IN THE COURT OF APPEAL **APPEAL REF: C1/2019/1053**
(CIVIL DIVISION)

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

R (on the application of PLAN B. EARTH)

Appellant

-and-

SECRETARY OF STATE FOR TRANSPORT

Respondent

-and-

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

Interested Parties

RESPONDENT'S SKELETON ARGUMENT

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*References to paragraphs of the judgment of the Court appear as **[J/x]**. References to the Appellant's Core Bundle appear as **[CB/x]** Supplemental Bundle as **[SB/x].***

INTRODUCTION

1. The Appellant ("**Plan B**") seeks to appeal against the decision by the Divisional Court (Hickinbottom LJ and Holgate J) to refuse permission to apply for judicial review of the decision of the Secretary of State for Transport ("**SST**") to designate the Airports National Policy Statement ("**ANPS**"). On 22 July 2019, Lindblom LJ ordered that Plan B's application for permission to appeal and, if permission to apply for judicial review is granted on that application (under CPR r.52.8(5)), the claim for judicial review (under CPR r.52.8(6)), be determined at an oral hearing[1].

2. The ANPS sets out the Government's policy on the need for and provision of new airport capacity in the South East of England, and its preferred location and scheme to meet that need, namely a third runway at Heathrow to the north west of the current runways ("**the NWR Scheme**").

[1] Much of the content of paras. 2 – 19 below is also include in the SST's skeleton in the FoE appeal C1/2019/1056.

3. The application for permission to apply for judicial review was heard with three others, all of which were determined in a single judgment: [2019] EWHC 1070 (Admin). The Court's judgment was reached after a hearing lasting seven days, following the submission of extensive written submissions and the presentation of an "*enormous*" amount of evidence **[J/14]**. The judgment is a conspicuously thorough and careful analysis, by a senior Court of Appeal Judge and the Planning Liaison Judge, of all the issues in the case, running to some 669 paragraphs and two appendices, and 188 pages. Issues relating to climate change were extensively canvassed in over 70 pages of skeleton arguments from Plan B, Friends of the Earth ("**FoE**")[2] and the SST and occupied over two days of oral argument.

4. Mr Crosland, the Director of Plan B, appeared as a litigant in person. He argued matters either not pursued, or positively disavowed, by FoE (which was legally represented). In particular, he spent much of the time allocated to his oral submissions (three hours in total) examining statements from a wide variety of sources (including many that were non-Governmental and/or international sources[3]) with the aim of seeking to establish that the Paris Agreement on Climate Change ("**the Paris Agreement**") represented at the date of designation of the ANPS "*Government policy relating to … climate change*" for the purposes of s. 5(8) of the Planning Act 2008 ("**PA 2008**"). That argument was expressly disavowed by FoE which, unlike Plan B (see below), agreed the scope of the latter concept with the SST[4].

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[2] Friends of the Earth was one of the other claimants below and also seeks permission to appeal from this Court: C1/2019/1056.

[3] Mr Crosland asked the Divisional Court to take judicial notice of then on-going climate change protests: see the Transcript, Day 7 p 103, lines 3 - 18. The relevance of this to any legal contention was never explained.

[4] Mr Wolfe QC for FoE said (see Transcript Day 3, p 31 lines 8 – 12) referring to s. 5(8) of the PA 2008 that *"Mr Crosland has a critique of it because he says it wrongly focuses on the Climate Change Act. We don't take that point because we accept that government policy is indeed focused on the Climate Change Act. That is just to signpost the distinction between us"*. And see also (Transcript Day 3, pp. 42 – 43) "*The distinction I have already mentioned between our position and that of Mr Crosland is what is meant for these purposes by government policy relating to mitigation and adaptation of climate change. He says, in a nutshell, this is a duty that should have picked up Paris and following. We say not so. We agree with the Secretary of State, as it happens.*"

5. Having "*heard full argument of all issues*" **[J/667]**, the Court's conclusion was that <u>none</u> of the arguments advanced by Plan B were arguable, such that permission to apply for judicial review was refused on all grounds. Nonetheless, Plan B continues in this Court to advance several of the arguments that were refused permission below, including:
   (1) under Ground 2, the argument that (what it refers to as) the "**Paris Temperature Limit**"[5] formed part of relevant Government policy for the purposes of s. 5(8) PA 2008; and
   (2) under Ground 3, the argument that the 2 degrees temperature limit was not a material consideration.

6. In addition to these points:
   (1) Ground 1 alleges that the Court erroneously understood the target set in s. 1 of the Climate Change Act 2008 ("**CCA 2008**") as precluding any consideration of Government policies and commitments that implied a more stringent level of emissions reduction.
   (2) Ground 4 is a new argument, which could and should have been run before the Court below but was not, and which alleges that the SST erred in failing to inform both consultees (in the consultation on the draft ANPS) and Parliament of his position in relation to the Paris Agreement and the 2 degrees temperature limit.

7. There is no merit whatsoever to any of Plan B's grounds of appeal. Permission should be refused.

<u>THE JUDGMENT BELOW</u>

8. The judgment below deals with the background to the ANPS and the judicial review claims in detail. After a general introduction to the litigation and the material covered in the judgment at **[J/1-5]**, the judgment covers the parties at **[J/6-13]** and the evidence presented at **[J/14-15]**. The structure of the judgment is explained at **[J/16-19]**. The effect and application of the PA 2008 is explained at **[J/20-41]**, followed by the factual background at **[J/42-85]**. The Court then sets out its conclusions on six "*Preliminary Points*" at **[J/86-184]**. The substantive grounds of challenge are dealt with at **[J/185-665]**, with the disposal at **[J/666-668]** and a Postscript at **[J/669]**. Appendix A sets out each of the grounds in summary, together with the result. Appendix B contains the list of issues and Appendix C sets out terms and abbreviations used in the judgment.

[5] This is described at **[J/580]** as "*a firm international commitment* [comprised in the Paris Agreement] *to restricting 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*".

9. The Court dealt with matters relating to climate change in **[J/558 – 660]** of its judgment, with a summary of individual grounds in Annex A. Plan B's discrete grounds were addressed at **[J/603 – 624]**, with the background set out at **[J/558 – 602]**; and see also **[J/146]**. The Court addressed disposal at **[J/666 – 669]**. This Court is invited to read these paragraphs in full.

THE RELEVANT TEST

10. Essentially, what is in issue is whether Plan B should be given permission to apply for judicial review (see the White Book at para. 52.8.6). Lindblom LJ in making the order he did made no finding that this claim, or any aspect of it, was *"properly arguable"* as he did in respect of C1/2019/1145.

11. It is submitted that applying ***Mass Energy Limited v Birmingham City Council*** [1994] Env. L.R. 298 the test in deciding whether to grant permission to apply for judicial review in this case is not merely that it is arguable but rather that it "*is strong; that is to say, is likely to succeed*". This heightened test was applied in ***Mass Energy*** (and in many later cases) for three reasons – all of which are equally applicable here, namely: (1) this Court will have had "*the benefit of detailed inter partes argument of such depth and in such detail that, in my view, if [permission] were granted, it is more unlikely that the points would be canvassed in much greater depth or detail at the substantive hearing*"; (2) the fact that the time-scale for the provision of the project in issue is one for which there is a very tight schedule[6] and that interests on all sides would be prejudiced by continued uncertainty as to the lawfulness of the decision under challenge; and (3) the Court has all the relevant documents in front of it and will have "*gone through the relevant ones in detail—indeed in really quite minute detail in some instances—in a way that a court dealing with an application for leave to move rarely does*", such that it will be "*in as good a position as would be the court at the substantive hearing to construe the various documents*".

12. The SST contends, in any event, that this application for permission gets nowhere near the threshold justifying the grant of permission, whether the threshold is arguability or the heightened ***Mass Energy*** test. Permission should be refused.

BACKGROUND

13. The legislative framework and factual background to the underlying claim were covered by the Agreed Statement of Common Ground ("**ASCG**"), and the Climate Change Annex to the ASCG

[6] See GLD's letters to the Civil Appeals Office dated 7 and 24 May 2019 seeking expedition in accordance with PD 52C para 26, and setting out the reasons why this was required.

("**CC Annex**") submitted pursuant to para. 7 of the 4 October 2018 order of Holgate J. The CC Annex was agreed to by FoE in full but by Plan B only in part (the parts not agreed included Section 2, which described the Government's policy on climate change).[7] Further relevant detail in respect of the factual background, and the development and content of the ANPS, including the Appraisal of Sustainability ("**AoS**") was provided in the witness statements of Caroline Low[8] and Ursula Stevenson[9]. Evidence on matters relating to the Airports Commission ("**AC**") and its treatment of climate change matters was given by Phil Graham[10]. The following matters of background are emphasised.

14. First, carbon impacts were not a differentiating factor in the choice between the 3 schemes short-listed for potential airport expansion (see the ANPS at para. 3.17). Plan B opposes any airport expansion but does not challenge chapter 2 of the ANPS, which sets out the need for expansion and estimates losses of up to £45 billion to the UK economy from not increasing capacity.

15. Second, as set out in para. 4 of the CC Annex, the SST agrees the importance of the issue of climate change. The UK is a world leader in reducing greenhouse gas ("**GHG**") emissions. It has sought to advance the climate agenda at both the domestic and the international level, and has consistently played an important and positive role in climate negotiations: in the UN, in the EU and in the international aviation and shipping agencies (ICAO[11] and IMO): see e.g. paras. 457 – 461 of Caroline Low's w/s. Moreover, the CCA 2008 was the first legislation anywhere in the world that set a legally long-term binding target ("**the 2050 Target**") in order to tackle climate change. The CCA 2008 also introduced interim GHG targets (or 'carbon budgets') which place successive five yearly caps on

[7] See para. 1(2) of the CC Annex.

[8] Caroline Low is a Senior Civil Servant at the Department for Transport ("**the DfT**"), and has been the Director of the Airport Capacity Programme since 2015 **[J/14 viii)].**

[9] Ursula Stevenson is employed by WSP Parsons Brinckerhoff ("**WSP**"), an engineering and project management consultancy, leading its Environmental Assessment and Management Service Group in the UK. WSP was retained by the Secretary of State to advise on environmental issues (particularly in respect of the preparation of the AoS) in developing ANPS policy including the short-listed schemes **[J/14 x)].**

[10] Phil Graham has been a Senior Civil Servant since 2006. He became Head of Airports Policy at DfT in 2012, and from 2012-15 was Head of the AC Secretariat **[J/14ix)].**

[11] International Civil Aviation Organization; see in this regard paras. 8.17, 8.19, 8.42 – 8.47 and 12.9 - 12.12 of the Government Response to the consultation on the ANPS.

UK emissions, tracking towards the 2050 target, and are among the most stringent carbon targets in the world.

16. For the purposes of the CCA 2008, while emissions from GHGs from international aviation do not count as emissions from UK sources (s. 30(1)), by virtue of s. 10(2)(i), in connection with decisions or advice in relation to any carbon budget, the Secretary of State and the Committee on Climate Change ("**CCC**") must take such emissions into account **[J/571-572]**. The Aviation Policy Framework 2013 ("**APF**") says "*Aviation is an international sector, and global action to address a global challenge is therefore essential if we are to achieve progress on reducing its climate change impacts while minimising the risk of putting UK businesses at a competitive disadvantage. National governments have a particularly important role in pushing for effective international action. We are committed to making progress through the …ICAO, the agency of the United Nations which regulates international civil aviation, on a global emissions deal and more stringent technology standards. We also continue to work with our European Union (EU) partners to ensure the success of the inclusion of aviation in the EU Emissions Trading System (ETS)*" [emphasis in original].

17. Third, as explained in the evidence of Caroline Low, Phil Graham and Ursula Stevenson, the assessment of climate change to support the ANPS built on the work of the AC, which was specifically charged with advising on "climate change". The Court set out as follows in respect of the AC, at **[J/593-594]**:

    "593. The AC was well aware that climate change too was an important matter with which it had to grapple. One of its members (Professor Dame Julia King, now Baroness Brown of Cambridge) was a member and Deputy Chair of the CCC. The work which the AC or the DfT did or commissioned on climate change for the purposes of the ANPS is set out in the evidence of Ms Low (see especially Low 1, paragraphs 471-499). The work was very substantial indeed.

    594. The AC integrated the Aviation Target into its approach, and developed two sets of forecasts: one with a firm aviation emissions cap of 37.5 $MtCO_2$ in place by 2050, and the other assuming carbon trading. The AC Final Report concluded that, whilst the Gatwick 2R Scheme was associated with the lowest additional emissions, each of the two Heathrow schemes was capable of being delivered within the CCA 2008 obligations. Generally, the Claimants make no complaint about the AC's analysis or conclusion." [Underlining added.]

18. Fourth, consistent with the above, climate change was a key focus for the SST in the process following the AC's final report and ending with the designation of the ANPS. There were multiple in-depth studies produced examining the compatibility of airport expansion with carbon targets, see

e.g. those referred to in paras. 76 and 88 of the ASCG, Caroline Low's 1st w/s at para. 360 and Appendix A-9 to the AoS[12].

19. Fifth, the depth of this consideration was recognised by the Court below in relation to the content of the ANPS itself; it held as follows at **[J/630]**:

"*… the ANPS (at paragraphs 3.17, 3.50, 3.61-69 and 5.69-5.84) gave substantial consideration to matters relating to the mitigation of, and adaptation to, climate change. In particular, the ANPS : i) expressly recognised that under section 5(8) of the PA 2008 the ANPS must give 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; ii) recorded the objectives in the APF in respect of aviation emissions; iii) noted that the UK's obligations on GHG emissions are set by the CCA 2008, and the position in respect of aviation emissions under that Act; iv) described how climate change matters have been assessed in developing the ANPS; v) explained how the ANPS had been informed by an assessment of whether expansion was capable of being achieved consistently with the UK's carbon obligation, the assessment being that the scheme was deliverable within the UK's climate change obligations; vi) set out what an applicant for a DCO [development consent order] must demonstrate in respect of likely significant climate factors; vii) addressed mitigatory measures; and viii) finally, set out how matters relating to climate change will be assessed under any DCO application.*"

20. Finally, save for the issues considered below as regards the Paris Agreement, no challenge is made to the conclusions reached in the numerous expert assessments undertaken by (or on behalf of) the AC or the SST, the ultimate conclusion of these being that the NWR Scheme was capable of being delivered within the UK's climate change obligations[13]. Whilst Plan B in the Court below made some limited criticisms of these conclusions in its evidence, there was (and is) no pleaded challenge on these matters. The conclusions reached in this regard, and the scenarios used i.e. carbon capped and carbon traded, are not the proper subject of judicial review and at the very least fall within an enhanced margin of appreciation: see ***R (Mott) v Environment Agency*** [2016] EWCA Civ 564; [2016] 1 WLR 4338 (and also **[J/179]**).

MATERIAL POST-DATING THE DECISION

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[12] Carbon is also considered in numerous places within the main report of the AoS.

[13] In order to address uncertainties over the future policy treatment of international aviation emissions, the assessments undertaken by the AC and the Government used two carbon policy scenarios: carbon capped and carbon traded: see **[J/597]**, and see also **[J/572-574, 594** and **596]**.

21. Plan B's skeleton argument refers to several matters that post-date the impugned decision to designate the ANPS (26 June 2018), a number of which also post-date the judgment below (1 May 2019). In particular, reference is made to:
    (1) The report of the CCC dated 2 May 2019 (the "**May 2019 CCC Report**"), which sets out the CCC's advice about how the Government should respond to the Paris Agreement; and
    (2) The amendment, on 27 June 2019, of the 2050 Target set in s. 1 of the CCA 2008, from "*at least 80% lower than the 1990 baseline*" to "*at least 100% lower than the 1990 baseline*" (i.e. to a "*net zero*" target): "**the Amended 2050 Target**"[14].

22. Plan B contends[15] that "*it is now apparent that contrary to the express purpose of the* [CCA 2008], *Government policy on aviation and climate change are now advancing in contrary directions*" and that "*this is the inevitable consequence of the Secretary of State's blinkered approach*". Plan B's reliance upon the above post-designation (and post-judgment) matters as part of the context to this claim is, however, entirely misconceived.

23. First, neither the May 2019 CCC Report nor the Amended 2050 Target were available to the SST to consider when deciding whether to designate the ANPS. The Court is required to adjudicate upon specific challenges to a discrete decision - see ***R (P) v. Essex County Council*** [2004] EWHC 2027 *per* Munby J at [33] - here the designation of the ANPS on 26 June 2018. Neither the May 2019 CCC Report nor the Amended 2050 Target can, then, properly be material that provides background or context to support Plan B's appeal. This is all the more evident when consideration is given to the relevant statutory scheme (see below) and to the detailed assessment of climate change matters that was undertaken when deciding whether to designate the ANPS.

24. Second, and more fundamentally, what the May 2019 CCC Report and the Amended 2050 Target show is that arguments associated with the Paris Agreement and the other related matters raised in Plan B's claim are now academic. It has from the outset been the SST's case that s. 6 of the PA 2008 provides a mechanism by which future changes in climate change obligations, policy or science can be dealt with. S. 6(1) PA 2008 provides that the SST "… *must review each national policy statement whenever the Secretary of State thinks it appropriate to do so*". S. 6(3)(a) PA 2008 provides that "*[i]n deciding when to review a national policy statement the Secretary of State must consider whether— … since the time when the statement*

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[14] There are other examples of post-designation events being relied on, see Plan B's skeleton at para. 37 relying on a report published in December 2018, 6 months after designation.

[15] Para. 20 of its skeleton argument.

was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided". Moreover, a decision whether to review an NPS is subject to judicial review pursuant to s. 13(2) and (3) PA 2008. On 2 May 2019, Plan B itself made a request for a review of the ANPS in light of the May 2019 CCC Report. That request is being considered and the SST will take into account not only the May 2019 CCC Report and the Government's response (i.e. the Amended 2050 Target) but also - if available - further anticipated advice from the CCC specifically addressing aviation emissions. The matters to be addressed when considering whether to review the ANPS under s. 6 of the PA 2008 will thus encompass the Paris Agreement (since that is the subject of the May 2019 CCC Report) and relate to the same substantive issues raised by Plan B in this appeal. Moreover, the Government intends to publish the *Aviation Strategy* White Paper. This has already been the subject of consultation and will replace the APF. It will set the wider framework for aviation policy, including on climate change.

25. Third, and in any event, in no way does the ANPS close off or preclude any potential objection, at the DCO stage, that the NWR Scheme should not be consented because of its potential impacts on climate change: see both ANPS itself and s. 104(2),(4), (5) and (7) of the PA 2008. This includes having regard to any developments in Government policy in relation to climate change, as may be in force at the time that any DCO application comes to be determined. If the obligations and policy do change, then it is against those changed circumstances that a DCO application will fall to be assessed. This was precisely the finding of the Court at **[J/631(ii) and (vi)]**, which is unchallenged in this appeal.

26. Plan B's concern that "*Government aviation policy and Government policy on climate change are proceeding in contrary directions, with potentially disastrous consequences*" is thus wholly unfounded[16]; and betrays a fundamental misunderstanding of the role and function of judicial review.

RESPONSE TO GROUNDS OF APPEAL

27. The following four grounds of appeal are advanced:
    (1) Ground 1: Alleged error in treating the (then-extant) 2050 Target of at least 80% GHG reduction by 2050 (against the 1990 baseline) as precluding any consideration of Government policies and commitments that implied a more stringent level of emissions reduction;

[16] Skeleton argument, para. 83.

(2) <u>Ground 2</u>: Alleged error in holding that neither the Paris Temperature Limit nor "*the Government's policy commitment to introducing a net zero target*" formed any part of relevant Government policy for the purposes of s. 5(8) of the PA 2008 (and that both were otherwise irrelevant);

(3) <u>Ground 3</u>: Alleged error in holding that the 2 degrees temperature limit was a relevant consideration; and

(4) <u>Ground 4</u>: Alleged error in treating as irrelevant the SST's "*failure to explain to Parliament the basis of his decision*".

28. Plan B's grounds of appeal depend, critically, on it demonstrating an error in the Divisional Court's approach. It is simply unable to do so. In certain key respects its arguments have a "*similarity*" (as Asplin LJ held) to those rejected in Plan B's previous judicial review challenge (to the decision not to amend the 2050 Target: **[J/584-585]**), which challenge was rejected as unarguable at every stage, including finally by Asplin LJ.

A. <u>THE FIRST GROUND: APPROACH TO THE 2050 TARGET</u>

29. The essence of the first ground of appeal is the assertion that the Court below erred in proceeding on the basis that "*Government policy relating to ... climate change*" for the purposes of s. 5(8) PA 2008 could not differ at all (or at least not materially) from the <u>base</u> level of the (then-extant) 2050 Target (i.e. an 80% reduction in GHG compared to the 1990 baseline).[17]

30. The specific passage in the Court's reasoning that is criticised is part of a single paragraph (**[J/615]**). It is obviously important to understand the context in which the reasoning set out in that passage was given by the Court:

(1) **[J/615]** forms part of the Court's reasoning on Plan B's Ground 1 below (Ground 14 of the consolidated grounds), which is set out at **[J/603-620]**;

(2) As is apparent from **[J/603-605]**, Plan B's "*overarching submission*" on that ground was that relevant "*Government policy*" for the purposes of s. 5(8) PA 2008 included the Paris Temperature Limit (and/or that the Paris Temperature Limit was otherwise a material consideration) and also that the 2 degrees temperature limit was no longer part of Government policy and was an immaterial consideration;

(3) At **[J/606-611]** the Court explained why it did not accept Plan B's argument, making the following key points:

[17] Skeleton argument, para. 22(i).

i. The Paris Agreement not having been implemented by a national statute, none of its obligations had any effect in domestic law (**[J/606]** and see below in respect of the second ground of appeal);

ii. In any event the Paris Agreement did not impose any obligation upon any individual state to limit global temperatures or to implement the objective of achieving the Paris Temperature Limit in any particular way (**[J/607]** and see below in respect of the second ground of appeal);

iii. The (then-extant) 2050 Target in s. 1 of the CCA 2008 (at least an 80% reduction on the 1990 baseline) was "*clearly based on a global temperature limit in 2050 of 2°C above pre-industrial levels*" and no-one, including Plan B, was suggesting otherwise **[J/608]**. The 2050 Target had been set by Parliament having taken into account not just environmental but also economic, social and other material factors. The Court described this as an "*entrenched policy*":

> "*608. ...It is an entrenched policy, in the sense that that target cannot be changed other than in accordance with the Act, i.e. only if there have been significant developments in scientific knowledge about climate or in European or international law or policy, and then only after obtaining and taking into account advice from the CCC and being subject to the Parliamentary affirmative resolution procedure.*
>
> *609. Mr Crosland submits that, if Government policy in this regard is restricted to that which is set out in the CCA 2008 from time-to-time, the policy may be – and is, in fact, now – lagging behind scientific knowledge. We accept that that may be so. But Parliament has determined the response to scientific knowledge and analysis concerning climate change, insofar as they bear upon the carbon target in section 1 of the CCA 2008; and has determined the way in which it may be changed. The Secretary of State cannot change the target unless and until the conditions set out in the CCA 2008 are met; and, as Supperstone J pointed out in the earlier Plan B Earth claim (i.e. the Carbon Target JR: see paragraphs 584-585 above), even then the Secretary of State does not have an obligation, but only a power, to change the target, the exercise of which would be challengeable only on conventional public law grounds*";

iv. At the date of designation of the ANPS, and indeed at the date of judgment, the most recent formally expressed view of the CCC was that the (then-extant) 2050 Target (at least an 80% reduction against the 1990 baseline) was potentially compatible with the ambition of the Paris Agreement to limit temperature rise to 1.5°C and "*well below*" 2°C (i.e. with the ambition of achieving the Paris Temperature Limit: **[J/610]**);

v. It did not follow that retaining the (then-extant) 2050 Target was optimal, or the policy option that the Secretary of State or Parliament would ultimately decide to take. The assessment of any change to the target - in terms of percentage and/or date - was however "*a matter for political judgment, taking into consideration not only the evolving information and analysis in respect of climate change, but also the economic and social consequences of any change, and the position in other states with regard to proposals for their own, national actions to reduce the carbon burden*" **[J/611]**.

(4) The Court therefore concluded at **[J/612]** that "*Government policy in respect of climate change was and is essentially that set out in the CCA 2008*" (as the SST argued, and FoE conceded).

(5) Plan B expressly accepted that the policy as set out in the CCA 2008 was Government policy **[J/613]** but contended (i) that the Paris Temperature Limit was also part of "*Government policy*" and a material consideration and (ii) that the 2 degrees temperature limit was not part of "*Government policy*" and was an immaterial consideration.

(6) The Court rejected that submission at **[J/614]** and at **[J/615]** reiterated its earlier point about Government policy being "*entrenched*":

> "*The UK policy in this regard, now and at all relevant times, is and has been based on a national carbon cap. The cap is as set out the* [sic] *CCA 2008. It is based upon the 2°C temperature limit. For the reasons we have given, that policy is "entrenched" and can only be changed through the statutory process*".

31. The impugned passage immediately follows:

> "*Despite the fact that Government policy could of course be outside any statutory provisions – and despite Mr Crosland's submissions 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. The same flaw permeated Plan B's Amended Statement of Facts and Grounds and written submissions*".

32. Plan B's complaint under the first ground of appeal appears to be that the Court erroneously treated the minimum percentage reduction sought by the (then-extant) 2050 Target (80% against the 1990 baseline) as a maximum - or at least a threshold - with which any policy or international agreement seeking a higher reduction would be incompatible (and as a result, irrelevant to the ANPS process): see Plan B's skeleton argument at paras. 22(i), 50-52 and 58 ("*...the Court below proceeded on the basis to*

consider policy commitments which implied more stringent emissions reduction than the statutory minimum, would be to "undermine" the statute..."[18]).

33. Thus, when the context of the impugned passage of reasoning within **[J/615]** is considered, it is unarguable that the Court fell into error in this way.

34. In the first part of the reasoning (from "*Despite the fact...*" to "*...as set out in the CCA 2008*"), the Court is simply making - in the abstract - the obviously correct observation that where (as with the 2050 Target) Government policy has been "*entrenched*" in statute, it cannot be overridden either by policy that has not been so entrenched, or by international agreement where such agreement has not been incorporated.

35. The Court then continues ("*In our view...*") to test Plan B's submissions against that principle. As explained above, all parties were agreed that the (then-extant) 2050 Target (at least an 80% reduction against the 1990 baseline) was "*clearly based*" on the 2 degrees temperature limit. Plan B's contention was that the 2 degrees temperature limit had nevertheless been supplanted by the Paris Temperature Limit such that the former was no longer part of Government policy (nor otherwise relevant to the ANPS process), whilst the latter was part of Government policy alongside the 2050 Target (and/or was otherwise a material consideration in the ANPS process).

36. The Court was plainly correct to view that contention as an attempt "*collaterally to undermine the statutory provisions*" that "*entrenched*" the 2050 Target as Government policy. Indeed such an attempt is inherent throughout Plan B's case. In Plan B's previous judicial review challenge (see above) it sought, and failed, to obtain permission to challenge the decision not to have amended the 2050 Target in the light of the Paris Agreement. Plan B's arguments below and on this appeal seek to get around this failed challenge, and argue that the ANPS was nonetheless required to proceed on the basis that the 2050 Target had been amended.

37. Plan B now complains that the Court's approach ignores the fact that the (then-extant) 2050 Target required a reduction of "*at least*" 80% against the 1990 baseline - i.e. that the Court wrongly understood the 80% figure to be a maximum that other Government policies / international agreements could not seek to surpass if they were to retain any relevance.

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[18] Emphasis added.

38. Nowhere does the Court reason to that effect. Plan B's submission was that the 2 degrees temperature limit was no longer part of "*Government policy*" and was otherwise irrelevant to the ANPS process. That submission was (as the Court notes at **[J/615]**) inconsistent with Plan B's "*express and unequivocal*" concession that the (then-extant) 2050 Target - which Plan B agreed was clearly based on the 2 degrees temperature limit - was both Government policy and a material consideration. The submission also amounted, in reality, to a contention that the (then-extant) 2050 Target was insufficiently demanding and that the minimum percentage reduction required (80%) ought to be higher - indeed, Plan B argued that these points were already part of Government policy (through the Paris Temperature Limit). The Court was plainly correct to hold that these arguments sought collaterally to undermine the provisions of the CCA 2008.

39. The CCA 2008 provides a mechanism for the 2050 Target to be amended in the light of significant developments in European or international law or policy. Moreover, it contains a number of important safeguards in this regard. Thus, before the target is amended, there is a requirement for obtaining, and taking into account, the advice of the CCC (see s. 3(1)(a) of the CCA 2008). There is also a requirement to take into account representations made by other national authorities (see s. 3(1)(b) of the CCA 2008). Finally, the Secretary of State must determine that any amendment is "*appropriate*" (see s. 2(2) of the CCA 2008) and this requires consideration to be given to¸ *inter alia,* the economic and fiscal consequences of amendment. Plan B's arguments seek to render these safeguards nugatory. They drive a coach and horses through the statutory scheme of the CCA 2008.

40. Plan B fails to acknowledge the distinction between (i) other policies / international agreements that allow for a reduction in GHG emissions of more than 80% against the 1990 baseline and (ii) other policies / international agreements that (in effect) require the minimum percentage reduction in the 2050 Target to be raised above 80%. Plan B was contending for the latter. The Court was right to reject its contentions as an attempt to override / undermine the policy "*entrenched*" in the CCA 2008.

41. For all of the above reasons, the first ground of appeal is without merit.

B. THE SECOND GROUND: THE PARIS TEMPERATURE LIMIT AND "NET ZERO"

42. Plan B's second ground of appeal is that the Court erred in holding that neither (i) the Paris Temperature Limit nor (ii) "*the Government's policy of introducing a net zero target in accordance with the Paris*

Agreement" ("**the Net Zero Commitment**") formed any part of "*Government policy relating to ... climate change*" for the purposes of s. 5(8) PA 2008.

43. This ground of appeal is, with respect, quite hopeless. It is parasitic on the first ground of appeal (see para. 58 of Plan B's skeleton argument), which is itself wholly unarguable for the reasons given above. It is in any event entirely without merit.

(i) The Paris Temperature Limit

44. Dealing first with Plan B's submissions on the Paris Temperature Limit, the assertion at paras. 58 and 60 of Plan B's skeleton argument that the Court "*did not consider*" whether the Paris Temperature Limit was part of Government policy relating to climate change is simply not understood. The point is expressly identified at **[J/603]** as part of Plan B's Ground 1 (Ground 14 of the consolidated grounds) and, indeed, as Plan B's "*overarching submission*" at **[J/604]**. It is then considered in detail by the Court at **[J/604-620]**, at **[J/623-624]** and also (by way of cross-reference at **[J/619]**) at **[J/633-649]** (FoE's Ground 2 / Ground 12 of the consolidated grounds).

45. If Plan B is seeking to found its case on a distinction between (i) considering whether the Paris Agreement is part of Government policy "*as a matter of fact*" (para. 60 of the skeleton argument) and (ii) (presumably) considering whether the Paris Agreement is part of Government policy as a matter of law, that distinction is illusory and takes Plan B nowhere. It is, at best, a misconceived attempt to ignore the import of the fundamental points made by the Court at **[J/606-607]** as regards the content of the Paris Agreement and the significance of the dualist nature of the domestic legal system (see further below).

46. Paras. 60 to 65 of Plan B's skeleton argument are then simply a re-run of the points that it made below in support of the argument that the Paris Temperature Limit was a component of "*Government policy relating to ... climate change*" for the purposes of s. 5(8) PA 2008; a point it will be recalled that FoE have expressly disavowed (see above). The Court was right to reject that argument for the reasons given at **[J/606-620]**. The Court's reasoning is unassailable. In particular:
    (1) As the Court notes at **[J/606]**, it is well-established that English law is a dualist legal system under which international law or an international treaty has legal force at the domestic level only after it has been implemented by a national statute (see e.g. ***J H Rayner (Mincing Lane) Limited v Department of Trade and Industry*** [1990] 2 AC 418 at 500 *per* Lord Oliver of Aylmerton and ***R v SSHD ex p Brind*** [1991] 1 AC 696 at 747F-H *per* Lord Bridge of Harwich).

In apparently founding itself on a distinction between considering the status of an international agreement as a matter of law and doing so as a matter of fact, Plan B appears not to have understood the import of this point;

(2) It is important, however, to note that the Court rejected the SST's submission that he was required to ignore the Paris Agreement (because none of its obligations had been incorporated into domestic law: see **[J/633-649]**, especially **[J/641 ff.]**). The Court held that international commitments were "*clearly*" "*a consideration in respect of which* [the SST] *had a discretion as to whether he took them into account or not*" **[J/647]**. Both that conclusion and the conclusion that the SST did not even arguably act unlawfully in exercising his discretion **[J/648]** are, again, unassailable.

(3) Plan B (sensibly) does not challenge any of the following factual conclusions drawn by the Court:

i. None of the obligations in the Paris Agreement has been incorporated into domestic law **[J/606]**;

ii. The Paris Agreement imposes no obligation upon any individual state to limit global temperatures or to implement the objective (of achieving the Paris Temperature Limit) in any particular way **[J/607]**;

iii. The previous 2050 Target of at least an 80% reduction in GHG levels against the 1990 baseline was clearly based on a global temperature limit in 2050 of 2ºC above pre-industrial levels **[J/608]**;

iv. The 2050 Target in s. 1 CCA 2008 is "*entrenched*" in the manner described at **[J/608]**; and

v. (At the date of the judgment) the most recent formally expressed view of the CCC was that the (then-extant) 2050 Target (at least an 80% reduction) was potentially compatible with the achievement of the Paris Temperature Limit. The Secretary of State had asked the CCC for advice on possible changes to the UK's contribution to the reduction of carbon emissions in the light of the Paris Agreement and following the IPCC Report **[J/611]**.

(4) Nor does Plan B (again, sensibly) attempt to resile from its concession, properly made below, that the 2050 Target in s. 1 CCA 2008 is "*Government policy relating to ... climate change*" for the purposes of s. 5(8) PA 2008.

47. At para. 64 of its skeleton argument, Plan B relies upon the fact that a net zero target has been passed into law since the designation of the ANPS (through the revision of the 2050 Target in s. 1 CCA 2008, to require at least a 100% reduction against the 1990 baseline). That reliance is misplaced and serves only to emphasise that the assessment of any change to the target (i) was anticipated in

due course, but had not yet been undertaken when the ANPS was designated and (ii) was in any event not a matter for the ANPS process to address (or to pre-empt) (see also **[J/611]**).

(ii) The Net Zero Commitment

48. Plan B's submissions under the second ground of appeal in respect of the Net Zero Commitment add nothing to its submissions under that ground in respect of the Paris Temperature Limit. That is because the aspiration in the Paris Agreement (art. 4) to achieve net zero GHG emissions during the second half of the 21st century **[J/580]** is expressly stated "[i]*n order to achieve the long-term temperature goal set out in Article 2*" (i.e. the Paris Temperature Limit): **[J/579]**, emphasis added.

49. Moreover, in so far as Plan B now seeks to criticise the Court for having failed to address the Net Zero Commitment independently of the Paris Temperature Limit and the Paris Agreement within which the latter is contained, it is not open to it to so do. Unlike both the Paris Agreement and the Paris Temperature Limit, the Net Zero Commitment did not feature in the list of issues that was agreed between all parties below (and appended to the judgment of the Divisional Court as Appendix B). Nor was it any part of Plan B's pleaded case below (or of its oral submissions) that independently of the position in respect of the Paris Temperature Limit / the remainder of the Paris Agreement, the Net Zero Commitment was "*Government policy ... relating to climate change*" for the purposes of s. 5(8) PA 2008. See e.g. Plan B's skeleton argument for the Divisional Court hearing at para. 1 ("[a]*t 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* [...] *and specifically the Paris Agreement temperature limit...*") and para. 97 ("[i]*n 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...*"). References to the Net Zero Commitment are made only in support of the argument that either the Paris Temperature Limit and/or the Paris Agreement in its entirety were relevant Government policy for the purposes of s. 5(8) PA 2008 (or were otherwise relevant considerations).

50. There cannot, therefore, be any legitimate criticism of the absence in the Divisional Court's judgment of any consideration of the Net Zero Commitment (in relation to s. 5(8) PA 2008) independently of the Paris Temperature Limit and the Paris Agreement.

51. In any event, the suggestion that the Net Zero Commitment (i.e. a commitment to achieving net zero GHG emissions by 2050) was part of relevant Government policy for the purposes of s. 5(8) PA 2008 offends even more obviously against Plan B's concession that the (then-extant) 2050 Target

of a reduction of at least 80% against the 1990 baseline was such policy. A commitment to achieving net zero by 2050 requires the percentage figure in s. 1 of the CCA 2008 to be set to at least 100%. Self-evidently, it cannot have been Government policy that that percentage figure should simultaneously be "at least 80%" and "at least 100%".

52. Finally, in respect of the second ground of appeal, the omission from the judgment of any reference to the fact that, aside from FoE, the other claimants supported Plan B's arguments on the Paris Agreement (para. 59 of Plan B's skeleton argument) does not disclose any legal error. As Plan B has itself observed,[19] at **[J/16]** the Court notes that "*...the Claimants helpfully agreed to restrict themselves to avoid duplication in the presentation of their oral submissions. So, for example, FoE and Plan B Earth took the lead on climate change issues...*". Having regard to that point, to the length and detail of the Divisional Court's judgment and to the relevant case-law authorities,[20] it is wholly fanciful to suggest that there is any material lacuna in the Court's reasoning. The alleged support from the Hillingdon claimants for Plan B's position is wholly inconsequential. Those claimants were not focussing on climate change issues. Further, the alleged support given is confined to one single line in the Hillingdon claimants' skeleton below; and it is far from clear that in this regard the Hillingdon claimants appreciated that they were siding with Plan B over FoE on such matters.

53. The second ground of appeal is thus, like the first, unarguable.

C. THE THIRD GROUND: THE 2 DEGREES TEMPERATURE LIMIT

54. The third ground of appeal is a reprise of Plan B's argument below that the 2 degrees temperature limit was an immaterial consideration and that the SST ought instead to have proceeded by reference to the Paris Temperature Limit.

55. For the avoidance of doubt, whilst Plan B appears[21] to read the penultimate sentence of **[J/613]** (beginning "*The fact that it...*") as forming part of the Court's reasoning, in the SST's submission it is clear that in **[J/613]** the Court is simply recording the submissions that were made by Plan B: see

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[19] Reply to the SST's Statement of Reasons, 17 May 2019, para. 3.

[20] E.g. ***Flannery v Halifax Estate Agencies Ltd (trading as Colleys Professional Services)*** [2000] 1 WLR 377 and ***English v Emery Reimbold & Strick Ltd*** [2002] 1 WLR 2409 at [24]: see para. 72 of the SST's skeleton argument in the FoE appeal (C1/2019/1056).

[21] Para. 69 of the skeleton argument.

the reference in the proceeding sentence to "*Mr Crosland submitted...*" and in the final sentence of the paragraph to the submission "*also* [being] *pressed by Mr Spurrier*"; see also **[J/614]** "*… the submission…*".

56. Nevertheless, the SST does not dispute that the 2 degrees temperature limit was taken into account as a material consideration in the ANPS process: see, for example, para. 6 of the Climate Change Annex. That approach discloses no possible legal error.

57. Plan B, as already noted above, accepted before the Divisional Court that the (then-extant) 2050 Target set in s. 1 CCA 2008 (of at least an 80% reduction in GHG levels compared to the 1990 baseline) was relevant Government policy. It also accepted that the 2050 Target in s. 1 CCA 2008 was clearly based on the 2 degrees temperature limit. The 2 degrees temperature limit was thus plainly a material consideration. The reason why it was not itself directly included in the "*entrenched*" Government policy found in s. 1 CCA 2008 (instead being "translated" through the 2050 Target) is explained by the Court at **[J/608]**: "*Of course,* [the UK's contribution] *is not framed in terms of global temperature reduction - a national contribution could not be so framed - but it was clearly based on a global temperature limit in 2050 of 2°C above pre-industrial levels*" (emphasis added).

58. The 2 degrees temperature limit was not "*the wrong global temperature limit*"[22]. It was the temperature limit that formed the "*clear*" basis for the 2050 Target in s. 1 CCA 2008 that Plan B accepted was relevant Government policy. As the Court correctly recognised at **[J/615]**, to have rejected the 2 degrees temperature limit as irrelevant and to have supplanted it with the Paris Temperature Limit would (for the reasons explained above and in the judgment) have been to undermine, collaterally, the Government policy entrenched in s. 1 CCA 2008.

59. Finally on Ground 3, Plan B entirely fails to engage with **[J/616-617]**, in which the Court rejects Plan B's argument that the ANPS process erred in considering carbon trading on the basis of the 2 degrees temperature limit. Plan B makes no criticism of the reasoning in those two paragraphs. It is right not to do so: there is none that can legitimately be made

60. The third ground of appeal is thus unarguable and should be dismissed.

[22] Para. 70 of Plan B's skeleton argument.

D. THE FOURTH GROUND: ALLEGED FAILURE TO EXPLAIN

61. Plan B complains of a failure on the part of the SST to inform (i) consultees when consulting on the draft and revised draft ANPS and (ii) Parliament, that his position was that the 2 degrees temperature limit was relevant and the Paris Temperature Limit irrelevant.

62. This ground, not argued below, is also without merit and should be refused permission and dismissed.

63. First, the proper context for understanding this ground is that both the draft ANPS (dated February 2017) and the revised draft ANPS (dated October 2017) were subject to consultation. In addition, draft versions of a number of supporting documents were consulted on including an AoS which gave detailed consideration to carbon impacts. The whole consultation process was subject to review by Sir Jeremy Sullivan as Independent Consultation Adviser. Moreover, these drafts, and a final proposed version, were laid before Parliament. In Parliament the ANPS was subject to scrutiny by a select committee and before designation it was subject to a debate and vote in the House of Commons: see **[J/67-72, 74, 78-79, 81 and 84]**.

64. Second, as regards the consultees on the draft ANPS and its supporting documents, Plan B does not provide any authority for the proposition that the SST was required, following consideration of their consultation responses, to explain to those who responded to the consultations to what extent and how he intended to give effect to the points that they had made in their responses.

65. At **[J/113-137]** the Divisional Court considered two potential sources for such a requirement in the PA 2008: s. 5(7) and s. 7.

66. First, at **[J/113]** ff. ("*Preliminary Point 3: Section 5(7): "Reasons for the policy"*") the Court considered s. 5(7) PA 2008, which provides that an NPS "*must give reasons for the policy set out in the statement*". The Court concluded at **[J/119]** that it was unnecessary for the SST to give reasons for rejecting every point made in response to consultation and continued:

   "*Furthermore, so far as reasons for not accepting consultation responses are concerned, the consultation requirement in section 5(4) applies to "the proposal", which is defined so as to refer to "the statement" that the Secretary of State proposes to designate as a "national policy statement" (section 7(2) and (3)). Thus, the obligation is to consult not only on the draft policy, but also the reasons for proposing to make that policy, i.e. its rationale. It is therefore clear that those reasons cannot be the Secretary of State's reasoning in response to representations made in*

the consultation exercise. By definition, it would be impossible to include that reasoning in the proposal which is to be the subject of consultation under section 7".

67. At **[J/123]** the Court clarified that s. 5(7) did not impose any obligation on the SST to give reasons responding to points raised in consultation (e.g. particular objections to his policy), but that any such obligation was confined to the common law requirements for consultation.

68. The Court then turned to consider those requirements at **[J/124]** ff. ("*Preliminary Point 4: Section 7: Consultation Requirements*"). It noted that the PA 2008 did not lay down a detailed procedure for the carrying out of the consultation exercise and that s. 7(2) (which simply requires the SST to "*carry out such consultation, and arrange for such publicity, as the Secretary of State thinks appropriate in relation to the proposal*") gave the SST a broad discretion.

69. Secondly, the Court then gave careful consideration to the "***Gunning*** *principles*" i.e. the common law consultation requirements set out by Stephen Sedley QC as approved by Hodgson J in ***R v Brent London Borough Council ex parte Gunning*** (1985) 84 LGR 168 and endorsed by the Supreme Court in ***R (Moseley) v Haringey London Borough Council*** [2014] 1 WLR 3947 at [25] per Lord Wilson JSC: "*First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third… that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals*".

70. The Court turned at **[J/130]** to the argument that, in relation to the fourth ***Gunning*** principle, the SST failed to give adequate reasons addressing points raised in the consultation exercise, which reflected a failure conscientiously to take them into account.

71. The Court endorsed as correct the approach advocated in ***R (West Berkshire DC) v SSCLG*** [2016] 1 WLR 3923 and ***R (Buckinghamshire County Council) v Secretary of State for Transport*** [2013] EWHC 481 (Admin). Pursuant to that approach (see **[J/132-136]**), the decision-maker is entitled to consider the whole range of consultation responses and to form his/her own conclusions independently of the views of any section of consultees. Moreover, "*conscientious consideration*" of consultation responses does not require the decision-maker to consider and respond to every item of detail in the consultation responses.

72. Again, Plan B entirely fails to engage with this section of the Divisional Court's judgment and does not challenge any aspect of the reasoning in relation to either s. 5(7) PA 2008 or s. 7 (consultation responses). In the SST's submission, the reasoning at **[J/113-137]** is correct. Furthermore, having regard to that reasoning, the common law requirements for consultation were plainly satisfied.

73. Thirdly, Plan B asserts that the SST's alleged failure to explain to Parliament that his position was that the 2 degrees temperature limit (and not the Paris Temperature Limit) was relevant amounted to a breach of s. 5(8) of the PA 2008.

74. That section follows from the requirement in s. 5(7) PA 2008 that an NPS "*must give reasons for the policy set out in the statement*". S. 5(8) then provides that "[t]*he 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*".

75. In so far as it relates to Parliament and to the requirements of s. 5(7)-(8) PA 2008, this fourth ground of appeal reprises one of FoE's arguments below.

76. As part of its Ground 1 (Ground 11 of the composite grounds: see **[J/625]** ff.), FoE submitted **[J/627]** that the ANPS was internally contradictory or otherwise unclear in six respects, which included (as (iii)) "*what target is (or targets are) referred to in paragraph 5.82; and, in particular, whether it is a reference only to the 2050 Target, or whether it includes international and non-statutory targets such as the Aviation Target and the overarching goals of the Paris Agreement*".

77. As noted above, the Court considered the nature of the obligation under s. 5(7) PA 2008 at **[J/113-123]**. It concluded that s. 5(7) "[did] *not require every reason and consideration the policy-maker had in mind when promoting or designating the NPS to be set out in the statement*".

78. At **[J/630]**, the Court observed that the ANPS "*gave substantial consideration to matters relating to the mitigation of, and adaptation to, climate change*" and expressly noted some particular examples. It explained that it was "*firmly of the view*" that this satisfied the obligation to give reasons under s. 5(7)-(8) PA 2008. It went on to hold that all of the specific complaints made by FoE were unjustified. In relation to (iii) it reasoned as follows (emphasis added):

> "*The reference to "carbon reduction targets, including carbon budgets" in paragraph 5.82 is to the targets (including those in carbon budgets) set by the CCA 2008. <u>It cannot refer to "international targets" such as the objectives set</u>*

by the Paris Agreement because, for the reasons we have given (see paragraphs 578-580 and 606-607 above), (i) the Paris Agreement does not specify any carbon reduction target and does not impose any obligation on the UK Government to meet any carbon reduction target (or, indeed, any other target or temperature objective); and (ii) any obligation imposed by the Paris Agreement has no domestic force and is not part of domestic policy. It does not refer to the Aviation Target which has not been adopted by the UK Government. Again, Mr Maurici submitted that the ANPS was unambiguously clear in these respects. We agree."

79. As the Court held, the ANPS was "*unambiguously clear*" that it was referring to the 2050 Target and not to the objectives of the Paris Agreement. Plan B is therefore wrong to assert that the SST failed to explain the basis of his decision to Parliament: it was entirely apparent from the ANPS itself. That is, moreover, also a complete answer to Plan B's criticisms under the fourth ground of appeal in relation to consultees (above).

80. Neither Plan B nor FoE itself advance any challenge to the Divisional Court's reasoning on FoE's Ground 1 (Ground 11 of the composite grounds). Plan B's fourth ground of appeal is, regrettably, an opportunistic attempt to miscast a clarification that was provided by the SST to his pleadings during the course of the litigation below (see paras. 76-78 of Plan B's skeleton argument) as an unlawful omission on the part of the SST prior to the designation of the ANPS. That attempt is misconceived, wrong in law, and should be rejected.

CONCLUSION

81. The Court is respectfully requested to refuse permission to appeal (or, if permission is granted, dismiss the application for judicial review) and to order costs against the Appellant.

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ANDREW BYASS
HEATHER SARGENT
Landmark Chambers

Friday, 30 September 2019

SUGGESTED PRE-READING:

No.	Document	Appeal bundle reference
1.	Judgment of Hickinbottom LJ and Holgate J dated 1 May 2019 (and the paragraphs dealing in particular with climate change set out at para. 7, below)	
2.	Airports National Policy Statement: paras. 2.32, 3.7, 3.17, 3.52, 3.61 – 3.69, 3.72, 4.41 – 4.52, 5.69 – 5.83, 5.147, 5.157, 5.159 and 5.168.	
3.	Agreed Statement of Common Ground paras. 7, 13, 14, 17, 18, 47, 49-50, 76, 88, 95(2), and 96-99	
4.	Climate Change Annex to the Agreed Statement of Common Ground	
5.	1st witness statement ("w/s") of Caroline Low, in particular paras. 453-506, and Annex A, pages 293 – 296 (internal numbering)	
6.	W/s of Phil Graham, in particular paras. 120-136	
7.	1st w/s of Ursula Stevenson, in particular paras. 3.125-3.134	

APPEAL REF: C1/2019/1053
IN THE COURT OF APPEAL
(CIVIL DIVISION)

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

R (on the application of PLAN B. EARTH)
Appellant

-and-

SECRETARY OF STATE FOR TRANSPORT
Respondent
-and-

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

RESPONDENT'S SKELETON ARGUMENT

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