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# DECISION OF THE DUTCH COURT OF APPEAL, URGENDA FOUNDATION V KINGDOM OF THE NETHERLANDS - CASE SUMMARY

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Legal Briefings - By **Silke Goldberg and Benjamin Rubinstein**

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The Dutch Court of Appeal (the “**Court**”) has upheld the 2015 decision of the Hague District Court in the case of Urgenda Foundation v Kingdom of the Netherlands, and ruled that the State (ie the Kingdom of the Netherlands) has a duty of care under Articles 2 and 8 ECHR to its citizens to reduce greenhouse gases by at least 25%, relative to the 1990 emission level. All of the defences raised by the State were dismissed.

In its decision the Court stressed that immediate action is required, noting that the later actions are taken to reduce emissions, the more ambitious measures will need to be in the future. In addition, the court held that the State cannot hide behind the EU level reduction target of 20% by 2020, especially as the EU as a whole is expected to achieve a reduction of 26-27% in 2020.

The Court held that by not taking action to reduce emissions by at least 25% by end-2020 the State fails to fulfil its duty of care to its citizens pursuant to Articles 2 and 8 ECHR. A reduction of 25% should be considered a minimum as recent insights about an even more ambitious reduction in connection with the 1.5°C target have not even been taken into consideration.

## **BACKGROUND**

In 2015 the Dutch environmental group Urgenda Foundation (Urgent Agenda), a citizens' platform involved in the development of plans and measures to prevent climate change with members from various domains in society, sued the Kingdom of the Netherlands (the "**State**") to require it to do more to prevent global climate change.

On 24 June 2015 the Hague District Court (the "**District Court**") ordered the State to reduce its greenhouse gas emissions by at least 25% as of end-2020 relative to the 1990 emission level, as lesser reductions would not meet the State's fair contribution towards the UN Goal of keeping global temperature increases within 2°C relative to pre-industrial levels. Furthermore, the court concluded that the State owed a duty of care to take climate change mitigating measures.

The State appealed the decision of the District Court citing 29 grounds, which were contested by Urgenda which additionally filed a cross appeal.

It should be noted that since the District Court decision, the level of CO<sub>2</sub> emissions in the base year of 1990 were retrospectively adjusted upwards due to the adaptation of a new calculation method. As a result the assumed total CO<sub>2</sub> reduction of the Netherlands of 14-17% in 2020 was revised to 23% (19-27% taking account of the margin of uncertainty).

In its appeal, the State sought to submit the dispute to the Court in its entirety and Urgenda cross appealed against the District Court's opinion that, considering Article 34 ECHR, it cannot rely on Articles 2 and 8 ECHR in the present proceedings.

In connection with its cross-appeal, Urgenda claimed "*that the State has acted unlawfully towards it, because such conduct violates proper social conduct and is contrary to the positive and negative duty of care expressed in Articles 2 (the right to life) and 8 ECHR (the right to family life, which also covers the right to be protected from harmful environmental influences of a nature and scope this serious).*"

In light of both positions the Court decided to re-assess the dispute in its entirety, with the proviso that the Court could not allow a reduction further than at least 25% by 2020 (as Urgenda had not put forward grounds of appeal against the rejection of a reduction of more than 25%).

## DECISION

### Applicability of Articles 2 and 8 ECHR - Urgenda's Cross Appeal

The Court started by establishing that Urgenda's ground of appeal (in the cross-appeal) was well founded stating that the State and the District Court had been wrong in their analysis that Article 34 ECHR hindered Urgenda from directly invoking Articles 2 and 8 ECHR. Article 34 only concerns access to the European Court of Human Rights, it does not address access to the Dutch Courts. This is a matter of Dutch law which established (Book 3 Section 305a of the Dutch Civil Code) that individuals who fall under the State's jurisdiction may invoke Articles 2 and 8, and Urgenda may do so on their behalf. Furthermore, the Court deemed that Urgenda has sufficient interest in its claim.

### Existence of a duty of care by the State

In its assessment of the asserted unlawfulness under Articles 2 and 8 ECHR the Court found that *"the State has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates the obligation to protect the right to home and private life."* Furthermore, in considerations of facts and circumstances surrounding the climate change debate which had been submitted to the Court, the Court stated that it *"believes that it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life. As has been considered above by the Court, it follows from Articles 2 and 8 ECHR that the State has a duty to protect against this real threat."*

### Scope of Duty

To assess whether the State had met its duty of care, the Court used the IPCC Fourth Assessment Report, 2007 ("**AR4**") which found that a reduction of 25-40% by 2020 was necessary to have a more likely than not chance of remaining under the 2°C temperature increase threshold, as a starting point. By doing so it went against the position of the State and expressly questioned the accuracy of the IPCC Fifth Assessment Report, 2013-2014 ("**AR5**") which the State sought to rely on. The AR5 is more optimistic in its assessment than the AR4 but as pointed out by the Court, the report's findings were based on the existence of negative emissions in the future (the possible existence of which is highly uncertain at this stage).

It noted that climate science has since the District Court decision acknowledged that a safe temperature rise is 1.5°C rather than 2°C, a consensus which was also expressed in the Paris Agreement (in which it was agreed that global warming should be limited to well below 2°C, with an aim for 1.5°C). Furthermore the Court stressed that fact that the State knew of the 25-40% target for a long time as it was first introduced in AR4 in 2007, and had been referred to at all Climate Conferences since. While it noted that this may not have established a legal standard with a direct effect, the Court *"believes that it confirms the fact that at least a 25-40% reduction of CO2 emissions as of 2020 is required to prevent dangerous climate change."*

Furthermore, the Netherlands having had a 2020 reduction target of 30% (which it had argued was necessary to stay on track for the 2°C objective) until 2011 when it adopted the 20% EU target, failed to give reasons how such reduction would credibly still meet the 2°C objective. (para 52) The Court also stressed the need for a significant effort which will have to be made by the State between now and 2030 to comply with the Netherlands' unilateral 49% target (set by the government in its 2017 Coalition Agreement).

In light of the above, the Court found that a reduction obligation of at least 25% by end-2020, as ordered by the District Court, was in line with the State's duty of care.

## **Defences by the State**

The State put forward a number of defences against a 25% obligation, all of which the Court rejected. The main ones are briefly summarised below along with the Courts ground for rejection:

- EU Emission Trading Scheme ("**EU ETS**") System stands in the way of the Netherlands taking measures to further reduce CO2 emissions – The Court stated that Art 193 TFEU allows an EU Member State ("**MS**") to adopt more ambitious protection measures provided these do not interfere with the functioning and the system of the ETS in an unacceptable measure. Furthermore, such effect had not been substantiated by the State and was "implausible."
- Any reduction by the Netherlands creates more room for emissions elsewhere in the EU under the ETS system, making such reductions pointless – The Court believes that this falsely assumes that EU MS make maximum use of their allocated emissions, ignoring these MS' individual responsibilities to reduce CO2, and noted that other countries (Germany, the UK, Denmark, Sweden and France) are taking further reaching measures than the Netherlands. Also quoted reports which suggest that no waterbed effect can occur before 2050.
- Risk of companies moving to other countries with less strict greenhouse gas reduction obligations and that such obligations would undermine the 'level playing field for Dutch companies – The Court found this to have been insufficiently substantiated particularly in light of other EU MS perusing stricter emission standards. Additionally, the Court noted that the same arguments were not decisive for the self-inflicted 49% reduction target for 2030 the State had unilaterally introduced.
- The State's adaptation efforts were not considered – The Court stated adaptation was not sufficient to adequately prevent the disastrous consequences of excessive global warming and that any such efforts would not take away from the State's mitigation obligation to reduce its CO2 emissions quicker than planned.
- The emission reduction percentage of 25-40% in 2020 is intended for the Annex I

countries as a whole, and should therefore not be taken as a starting point for the emission reduction of an individual Annex I country – The State has failed to provide substantiation why a lower emission reduction percentage should apply to the Netherlands than for the Annex I countries as a whole.

- The Dutch greenhouse gas emissions, in absolute terms and compared with global emissions, are minimal, and the State cannot solve the problem on its own – The Court stated, that this does not release the State from its obligation to take measures in its territory, within its capabilities, which in concert with the efforts of other states provide protection from the hazards of dangerous climate change.
- Lack of causal link – Court stated that the proceedings concern a claim for imposing an order and not a claim for damages, so that causality only plays a limited role. A state held accountable cannot be able to argue that it does not have to take measures if other states do not do so either. Furthermore, it is impossible for the Urgenda to summon all eligible states to appear in a Dutch court.
- The remaining available time (until end-2020) is very short – Strongly rejected by the Court as the judgment (declared provisionally enforceable) is over three years old, the State has known about the severity of the climate problem for a long time, and up to 2011 the State had focused its policy on a reduction of 30%. Thereby stressing that the State *“should assume its responsibility”*, considering it *“[being] a highly developed country,[which] has profited from fossil fuels for a long time and still ranks among the countries with the highest per capita greenhouse gas emissions in the world.”*
- Separation of powers: it is not up to the courts but to the democratically elected government as the appropriate body to make the attendant policy choices –Rejected by the Court because the State violates human rights, which calls for the provision of measures, while at the same time the order to reduce emissions gives the State sufficient room to decide how it can comply with the order.
- Realisation of envisaged reduction requires legislation, meaning that the order constitutes an order to create legislation – The District Court correctly considered that Urgenda’s claim is not intended to create legislation, and that the State retains complete freedom to determine how it will comply with the order.
- *Trias politica*: the role of the court stands in the way of imposing an order on the State – The Court is obliged to apply provisions with direct effect of treaties to which the Netherlands is party, including Articles 2 and 8 ECHR, which take precedence over Dutch laws that deviate from them.

## Conclusion

The Court has provided a rather political judgment upholding the District Court's decision and confirming that the State owes a duty of care under Articles 2 and 8 ECHR to its citizens to reduce greenhouse gases by at least 25% against a 1990 benchmark, which the state failed to fulfil.

The Court also rejected outright every defence raised by the State and made multiple strong comments that "the State should assume its responsibility" and effectively pull its weight as part of the global efforts reduce emissions. It has been adamant that imminent action is a necessity and that any delay will simply make it harder to achieve the more ambitious 2030 and 2050 targets, and ultimately the 2°C (closer to 1.5°C) aim.

Lastly, it should be noted that the Dutch government has the option to appeal the decision to the Supreme Court.

### **PLAN B CLAIM - THE UK VERSION?**

In the UK Plan B Earth ("**Plan B**"), a charity with the mission to realise the goals of the Paris Agreement on climate change, has filed a climate change lawsuit against the Secretary of State for Business, Energy, and Industrial Strategy (the "**Secretary of State**"). Plan B and 11 citizen claimants (between 9 and 79 years of age) allege that the Secretary of State violated the Climate Change Act 2008 and other law by failing to revise the UK's 2050 carbon reduction target in light of new international law and scientific developments.

While the High Court found on 20 July 2018 that the claims were not arguable and denied permission for the case to proceed, Plan B has appealed this decision arguing amongst other things that the judge had misinterpreted the obligations under Article 2(1)(a) of the Paris Agreement.

In light of the Dutch Appeal decision it will be interesting to see whether the English Court of Appeal holds up the High Court decision, or interprets the UK's climate obligations similar to their Dutch counterpart and allows the appeal.



## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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