

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

In the matter of a claim for judicial review

BETWEEN

THE QUEEN

on the application of

PLAN B. EARTH

Claimant

- and -

THE SECRETARY OF STATE FOR
TRANSPORT

Defendant

-and-

(1) HEATHROW AIRPORT LIMITED
(2) ARORA HOLDINGS LIMITED

Interested Parties

SKELETON ARGUMENT

A. INTRODUCTION

1. At the heart of all three grounds of Plan B's claim, lies a common concern: the Secretary of State's failure to assess the ANPS against the Paris Agreement on Climate Change ("**the Paris Agreement**") and specifically the Paris Agreement temperature limit ("**Paris Temperature Limit**"), which, according to the best available science, demarcates the boundary between humanity and an intolerable risk of disaster: disaster for the environment; for the economy; and for international security.
2. Initially the Secretary of State purported to have taken the Paris Agreement into account. His own witnesses, however, undermined that claim. Once Plan B drew that to his attention, the Secretary of State modified his position: when he said that he had considered the Paris Agreement, he meant only that he had considered it to be irrelevant.
3. In truth, as from December 2015 the Paris Agreement, which the Government has advanced, signed and ratified, has been the foundation of national and international policy on climate change. The Secretary of State's contention that the Paris Agreement was irrelevant to his consideration is fanciful and legally flawed from every angle of approach. Specifically, the Secretary of State has:
 - (a) breached the 2008 Act, ss. 5(8) and 10(3), such that his designation was *ultra vires* (**Ground 1**)
 - (b) acted irrationally by treating the Paris Temperature Limit as irrelevant to his consideration and the discredited 2°C temperature limit as relevant to his consideration (**Ground 2**).
 - (c) breached the Human Rights Act 1998, s. 3 ("**HRA s.3**"), by failing to interpret the 2008 Act, s.5(8) in accordance with the right to family life and the right to life (**Ground 3**).
4. All three grounds of claim are closely interlinked, but since Ground 1 and Ground 3 both relate to the interpretation of s. 5(8) of the 2008 Act, for the remainder of this skeleton argument, and at the hearing, Plan B proposes to address Ground 3 immediately following Ground 1 and prior to Ground 2.
5. In substance, Plan B's and Friends of the Earth's grounds of claim are complementary. In terms of the legal framing, however, there is an important distinction between Plan

B's Ground 1 and Friends of the Earth's Grounds 1 and 2. Plan B adopts Friends of the Earth's submissions on s. 10(3) of the 2008 Act in so far as the argument is that the Secretary of State was required by that section to take the Paris Agreement into account and does not propose to advance separate submissions on that point. However, in contrast to Friends of the Earth, it is Plan B's submission that the Secretary of State was required to consider the Paris Agreement also pursuant to s. 5(8) of the Act, since the Paris Agreement is in reality the foundation of "government policy" on climate change.

6. It may be convenient (in the interests of clarity) to mention briefly one argument on which Plan B does not rely. Plan B does not suggest that the Paris Agreement is, of itself, legally enforceable in domestic law; nor does it ask this Court to engage in an exercise of interpreting international law. To the contrary, Plan B's claim is grounded in straightforward and non-technical considerations of public law: (i) the interpretation of the 2008 Act s. 5 (and specifically whether "government policy" on climate change should be interpreted to include the government's commitment to the Paris Temperature Limit); and (ii) the rationality or otherwise of the Secretary of State's conclusions that the Paris Temperature Limit was irrelevant to his consideration and that the discredited 2°C limit was a relevant consideration.

B. FACTUAL BACKGROUND

The Secretary of State has declined to include in the climate change annexe to the statement of common ground ("**the Climate Change Annexe**") any material embarrassing to his case. Since all evidence of government policy on climate change is embarrassing to the Secretary of State's case, in so far as all evidence of government policy on climate change confirms the central place of the Paris Agreement in government policy, what remains in the climate change annexe is at best partial and fragmentary, and at worst misleading. The Secretary of State's approach compels Plan B to summarise the evidence of government policy in this skeleton argument, since such evidence is relevant to the interpretation of s. 5(8) of the 2008 Act.

B.1 UK Government policy on climate change

7. Since climate change is a global threat, the only plausible basis for developing national policies on climate change is to derive them from a global target or temperature limit, which is recognised by other countries.
8. Consequently, the first principle of Government policy on climate change has been consistent over many years and across a number of different governments. That first principle is that the UK should commit to making an appropriate contribution to maintaining the global temperature limit, which:
 - (i) prior to the Paris Agreement was 2°C; and
 - (ii) post the Paris Agreement became the more stringent 1.5°C and “well below” 2°C.

8.2 Indeed almost all other countries (with the notable exception of the USA under President Donald Trump) adopt the same principle.

B.1.1 Government policy on climate change prior to the Paris Agreement (ie prior to December 2015)

9. Thus, in 2008, when the international consensus was that global warming should be limited to 2°C, it was Government policy to make an appropriate contribution to maintaining that 2°C limit.
10. In 2000, The Royal Commission¹ had recommended an emissions reduction target of 60% by 2050. But by the time of Climate Change Bill was published in 2007, including that 60% target, it no longer appeared adequate to maintaining the 2°C limit. Consequently, as the draft legislation went through pre-legislative scrutiny, the responsible Minister was questioned by the House of Commons Environmental Audit Committee on the Government’s commitment to the 2°C limit:²

“The Secretary of State for Environment, Food and Rural Affairs confirmed to us that the Government was still completely committed to limiting global warming to a rise of 2°C. By

1 The Royal Commission on Environmental Pollution’s 22nd Report, 2000, ‘Energy – the Changing Climate’

2 Environmental Audit Committee, July 2007 report, Beyond Stern: From the Climate Change Programme Review to the Draft Climate Change Bill, Seventh Report of Session 2006–07, page 31, §65, Bundle [x/y]

stressing the dangers even of this level of warming, he emphasised the reasons why the UK and EU were committed to holding a rise in temperature at no more than 2°C”.

11. Lord Adair Turner, the first Chair of the CCC, emphasised the “crucial” role of the global temperature limit to Ed Miliband, then Secretary of State for the Department of Energy and Climate Change, when advising in 2008 that the appropriate level for the 2050 Target should be increased to “at least 80%”³:

“To determine a UK emissions reduction target, we first considered what a global target should be and then the UK’s appropriate contribution. The global emissions target needs to be based on an analysis of the climate science. The crucial issue is what level of global temperature should the world seek to avoid, and what emissions path will keep us below this temperature.” (emphasis added)

12. The general principles for deriving a national emissions reduction target from the global temperature limit are straightforward. Since carbon dioxide, which is the main driver of climate change, stays in the atmosphere for many hundreds of years, for any given temperature limit there is a global “carbon budget”. To avoid exceeding a given temperature limit, countries must ensure, collectively, that their combined emissions do not exceed the relevant budget. For background, the Court may be assisted by a graphic, prepared by the Global Commons Institute, which visualises global carbon budgets in the context of the Paris Agreement, as specified by the Intergovernmental Panel on Climate Change (“**the IPCC**”) in its Fifth Assessment Report⁴.

13. The derivation of the 2050 Target from the 2°C limit is confirmed in the quotation from the Committee on Climate Change’s (“CCC”) report of 2016, which is included at §16 of the Climate Change Annexe:

“This 2050 target was derived as a contribution to a global emissions path aimed at keeping global average temperature to around 2°C above pre-industrial levels.”

14. The CCC also summarises the position on its website⁵:

“Through the Climate Change Act, the government has committed to:

- *reduce emissions by at least 80% of 1990 levels by 2050*

³ Bundle [x/y]

⁴ See Bundle [x/y]

⁵ <https://www.theccc.org.uk/tackling-climate-change/reducing-carbon-emissions/carbon-budgets-and-targets/>

- *contribute to global emission reductions, to limit global temperature rise to as little as possible above 2°C*”.
15. Put simply, the Government’s policy in 2008 was to limit warming to 2°C, in accordance with the international consensus of the time. The Climate Change Act 2008 (“CCA”) s. 1, which establishes the 2050 Target, makes no mention of the 2°C limit. Its purpose was to *give effect to* government policy on climate change, expressed as a contribution to the 2°C limit.
 16. From around 2010, concerns were expressed in the UK and internationally regarding the adequacy of the 2°C limit.
 17. In 2011, Christiana Figueres, then Executive Secretary of the United Nations Framework Convention on Climate Change (“UNFCCC”), warned:

*“Two degrees is not enough – we should be thinking of 1.5°C. If we are not headed for 1.5°C we are in big, big trouble.”*⁶
 18. In 2012, the UNFCCC Conference of the Parties (“COP”), which includes the UK Government, commissioned an expert review (“**Structured Expert Dialogue**”) concerning the adequacy of the 2°C global temperature limit.
 19. In 2013, Lord Stern, whose 2007 Review informed the setting of the 2050 Target, gave a presentation to the World Economic Forum in Davos, in which he stated:

“Looking back, I underestimated the risks. The planet and the atmosphere seem to be absorbing less carbon than we expected, and emissions are rising pretty strongly. Some of the effects are coming through more quickly than we thought ...

*This is potentially so dangerous that we have to act strongly. Do we want to play Russian roulette with two bullets or one? These risks for many people are existential.”*⁷
 20. In May 2015, the Structured Expert Dialogue issued its final report, which concluded:

*“The ‘guardrail’ concept, in which up to 2°C of warming is considered safe is inadequate ...Experts emphasised the high likelihood of meaningful differences between 1.5°C and 2°C of warming regarding the level of risk from ... extreme events or tipping points ...”*⁸

⁶ The Guardian, 1.6.2011, “UN chief challenges world to agree tougher targets on climate change”, Bundle [x/y]

⁷ Nicholas Stern: ‘I got it wrong on climate change – it’s far, far worse’, The Guardian, 26.1.2013, Bundle [x/y]

21. In June 2015, the UK Government made the following intervention at the UN Security Council Debate on Climate Change:

“As an island state, we too face risks. Risks of losing land to the sea, and more frequent – and more dangerous – flooding. However our first national climate change risk assessment, two years ago, found that it could be the indirect, international impacts of climate change that present the greatest risks. We may see food price spikes, large-scale migration, and even state failure ...

That is why we must approach climate change in the same way we approach any other grave threat to our international security – with urgency, effectiveness and determination.”⁹

22. In September 2015, Mark Carney, Governor of the Bank of England, warned of the threat to prosperity from climate change, describing it as “the tragedy of the horizon”¹⁰.

23. Against this background, the Government invested heavily, both diplomatically and financially, in building the international consensus for a global, legally binding treaty on climate change, which would commit all countries to taking action in accordance with the best available science and a more stringent temperature limit.

B.1.2 Government policy on climate change post the Paris Agreement (ie post December 2015)

24. In December 2015, the 197 Governments which are parties to the UNFCCC, including the UK, united in adopting the Paris Agreement on Climate Change, which reframes the global climate obligation as:

“Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels”.

25. The Paris Agreement represented a step-change in national and international policy, even where the process of implementing policy into domestic law would take time.

⁸ Report of the Structured Expert Dialogue (2015), page 18, Bundle [x/y]

⁹ http://www.spainun.org/wp-content/uploads/2015/07/United-Kingdom_CC_201506.pdf, Bundle [x/y]

¹⁰ <https://www.bankofengland.co.uk/speech/2015/breaking-the-tragedy-of-the-horizon-climate-change-and-financial-stability>, Bundle [x/y]

26. In October 2016 the CCC published a report on the implications of the Paris Agreement for the UK: *UK climate action following the Paris Agreement*. The report is explicit about the gap between the Paris Agreement and the 2050 Target, while advising the Government to wait for further evidence, including from the IPCC, before making any legislative change:

“The Agreement describes a higher level of global ambition than the one that formed the basis of the UK’s existing emissions reduction targets: The UK’s current long-term target is a reduction in greenhouse gas emissions of at least 80% by the year 2050, relative to 1990 levels. This 2050 target was derived as a contribution to a global emissions path aimed at keeping global average temperature to around 2°C above pre-industrial levels. The Paris Agreement aims to limit warming to well below 2°C and to pursue efforts to limit it to 1.5°C. This is more ambitious than both the ambition underpinning the UK 2050 target and previous international agreements.”¹¹

27. In November 2016, the UK Government ratified the Paris Agreement.

28. In October 2017, the UK Government published its *Clean Growth Strategy*. It is notable that, in his amended pleadings, the Secretary of State acknowledges that the *Clean Growth Strategy* constitutes Government policy on climate change:

“The relevant domestic legal and policy commitments being those found principally in or set under the CCA 2008 itself (which included for example the Clean Growth Strategy referred to paragraphs 8.5 and 8.6 of the Consultation Response)”¹².

29. In the Prime Minister’s Forward to the *Clean Growth Strategy*, Theresa May states:

“On the world stage, we were instrumental in driving through the landmark Paris Agreement.”¹³

30. In the Minister’s Forward to the *Clean Growth Strategy*, Greg Clark MP states

¹¹ See Climate Change Annexe

¹² Amended Detailed Grounds of Defence to Friends of the Earth, §62(5)

¹³Clean Growth Strategy,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700496/clean-growth-strategy-correction-april-2018.pdf, PM Forward, Bundle [x/y]

“Following the success of the Paris Agreement, where Britain played such an important role in securing the landmark deal, the transition to a global low carbon economy is gathering momentum.”

31. The Strategy itself states at:

*“The actions and investments that will be needed to meet the Paris commitments will ensure the shift to clean growth will be at the forefront of policy and economic decisions made by governments and businesses in the coming decades.”*¹⁴ (emphasis added).

32. It explains the risks of climate change:

*“This growing level of global climate instability poses great risks to natural ecosystems, global food production, supply chains and economic development. It is likely to lead to the displacement of vulnerable people and migration, impact water availability globally, and result in greater human, animal and plant disease. Climate change can indirectly increase the risks of violent conflicts by amplifying drivers of conflicts such as poverty and economic shocks. For this reason the UN, Pentagon and UK’s National Security and Strategic Defence Reviews cite climate change as a stress multiplier.”*¹⁵

33. More specifically, it explains the rationale for the Paris Temperature Limit:

*“Scientific evidence shows that increasing magnitudes of warming increase the likelihood of severe, pervasive and irreversible impacts on people and ecosystems. These climate change risks increase rapidly above 2°C but some risks are considerable below 2°C. This is why, as part of the Paris Agreement in 2015, 195 countries committed to hold “the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change ...”*¹⁶ (emphasis added).

34. In January 2018 the CCC published a report entitled “An independent assessment of the UK’s Clean Growth Strategy”. In the course of this report the CCC invited the Secretary of State to commission a review of the 2050 Target in October 2018, following the publication of the IPCC’s report into global pathways to uphold the 1.5°C limit. It explained that the Paris Agreement was likely to require revision to the 2050 Target:

“This [carbon target] currently set in legislation as a reduction of at least 80% on 1990 emissions. However, the Paris Agreement is likely to require greater ambition by 2050 and for

¹⁴ Ibid. p. 8

¹⁵ Ibid. p. 139

¹⁶ Ibid. p.140

*emissions to reach net-zero at some point in the second half of the century. It is therefore essential that actions are taken now to enable these deeper reductions to be achieved.*¹⁷

35. Also in January 2018, the Government published “A Green Future: Our 25 Year Plan to Improve the Environment”. In this the Government promised:

“We will: Provide international leadership and lead by example in tackling climate change...

We will use our diplomacy on the international stage to encourage more ambitious global action ...

Using our leading role in the UNFCCC, through which the Paris Agreement was established, we will urge the international community to meet the goals enshrined in the text ... This is vital for future environmental security: current global commitments under the Agreement are insufficient to limit average temperature rise to well below 2°C.”¹⁸

36. On 27 March, 2018, the Foreign and Commonwealth Office (“FCO”) Minister, Mark Field MP, was asked the following written question:

“What diplomatic steps his Department has taken to support the implementation of the Paris agreement on climate change.”

37. Mr Field began his response as follows:

“Climate change is an existential threat ... Our diplomats and Climate Envoy are working, with BEIS [the Department for Business, Energy and Industrial Strategy] and international partners, to ensure international implementation of Paris Agreement commitments”¹⁹. (emphasis added)

38. On 17 April 2018, the Government announced at the Commonwealth Heads of Government Meeting that it would review and revise its climate change targets to align them to the Paris Agreement, following publication in October 2018 of the IPCC’s report into the implications of crossing the 1.5°C threshold of global warming.

39. On 1 May 2018, Claire Perry MP, on behalf of the Government, informed Parliament that the Government wanted to know how to get to a “zero-carbon economy by 2050”,

¹⁷ <https://www.theccc.org.uk/wp-content/uploads/2018/01/CCC-Independent-Assessment-of-UKs-Clean-Growth-Strategy-2018.pdf>, Bundle [x/y]

¹⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/693158/25-year-environment-plan.pdf, Bundle [x/y]

¹⁹ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-03-27/904604/>, Bundle [x/y]

and asked for cross-party support for “something so vital.”²⁰ Evidence of the significance of this announcement, and the level of cross-party Parliamentary support for it, comes from an open letter to the Prime Minister, currently signed by 180 MPs and 53 members of the House of Lords, which says:

“We are writing to you to welcome the announcement that the Government has asked the Committee on Climate Change (CCC) for advice on a net zero emissions target, with the aim of bringing our greenhouse gas emissions reduction target in line with the Paris Agreement.

... The Paris Agreement commits parties to “holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels”. In order to achieve this, we will support you in setting a before-2050 net zero greenhouse gas emissions reduction target, and hope that you will enshrine this in law within the lifetime of this Parliament.”²¹ (emphasis added)

40. In summary, it was clear that by June 2018, when the ANPS was designated, the Paris Agreement already had a central place at the heart of Government policy on climate change.

B.2 The Secretary of State’s approach to the Paris Agreement and the global temperature limit

41. Initially the Secretary of State claimed to have taken the Paris Agreement into consideration in designating the ANPS. Thus his original Detailed Grounds of Defence to Plan B’s claim read²²:

“Furthermore, the Secretary of State considered the Paris Agreement in producing the ANPS”.

42. It was evident, however, from his own witnesses that that did not reflect the reality of his position. It was not just that the Secretary of State had failed to take the Paris Agreement into account. He had assessed the ANPS against the historic temperature limit of 2°C, which had been discredited as inadequate and rejected by governments as long ago as December 2015.

²⁰ <https://hansard.parliament.uk/commons/2018-05-01/debates/BAD2B942-B27A-428E-87B5-6F50B699DCBE/OffshoreWindSector>, Bundle [x/y]

²¹ <https://www.theclimatecoalition.org/joint-letter>

²² at §24

43. Thus Caroline Low, Director of Heathrow Expansion, states in her witness statement:

“Subsequently, in establishing its carbon obligations for the purpose of assessing the impact of airport expansion, my team has ... considered existing domestic legal obligations as the correct basis for assessing the carbon impacts of the project, and that it is not appropriate at this stage for the government to consider any other possible targets that could arise through the Paris Agreement.”

44. Further, Low explains that in assessing the climate change impacts under the carbon traded scenario, the Secretary of State relied on the old, discredited 2°C limit:

“The carbon traded scenario assumes aviation emissions are tackled at an international level. It follows BEIS modelling assumptions that UK aviation is part of the EU Emissions Trading System until 2030 and then a full functioning global cap thereafter. Under this scenario overall CO2 emissions are set at a cap consistent with a future global goal to limit warming to 2°C ...”²³ (emphasis added).

45. Phil Graham, the Chief Executive of the National Infrastructure Commission, makes the same point:

“Under the first of the AC’s two approaches (‘carbon traded’), aviation emissions are tackled at international level through a global carbon trading system ... under this approach the CCC planning assumption is not treated as a constraint since all emissions across the world are assumed to be captured within a carbon market that only allows total global carbon emissions consistent with a 2 degree climate stabilisation target.”²⁴ (emphasis added).

46. As does Ursula Stevenson, Technical Director at WSP, while acknowledging that the 2°C limit has been superseded:

“The overarching target was devised by the CCC to reduce UK’s carbon emissions in line with global targets to limit global temperature rise to 2°C in consonance with the international consensus of the time. In the setting of the Carbon Budgets, there is an expectation that, should additional reductions be required to meet stricter emissions

²³ Low, §469

²⁴ Witness statement of Phil Graham, §124

*targets, as for example under the Paris Agreement, future budgets will be altered by the CCC accordingly ...*²⁵

...The AoS has followed this advice and considered domestic legal obligations as the correct basis for assessing the carbon impact of the project. At this stage it is not possible to consider what any future targets might be recommended by the CCC to meet the ambitions of the Paris Agreement. It is expected that, should more ambitious targets be recommended ... then government will be required to make appropriate policy decisions across all sectors of the economy to limit emissions accordingly."²⁶

47. James Maurici QC conceded at the pre-trial on 15 January 2019 that the Secretary of State had considered the Paris Agreement only in the sense that he had concluded that it was irrelevant to his determination.
48. To all intents and purposes, the Secretary of State proceeded as if there had been no material developments in government policy on climate change since 2008, deeming irrelevant the profound changes that had in reality occurred. The Paris Agreement, which for the Prime Minister was a "landmark deal" which would be "at the forefront of policy and economic decisions made by governments", and which BEIS and the FCO were pressing on international partners to avert "existential threat" to the UK, was, from the point of view of the Secretary of State, simply an irrelevance (or possibly an inconvenience).

B. 3 The available basis for assessing the ANPS

49. The Secretary of State suggests that since the CCA has not as yet been amended in light of the Paris Agreement, the Paris Agreement itself did not provide him with a basis for assessing the ANPS²⁷. That proposition does not withstand scrutiny.
50. First, even if the Secretary of State were unsure *how* to take the Paris Agreement into account, that does not render it an irrelevant consideration.
51. Second, if the Secretary of State were concerned to understand the implications of the Paris Agreement for UK government policy on climate change, he might easily have consulted the responsible government department, which is Business, Energy and

²⁵ Witness Statement of Ursula Stevenson, §3.126

²⁶ Stevenson, §3.128

²⁷ See *Stevenson* statement, §[xx] above

Industrial Strategy, and with the CCC, which has a statutory responsibility to advise the government on climate change. To the contrary, by his own admission he chose to ignore developing thinking across government regarding the implications of the Paris Agreement; and appears to have declined the CCC's offer to meet to discuss the issue.

52. Third, there is no evidence that the Secretary of State even turned his mind to the question of whether the ANPS left scope for *any* increase in the ambition for the 2050 Target, which the CCC had advised was “likely to be required” by the Paris Agreement; or whether indeed the ANPS, if implemented, would in fact preclude the increase required.
53. Fourth, the witnesses for the Secretary of State confirm that, for the purposes of the carbon-traded scenario, the ANPS was assessed against the discredited 2°C temperature limit. On that basis, the ANPS could equally have assessed against the Paris Temperature Limit, which had been current at the time of the designation for more than 2 ½ years.
54. Fifth, by the time of the designation, the Secretary of State should have been aware of at least the following circumstances:
 - (i) The draft IPCC report, which had been presented to governments in January 2018, implied that, for consistency with the Paris Agreement and to avoid catastrophic consequences, there was a need for global decarbonisation by 2050;
 - (ii) In January 2018, the European Parliament voted in favour of decarbonisation across the European Union by 2050, in light of the Paris Agreement²⁸; and
 - (iii) In May 2018, the Government had informed Parliament that it wanted to know how to get to a “zero-carbon economy by 2050”, and asked for cross-party support for “something so vital.”²⁹

²⁸ Amendments adopted by the European Parliament on 17 January 2018 on the proposal for a regulation of the European Parliament and of the Council on the Governance of the Energy Union, (Ordinary legislative procedure: first reading), Amendment 8, Proposal for a regulation, Recital 6 a (new)

²⁹ <https://hansard.parliament.uk/commons/2018-05-01/debates/BAD2B942-B27A-428E-87B5-6F50B699DCBE/OffshoreWindSector>

55. Thus, by the time of the designation, there was recognition at the global, European and national policy levels that the Paris Agreement implied decarbonisation by 2050 at the very latest, which the Secretary of State chose to ignore.

THE CLAIMANT'S GROUNDS

C. GROUND 1 - *ultra vires*

Issues for the Court's determination

Issue 1: Should "Government policy relating to ... climate change", for the purposes of s.5 (8) of the 2008 Act, be interpreted to include the Government's commitment to the Paris Agreement and specifically to the Paris Temperature Limit?

Issue 2: Was the Secretary of State obliged to have regard to the Paris Agreement and specifically to the Paris Temperature Limit, for the purposes of s. 10(3) of the 2008 Act?

56. In Plan B's submission, the designation of the ANPS was *ultra vires* because the Secretary of State excluded the Paris Temperature Limit from his consideration, contrary to ss. 5(8) and 10(3) of the 2008 Act.

57. Plan B adopts Friends of the Earth's submissions regarding s. 10(3) of the 2008 Act in so far as the argument is that the Secretary of State was required by that section to take the Paris Agreement into account.

58. The focus of Plan B's submissions on Ground 1 are ss. 5(7) and 5(8) of the 2008 Act, which read:

"(7) A national policy statement must give reasons for the policy set out in the statement.

(8) The reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change."

59. "Government policy relating to ... climate change" is thus given a unique status by the legislation. It is the sole criterion that the Secretary of State is specifically directed to consider.

60. According to the Secretary of State's *evidence*, he interpreted "Government policy relating to ... climate change" to mean:

- (i) the CCA, s. 1, ie the 2050 Target; and
- (ii) the 2°C temperature limit (the basis for the assessment of the carbon-traded scenario).

61. In his *pleadings*, however, the Secretary of State neglects to mention his reliance upon the 2°C limit, implying his consideration was confined to the CCA, s. 1:

*"it was sufficient for the ANPS to refer to the 2050 Target"*³⁰.

62. The Government, along with the rest of the international community, had rejected the 2°C limit in December 2015 as inadequate and dangerous. By assessing the ANPS against the 2°C limit, the Secretary of State, was acting inconsistently with "Government policy relating to ... climate change" and in breach of the 2008 Act.

63. The Secretary of State's pleaded position, which is that the ANPS was assessed essentially against the 2050 Target, is indefensible for the following reasons:

64. First, the natural meaning of "Government policy relating to ... climate change" is not restricted to legal obligations. The Oxford Dictionary (online) defines policy as: "A course or principle of action adopted or proposed by an organization or individual"³¹. This definition is consistent with the concept of a "National Policy Statement" and would encompass the Government's commitment to the Paris Agreement and its intention to revise domestic targets accordingly. In line with this natural interpretation, the Court of Appeal in *Limit No. 2 Ltd*³², has held (per Longmore LJ):

*"The word 'policy' can in general import elements of both the present and the future ..."*³³

*My own view is that 'intention' is at least an important element of the concept of 'policy'."*³⁴

³⁰ See amended DGD, §23

³¹ <https://en.oxforddictionaries.com/definition/policy>

³² *Limit No. 2 Ltd v Axa Versicherung AG*, [2008] EWCA Civ 1231

³³ *Ibid.* §7

³⁴ *Ibid.* §9

65. Second, s. 5(8) of the Act was specifically referred to by the court in *R (Hillingdon) v. Secretary of State for Transport* [2010] EWHC 626 (Admin), where Carnwath LJ (as he was then) referred to “government policy” on climate change in accordance with its natural meaning. The claimants had contended that in light of developments in government and CCC thinking, a consultation process should have been re-opened, because it had become clear that the proposed expansion of aviation was fundamentally inconsistent with government policy on climate change³⁵. Denying the claim at that stage of the process, Carnwath LJ considered that such matters should instead be considered in the context of the ANPS:

“ ... the claimants’ submissions add up, in my view, to a powerful demonstration of the potential significance of developments in climate change policy since the 2003 White Paper. They are clearly matters which will need to be taken into account under the new Airports NPS. As has been seen, the Act specifically requires an explanation as to how the NPS takes account of the government’s climate change policy.”

66. Third, the CCA and the 2008 Act were developed in tandem and received Royal Assent on the same day, 26 November 2008. If the purpose of ss. 5(8) and 10(3) of the 2008 Act were to restrict the analysis to the CCA, section 1(1), then that is what the provisions would have said³⁶.

67. Fourth, the Secretary of State asserts that, “CCA 2008 does not include emissions from international aviation”³⁷. It is surprising that the Secretary of State’s contends that the interpretation of “government policy”, in this context, should be restricted to statutory provisions, which do not, in his view, apply.

68. Fifth, the Secretary of State’s witnesses confirm that the benchmark adopted for the purposes of the carbon-traded scenario was in fact the historic, discredited global temperature limit of 2°C, which is referred to neither in the CCA nor in any current Government policy on climate change³⁸.

³⁵ *R (Hillingdon) v. Secretary of State for Transport* [2010] EWHC 626 (Amin), §72-74

³⁶ See, for example, the 2007 White Paper, *Planning for a Sustainable Future*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228933/7120.pdf, page 11

³⁷ DDG to Friends of the Earth, §30

³⁸ See Low, Graham and Stevenson

69. Sixth, it is the Government's *policy* (ie its intention, as per the Court of Appeal's decision in *Limit No. 2 Ltd*) to review CCA, s.1, to ensure it is aligned with the Paris Agreement and to decarbonise the economy by 2050. These are policies which the Secretary of State admits he chose not to take into account.

70. The Secretary of State directly rejects Plan B's contention that the Paris Temperature Limit is Government policy:

"the Claimant is wrong to assert that "Government policy [...] is to limit warming to the more stringent standard of 1.5°C and "well below" 2°C""³⁹.

71. The Secretary of State's position in this regard is insupportable given that:

- (i) The Government advanced, signed and ratified the Paris Agreement, which established the Paris Temperature Limit;
- (ii) the Government confirmed its commitment to the Paris Temperature Limit in its *Clean Growth Strategy*, which the Secretary of State acknowledges as constituting government policy (see §§28 and 33 above);
- (iii) The Government's commitment to the Paris Temperature Limit is set out in its *25 Year Plan for the Environment*, published in January 2018 (see §35 above);
- (iv) As set out above (see §§7ff above), government policy on climate change must derive from some global temperature limit. Since the Secretary of State denies that, *"Government policy [...] is to limit warming to the more stringent standard of 1.5°C and "well below" 2°C"* he appears to believe that government policy remains tied to the discredited 2°C limit, which is incorrect.
- (v) In April 2018, the Government announced it would review its domestic climate change targets in light of the Paris Temperature Limit and in May the Government expressed an intention to decarbonise the economy by 2050.

³⁹ Detailed Grounds of Defence, §15

72. In summary, the Secretary of State's decision to interpret the phrase "*Government policy relating to ... climate change*" as if the phrase excluded reference to the Paris Agreement was wrong and a breach of sections 5(8) and 10(3) of the 2008 Act.

D. GROUND 3 - BREACH OF HUMAN RIGHTS ACT 1998, SECTION 3(1)

Issues for the Court's determination

Issue 1: Does HRA 1998, s. 7 preclude Plan B from reliance upon HRA 1998, s. 3?

Issue 2: Does climate change present a threat to life and to family life, such that the Government is under a positive obligation to take reasonable and proportionate measures to safeguard against that threat and / or a negative obligation to avoid exacerbating that threat?

Issue 3: Accepting that the Government has a wide discretion in relation to the implementation of any such measures, is its discretion constrained by its commitments under international law (such as the Paris Agreement) and general principles of law (such as the precautionary principle)?

Issue 4: To the extent that there is otherwise any ambiguity in the meaning of "*Government policy relating to ... climate change*" for the purposes of s. 5(8) of the 2008 Act, does HRA s.3(1) compel an interpretation which includes the Government's commitment to the Paris Agreement, and specifically to the Paris Temperature Limit?

73. In so far as the Secretary of State considered "*Government policy relating to ... climate change*" to be ambiguous then, in light of the gravity of the threat from climate change, and the risk of mass displacement and loss of life, he was bound, in Plan B's submission, to interpret the phrase in accordance with the Human Rights Act 1998, s.3(1), which states:

"3 Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

74. By signing and ratifying the Paris Agreement, the Government has expressly acknowledged that, "*Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights*"⁴⁰.

⁴⁰ Preamble to the Paris Agreement

75. Climate change is already having substantial adverse impacts in the UK. Research has been conducted into the 2003 heat-wave, associated with the loss of 70,000 lives across Europe, which concluded that the loss of lives in London can be attributed to climate change.⁴¹ According to the Environment Agency more than a million homes in the UK risk becoming uninsurable due to flood risk.⁴² Beyond the Paris Temperature Limit, the risk of crossing critical tipping points in the climate system, leading to runaway climate change, becomes intolerable.
76. The Secretary of State does not deny the severity of the impacts of climate change in general, or of transgressing the Paris Temperature Limit in particular. He does not deny that the Government regards climate change as an “existential threat”, which implies a risk of mass loss of life, or that the IPCC considers the consequences of crossing the 1.5°C boundary to be appalling. Consequently it is difficult to understand on what basis the Secretary of State disputes the proposition (if he does) that the Government has a positive obligation, pursuant to Article 2 of the European Convention on Human Rights (“ECHR Art. 2”), to take reasonable and proportionate measures to uphold the right to life in the face of the threat from climate change.
77. The Secretary of State contends that Plan B is not permitted to raise an argument under HRA s. 3(1), because it is not a victim for the purposes of HRA s.7, which reads as follows:
- “(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –*
- (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or*
- (b) rely on the Convention right or rights concerned in any legal proceedings,*
- but only if he is (or would be) a victim of the unlawful act.”(emphasis added)*
78. HRA s.7 imposes a “victim” requirement for a claim that HRA s.6(1) has been breached. Since Plan B does not assert a breach of HRA s.6(1), HRA s. 7 has no application and the Secretary of State’s argument on this point fails.

⁴¹ Mitchell et al. *Attributing human mortality during extreme heat waves to anthropogenic climate change* (July 2016)

⁴² *Rise in flood risk could make one million homes uninsurable*, The Independent, 09.01.11

79. The Secretary of State asserts that Plan B does not cite any Strasbourg jurisprudence in support of its position. So far as Plan B is aware, there is, for the time being, no Strasbourg jurisprudence relating specifically to climate change. That is one of the reasons that make it appropriate to consider jurisprudence from other parties to the ECHR, which relate to the issue.
80. On 9 October 2018, the Dutch Court of Appeal upheld the decision of the Dutch District Court in *Urgenda* that the Dutch State had failed to plan for sufficient carbon emission reductions to safeguard its citizens from climate change. Specifically, the Court of Appeal found that the Dutch State was in breach of Articles 2 and 8 of the ECHR:⁴³

"Articles 2 and 8 ECHR

45. As is evident from the above, the Court 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 ...

73. Based on this, the Court is of the opinion that the State fails to fulfil its duty of care pursuant to Articles 2 and 8 ... The very serious dangers, not contested by the State, associated with a temperature rise of 2° C or 1.5° C – let alone higher – also preclude such a margin of uncertainty ...

74. On these grounds, the State's reliance on its wide 'margin of appreciation' also fails". (emphasis added)

81. It is accepted that, in general terms, the Government enjoys substantial discretion in relation to the measures it takes to uphold ECHR protections. Strasbourg jurisprudence, however, is clear in this regard: a State's discretion, in the context of environmental protection and human rights, is constrained by applicable Treaty obligations and general principles of law, including the precautionary principle⁴⁴. To put it the other way round, a State's "margin of appreciation" does not extend to

⁴³ *Urgenda v State of the Netherlands*, THE HAGUE COURT OF APPEAL, Civil-law Division, Case number: 200.178.245/01, For an English translation of the judgment see: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>

⁴⁴ See, for example, *Tatar v Romania* (App. No. 67021/01, Judgment of 27 January 2009), §112 (available only in French).

ignoring its treaty obligations and does not extend, in the context of climate change, to disregarding the Paris Agreement and the Paris Temperature Limit.

82. Consequently, to the extent that there is any ambiguity in the phrase “*government policy ... relating to climate change*”, the interpretative provision of HRA s.3(1) obliged the Secretary of State to interpret s.5(8) of the 2008 Act as including and giving effect to the Paris Temperature Limit, which, according to the best available science, is the boundary between humanity and intolerable risks of disaster.

E. GROUND 2 – IRRATIONAL POLICY

Issues for the Court’s determination

Issue 1: Was the Paris Agreement and specifically the Paris Temperature Limit a relevant consideration for the purposes of the designation (or purported designation) of the ANPS?

Issue 2: Was the 2°C temperature limit a relevant consideration for the purposes of the designation (or purported designation) of the ANPS?

83. In Plan B’s submission the Secretary of State’s designation of the ANPS was irrational because:
- (i) he considered the Paris Temperature Limit, which was a relevant factor, to be irrelevant;
 - (ii) he considered the 2°C temperature limit, which was an irrelevant factor, to be relevant.

84. The distinction between Plan B’s Grounds 1 and 2 reflects the distinction drawn by this Court in *R (DSD & NBV) v The Parole Board of England*:

*“If a consideration falls to be taken into account only in certain circumstances, it cannot logically be one which the statute impliedly identifies account must be taken as a matter of legal obligation. If, on the other hand, a matter is so obviously material to a decision on a particular project, it would be Wednesbury unreasonable for the decision-maker to ignore it.”*⁴⁵

⁴⁵ [2018] EWHC 694 (Admin), §137

85. In Plan B's submission, the Paris Temperature Limit was a matter so obviously material to the designation of the ANPS, that, irrespective of the terms of the 2008 Act, it was *Wednesbury* unreasonable for the Secretary of State to regard it as irrelevant to his consideration and it was *Wednesbury* unreasonable for him to rely instead on the discredited 2°C limit.
86. The Secretary of State's response to Plan B's Ground 2 is to point out that the threshold for irrationality is high⁴⁶ which Plan B does not dispute.
87. Further, the Secretary of State notes that the threshold is higher still where:
- (i) Parliament has had a role in approving measures⁴⁷
 - (ii) The decision involved political, social and economic considerations⁴⁸
 - (iii) Where the matters in issue involve scientific, technical and predictive assessment⁴⁹
88. These principles, which are accepted, do not assist the Secretary of State.

The role of Parliament

89. The consequence of the Secretary of State's failure to discharge his obligations under the 2008 Act was that Parliament was not alerted to the conflict between the ANPS and the Government's commitment to the implementation of the Paris Temperature Limit.
90. The point is alluded to by the Chair and Deputy Chair of the CCC who took the unusual step of writing to him publicly to express their concerns:

"The UK has a legally binding commitment to reduce greenhouse gas emissions under the Climate Change Act. The Government has also committed, through the Paris Agreement, to limit the rise in global temperature to well below 2°C and to pursue efforts to limit it to 1.5°C.

We were surprised that your statement to the House of Commons on the National Policy Statement on 5 June 2018¹ made no mention of either of these commitments. It is

⁴⁶ DDG, §26

⁴⁷ DDG, §27(1)

⁴⁸ DDG, §27(2)

⁴⁹ DDG, §27(3)

essential that aviation's place in the overall strategy for UK emissions reduction is considered and planned fully by your Department ...

"We would welcome the opportunity to discuss these matters more fully."⁵⁰ (emphasis added)

91. The purpose of s. 5(8) of the 2008 Act is to harness the Government's planning and development policy to its climate change policy, to avoid these two branches of government policy developing in different and contrary directions. The 2008 Act envisages that Parliament should be informed of the relationship between the ANPS and the Government policy on climate change, so that Parliament has the opportunity to consider and to address any conflict arising. As things stand, Parliament has approved the proposal on the false premise that there is no conflict between the ANPS and the Government's policy on climate change.

The nature of the matters in dispute

92. Plan B's submissions do not require the Court to engage in complex political or technical considerations. The Court is simply required to consider whether it was right for the Secretary of State to rely upon the historic, discredited 2°C temperature limit, or whether he should instead have had regard to the Paris Temperature Limit, which was adopted by the Government in December 2015.

F. CONCLUSION

93. In the words of the Prime Minister, the Government was *"instrumental in driving through the landmark Paris Agreement"*, which from December 2015 introduced a step-change in national and international policy on climate change. According to the FCO, the FCO and BEIS are working with international partners, to ensure implementation of the Paris Agreement internationally, to avert "existential threat" to the UK.
94. As acknowledged by the Secretary of State in his response to the 2017 consultation on the Appraisal of Sustainability, *"Many respondents argue that expansion leads to a rise in carbon emissions which will threaten the UK's ability to meet its domestic and international climate commitments"*. The CCC felt compelled to write directly to the Secretary of State

⁵⁰ Letter from CCC to Secretary of State, June 2018, Bundle [x/y]

expressing its surprise that he had neglected to mention the Paris Agreement in his statement on the ANPS to the House of Commons.

95. With respect, it must have been obvious to the Secretary of State that the Paris Agreement was a relevant and significant consideration. He had every opportunity between December 2015 and June 2018 to seek and obtain advice on the implications for the ANPS, whether from the CCC or elsewhere. The question arises as to whether the Secretary of State wished to understand the implications of the Paris Agreement, given the difficulties he was having in justifying the ANPS against a target tied to the less stringent 2°C temperature limit.
96. The legal consequence of the Secretary of State's position is worth further consideration. On the basis of his analysis that the Paris Agreement was an irrelevant consideration, had he commissioned an opinion on the implications of the Paris Temperature Limit for the ANPS, as he ought to have done, and had he taken it into account, his approach would have been unlawful for taking into account an irrelevant consideration. The Court may be wary of embracing that logic.
97. In reality, whether as a matter of construction of the 2008 Act or as a matter of rationality the Secretary of State was bound to consider the relationship between the ANPS and the Paris Temperature Limit, which, since December 2015, has been the foundation of the Government's policy on climate change.
98. As his own witnesses confirm, he did not even attempt to do so. Consequently he failed his responsibility to alert Parliament to the inconsistency between the ANPS and Government policy on climate change. His designation of the ANPS was unlawful and his decision should be quashed.

TIM CROSLAND
DIRECTOR, PLAN B
8 FEBRUARY 2019