IN THE COURT OF APPEAL
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Before Lord Justice Hickinbottom and Mr Justice Holgate

IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW

BETWEEN

THE QUEEN
on the application of
PLAN B. EARTH

Appellant

- and -

THE SECRETARY OF STATE
FOR TRANSPORT

Respondent

- and -

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

Interested Parties

APPELLANT'S SKELETON ARGUMENT
IN SUPPORT OF AN
APPLICATION FOR PERMISSION TO APPEAL
AGAINST THE
REFUSAL OF PERMISSION
TO APPLY FOR JUDICIAL REVIEW

[References in this skeleton are in the form "[CB/x/y]" and "[SB/x/y]" where "CB" is the Core Bundle, "SB" is the Supplementary Bundle, "x" is the tab number and "y" is the page number"]

INTRODUCTION

1. This is an application for permission to appeal against the judgment of Hickinbottom LJ and Holgate J (**[CB/x/y]**)) dated 1 May 2019 refusing permission to bring a claim for judicial review. The Appellant wishes to challenge the Secretary of State's decision (**[CB/x/y]** and **[CB/x/y]**) to designate the Airports National Policy Statement ("**the ANPS**") in support of the expansion of Heathrow Airport under the Planning Act 2008 ("**the 2008 Act**"), on the basis of his failure to give proper consideration to the climate change impacts of the proposal.

2. In refusing permission, the judges below made the following errors:

(i) **The Court erred in law in treating the minimum target of 80% greenhouse gas emissions reduction by 2050, established by the Climate Change Act 2008 ("CCA") s. 1, as precluding Government policy which implied emissions reduction of greater than 80%:** The Court proceeded on the basis that "Government policy relating to … climate change" could not differ at all (or at least could not differ materially) from the base level of the emissions target set out in the CCA. That approach is fundamentally flawed. It is clear that Government Policy may exceed the 80% emissions reduction target, as the CCA establishes only a minimum level of reductions of "at least 80%" by 2050, which the Court failed to take into account.

(ii) **Consequently the Court erred in law in holding that neither the Paris Agreement Temperature Limit ("Paris Temperature Limit") nor the Government's policy of introducing a net zero target in accordance with the Paris Agreement, formed any part of "government policy relating to … climate change" for the purposes of section 5(8) of the Planning Act 2008 and that they were otherwise irrelevant considerations**: By the time of the designation of the ANPS, not only had the Government advanced, signed and ratified the Paris Agreement, it had publicly committed to introducing a net zero target in accordance with the Paris Agreement, and specifically to decarbonising the economy by 2050. The Court erred in law in treating these matters as irrelevant to Government policy on climate change.

(iii) **The Court erred in law in holding that the historic, discredited 2˚C temperature limit was a relevant consideration**: In addition to the CCA target, the Secretary of State assessed the ANPS against the historic and discredited 2˚C global temperature limit, rejected by 195 governments including the UK Government, in December 2015. The Court was wrong to consider the historic 2˚C limit a relevant consideration, which it was proper for the Secretary of State to take into account

(iv) **The Court erred in law in treating as irrelevant the Secretary of State's failure to explain to Parliament the basis of his decision:** It was only as a result of the Appellant's legal action that it emerged that the Secretary of State had used the 2˚C target as the basis for assessment and that he had

treated the Paris Agreement as irrelevant. The Secretary of State's failure to explain the basis of his decision to Parliament was of itself a breach of s.5(8) of the 2008 Act, which the Court was wrong to ignore.

LEGAL AND FACTUAL BACKGROUND

Legal background

3. The 2008 Act and the Climate Change Act 2008 were passed simultaneously on 26 November 2008 (see §565 of the judgement below), with the objective of aligning government policies on planning and climate change. The 2008 Act contains two express and distinct statutory obligations on the Secretary of State to consider climate change impacts in designating a National Policy Statement.

4. Specifically, s.5(7)-(8) of the 2008 Act read as follows:

> *"(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."* (emphasis added)

5. CCA s. 1(1) establishes a minimum target (**"the carbon target"**) for carbon emissions reduction:

> *"It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline."* (emphasis added).

6. It is common ground between the parties that for the purposes of s. 5(8) of the 2008 Act, the carbon target established by the CCA is an important feature of "Government policy relating to … climate change" and was therefore a relevant matter for the Secretary of State to take into account. For the Secretary of the State and the Court, however, the target establishes a maximum level of emissions reduction, which may not be exceeded by any other Government policy. For the Appellant the position is the contrary: the wording "at least" makes it clear that the target establishes only a minimum threshold, which the Government is free to exceed.

7. For the Secretary of State the historic 2˚C global temperature limit was a relevant consideration, and the Paris Temperature Limit (which is to hold average temperature increase to "*well below 2˚C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5˚C …*") was an irrelevant consideration. For the Appellant the position is the converse: The Paris Temperature Limit, which was current at the time of

the designation of the ANPS, was a relevant consideration, and the 2˚C limit, which has been rejected as inadequate by 195 governments in December 2015, was an irrelevant consideration.

Factual background

8. When the CCA came into force, the politically recognised global temperature limit, which is the basis for Government policy relating to climate change, was 2˚C.

9. The "carbon target" set out in the CCA s. 1 (**"the 2050 Target"**) was based on that 2˚C global limit (see §566 of the judgement below) but the 2˚C limit is not referred to in the statute itself.

10. From around 2010, concerns emerged regarding the adequacy of the 2˚C limit. As a result, a number of governments, including the UK Government, invested heavily in obtaining a further international agreement on climate change (see §567 of the judgement below).

11. The outcome of these efforts was the landmark Paris Agreement on Climate Change, adopted by consensus on 12 December 2015. The Paris Agreement established the more stringent global temperature limit of "*well below 2˚C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5˚C …*" (see §580 of the judgment below).

12. On 14 March 2016, the Rt. Hon. Andrea Leadsom MP, the then Minister of State for Energy, said in a debate in the House of Commons during the Report stage of the Energy Bill:

> *"The Government believe[s] we will need to take the step of enshrining the Paris goal of net zero emissions in UK law – the question is not whether, but how we do it, and there is an important set of questions to be answered before we do. The Committee on Climate Change is looking at the implications of the commitments made in Paris and has said it will report in the autumn. We will want to consider carefully its recommendations, and I am happy to give the right hon. Gentleman the undertaking that we will also discuss with him and others across the House how best to approach this matter, once we have undertaken that consideration."*[1]

13. That position was further confirmed on 24 March 2016 by the Rt. Hon. Amber Rudd MP, the then Secretary of State for Energy and Climate Change, in answer to an Oral

[1] CB/x/y

Question as to "*What steps her Department is taking to enshrine the commitment to net zero emissions made at the Paris climate change conference of December 2015 in UK law*". She replied:

> "*As confirmed last Monday during the Report stage of the Energy Bill, the Government will take the step of enshrining into UK law the long-term goal of net zero emissions, which I agreed in Paris last December. The question is not whether we do it but how we do it.*"[2]

14. In October 2016 the Committee on Climate Change (**"the CCC"**), the Government's independent statutory adviser on climate change, advised that:

> "*In line with the Paris Agreement, the Government has indicated it intends at some point to set a UK target for reducing domestic emissions to net zero. We have concluded it is too early to do so now, but setting such a target should be kept under review*."[3]

15. In January 2018, following the presentation of the draft report of the Intergovernmental Panel on Climate Change (the IPCC), the EU Parliament voted for a net zero target by 2050 in light of the Paris Agreement[4]. Also In January 2018 the CCC recommended that the Government commission a review of the UK's climate change targets in light of the Paris Agreement[5], and the Government publicly committed to doing so in April 2018[6].

16. On 1 May 2018, prior to the designation of the ANPS, The Rt Hon 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", and asked for cross-party support for "something so vital"[7].

17. The Secretary of State himself commissioned a report, "*International aviation and the Paris Agreement temperature goals*"[8], published in December 2018, which states:

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[2] CB/x/y

[3] CB/x/y

[4] CB/x/y

[5] CB/x/y

[6] CB/x/y

[7] CB/x/y

[8] CB/x/y

"*any continued emissions of CO2 from aviation using fossil fuels beyond around 2050 will be inconsistent with the Paris Agreement goals in the absence of extra measures*".

18. Beyond introducing a net zero target in line with the Paris Agreement, it was clear that the Paris Agreement was critical to Government policy relating to climate change in other ways, and that it was Government policy to use its influence to ensure that other countries acted to implement its objectives.

19. In October 2017, the UK Government published its *Clean Growth Strategy* under ss. 12 and 14 of the CCA. 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)"* [9].

20. In the Prime Minister's Foreword to the *Clean Growth Strategy*, Theresa May states:

> "*On the world stage, we were instrumental in driving through the landmark Paris Agreement."*[10]

21. In the Minster's Foreword, Greg Clark MP states

> *"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."*[11]

22. As highlighted in the judgment below (at §587) the Strategy itself states:

> *"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."*[12] (emphasis added).

23. The strategy explains the risks of climate change in general terms:

> "*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*

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[9] CB/x/y

[10] CB/x/y

[11] CB/x/y

[12] CB/x/y

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."[13]

24. More specifically, it explains *why* the historic, discredited 2˚C limit was replaced with the more stringent 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 …"*[14] (emphasis added).

25. 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."*[15]

26. 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.*"

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[13] CB/x/y

[14] CB/x/y

[15] CB/x/y

27. 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*" [16].

28. By coincidence, on 2 May 2019, the day immediately following the publication of the judgement below, the CCC published its advice to the Government recommending a 'net zero' target by 2050, stating:

> "*We conclude that net-zero is necessary, feasible and cost-effective. Necessary – to respond to the overwhelming evidence of the role of greenhouse gases in driving global climate change, and to meet the UK's commitments as a signatory of the 2015 Paris Agreement …*
>
> *I urge the governments of the UK, in London, Edinburgh, Cardiff to consider our advice carefully and legislate for these new targets as swiftly as possible. We must now increase our ambition to tackle climate change. The science demands it; the evidence is before you; we must start at once; there is no time to lose."*[17]

29. By the time the Secretary of State designated the ANPS in June 2018, the global temperature limit of 2˚C had been discredited as inadequate for a period of more that 2 ½ years.

30. Further, by the time of the designation of the ANPS:

(a) the UK Government had ratified the Paris Agreement;

(b) The Government had publicly committed to introducing a net zero target in line with the Paris Agreement;

(c) The Government had committed to commencing the formal review process for its climate targets under the CCA; and

(d) The Government had informed Parliament of its policy to decarbonise the UK economy by 2050.

31. It is the Secretary of State's case that since the matters set out at §30 above were irrelevant to "government policy … relating to climate change", he was justified in not taking them into account (and would have fallen into error had he done so).

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[16] CB/x/y

[17] SB/x/y

32. Further, it is the Secretary of State's case that the historic, discredited 2˚C temperature limit was a relevant consideration (see §613 of the judgment below). It is notable, however, that the Secretary of State advanced no explanation in his pleadings, skeleton argument or in his submissions to the court as to *why* the historic, discredited 2˚C temperature limit remained in June 2018 a relevant consideration.

33. Moreover, the Secretary of State informed neither consultees nor Parliament that he had assessed the climate change impacts of the ANPS against the historic 2˚C temperature limit as opposed to the current Paris Temperature Limit. Indeed in defending this claim, he asserted initially that he had taken the Paris Agreement into account:

> *"Furthermore, the Secretary of State considered the Paris Agreement in producing the ANPS …"*[18]

34. It was only following disclosure of the Secretary of State's witness statements that it emerged that he had in fact treated the Paris Agreement as irrelevant, and that he had instead used the historic, discredited 2˚C limit as his benchmark. Consequently, further to direction from Holgate J, he was required to amend his pleadings to clarify his position.

35. It follows that neither those responding to the consultation process nor Parliament itself were informed of the proper basis of the Secretary of State's decision, and that the relevant procedural safeguards were accordingly circumvented.

36. It is apparent from the Airports Commission's Final Report that the ANPS would strain even the minimum carbon target of 80% emissions reduction by 2050[19]. It may be inferred that implementation of the ANPS would be incompatible with net zero emissions by 2050, which it is the policy of the Government to introduce. In any event it is beyond dispute that:

i. The Secretary of State did not consider whether the ANPS was compatible with net zero emissions by 2050; and that

ii. There was no evidence before him that the ANPS would be compatible with net zero emissions by 2050.

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[18] SST's Detailed Grounds of Defence §24, [CB/x/y]

[19] See Airports Commission, Final Report, 2.64, p. 66 [CB/x/y]

37. As things stand, therefore, Government policies relating to aviation and climate change are proceeding in contrary directions contrary to the express of the 2008 Act, with the former threatening to preclude the effective implementation of the latter.

GROUND 1: THE COURT ERRED IN LAW IN TREATING THE MINIMUM TARGET OF 80% GREENHOUSE GAS EMISSIONS REDUCTION BY 2050, ESTABLISHED BY THE CLIMATE CHANGE ACT 2008, AS PRECLUDING GOVERNMENT POLICY TO REDUCE EMISSIONS BY A GREATER PERCENTAGE

38. The judges below considered that evidence of government policy to increase the ambition of the 80% target in the CCA was irrelevant, on the basis that to take account of it would be to "override or undermine" the statutory regime.

> "*Despite the fact that Government policy could of course be outside any statutory provisions – and despite Mr Crosland's submissions that that, in some way, the CCA 2008 cap has to be read with the Paris Agreement (see, e.g., Transcript, day 7 pages 112 and 116) – neither policy nor international agreement can override a statute. Neither Government policy (in whatever form) nor the Paris Agreement can override or undermine the policy as set out in the CCA 2008. In our view, this way of putting the submission is inconsistent with Mr Crosland's express and unequivocal concession that the carbon target in the CCA 2008 is Government policy and was a material consideration for the purposes of the ANPS. It seeks collaterally to undermine the statutory provisions*." (emphasis added)

39. The judges were wrong to treat the CCA as precluding a government policy of introducing emissions reduction of greater than 80% by 2050 and wrong to regard government policy to impose a more stringent target than 80% as an attempt to undermine the statute. The CCA s.1(1) establishes only a minimum target and does not in any way preclude or discourage greater ambition on the part of the Government:

> "*It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline.*" (emphasis added).

40. Neither the Secretary of State nor the Court offered any explanation for interpreting CCA, s. 1 contrary to its natural meaning, which is that it imposes only a minimum level of emissions reduction.

41. Moreover, the judges elsewhere noted the CCC's position that the CCA and the Paris Agreement were "potentially compatible" (§610 of the judgement), a position which referenced the "at least" criterion of the legislation.

42. Indeed on 14 June 2018 the CCC had written directly to the Secretary of State to express its surprise that he had not referred to both the CCA and the Paris Agreement in his statement to Parliament:

> *"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 2018 made no mention of either of these commitments. It is essential that aviation's place in the overall strategy for UK emissions reduction is considered and planned fully by your Department …".*[20] (emphasis added)

43. Furthermore, the Secretary of State himself claimed to have taken into account both CCA obligations and his international law obligations, as evidenced in his post adoption statement:

> "*The Government acknowledges that the scheme is likely to result in an increase in emissions from activities at Heathrow Airport and that any increase in emissions must be kept within the UK's commitments. This has been considered using two future policy scenarios, meeting the UK's overall emissions target in the Carbon Capped case, and meeting the UK's commitments under any future international agreement in a Carbon Traded case.*"[21] (emphasis added)

44. More specifically, the CCC had explained *how* the Climate Change Act and the Paris Agreement should be read in conjunction: pending revision to the CCA, the Government should retain the flexibility to go further than the 80% emissions reduction target by 2050. The CCC's advice on this matter was clearly set out in a report published in January 2018:

> *"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*

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[20] CB/x/y

[21] Post adoption statement, 4.4.50 [CB/x/y]

and for emissions to reach net-zero … It is therefore essential that actions are taken now to enable these deeper reductions to be achieved."[22] (emphasis added).

45. It is clear that the Secretary of State and the Court erred in holding that the CCA s.1 precluded Government policy to increase emissions reduction beyond 80% and specifically to increase emissions reduction to 100% (ie "net zero").

46. Further, the judges were wrong to treat the CCA carbon target as the exclusive determinant of government policy relating to climate change for the following additional reasons.

47. First, the natural meaning of "*policy*" is not restricted to legal obligations. The online Oxford Dictionary defines policy as: "*A course or principle of action adopted or proposed by an organization or individual*"[23]. In line with this natural interpretation, the Court of Appeal in *Limit No. 2 Ltd*[24], has held (per Longmore LJ):

> *"The word 'policy' can in general import elements of both the present and the future …*[25]
>
> *My own view is that 'intention' is at least an important element of the concept of 'policy'."*[26]

48. Second, as noted above, 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 s. 5(8) of the 2008 Act was to restrict the analysis to the CCA, section 1(1), then that is what it would have said.

49. Third, the rationale for requiring the Secretary of State to consider not just statutory obligations but additionally government policy is readily apparent from the current context. The Government has publicly committed to introducing a net zero target in accordance with the Paris Agreement and commenced the statutory process under the CCA for doing so. It would be artificial, and contrary to the principle of joined-up government, to ignore these developments simply because they have not yet passed into legislation.

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[22] "An independent assessment of the UK's Clean Growth Strategy" [CB/x/y]

[23] https://en.oxforddictionaries.com/definition/policy

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

[25] Ibid. §7

[26] Ibid. §9

50. On the judges' view, "Government policy relating to climate change" cannot develop unless and until it is enacted into law by Parliament. The practical disadvantage of that approach is the risk of shutting the stable door only after the horse has bolted: the delay between a change government policy and the passage of legislation would create a window during which projects jeopardized by the change in policy might be rushed through, precluding effective implementation of the policy. That is not the way to deal with matters of overriding public importance, and not the approach envisaged by the legislation.

51. Be that as it may, the judges erred in law by conflating "government policy" with the will of Parliament. If ever there were a moment in the UK's constitutional history when the distinction between the two concepts were clear, it is now. A change to government policy is the precondition to a change to legislation, and, logically, must come prior to a change to legislation. The judges were wrong to hold otherwise.

GROUND 2: CONSEQUENTLY THE COURT ERRED IN LAW IN HOLDING THAT NEITHER THE PARIS TEMPERATURE LIMIT NOR THE GOVERNMENT'S POLICY OF INTRODUCING A NET ZERO TARGET IN ACCORDANCE WITH THE PARIS AGREEMENT FORMED ANY PART OF "GOVERNMENT POLICY RELATING TO … CLIMATE CHANGE" FOR THE PURPOSES OF SECTION 5(8) OF THE PLANNING ACT 2008 AND THAT THEY WERE OTHERWISE IRRELEVANT CONSIDERATIONS

52. Because the judges below proceeded on the false premise that Government policy was irrelevant in so far as it implied emissions reduction of greater than 80%, since a higher level of emissions reduction would "undermine" the statutory provisions, they failed to address their minds to the questions of whether i) the Paris Temperature Limit and ii) the Government's commitment to introducing a net zero target were in fact key aspects of Government policy relating to climate change.

53. Nor did the judges note in their judgment that seven other claimants (the Mayor of London, the five boroughs and Greenpeace) expressly supported the Appellant's proposition that the Paris Agreement was "a key aspect" of Government policy relating to climate change.

1. The Paris Agreement is a key aspect of Government policy

54. Had the judges considered whether, as a matter of fact, the Paris Agreement is part of Government policy relating to climate change, they would have been bound to conclude that it was.

55. First, the Government advanced, signed and ratified the Paris Agreement, and as noted by the judges below (§575), "invested heavily" in doing so. In the circumstances, it would be surprising if it were Government policy to ignore the Paris Agreement in relation to its own long-term national infrastructure projects.

56. Second, the Government's policies relating to climate change are explicit that implementation of the Paris Agreement temperature limit is a central Government policy objective (see §10-27 above).

57. Third, the Secretary of State acknowledges in his pleadings that:

> "*the Government is fully committed to the objectives of the Paris Agreement (the UK played an important role in pushing for ambitious aims to be set in the Paris Agreement)*"[27].

58. Fourth, the Government has publicly committed to the implementation of a net zero target in line with the Paris Agreement and commenced the statutory process for doing so (see §12-16 above and §591 of the judgment below).

59. Since the Paris Agreement temperature limit, is in fact a component of "*Government policy relating to … climate change*", for the purposes of s. 5(8) of the 2008 Act, the Secretary of State was bound to take it into account as a matter of law, and his failure to do so was unlawful. The judges were wrong to hold otherwise.

2. It is Government policy to introduce a net zero target in line with the Paris Agreement

60. It is beyond dispute that the Government publicly committed to introducing a net zero target in line with the Paris Agreement in March 2016, and that in May 2018 it publicly stated that its goal was net zero emissions by 2050 (see §§12-16 above).

61. Had the judges considered whether it was Government policy to establish a net zero emissions target in line with the Paris Agreement they would have been bound to conclude that it was.

62. The Secretary of State was wrong to consider that the Paris Agreement and the Government's commitment to introducing a net zero target in line with the Paris

[27] See DGR to FOE claim, §34(1), CB/x/y

Agreement were irrelevant to Government policy relating to climate change, and the judges were wrong to adopt his position.

GROUND 3: THE COURT ERRED IN LAW IN HOLDING HOLD THAT THE HISTORIC, DISCREDITED 2˚C TEMPERATURE LIMIT WAS A RELEVANT CONSIDERATION

63. Contrary to the main thrust of their judgment, the judges acknowledged that the Secretary of State did not in fact confine his analysis to the CCA. He also took into consideration the 2˚C global temperature limit, which is not set out in statue, but which was politically recognised as the global temperature limit prior to the adoption of the Paris Agreement in December 2015:

> *"After Paris, Mr Crosland submitted, the "discredited" temperature limit of 2ºC was neither Government policy nor a relevant consideration for the purposes of the ANPS. The fact that it (and not the Paris temperature limit) was treated as policy and a relevant consideration is clear from (e.g.) Graham, paragraph 124, where it is said that the Aviation Target was not a constraint because "all emissions are assumed to be captured within a carbon market that allows total global carbon emissions consistent with a 2 degree climate stabilisation target …"*[28] (emphasis added).

64. This matter reveals the reality of the position. It was not in fact the Secretary of State's position that the global temperature limit was an irrelevant consideration. Rather the Secretary of State simply took into account the *wrong* global temperature limit, ie the one that was current at the time of the Airports Commission's Final Report in June 2015, but which was superseded in December 2015.

65. That the 2˚C temperature limit was by June 2018 no part of Government policy relating to climate change is evident not only from the Government's ratification of the Paris Agreement, but from documents including the Government's *Clean Growth Strategy* (see §24 above), which explain the necessity for the more stringent Paris limit.

66. It is notable that the Secretary of State provided no justification for his reliance upon the 2˚C limit either in his pleadings or in his submissions to the Court. Rather he proceeded as if the issue simply did not exist.

67. No credible explanation has been advanced for why the historic, discredited 2˚C global temperature limit remained a relevant consideration in June 2018, more than 2 years

[28] See §613 of the judgment below

after its replacement with the Paris Temperature Limit. The judges were wrong to prefer the historic 2˚C limit to the current Paris Temperature Limit.

GROUND 4: THE COURT ERRED IN LAW IN TREATING AS IRRELEVANT THE SECRETARY OF STATE'S FAILURE TO EXPLAIN TO PARLIAMENT THE BASIS OF HIS DECISION

68. The Secretary of State informed neither the consultees to the ANPS process nor Parliament that his position was that Paris Temperature limit was irrelevant and that the historic 2˚C target was a relevant consideration. To the contrary, in his response to the consultation on the ANPS, the Secretary of State asserted:

> "*The Government notes the concerns raised about the impact on the UK's ability to meet its climate change commitments; the Government has a number of international and domestic obligations to limit carbon emissions*."[29]

69. He referred directly to the Paris Agreement at 8.19 and 8.42 of the consultation response, implying that it has been taken into consideration, even if he did not say so in terms.

70. In his post adoption statement, the Secretary of State claimed he had assessed the ANPS against both domestic and international commitments (see §43 above). Initially, in responding to the Appellant's case, he asserted that "*the Secretary of State considered the Paris Agreement in producing the ANPS …*"[30]

71. Following the disclosure of his witness statements, which made it clear that he had in fact relied upon the 2˚C target and not the Paris Temperature Limit, the Secretary of State acknowledged in a position statement and in oral submissions that he had in fact considered the Paris Agreement only in so far as to conclude that it was irrelevant. Initially, however, he declined to make appropriate amendments to his pleadings until directed to do so by Holgate J:

> "*The Defendant appears to be seeking to draft the concession in language materially different from that used in the position statement and from what was said at the PTR and without explaining so far to the court why he has sought to do this …*
>
> *The court therefore directs the defendant to reconsider his position on these issues today. If he maintains his revised "concession" then he must file by 9am tomorrow a position*

[29] Government response to the consultation on the ANPS, §8.18, [CB/x/y]

[30] SST's Detailed Grounds of Defence §24, [CB/x/y]

statement explaining why the different wording is said to be justified, why para 29 was included in his position statement in different terms and set out any consequential amendments of pleadings needed."[31]

72. Following this direction, the Secretary of State amended his pleadings to read as follows:

> *"The Secretary of State and his officials therefore did not ignore the Paris Agreement, or that there would be emerging material within Government evidencing developing thinking on its implications, but it was concluded that such material should not be taken into account, i.e. it was not relevant, since it did not form an appropriate basis upon which to formulate the policies contained in the ANPS".*[32]

73. Since the Secretary of State did not disclose his true approach to the Paris Agreement until January 2019, it follows that there was a breach of:

(i) the basic fairness requirements of a consultation process; and of

(ii) the obligation to explain to Parliament his approach to Government policy relating to climate change, pursuant to s. 5(8) of the 2008 Act.

74. It is only a result of these legal proceedings that it came to light that the Secretary of State considered the Paris Agreement to be irrelevant and that he had used the historic 2˚C limit as his benchmark. Given the overriding public importance of the matters in issue, that was an exceptionally serious failing of due process, which the judges were wrong to ignore in their judgment.

CONCLUSION

75. The judges below have interpreted "Government policy relating to …climate change", for the purposes of s. 5(8) of the 2008 Act, in such a way that, unless and until the terms of the CCA are revised, it precludes any policy which implies more stringent emission reductions than 80% by 2050.

76. That is a startling conclusion for three primary reasons:

(a) It creates an artificial situation in which Government policy must be presumed to be precisely as it was in 2008, unless and until there is a change to the legislation, despite overwhelming evidence that Government policy has in fact substantially progressed;

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[31] CB/x/y

[32] CB/x/y

(b) It ignores the fact that the terms of the CCA s. 1 provide only for a minimum target of 80% reductions by 2050, and expressly do not preclude greater ambition on the part of the Government; and

(c) It requires key aspects of Government policy relating to climate change, including in particular its commitment to the Paris Agreement Temperature Limit and its commitment to the adoption of a net zero target in line with the Paris Agreement, to be ignored, contrary to the natural meaning of s.5(8) of the 2008 Act.

77. Given the impact of such an interpretation not just for the present case but for major national infrastructure projects subject more generally, the interpretation of the judges below raises questions of overriding public importance, which the Court of Appeal ought properly to review.

78. As things stand in relation to the ANPS, two things are clear:

(a) The Government's policy direction on climate change is to reach net zero emissions by 2050

(b) The Secretary of State has given no consideration to the compatibility between that policy direction and the expansion of Heathrow Airport in accordance with the ANPS.

79. In passing simultaneously the Climate Change Act 2008 and the Planning Act 2008, and in passing express statutory provisions to harness government policies on planning and climate change, Parliament did everything it could to prevent such a situation arising. That the situation has in fact arisen is down to the Secretary of State's errors of law.

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[Updated with cross-references on ….]