In the Supreme Court of the United Kingdom

UKSC 2021/0160

ON APPEAL
FROM THE SUPREME COURT
(SITTING AS A COURT OF FIRST INSTANCE)
[2021] UKSC 15; [2021] 4 WLR 143

B E T W E E N

TIM CROSLAND

Appellant

- and –

HER MAJESTY'S ATTORNEY GENERAL

Respondent

CASE FOR THE APPELLANT

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A. INTRODUCTION

1. On 10 May 2021, Lord Lloyd-Jones, Lord Hamblen and Lord Stephens, sitting as a court of first instance ("the court below"), held that my action on 15 December 2020 in disclosing the outcome of the Supreme Court's judgment concerning Secretary of State for Transport's (**"SST"**) designation of the Airports National Policy Statement (**"ANPS"**) in support of the expansion of Heathrow Airport ("the Heathrow case"), 22 hours prior to hand-down of the judgment, constituted a criminal contempt of court, imposing a £5,000 fine and additionally, some weeks later, a £15,000 adverse costs order.

2. The order of the court below confirmed my right to appeal:

> **"If permission to appeal against the finding of contempt, the penalty imposed and the order for costs is required, the Respondent be granted permission to appeal to a differently constituted panel of the Supreme Court."**

3. The judgment summarised my motivation for breaching the order as being what I saw as:

> **"the erroneous approach of the Supreme Court and the consequences to which it will lead."**[1]

4. That was correct, insofar as it went, but it did not accurately explain the nature of the perceived error, nor why I considered that breaching the embargo was an appropriate response.

5. I had likewise considered the approach of the Divisional Court in the Heathrow case to be "erroneous", but it never occurred to me to breach the embargo in that case (nor, since I was called to the Bar in 1994, has it occurred to me to do so in any other case).

6. For all that I disagreed with its legal analysis, the judgment of the Divisional Court did not misrepresent the facts. Nobody reading that judgment would be misled into believing that expansion of Heathrow Airport had been assessed as consistent with the Paris Agreement temperature limits, for it said:

> **"Mr Crosland expressly accepted that the policy as set out in the CCA 2008 was Government policy; but, he submitted, it was only a component of it. Government policy also included the Paris Agreement temperature limit of 1.5ºC and "well below" 2ºC, and that temperature limit was also a relevant consideration for ANPS purposes. After Paris, Mr Crosland submitted, the "discredited" temperature limit of 2ºC was neither Government policy nor a relevant consideration for the purposes of the ANPS. The fact that it (and not the Paris temperature limit) was treated as policy and a relevant consideration is clear from (e.g.) Graham, paragraph 124, where it is said**

[1] https://www.supremecourt.uk/cases/docs/uksc-2021-0099-judgment.pdf, §29

that the Aviation Target was not a constraint because "all emissions are assumed to be captured within a carbon market that allows total global carbon emissions consistent with a 2 degree climate stabilisation target"[2]

"<u>Nor, in our view, did [the Secretary of State] err in failing to take into account the Paris Agreement, or the premise upon which that Agreement was made namely that the temperature rise should be limited to 1.5ºC and "well below" 2ºC</u> … Nor was he otherwise obliged to have taken into account the Paris Agreement limits or the evolving knowledge and analysis of climate change that resulted in that Agreement."[3] (emphasis added)

7. It was clear from the Divisional Court's judgment that the SST had assessed the expansion plans against the historic 2˚C limit and not against the Paris Temperature limit of 1.5˚C and well below 2˚C. It was the position of the Divisional Court, however, that such an approach was lawful.

8. It was otherwise with the draft judgment of the Supreme Court. That judgment omitted any reference to the SST's reliance on the historic 2˚C target (despite the centrality of that fact to the claim of Plan B.Earth, the party to the proceedings I represented). It omitted reference to the Department of Transport's own evidence, which showed that the expansion of Heathrow Airport would breach the 1.5˚C threshold in the Paris Agreement, exposing the public to intolerable risk; and it falsely asserted, contrary to the Secretary of State's own pleaded position, that:

"the Secretary of State took the Paris Agreement into account"

9. All those reading this unusually high profile judgment, including those concerned with a future application for development consent, would infer that the expansion of Heathrow Airport had been assessed as being consistent with the Paris Agreement temperature goals - a misunderstanding which risked globally catastrophic consequences.

10. In these exceptional circumstances, I felt bound to draw public attention to the true position, ie that the expansion of Heathrow Airport would, according to the Department of Transport's own evidence, cause the critical 1.5˚C Paris Agreement temperature threshold to be breached.

11. Irrespective of the consequences for me personally, which were likely to be serious but not catastrophic, breaching the embargo achieved that objective. With support from a great many leading scientists, economists and others, including the Government's former Chief Scientific Adviser, Sir David King, the reality of the situation (ie that the expansion of Heathrow Airport is, according to the Government's own figures, inconsistent with maintaining the 1.5˚C limit) has now been placed in the public domain:

[2] https://www.judiciary.uk/wp-content/uploads/2019/05/Heathrow-main-judgment-1.5.19.pdf, §613
[3] https://www.judiciary.uk/wp-content/uploads/2019/05/Heathrow-main-judgment-1.5.19.pdf, §619

> **"The rule of law, including international law, is a vital part of the fabric of a democratic society and it is key to securing the safety of our interconnected world. We understand why Tim Crosland of Plan B. Earth felt it necessary to raise the alarm about the goals of the Paris Agreement being ignored by British courts. We remind the Court of its own obligations under the Human Rights Act 1998 to safeguard the right to life. That entails taking all reasonable measures to ensure respect for the entirety of the Paris Agreement."[4]**

12. No-one has challenged the basic factual propositions underpinning my defence. The court below, by failing even to refer to it, implicitly treated my intention to correct a factual misrepresentation, which if uncorrected, risked catastrophic consequences, as irrelevant to liability, to penalty and to costs. It was wrong to do so.

13. In particular, such an approach was inconsistent with the principles to be applied to the criminalisation of acts, falling within the scope of Article 10 of the European Convention on Human Rights, which demand a careful consideration of the factual context (as recently articulated by the Supreme Court in the case of *Ziegler and others*[5]):

> **"Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case."[6]**

14. Further, the action I took was consistent with the World Lawyers' Pledge on Climate Action I have since signed, initiated by researchers at the Max Planck Institute for Comparative Public Law and International Law, and whose lead signatories include Judge Prof Helen Keller, Judge at the Constitutional Court of Bosnia & Herzegovina; former Judge at the European Court of Human Rights (2011-2020); Judge Eduardo Ferrer Mac-Gregor Poisot, Judge at the Inter-American Court of Human Rights; Dr Fatou Bensouda, Former Chief Prosecutor of The International Criminal Court (2012-2021); and Dr David R Boyd, UN Special Rapporteur on Human Rights and the Environment, which states:

> **"We, the undersigned, as concerned members of the legal community, commit ourselves to taking action against climate change. To this end, we will take personal and institutional responsibility, to the best of our abilities and within our respective fields of activity and expertise. We will cultivate a heightened awareness of the relevance of our activities to climate change and vice versa, and seek to integrate, address, and mitigate climate concerns throughout our professional life. We call upon the global legal community—including practicing lawyers, judges, academics, civil servants, law students, lawmakers, and all others working in and with the law—to join us in this vital endeavour. Together, we can initiate, foster, and**

[4] App, [X]
[5] Director of Public Prosecutions (Respondent) v Ziegler and others (Appellants), [2021] UKSC 23
[6] *Ibid.* §59

sustain the change necessary to avert climate catastrophe, and transition our societies and laws towards a sustainable future.

The science of climate change is clear—we are facing a climate emergency. Climate change is part of an unprecedented series of overlapping and mutually reinforcing ecological crises, and time is running out to prevent its most dangerous impacts on the environment and on human and other life. The 2015 Paris Agreement calls on States 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'. This requires immediate and systemic changes, societal transformations, and concerted action to drastically reduce greenhouse gas emissions within this decade, and to reach global net-zero emissions of CO2 around 2050 ..."[7] (emphasis added)

B. FACTUAL CONTEXT

15. There was no factual dispute between Plan B.Earth and the SST in the Heathrow case. The dispute concerned only the legal consequences of the agreed facts: in summary was it lawful for the SST to assess the ANPS against the historic global temperature goal of 2˚C as opposed to Paris Temperature Limit of 1.5˚C and "well below" 2˚C that was current at the time? The Divisional Court said "yes"; the Court of Appeal said "no".

16. More specifically, the agreed facts were as follows.

B.1 Estimated carbon emissions from UK aviation with Heathrow expansion were approximately 40,000,000 tonnes per year by 2050

17. For the purpose of the proceedings in the Heathrow case, all parties accepted the Department of Transport's (**"DfT"**) estimate of the likely weight of annual carbon emissions from UK aviation in the event of the proposed expansion to Heathrow Airport proceeding. That estimate was contained in the DfT's *UK Aviation Forecasts (October 2017)* (Table 36 p.107):

[7] https://lawyersclimatepledge.org/full-text/

Baseline				LGW Second Runway			
	low	central	high		low	central	high
2015	36.2	36.2	36.2	2015	36.2	36.2	36.2
2020	37.2	38.9	40.7	2020	37.2	38.9	40.7
2030	36.6	38.6	41.6	2030	37.0	39.1	42.4
2040	36.3	38.1	41.4	2040	36.7	39.3	43.1
2050	35.0	37.0	42.1	2050	36.5	39.3	44.3
LHR Extended Northern Runway				**LHR Northwest Runway**			
	low	central	high		low	central	high
2015	36.2	36.2	36.2	2015	36.2	36.2	36.2
2020	37.2	38.9	40.7	2020	37.2	38.9	40.7
2030	40.4	42.8	45.2	2030	41.2	43.5	45.7
2040	39.2	41.7	44.4	2040	39.8	42.3	45.1
2050	37.6	39.2	44.0	2050	38.1	39.9	44.1

$MtCO_2$, departing flights

Table 36 Total UK international and domestic departing aircraft CO_2 forecasts, $MtCO_2$

18. The scheme supported by the designation of the ANPS was the "LHR Northwest Runway", the estimates for which are contained in the bottom right hand corner of the table. It can be seen that the low estimate for carbon emissions in that case was 38,100,000 tonnes of CO2 per year, the central estimate was 39,900,000 tonnes and the high estimate 44,100,000 tonnes (a megaton or Mt of CO2 = 1,000,000 tonnes of CO2).

19. It was this estimate that was before the Supreme Court in the Heathrow case, as can be seen from the Statement of Fact and Issues in that matter (**"Heathrow SFI"**)[8].

B.2 To maintain the Paris Agreement temperature threshold of 1.5˚C, global carbon emissions would need to reach net zero by 2050 at the latest

20. The Heathrow SFI confirms that the evidence before the Supreme Court in the Heathrow case was that to maintain the Paris Agreement temperature threshold of 1.5˚C, carbon dioxide emissions must reach net zero by 2050.

21. This is apparent from Heathrow SFI, §44-46, which states that, according to the Climate Change Committee (**"CCC"**), the Government's statutory adviser on climate change under the Climate Change Act 2008:

> **"Emissions pathways indicate that CO2 emissions will need to reach net zero by the 2050s-70s, along with deep reductions of all other greenhouse gases, in order to stay below 2°C. To stay close to 1.5°C CO2 emissions would need to reach net zero by the 2040s …"**[9] (emphasis added)

[8] Heathrow SFI, §40: https://planb.earth/wp-content/uploads/2020/09/SC-SFI-FINAL.pdf
[9] *Ibid.* https://planb.earth/wp-content/uploads/2020/09/SC-SFI-FINAL.pdf

22. It is apparent from Heathrow SFI §58, concerning the report of the Intergovernmental Panel on Climate Change (**"IPCC"**):

> **"[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… <u>reaching net zero around 2050</u>"**[10] (emphasis added)

23. It is apparent from Heathrow SFI, §59-60, which quotes from a paper published by the DfT, *'International aviation and the Paris Agreement temperature goals'*, which states:

> **"For the Paris Agreement's goals to be met, large reductions in global greenhouse gas emissions are required …**
>
> **The Paris Agreement is a temperature-based target and therefore implies inclusion of all emissions that affect climate. Aviation has significant non-CO2 climate impacts from oxides of nitrogen (NOx), particle emissions, and effects on cloudiness that overall cause additional overall warming but these impacts are subject to greater scientific uncertainty than its CO2 impacts. Examples of CO2 emission equivalents metrics indicate up to a doubling of aviation CO2 equivalent emissions to account for these non-CO2 effects …**
>
> **… <u>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</u> …"** (emphasis added)

24. The Court of Appeal referenced this position at §207 of its judgment:

> **"On page 9 of the [CCC] report it was said that to stay close to 1.5ºC, CO2 emissions would need to <u>reach net zero by the 2040s</u>."** (emphasis added)

25. The Supreme Court referenced it at §90 of its judgment:

> **"To achieve [the 1.5˚C] target global net emissions of CO_2 would need to fall by about 45% from 2010 levels by 2030, <u>reaching zero by 2050</u>."** (emphasis added)

<u>B.3 The SST considered the Paris Agreement to be "not relevant" - instead he assessed the ANPS against the historic temperature goal of 2˚C</u>

26. The SST did not attempt to reconcile the projection of approximately 40,000,000 tonnes CO2 per annum by 2050, assuming Heathrow expansion, with the 1.5˚C temperature limit. To the contrary his pleaded position was that the Paris Agreement and its implications were "not relevant". This is set out at Heathrow SFI, §69:

[10] *Ibid.*

> **"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 …**
>
> **In sum, the above facts demonstrate why emerging material within Government evidencing developing thinking on the Paris Agreement was not so obviously material to the designation of the ANPS that the Secretary of State was obliged to take it into account, and indeed the clear statutory indications are that such matters were not intended by Parliament to be considered ...**
>
> **Accordingly, the Secretary of State will not pursue any discretion argument that there (a) was no emerging material within Government evidencing developing thinking on the implications of the Paris Agreement, or (b) that such material would highly likely have made no difference to the decision to designate the ANPS. There is no need for him to do so as the argument that he was obliged to consider such material in the first place is hopeless…"**

27. By describing the argument that he was obliged to consider the Paris Agreement as "hopeless", the SST could have made it no clearer that he did <u>not</u> take the Paris Agreement into account.

28. Both the Divisional Court and the Court of Appeal made their rulings on this basis. For the Divisional Court's position see para 6 above. The Court of Appeal stated:

> **"It is c<u>ommon ground</u> that the Secretary of State did not take the Paris Agreement into account in the course of making his decision to designate the ANPS …**[11]
>
> **It is clear that, in deciding to designate the ANPS, he did <u>not</u> take the Paris Agreement into account at all. On the contrary, as we understand it, he consciously chose – on advice – not to take it into account …**[12]
>
> **We find it impossible to conclude that it is "highly likely" that the ANPS would not have been "substantially different" if the Secretary of State had gone about his task in accordance with law. In particular, in our view, it was a basic defect in the decision-making process that <u>the Secretary of State expressly decided not to take into account the Paris Agreement at all</u>. That was a fundamentally wrong turn in the whole process."**[13] (emphasis added)

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[11] https://www.judiciary.uk/wp-content/uploads/2020/02/Heathrow-judgment-on-planning-issues-27-February-2020.pdf?fbclid=IwAR3OQKZqQ_Wd41jVtcxrBimnVuqWMogMaPXgi1JYWrAA6XCF3lqhZL1uowQ, §186

[12] Ibid. §216

[13] Ibid. §276

29. Instead of assessing the ANPS against the Paris Temperature threshold of 1.5˚C, adopted by the international community in 2015, the SST assessed it against the historic limit of 2˚C, which the international community had rejected as exposing humanity to intolerable risks.

B.4 - The difference between 1.5˚C and 2˚C warming

30. The Heathrow SFI quotes at §49 the Government's explanation, contained in its *Clean Growth Strategy* of October 2017, for rejecting the 2˚C limit in favour of the Paris Temperature Limit:

> **"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.**
>
> **…**
>
> **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 2ºC. 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".**

31. More specifically, the difference between 1.5˚C warming and 2˚C warming was set out in in the report of the IPCC, presented to governments in January 2018:

> **"limiting global warming to 1.5°C, compared with 2°C, could reduce the number of people both exposed to climate-related risks and susceptible to poverty by up to several hundred million by 2050 ...**[14]
>
> **Lower risks are projected at 1.5°C than at 2°C for heat-related morbidity and mortality (very high confidence) …**[15]

[14] App, [X]
[15] App, [X]

Risks from some vector-borne diseases, such as malaria and dengue fever, are projected to increase with warming from 1.5°C to 2°C, including potential shifts in their geographic range (high confidence) ...[16]

Limiting warming to 1.5°C compared with 2°C is projected to result in smaller net reductions in yields of maize, rice, wheat, and potentially other cereal crops, particularly in sub-Saharan Africa, Southeast Asia, and Central and South America, and in the CO2-dependent nutritional quality of rice and wheat (high confidence). Reductions in projected food availability are larger at 2°C than at 1.5°C of global warming in the Sahel, southern Africa, the Mediterranean, central Europe, and the Amazon (medium confidence) ...[17]

Depending on future socio-economic conditions, limiting global warming to 1.5°C compared to 2°C may reduce the proportion of the world population exposed to a climate change-induced increase in water stress by up to 50%, although there is considerable variability between regions (medium confidence) ...[18]

Exposure to multiple and compound climate-related risks increases between 1.5°C and 2°C of global warming, with greater proportions of people both so exposed and susceptible to poverty in Africa and Asia (high confidence)"[19]

B.5 - SST's failure to inform the public he had relied on the historic 2˚C temperature goal instead of the Paris Agreement

32. Prior to the Heathrow litigation, the SST failed to state publicly that he had used the historic 2˚C goal as his benchmark. To the contrary, the agreed evidence before the Supreme Court implied he had used the Paris Agreement as his benchmark.

33. Heathrow SFI, §40 quotes from the DfT's *UK Aviation Forecasts (October 2017)* as follows:

> **"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 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."** (emphasis added)

[16] App, [X]
[17] App, [X]
[18] App, [X]
[19] App, [X]

34. Heathrow SFI, §§11-13 quotes from the DfT's response to its consultation on the ANPS. At §11, the DfT notes that the UK has both international and domestic obligations on climate change:

> **"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."**

35. At §12, the DfT refers directly to the Paris Agreement temperature limit (albeit misstating it):

> **"The Government's position remains that action to address aviation emissions is best taken at the international level, given aviation is an inherently global industry and climate change is a global rather than local environmental issue … 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 <u>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</u>."** (emphasis added)

36. At §13, the DfT reassures the public that the proposal is consistent with all the UK's climate obligations:

> **"The Government believes that the Department has demonstrated, through robust analysis, forecasting and modelling, that the UK's climate change obligations will be achievable in a range of policy futures."**

37. Heathrow SFI §16 records the Chair of the CCC, Lord Deben and the Deputy Chair, Baroness Brown, writing to the SST, prior to the designation of the ANPS, regarding the importance of taking the Paris Agreement temperature limit into account:

> **"The UK has a legally binding commitment to reduce greenhouse gas emissions under the Climate Change Act. The Government has also committed, through the Paris Agreement, to limit the rise in global temperature to well below 2°C and to pursue efforts to limit it to 1.5°C.**
>
> **We were surprised that your statement to the House of Commons on the National Policy Statement on 5 June 2018 made no mention of either of these commitments. It is essential that aviation's place in the overall strategy for UK emissions reduction is considered and planned fully by your Department …"**

38. In his reply, referenced at §17 of the Heathrow SFI, the SST failed to explain that he had used the historic 2˚C goal as his benchmark instead of the Paris Agreement goal.

39. Heathrow SFI §21 quotes the relevant parts of the ANPS itself, concerning carbon emissions. Again, this makes no reference to the SST's reliance on the historic 2˚C target:

> **"The Government has considered this further analysis, and concludes both that expansion via a Northwest Runway at Heathrow Airport (as its preferred scheme) can be delivered within the UK's carbon obligations …"**

40. According to the evidence before the Supreme Court, the SST failed to explain to the public or to Parliament that, according to the DfT's own evidence, the proposed expansion of Heathrow Airport would result in approximately 40,000,000 tonnes of carbon dioxide a year from UK aviation by 2050, whereas the Paris Agreement temperature limit implied net zero carbon dioxide by 2050; nor did he offer any explanation for how these position could be reconciled. Given his pleaded position that the Paris Agreement was "not relevant", there was no need for any such explanation.

C. THE SUPREME COURT'S ERROR OF FACT IN THE HEATHROW CASE

41. The Divisional Court concluded that the SST's position of treating the Paris Agreement as "not relevant" was lawful; the Court of Appeal concluded the reverse. In the ordinary course of events, the Supreme Court might have been expected to come down in favour of one position or the other.

42. That is not, however, what the Supreme Court did.

43. The draft judgment I received on 9 December 2020 made no reference to the SST's reliance on the historic 2˚C target. It made no reference to the conflict between the DfT's estimate of carbon emissions with Heathrow expansion and the implications of the Paris Agreement. To the contrary, it made a finding of fact that was contrary to the position of all parties in the case and contrary to the position of both the Divisional Court and the Court of Appeal. It held that:

> **"the Secretary of State took the Paris Agreement into account …"**

44. On behalf of Plan B, I had presented arguments to the Supreme Court on the basis of the SST's pleaded position, ie that the SST had <u>not</u> taken the Paris Agreement into account because he had considered it "not relevant".

45. The rubric on the draft judgment stated:

> **"Counsel must check the judgment for any apparent factual, typographical or grammatical error or ambiguities …"**

46. I drew the error to the Court's attention, over the course of a number of emails.

47. Following my representations to the Court, the Court grafted onto the final judgment references to the 2˚C target:

> **"Mr Crosland placed great emphasis on the facts (i) that the Airports Commission had assessed the rival schemes against scenarios, one of which was that overall CO_2 emissions were set at a cap consistent with a worldwide goal to limit global warming to 2ºC, and (ii) that that scenario was an input into Secretary of State's assessment of the ANPS at a time when the UK Government had ratified the Paris Agreement and ministers had made the statements to which we referred above. But those facts are irrelevant to the section 5(8) challenge."**

48. This drafting implied that the 2˚C target was simply one of a number of scenarios the SST had considered and that he had also taken the Paris Agreement temperature limit into account. But that was just not true. The SST had assessed the ANPS only against the historic 2˚C limit and not against the more stringent Paris Agreement limit. Had he taken the Paris Agreement into account a substantial difficulty would have presented itself, since according to the DfT's own estimates, Heathrow expansion would cause the 1.5˚C Paris threshold to be breached, with devastating consequences.

49. I felt bound to speak out in a way that would be heard and which would bring the correct factual position to public attention.

D. THE CONSEQUENCES OF MY ACTION

50. I recognise that my action caused substantial annoyance and inconvenience and I apologise for that - that was not the intent. I did not, however, reveal anything that would not be public knowledge less than a day later and my action did not cause substantial harm.

51. Accurate information is the life-blood of democracy and I succeeded in my objective of ensuring the true relationship between the ANPS and the Paris Agreement threshold of 1.5˚C entered the public domain.

52. In particular my action, and the publicity it generated, caused more than a 100 leading scientists and economists and others, from all continents, including Sir David King, the Government's former Chief Scientific Adviser, Professor Jeffrey Sachs, former Special Adviser to the UN Secretary General and Caroline Lucas, MP for Brighton, Pavilion to write to Lord Reed, President of the Supreme Court, together with experts from France, Canada, Nigeria, Australia, Vanuatu, Ghana, Guyana, US, Australia, Germany, South Sudan and elsewhere, to write in the following terms:

> **"Dear Lord Reed:**

We write concerning the Supreme Court's decision last December, which ruled that the Government's policy in support of Heathrow expansion was lawful, despite the Government's failure to take into account the Paris Agreement's agreed temperature limits which constitute a key part of its architecture.

There was uncontested evidence before the Court that:

● The expansion of Heathrow Airport would lead to around 40,000,000 tonnes of carbon dioxide emissions from UK aviation by 2050;

● That in order to meet the Paris Temperature Limit (ie 1.5˚C and "well below" 2˚C), carbon dioxide emissions would need to be "net zero" before 2050; and that

● Breaching the Temperature Limits prescribed in the goals of the Paris Agreement would have dire implications for humanity, in particular for the younger generation and the Global South.

The Government did not explain how the expansion of Heathrow Airport could be reconciled with the goals agreed in Paris by every country in the world. To the contrary, it argued that the Paris Agreement was "not relevant". Chris Grayling MP, the Transport Minister at the time, relied instead on the historic 2˚C temperature limit, rejected by governments (including the UK Government) in December 2015. The Court of Appeal ruled that approach unlawful, on the basis that it was the Government's own policy to uphold the Paris Agreement - including its globally agreed temperature limits which are based on impeccable science:

"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 2ºC and to pursue efforts to limit it to 1.5ºC."

Reversing the Court of Appeal's decision, the Supreme Court held that the Paris goals could not be regarded as Government policy (despite the fact that the Government itself had accepted the Court of Appeal's ruling). Consequently, the Court held that there was no requirement on the Government to take the Paris goals set out in Article 2 into account.

We urge you to consider the grave implications of this judgment. The highest court in the United Kingdom has set a precedent that major national projects can proceed, even where they are inconsistent with maintaining the temperature limit on which our collective survival depends. Indeed, the precedent goes further still. It says that the Government is not bound even to consider the goals of an Agreement that is near universally agreed. Not only does that undermine the UK's status as a "champion of the Paris Agreement," just ahead of the critical climate talks in Glasgow

later this year (COP26). It also substantially reduces humanity's prospects of maintaining that limit and hence, averting disaster.

The rule of law, including international law, is a vital part of the fabric of a democratic society and it is key to securing the safety of our interconnected world. We understand why Tim Crosland of Plan B. Earth felt it necessary to raise the alarm about the goals of the Paris Agreement being ignored by British courts. We remind the Court of its own obligations under the Human Rights Act 1998 to safeguard the right to life. That entails taking all reasonable measures to ensure respect for the entirety of the Paris Agreement.

The climate crisis jeopardizes civilization and the natural world alike, with those who have contributed least to the crisis, the younger generation and the Global South, on the frontline. With all that is at stake, in the UK and beyond, we urge the Court to take appropriate steps to mitigate the profound harm its judgment has caused and to consider the actions of Tim Crosland in this light.

Yours sincerely"

53. The letter was widely publicised, including in the national media and will be relevant evidence in the context of any application for development consent for Heathrow expansion, and in relation to other matters too.

E. GROUNDS OF APPEAL

54. GROUND 1: In violation of Articles 6 and 10 of the European Convention on Human Rights ("ECHR"), the court below cast a veil over the Appellant's principal line of defence, which was that evidence that Heathrow expansion would breach the Paris Temperature Limit of 1.5˚C, with catastrophic implications, had been wrongly concealed from the public, such that there was an overriding public interest in shining a spotlight on this concealment, in accordance with ECHR Article 10. The judgment of the court below fails even to mention that this was the Appellant's defence.

55. GROUND 2: The court below wrongly disregarded a letter, submitted into evidence on behalf of the Respondent, which had been sent to the Supreme Court by leading scientist and economists, including the Government's former Chief Scientific Adviser, Sir David King, and which stated:

> ***"We understand why Tim Crosland of Plan B. Earth felt it necessary to raise the alarm about the goals of the Paris Agreement being ignored by British courts."***

56. **GROUND 3: Contrary to Article 6 of the ECHR, the court below was not an independent and impartial tribunal since it was also the complainant in the case, in that it had lodged the original complaint against the Appellant to the Attorney General, and also separately filed a complaint against the Appellant to the Bar Council. In so far as such a compromise to impartiality was inevitable, it was incumbent upon the court to adopt appropriate mitigating measures, including by acknowledging the existence of such compromise. It wrongly failed to take any such measures. To the contrary it adopted a number of measures which reinforced the appearance of bias.**

57. **GROUND 4: The Respondent failed to disclose to the Appellant evidence that in July 2020 the Government had a) deliberately breached the Court embargo in the judgment in the case of Shamima Begum; and b) subsequently failed to conduct an investigation into that breach. Such evidence was capable of assisting the Appellant in the conduct of his defence, and ought to have been disclosed in accordance with ECHR Article 6 and the Criminal Procedure and Investigations Act 1996, section 3.**

58. **GROUND 5: The ruling of the court below on costs, which combined with the fine, resulted in an overall financial penalty to the Appellant of £20,000, was oppressive and arbitrary. The Appellant is a full-time volunteer for a small charity. The court below should have followed the principles applicable to costs orders in criminal cases, including that costs ought not to exceed the level of any fine imposed.**

F. GROUND 1 - THE COURT BELOW WRONGLY DISREGARDED THE FACTUAL CONTEXT FOR MY ACTION, CONTRARY TO THE PRINCIPLES SET OUT BY THIS COURT IN *ZIEGLER*

59. My opening submission to the court below began as follows:

> **"My Lords, I broke the embargo on the Heathrow judgment because I believed that:**
>
> > **i) the evidence that Heathrow expansion would breach the Paris Temperature Limit of 1.5˚C, exposing the public to extreme danger, was being deliberately suppressed from the public domain, to smooth the progress of the £14bn project; and that**
> >
> > **ii) the antidote to that suppression was the spotlight of publicity that would follow from breaking the embargo."**

60. I invoked the *dicta* of Lord Bingham in the case of *Shayler*:

> **"Sometimes, inevitably, those involved in the conduct of government, as in any other walk of life, are guilty of error, incompetence, misbehaviour,**

dereliction of duty, even dishonesty and malpractice. Those concerned may very strongly wish that the facts relating to such matters are not made public. Publicity may reflect discredit on them or their predecessors. It may embarrass the authorities. It may impede the process of administration. Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant. Where abuses are exposed, they can be remedied. Even where abuses have already been remedied, the public may be entitled to know that they occurred. The role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge."[20]

61. I cited the *Public Interest Disclosure Act 1998, section 43B*, which though not directly applicable to the circumstances of the case, is nevertheless indicative of public policy in relation to acts of disclosure:

> **"Disclosures qualifying for protection.**
>
> **(1)In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—**
>
> > **....**
> >
> > **(e)that the environment has been, is being or is likely to be damaged, or**
> >
> > **(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."**[21] (emphasis added)

62. It was, in other words, at the heart of my case, that evidence regarding the exceptional dangers of Heathrow expansion had been suppressed, and that the publicity generated by my breach of the embargo was a proportionate antidote to that suppression.

63. My objective of getting accurate information into the public domain succeeded. The following facts are now in the public domain:

    a. At the time of designating the ANPS, the Government was aware that Heathrow expansion was inconsistent with the 1.5˚C temperature limit;

    b. It failed to communicate that to the public.

    c. For the purposes of the ANPS the benchmark applied by the Government was the discredited 2˚C limit.

[20] AB, [X]
[21] AB, [X]

64. The Respondent has rightly not challenged the facts set out at para 63 above. Each proposition is confirmed by the documentary record.

65. As acknowledged by the court below, my action was protected by ECHR Article 10, the right to freedom of expression.

66. The Supreme Court has recently considered the principles to be applied to the prosecution of acts falling within the scope of Articles 10 and 11 of the ECHR in *Ziegler and others*.[22] The lead judgment, delivered by Lord Hamblen and Lord Stephens, highlights that the prosecution and sentencing of a person for an act falling within the scope of Article 10 is itself an interference with that right, and must be justified accordingly:

> **"57. The second certified question relates to both the right to freedom of expression in article 10 and the right to freedom of assembly in article 11. Both rights are qualified in the manner set out respectively in articles 10(2) and 11(2): see paras 14-15 above. Article 11(2) states that "No restrictions shall be placed" except "such as are prescribed by law and are necessary in a democratic society …" In Kudrevičius v Lithuania (2016) 62 EHRR 34, para 100 the European Court of Human Rights ("ECtHR") stated that "The term 'restrictions' in article 11(2) must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards" so that it accepted at para 101 "that the applicants' conviction for their participation in the demonstrations at issue amounted to an interference with their right to freedom of peaceful assembly". Arrest, prosecution, conviction, and sentence are all "restrictions" within both articles. Different considerations may apply to the proportionality of each of those restrictions."**

67. It then set out the five questions that arise in such a case:

> **"58. As the Divisional Court identified at para 63 the issues that arise under articles 10 and 11 require consideration of five questions: see para 16 above. In relation to those questions it is common ground that (i) what the appellants did was in the exercise of one of the rights in articles 10 and 11; (ii) the prosecution and conviction of the appellants was an interference with those rights; (iii) the interference was prescribed by law; and (iv) the interference was in pursuit of a legitimate aim which was the prevention of disorder and the protection of the rights of others to use the highway. That leaves the fifth question as to whether the interference with either right was "necessary in a democratic society" so that a fair balance was struck between the legitimate aims of the prevention of disorder and protection of the rights and freedoms of others and the requirements of freedom of expression and freedom of assembly."**

[22] https://www.supremecourt.uk/cases/docs/uksc-2019-0106-judgment.pdf

68. The question of whether the interference was "necessary in a democratic society" cannot be answered simply by reference to whether the act in question would otherwise be a breach of the criminal law - if that were the case the protection of ECHR Article 10 would confer no protection at all. It cannot, in other words, be justified simply by reference to the general importance of preserving the confidentiality of draft judgments. To the contrary a careful balancing exercise is required, in light of the specific facts of the case:

> **"59. Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case."[23]**

69. Even where the breach of the law (in the case of *Ziegler*, an obstruction of the highway) is more than *de minimis*, it does not follow that interference by way of prosecution is proportionate:

> **"70. It is clear from those authorities that intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11, but both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality. Accordingly, intentional action even with an effect that is more than de minimis does not automatically lead to the conclusion that any interference with the protesters' articles 10 and 11 rights is proportionate. Rather, there must be an assessment of the facts in each individual case to determine whether the interference with article 10 or article 11 rights was "necessary in a democratic society"."**

70. Lord Hamblen and Lord Stephens then considered the factors to be taken into account in the assessment of proportionality:

> **"71. In setting out various factors applicable to the evaluation of proportionality it is important to recognise that not all of them will be relevant to every conceivable situation and that the examination of the factors must be open textured without being given any pre-ordained weight.**
>
> **72. A non-exhaustive list of the factors normally to be taken into account in an evaluation of proportionality was set out at para 39 of the judgment of Lord Neuberger of Abbotsbury MR in City of London Corpn v Samede (see para 17 above). The factors included "the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public". At paras 40-41 Lord Neuberger identified two further factors as being: (a) whether**

[23] *Ibid.* para. 59, per Lord Hamblen and Lord Stephens

> **the views giving rise to the protest relate to "very important issues" and whether they are "views which many would see as being of considerable breadth, depth and relevance"; and, (b) whether the protesters "believed in the views they were expressing". In relation to (b) it is hard to conceive of any situation in which it would be proportionate for protesters to interfere with the rights of others based on views in which the protesters did not believe."**

71. It follows that the nature and extent of potential breaches of the law is just one factor to be considered:

> **"77… So, whilst there is autonomy to choose the manner and form of a protest an evaluation of proportionality will include the nature and extent of actual and potential breaches of domestic law."**

72. Lady Arden, who agreed with the order made by Lord Hamblen and Lord Stephens, explained at §92 that a preconceived approach to what is and is not lawful in the context of acts of protest would be inconsistent with Article 10 and 11:

> **"The Human Rights Act 1998 has had a substantial effect on public order offences and made it important not to approach them with any preconception as to what is or is not lawful."**

73. At §97 Lady Arden quoted from *Navalnyy v Russia* (Application No 29580/12) as follows:

> **"137. The Court has previously held that the exceptions to the right to freedom of assembly must be narrowly interpreted and the necessity for any restrictions must be convincingly established (see Kudrevičius, para 142). In an ambiguous situation, such as the three examples at hand, it was all the more important to adopt measures based on the degree of disturbance caused by the impugned conduct and not on formal grounds, such as non-compliance with the notification procedure. An interference with freedom of assembly in the form of the disruption, dispersal or arrest of participants in a given event may only be justifiable on specific and averred substantive grounds, such as serious risks referred to in paragraph 1 of section 16 of the Public Events Act. This was not the case in the episodes at hand."**

74. The judgment in *Ziegler* was handed down on 25 June 2021, subsequent to the hearing in the court below on 10 May 2021. The case itself was heard on 25 January 2021.

75. The court below, despite its compositional intersection with the court in *Ziegler*, failed to adopt the correct approach to a prosecution which involved an interference with Article 10. To the contrary it adopted precisely the approach it would have adopted to an action that was not an act of conscience, summarising the issues as follows:

> **“16. The principal issues that we have to decide are (1) whether the respondent was responsible for disclosing to the public the outcome of the Supreme Court’s judgment in the Heathrow Airport case prior to the Supreme Court handing down its judgment in breach of an embargo on disclosure; and, if so, (2) whether, when he did so, he was aware of the embargo on disclosure; (3) whether in all the circumstances the respondent’s actions were or created a risk of an interference with the administration of justice that was sufficiently serious to amount to the actus reus of criminal contempt; and (4) whether the respondent had a specific intention to interfere with the administration of justice. If the contempt of court is proved to the criminal standard, it will be necessary to consider questions relating to penalty and costs.”**

76. It misstated my position at §9:

> **“In those emails, the respondent maintained that the Secretary of State for Transport had in June 2018 assessed the ANPS against the historic global temperature limit of 2 degrees Centigrade, a standard which by that date had been rejected by the UK Government and by the wider international community. The respondent said that the fact that this standard had been applied had only come to light through the disclosure process in the Heathrow litigation.”**

77. That was misleading because it failed to communicate that a) it was a fact that the SST had assessed the ANPS against the 2˚C limit and not against the Paris limit and that b) the draft judgment of the Supreme Court had omitted any reference to that fact.

78. The analysis concerning Article 10 is set out at §§39-41. The analysis treats as irrelevant the purpose and factual context for my action, assessing proportionality and necessity only in terms of the embargo itself:

> **“This restriction was clearly necessary in order to achieve the legitimate objective of maintaining the authority of the judiciary and judicial decisions and was a proportionate means of achieving that result.”**

79. Specifically, the court below failed to refer to my belief that the judgment of the Supreme Court concealed from the public the reality of the situation, ie that the expansion of Heathrow Airport would cause the 1.5˚C Paris temperature threshold to be breached with catastrophic consequences, and that my action was necessary to set the record straight.

80. Further, the failure of the court below to engage with my defence was a violation of ECHR Article 6: the right to a fair trial implies at a minimum that a court addresses the defence advanced by the defendant to a criminal trial.

G. GROUND 2 - THE COURT BELOW WRONGLY DISREGARDED THE LETTER SENT IN SUPPORT OF MY POSITION FROM 100+ LEADING SCIENTISTS AND ECONOMISTS

81. The letter sent to the Supreme Court by more than a hundred leading scientists and economists, set out at para 52 above, was central to my defence. It supported my position on the following matters:

    a. The inconsistency between the ANPS and the 1.5˚C Paris threshold (which the authors refer to as *"Humanity's Lifeline"*), which the Supreme Court's judgment had served to conceal from the public

    b. The exceptionally grave consequences of legitimising breach of that limit

    c. The reasonableness of sounding the alarm regarding the approach taken by the Supreme Court

    d. The efficacy of sounding the alarm in the way that I did (ie the letter demonstrated that the alarm had been heard).

82. Further, the letter, and the support expressed for the Appellant by so many leading authorities, was relevant to the issues of sentence and costs, particularly in light of the recommendation that:

> **"The climate crisis jeopardizes civilization and the natural world alike, with those who have contributed least to the crisis, the younger generation and the Global South, on the frontline. With all that is at stake, in the UK and beyond, we urge the Court to take appropriate steps to mitigate the profound harm its judgment has caused and to consider the actions of Tim Crosland in this light."**

83. The court below was wrong to make no reference to this letter in any part of its judgement, appearing to disregard the opinion of so many leading experts, in relation to liability, penalty or costs. The letter was an important consideration in the balancing exercise demanded by ECHR Article 10. The error flowed from its wider failure to give proper consideration to the surrounding factual circumstances, contrary to the principles set out in *Ziegler*.

H. GROUND 3 - THE COURT BELOW WAS NOT AN IMPARTIAL TRIBUNAL, CONTRARY TO ECHR ARTICLE 6

84. ECHR Article 6(1) states:

> **"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …"** (emphasis added)

85. The court below was not an independent and impartial tribunal in this matter, firstly because my action was prompted by my belief that the Supreme Court had misrepresented the facts in its judgment on the Heathrow case; and secondly because it was the Supreme Court that instigated this prosecution. The Registrar of the Supreme Court wrote the letter of complaint to the Attorney General on 17 December 2020.

86. That letter stated:

> **"In light of these events, Lord Reed has decided that the court should refer the matter to the Attorney General so that she can consider whether proceedings should be taken against Mr Crosland for contempt of court. Lord Reed also intends to make a complaint about Mr Crosland's conduct to the Bar Standard Board, so that it can consider whether disciplinary action should be taken."**[24]

87. A complaint was also filed with the Charity Commission against Plan B.Earth. The Supreme Court has since informed me that it was not responsible for this complaint.

88. Given the nature of my defence and the complaints against me made by the Supreme Court, there was a clear compromise to the independence and the impartiality of the trial court. At the very least, there was a risk of the perception of bias. It was, at a minimum, incumbent upon the court below to acknowledge this position, so that the compromise could be mitigated as far as possible. Alternatives should have been considered, such as a trial on indictment.

89. In applying for the proceedings to be live-streamed, in accordance with the Supreme Court's ordinary practice, I made the following observation:

> **"First, the Supreme Court is in this case both complainant and judge. Even if such compromise to the principle of impartiality is inherent to contempt proceedings, it is a circumstance which nevertheless calls for the highest level of openness and transparency …"**[25]

90. Far from acknowledging the compromise to impartiality, on 19 April 2021, the court below, issued a court order which appeared to dispute the existence of any such compromise:

> **"Contrary to the submission of the respondent, the applicant in these proceedings is the Attorney General and not the Supreme Court. It is the Attorney General who is bringing these proceedings and who made the decision to do so …"**[26]

91. I was, of course, aware that the Supreme Court was not the applicant in the proceedings.

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[24] App, [X]
[25] App, [X]
[26] App, [X]

92. Further, the Supreme Court adopted various measures which reinforced the perception of bias, including the following:

    a. Bilateral communication with the Attorney-General concerning these proceedings, contrary to the principle that all parties should be copied into such correspondence;

    b. Delivering a pre-prepared written judgement only 6 minutes after the conclusion of my submissions, such that it as apparent that the judgement had been written prior to hearing my submissions;

    c. Announcing fundamental changes to the procedure to be followed by the court on the afternoon of Friday 7 May afternoon, just half a working day ahead of the hearing on Monday 10 May;

    d. A pick-and-mix approach to the procedures, such that it led me to believe that the rules and procedure applicable to criminal trials would be applied to the case, but for the purpose of the Respondent's costs application, it disregarded the Practice Direction applicable to costs orders in criminal cases;

    e. Breaching my confidentiality and the confidentiality of my children, without warning or explanation, by publishing sensitive material relating to the financial interests of my children, which I had disclosed to the court in confidence out of a duty of candour to the court concerning the matter of costs; and then subsequently amending the judgment without notice to the parties.

    f. Subsequently amending the judgment, without notice to the parties, in a way which served to highlight the sensitive material and draw attention to it.

93. Individually and cumulatively, these matters constituted a violation of my right to a fair trial, which is protected by ECHR Article 6, and invited the perception of bias.

I. GROUND 4 - THE RESPONDENT BREACHED HIS OBLIGATIONS UNDER ECHR ARTICLE 6 BY FAILING TO DISCLOSE TO ME EVIDENCE OF THE GOVERNMENT'S BREACH OF A COURT EMBARGO IN JULY 2020

94. Robert Earl submitted an affidavit on behalf of the Respondent which indicated that the decision to prosecute the Appellant flowed in part from previous breaches of court embargos:

> **"The Applicant has considered carefully whether it is in the public interest to bring these proceedings and has concluded that they are necessary to uphold the due administration of justice. In particular, the Applicant has taken into account the powerful public interest in the courts being able to circulate draft judgments confidentially among the parties … Indeed it is of such significance that the Applicant had cause to issue a media advisory**

notice in October 2020 drawing attention to the importance of observing this confidentiality."[27]

95. The Respondent placed the media advisory notice before the court below at the hearing on 10 May.

96. Further, in his outline submissions the Respondent stated:

> **"... the premature leaking of draft judgement appears to be growing in prevalence and is a matter of serious concern. The Applicant had cause to issue a media advisory notice about this in October 2020 …"**[28]

97. It would have assisted me to know that in July 2020, in the context of the high profile case concerning Shamima Begum, the Government's "serious concern" over the breaching of embargoed court judgements was less apparent.

98. The BBC Report into the breach of the embargo in that case reads as follows:

> **"Separately, the court has revealed that the Sun newspaper will be referred to the Attorney General after it obtained a copy of the Court of Appeal's draft judgement - or its "essential contents" - in advance of it being handed down on 16 July …**
>
> **Lady Justice King, the head of the panel of three judges, said they were referring the newspaper to the Attorney General because of a potential contempt of court in publishing a story about the judgement - <u>seemingly leaked from government</u> - before it was announced in court …**
>
> **Sir Jonathan Jones, the head of the government legal department, is now under pressure to identify who leaked it and report that finding back to the judges. There will only be a handful of people inside the Home Office or elsewhere in Whitehall who knew the outcome.**
>
> **<u>But there is also pressure for Attorney General Suella Braverman</u>. She is simultaneously legally responsible for any decisions to pursue newspapers for contempt of court - and a cabinet minister.**
>
> **And that means her decision on this matter will face the utmost scrutiny."**[29] (emphasis added)

99. There does not appear to be any public information regarding the outcome of this inquiry. In any event no prosecution was commenced. Sir Jonathan Jones resigned in September 2020. In March of this year Sir Jonathan Jones tweeted:

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[27] Affidavit of Robert Earl, para. 20
[28] App, [X]
[29] https://www.bbc.co.uk/news/uk-53607595

"This government has an ambiguous attitude to the law. It wants the full "force of the law" to apply to everyone else (immigrants, covid rule-breakers, protesters ...), but not necessarily to itself."[30]

100. There was an obligation on the Respondent, pursuant to both ECHR Article 6 and the Criminal Procedure Investigations Act 1996, section 3 (not to mention the Respondent's own guidelines on disclosure) to disclose to me material which might have a) assisted my case; or b) undermined the case for the Respondent.

101. Exposing the double-standards of the Government's "concern" was capable of assisting both the court below and me in the fair resolution of this matter, and it was disingenuous of the Respondent to refer to his concern without reference to the events in the Shamima Begum case.

102. In particular, it is hard to conceive of any good faith motive for the breach of the embargo in the Shamima Begum case. The contrast with my motivation for breaching the embargo, and the Respondent's different responses to the respective breaches, was potentially relevant to the analysis under Article 10.

103. As it was, it was left to one of the journalists attending court on 10 May to alert me to what had occurred in the Shamima Begum case. The consequence was that when I should have been addressing the court below on costs, I was instead reading about this matter on my phone for the first time, in order to raise it with the court.

104. It was wrong that I was not given a proper opportunity to consider the implications of this evidence in advance of the hearing.

J. GROUND 5 - THE COURT'S RULING ON COSTS WAS OPPRESSIVE AND UNJUST

105. Up until 2015, I was part of the Government Legal Department. Working alongside the Foreign & Commonwealth Office (as it was then), in 2013 I travelled to Nigeria to assist the Nigerian Government with the development of legislation around national and international security. In the course of that visit, the Office of National Security in Nigeria explained to me how Lake Chad, the primary freshwater resource for 20 million people, had lost 80% of its volume, largely as a result of the climate crisis, driving insecurity in the region and more widely.

106. Partly in consequence of this experience, and because, by this stage there was sufficient financial provision for my children, I left the Government in 2015, firstly to provide legal support to the parties to COP21 (which culminated in the Paris Agreement) and subsequently to establish Plan B. Earth, a small volunteer-based charity focussed on legal action in support of the Paris Agreement goals. I have been an unpaid volunteer since that time.

[30] https://twitter.com/SirJJQC/status/1368531955843731461

107. The Respondent does not dispute that my act was motivated by concern for my children and for the public and it was acknowledged by the court below that the action did not cause any substantial harm.

108. An overall financial penalty of £20,000, imposed upon a full-time charity volunteer, was disproportionate, arbitrary and oppressive. A penalty on this scale appears calculated to cause me and my family substantial hardship.

109. There is no fixed procedure for a contempt of court case before the Supreme Court. Specifically the Rules of the Supreme Court did not apply to the case:

> **"2.—(1) These Rules apply to civil and criminal appeals to the Court and to appeals and references under the Court's devolution jurisdiction."**

110. The court below gave me every indication that criminal procedures would be applied to the case. On 18 March 2021, for example, I had emailed the Court regarding the live-streaming of proceedings and setting out my understanding of the procedure to be followed in what was essentially a criminal trial.

111. On 26 March 2021, the Court Registrar replied on behalf of the court below as follows:

> **"2. As for live streaming, <u>criminal trials</u> are not live streamed and the Justices have decided this practice should be followed in this case. The criteria of a public hearing are met without live streaming.**
>
> **3. As for the procedure at the hearing the sequential procedure will be as you have outlined."** (emphasis added)

112. Consequently, it was my understanding and expectation that any application on behalf of the Applicant for a costs order would be subject to the ordinary principles applicable to criminal proceedings.

113. The *Practice Direction (Costs In Criminal Proceedings) 2015 [2015] EWCA Crim 1568 Consolidated With Amendment No. 1 [2016] EWCA Crim 98* does not apply directly to proceedings before the Supreme Court, but it does establish the principles to be applied to costs orders in criminal proceedings generally. Given the court's indication that the principles applicable to criminal cases would be followed, and the inapplicability of the Rules of the Supreme Court, I had assumed that these principles would govern the approach to any costs order in this case.

114. The Practice Direction states as follows:

> **"The court may make such order payable to the prosecutor as it considers just and reasonable" (§3.1)**

> **"<u>An order should be made where the court is satisfied that the defendant or appellant has the means and the ability to pay</u> ... An order should not be made on the assumption that a third party might pay" (§3.4)**
>
> **"<u>The prosecution should serve upon the defence, at the earliest time, full details of its costs so as to give the defendant a proper opportunity to make representations upon them if appropriate</u> … There is no provision for assessment of prosecution costs in a criminal case, such disputes have to be resolved by the court, which must specify the amount to be paid" (§3.6)**
>
> **"<u>The Divisional Court has held that there is a requirement that any sum ordered to be paid by way of costs should not ordinarily be greatly at variance with any fine imposed</u>."** (§3.7) (emphasis added)

115. The Respondent did not serve me with details of his costs ahead of the trial, so that on 10 May I had no information as to the level of costs being sought.

116. After I raised the Practice Direction with the court below, the court invited further written submissions from the parties. Seemingly in consequence of those submissions, it withdrew the order for costs it had made in open court. Ultimately the court below appeared to follow the Practice Direction in specifying the amount of the costs to be paid.

117. However, the judgment of the court below asserts:

> **"The respondent's reliance on the Crim P D is misplaced as it has effect in magistrates' courts, the Crown Court, the High Court and the Court of Appeal (Criminal Division) (paras 1.1.2, 3.1-3.3). It has no application to proceedings before the Supreme Court."**

118. The court below made a costs order that was three times greater than the fine it imposed, contrary to the principle in the Practice Direction that:

> **"any sum ordered to be paid by way of costs should not ordinarily be greatly at variance with any fine imposed."**

119. Given that the court below had informed me that criminal procedures would be followed, and given that the case was outside the scope of the Supreme Court rules, the court below was wrong to treat the Practice Direction as having "no application". While not applying to the Supreme Court directly, in the circumstances of this case it was nevertheless a relevant consideration. The court below did not offer any principled justification for why the approach to costs orders in criminal cases should be fundamentally different simply by virtue of a case being heard in the Supreme Court, as opposed to in the Crown Court, High Court or Court of Appeal.

120. The court below summarised the financial information, which formed the basis of its decision on costs:

> **"[Mr Crosland] explained that he had a share of the income from properties he owns and rents out with his wife, which came to approximately £1,500 per month, in addition to outgoings of £2,000. This information was before the court and was taken into account when the issue of costs was considered. It appears to be more favourable to him than the details which have since been provided in annex 1 of his written submission …**
>
> **Thirdly, in annex 1 of his written submission he states that he works full time as the unpaid Director of Plan B Earth, a charity. He states that as a result his annual income from letting property and investments is £3,199.76. However, he does own jointly with his wife three properties: the family home and two flats which are let. The combined value of these properties has not been disclosed. The respondent states that the flats are held on trust."**

121. The information I provided in court was an approximation in response to an oral question from the court. The information I provided later in writing derived from the tax return I had submitted for the previous financial year. Since the tax return did not include all my expenses it provided a more favourable overall picture than my initial approximation. I was not asked to provide a value for the real property and did not do so because a) it is not mine to dispose of; b) it relates to the sensitive financial interests of third parties; c) I did not understand the court to be contemplating that the family home should be sold.

122. In any event, as the information before the court makes clear, my disposable income is modest and an overall financial penalty of £20,000 for an act of conscience is oppressive and arbitrary and inconsistent with the balanced approach appropriate to an act of conscience, which caused no substantial harm, and which falls within the scope of ECHR Article 10.

123. Had I been aware that that was the approach to be adopted, I would have been under substantial economic pressure to plead guilty, in addition to self-representing, to minimise legal costs.

124. The application of such economic pressure in the context of proceedings which are essentially criminal, and where liberty is at risk, is fundamentally wrong.

K. CONCLUSION

125. The court below made no reference in its judgment to my motivation in shining a spotlight on evidence which had been concealed; it made no reference to the letter of support I received from 100+ leading scientists and economists. It did, however, consider it necessary to refer to confidential information relating to the financial interests of my children.

126. I have had more than a quarter of a century of experience of litigation, in private practice, as a Government lawyer and as Director of Plan B. I am well used to adverse legal decisions.

127. I did not expect to find myself in the position that I did on 9 December 2020. In a ruling of immense significance, both nationally and internationally, in the build up to COP26 and in the midst of a climate and ecological emergency, which was recognised by Parliament on 1 May 2019, the Supreme Court of the United Kingdom in its draft judgment drew a veil over the reality of what had occurred.

128. That reality was that the Rt Hon Chris Grayling MP did not assess the ANPS in support of Heathrow expansion against the Paris Agreement temperature limit of 1.5˚C, "humanity's lifeline". For reasons best known to himself, which have yet to be explained, he assessed it instead against the historic and discredited 2˚C limit, rejected by nearly all the governments of the world, including the UK government, as posing intolerable risks. Had he assessed the ANPS against the 1.5˚C limit, which demands global decarbonisation by 2050 at the latest, the fundamental impediment to progress of the £14bn project would have been exposed.

129. Inexplicably the draft judgment of the Supreme Court in the Heathrow case, excluded reference to the Mr Grayling's reliance upon the 2˚C target, which was the central fact of the case before it, and stated, contrary to the agreed facts in the case and contrary to Mr Grayling's pleaded position, that he "took the Paris Agreement into account".

130. Preserving the confidentiality of court embargos is important. Conserving the conditions on which the habitability of the planet depends is more important still. Confronted by the situation I found myself in, and believing that breach of the embargo presented my best chance of sounding the alarm loudly, I believe many others would have done the same thing.

131. Laws which support life, which in turn depend on maintenance of the Paris Agreement temperature limit of 1.5˚C, command universal respect. Disregard for the 1.5˚C limit heralds disorder and the end of the rule of law. Article 10 of the European Convention on Human Rights, the right to freedom of expression, was designed in particular to protect those speaking out in circumstances, which might cause them to fall foul of those in authority.

132. Had the court below followed the careful and principled approach articulated by the Supreme Court in *Ziegler and others* applicable to acts of protest falling within the scope of Article 10 (which it failed to do) it would have reached different conclusions.

TIM CROSLAND
THE APPELLANT
14 SEPTEMBER 2021