IN THE SUPREME COURT **UKSC 2020/0042**

B E T W E E N :

HEATHROW AIRPORT LIMITED

Appellant

and

(1) FRIENDS OF THE EARTH LIMITED
(2) PLAN B EARTH

Respondents

CASE FOR HEATHROW AIRPORT LIMITED (APPELLANT)

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INTRODUCTION

Summary

1 The Appellant owns and operates Heathrow Airport. It has promoted the Northwest Runway ("NWR") scheme for many years and aspires to make an application under Part 5 of the Planning Act 2008 ("PA 2008") for a development consent order ("DCO") to construct and operate it.

2 The subject of this appeal is the decision of the Secretary of State for Transport ("Secretary of State") on 26 June 2018 to designate the Airports National Policy Statement ("ANPS") (**Appx/1427**) under s5 PA 2008. That designation followed a report by the independent Airports Commission on airport expansion in the south-east, further work carried out by the Department for Transport, extensive consultation on two drafts of the ANPS, and parliamentary approval.

The ANPS

3 Four important points about the ANPS should be borne in mind:

(1) The ANPS has a specific purpose, quite distinct from the formulation of government policy on aviation and climate change issues. As stated at its 1.38:

> *"The [ANPS] sets out Government policy on expanding airport capacity in the South East of England, in particular by developing a Northwest Runway at Heathrow Airport. Any application for a new Northwest Runway development at Heathrow will be considered under the [ANPS]. Other Government policy on airport capacity has been set out in the Aviation Policy Framework, published in 2013. The [ANPS] does not affect Government policy on wider aviation issues, for which the 2013 Aviation Policy Framework and any subsequent policy statements still apply."* (**Appx/1437**)

The Aviation Policy Framework (**Appx/633**) will soon be superseded by the Aviation Strategy, on which the Government has already consulted and which it has stated will include both *"a framework for UK aviation carbon emissions to 2050"* (**Appx/1421,** ASFI/17) and consideration of "*aviation's contribution to non-carbon dioxide climate change effects and how policy might make provision for their effects*" (**Appx/1293**, ASFI/55).[1]

[1] The Government stated in October 2019 that the final Aviation Strategy would be published in 2020: "Leading on Clean Growth: The Government Response to the Committee on Climate Change's 2019 Report to Parliament – Reducing UK emissions", pp.79, 82, 112.

(2) The Government's climate change obligations, as they existed at the relevant time, were a central element of the consideration that led to the designation of the ANPS.[2]

(3) The ANPS neither determines the grant of development consent nor precludes objections on climate change grounds to any future application for development consent; indeed, those issues are positively required to be considered (paras 17-18 below). The ANPS itself requires any applicant for development consent to provide evidence of the carbon impact of the development so that it can be assessed against the Government's carbon obligations (para 5.76) (**Appx/1475**), and makes it clear that an increase in carbon emissions that would have a material impact on the ability of the Government to meet its carbon reduction targets, including carbon budgets, would be a reason for refusal of development consent (para 5.82) (**Appx/1476**).

(4) Designation was a "*macro-political*" decision.[3] It was consistent in all relevant respects with the expert advice of both the Committee on Climate Change ("CCC") and Airports Commission. It had been subject to extensive consultation and parliamentary scrutiny. The Secretary of State was accountable to Parliament for it. Though it was adopted within a statutory framework, the applicable statutory constraints were expressed in highly general terms. Lacking grounds of a hard-edged nature, such as "*a complete failure to address a legally mandated matter*" (DC/183), the relevant challenges merited a *"'low intensity' of review*".[4]

The Paris Agreement

4 The Respondents' case is built chiefly upon the Paris Agreement, adopted in December 2015 and ratified by the UK in November 2016. That agreement, too, must be properly understood. The Divisional Court accurately summarised its key provisions, Arts 2 and 4, at DC/580:

> *"The Paris Agreement thus comprised a firm international commitment 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", as well as an aspiration to achieve net zero GHG emissions during*

[2] See e.g. paras 3.61-3.69 (**Appx/1456**), 4.41-4.52 (**Appx/1467**) and 5.69-5.83 (**Appx/1474**) of the ANPS; and the Appraisal of Sustainability ("AoS") at section 6.11 (**Appx/1377**), paras 7.4.102-105 (**Appx/1381**) and Appendix A-9 (**Appx/1383**).

[3] *R (Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004, [47].

[4] *Ibid.* [48]; cf. DC/151-184.

the second half of the 21st century. It further required each state to determine its own contribution to the article 2 target."

5 The last point is of particular significance. Unlike previous international agreements, the Paris Agreement did not set specific national carbon reduction targets. Its central requirement is that parties should *"prepare, communicate and maintain successive nationally determined contributions"* (Art 4(2)) in order to achieve the *"long term temperature goal"* in Art 2.

6 At the time of the contested decision, the UK's nationally determined contribution ("NDC") was its statutory carbon reduction target as enshrined in s1(1) of the Climate Change Act 2008 ("CCA 2008"). This was the UK's target to reduce its "*net UK carbon account*" in 2050 by at least 80% from 1990 levels (amended to 100%, "*net zero*", in June 2019). An earlier attempt by Plan B to secure a ruling that the UK's 80% reduction target had to be amended in the light of the Paris Agreement was denied permission to proceed by the High Court in July 2018, with the Court of Appeal subsequently refusing a renewed application. As Supperstone J held:[5]

"… the Secretary of State was plainly entitled, having had regard to the advice of the Committee [the CCC]*, to refuse to change the 2050 target at the present time."*

That result is not in issue in the present case: but the challenges before this Court nonetheless seek to undermine it.

<u>These challenges</u>

7 Unable to use the Paris Agreement to challenge the UK's (former) statutory carbon reduction target directly, the Respondents seek to use a range of legislative vehicles – s5(3) PA 2008, s10 PA 2008 and Directive 2001/4/EC ("the SEA Directive") – to do so indirectly.[6] That approach is based on an exaggerated conception both of the legal status of the Paris Agreement and of its substantive content. If successful, it would result in either:

(1) the formulaic inclusion in future NPSs of references to unincorporated international agreements (which would be empty references, in the absence of domestic policy levers to give them effect), or

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[5] *Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 1892 (Admin), [2019] Env. L.R. 13 at [42].

[6] The Respondents' arguments on non-CO_2 under Ground 4 lack even the hook of the Paris Agreement. Paris, in common with other international agreements, has nothing to say on the non-CO_2 effects of aviation.

(2) an inability to designate new policy statements or grant planning consent for infrastructure projects (or indeed other large developments) until such time as detailed policy exists to address their climate impacts throughout their anticipated lifetime: an outcome which the Respondents would no doubt welcome, but which is manifestly not the objective of PA 2008 or the SEA Directive.[7]

8 Four separate challenges to the designation of the ANPS were heard in a rolled-up hearing over seven days. In a judgment described by the Court of Appeal (CA/7) as a *"tour de force",* the Divisional Court concluded that the claims now before this Court did not meet even the permission threshold. It did so after conducting a detailed and searching analysis of six preliminary points (DC/86-184) and of the climate change issues advanced by FoE and Plan B (DC/558-660). Its reasoning and conclusions were, with respect, correct; and in departing from them, the Court of Appeal fell into error.

Climate change law and policy

9 Before turning to the individual grounds of appeal it may be helpful to review some features of UK climate change law and policy, with particular reference to aviation. The Government's assessment of climate change and its consequences for aviation built on the work of two independent bodies:

(1) the CCC, established under s32 of the CCA 2008 as an independent body to advise Government on climate change issues, chaired initially by Lord (Adair) Turner and since 2012 by Lord Deben (John Gummer); and

(2) the Airports Commission, chaired by Sir Howard Davies, whose terms of reference required it to have regard to climate change and whose final report of July 2015 recommended the construction of the NWR and a package of measures to address its environmental and community impacts.[8]

10 Concerted international action to address the issue of climate change started with the signing of the United Nations Framework Convention on Climate Change ("UNFCCC") at

[7] See also at para 88 below. A similarly-constituted Court of Appeal sought to resist this result in *R (Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004 by distinguishing the present case (at [102]-[103]). That distinction however required considerable weight to be placed on what were described as "*specific duties such as those in sections 5(8) and 10(3)*" (emphasis added: the adjective might be considered controversial), and offers little reassurance for cases in which those or similar broad statutory duties are in play.

[8] Dame Julia King, now Baroness Brown of Cambridge, was a member of both the Airports Commission and the CCC.

the Rio Earth Summit in 1992 (ASFI/24-25). The UNFCCC was a framework convention, whose objectives have been operationalised by later agreements. Thus:

(1) The Kyoto Protocol (1997), which entered into force on 16 February 2005 (ASFI/26), committed individual industrialised countries, including the UK, to specific national carbon reduction targets for the period 2008-2012 against a 1990 baseline. Kyoto did not, however, include international aviation in such targets, leaving it (by its Article 2(2)) to be dealt with on an international basis with parties working through the International Civil Aviation Organisation ("ICAO").

(2) The Doha Amendment (2012) (ASFI/27), though it never came into force, sought to tighten and extend the individual national carbon reduction targets for the period 2013-2020.

Neither the UNFCC, Kyoto nor Doha set an express global temperature objective.

11 The Paris Agreement of December 2015 (ASFI/28-29), which was ratified by the UK and entered into force in November 2016, adopted a different approach. It set a global *"long-term temperature goal"*,[9] but did not set individual carbon reduction targets for participating member states. Rather, it established a mechanism for an individual party to *"prepare, communicate and maintain successive nationally determined contributions that it intends to achieve [and] pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions"* (Art 4(2)). It left unchanged the Kyoto commitment to tackle international aviation through the ICAO.

12 It was within the context of the UNFCCC and the Kyoto Protocol that the UK enacted CCA 2008 (ASFI/30-33). CCA 2008 established a 2050 carbon reduction "*target*" (expressed as a percentage reduction on a 1990 baseline) and a series of five-yearly "*budgets*" expressed in tonnes of carbon dioxide equivalent.

13 The target within the (original) s1(1) was that *"the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline"*. Following the approach in the Kyoto Protocol, the 80% target does not include international aviation (s30 CCA 2008: but see para 15 below). Under s2(1) the Secretary of State for Business, Energy and Industrial Strategy may amend the s1(1) target, but only in the circumstances set out in s2 and subject to taking the advice of the CCC under s3. Those circumstances include there

[9] Art 2(1)(a): "*Holding the increase in global average temperature to well below 2^{o}C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5^{o}C above pre-industrial levels*".

being significant developments in knowledge about climate change, or developments in European or international law or policy, that make it appropriate to do so (s2(2)(a)). Amendment is subject to the affirmative resolution procedure in Parliament (s2(6)).

14 Carbon budgets are set by statutory instrument for five-yearly periods, starting with the period 2008-2012, pursuant to ss4-10. Before setting a carbon budget, the Secretary of State must take advice from the CCC, and the setting or amendment of a carbon budget is, again, subject to affirmative resolution procedure in Parliament (ss5(3), 6(5) and 8(3)). The CCA 2008 gives the CCC specific duties to advise the Secretary of State on the level of the 2050 carbon target (s33) and in connection with carbon budgets (s34).

15 In setting a carbon budget the Secretary of State must take into account a number of matters set out in s10, including "*the estimated amount of reportable emissions from international aviation and international shipping for the budgetary period or periods in question*" (s10(2)(i)/(3)). Although international aviation does not fall within the 2050 carbon target or the five-yearly budgets, in practice the Secretary of State sets budgets "*allowing for*" future emissions from international aviation by reference to a "*planning assumption*" (also known as the *"aviation target"*). At the date of designation, the planning assumption was 37.5Mt (megatonnes) of CO_2, equating to the UK's emissions for international aviation in 2005 (the year that the Kyoto Protocol entered into force); this planning assumption was adopted by Government on the advice of the CCC (**Appx/577**, ASFI/7(a), 33-34). This is also the planning assumption that was adopted for the UK's Fifth Annual Carbon Budget set in July 2016 for the period 2028-2032. That budget, and the level at which the planning assumption is set, are not under challenge in these proceedings.

16 That is the context for:

(1) the CCC's advice of October 2016 that "*the Government does not alter the level of existing carbon budgets or the 2050 target now*", that there would be "*several opportunities to revisit the UK's targets in [the] future*" (**Appx/1073**), and that "*the UK 2050 target is potentially consistent with a wide range of global temperature outcomes*" (**Appx/1077**, ASFI/44-48), and for

(2) the CCC's explanation, in the earlier judicial review proceedings brought by Plan B, that "*the existing UK target was potentially consistent with more ambitious*

global temperature goals, including that in the Paris Agreement" (**Appx/1521**, ASFI/67).[10]

The Secretary of State followed the CCC's advice in assessing the carbon impact of the scheme in the context of the (then) carbon target in s1(1) and the then existing carbon budgets, which had been set having regard to the 37.5Mt CO_2 planning assumption.[11] As the CCC had advised the Secretary of State not to amend the carbon target or the carbon budgets, and as the UK had not at that time determined to adopt any alternative NDC under the Paris Agreement, it is difficult to see what else those undertaking the assessment could have done.

The PA 2008 regime

17 The structure of the PA 2008 regime is summarised at DC/20-41 and 91/112, and in ASFI/74-83. The following points are emphasised:

(1) Any application for development consent for a project under Part 6 of PA 2008 will be examined by an independent panel of inspectors (the Examining Authority) during a 6-month examination undertaken in accordance with the Infrastructure Planning (Examination Procedure) Rules 2010. That examination will include written representations by interested parties, written questions by the Examining Authority and hearings (which might be open floor hearings, issue-specific hearings or compulsory acquisition hearings) with oral evidence.

(2) Following the examination, the Examining Authority must produce a written report to the Secretary of State setting out its recommendations. The Secretary of State must then determine the application and may, where appropriate, amend the draft DCO as submitted by the applicant.

(3) The application must be determined in accordance with any relevant NPS (s104(3)), except to the extent that one or more of s104(4)/(8) apply. That does not mean that development consent must be granted. Indeed:

(a) The NPS itself may identify red lines where development consent may or should be refused (e.g. ANPS para 5.82 (**Appx/1476**)).

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[10] This explanation was provided by the CCC to the Administrative Court on 10 April 2018 at para 11(v) of submissions filed following a direction from Nicola Davies J (as she then was) requiring CCC to provide a formal response to Plan B's reply in that claim (**Appx/1521**).

[11] 1st WS of Caroline Low (SoS)/458 (**Appx/492**).

(b) There is always a balancing exercise to be undertaken to determine whether the adverse impact of the proposed development would outweigh its benefits (s104(7)).

(c) The Secretary of State must be satisfied that deciding the application in accordance with the NPS would not lead to the UK being in breach of its international obligations (s104(4)).

(d) The Secretary of State must be satisfied that deciding the application in accordance with the NPS would not lead the Secretary of State to be in breach of any duty imposed on the Secretary of State by enactment (s104(5)) or would be unlawful by virtue of any enactment (s104(6)).

(4) Section 120 allows the Secretary of State to impose "*requirements*" (equivalent to planning conditions) on a DCO to mitigate or control its environmental effects. A DCO will usually be made as a statutory instrument (s117(4)), and has the force of law. It may make provision relating to, or to matters ancillary to, the development for which consent is granted (s120(3)), including the matters in Schedule 5 to the PA 2008 (s120(4)). A DCO generally imposes strict legal obligations to mitigate or control the environmental effects of a development: these may include its carbon emissions.

(5) There is provision for judicial review of any decision to grant development consent (s118).

18 Thus, in the context of the intended application for development consent for the NWR project:

(1) Paragraphs 5.69-5.83 (**Appx/1474**) of the ANPS mean that climate change emissions and their consistency with the UK climate change obligations will have to be examined by the Examining Authority.

(2) The Examining Authority will have the opportunity to examine the carbon emissions from the actual project proposed, rather than those assessed for the policy framework contained in the ANPS, and thus to consider the actual mitigation and controls proposed by the applicant.

(3) ANPS para 5.82 (**Appx/1476**) means that the application will be considered against the UK's climate change obligations as they exist at the time of the

decision, and that an increase in carbon emissions resulting from the project may be a reason for refusing consent if it is so significant as to have a material impact on the ability of Government to meet its carbon reduction targets, including carbon budgets.

(4) The Secretary of State has considerable powers to mitigate and control the potential environmental effects of the actual project, including its carbon emissions, through the imposition of "*requirements*" under s120.

(5) The designation of the ANPS does not prevent the Examining Authority and the Secretary of State from considering climate change in the legal and policy context that will exist at the time of any development consent decision. On the contrary, it requires them to do so. If they did not, that would be a ground for judicial review of the development consent decision.

GROUND 1 – PARIS AGREEMENT AND s5(8) PA 2008 (DC/603-624, CA/222-233)

Introduction

19 Ground 1 was advanced only by Plan B. FoE "*expressly distanced*" itself from Ground 1 before the Divisional Court (DC/605), and accepted in the Court of Appeal that current Government policy in respect of climate change was as *"established under the CCA 2008 only"*.[12]

20 The argument is founded on s5(8) PA 2008, which requires that an NPS 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"*.

That requirement was amply satisfied: see fn 1 above.

21 The Court of Appeal concluded that the Secretary of State had contravened s5(8) by omitting to explain how the policy in the ANPS took account of the Paris Agreement. The Government's commitment to the Paris Agreement was said to be clearly part of "*Government policy*" by June 2018 because it had been ratified in November 2016, and because of "*firm statements re-iterating Government policy of adherence to the Paris Agreement by relevant Ministers*", notably by Andrea Leadsom MP and Amber Rudd MP in March 2016 (CA/228).

[12] See FoE's Skeleton Argument for the Court of Appeal at para 18 (**Appx/402**).

22 That position had been rejected by the Divisional Court as "*misconceived*" (DC/605) and unarguable (DC/667). The Court of Appeal's conclusions on Ground 1 are flawed for the following reasons, which are addressed in turn:

(1) Treaties are not Government policy for the purposes of s5(8) PA 2008.

(2) The Paris Agreement was not Government policy for the purposes of s5(8).

(3) Government policy was in any event bounded by the CCA 2008 s1.

(4) The ANPS was consistent with the Paris Agreement.

Treaties are not "Government policy"

23 The unimplemented provisions of an international treaty are not *"policy"* within the meaning of s5(8) PA 2008, as a matter both of statutory construction and of broader legal principle.

Statutory construction

24 The reference to "*Government policy*" in s5(8) PA 2008 makes no reference to international treaties, despite the fact that PA 2008 post-dates a number of international agreements in this area. There is neither any basis for implying such a reference,[13] nor clarity as to whether such reference, if it were implied, would relate to treaties when signed, when ratified (as Plan B asserts) or only when in force.

25 Where PA 2008 requires regard to be had to the UK's obligations under international law, it says so expressly. Section 104 PA 2008 requires the Secretary of State to decide an application for a DCO in accordance with the relevant NPS (s104(3)), except to the extent that the Secretary of State is satisfied that (inter alia) "*deciding the application in accordance with any relevant [NPS] would lead to the United Kingdom being in breach of any of its international obligations*" (s104(4)).

26 Parliament is at liberty to require that an administrative discretion be exercised by reference to the international law obligations of the United Kingdom. However, where Parliament intends this consequence in comparable statutory contexts, it says so

[13] *"The question whether an implication should be found within the express words of an enactment depends on whether it is proper, having regard to the accepted guides to legislative intention, to find the implication…"*: Bennion on Statutory Interpretation (7th ed., 2017) at para 9.5.

expressly.[14] That is unavoidable, given the broader legal and constitutional principles identified at paras 28-33 below.

27 The difficulties of characterising shared international aims as "*Government policy*" are especially evident where the relevant goals (in the case of the Paris Agreement a *"long-term temperature goal"* at a global level) do not dictate national policy for individual signatory states. It requires their governments to formulate policies (via NDCs and mitigation measures), but does not itself constitute such a policy. See further paras 4-6 and 11 above and 34-41 below.

Broader legal principles

28 There is a general legal duty on administrative decision-makers (recognised in the specific context of s5(8) PA 2008) to take account of Government policy.[15]

29 There is no such general duty to take account of international obligations which have not been implemented into domestic law, even when the source of such obligations is a ratified treaty.[16] See *R v SSHD, ex p. Brind* [1991] 1 AC 696 (HL) per Lord Ackner at 761G-762D; *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189 (HL), per Lord Brown at [55]-[59]; *R (Yam) v Central Criminal Court* [2016] AC 771 (SC), per Lord Mance at [35]-[36]; 'International Law in Domestic Courts: The Developing Framework' (2008) 124 LQR 388, Philip Sales QC and Joanne Clement, at p.404.

30 That approach has its origins in the dualist approach followed by the United Kingdom constitution: "*although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic*

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[14] See e.g. Greater London Authority Act 1999, s41(5)(a) which provides that when preparing, revising or implementing any of the listed strategies the Mayor shall have regard to, *inter alia*, "*the need to ensure that the strategy is consistent with*" both "*national policies*" and (distinctly) "*with the EU obligations of the United Kingdom and with such other international obligations of the United Kingdom as the Secretary of State may notify to the Mayor*"; Taxation (Cross-border Trade) Act 2018, s28(1): "*In exercising any function under any provision made by or under this Part [certain listed public bodies] must have regard to international arrangements to which Her Majesty's government in the United Kingdom is a party that are relevant to the exercise of the function*" other examples include s2(2) and 8(2)(b) of the Space Industry Act 2018, s1(3)(f) of the Civil Aviation Act 2012, s9F of the Bank of England Act 1998 and s410 of the Financial Services and Markets Act 2000.

[15] See *R (Lumba) v Secretary of State for the Home Department (JUSTICE and another intervening)* [2012] 1 AC 245 (SC) at [26] per Lord Dyson JSC approving the following statement from De Smith's Judicial Review *"[T]here is an independent duty of consistent application of policies, which is based on the principle of equal implementation of laws, non-discrimination and the lack of arbitrariness."*

[16] Although a decision maker *may* as a matter of discretion do so: *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189 (HL), per Lord Brown at [55].

law": *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 (SC) at [55].

31 It is reflected in a number of well-established rules which distinguish policies from international treaties. In particular:

(1) Government policies, but not international treaties, by their nature give rise to domestic law obligations: see e.g. *R (Lumba) v Secretary of State for the Home Department (JUSTICE and another intervening)* [2012] 1 AC 245 (SC) at [26] in relation to Government policies; *c.f. R (SG and others) v SSWP* [2015] 1 WLR 1449 (SC) at [235] in relation to international treaties.

(2) Government policies, but not international treaties, are justiciable in the sense that domestic courts are competent authoritatively to construe the relevant instrument: see *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd and another intervening)* [2012] PTSR 983 (SC) at [18]-[21] and [35] in relation to Government policies; *c.f. R (SG)* at [235] in relation to international treaties.

32 Furthermore, in the planning context, the power to make government policy derives from statute, which has superseded any prerogative power to do so - see *Hopkins Homes Ltd v SSCLG* [2017] 1 WLR 1865 (SC) at [19]-[20]). By contrast, the power to agree international treaties derives from the royal prerogative (see *Miller* (para 30 above) at [55]).

33 The principles outlined above have two consequences material to this appeal:

(1) They support the proposition that Parliament would not have used the term "*Government policy*" if it meant a treaty obligation (paras 23-27 above). The two have different and contradictory meanings and characteristics.

(2) They defeat the proposition that the act of ratification gives rise to a "*Government policy*" separate from but identical to the treaty itself. As it was put by Sales and Clement (para 29 above, at p.409), rejecting the related suggestion that ratification might give rise to a legitimate expectation:

> *"Precisely because under English law it is established that a treaty has no force in domestic law and is incapable of operating as a direct source of rights or obligations, ratification does not constitute a representation or undertaking operating on the plane of domestic law to perform obligations under the treaty"* (emphasis added).

The Paris Agreement is not "Government policy"

34 Even if some ratified treaties could in principle constitute "*Government policy*" within the meaning of s5(8) PA 2008 (contrary to paras 23-33 above), that could not be said of the Paris Agreement which does not purport to dictate national policy.

35 The Court of Appeal failed to specify the respect in which the Paris Agreement could be said to be *"Government policy"*. It characterised the relevant policy only as *"adhering to the Paris Agreement to limit the rise in global temperature…"* (CA/216), or as *"the Government's commitment to the Paris Agreement"* (CA/228).

36 The UK was of course bound by the Paris Agreement in international law. However, the Court of Appeal did not address the relevant question, which was whether anything in the Paris Agreement constituted (or could constitute) relevant domestic policy. It is plain from the face of the Paris Agreement itself that it did not and could not. In particular:

(1) The Paris Agreement sets a global "*long-term temperature goal"* (CA/216), not national targets (paras 37-39 below).

(2) Such a global aim is incapable of being "*Government policy*" for the purposes of assessing the potential carbon effects of an individual development scheme (paras 40-41 below).

<u>Paris Agreement sets global aims</u>

37 The aims of the Paris Agreement are expressed in global terms:

(1) Art 2(1)(a) relates to global temperature increases. It states that the Agreement

> "*aims to strengthen the global response to the threat of climate change… including by… [h]olding the increase in the global average temperature to well below 2^{o}C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5^{o}C above pre-industrial levels…".*

(2) Art 4 relates to global greenhouse gas emissions. It refers to the "*long-term temperature goal*" set out in Art 2 and then states that the signatories

> "*aim to reach global peaking of greenhouse gas emissions as soon as possible… and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by*

sources and removals by sinks of greenhouse gases in the second half of this century…".

38 Crucially, the Paris Agreement leaves it to each signatory to determine for itself the contribution it will make to those aims. In particular (emphasis added):

(1) The Paris Agreement states that it "*will be implemented to reflect… the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.*": Art 2(2).

(2) The obligation imposed on each signatory is to "*prepare, communicate and maintain successive nationally determined contributions that it intends to achieve*": Art 4(2) (emphasis added). Those nationally determined contributions are again to reflect each state's "*highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*": Article 4(3).

39 The absence of binding obligations on individual signatory states is obvious, and indisputable:[17]

(1) FoE's pleaded case was (and is) that "*there is no obligation on a state party to set any particular target by any specific time"* (FOE's Amended Statement of Facts and Grounds para 27) (**Appx/382**).

(2) Refusing permission to apply for judicial review (*Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 1892 (Admin), [2019] Env. LR 13), Supperstone J held in July 2018 that the Secretary of State had correctly understood that "*the Paris Agreement does not impose a binding legal target on each specific contracting party to achieve any specified temperature level by 2050"* (at [30)], and was "*plainly entitled… to refuse to change the 2050 target at the present time*" (at [42]).

(3) In the present case, the Divisional Court held as follows (DC/607):

[17] To illustrate the point, assume the Agreement had two signatories, "A" and "B"; and set a combined aim to reduce the combined emissions of A and B to 100 Mt per annum. The government of A receives a proposal for project X, which will increase A's emissions to 60 Mt per annum. The question whether project X is compatible with the combined aim is impossible to resolve without knowing, for example, whether B has committed to maximum national emissions of 40 Mt per annum (in which case it would be compatible), or 60 Mt per annum (in which case it would not be compatible).

> *"… whilst expressing international objectives… the Paris Agreement imposes no obligation upon any individual state to limit global temperatures or to implement the objective in any particular way… it clearly recognises that the action to be taken in terms of contributions to the global carbon reduction will be nationally determined "in the light of different national circumstances" (article 2(2)) …* *It is clearly recognised on the face of the Paris Agreement that the assessment of the appropriate contribution will be complex and a matter of high level policy for the national government."* (emphasis added)

Global aims are not "*Government policy*"

40 The Court of Appeal did not address the point developed at paras 37-39 above, beyond reciting DC/607 at CA/192. Characterising the relevant policy as the Government's commitment to the Paris Agreement, it found that policy to have been adopted on the basis of (1) the *"solemn act of the United Kingdom's ratification of that international agreement"*; and (2) what it characterised as *"firm statements re-iterating Government policy of adherence to the Paris Agreement by relevant Ministers"* (CA/228).

41 Neither of those mechanisms is remotely capable of translating a series of global aims into "*Government policy*" for the purposes of assessing the potential carbon effects of an individual development scheme.

(1) The significance of ratification is to signal assent on the international plane to an international agreement, not to give effect to that agreement in domestic law or policy: paras 28-33 above; *Miller* (para 30 above) at [55]-[56].

(2) As to the statements of Amber Rudd MP and Andrea Leadsom MP, neither did more than express the Government's commitment to the Paris goal of 'net zero' emissions *"in the second half of this century"* (Art.4(1)). They said *"the question is not whether, but how we do it"* (Rudd CA/212, and in almost identical terms Leadsom CA/213). The question of *when* it would be done was left open, as it had been by the CCC.

Government policy is bounded by statute

42 Even if (contrary to paras 23-41 above) international treaties in general and the Paris Agreement in particular were in principle capable of constituting *"Government policy"* for the purposes of s5(8), no such policy could have overridden the applicable statute.

43 Given the nature of the Paris Agreement, the Government could not have adopted any relevant policy except by altering the United Kingdom's nationally determined contribution – i.e. by amending the target set under s1 CCA 2008. That was not done until June 2019, long after the ANPS was designated.[18]

44 Section 1 CCA 2008, prior to its amendment in June 2019, constituted an entrenched policy in respect of carbon emissions and represented the UK's NDC towards the global long-term temperature goal under the Paris Agreement. That policy could not be changed except pursuant to the procedure set out in ss2-3 CCA 2008:

(1) As the Divisional Court correctly held (at DC/608, emphasis added; see also DC/615):

> *"Parliament has determined the contribution of the UK towards global goals in the CCA 2008… the target set in section 1 of the Act… was set, by Parliament, having taken into account, not just environmental, but economic, social and other material factors. It is an entrenched policy, in the sense that that target cannot be changed other than in accordance with the Act …"*

(2) The Court of Appeal rejected that analysis. It reasoned that because s1 CCA 2008 required only that UK emissions be "*at least*" 80% lower than the 1990 baseline, there was "*no inconsistency or contradiction*" (CA/225) between that target and the higher target it apparently assumed would follow from "*commitment to the Paris Agreement*" (CA/228).

(3) With respect, that reasoning is flawed. The fixing of the statutory target as "*at least*" 80% gave the necessary flexibility to permit a (presumably desirable) overshoot, and to accommodate the different needs of different economic sectors,[19] but does not mean that the Government was entitled to substitute a higher target without going through the procedure in ss2-3 CCA 2008. In short:

(a) If that were the position, the amendment procedure in ss2-3 CCA 2008 would be expressly limited to downward amendments; it is not. Indeed,

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[18] See the CCC's May 2019 paper entitled 'Net Zero – the UK's contribution to stopping Global Warming' (**Appx/1542**, ASFI/62); and s2(2) of the Climate Change 2008 (2050 Target Amendment) Order 2019 (ASFI/63).

[19] Thus, the CCC letter of 7 October 2008 to the Secretary of State for Energy and Climate Change recommended that 80% "*should be regarded as a minimum (average) target for those sectors covered by the Bill, with further reductions required if international aviation and shipping emissions are not on track to deliver an 80% reduction in 2050"* (**Appx/574**).

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when in 2019 it was decided to adopt a higher target, the statutory amendment procedure was followed.

(b) The fact that upward amendments require the same procedure as downward amendments underlines the careful balance that must be struck between economic development and environmental protection. Upward amendments carry different but no less serious risks.

45 Even if ss2-3 CCA 2008 did not expressly preclude the adoption by the Secretary of State of a more ambitious target than that set under s1 CCA 2008, the statutory scheme did so implicitly. As to this:

(1) A prerogative power *"will be displaced in a field which becomes occupied by a corresponding power conferred or regulated by statute"*: *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 (SC), at [48], citing *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL) and *R v Secretary of State for the Home Department, Ex parte Fire Brigades Union and Others* [1995] 2 AC 513 (HL).

(2) Thus, where the source of a power to adopt a particular type of policy derives from statute, any parallel pre-existing prerogative power is "*superseded*": see *Hopkins Homes Ltd v SSCLG* [2017] 1 WLR 1865 (SC), per Lord Carnwath at [20], in relation to the power to adopt national planning policy.

(3) That is exactly what has happened in relation to the power to adopt a policy as to carbon emissions targets. Any pre-existing prerogative power to adopt a policy in that field has been ousted by the scheme established in ss1-3 CCA 2008.

No inconsistency between ANPS and Paris Agreement

46 Finally under this head, it is important to appreciate that the ANPS reflected domestic statutory and policy choices that were consistent, not only in law but in substance, with the requirements of the Paris Agreement.

47 It is true that the original 2050 statutory target dated from 2008, when the broad consensus was for limiting global temperature rise to 2°C above pre-industrial levels.[20] It is also true that the Government could lawfully, and in the exercise of its discretion,

[20] See, by way of illustration, the CCC's advice of 7 October 2008 that "*global policy should seek to limit the central expectation of global temperature rise to, or close to, 2 °C"* (**Appx/572**).

have sought to amend the UK's NDC prior to designation in June 2018. In not amending until June 2019, the Government was acting both lawfully and consistently with the independent scientific advice of the CCC:

(1) In October 2016, the CCC had advised (ASFI/44-48) that it was possible that the UK's existing 2050 target could be consistent with the Paris global long-term temperature goal, and that while some revision to that target was likely to be required in due course, "*[t]he five-yearly cycle of pledges and reviews created by the Paris Agreement provides regular opportunities to consider increasing UK ambition*" (**Appx/1068**).

(2) In January 2018, the CCC indicated (**Appx/1243**, ASFI/52) that the appropriate time to consider the implications of the Paris Agreement for the UK's long-term emission targets was after the Intergovernmental Panel on Climate Change published its report on the implications of the Paris Agreement in October 2018. In May 2019 the CCC recommended (**Appx/1544**, ASFI/62) a new statutory 2050 target of net-zero greenhouse gases by 2050, and CCA 2008 was amended to achieve this in the following month (ASFI/63), nearly a year after designation of the ANPS.

(3) The NDC, communicated to the UN on behalf of the UK by the European Union, took the form of an EU-wide target of achieving a 40% reduction of 1990 emissions by 2030.[21] This was less stringent than the targets which had already been set in the fourth and fifth carbon budgets under the CCA 2008 (which target a 50% reduction on 1990 levels for the period 2023-2027 and a 57% reduction for the period 2028-2032).[22]

(4) When Plan B Earth sought to contend that the Secretary of State had acted unlawfully by not setting a more ambitious target, it was refused permission to apply for judicial review by both the Administrative Court and the Court of Appeal.[23]

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[21] Submitted by Latvia (as president of the Council of the European Union) and the European Commission on behalf of both the European Union and its Member States in a communication dated 6 March 2015. Member States contribute to this by participating in the Emissions Trading Scheme (which covers activities including intra-EEA aviation) and pursuant to Regulation 2018/842 (EU).

[22] A point made in the Secretary of State's Skeleton Argument for the CA, para 160: see Carbon Budget Order 2011, Art 2 for the period 2023-27; Carbon Budget Order 2016, Art 2 for the period 2028-32.

[23] *Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 1892 (Admin), [2019] Env. LR 13.

48 Nor is it the case that the designation of the ANPS in June 2018 had the effect of immunising the third runway development from the impact of such future changes to law and policy as may be made in conformity with the Paris Agreement. On the contrary, development consent is required before any third runway can be built at Heathrow, and may be refused or granted subject to requirements as summarised at paras 17-18 above,[24] including the future-proofing ANPS para 5.82 (**Appx/1476**) which requires the application to be considered against the UK's climate change obligations as they exist at the time of the decision.

49 To conclude on Ground 1, Plan B's suggestion that the Secretary of State breached s5(8) of PA 2008 is not only without legal foundation, but without substance and without merit. The Paris Agreement did not constitute "*Government policy*" in the sense intended by s5(8) (paras 23-41 above); it could not have supplanted CCA 2008 s1 even if it had (paras 42-45 above); and its requirements were consistent with the ANPS (paras 46-48 above). It was lawful, and correct, that the Secretary of State designated the ANPS within the legal and policy framework that existed at the time of designation.

GROUND 2 – PARIS AGREEMENT AND s10 PA 2008 (DC/633-649, CA/234-238)

Introduction

50 Section 10(2) PA 2008 provides that the functions of the Secretary of State under ss5 and 6 PA 2008 must be exercised "*with the objective of contributing to the achievement of sustainable development*" (as to which, see DC/635). Section 10(3)(a) PA 2008 provides:

> *"For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of… mitigating, and adapting to, climate change…".*

51 A requirement to have *"regard"* to a particular factor has been described by the Court of Appeal as being "*just that"*, not requiring a "*precise mathematical exercise to be carried out*" in relation to any particular impact, and in respect of which a decision maker could and should adopt "*a relatively broad-brush approach*".[25]

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[24] See also DC/631(i) and (ii).

[25] *R (West Berkshire District Council and another) v Secretary of State for Communities and Local Government* [2016] 1 WLR 3923 (Lord Dyson MR, Laws and Treacy LJJ) at [83]–[85], in the context of the public sector equality duty arising under section 149 of the Equality Act 2010, which requires a decision maker to have *"due regard"* to equality impacts. The Court went on to hold that, in the case before them, the judge erred in adopting "*a more stringent and searching approach*": see [85]. The burden imposed by a requirement (as here) to have "regard" can be no higher than that imposed by a duty to have *"due regard"* – see *R (National Pharmacy*

52 It is not disputed that the Secretary of State had abundant regard to the "*desirability of … mitigating, and adapting to, climate change*", and indeed commissioned a considerable volume of material for that purpose: see fn2 above. That exercise was framed by the targets set under s1 CCA 2008, which contained Parliament's legislative solution for the mitigation of and adaptation to climate change: see DC/644-646.

53 FoE contended however – notwithstanding the absence from s10 of any reference to the Paris Agreement or indeed to international obligations generally – that s10 required the Secretary of State to have regard to the Paris Agreement, and that he had failed in that obligation. FoE thus sought to use s10 as the vehicle for the Ground 1 argument that Plan B had advanced under s5(8).

54 The Divisional Court considered FoE's point unarguable, holding that:

(1) CCA 2008, and consistent government policies such as those within the Aviation Policy Framework, reflected international obligations and evolving science (DC/642).

(2) The Secretary of State was bound by the obligations in CCA 2008, which effectively transposed international obligations into domestic law (DC/643).

(3) CCA 2008 and PA 2008, passed on the same day, were clearly to be read together: CCA 2008 "*was obviously passed because of the perceived desirability of mitigating, and adapting to, climate change*" (DC/644), and ss5(8) and 10(3) were added to PA 2008 "*in response to members of both Houses who wished to see a more specific requirement that climate change and reduction targets set in the CCA 2008 be considered when NPSs were drawn up*" (DC/646).

(4) The Secretary of State had a discretion under s10 to take the Paris Agreement into account, but in the circumstances it was not arguable that he acted unlawfully in not taking it into account when designating the ANPS (DC/639, 647-648).

Association) v Secretary of State for Health [2019] PTSR 885 (CA) at [85] – [86] approving *R (West Berkshire)* and applying it in the context of an obligation under s1C of the National Health Service Act 2006 to "*have regard to the need to reduce inequalities between the people of England with respect to the benefits that they can obtain from the health service*". The Court also approved Elias LJ's caution *R (Greenwich Community Law Centre) v Greenwich London Borough Council* [2012] Eq LR 572, [30] that "*The courts must ensure that they do not micro-manage the exercise*." Uncontroversially, neither the Divisional Court nor the Court of Appeal appears to have distinguished between the phrases "*have regard to*" (s10(3)) and "*take account of*" (s5(8)).

55 The Court of Appeal held, with striking brevity, that the Secretary of State had failed to comply with the requirements of s10 PA 2008 when deciding to designate the ANPS, because:

(1) he never considered whether to take the Paris Agreement into account in the exercise of his discretion: see CA/236, responding to CA/234(1); and

(2) even if he had so considered, "*the only reasonable view open to him was that the Paris Agreement was so obviously material that it had to be taken into account*": see CA/237, responding to CA/234(2).

56 Both those findings were in error. Put shortly:

(1) The Secretary of State did consider whether to take the Paris Agreement into account, and decided not to (57-60 below).

(2) His decision not to take the Paris Agreement into account was neither irrational nor otherwise unlawful under s10 PA 2008 (61-70 below).

SoS considered taking Paris Agreement into account

57 The Court of Appeal found that the Secretary of State did not ask himself whether to take the Paris Agreement into account in the exercise of his discretion. In that regard, the Court reasoned as follows (at CA/236, emphasis added):

> *"it is clear to us from the material that was before the Divisional Court that the Secretary of State was advised that he was not permitted as a matter of law to take into account the Paris Agreement because he should for relevant purposes confine himself to the obligations set out in the Climate Change Act (see paragraphs 218 and 220 above)."*

No such finding had been made by the Divisional Court; nor did it follow from the materials before the Divisional Court; nor was it correct.

58 The Court of Appeal relied on the materials extracted at CA/218 and CA/220:

(1) CA/218 reproduced (with emphasis) paras 61, 62(5), 62(6) and 63(9) (**Appx/466**) from the Secretary of State's amended detailed grounds for contesting the claim (dated 29 November 2018, amended on 1 February 2019).

(2) CA/220 reproduced a letter conveyed on behalf of Holgate J to the parties following a pre-trial review in early 2019.

59 Neither of the extracted passages provide any basis for the inference that the Secretary of State was "*advised that he was not permitted as a matter of law to take into account the Paris Agreement*". In particular:

(1) The amended grounds state expressly that the Secretary of State did consider whether to take the Paris Agreement into account but, having considered that question, decided that it was not relevant. That is clear from paragraph 62(6) of the grounds (cited at CA/218):

> *"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 reasons were then spelled out: the nature of the obligations set out in the Paris Agreement; its status as an unincorporated international treaty; and the fact that the CCC had not yet given its views on its implications.

(2) That approach was a lawful and proper one. The Secretary of State rationally concluded that the Paris Agreement did not affect the decision whether to designate the ANPS. Whether a NWR at Heathrow would ultimately be permitted to proceed would depend, among other things, on whether an applicant could demonstrate that the particular project being applied for, and its mitigation, could be delivered consistently with the United Kingdom's climate change obligations at the time of the development consent decision.[26]

(3) Nothing in the letter on behalf of Holgate J suggests any different approach on the part of the Secretary of State. The letter does no more than reflect the Secretary of State's position that, at the time the ANPS was designated, he was "*entitled… to consider matters as against existing legal obligations and policy commitments as given effect by the Climate Change Act 2008*", and did not need to consider his decision "*as against the Paris Agreement*" (**Appx/1540**).

[26] See DC/631(i) and (ii).

60 The fact that the Secretary of State did consider whether to take the Paris Agreement into account, but decided not to do so on the basis of advice from the CCC, is put beyond doubt by the contemporaneous documentation and relevant witness evidence. Thus:

(1) Caroline Low, Director of the Airport Capacity Programme at all relevant times, states that the team responsible for preparing the ANPS decided not to take account of possible future carbon reduction targets that could arise following the Paris Agreement on the basis of CCC advice: 1st WS of Caroline Low at 458; (**Appx/492**, ASFI/67).

(2) Ursula Stevenson, an engineering and project management consultant retained by the Secretary of State to advise on environmental issues, similarly states that (when preparing the AoS) it was decided not to take account of possible future carbon reduction targets that could arise following the Paris Agreement for the same reason: 1st WS of Ursula Stevenson at 3.128 (**Appx/536**, ASFI/68).

(3) The Secretary of State's paper dated 5 June 2018 to the Cabinet Airports Sub-Committee acknowledged that the Government had *"international and domestic obligations to limit carbon emissions"*, but noted that "*[e]xactly how international aviation carbon emissions will be incorporated into the Government's carbon budget framework is currently uncertain*" and that the "*development of carbon policy is ongoing and will be driven forward during the development of the Aviation Strategy*" (paras 96-100, fn 45) (**Appx/1328**).[27]

(4) The Government's obligations under the Paris Agreement were squarely raised in the consultations which preceded the designation of the ANPS, and the Secretary of State's position, making it clear that he had considered the matter, was set out at paras 8.17-8.25 of the Government's response to consultation, also published on 5 June 2018 (**Appx/1299**, ASFI/11-13).

There is no sound basis for the contrary inference drawn by the Court of Appeal.

[27] See also the Ministerial Submission dated 25 June 2018 advising designation of the ANPS, which referred to pre-action correspondence regarding a likely challenge to any designation decision on the basis of (amongst other things) alleged breaches of domestic and international climate change obligations. A demand for further consultation was refused because the ANPS would make it clear that any increase in carbon emissions that would have a material impact on the ability of Government to meet its carbon reduction targets would be a reason to refuse development consent and "[*i]n any event, wider policy on carbon emissions from aviation will be considered as part of the development of the Aviation Strategy, when it will be subject to consultation*" (paras 12-17) (**Appx/1424**).

Lawful not to take Paris Agreement into account

61 Having considered whether to take the Paris Agreement into account, the Secretary of State decided not to do so. That was a proper course of action for two reasons:

(1) The Secretary of State had a discretion not to take the Paris Agreement into account in making his decision.

(2) Having taken expert advice, he was entitled to conclude that he did not need to take it into account.

Secretary of State had a discretion

62 As identified in *R v Somerset County Council, ex parte Fewings* [1995] 1 WLR 1037 (CA) the matters to which a minister must or may have regard when exercising a statutory discretion fall into three distinct categories:[28]

> *"First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so."*

(per Simon Brown LJ at p.1049H). Where an unimplemented international treaty is concerned, the premium on clarity is all the greater given the factors referred to at paras 23-33 above.

63 The Divisional Court (DC/648) and Court of Appeal (CA/237) agreed that the Paris Agreement fell within the third of the *Fewings* categories; they were, with respect, correct. Applying the test set out above, it is obvious that Paris was not "*clearly (whether expressly or impliedly) identified*" by the highly general references in s10(2) and s10(3)(a) PA 2008 to "*the achievement of sustainable development*" and "*the desirability of … mitigating and adapting to, climate change*".

64 Accordingly, since the Paris Agreement fell within the third *Fewings* category, it was a consideration "*to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so*".

[28] See, to similar effect, *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189 (HL), per Lord Brown at [57].

Discretion was lawfully exercised

Relevant principles

65 The principles applicable to the exercise of a decision-maker's discretion as to whether or not to take account of a consideration not expressly or impliedly identified in the relevant statute are those set out by the House of Lords in *In re Findlay* [1985] AC 318 (HL). That case concerned (relevantly) whether the Secretary of State was required to consult and have regard to the views of the Parole Board before introducing a particular policy change. Lord Scarman (with whom the other members of the Appellate Committee agreed), having concluded that there was no express or implied statutory requirement to do so, went on to endorse (at pp.333-334) as "*a correct statement of principle*" two observations of Cooke J in the New Zealand case of *CREEDNZ Inc. v Governor General* [1981] NZLR 172 (CA). The first was that:

> *"… it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."*

The second observation was that in certain circumstances, notwithstanding the silence of the statute,

> *"there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the Ministers ... would not be in accordance with the intention of the Act."*

(emphasis added).

66 The Supreme Court in *R (Samuel Smith Old Brewery) v North Yorkshire County Council* [2020] PTSR 221 (SC) has recently confirmed the principles established in *In re Findlay*. In *Samuel Smith*, Lord Carnwath (with whom the other Justices agreed) held that the key question is whether the consideration(s) in issue were *"expressly or impliedly identified in the Act or the policy as considerations required to be taken into account by the authority 'as a matter of legal obligation', or alternatively whether, on the facts of the case, they were 'so obviously material' as to require direct consideration"* (at [32]).

67 The question whether a consideration is "*so obviously material*" as to require direct consideration is, in essence, the same as the question whether no reasonable decision-maker would have failed to take account of the consideration. This was accepted by FoE and by the Court of Appeal (CA/234(2), 237), reflecting the long-standing principle that a decision not to take into account a consideration falling within the third category identified in *Fewings* "*will only be able to be challenged on Wednesbury grounds*": Wade & Forsyth, Administrative Law, 11th Ed (2014), at p.324. That, in turn, reflects the principle that, absent some other fault, a decision ought not to be rendered unlawful by a failure to take account of a consideration which a reasonable decision-maker might equally have discounted.

(1) Thus, in *In re Findlay* Lord Scarman was responding to counsel's invocation of the *Wednesbury* principle (pp.333 - 334). He adopted and applied the "*so obviously material*" formulation in the context of that "*submission of unreasonableness*".

(2) Recent decisions have confirmed that the "*so obviously material"* threshold will only be satisfied if, in the circumstances, no reasonable decision-maker would have failed to take the consideration into account. See the decision of the Court of Appeal in *Baroness Cumberlege of Newick and another v Secretary of State for Communities and Local Government and another* [2018] PTSR 2063 (CA), per Lindblom LJ (with whom the other members of the Court agreed) at [20]-[26];[29] and also the decision of the Divisional Court in *R (DSD) v Parole Board and another* [2019] QB 285 (Div Ct), in particular at [137] and [141].[30] As Holgate J recently put it (after referring to this Court's decision in *Samuel Smith*):

> *"it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation… to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account"*

(*R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin) at [99]; see also *R (Packham) v Secretary of State for Transport* [2020] EWCA Civ 2004 at [102])).

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[29] Upholding the first instance judgment (reported at [2017] PTSR 1513), which reasoned at [65] that "*[t]he consequence of adopting a test that is less stringent than one of unreasonableness is that a failure to take into account a particular matter that an authority could reasonably have decided not to take into account in the circumstances may nonetheless render the decision unlawful. But, assuming that there is no other flaw involved, in my judgment it is not for the court to find that what an authority could reasonably have done was unlawful*."

[30] To similar effect are the authorities cited in the first instance decision in *Cumberlege* (Admin Ct) at [71], fn. 10.

Application of relevant principles

68 In light of the above, the relevant question is whether the Paris Agreement was "*so obviously material"* to the ANPS designation decision that no reasonable Secretary of State could have decided that it did not need to be taken into account at the designation stage.

69 That was plainly not the case. The Secretary of State acted entirely rationally by deciding not to take the Paris Agreement into account, in circumstances where:

(1) He had extensive regard to the "*desirability of … mitigating, and adapting to, climate change*": see fn2 and para 52 above.

(2) The CCC had at the relevant time advised that the national targets set under s1 CCA 2008 did not require immediate revision in light of the Paris Agreement (and may not have required revision at all): see para 16 above and ASFI/43-48.[31] It need hardly be stated that a rationality inquiry falls to be conducted in light of the position as it was at the time, not as it has turned out (with hindsight) to be.

(3) There could have been no purpose in taking account of the Paris Agreement. It provided no relevant guidance to which regard could be had in the context of a decision regarding the location of the next runway in the south-east of England.

(4) The Secretary of State explained in his response to consultation that the Government was committed to driving forward reductions in aviation emissions at international level, and to addressing the issue of carbon emissions from international aviation in the forthcoming Aviation Strategy (**Appx/1299**, ASFI/11-13).

(5) The Secretary of State knew that any new UK carbon target or budget that emerged following the Government's consideration of the Paris Agreement, and any revision of the UK's NDC would be taken into account at the development consent stage, pursuant to the terms of the ANPS and s104 PA 2008 (paras 17-18 above).

[31] The Secretary of State was obliged to take this advice into account before revising the targets and carbon budgets set under CCA 2008: see ss3 and 9 CCA 2008.

70 To conclude, the Divisional Court was entirely correct in reaching the conclusion it did at DC/648. By contrast, it is (with respect) impossible to see how the Court of Appeal concluded that the high hurdle of irrationality was surmounted.

GROUND 3 – PARIS AGREEMENT AND SEA DIRECTIVE (DC/650-655, CA/242-247))

Introduction

71 The ANPS was accompanied by a detailed Appraisal of Sustainability ("AoS") (**Appx/1335**). The AoS was required to be produced by s 5(3) PA 2008, and formed the *"environmental report"* required by Art 5 of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive").

72 The AoS addressed climate change in detail, though without express reference to the Paris Agreement. Carbon emissions were treated as a *"significant negative effect"* of the proposals (and of the alternative schemes) (**Appx/1401**).

73 FoE's contention was that in preparing the AoS the Secretary of State had failed to take account of the *"overarching goals"* of the Paris Agreement to limit warming to well below 2°C, to pursue efforts to limit it to 1.5°C, and to aim for net zero global emissions in the second half of this century. These, it was said, were "*environment protection objectives, established at international … level*", which constituted "*information that may reasonably be required*" within the meaning of Annex I(e) and Art 5 of the SEA Directive.[32] The SEA Directive thus became the third vehicle (after ss5(8) and 10 of PA 2008) by which the claimants sought to rely on the Paris Agreement.[33]

74 The Divisional Court refused permission to apply for judicial review on Ground 3 for the following reasons:

(1) At DC/653 the Court pointed out that the SEA Directive "*only requires information to be provided on matters falling within the scope of Annex I in so far as the Secretary of State judges that to be "reasonably required""*" and noted that FoE accepted that that judgment could only be impugned on *Wednesbury* grounds.

(2) In the light of its conclusions on FoE's principal argument (Ground 2), the Court found at DC/654 that the implications of the revised global targets for domestic

[32] FoE Amended Statement of Facts and Grounds, paras 66-70 (**Appx/393**).

[33] Ground 3 is however distinct from various other challenges linked to the SEA Directive (DC/374-502, CA/125-183), which were dismissed by both the Divisional Court and the Court of Appeal.

targets were the subject of ongoing consideration, and that in those circumstances it was rational for the Secretary of State not to address the Paris Agreement in the SEA process (DC/654).

(3) The Court considered the Secretary of State's evidence (1st WS of Ursula Stevenson at paras 3.125–3.134) (**Appx/536**) on the point and found that the approach described could not be faulted on any public law ground (DC/655).

75 The Court of Appeal, by contrast, held that the Secretary of State's "*failure to consider*" the Paris Agreement amounted to a breach of the SEA Directive. The Court implicitly accepted that the Paris Agreement contained "*environmental protection objectives*" set at an international level (CA/243-4), and stated that the Paris Agreement was "*obviously relevant to the plan or programme under consideration in this case*" for the reasons given in respect of s 10 PA 2008 (CA/246). Without further elaboration, it held that the designation of the ANPS was for that reason "*vitiated by an error of law*" (CA/247). The Court of Appeal's findings that there was a breach of the SEA Directive were clearly parasitic on their conclusions on s5 and s10 PA 2008: see CA/246 "*… essentially for the reasons we have already given in considering domestic law (see section 10 of the Planning Act).*"

Legal framework

SEA Directive and its purpose

76 The SEA Directive is intended (Article 1) to

> "*provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development*"

It is incorporated into national law through the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633). The "*fundamental objective*" of the SEA Directive is "*to require, where plans and programmes are likely to have significant effects on the environment, that an environmental assessment be carried out in their regard at the time they are prepared and before they are adopted*" (Case C-567/10 *Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale* [2012] 2 CMLR 30, at [20]). The background to the SEA Directive was considered by this Court in *Walton v The Scottish Ministers* [2013] PTSR 51 (SC), per Lord Reed JSC at [12]-[14].

77 Like its sister measure the Environmental Impact Assessment Directive, the SEA Directive is procedural in nature (Recital 9). It does not prescribe a particular environmental outcome. Rather it imposes a duty of assessment, and a duty to take into account that assessment, prior to the adoption of the "*plan or programme*" in question. Such assessment is "*an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes… because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption*" (Recital 4).

78 The assessment required is the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision (Art 2(b)). Thus the "*environmental assessment*" is not limited to the environmental report, but includes consultation responses on it.

79 One of the purposes of the environmental report is to inform the consultation (along with the draft plan or programme) under Article 6. The core legal duty on the decision-maker, in Article 8, is to take account of the environmental report, together with the opinions expressed in consultation, before the adoption of the plan or programme.

80 The "*complementary nature of the objectives of the SEA and EIA Directives has to be borne in mind*" (*Walton*, at [21]). The SEA Directive applies upstream, to a plan or programme which sets the framework for a later grant of development consent. The specific project subsequently falls to be assessed under the EIA Directive.

Content and reviewability of environmental report

81 The environmental report must identify, describe and evaluate "*the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and geographical scope of the plan or programme*" (Art 5(1)). The "*information to be given*" for that purpose is referred to in Annex I: it includes (by Annex I(e)):

> *"the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation".*

82 Art 5(2) provides (emphasis added):

"The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

83 The Court's approach in considering whether an environmental report complies with the SEA Directive was addressed by the Court of Appeal at CA/126-144, as part of its consideration of other, unsuccessful challenges based on the SEA Directive.[34] The Court applied the approach established in the context of the EIA Directive in *R (Blewett) v Derbyshire County Council* [2004] Env LR 29 (Admin). In *Blewett*, Sullivan J held:

"41. …In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the "full information" about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting "environmental information" provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations…, but they are likely to be few and far between."

84 The above passage was cited with approval by the House of Lords in *R (Edwards) v Environment Agency* [2008] Env LR 34 (HL), per Lord Hoffmann at [38].

85 Consistently with its earlier case law,[35] the Court of Appeal in the present case rejected submissions that there was a different standard of review under the SEA Directive. This Court has refused permission to appeal against those findings.[36] Thus the approach is as set out by the Court of Appeal at CA/136 (emphasis added):

"The court's role in ensuring that an authority – here the Secretary of State – has complied with the requirements of article 5 and Annex I when preparing an environmental report, must reflect the breadth of the discretion given to it to decide what information "may reasonably be required" when taking into account the considerations referred to – first, "current knowledge and methods of assessment"; second, "the contents and level of detail in the plan or programme"; third, "its stage in

34 See DC/374-502, CA/125-183.

35 See e.g. *No Adastral New Town Ltd v Suffolk Coastal DC* [2015] Env LR 28 (CA), at [52].

36 Permission decision of Lord Reed JSC, Lord Hodge JSC and Lord Sales JSC in *R (on the application of London Borough of Hillingdon and others) v Secretary of State for Transport and others* dated 6 May 2020.

the decision-making process"; and fourth "the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment". These requirements leave the authority with a wide range of autonomous judgment on the adequacy of the information provided. It is not for the court to fix this range of judgment more tightly than is necessary. The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional "Wednesbury" standard of review – as adopted, for example, in Blewett. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court."

86 The Divisional Court, having considered the legal test in detail at DC/402-435, had come to the same conclusion at DC/434.[37] As it noted (DC/653), FoE has accepted that the judgement as to what was "*reasonably required*" to be included in the AoS was a matter for the Secretary of State, subject only to *Wednesbury* review.

AoS and consultation

87 The process for the preparation of the AoS is described in ASFI/8-15. There were two consultations: on a draft AoS and draft ANPS in February 2017, and on further information relating to climate change (together with a revised draft ANPS) in October 2017. In his response of June 2018 to these consultations, the Secretary of State accepted that there are "*a number of international and domestic obligations to limit carbon emissions*" (8.18) (**Appx/1299**) and emphasised the importance of action at international level, referencing CORSIA and the ICAO, to achieving the Paris global temperature goal (**Appx/1299**, ASFI/12).

88 The response made the further point, central to this appeal, that:

"… aviation and climate change is a much broader issue than the development of a runway at a single airport. The Government does not agree that until the future policy in relation to aviation carbon emissions is fixed, no further runway development should be planned. The ongoing development of policy relating to carbon emissions from international aviation, which will be driven forward during the development of the Aviation Strategy, does not prevent the Government from taking forward plans now for airport expansion which is needed by 2030"

[37] "The established principle is that the decision-maker's judgment in such circumstances can only be challenged on the grounds of irrationality … The 'Blewett approach' is simply an application of this public law principle."

(**Appx/1300**, para 8.25, see ASFI/13 and cf. para 7(2) above).

89 The final AoS addressed climate change issues under the *"carbon"* topic. This comprised a consideration of the relative impacts of the three shortlisted schemes in the appraisal of alternatives (AoS Main Report, 6.11) (**Appx/1377**), the summary of significant effects (AoS Main report 7.4.102-105) (**Appx/1381**) and a 35-page Appendix (Appendix A-9) (**Appx/1383**). Appendix A-9 includes an analysis of the background to the assessment as well as the detail of the assessment, with the results of modelling emissions of the shortlisted schemes over a 60-year assessment period.

The SEA Directive was complied with

90 The Paris Agreement no doubt contains "*environmental protection objectives, established at … international level*", within the meaning of Annex I(e) to the SEA Directive. By Article 5, however, "*information*" on such objectives need only be "*provided*" in the AoS to the extent that it "*may reasonably be required*", taking into account the Art 5(2) factors set out at para 82 and referred to at para 85 above.

91 The Secretary of State's approach to the Paris Agreement was consistent with the SEA Directive:

(1) The judgment as to what information is *"reasonably required"* was for the Secretary of State. The Court's role is limited to review on *Wednesbury* principles. The question is whether the environmental report is a lawful environmental report, noting that the report may be deficient (though in this case it is not) without being unlawful.

(2) The Paris Agreement was not forgotten (see paras 57-60 above); it was expressly raised in consultation and expressly addressed in the Government's response (para 87 above). That consultation response forms part of the *"environmental assessment"* as defined in Art 2(b) of the SEA Directive.

(3) It was rational to conclude that the Paris Agreement's *"overarching goals"* were not *"reasonably required"* to be included in the AoS; the AoS did take account of the planning assumption for aviation adopted within the context of the UK carbon target and budgets.[38]

[38] See AoS Appendix A-9 paras 9.1.6-9.1.11 (**Appx/1385**).

92 The Secretary of State's evidence on this issue, accepted by the Divisional Court DC/655 but not referred to by the Court of Appeal, is in the 1st WS of Ursula Stevenson at 3.125-3.134 (**Appx/536**, ASFI/68). She emphasised at 3.128 that it was not possible to consider what, if any, future targets might be recommended by the CCC "*to meet the ambitions of the Paris Agreement*", adding that it was to be expected that should more ambitious targets be recommended and set through the carbon budgets beyond 2032, "*government will be required to make appropriate policy decisions across all sectors of the economy to limit emissions accordingly*". Specific reference was made (at 3.133-3.134) (**Appx/538**) to paras 5.76 and 5.82 of the ANPS (**Appx/1476**).

93 As the Court of Appeal accepted (CA/245-246), the Secretary of State had a "*wide margin of discretion*" under the SEA in deciding what is "*relevant*" to the plan or programme in question. HAL has explained under Grounds 1 and 2 why the Secretary of State was correct to approach the Paris Agreement in the way he did. If the Secretary of State lawfully discharged his duties under s5 and s10 PA 2008, then he was entitled, rationally, to conclude that the AoS was adequate and that consideration of the Paris Agreement was not reasonably required within that document. The Divisional Court treated the matter in that way at DC/654. Since work to consider the implications of the global targets for the domestic legal target was "*in hand and decisions [had] not been reached*", it could not be said that the Secretary of State acted irrationally by not addressing the Paris Agreement in the SEA process.

94 Furthermore, the "*environmental assessment*" carried out by the Secretary of State included the responses to consultation, as required by the SEA Directive. Art 2(b) of the Directive defines the *"environmental assessment"* as meaning the preparation of the environmental report (here, the AoS) and *"the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making".* Consultees raised the Paris Agreement, and the Secretary of State explained why he did not consider that it made any difference to his assessment (**Appx/1299**, ASFI/11-13). The Paris Agreement was not ignored, but its exclusion from the AoS was justified.

95 For those reasons, the Court of Appeal was wrong to find that the AoS was legally defective and that there was a breach of the SEA Directive.

GROUND 4 – NON-CO_2, POST-2050 AND s10 PA 2008 (DC/637-649, 659(iv); CA/248-261)

Introduction

96 Ground 4, developed by FoE, was an extension to the submission already considered under Ground 2: that the Secretary of State failed to discharge his duty under ss10(2) and 10(3) PA 2008 to have regard to the desirability of mitigating and adapting to climate change.

97 The Divisional Court summarised the submission before it as follows (DC/637, emphasis added):

> *"The Secretary of State has been advised that the Paris Agreement was likely to result in a change to the CCA 2008 targets, in the form of a more stringent 2050 carbon emissions target and/or a new post-2050 carbon target, and/or a further net zero emissions target in the near future and/or a non-CO_2 emissions target; but, prior to the ANPS designation, he simply failed to consider the desirability of mitigating and adapting to climate change against that backdrop."*

In that formulation, based on FoE's own expression of its case,[39] the submissions under Ground 4 and Ground 2 were so closely interwoven as to be two parts of the same whole. It was no surprise, therefore, that the Divisional Court dealt with them together, both in its reasoning (DC/638-649, already summarised at para 54 above) and in its conclusions (DC/659(iv)).

98 On appeal, FoE limited itself to what the Court of Appeal twice described as a reasons complaint (CA/250,254), criticising the Divisional Court for its failure to deal separately with the non-CO_2 and post-2050 issues. In response, the Secretary of State submitted that:

(1) the Divisional Court's reasoning relating to the Paris Agreement applied in substance to these additional issues, and so did not need to be set out again (CA/253);

(2) the effect of emissions post-2050 was in any event "*closely bound up*" with the Paris Agreement aspiration for net zero emissions in the second half of the century (CA/256); and that

[39] See FoE's Skeleton Argument for the Court of Appeal, para 13 (**Appx/400**).

(3) non-CO_2 emissions were not taken into account because the state of scientific knowledge was too uncertain to be capable of accurate measurement at that stage (CA/257).

99 The Court of Appeal accepted the Secretary of State's submission that both the post-2050 and the non-CO_2 points were "*closely bound … with the Paris Agreement issue*" (CA/256). It did not, therefore, criticise the Divisional Court for any lack of independent reasoning on the issues that are now Ground 4. However, the closeness of the bond between the Ground 2 and the Ground 4 points, coupled with the conclusion it had already reached in relation to Ground 2 (CA/234-238), caused the Court of Appeal to uphold FoE's appeal on each of the "*two additional aspects of the case*" (CA/256), with the result that the post-2050 and non-CO_2 issues fell to be taken into account in the reconsideration of the ANPS (CA/261).

100 The Secretary of State's submission on the state of scientific knowledge (para 98(3) above) was said by the Court of Appeal to have some force, but was in the end rejected on the basis of "*common sense*" and the precautionary principle (CA/258-260).

Non-CO_2: the facts

101 The phrases "*non-CO_2 emissions*" and "*non-CO_2 effects*" are often used loosely, or interchangeably, and require some preliminary explanation.

102 The "*net UK carbon account*" in s1(1) CCA 2008 (the 2050 target) is set by reference not only to CO_2 but also to five other greenhouse gases or GHGs. The six GHGs were identified in Annex A to the Kyoto Protocol and are listed as *"targeted greenhouse gases"* in s24 CCA 2008.[40] Section 27 CCA 2008 defines "*net UK carbon account*" by reference to "*the amount of net UK emissions of targeted greenhouse gases*". For aviation, however, CO_2 makes up about 99 per cent of the UK's Kyoto GHG emissions, with the other 1% coming from Nitrous Oxide (N_2O).[41]

103 Combustion of fuel by aircraft also results in emissions of water vapour, nitrogen oxides (NOx) and aerosols; furthermore, at altitude, condensation can result in the formation of linear ice clouds (contrails) and lead to further aviation-induced cloudiness. These

[40] The six GHGs listed are CO_2, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride.

[41] DfT Aviation Forecasts (2017) para 3.8 (**Appx/1126**).

phenomena may have impacts on climate: they are the main focus of FoE's concerns under Ground 4.[42]

104 The phenomena summarised at paras 102-103 above are variably described as "*non-CO_2 emissions*" and "*non-CO_2 effects*": the latter phrase is used in this Case.

105 Four points should be made about the non-CO_2 effects of aviation.

(1) First, there is no consensus as to their significance, nor even an established metric. Non-CO_2 effects tend to be short-lived and their associated climate impact (if any) depend on where and when they occur.[43] For example, contrails may last for a few hours. By contrast, CO_2 emissions are long-lived and anthropogenic emissions accumulate over many years. Given these uncertainties, it was common ground below that any *"multiplier"* to be applied to CO_2 emissions to take account of the non-CO_2 effects of aviation is *"subject to significant uncertainty"*. As FoE's witness Tim Johnson put it:

> *"There is consensus that while differing degrees of uncertainty continue to be associated with the individual impacts from non-CO2 emissions, there is high scientific confidence that the total climate warming effect of aviation is more than that from CO2 emissions alone. Scientists continue to explore metrics to show how non-CO2 impacts can be reflected in emission forecasts for policy purposes."*[44]

Mr Johnson quotes a study suggesting that "*overall radiative forcing by aircraft is a factor of 1.9 times greater than the forcing by aircraft CO2 emissions alone*", but goes on to accept that the radiative forcing metric "*is not suitable for forecasting future impacts*", and that the scientific community "*is currently working on alternative temperature-based metrics*".[45] There are thus two levels of uncertainty: scientific uncertainty as to the climate impact of non-CO_2 effects, and a lack of consensus as to what metric could be used to express that impact.

(2) Secondly, in the words of the AoS that accompanied the ANPS:

> *"non-CO_2 emissions of this type are not currently included in any domestic or international legislation or emissions targets …".*[46]

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42 WS of Tim Johnson (FoE) at 46-58 (**Appx/561**).
43 WS of Tim Johnson (FoE) at 51 (**Appx/562**).
44 WS of Tim Johnson (FoE) at 52 (**Appx/562**).
45 WS of Tim Johnson (FoE) at 50, 53 (**Appx/561, Appx/563**).
46 AoS App A-9, para 9.11.5 (**Appx/1410**).

It remains the case that there is no law, policy or international treaty – even one as general in its terms as the Paris Agreement – on the subject of the non-CO_2 effects of aviation.[47]

(3) Thirdly, at the time of the contested decision, the DfT had recently committed to considering in the forthcoming Aviation Strategy what were described as "*areas of greater scientific uncertainty, such as … aviation's contribution to non-carbon dioxide climate change effects and how policy might make provision for their effects*".[48]

(4) Fourthly, it is indisputable that the Secretary of State considered whether to take non-CO_2 effects into account,[49] before deciding (as he acknowledged before the Divisional Court: DC/638) not to do so.

106 These points are developed further in the context of the submissions made below.

Scope of the s10 duty

107 Sections 10(2) and (3) have already been considered under Ground 2. They require the Secretary of State to exercise his designation function "*with the objective of contributing to the achievement of sustainable development*" and with regard to "*the desirability of … mitigating and adapting to climate change*".

108 It is accepted that s10 requires the Secretary of State to have regard to the targets set under s1 CCA 2008. It arguably requires the Secretary of State to have regard also to wider government policy on the mitigation of and adaptation to climate change, including the planning assumption (para 15 above), though the obligation to have regard to such policy is in any event inherent in the s5(8) obligation to explain in an NPS how the statement takes account of such policy.

109 Climate change policy is based on CCA 2008 and is contained in documents such as the Aviation Policy Framework and the forthcoming Aviation Strategy. The ANPS sets out policy on expanding airport capacity in the South East of England, in the light of established policies on sustainable development and climate change. It is plain however

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47 It was made clear in the Kyoto Protocol (Art 2(2)) that international aviation was to be dealt with through ICAO, a position not changed by the Paris Agreement.

48 "Beyond the Horizon: The Future of UK Aviation – Next Steps towards an Aviation Strategy", April 2018, 6.24 (**Appx/1293**, ASFI/55).

49 See, for example, the Appraisal of Sustainability at para 6.11.11 (**Appx/1378**) and Appendix A to the Appraisal of Sustainability at para 9.11.5 (**Appx/1410**).

that s10 does not require new Government policy on climate change to be manufactured as part of the NPS designation process. FoE seeks to use s10 (just as Plan B seeks to use s5) to mark its dissatisfaction with existing climate change policies. Yet that is to take s10 well beyond its proper scope.

110 Nor is s10 in any way prescriptive as to how the Secretary of State must pursue the objective of contributing to the objective of sustainable development, or have regard to the desirability of mitigating or adapting to climate change. In examining whether the requirements of s10 have been met, it is necessary to look not just at the immediate effects of the ANPS but at the provision made by statute and by the ANPS itself (paras 17-18 above) to ensure that future decisions pursuant to the ANPS are taken with proper regard to the legal and policy context as it then exists.

111 It is also relevant (as specifically suggested by the word "*mitigating*" in s10(3)) to have regard to the full set of tools that the Government has at its disposal to control emissions in the future, including any *"requirements"* (para 17(4) above) that may be imposed on a future DCO for the NWR project, and mechanisms such as carbon pricing, improvements to aircraft design, operational efficiency improvements and limitation of demand growth[50]. As the Secretary of State expressed it:[51]

> *"As and when carbon reduction targets are developed for the post-2050 period, Heathrow and the airlines associated with it will have to comply with the obligations that result, when and to the extent that they apply."*

The same applies in relation to any targets and constraints that may in future be developed in order to deal with non-CO_2 emissions.

112 The suggestion that s10 is to be interpreted as requiring immediate regard to be had to factors which are not reflected in current law and policy runs up against an insuperable practical obstacle. Regard could not be meaningfully had, in June 2018, to a phenomenon which cannot be accurately measured and in respect of which no targets or policies exist at national or international level (non-CO_2 effects). Similarly, it is hard to see what the Secretary of State could have said or done that could have had practical value in relation to a post-2050 period in respect of which no targets yet existed at

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50 See AoS App A-9, 9.11.7 (**Appx/1410**).

51 Secretary of State's Skeleton Argument for the Divisional Court at [195] (**Appx/349**), referencing the response to para 55(d) of FoE's Amended Statement of Facts and Grounds (1st WS of Caroline Low (SoS), Annex A) (**Appx/516**): "*In the future if/when carbon reduction targets are developed post 2050 Heathrow, and the airlines associated with it, will have to comply with whatever regulations are in place".*

international or national level, and the relevant policies for mitigation and adaptation were yet to be developed.

113 Against that background, and the rationality test described at paras 65-67 above, the following specific submissions are made on non-CO_2 and post-2050.

SOS acted rationally in relation to non-CO_2

114 The Secretary of State considered carefully whether to take account of non-CO_2 effects. He decided not to do so on the basis that their various impacts could not be adequately quantified so as to form part of the necessary assessment. There was, and is still, no scientific consensus on *how* to quantify these impacts. Thus:

(1) The Appraisal of Sustainability expressly acknowledged the possible climate impact of non-CO_2 effects, but stated that that potential impact had not been assessed because it "*cannot be readily quantified due to the level of scientific uncertainty*": see para 6.11.11 (**Appx/1378**).

(2) Appendix A to the Appraisal of Sustainability similarly acknowledged the possible climate impact of non-CO_2 effects, but stated that "*the level of scientific uncertainty involved means that no multiplier should be applied to the assessment*": see para 9.11.5 (**Appx/1410**), referred to in the 1st WS of Ursula Stevenson (SoS) at 3.132 (**Appx/537**).

(3) Both the Government response to the ANPS consultation and the ANPS Post-Adoption Statement noted that some consultation respondents had advocated for "*a new system of assessing the impact of non-CO_2 emissions*", but stated (in effect) that the assessment would nevertheless be limited to CO_2 emissions. Areas of "*greater scientific uncertainty*", including "*aviation's contribution to non-CO_2 climate change effects*", would be considered as part of "*the forthcoming Aviation Strategy*": see paras 11.49-50 (**Appx/1313**) of the Government response to consultations, and paras 4.4.49-50 (**Appx/1506**) of the Post Adoption Statement.

115 The Court of Appeal appears to have considered the Secretary of State's decision not to take non-CO_2 effects into account on the basis of scientific uncertainty to have been irrational. Its reasoning was as follows (CA/258):

> *"[i]n line with the precautionary principle, and as common sense might suggest, scientific uncertainty is not a reason for not taking something into account at all, even if it cannot be precisely quantified at that stage"*.

116 The Secretary of State's decision not to take into account the possible climate impact of non-CO_2 effects is submitted to have been, on the contrary, entirely rational in light of the following considerations:

(1) The difficulties involved in quantifying the climate impact of non-CO_2 effects on climate change are serious and well-documented. Indeed, the existence of those difficulties does not appear to be in dispute: see the evidence of FoE's witness Mr Johnson, cited at para 105(1) above. Thus, for example:

(a) In April 2013, the Airport Commission's "Discussion Paper 03: Aviation and Climate Change" noted the "*complication*" involved in seeking to take account of non-CO_2 emissions when forecasting aviation emissions. Difficulties arising from differences in the source[52] and effect[53] of non-CO_2 emissions in comparison to CO_2 emissions were compounded by "*scientific uncertainty around the effect of these emissions*": see paras 4.18-4.19 (**Appx/679**), *c.f.* paras 2.9-2.12 (**Appx/663**). The "*level of scientific understanding*" of all non-CO_2 aviation emissions components other than NO_x was classified as either "*Low*" or "*Very Low*": see Figure 2.1 (**Appx/663**).

(b) In December 2013, the Airport Commission's Interim Report noted that "*climate metrics*" for quantifying the effects of non-CO_2 emissions "*remain more uncertain than for CO_2*": see Box 4a (**Appx/813**).

(c) The uncertainties referred to in the above documents primarily relate to the *magnitude* of the effect on global temperatures of a given type of emission: see the Discussion Paper, Figure 2.1 (**Appx/663**). However, uncertainties also exist (and existed at the time of designation) as to whether some emissions (e.g. NOx) have a positive or negative impact on global temperatures, even if "*the direction of the effect (warming or cooling) tends to be known…*". (Discussion Paper, 2.10) (**Appx/664**).

(d) The difficulties involved in quantifying the impact of the non-CO_2 effects of aviation are reflected in the fact, noted at para 105(2) above, that no major national or international policy framework allows for such effects: see e.g.

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[52] See para 4.18: "*unlike carbon dioxide, many of the non-CO_2 emissions are not a simple function of aircraft fuel burn. For example, NO_X emissions are engine and technology specific*" (**Appx/679**).

[53] See para 4.18: "*whereas CO_2 is long-lived and affects the global climate, many of the non-CO_2 emissions are short-lived and/or more local in their effects*" (**Appx/679**).

the Airport Commission's Interim Report at para 4.38 (**Appx/812**), and Appendix A to the Appraisal of Sustainability at para 9.11.5 (**Appx/1410**).

(e) Those uncertainties continued to be recognised after the designation of the ANPS in the consultation on the Aviation Strategy, which stated that the *"government has commissioned scientific advice on these non-CO_2 effects which shows that large scientific uncertainties remain and new effects have been identified. Uncertainties include the scale and impact of these effects and their warming effect relative to CO_2"* (Aviation 2050: The future of UK Aviation, December 2018, p73, para 3.94) (**Appx/1537**).

(2) The relevant expert body, the CCC, had advised in light of those difficulties that non-CO_2 emissions ought not to be taken into account when planning future airport capacity.[54] Thus, for example:

(a) The Chair of the CCC, Lord Deben, advised the Chair of the Airports Commission that the appropriate approach was not to assess or include the impact of non-CO_2 effects, given the significant scientific uncertainty surrounding their scale: see CA/257; WS of Phil Graham (SoS) at 70 (**Appx/553**).

(b) In December 2013, the Airport Commission's Interim Report noted that, "*taking account of all these uncertainties*" in the quantification of impact, "*[t]he CCC's recommendation to the Commission… is that the target of constraining CO_2 emissions… remains the most appropriate basis for planning future airport capacity*": see Box 4a and para 4.39 (**Appx/813**).

(3) The Secretary of State knew that the impact of the non-CO_2 effects of aviation was likely to be addressed at a later stage of the planning process. Thus:

(a) The impact of non-CO_2 aviation emissions, and "*how policy might make provision for their effects*", was (and is) set to be addressed as part of the forthcoming Aviation Strategy: see paras 11.49-50 of the Government response to consultations on the ANPS (**Appx/1313**), and paras 4.4.49-50 (**Appx/1506**) of the Post-Adoption Statement. The Secretary of State

[54] On similar grounds, the CCC advised the Secretary of State by a letter of 24 September 2019 (at p.7) that "*[t]he appropriate approach to policy at this stage is not to include these effects [i.e. non-CO_2 aviation emissions] within the net-zero target, but to improve scientific understanding… and develop options to markedly reduce them over the coming decades that are not at the expense of GHG emissions*" (**Appx/1584**).

therefore knew that any application for a DCO in connection with the NWR project would fall to be determined against the backdrop of a focused assessment, in the Aviation Strategy, of the proper approach to non-CO_2 emissions. The outcome of that assessment would at the very least be capable of being taken into account by the Secretary of State when considering any subsequent DCO application, being (for example) a matter which the Secretary of State might think "*important and relevant*" to his decision: see s104(2)(d) PA 2008.

(b) The Appraisal of Sustainability had recommended (at para 9.11.5) (**Appx/1410**) that "*further work be done on [the impacts of non-CO_2 effects] by an applicant during the detailed scheme design, according to the latest appraisal guidance*".[55]

(c) The ANPS itself required (para 5.76) (**Appx/1475**) that *"Pursuant to the terms of the Environmental Impact Assessment Regulations, the applicant should undertake an assessment of the project as part of the environmental statement, to include an assessment of any likely significant climate factors."*

117 Accordingly, the Secretary of State's decision not to take account of the non-CO_2 effects of aviation was completely rational.

118 The "*precautionary principle*", cited at CA/258-260, dictates no different conclusion. The challenge in relation to non-CO_2 effects concerns the exercise of a discretion under a domestic statute: see FoE's Amended Statement of Facts and Grounds, paras 64-67 (**Appx/392**). The precautionary principle, being a principle of EU law and unincorporated international law, does not apply in that context. FoE seeks to overcome that difficulty by submitting that the Court of Appeal relied on the precautionary principle as no more than an indicator of a "*common sense*" approach: see FoE's Summary Response to HAL's application for permission to appeal to this Court, at para 31. However, as explained at para 116 above, the true "*common sense*"

[55] The "*detailed scheme design*" referred to will be required of HAL at the DCO stage: see 4.4.70 of the Post-Adoption Statement (**Appx/1508**) ("*It is appropriate that [a further environmental assessment] be done at the development consent application stage using the more detailed scheme design required at that stage*").

approach in the circumstances was to refrain from attempting to incorporate non-CO_2 emissions into the necessary assessment.[56]

SoS acted rationally in relation to post-2050

119 The Secretary of State's approach to post-2050 emissions was also entirely rational.

120 FoE's pleaded case was that, as part of the s10(3) duty, the Secretary of State needed to consider the "*fact that the third runway at Heathrow will, in the current circumstances, outlive the 2050 target and current climate policy*" (**Appx/390**).

121 The Court of Appeal at CA/249 recorded FoE's submission as being that NWR's *"benefits were assessed in the ANPS up to 2085 but… there was no assessment of the climate change impacts beyond 2050"*.

122 Neither version of FoE's submission is correct. The Airports Commission assessed the total carbon emissions of the three shortlisted schemes, including the NWR, over a 60 year *"appraisal period"*, up to 2085/2086. In the AoS, the same *"appraisal period"* was used,[57] and the carbon analysis was updated.[58] Accordingly, the Secretary of State plainly did take account of the fact that there would be carbon emissions from the NWR scheme after 2050 and indeed quantified those emissions.[59]

123 In relation to the post-2050 period, FoE complained that the Secretary of State did not

> "*consider the desirability of mitigating and adapting to climate change in a way that is broader than a consideration of how to meet existing legal obligations and policy commitments*"

and that he "*failed to consider the likely impact on future generations in the round*".[60] Yet it was not irrational for the Secretary of State to decline to attempt to assess post-2050 emissions by reference to an as-yet undefined future policy. Section 10 PA 2008 does not require new Government policy on sustainable development and climate change to be manufactured as part of the NPS designation process.

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[56] The "*common sense*" of that approach is confirmed by the fact that, notwithstanding the status of the precautionary principle as a principle of EU and international law, no current EU or international framework itself sets emissions targets in relation to non-CO_2 aviation emissions.

[57] AoS paras 6.11.2/3 (**Appx/1377**).

[58] AoS para 6.11.13 and Table 6.4 (**Appx/1378**).

[59] In any event, even if the Secretary of State had only assessed carbon emissions up to 2050, it would not follow that account had only been taken of climate change impacts up to that date. The effects of carbon emissions up to 2050 are felt for many years beyond that date.

[60] FoE's Amended Statement of Facts and Grounds, paras 52, 53 and 55(e) (**Appx/389**).

124 On the contrary, it was perfectly rational for the Secretary of State to assume that insofar as future policy might give rise to a new emissions target in respect of the post-2050 period, any third runway project would and could be made to comply with such a target – whether that be by means of DCO requirements, or mechanisms such as carbon pricing, improvements to aircraft design, operational efficiency improvements and limitation of demand growth (see paras 17-18 and 46-49 above).

GROUND FIVE – RELIEF (CA/274-280)

125 The grant of relief in judicial review claims is discretionary. The Court *"may"* grant relief if it considers it *"just and convenient"* to do so: Senior Courts Act 1981, s31(2). That discretion is not absolute, however. A court *"must"* refuse relief if it appears to the Court *"highly likely that the outcome for the applicant would not have been substantially different"* absent the conduct complained of: s31(2A).

126 The relief granted by the Court of Appeal was a declaration "*the effect of which will be to declare the designation decision unlawful and to prevent the ANPS from having any legal effect unless and until the Secretary of State has undertaken a review of it in accordance with the statutory provisions… [and] with the judgment of this court*" CA/280.

127 It is respectfully submitted that the Court erred in granting this relief. Even if (contrary to HAL's submissions on Grounds 1-4 above) the Secretary of State did err in the process preceding his decision to designate the ANPS, there is no reason to suppose that the outcome of the designation exercise would have been materially different had the Secretary of State complied with the law as the Respondents assert it to be.

128 The essence of the Court of Appeal's decision is that the decision to designate the ANPS was vitiated by a failure to take account of certain considerations. However:

(1) in the absence of developed policy concerning such matters at the time of designation, to take them into account would have been an empty and formulaic exercise which, if complied with, would not have altered the decision as to designation (cf. para 7(1) above); and

(2) to the extent that it was necessary and feasible to do so, such matters would in any event be taken into account before any grant of planning permission (paras 17-18 above).

129 The PA 2008 s6 review ordered by the Court of Appeal is thus without purpose. The Court of Appeal ought to have refused to grant relief even if it was correct to find that any of FoE's or Plan B's grounds were made out.

CONCLUSION

130 The Appellant therefore invites the Court to allow the appeal for the following reasons:

(1) The Court of Appeal erred in concluding that:

(a) the Paris Agreement (and the temperature goals contained therein) constituted 'government policy' for the purposes of s5(8) of the PA; and that

(b) the designation of the ANPS was unlawful because the Secretary of State failed adequately to take account of the Paris Agreement, contrary to s5(8) of the PA.

(2) The Court of Appeal erred in concluding that the designation of the ANPS was unlawful because the Secretary of State acted in breach of s10(3) PA 2008.

(3) The Court of Appeal erred in concluding that the Secretary of State acted in breach of the SEA Directive by failing adequately to consider or address the Paris Agreement in the AoS.

(4) The Court of Appeal erred in concluding that the Secretary of State's approach to non-CO2 climate effects of aviation and the effect of emissions beyond 2050 was in breach of s10(3) PA 2008.

(5) The Court of Appeal erred in granting relief.

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