Is There a Coherent View of Standing?’ (1996) 16 *Legal Studies* 1.

⁴⁷ On Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

⁴⁸ Under *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 WLR 2600.

⁴⁹ See ClientEarth communication to the Aarhus Convention Compliance Committee: <http://www.clientearth.org/the-case-for-access-to-the-courts>. The Compliance Committee issued draft findings confirming a breach on 25 August 2010. Before these findings, the UK costs system had recently been reviewed in a report by Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (TSO, London 2009). See further A Tew, ‘The Jackson Report and Judicial Review’ [2010] *Judicial Review* 118. Post the findings, see now Working Group on Access to Environmental Justice, *Ensuring Access to Environmental Justice in England and Wales: Update Report* (August 2010).

regimes, one might well expect more CCL compared to the UK on this basis. However, while the costs element of LO may, in this way, provide a poor explanation for levels of *proactive* UK CCL, it may help to explain the high levels of *reactive* UK CCL: in other words, objectively weak proactive LO need not amount to weak reactive LO. After all, one might expect to find higher levels of this cheaper alternative way of accessing the courts – as a criminal defendant rather than as a civil claimant – in jurisdictions like the UK where the costs of judicial review are high. In other states with more favourable costs regimes, climate change activists may not need to avail themselves of the criminal court route to secure a cheap ‘day in court’. We may therefore expect to find lower levels of reactive CCL in such states.

Another possible explanation for high levels of CCL in the UK may lie with theories of ‘resource mobilisation’ (RM),⁵⁰ which suggests that resources are important in explaining the uptake of litigation.⁵¹ Here, there is of course a degree of overlap with the costs element of LO discussed above. However, examining the issue from a RM perspective highlights an important part of the picture: thus, it can be seen that while proactive litigation costs in the UK are indeed relatively high, the UK also has a comparatively well resourced environmental NGO sector which can help to take on some of those legal costs. In other words, to those groups with appropriate resources, objectively weak LO may not appear subjectively weak. On this basis (and all other things being equal), one might expect similar levels of proactive CCL in other Northern European countries with well-resourced environmental NGOs, and lower levels in Central and Eastern Europe and also in a number of Southern European States where such NGOs enjoy fewer resources.⁵²

However, resources within RM are not only financial in nature. Social movement actors can also be well resourced in terms of experience. Thus, with proactive litigation, one might well point to the significant experience which UK environmental NGOs built up in the 1990s through judicial review challenges to a wide range of policy areas ranging from roads to drinking water quality. And with reactive

⁵⁰ See eg J McCarthy and M Zald, ‘Resource Mobilization and Social Movements: A Partial Theory’ (1977) 82 *American Journal of Sociology* 1212.

⁵¹ Hilson (n 43) 240-241.

⁵² On comparative NGO resourcing in Europe, see eg T Borzel, ‘Why There is no Southern Problem. On Environmental Leaders and Laggards in the European Union’ (2000) 7 *Journal of European Public Policy* 141.

litigation, one might equally point to the extensive experience of using this in the UK across the environmental and peace movements. Lord Melchett, then executive director of Greenpeace, was, with other defendants, famously acquitted of causing criminal damage to a field of GM crops in 2000 having raised a defence of lawful excuse.⁵³ And there was a number of Crown Court acquittals secured by the Trident Ploughshares wing of the peace movement in the latter decades of the last century, which built on earlier experience gained at the US airbase at Greenham Common in Berkshire.⁵⁴

Although somewhat out of fashion in social movement studies, an attention to ‘grievance’ (the issue that motivates collective action in the first place) may also help here as an additional variable to explain the UK position.⁵⁵ Nevertheless, it is necessary to distinguish between general and specific grievances. The general grievance here is climate change. One might assume that a country with significant general or overall levels of concern over climate change, and whose citizens felt that industry and their government were not doing enough to tackle it, would have higher levels of CCL. However, there is a problem with such an assumption, in that one might have low levels of overall concern over climate change and industry and government performance but with enough concern among some citizens to mobilise collective action. Indeed, the UK seems to fit just such a picture: Eurobarometer data reveals very low levels of concern about climate change in the UK when compared with most other EU Member States,⁵⁶ with again relatively, fewer of its citizens believing that industry and government are not doing enough to tackle it;⁵⁷ however, UK CCL data suggests that, despite this, there remains sufficient concern to produce significant levels of legal mobilisation.

⁵³ *R v Melchett* (2000), <http://www.guardian.co.uk/environment/2000/sep/21/activists.gmcrops>.

⁵⁴ Hilson (n 7) 101, citing A Zelter, ‘People’s Disarmament’ in A Zelter (ed), *Trident on Trial: The Case for People’s Disarmament* (Luath Press, Edinburgh 2001) 53. On Greenham, see further Roseneil (n 33).

⁵⁵ On grievance, see eg S Buechler, ‘Beyond Resource Mobilization? Emerging Trends in Social Movement Theory’ (1993) 34 *The Sociological Quarterly* 217; R Schurman and W Munro, ‘Ideas, Thinkers, and Social Networks: The Process of Grievance Construction in the Anti-genetic Engineering Movement’ (2006) 35 *Theory and Society* 1.

⁵⁶ Special Eurobarometer 300, *Europeans’ Attitudes Towards Climate Change* (2008), pp 13 and 37.

⁵⁷ *Ibid*, pp 41 and 46. In the UK, again more than in most other Member States, 7% believed quite the contrary – ie that the government was doing *too much* to fight climate change (p 46).

Rather than rely on general grievance, it is therefore more useful to drill down to examine specific grievances. In the UK, much of the legal mobilisation has, as we've seen, concerned coal-fired power stations, airport expansion and incineration (and to an extent also wind farms). There are, in other words, specific grievances around these industries. Social movement theory fell out of love with grievance as an explanation for collective action because of course grievances are everywhere and yet not all of them give rise to a collective action response.⁵⁸ There was thus a search for other variables (such as resources or political opportunity) to help explain why, in certain places and at certain times, grievances were acted upon in certain ways.

Thus in the UK, there may be a climate-based grievance against coal-fired power, airport expansion and incineration, but what has translated that into litigation-based collective action is, inter alia, poor PO and more positive LO and the availability of resources. However, while a specific grievance is thus not *sufficient* in explaining high levels of CCL, it is nevertheless *necessary*.⁵⁹ One might therefore expect to find lower levels of CCL in countries with low levels of reliance on coal and with relatively little in the way of airport expansion. Similarly, countries with a long history of using incineration as a waste disposal method may produce fewer grievances around it – in contrast with the UK, where incineration is very much still the shock of the new after a long, historical reliance on landfill.

Of course much of the above discussion presupposes that most CCL involves social movement actors such as environmental NGOs. In the UK, that does seem to be true; however, in other countries, one may find that industry challenges form a more significant proportion of climate change cases, and industry will often fare very differently, particularly regarding the ability to resource litigation but also, potentially, in terms of standing and political opportunity. In other words, while social movement theory may help us better to understand the use of CCL by social movement actors (both pro and anti), it will not necessarily help to explain high levels of industry CCL.

⁵⁸ Buechler (n 55) 221.

⁵⁹ Ibid.

Conclusion

Climate change litigation has certainly arrived in the UK and is likely to grow in the future as experience of its use develops. The current chapter has sought to categorise the various cases that we have seen so far and has emphasised how some of the examples may not always chime with what people ‘expect’ climate change litigation to be about. Thus, industry and other types of ‘anti’ litigation, but also reactive ‘pro’ litigation may strike some as unusual examples of CCL, but they are important features within the UK CCL landscape.

In the latter part of the chapter, an attempt was made to try to explain the relatively high levels of CCL that we have seen in the UK – in particular the ‘pro’ cases involving social movements. Although a number of factors seem to be relevant – including legal opportunity and resources – it was suggested that the often neglected aspect of ‘grievance’ also appears to play a part and, in that respect, should be brought more squarely into law and social movement studies. Whether this and the other factors also help to explain the uptake (or non-uptake) of CCL in other countries, in Europe and more widely, is something on which further research needs to be conducted.