IN THE HIGH COURT OF JUSTICE **CO/3149/2018**

QUEEN'S BENCH DIVISION

PLANNING COURT

R (on the application of

PLAN B)

Claimant

and

SECRETARY OF STATE FOR TRANSPORT

Defendant

and

(1) HEATHROW AIRPORT LIMITED

(2) ARORA HOLDINGS LIMITED

Interested Party

DEFENDANT'S AMENDED DETAILED GROUNDS FOR CONTESTING THE CLAIM

Introduction

1. The Claimant seeks judicial review of *the Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England* (hereinafter "**the ANPS**"), which was designated by the Defendant, the Secretary of State for Transport ("**Secretary of State**") under the Planning Act 2008 ("**the PA 2008**") on 26 June 2018.

2. The claim is one of a number of claims seeking judicial review of the ANPS that have been adjourned to a rolled-up hearing in March 2019, pursuant to an Order of Holgate J dated 4 October 2018.[1] These Amended Detailed Grounds of Defence are provided in accordance with para. 11 of that Order, as well as the further direction of Holgate J of 31 January 2019 to file and serve amended grounds to clarify the Defendant's position in respect of the approach taken to the Paris Agreement when designating the ANPS.[2]

3. The claim is contested in full by the Secretary of State. In summary:

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[1] The others are CO/2760/2018, CO/3071/2018, CO/3089/2018 and CO/3147/2018.

[2] Amendments are shown in red text, and underlined.

1) Grounds 1 and 2 raise identical issues to those raised by the claimant (Friends of the Earth) in CO/3147/2018. For the reasons set out in full in the Secretary of State's detailed grounds in response to that claim (the content of which the Secretary of State relies upon but does not repeat in these grounds), Grounds 1 and 2 are unarguable. For the avoidance of doubt this includes all the amended paragraphs in that pleading which should be read as applying to this claim also.

2) Ground 3 (human rights) is not pursued by any other claimant apart from Mr Spurrier, whose case on human rights is somewhat different and not focussed on climate change. Friends of the Earth does not pursue this ground (and as the Claimant acknowledges at para. 3 of its Amended Statement of Facts and Grounds ("**ASFG**") Friends of the Earth is the lead claimant on grounds relating to climate change). It is entirely without merit.

3) Sensibly, the Claimant no longer pursues Ground 4 (public sector equality duty).

Legislative context, factual background and the proper approach of the Court in reviewing the ANPS

4. The relevant legal framework is set out in the following sections of the Draft Statement of Common Ground ("**the DSG**") dated 25 October 2018:

1) Section 3.1 (paras. 89 to 103): the PA 2008;

2) Sections 3.4.1 to 3.4.3 (paras. 119 to 138): climate change; and

3) Section 3.6: the Human Rights Act 1998 ("**HRA 1998**").

5. The factual background that is relevant to this claim is set out at paras. 7-16, 31-38, 44-49, 52-59 and 67-85 of the DSG. Further detail is provided in the witness statements of Phil Graham, Caroline Low and Ursula Stevenson.

6. The Secretary of State will seek to reach such agreement as is possible with the Claimant in the final agreed statement of facts.

7. The Secretary of State additionally relies on the following sections of its detailed grounds in response to the Friends of the Earth claim (CO/3147/2018):

1) *Legal and factual background*;

2) *The content and effect of the ANPS*;

3) *Climate change law and policy*;

4) *The proper approach of the Court in reviewing the ANPS.*

8. The Secretary of State highlights the following points in response to section C of the DSG ("*Factual background*").

9. First, a key aspect of the claim is the Secretary of State's alleged failure to take into account the target set in the Paris Agreement. However, the Paris Agreement was raised by respondents to the consultation carried out in 2017 on the Appraisal of Sustainability ("**AoS**") and it was considered e.g. in the *Government response to the consultations on the Airports National Policy Statement*[3] ("**the Consultation Response**"):

> "**Impacts on the ability of the UK to meet its climate change commitments**
> 8.17 ... Several respondents refer to the UK Climate Change Act 2008 and what they perceive as inadequate targets, or the Government's responsibility to meet targets set out in the 2015 Paris Climate Agreement.
> **Government response**
> …
> 8.19 The Government's position remains that action to address aviation emissions is best taken at the international level, given aviation is an inherently global industry and climate change is a global rather than local environmental issue. Industry and Government have made significant progress in addressing aviation CO_2 emissions, such as the agreement at the International Civil Aviation Organisation (ICAO) Assembly in October 2016 to develop a global market based measure for international aviation. The Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) is the first worldwide scheme to address CO_2 emissions in any single sector and will be a first important contribution from this sector to meeting the long-term goal set out by the 2015 Paris Climate Agreement to pursue efforts to limit the global temperature increase to well below 2 degrees Celsius. In the technical negotiations since the 2016 Assembly, the UK has continued to negotiate hard for a scheme that is environmentally effective and minimises competitive distortions. Global action allows for progress in reducing aviation's climate change impacts while minimising the risks of competitive disadvantage to the UK's aviation industry. This position is shared internationally.
>
> …
> **Carbon trading and carbon capping and suggestions on curbing carbon emissions**
> …
> 8.42 Several respondents contended that the UK's current carbon emissions targets under the Climate Change Act were adopted before the ratification of the 2015 Paris Climate Agreement and therefore need to be updated.
> **Government response**
> 8.43 As set out previously, the Government is yet to take a decision on whether or not to adopt the CCC's planning assumption. Further consideration of this matter and on wider sustainable growth will be taken forward in development of the new Aviation Strategy, the foundations of which were laid with the call for evidence in summer 2017

[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713357/government-response-to-the-consultations-on-the-airports-nps.pdf.

and developed further in the Next Steps document published in spring 2018. The Airports NPS is not the right vehicle for taking forward or setting wider Government policy.

8.44 The Government has taken significant steps in helping to progress the development of measures for addressing aviation CO2 emissions, such as the agreement at ICAO for a global market based measure. In the event that there is not an internationally agreed carbon traded scheme in the future, the carbon capped scenario shows that aviation policy measures would still be able to meet emissions reduction targets through a series of carbon abatement measures.

8.45 The Government does not agree that the carbon traded scenario cannot be considered and the UAR models both carbon capped and carbon traded scenarios in a manner consistent with the Commission's analysis. While it is true that expansion at Heathrow is forecast to increase overall CO2 emissions at the UK level compared to a no-expansion scenario, these emissions would either be offset elsewhere through an international carbon trading scheme (carbon traded scenario) or limited to meet the CCC's planning assumption of 37.5 MtCO2 (carbon capped scenario).

8.46 The carbon capped policy regime assumes that total emissions from UK departing flights are capped at 37.5 MtCO2 per annum in 2050. To illustrate how such a cap could be met, the Department worked with independent experts Ricardo Energy & Environment (REA) to assess a host of abatement measures55, and the UAR identified action to encourage more efficient ground movements and increased use of renewable fuels as two potential mitigation options that would be cost-effective and follow established policy levers. The call for evidence on the new aviation strategy set out the range of existing measures already being explored and sought views on the best approach and combination of policy measures to effectively address carbon emissions from aviation. The Government set out its next steps towards an Aviation Strategy in its publication in April 2018.

8.47 The Government has concluded that, given the range of policy measures available, expansion at Heathrow Airport is compatible with the UK's climate change obligations. The matter of UK wide policy in relation to aviation emissions will be considered in developing a new Aviation Strategy.

…

Specific comments on the draft Airports NPS

…

12.9 Some respondents argue that the draft Airports NPS evolved without sufficient reference to other current or pending policy documents, such as the 2015 Paris Climate agreement and the UK plan for tackling roadside nitrogen dioxide concentrations. These respondents argue that it is therefore already obsolete, particularly with regard to environmental targets.

Government response

12.10 The Airports NPS takes account of other policy initiatives where relevant. The NPPF in particular has been a fundamental consideration in the drafting of the Airports NPS and is heavily referenced throughout. The Airports NPS will be an important and relevant consideration in respect of applications for new runway capacity and other airport infrastructure in London and the South East of England (Airports NPS 1.12). The 2013 Aviation Policy Framework (APF) states that "we support the growth of airports in Northern Ireland, Scotland, Wales and airports outside the South East of England". Drafting of the Airports NPS was informed by a cross-Whitehall steering group. Throughout its development the Department for Transport (the Department) maintained regular contact with this steering group and took full account of the views provided. Both the Department for Environment, Food

and Rural Affairs (Defra) and Public Health England were involved in that process. Further information on the Air Quality Plan can be found in Chapter 6.
12.11 …
12.12 The Government recognises the importance that the nations and regions of the UK attach to domestic connectivity, particularly connections into Heathrow Airport. Airports across the UK provide a vital contribution to the economic wellbeing of the whole of the UK. Without expansion, there is a risk that, as airlines react to limited capacity, they could prioritise routes away from domestic connections. The Government therefore sees expansion at Heathrow Airport as an opportunity to not only protect and strengthen the frequency of existing domestic routes, but to secure new domestic routes to the benefit of passengers and businesses across the UK. The Government's Call for Evidence on a new Aviation Strategy, published in July 2017, stated that it was minded to be supportive of all airports that wished to make best use of their existing runways, including those in the South East. Having analysed the responses to the call for evidence, the Government is supportive of airports beyond Heathrow making best use of their existing runways. However, it is recognised that the development of airports can have positive and negative impacts, including on noise levels. Any proposals should be judged on their individual merits by the relevant planning authority, taking careful account of all relevant considerations, particularly economic and environmental impacts." [Footnotes omitted.]

10. The Claimant inexplicably omits even to mention this. For the avoidance of doubt, the above matters confirm that the Secretary of State and his officials 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. The Secretary of State repeats the submissions made in his detailed grounds in CO/3147/2018, including as to the meaning and effect of the Paris Agreement, as well as all the amended paragraphs.

11. Second, the Claimant refers to a number of events that have occurred subsequent to the designation of the ANPS on 26 June 2018, i.e.:

    1) The 31 July 2018 letter to the Prime Minister (ASFG para. 42);
    2) The Intergovernmental Panel on Climate Change's 8 October 2018 report *Global Warming of 1.5°C* ("**the IPCC Report**": ASFG paras. 43 and 44);
    3) The Government's formal commissioning of advice from the Committee on Climate Change ("**CCC**") on 15 October 2018 (ASFG para. 45); and
    4) Research from August 2018 (ASFG para. 58).

12. The lawfulness of the designation of the ANPS cannot in any way be affected by such post-designation events. Judicial review is not a rolling exercise of monitoring, regulating or policing the actions of the Secretary of State in relation to airports expansion (or indeed any other Government minister in the exercise of their functions). The Court exists to adjudicate upon specific challenges to a discrete decision: see *per* Munby J in ***R (P) v. Essex County Council*** [2004] EWHC 2027 at [33]. The role of the Planning Court in these proceedings is thus to review the lawfulness of the designation of the ANPS on 26 June 2018.

13. In so far as any post-designation event (e.g. the publication of advice from the CCC) would need to be considered by the Secretary of State in the context of the ANPS, that would only be under s. 6 of the PA 2008, which imposes a duty to review a national policy statement ("**NPS**") in whole or in part where the Secretary of State considers it appropriate to do so. In deciding when to review an NPS the Secretary of State must consider whether: (i) since the time when the NPS 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, (ii) the change was not anticipated at that time, and (iii) if the change had been anticipated at that time, any of the policy set out in the NPS would have been materially different (see s. 6(3) and (4)). The decision whether to review an NPS is subject to judicial review pursuant to s. 13(2) and (3) of the PA 2008. These are not matters that are (or could be) before the Court in these proceedings. Moreover, Plan B in correspondence requested that the Secretary of State carry out a review. The Secretary of State considered this request and decided that a review was not appropriate.

14. Furthermore, a post-designation event might well be relevant to the examination and determination of an application under the PA 2008 for a Development Consent Order ("**DCO**"). Such events might, for example, bear upon the decision-making tests set out in the ANPS (whether amended following a review or not) and upon the matters that the ANPS requires any applicant for a DCO to assess. Where the ANPS applies, these may also be matters that the Secretary of State will think are *"important and relevant"* to his decision. These matters will no doubt be the subject of detailed representations and submissions by a number of parties in the context of an application for a DCO and its

examination. Again, a decision either to grant or to refuse an application is subject to judicial review under the PA 2008.

15. Third, the Claimant is wrong to assert that "*Government policy* [...] *is to limit warming to the more stringent standard of 1.5°C and "well below" 2°C*" (original emphasis).[4] The Secretary of State refers to (but does not repeat) the more detailed account that is set out in his detailed grounds in response to the Friends of the Earth claim. Shortly (and accurately) stated, however, the position is that the IPCC has published its report on the global implications of the 1.5°C target and the Government has formally commissioned advice from the CCC by the end of March 2019, which is specifically to include advice on: (i) setting a date for achieving net zero greenhouse gases ("**GHG**") emissions across the economy; (ii) whether the 2050 Target needs to be raised in order to meet international climate targets set out in the Paris Agreement; (iii) how emissions reductions might be achieved across the economy and (iv) the expected costs and benefits.[5]

16. The assertion at ASFG para. 40 that the Government announced on 17 April 2018 that "*it would review and revise its climate change targets to align them to the Paris Agreement*" is misleading. The Government actually announced only that "*after the IPCC report later this year, we will be seeking advice from the UK's independent advisers, the* [CCC], *on the implications of the Paris Agreement for the UK's long-term emissions reduction targets*".[6]

17. Fourth, as to paras. 33 and 34 of the ASFG, it is irrelevant that the CCC's view that the 2050 Target is "*potentially consistent*" with the Paris Agreement has been expressed in a legal submission made on its behalf, rather than in evidence. The legal submission is equally a public statement of the CCC's view.

18. Fifth, at a number of points in the ASFG (e.g. paras. 37 and 50) the Claimant appears to be inviting the Court to engage with (i) the respective merits of the various targets that are referenced in the document and (ii) the likely efficacy of potential abatement

[4] ASFG, heading to section C.1 (p. 5).
[5] Witness statement of Caroline Low on behalf of the Secretary of State.
[6] TC/1/7; this is covered in the annex to the witness statement of Caroline Low.

measures. Those issues are self-evidently not ones that are the proper subject-matter of a judicial review. Moreover, they involve the consideration of matters involving scientific, technical and predictive assessment: as such, the Court should afford the Secretary of State an enhanced margin of appreciation (see the decision of the Court of Appeal in ***R (Mott) v. Environment Agency*** [2016] EWCA Civ 564, [2016] 1 WLR (***"Mott"***) at [69] to [75]).

19. Sixth, the argument at ASFG para. 63 that "*application of the precautionary principle to the context of climate change, requires that the UK Government should, at a minimum, revise its climate change targets to be consistent with a 50% probability of limiting warming to 1.5°C (which equates to an 80% probability of limiting warming to 2°C*" (emphasis added) retreads ground already covered by the Claimant in claim CO/16/2018.[7] In those proceedings, in refusing permission both Lang J (orally) and Supperstone J (in writing) concluded that it was unarguable that the Government's failure to act now to amend the 2050 Target to reflect the Paris Agreement was unlawful.

Ground 1: Designation of ANPS allegedly *ultra vires*

20. As the Claimant explains at para. 6 of the ASFG, this ground of challenge is equivalent to Grounds 1 and 2 of the Friends of the Earth claim (CO/3147/2018), taken together. It is unarguable for the reasons set out in the Secretary of State's Detailed Grounds of Defence in the latter claim, in respect of Grounds 1 and 2.

21. The Claimant sets out "*supplemental submissions*" (to those of Friends of the Earth) at paras. 69 to 72 of the ASFG. It contends that the decision to designate the ANPS is *ultra vires* ss. 5 and 10 of the PA 2008. S. 5(7) and (8) require the ANPS to include (*inter alia*) "*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*". S. 10 provides that in exercising his functions under s. 5, the Secretary of State "*must (in particular) have regard to the desirability of* [...] *mitigating, and adapting to, climate change*".

22. The Claimant alleges (para. 71 of the ASFG, at page 20) that the Secretary of State breached ss. 5 and 10 of the PA 2008 by failing to address in the ANPS (i) "*the fact that*

[7] ***Plan B v. Secretary of State for Business, Energy and Industrial Strategy and the Climate Change Committee.*** An appeal has been lodged with the Court of Appeal.

the 2050 Target aims at the discredited 2ºC temperature limit"; (ii) the Government's "*commitment*" to the Paris Agreement limit of 1.5ºC and "*well below*" 2ºC; (iii) the Government's "*commitment to a process of review to align the 2050 Target to the Paris Agreement in light of the IPCC report*"; and (iv) the Government's "*policy commitment and legal obligation to provide leadership on the implementation of the Paris Agreement*".

23. The PA 2008 was not breached as the Claimant alleges (or at all). Given (in particular) that the IPCC Report had not been published when the Secretary of State designated the ANPS and that the CCC had not (nor has it yet) advised on whether the 2050 Target needs to be raised in order to meet international climate targets set out in the Paris Agreement, it was sufficient for the ANPS to refer to the 2050 Target. It was in the circumstances both adequate and entirely appropriate for the ANPS to identify (at para. 5.71) the current source of the UK's obligations on GHG (the CCA 2008) and the current target (the 2050 Target).

24. Furthermore, the Secretary of State considered the Paris Agreement in producing the ANPS and explained his position in e.g. the Consultation Response (above). 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

25. Given the context, the Secretary of State was not required expressly to address in the ANPS any of the matters raised at (the first) para. 71 of the ASFG (at page 20). The obligation in s. 5(7) of the PA 2008 is to provide reasons for the policy in the ANPS. The Secretary of State has plainly done so. There is no obligation to give reasons for reasons or to respond to every point raised by consultees in the ANPS itself.

Ground 2: Designation of ANPS allegedly irrational

26. Ground 2 of the claim is a bare allegation of "*irrational policy*" based on three of the four points that are raised under Ground 1. It is unarguable for the reasons given above in respect of the latter. In ***Newsmith v. Secretary of State for the Environment*** [2001] EWHC Admin 74, [2017] PTSR 1126 6, Sullivan J explained that the "*threshold of*

Wednesbury unreasonableness is a difficult obstacle for an applicant to surmount" and that the "*difficulty is greatly increased in most planning cases*" because the decision-maker (or here it might be said policy-maker) is not simply deciding questions of fact, he or she is reaching a series of planning judgmeents. And in respect of these "*a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable*" (at [6]).

27. Moreover, as explained more fully in the detailed grounds in response to the Friends of the Earth claim, any allegation of irrationality must take into account, *inter alia*, the following points:

1) The Courts have long recognised that there is a very high threshold indeed for intervention in cases where Parliament has had a role in approving the measures under challenge. Thus, *per* Lord Woolf in ***M v. Home Office*** [1994] 1 AC 377, at 413D-G, "*it could be difficult to persuade a court to intervene*" where what was at issue was a scheme laid before Parliament for approval. Similarly, *per* Auld LJ in ***O'Connor v. Chief Adjudication Officer*** [1999] 1 FLR 1200, at 1210F-1211B ("***O'Connor***"):

> "… in cases where the minister has acted after reference to Parliament, usually by way of the affirmative or negative resolution procedure, there is a heavy evidential onus on a claimant for judicial review to establish the irrationality of a decision which may owe much to political, social and economic considerations in the underlying enabling legislation."

The Supreme Court has more recently reasoned to the same effect: see ***R (SG) v. Secretary of State for Work and Pensions*** [2015] UKSC 16, [2015] 1 WLR 1449 at [92]-[95], in which Lord Reed observed that the regulations in issue in that appeal "*were the subject of full and intense democratic debate. That is an important consideration. As Lord Bingham observed in* ***R (Countryside Alliance) v Attorney General*** *[2008] AC 719, para 45: 'The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament.' The same is true of questions of economic and political judgment*" (emphasis added).

2) The decision made by the Secretary of State to designate the ANPS involved precisely the sort of political, social and economic considerations at the national level identified in ***O'Connor***. It is well-established that, for example, the formulation and implementation of national economic policy are matters

"*depending essentially on political judgment*", which are not open to challenge on rationality grounds, short of the extremes of bad faith, improper motive or manifest absurdity: see, for example, ***R v. Secretary of State for the Environment, ex parte Hammersmith and Fulham LBC*** [1991] 1 AC 521, at 596F-597H; ***R v. Secretary of State for the Environment, ex parte Nottinghamshire CC*** [1986] AC 240, 250E-251A, 247H.

3) Where the matters in issue involve the consideration of matters involving scientific, technical and predictive assessment, the Court should afford the Secretary of State an enhanced margin of appreciation: see ***Mott*** (above).

28. In short, any allegation of irrationality is hopeless.

Ground 3: Human rights

29. Under Ground 3, the Claimant relies on Articles 2 and 8 of the European Convention on Human Rights ("**ECHR**"), both individually and read in conjunction with Article 14: see paras. 65 to 74 of the ASFG. For the following reasons, the points raised are unarguable (and indeed entirely without merit).

30. First, the essence of the complaint made under Ground 3 remains (see para. 74 of the ASFG) an allegation that the Secretary of State failed to take into account the Paris Agreement. That allegation is without foundation for the reasons given above in response to Grounds 1 and 2.

31. Second, the Claimant previously accepted (para. 38 of its original Statement of Facts and Grounds) that it is not a victim of any human rights breach. As the Secretary of State explained in his Summary Grounds of Defence, it follows that it is simply not open to the Claimant to argue that any human rights point affects the legality of the designation of the ANPS: see ss. 6(1) and 7(1) of the HRA 1998. The Claimant has no answer to this point, which it does not engage with at all in the ASFG. It follows that Ground 3 should not have been pursued in the ASFG. Moreover, the effect of s. 104(6) of the PA 2008 and s. 6(1) of the HRA 1998 is that the Secretary of State will be prevented from determining any application for a DCO in accordance with the ANPS if to do so would be incompatible with the Claimant's human rights or the human rights of any other person who would be a "victim" under the HRA 1998.

32. Third, the Claimant, accepting he cannot rely on s. 6 of the HRA 1998, instead seeks to rely on s. 3. S. 3(1) provides that "*[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights*". The argument made in the ASFG is that, via s. 3(1) of the HRA 1998, Articles 2 and/or 8 and/or 14 of the ECHR required s. 5(8) of the PA 2008 to be interpreted and given effect to as including any obligations in the Paris Agreement. Even if accepted, however, that argument does not lead to an obligation on the part of the Secretary of State to give effect to the Paris Agreement (as the Claimant suggests). S. 5(8) is a procedural obligation - it extends only to a requirement to explain how (that is, how if at all) the ANPS takes account of Government climate change policy. Government climate change policy has yet to be amended in the light of the Paris Agreement (see above, and see the detailed grounds in the Friends of the Earth challenge). In other words, the Claimant has failed to explain how the HRA 1998 bites on s. 5(8) of the PA 2008.

33. Similarly, whilst the Claimant contends that the Paris Agreement constrains "*the Government's margin of appreciation in this area*", no explanation is given of how any such margin of appreciation arises under s. 5(8) of the PA 2008. The Claimant appears to be seeking to use s. 3 of the HRA 1998 as a fig leaf to disguise what is in fact an argument that the Paris Agreement should without more be given direct effect without being incorporated into domestic law.

34. Fourth, the original grounds lodged by the Claimant quoted from various Strasbourg cases but failed to identify any such authority providing support for the arguments it is making on human rights. This appears to be accepted as the ASFG does not cite any Strasbourg authority. The arguments advanced are now made only by reference to the Dutch case *Urgenda Foundation v. Kingdom of the Netherlands, District Court of the Hague* [2015] HAZA c/09/00456689, June 2015 ("***Urgenda*")** (see below).

35. Fifth, whilst (as is noted at para. 73 of the ASFG) the decision in ***Urgenda*** was upheld by the Dutch Court of Appeal on 9 October 2018, no reliance can be placed on that decision given that:

1) Dutch law is monist so that national courts may directly apply international norms after the process of ratification.

2) English law is, of course, a dualist legal system and it is trite law that international law has legal force at the domestic level only after being implemented by national statutes: see ***JH Rayner (Mincing Lane) Ltd v. Department of Trade and Industry*** [1990] 2 AC 418. It is accepted that, under the ECHR and in accordance with the Vienna Convention, regard may be had to principles of international law, including international conventions, for the purpose of interpreting the "*terms and notions in the text of the [ECHR]*" where there is the necessary connection between the international law invoked and the ECHR right under consideration: see ***R (SG) v Secretary of State for Work and Pensions*** [2015] UKSC 16, [2015] 1 W.L.R. 1449.

3) In any event, it is impossible to see that ***Urgenda*** is of any relevance given that the Claimant is not able to argue that the ANPS is unlawful on human rights grounds and is confined to relying on the HRA 1998 as an aid to interpreting s. 5(8) of the PA 2008 and the duty it imposes to give reasons. It is not made clear how in this regard arguments about the *"margin of appreciation"* have any bearing on that duty.

4) Moreover, the Secretary of State understands in any event that the ***Urgenda*** decision might be subject to further appeal within the Dutch legal system.

36. Fifth, the Claimant ran similar arguments to those pursued under Ground 3 in claim CO/16/2018, the judicial review proceedings that it brought earlier this year seeking to challenge the failure to act now to amend the 2050 Target to reflect the Paris Agreement. As noted above, that claim was refused permission (as unarguable) both orally (Lang J) and in writing (Supperstone J).

37. For all of these reasons, permission should be refused on Ground 3.

Conclusion

38. The Court is respectfully requested to refuse permission, or if permission is granted, to dismiss the claim for judicial review.

39. In either event, the Secretary of State seeks a contribution to his costs, summarily assessed in the sum of £10,000, in view of the Aarhus costs limits in CPR 45.41-45.43.

JAMES MAURICI QC
DAVID BLUNDELL
ANDREW BYASS
HEATHER SARGENT

LANDMARK CHAMBERS

~~**29 NOVEMBER 2018**~~ **1 FEBRUARY 2019**