**IN THE SUPREME COURT**
**ON APPEAL FROM THE COURT OF APPEAL**
**[2020] EWCA Civ 214**

**UKSC 2020/0042**

**B E T W E E N:**

**(1) HEATHROW AIRPORT LIMITED**

**Appellant**

**-and-**

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

**Respondents**

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# CASE FOR PLAN B. EARTH

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## A. INTRODUCTION

1. The Appellant was one of the Interested Parties in Plan B. Earth's (**"Plan B"**) claim against the Secretary of State for Transport (**"SST"**), arising out of his purported designation of the Airports National Policy Statement (**"ANPS"**) in support of the expansion of Heathrow Airport. The Court of Appeal upheld Plan B's claim that the designation of the ANPS was unlawful, on the grounds that the SST had failed to take into account the Paris Agreement on Climate Change (**"Paris Agreement"**) and specifically its objective to limit global warming to **"well below" 2˚C** while aiming for no more than **1.5˚C** (**"Paris Temperature Limit"**).

2. While Plan B adopts and supports the submissions of the First Respondent, its case centres on the obligation imposed on the SST by the PA section 5(8) to explain the relationship between the ANPS and "Government policy relating to ... climate change", which states:

> **"(7) A national policy statement must give reasons for the policy set out in the statement.**
>
> **(8) The reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change."** (emphasis added)

3. The Government has described compliance with the Paris Temperature Limit as "*vital for future environmental security*"[1]. Its Clean Growth Strategy states that:

> *"***The actions and investments that will be needed to meet the Paris commitments will ensure the shift to clean growth will be at the forefront of policy and economic decisions made by governments and businesses in the coming decades.***"*[2] (emphasis added)

4. A plan to expand the UK's principal international airport is a prime example of such a "policy and economic" decision.

5. Initially, in setting out his defence, the SST (the Rt. Hon. Chris Grayling MP at the relevant time) claimed he had "*considered the Paris Agreement in producing the ANPS …*" . After his witness statements revealed that instead of using the Paris

[1] 'A Green Future: Our 25 Year Plan to Improve the Environment' – HM Government, App. 33/1281
[2] 'Clean Growth Strategy' – HM Government (as amended April 2018), App. 30/1235

Temperature Limit as his benchmark, he had in fact relied on the discredited 2˚C limit, he acknowledged that he had not taken the Paris Agreement into account after all. He was required by Holgate J to amend his pleadings and henceforth adopted the position that the Paris Agreement was "*not relevant*"[3].

6. The SST accepted the ruling of the Court of Appeal. On 4 March 2020, the Prime Minister stated in Parliament:

> **"we will ensure that we abide by the judgment and take account of the Paris convention on climate change"[4]**.

7. Arora Holdings Limited, the other Interested Party in the case, does not pursue an appeal.

8. In essence the Appellant now contends that, *as a matter of law*, the Government cannot have a policy commitment to the Paris Temperature Limit but may have a policy commitment to the discredited 2˚C temperature limit, even when, *as a matter of fact*, the Government has adopted the former limit and rejected the latter. Such a proposition defies both law and common-sense.

9. In reality, this Appeal turns primarily on the facts, which were considered by the Court of Appeal at a full hearing of the case (the Divisional Court having refused permission).

10. As the Court of Appeal emphasised:

> **"[I]t is important to appreciate that the words "Government policy" are words of the ordinary English language. They do not have any specific technical meaning. They should be applied in their ordinary sense <u>to the facts</u> of a given situation."[5]** (emphasis added)

11. Consequently the majority of Plan B's written case is an explanation of the facts which support the Court of Appeal's unequivocal conclusion:

> **"It is clear ... that it was the Government's expressly stated policy that it was committed to adhering to the Paris Agreement to limit the rise in global temperature to well below 2˚C and to pursue efforts to limit it to 1.5˚C."[6]**

[3] For references, see Section F below
[4] App. 58/1594
[5] Court of Appeal judgment, §224
[6] Court of Appeal judgement, §216

## B. THE GLOBAL TEMPERATURE LIMIT AND THE PARIS AGREEMENT

12. Since climate change is a global threat, the climate change policies of individual countries are framed as contributions towards maintaining a global temperature limit (sometimes referred to as "the global climate obligation"). Having made a policy commitment to that global limit, the Government requires technical advice on the level of domestic emissions reduction required to meet that commitment.

13. This relationship between government policy on climate change and the adoption of a specific emissions reduction target is evident in the pre-legislative process for the Climate Change Act 2008 (**"CCA 2008"**). The Bill originally proposed a 60% emissions reduction target, but this was challenged on the basis that it was inadequate to meet the Government's policy intent to limit global warming to 2˚C. The following excerpts from the House of Commons Environmental Audit Committee report summarise the discussion:

> **"63. The draft Bill contains provisions to place an obligation on the Government to achieve at least a 60% reduction, from 1990 levels, in the UK's net annual carbon emissions in 2050 …**
>
> **64. The majority of evidence we considered suggested strongly that the 60% target is inadequate. This target level was based on a recommendation made by the Royal Commission on Environmental Pollution (RCEP) in 2000. The RCEP's overarching aim in making this recommendation was that global warming should be limited to a rise of no more than 2˚C; according to the science at the time this was adjudged to require stabilisation of the global atmospheric concentration of carbon dioxide at 550 parts per million (ppm) by mid-century, which the RCEP worked out as necessitating a 60% cut in UK emissions. In the intervening time, scientific understanding of the requisite stabilisation total has moved on. This is something the Government itself recognises:**
>
> > ***in the mid-1990s the EU proposed that the aim should be to limit global temperature rise to no more than 2ºC to avoid dangerous climate change […] At that time, it was thought that this equated to atmospheric carbon dioxide levels below approximately 550 ppm. The more recent work of the IPCC***

***suggests that a limit closer to 450 ppm or even lower, might be more appropriate to meet a 2°C stabilisation limit ...***

**65. The Secretary of State for Environment, Food and Rural Affairs confirmed to us that the Government was still completely committed to limiting global warming to a rise of 2˚C. By stressing the dangers even of this level of warming, he emphasised the reasons why the UK and EU were committed to holding a rise in temperature at no more than 2˚C:**

***Just to put that in perspective, I was told … that with a two-degree average change it will not be uncommon to have 50˚C in Berlin by mid century, so associated with a two-degree change is something that is pretty unprecedented in northern Europe, and I think that is quite a sobering demonstration because 50˚C is beyond our experience …***

**69. The Government's policy towards the UK's 2050 target is clearly incoherent. The Government remains committed to limiting global warming to a rise of 2˚C; but it also acknowledges that, according to recent scientific research, a cut in UK emissions of 60% by 2050 is now very unlikely to be consistent with delivering this goal."**[7]

14. In light of these concerns, the Government sought further advice from the Committee on Climate Change (**"CCC"**). On 7 October 2008, Lord Adair Turner, Chair of the CCC the time, wrote to the Rt Hon Ed Miliband MP, the Secretary of State for the Department of Energy and Climate Change, recommending the adoption of a more stringent 80% emissions reduction target by 2050:

**"The Committee's judgement, on the basis of the IPCC AR4 report, is that adverse human welfare consequences are likely to increase significantly if global temperature rises more than 2°C relative to pre-industrial temperatures, and that if a 4°C rise were reached, extreme consequences potentially beyond our ability to adapt would arise …**

**The appropriate UK share of a global emissions target involves ethical judgements and will be the subject of international**

[7] House of Commons Environmental Audit Committee: Beyond Stern: From the Climate Change Programme Review to the Draft Climate Change Bill, Seventh, Report of Session 2006–07, App. 12/565 ff

**negotiations. A range of methodologies for allocating emissions reductions between countries have therefore been proposed. Most of these methodologies base emission reduction targets on per capita emissions, abatement costs or income. They differ in relation to the time when different countries begin emissions reductions, the rate at which they then reduce emissions, and the extent to which already industrialised countries should have to compensate for historic emission levels.**

**… we believe that it is difficult to imagine a global deal which allows the developed countries to have emissions per capita in 2050 which are significantly above a sustainable global average. In 2050 the global average, based on an estimated population of 9.2 billion, would be between 2.1 to 2.6 tonnes per capita, implying an 80% cut in UK Kyoto GHG emissions from 1990 levels.**

**Our recommended 80% target covers all Kyoto GHGs and all sectors of the UK economy.**"[8] (emphasis added)

15. The Government acted on this recommendation and the CCA 2008, as originally passed, established a minimum target to reduce emissions by "at least 80%" by 2050 compared to a 1990 baseline.

16. The Divisional Court summarised the position as follows:

> **"The figure of 80% was substituted for 60% during the passage of the Bill, as evolving scientific knowledge suggested that the lower figure would not be sufficient to keep the rise in temperature to 2˚C in 2050."[9]**

17. In the words of the Divisional Court:

> **"From about 2010, concerns emerged as to whether keeping global average temperatures to around 2˚C above pre-industrial levels would be adequate to combat climate change effectively, because (amongst other things) it appeared that CO2 was being absorbed at a slower rate than anticipated and some of the effects of global warming appeared to be emerging quicker than expected. As a**

[8] Committee on Climate Change ('CCC') letter to Secretary of State for Energy and Climate Change, App. 13/570ff

[9] Divisional Court judgment, §566

**result, a number of states (including, in line with the APF, the UK Government) invested heavily in obtaining a further international agreement."**[10]

18. Prior to the Paris Conference on Climate Change, governments had commissioned a "Structured Expert Dialogue" to consider the implications of 2˚C warming. The final report emphasised the increasing risk of "extreme events or tipping points" above 1.5˚C warming:

> **"Experts emphasized the high likelihood of meaningful differences between 1.5 °C and 2 °C of warming regarding the level of risk from ocean acidification and of extreme events or tipping points, because impacts are already occurring at the current levels of warming; risks will increase with further temperature rise."**[11]

19. In light of such advice, in December 2015, five months after the final report of the Airports Commission, governments adopted the Paris Agreement, which introduced a new more stringent global temperature limit. As noted by the Divisional Court:

> **"The Paris Agreement ... 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""**[12]

20. Alongside the Paris Agreement, governments adopted an accompanying "Decision". The Preamble to the Decision recognised that climate change represents "*an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries, and their participation in an effective and appropriate international response, with a view to accelerating the reduction of global greenhouse gas emissions*". It emphasised the urgent need to address the significant gap between the Parties' existing mitigation pledges and aggregate emission pathways consistent with the Paris Temperature Limit.[13]

[10] Ibid. §575
[11] App. 21/927
[12] Divisional Court judgement, §580
[13] SFI, §29

21. The Paris Agreement does not set specific targets for countries. Rather it establishes the framework for countries to set their own "nationally determined contributions" (**"NDCs"**) to meeting the objective of the Paris Agreement.

22. The objectives of the Paris Agreement are set out in Article 2, which include compliance with the Paris Temperature Limit.

23. Article 3 states:

> **"As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2."** (emphasis added).

24. Article 4 states:

> "**1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, 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, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.**
>
> **2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.**
>
> **3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.**
>
> **4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets …"**

25. Article 4 does not set specific targets for individual countries. What it does do, however, is establish the criteria for NDCs, which include:

    - aiming at the Paris Temperature Limit (Arts. 3 and 4(1))
    - equity (Art. 4(1))
    - progressive ambition (Art. 4(3)), and
    - leadership by "Developed country Parties" (Art. 4(4)).

26. The Appellant asserts that "*At the time of the contested decision, the UK's nationally determined contribution … was its statutory carbon reduction target as enshrined in s1(1) of the Climate Change Act 2008*".[14]

27. That assertion is not only false it is legally illogical. Since the CCA 2008 predated the Paris Agreement by seven years, and aimed at the historic 2˚C temperature limit, it was obviously not intended as a contribution to meeting the objectives of the Paris Agreement.

## C. THE UK GOVERNMENT'S POLICY COMMITMENT TO THE PARIS AGREEMENT

28. The Appellant attempts to present the issue in this case as a constitutional question about the status of treaties in domestic law:

> **"The unimplemented provisions of an international treaty are not "policy" within the meaning of s5(8) PA 2008, as a matter of both statutory construction and of broader legal principle."**[15]

29. That is a fundamental misrepresentation of the position and the Court of Appeal was right to give it short shrift, describing it as a "*distraction from the true issue*":

> **"...there is no question of giving effect to the Paris Agreement (an unincorporated international agreement) through "the back door", as Mr Maurici submitted before us. In our view, the debate that took place before the Divisional Court about the possible impact of an international agreement on domestic law that has not been incorporated by legislation enacted by Parliament was a distraction from the true issue. That debate, it seems to us, did not bear on the proper interpretation of a statutory provision deliberately and**

[14] Appellant Case, §6
[15] Appellant's Case, §23

**precisely enacted by Parliament itself, in the words of section 5(8) of the Planning Act."**

30. Plan B does not contend that all international treaties are government policy. We do not argue that the Paris Temperature Limit is Government policy just because the Government has ratified the Paris Agreement. Rather the fact that the Government, along with 196 other governments, has adopted the Paris Agreement, is compelling evidence that it has accepted the scientific advice that the risks of the 2˚C limit are intolerable and that the more stringent Paris Temperature Limit should be the basis of its policy relating to climate change.

31. By contrast, the Appellant does not dispute that in 2008 the Government had a policy commitment to the 2˚C global limit, which, in the words of the CCC *"was derived as a contribution to a global emissions path aimed at keeping global average temperature to around 2°C above pre-industrial levels*".[16] Indeed the Appellant acknowledges that the SST assessed the ANPS against that 2˚C limit even though that limit was not enshrined in an international treaty and had been rejected as inadequate and dangerous by 197 governments:

> "**The AC used … a "carbon traded" scenario in which emissions are traded as part of a global carbon market. Under this scenario overall global CO2 emissions are set at a cap consistent with a future global goal to limit warming to 2˚C**"[17] (emphasis added)

32. It appears to be the Appellant's position that the Paris Temperature Limit cannot be government policy simply because it has been enshrined in a treaty. On that analysis, the Government could only make a policy commitment to the Paris Temperature Limit by not signing the Paris Agreement.

33. As stated by the Court of Appeal:

> **"the words "Government policy" are words of the ordinary English language. They do not have any specific technical meaning"**[18]

34. The Court of Appeal did not conclude that the Paris Agreement was Government policy just because the Government had advanced, signed and ratified it. Its conclusion was reinforced by numerous statements made on behalf of the

[16] SFI, §47
[17] SFI, §7
[18] Court of Appeal judgment, §224

Government prior to the SST's purported designation of the ANPS, confirming that position:

> "**In our view, the Government's commitment to the Paris Agreement was clearly part of "Government policy" by the time of the designation of the ANPS. First, this followed from the solemn act of the United Kingdom's ratification of that international agreement in November 2016. Secondly, as we have explained, there were firm statements re-iterating Government policy of adherence to the Paris Agreement by relevant Ministers …**" (emphasis added).

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

> **"The Government believe we will need to take the step of enshrining the Paris goal of net zero emissions in UK law – the question is not whether, but how we do it, and there is an important set of questions to be answered before we do. The Committee on Climate Change is looking at the implications of the commitments made in Paris and has said it will report in the autumn. We will want to consider carefully its recommendations ... ."** [19]

36. On 24 March 2016, the Rt. Hon. Amber Rudd MP, then Secretary of State for Energy and Climate Change, said, in answer to an oral question on what steps her department was taking to enshrine the commitment to net zero emissions made at the Paris Climate Change Conference:

> **"As confirmed last Monday during the Report stage of the Energy Bill, the Government will take the step of enshrining into UK law the long-term goal of net zero emissions, which I agreed in Paris last December. The question is not whether we do it but how we do it."** [20]

37. In October 2017, the Department of Transport's own "UK Aviation Forecast" stated:

> **"The forecasts of UK aviation CO2 emissions should be interpreted within the context of broader UK and international climate change policy. The Climate Change Act (2008) commits the UK government by law to reducing greenhouse gas emissions by at least 80% of**

[19] Court of Appeal judgement, §212
[20] Court of Appeal judgement, §213

**1990 levels by 2050. The UK has also signed up to the Paris Agreement that aims to hold the increase in global average temperature to well below 2°C of pre-industrial levels."[21]**

38. Also in October 2017 the UK Government published its *Clean Growth Strategy* under ss. 12 and 14 of the CCA. In his amended defence to the Friends of the Earth claim, the Secretary of State acknowledges that the Strategy constitutes Government policy on climate change.

39. In the Prime Minister's Foreword to the Strategy, The Rt Hon Theresa May MP states:

> **"On the world stage, we were instrumental in driving through the landmark Paris Agreement."[22]**

40. In the Minister's Foreword, Greg Clark MP states:

> **"Following the success of the Paris Agreement, where Britain played such an important role in securing the landmark deal, the transition to a global low carbon economy is gathering momentum."[23]**

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

> **"This growing level of global climate instability poses great risks to natural ecosystems, global food production, supply chains and economic development. It is likely to lead to the displacement of vulnerable people and migration, impact water availability globally, and result in greater human, animal and plant disease. Climate change can indirectly increase the risks of violent conflicts by amplifying drivers of conflicts such as poverty and economic shocks. For this reason the UN, Pentagon and UK's National Security and Strategic Defence Reviews cite climate change as a stress multiplier."[24]**

42. More specifically, it explains why the historic, discredited 2˚C limit was replaced with the more stringent Paris Temperature Limit:

> **"Scientific evidence shows that increasing magnitudes of warming increase the likelihood of severe, pervasive and irreversible impacts**

[21] SFI, §40
[22] 'Clean Growth Strategy' – HM Government (as amended April 2018), App. 30/1233
[23] Ibid. App. 30/1234
[24] Ibid. App. 30/1237

**on people and ecosystems. These climate change risks increase rapidly above 2°C but some risks are considerable below 2˚C. This is why, as part of the Paris Agreement in 2015, 195 countries committed to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change ..."**[25] (emphasis added)

43. In January 2018, the Government published "A Green Future: Our 25 Year Plan to Improve the Environment". In this the Government promised:

> **"We will: Provide international leadership and lead by example in tackling climate change…**
>
> **We will use our diplomacy on the international stage to encourage more ambitious global action ...**
>
> **Using our leading role in the UNFCCC, through which the Paris Agreement was established, we will urge the international community to meet the goals enshrined in the text ... This is vital for future environmental security: current global commitments under the Agreement are insufficient to limit average temperature rise to well below 2˚C.**[26]**"** (emphasis added)

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

> **"What diplomatic steps his Department has taken to support the implementation of the Paris agreement on climate change."**

45. Mr Field began his response as follows:

> **"Climate change is an existential threat ... Our diplomats and Climate Envoy are working, with BEIS [the Department for Business, Energy and Industrial Strategy] and international partners, to ensure international implementation of Paris Agreement commitments"**[27]

46. It is difficult to square these statements with the Appellant's contention that the Paris Agreement was "not relevant" to Government policy relating to climate

[25] Ibid. App. 30/1238
[26] 'A Green Future: Our 25 Year Plan to Improve the Environment' – HM Government, App.33/1281
[27] App. 35/1287

change. And it is difficult to square these comments with the Appellant's (unstated but implicit) position that it was lawful for the SST to assess the ANPS against the discredited 2˚C limit but was not lawful for him to assess against Paris Temperature Limit because it was "not relevant".

47. So far as Plan B is aware there is no evidence that after December 2015 the Government, in contradiction with its commitment to the Paris Agreement, retained a policy commitment to the discredited and dangerous 2˚C goal (certainly the Appellant has produced no such evidence).

## D. THE IMPLICATIONS OF THE PARIS TEMPERATURE LIMIT FOR UK DOMESTIC EMISSIONS REDUCTION AND THE POSITION OF THE CCC

48. On 16 September 2016, the Board of the CCC, the Government's statutory adviser met to discuss the implications of the Paris Agreement for the UK's emissions reduction target. According to the minutes of that meeting the CCC concluded that a new domestic target would be required, but that more evidence was needed before specifying it:

> **"It was clear that the aims of the Paris Agreement, to limit warming to well below 2°C and to pursue efforts to limit it to 1.5°C, went further than the basis of the UK's current long-term target to reduce emissions in 2050 by at least 80% on 1990 levels (which was based on a UK contribution to global emissions reductions keeping global average temperature rise to around 2°C).**
>
> **Emissions pathways also suggest that CO2 emissions will need to reach net zero by the 2050s-2070s in order to stay below 2°C …**
>
> **The Committee therefore agreed that whilst a new long-term target would be needed to be consistent with Paris, and setting such a target now would provide a useful signal of support, the evidence was not sufficient to specify that target now.**"[28] (emphasis added)

49. This position was developed in more detail in the CCC's report of October 2016, *UK Climate Action Following the Paris Agreement*. Again the CCC highlighted the gap between the CCA 2008 section 1 "carbon target" (as it was originally) and the Paris Temperature Limit:

[28] App. 27/1065

**"In December 2015 the UK, under the UN negotiations and alongside over 190 other countries, drafted the Paris Agreement to tackle climate change. It will enter into force by the end of 2016 having been ratified by the US, China, Brazil, the EU and others.**

**The Agreement describes a higher level of global ambition than the one that formed the basis of the UK's existing emissions reduction targets:**

**• The UK's current long-term target is a reduction of greenhouse gas emissions of at least 80% by the year 2050, relative to 1990 levels. This 2050 target was derived as a contribution to a global emissions path aimed at keeping global average temperature to around 2˚C above pre-industrial levels.**

**• The Paris Agreement aims to limit warming to well below 2˚C and to pursue efforts to limit it to 1.5˚C. To achieve this aim, the Agreement additionally sets a target for net zero global emissions in the second half of this century."**[29]

50. Contrary to the false claim of the Appellant that *"In October 2016, the CCC had advised … that it was possible that the UK's existing 2050 target could be consistent with the Paris global long-term temperature goal"*[30] the report said no such thing. The Appellant has no excuse for misleading the Court in this way, since the issue was addressed directly in the Court of Appeal[31].

51. What the CCC did say was that October 2016 was not the right time to change the target:

"**However, we recommend the Government does not alter the level of existing carbon budgets or the 2050 target now …**

**There will be several opportunities to revisit the UK's targets in future as low-carbon technologies and options for greenhouse gas removals are developed, and as more is learnt about ambition in other countries and potential global paths to well below 2˚C and 1.5˚C:**

[29] Court of Appeal judgement, §206
[30] HAL Case,§47(1)
[31] Court of Appeal judgment, §200

**• 2018: the Intergovernmental Panel on Climate Change (IPCC) will publish a Special Report on 1.5˚C, and there will be an international dialogue to take stock of national actions …"**[32]

52. Nevertheless, as noted by the Court of Appeal, the CCC provided an indication of the implications of the Paris Agreement in this report:

> **"On page 9 of the report it was said that to stay close to 1.5˚C, CO2 emissions would need to reach net zero by the 2040s. Reference was made to Table 1, which was set out on the same page."**[33] (emphasis added)

53. The CCC's conclusion from 2016 is consistent with the revised CCA s.1(1), brought into law in 2019, which requires that there should be "at least 100%" emissions reduction by 2050. Even in 2016 the SST had available to him a good indication of the practical implications of the Paris Agreement for the UK's emissions reduction targets.

54. In January 2018 the draft IPCC report on the implications of 1.5˚C warming had been shared with Governments.[34] One of the key conclusions of the report (as published in October) was that:

> **"[i]n model pathways with no or limited overshoot of 1.5°C, global net anthropogenic CO2 emissions decline by about 45% from 2010 levels by 2030… reaching net zero around 2050"**[35] (emphasis added)

55. That conclusion was reflected in the vote of the European Parliament, also in January 2018:

> **"The Paris Agreement substantially increased the level of global ambition on climate change mitigation, with signatories to it committing to "holding the increase in the global average temperature to well below 2°C above preindustrial levels and to pursue efforts to limit the temperature increase to 1,5°C above pre-industrial levels". The Union needs to prepare for much deeper and faster cuts in emissions than previously foreseen. At the same time such reductions are feasible at a lower cost than previously**

[32]
[33] Court of Appeal judgment, §207
[34] SFI, §57
[35] SFI, §58

**assessed, given the pace of development and deployment of renewable energy technologies.**

**In line with the aim of the Paris Agreement to achieve a balance between anthropogenic emissions by sources and removals of GHG by sinks in the second half of the 21st century, the Union should aim, on an equitable basis, to reach net zero emissions domestically by 2050, followed by a period of negative emissions."[36]** (emphasis added)

56. The CCC's suggestion in its 2016 Report that publication of the IPCC report in 2018 could be the occasion for introducing a Paris compliant domestic target reflected this eventuality. In January 2018, as the draft IPCC report was shared with Governments, but still prior to the designation of the ANPS, the CCC formally recommended that the Government review its long-terms emissions reduction targets, following publication of the IPCC report in October 2018:

> **"In our advice on UK Climate Action Following the Paris Agreement, the Committee recommended that the Government wait to set more ambitious long-term targets until it had strong policies in place for meeting existing budgets and the evidence base is firmer on the appropriate level of such targets. The Government has now published its strategy to meet the legislated carbon budgets. The Intergovernmental Panel on Climate Change (IPCC) will produce a Special Report on the implications of the Paris Agreement's 1.5°C ambition in 2018. At that point, the Government should request further advice from the Committee on the implications of the Paris Agreement for the UK's long-term emissions targets."[37]**

57. On 17 April 2018, the Rt Hon Claire Perry MP, then Minister of State for Energy and Clean Growth, formally accepted that recommendation via Twitter[38].

58. On 1 May 2018, the Rt Hon Claire Perry MP, informed Parliament on behalf of the Government, that the Government had not only asked the CCC to review the carbon target, they had asked for advice specifically on how to get to net zero by 2050:

[36] EU Parliament votes for net zero emissions by 2050, App. 34/1285-6
[37] Independent Assessment of the UK's Clean Growth Strategy – CCC, App. 31/1243
[38] App. 37/1294

> **"We were the first country in the world to ask <u>how we will get to a decarbonised economy in 2050</u>, and I would hope that we could enjoy cross-party support for something so vital."[39]**

59. On 26 June 2019, following formal advice from the CCC, the statutory 2050 target in s 1(1) CCA 2008 was amended by the Climate Change Act 2008 (2050 Target Amendment) Order 2019 implementing the Government's net-zero policy into law.[40]

60. Despite the fundamental changes to Government climate change policy that occurred between December 2015 and the designation of the ANPS in June 2018, the SST proceeded precisely as if there had been no such changes. He proceeded on the basis that these developments were simply "not relevant" to Government policy relating to climate change.

61. The Appellant claims that the ANPS was "*was consistent <u>in all relevant respects</u> with the expert advice of both the … CCC … and Airports Commission*" (emphasis added)[41].

62. To the contrary, in the only relevant respect which matters in this case, ie the relevance or otherwise of the Paris Agreement and the Paris Temperature Limit, that statement is false. The Airports Commission could not directly comment on the relevance of the Paris Agreement, because the Paris Agreement did not exist at the time. But it did state:

> **"Any change to UK's aviation capacity would have to take place in the context of global climate change, and the UK's policy obligations in this area."[42]**

63. Following the SST's statement to the House of Commons on the ANPS on 4 June, the CCC, which is a government-funded body, took the unusual step of writing publicly to the SST to express its surprise at the SST's failure to refer to the Paris Temperature Limit:

> **"The UK has a legally binding commitment to reduce greenhouse gas emissions under the Climate Change Act. The Government has <u>also</u> committed, through the <u>Paris Agreement</u>, to limit the rise in**

[39] App. 37/1295
[40] SFI, §63
[41] Appellant Case, §3(4)
[42] App. 22/956

**global temperature to well below 2°C and to pursue efforts to limit it to 1.5°C.**

**We were surprised that your statement to the House of Commons on the National Policy Statement on 5 June 20181 made no mention of either of these commitments. It is essential that aviation's place in the overall strategy for UK emissions reduction is considered and planned fully by your Department."** (emphasis added)

64. It is evident from this letter, that the SST's approach was inconsistent with the position of the CCC which was that the Paris Temperature Limit was a relevant consideration, which the SST should have considered before designating the ANPS.

## E. THE IMPLICATIONS OF THE PARIS TEMPERATURE LIMIT AND A NET ZERO TARGET FOR THE DESIGNATION OF THE ANPS

65. It would not be appropriate to comment on the SST's motivation for deeming the Paris Temperature Limit and other developments in the Government's policy relating to climate change "not relevant".

66. The application of a more stringent standard to carbon emissions, however, would almost certainly have precluded the designation of the ANPS.

67. The SST assessed the impact of the ANPS on climate change against two "scenarios":

    a. A "carbon-capped" scenario, in which the maximum emissions from UK aviation could be **37.5Mt CO2 (37,500,000 tonnes of CO2) by 2050**; and

    b. A "carbon-traded" scenario, based on the historic and discredited **2˚C** global temperature limit.[43]

68. Yet the Department of Transport's own forecasts projected that even the bottom of the range of emissions from UK aviation would be **in excess** of that 37.5 mt CO2 limit by 2050:

    **"The Department of Transport's UK Aviation Forecasts (October 2017) estimated total UK international and domestic departing**

[43] SFI, §7

**aircraft CO2 to be in the range 38.1 Mt CO2 to 44.1 Mt CO2."**[44] (emphasis added)

69. The Airports Commission had been clear that the 37.5 MtCO2 limit was the maximum compatible event with the historic 80% emission reduction target:

> "**The UK Climate Change Act 2008 sets a legally binding target to reduce overall UK emissions by 80% below 1990 levels by 2050. Aviation will need to play its part, and the Committee on Climate Change has specified a planning assumption for the sector that requires gross carbon dioxide emissions from aviation to total no more than 37.5Mt CO2 by mid century**."[45] (emphasis added)

70. Since the projected emissions for UK aviation were already in excess of the Planning Assumption of 37.5 Mt CO2, associated with an 80% emissions reduction, it is difficult to see how Heathrow Expansion could be reconciled with a more stringent limit, in accordance with the Paris Agreement (certainly the SST provided no explanation for how this would be possible).

71. Indeed the SST commissioned a report, *"International aviation and the Paris Agreement temperature goals"*, published only subsequent to the designation of the ANPS, in December 2018, which states:

> **"any continued emissions of CO2 from aviation using fossil fuels beyond around 2050 will be inconsistent with the Paris Agreement goals in the absence of extra measures"[46].** (emphasis added)

72. Again, it is difficult to see Heathrow expansion could be consistent with zero emissions from aviation by 2050 (and again, the SST has provided no explanation as to how this might be possible).

73. It was not necessary for the SST to know with certainty when and in what form legislation would be changed. He was required by the Planning Act s.5(8) to consider "Government policy relating to … climate change" and that policy was already clear at the time of the designation of the ANPS. There is no evidence that he even asked himself, as a reasonable SST would have done, "*Is Heathrow expansion likely to be consistent with the new net zero, Paris compliant emissions reduction target that the Government has committed to"*.

[44] SFI, §40
[45] App. 22/935
[46] App. 51/1539

## F. THE SST'S REPRESENTATIONS CONCERNING THE PARIS AGREEMENT

74. The Appellant's position is that the SST was correct to assess the ANPS against the outdated and dangerous 2˚C target and that it would have been unlawful for him to consider it against the Paris Temperature Limit, considered by the Government to be "*vital for future environmental security*".

75. Regardless of the merits of that position, prior to this litigation the SST had failed to communicate it, either to the public or to Parliament. To the contrary, he actively implied that he had taken account of the Paris Agreement in designating the ANPS.

76. The SST's response to the public consultation referred not just to the Paris Agreement but specifically to concerns that the Paris Agreement demanded more stringent domestic emissions reduction targets:

> **"8.18 The Government notes the concerns raised about the impact of expansion on the UK's ability to meet its climate change commitments; the Government has a number of international and domestic obligations to limit carbon emissions ...**
>
> **8.19 The Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) is the first worldwide scheme to address CO2 emissions in any single sector and will be a first important contribution from this sector to meeting the long-term goal set out by the 2015 Paris Climate Agreement to pursue efforts to limit the global temperature increase to well below 2 degrees Celsius ...**[47]
>
> **8.42 Several respondents contended that the UK's current carbon emissions targets under the Climate Change Act were adopted before the ratification of the 2015 Paris Climate Agreement and therefore need to be updated."**[48]

77. This response did not explain that the SST considered the Paris Agreement "not relevant", nor that he had instead used the 2˚C benchmark. To the contrary, he appeared to be indicating that he had considered the Paris Agreement in approving plans to expand Heathrow Airport.

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[47] 'Government Response to the consultations on the Airports National Policy Statement', DfT, App.39/1299

[48] Ibid. App.39/1303

78. Initially, the SST disputed Plan B's claim that he had failed to take the Paris Agreement into account:

> **"a key aspect of the claim is the Secretary of State's alleged failure to take into account the target set in the Paris Agreement. However, the Paris Agreement was raised by respondents to the consultation carried out in 2017 on the Appraisal of Sustainability ("AoS") and it was considered e.g. in the Government response to the consultations on the Airports National Policy Statement ("the Consultation Response") …**
>
> **…The Claimant inexplicably omits even to mention this."**[49] (emphasis added).

79. More specifically he claimed:

> **"Furthermore, the Secretary of State considered the Paris Agreement in producing the ANPS and explained his position in e.g. the Consultation Response (above)."**[50]

80. On the basis that the SST's position was that the Paris Temperature Limit was "not relevant" (and that it was the 2˚C limit that was relevant) that statement was false. That position was not explained in the consultation response.

81. It was only following the disclosure of his witness statements, which revealed that he had in fact relied upon the 2˚C target and not the Paris Temperature Limit, and in the course of a pre-trial review, that the Secretary of State acknowledged that he had disregarded the Paris Agreement as "not relevant". Initially, however, he declined to concede the point in his pleadings, until directed to do so by Holgate J:

> **"The judge has read the recent exchange of emails on the Statement of Common Ground and climate change issues. His recollection of what occurred at the PTR is broadly along the lines recounted in the letter from Mr Crosland. The defendant's "concession" (if that be the correct description), or rather helpful narrowing of issues, arose in the context of submissions regarding the applications for disclosure by FoE and Plan B. A principal submission by the Defendant was that once the real issue under the grounds of challenge were correctly defined, then the disclosure sought was unnecessary. Para**

[49] Defendant's Amended Detailed Grounds of Resistance to Plan B Claim, App. 7/477-9, §9-10
[50] Ibid. 7/483, §24

**29 of his position statement says that the only issue is whether the Defendant was entitled as a matter of law to consider matters as against existing legal obligations and policy commitments as given effect by the Climate Change Act 2008. If he was, then this particular ground fails. If he was not, and the matter had to be considered as against the Paris Agreement, then the ground of challenge would be made out. Leading counsel for the Defendant confirmed to the court that that was the issue and that any other references in the Defendant's documents which might be taken to suggest otherwise could be ignored. He also said that if the Defendant lost on this issue (defined in this way) he would not raise any discretion points which would justify further specific disclosure. Instead discretion points would be "generic" in nature. <u>The indication given for the Defendant at the hearing was that in so far as the Paris Agreement differs from the 2008 Act in any relevant, significant way, then that matter was not taken into account.</u>**

**<u>The Defendant appears to be seeking to draft the concession in language materially different from that used in the position statement and from what was said at the PTR and without explaining so far to the court why he has sought to do this</u> ...**

**The court therefore directs the defendant to reconsider his position on these issues today. If he maintains his revised "concession" then he must file by 9am tomorrow a position statement explaining why the different wording is said to be justified, why para 29 was included in his position statement in different terms and set out any consequential amendments of pleadings needed."**[51]

## G. THE APPELLANT IS NO LONGER "THINKING ABOUT" THE THIRD RUNWAY

82. The Appellant's case asserts that "*It has promoted the Northwest Runway ("NWR") scheme for many years and aspires to make an application … for a development consent order … to construct and operate it*."[52]

[51] Email from clerk to Holgate J to parties, App. 52/1540-1
[52] Appellant Case, §1

83. The Appellant neglects to mention that, according to evidence given to the House of Commons Transport Committee by its CEO, John Holland-Kaye, it is no longer planning for a third runway:

> **"In terms of the third runway, my focus is solely on protecting jobs, protecting our business and serving the country at the moment. I am not thinking about the third runway. However, in 10 or 15 years' time, if we are successful in rebooting the UK economy and getting us back to full strength, we will need the third runway at that point."**[53]

## H. THE RULING OF THE DIVISIONAL COURT

84. The Divisional Court rejected Plan B's claim on the basis that consideration of the Paris Temperature Limit would have been to "override or undermine" the CCA 2008:

> **"Despite the fact that Government policy could of course be outside any statutory provisions – and despite Mr Crosland's submissions that that, in some way, the CCA 2008 cap has to be read with the Paris Agreement (see, e.g., Transcript, day 7 pages 112 and 116) – neither policy nor international agreement can override a statute. Neither Government policy (in whatever form) nor the Paris Agreement can override or undermine the policy as set out in the CCA 2008. In our view, this way of putting the submission is inconsistent with Mr Crosland's express and unequivocal concession that the carbon target in the CCA 2008 is Government policy and was a material consideration for the purposes of the ANPS. It seeks collaterally to undermine the statutory provisions."**[54] (emphasis added)

85. The Divisional Court was wrong to reduce "*Government policy relating to climate change*" to the CCA 2008 section 1, statutory target. PA 2008 and CCA 2008 were passed into law simultaneously, and PA 2008 section 5(8) could have referred specifically to the statutory target but does not do so. In practical terms, reducing Government policy to the statutory target would lead to perverse outcomes, requiring the SST to ignore an imminent change to the law.

[53] App. 59/1595
[54] Divisional Court judgment, §615

86. Moreover the Divisional Court's reading was inconsistent with the language of CCA 2008 s.1, which establishes only a minimum target:

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

87. Plainly that did not preclude the SST from taking into account that which, at the time of designation, he knew to be the case, which was that the Government was now committed to the Paris Temperature Limit and that it planned to introduce a new net zero target in accordance with the Paris Agreement in the near future.

88. In the words of the Court of Appeal:

> **"We note that the target set out in the Act is "at least" 80% by 2050. We consider that the Divisional Court fell into error in those passages of its judgment that we have cited earlier (in particular at paragraph 615), where it appears to have taken the view that the Secretary of State was somehow being required to take a position inconsistent with what was required by his statutory obligations in the Climate Change Act."**[55]

## I. THE HUMAN RIGHTS ACT 1998, SECTION 3(1)

89. Section 3(1) of the Human Rights Act 1998 ("the HRA") requires primary legislation to be read in a Convention-compliant manner:

> **"So far as it is possible to do so, primary legislation […] must be read and given effect in a way which is compatible with the Convention rights".**

90. The Foreign Office has described climate change as an "existential threat". Climate change is already causing loss of life and displacement of people from their homes, including through repeated flooding, and it is clear that it presents a risk to home and to family life and to life itself, and consequently that the Government should take necessary and proportionate steps to address that threat.

[55] Court of Appeal judgment, §225

91. The Government highlight the seriousness of the threat from climate change in its *Clean Growth Strategy* and its tendency to have disproportionate and discriminatory impacts of vulnerable members of the community:

> **"This growing level of global climate instability poses great risks to natural ecosystems, global food production, supply chains and economic development. It is likely to lead to the displacement of vulnerable people and migration, impact water availability globally, and result in greater human, animal and plant disease."**

92. It has explained the importance of upholding the Paris Temperature Limit to mitigating those risks:

> **"Scientific evidence shows that increasing magnitudes of warming increase the likelihood of severe, pervasive and irreversible impacts on people and ecosystems. These climate change risks increase rapidly above 2°C but some risks are considerable below 2˚C. This is why, as part of the Paris Agreement in 2015, 195 countries committed to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change ..."**[56]

93. Interpreting PA 2008 s. 5(8) in such a way that it would preclude, in the context of major national infrastructure projects, consideration of the global temperature limit which the Government considers necessary to reduce risk to a tolerable level, would itself be a breach of HRA section 3(1).

94. Art. 2 ECHR provides:

> **"(1) Everyone's right to life shall be protected by law […]."**

95. Art. 8 ECHR provides:

> **"(1) Everyone has the right to respect for his private and family life, his home and his correspondence […]."**

96. Art. 14 ECHR provides:

[56] For references, see Section C above

**"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."**

97. As recognised by this Court in *Rabone v Pennine Care NHS Trust* [2012] UKSC 2 at [12]-[16], Art. 2 imposes both a negative duty on the state to refrain from taking life and a positive duty to protect life in certain circumstances. This positive duty contains two distinct elements. The first is a general duty on the state "to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life": see *Öneryildiz v Turkey (ECtHR 30 November 2004, no. 48939/99)* at [89]. The second is what has been described as an "operational duty": where there is a "real and immediate risk" to persons and the state is aware of that risk, Art. 2 may impose a duty on the state to take appropriate steps to safeguard lives of those within its jurisdiction (Öneryildiz at [101]).

98. The positive obligations of the State under Art.8 extend to requiring the State to adopt all the reasonable and appropriate measures needed to protect individuals from serious damage to their environment: *Tătar v Romania* (ECtHR 27 January 2009, no 67021/01) at [88]. Art. 8 may apply in environmental cases where the pollution is directly caused by the State, or where State responsibility arises from the failure to take measures to protect citizens, such as proper regulation of private sector activities: *Jugheli v Georgia* (ECtHR 13 July 2017, no 38342/05) [73-75].

99. ECtHR jurisprudence demonstrates that it is not necessary to identify particular victims of environmental disaster to engage Art. 2 and Art. 8. Rather, the state can owe protective obligations to residents of an entire region, or even to the general population or society at large. For Art. 2, see, inter alia, *Gorovenky and Bugara v Ukraine* (ECtHR 12 January 2012, no. 36146/05) at [32]; and *Tagayeva v Russia* (ECtHR 13 April 2017, no. 26562/07) at [482]. For Art. 8, see, inter alia, *Stoicescu v Romania* (ECtHR 26 July 2011, no. 9718/0), at [59]; and the environmental hazard case of *Cordella v Italy* (ECtHR 24 January 2019, nos 54414/13 and 54264/15) at [172].

100. While states have been found to violate these requirements on many occasions, the ECtHR has not yet decided a case relating specifically to the threat from climate change. However, the protection of Art. 2 and Art. 8 must

extend to the gravest environmental threat of all, a threat the Government describes as “existential”.

101. This is the conclusion the Dutch Supreme Court reached in December 2019, upholding the judgment of the High Court and Court of Appeal in the *Urgenda* litigation:

> **“Climate science has ... arrived at the insight that a safe warming of the earth must not exceed 1.5°C and that this means that the concentration of greenhouse gases in the atmosphere must remain limited to a maximum of 430 ppm. Exceeding these concentrations would involve a serious degree of danger that the consequences referred to in 4.2 [which includes the loss of human life] will materialise on a large scale … the Supreme Court finds that Articles 2 and 8 ECHR relating to the risk of climate change should be interpreted in such a way that these provisions oblige the contracting states to do ‘their part’ to counter that danger. In light both of the facts set out in 4.2-4.7 and of the individual responsibility of the contracting states, this constitutes an interpretation of the positive obligations laid down in those provisions that corresponds to its substance and purport … This interpretation is in accordance with the standards … that the ECtHR applies when interpreting the ECHR and that the Supreme Court must also apply when interpreting the ECHR.”**

102. Strasbourg jurisprudence is clear that the interpretation of the ECHR should take relevant international law into consideration. In *Nada v Switzerland* (ECtHR 12 September 2012, no. 10593/08), the Court held that “*the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law*” [169]. In *Demir and Baykara v Turkey* (ECtHR 12 November 2008, no. 34503/97) [85]-[86], the Grand Chamber emphasised the role of the “common ground” as an interpretative tool that the Court must take into account when defining terms and notions within the Convention. This “common ground” includes other international human rights treaties, other “elements of international law,” states’ interpretation of such elements, and state practice reflecting common values.

103. In *Tătar*, a case concerning a state’s environmental law obligations under Art. 8, the ECtHR found that the Romanian Government should have applied norms of international law, as well as national law. The Court emphasised the

importance of the international law precautionary principle, which countries endorsed through the Rio Declaration [120].

104. The disproportionate and discriminatory impacts of climate change on vulnerable groups engages Art. 14, which reinforces the State's positive obligations under Art. 2 and Art. 8.

105. Interpreting PA section 5(8) so as to preclude consideration of the Paris Temperature Limit, which is the internationally recognised threshold for reducing the risks from climate change to a tolerable level, would tend to the progression of major national projects creating an intolerable level of risk to home and to life. Such an approach would be incompatible with positive obligations arising under Article 2, 8 and 14 of the ECHR, and would breach HRA section 3(1).

## J. CONCLUSION

106. At the time of the designation of the ANPS in June 2018, the SST knew, or ought to have known, that the Government had:

a) rejected the 2˚C temperature limit as creating intolerable risks, in the UK and beyond
b) committed instead to the Paris Agreement and the Paris Temperature Limit, and that it had
c) committed to introducing a new net zero target in accordance with the Paris Agreement.

107. In reality these matters were fundamental to Government policy relating to climate change and it was irrational for the SST to treat them as irrelevant.

108. While PA 2008 s.5(8) does not require the SST to *follow* Government policy relating to climate change it does require that the SST communicate transparently the relationship between the ANPS and that policy, so that any tension arising can be debated openly and democratically. The SST's failure in this regard was a fundamental flaw in the process.

109. This Appeal is misconceived and should be dismissed.

**TIM CROSLAND**
**Director, Plan B**
**9 September 2020**