

Claim No. []

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT**

In the matter of a claim for judicial review

BETWEEN

THE QUEEN

on the application of

PLAN B. EARTH

Claimant

- and -

**THE SECRETARY OF STATE FOR
TRANSPORT**

Defendant

-and-

HEATHROW AIRPORT LIMITED

Interested Party

STATEMENT OF FACTS AND GROUNDS

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LIST OF ESSENTIAL READING¹

The Court is invited to read, in particular:

- This statement of facts and grounds [**PB/B**];
- The Claimant’s witness statement [**PB/C**];
- The Decision [**PB/E**];
- The Claimant’s pre-action protocol letter [**PB/F**].

A. SUMMARY OF THE CLAIM

Summary of the Claim

1. This is an application for judicial review, brought by Plan B Earth (“**Plan B**”). The Claimant seeks:
 - (a) a declaration that the Secretary of State has acted unlawfully by designating the Airports National Policy Statement (“**The NPS**”), which supports the proposed expansion of Heathrow Airport, as a national policy statement on 26 June 2018, under section 5(1) of the Planning Act 2008 (“**the 2008 Act**”).
2. Under section 10 of the 2008 Act, the Secretary of State is bound to exercise his functions under section 5 of the 2008 Act:

“(2) ... with the objective of contributing to the achievement of sustainable development.

(3) For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of—

(a) mitigating, and adapting to, climate change ...”
3. It is implicit that Section 10 requires the Secretary of State at a minimum to give proper consideration to:
 - (i) The Government’s obligations under the Climate Change Act 2008
 - (ii) The advice of the Committee on Climate Change (“**the CCC**”)

¹ References to documents cited take the form “[**PB/x/y**]” where “x” is the tab number and “y” is the page number within the accompanying permission bundle.

- (iii) The Government’s obligations under the Paris Agreement on Climate Change 2015 (“**The Paris Agreement**”)
 - (iv) The Government’s recent commitment to reviewing its climate change targets in light of the Paris Agreement.
4. The Secretary of State has failed to give any or adequate consideration to (ii) to (iv) above and has assessed the NPS against a climate target rejected by the international community as inadequate and dangerous. It is the Claimant’s case that that failure breaches:
- (i) Section 10 of the 2008 Act
 - (ii) the public sector equality duty set out in s. 149 of the Equality Act 2010 (“**the 2010 Act**”)
 - (iii) the Human Rights Act 1998 (“**HRA 1998**”), in particular by disproportionately interfering with the right to life, the right to property, the right to a private and family life and the rights of those with certain protected characteristics to be free from discrimination.

B. THE CLAIMANT

5. Plan B is a charitable incorporated organisation, constituted in June 2016. It was established in response to the call from the governments that negotiated the Paris Agreement for civil society to support the realisation of the goals set out in that Agreement. Further detail about Plan B and the reasons it was set up are set out in the witness statement of Tim Crosland, the Founder and Director of Plan B, (“**TC1**”) §§ 10-12.

C. LEGAL FRAMEWORK AND FACTUAL BACKGROUND

The 2008 Act

6. Section 5 of the 2008 Act provides for the designation of a statement as a ‘national policy statements’:

“5 National policy statements

(1)The Secretary of State may designate a statement as a national policy statement for the purposes of this Act if the statement—

(a)is issued by the Secretary of State, and

(b)sets out national policy in relation to one or more specified descriptions of development.

(2)In this Act “national policy statement” means a statement designated under subsection (1) as a national policy statement for the purposes of this Act.

(3)Before designating a statement as a national policy statement for the purposes of this Act the Secretary of State must carry out an appraisal of the sustainability of the policy set out in the statement ...”.

7. Section 10 of the 2008 Act provides that in exercising his functions under section 5 of the 2008 Act, the Secretary of State must do so:

“(2) ... with the objective of contributing to the achievement of sustainable development.

(3)For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of—

(a)mitigating, and adapting to, climate change ...”

8. The concept of sustainable development is not defined in the 2008 Act but was considered by Collins J (as he was then) in *Scrivens v Secretary of State for Communities & Local Government and Ashford Borough Council* [2013] EWHC 3549 (Admin) (at §10), by reference to the Brundtland definition of sustainable development:

“The NPPF under the heading ‘Achieving sustainable development’ quotes the definition of sustainable development given in Resolution 42/187 of the UN, which is that it meets:—

“... the needs of the present without compromising the ability of future generations to meet their own needs.””

The Government’s legal obligations on climate change

The Climate Change Act 2008 (“**the Climate Act**”)

9. The Climate Act imposes a duty on the Secretary of State for Business, Energy and Industrial Strategy, to ensure that the net UK carbon account for the year 2050 (“**the 2050 Target**”) is at least 80% lower than the 1990 baseline; and to set and implement 5 yearly carbon budgets that are consistent with that target.
10. In 2008 there was an international policy and political consensus that global warming should be limited to 2°C to avoid the worst impacts of climate change. The 2050 Target aligned to that goal with a probability of success of approximately 50% (see CCC report, [TC/1/13]).
11. The Climate Act section 2 provides for the Secretary of State to revise the 2050 Target where there have been:

“... significant developments in—

(i) scientific knowledge about climate change, or

(ii) European or international law or policy”.
12. The Climate Act section 32 establishes the CCC, the government’s independent adviser on climate change, as a body corporate.

The Paris Decision and Agreement 2015

13. In 2015, in light of significant developments in the science, the international community rejected the 2°C limit as inadequate and dangerous. The Paris Agreement on Climate Change was adopted, committing its 195 signatories (including the government of the UK) both to limiting warming to “*well below*” 2°C and to pursuing efforts towards a 1.5°C limit.
14. In the accompanying Decision [TC/1/6], governments recognised the urgency and the gravity of the threat from climate change, and the need to raise ambition:

“Recognizing that climate change represents an urgent and potentially irreversible threat to human societies and the planet ...

Emphasizing with serious concern the urgent need to address the significant gap between the aggregate effect of Parties’ mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent [with the Paris Agreement temperature limit ...]”

15. In November 2016, the United Nations Environment Programme published its “*Emissions Gap Report*” asserting that ‘urgent action’ was necessary to ‘avert disaster’ [TC/1/10]:

“This report estimates we are actually on track for global warming of up to 3.4 degrees Celsius. Current commitments will reduce emissions by no more than a third of the levels required by 2030 to avert disaster. So, we must take urgent action.”

The CCC’s advice to the Government following the Paris Agreement

16. The CCC set out its analysis of the relationship between the 2050 Target and the Paris Agreement in the minutes of a meeting held in September 2016 [TC/1/11]:

“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)”.

17. In October 2016, the CCC published a 60 page report, *UK Climate Action Following the Paris Agreement* [TC/1/13]. Likewise this report emphasises that the Paris Agreement requires more ambitious targets:

“While relatively ambitious, the UK’s current emissions targets are not aimed at limiting global temperature to as low a level as in the Agreement, nor do they stretch as far into the future.”

18. In January 2018, the CCC published “*An independent assessment of the UK’s Clean Growth Strategy*” [TC/1/14] which states (at page 21):

“This [carbon target] currently set in legislation as a reduction of at least 80% on 1990 emissions. However, the Paris Agreement is likely to require greater ambition by 2050 It is therefore essential that actions are taken now to enable these deeper reductions to be achieved.”

19. It also recommended that the Government commission a review of its climate targets later this year (at page 22):

“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.”

The Government’s response to the Paris Agreement and the CCC’s advice

20. In January 2018, the Government published *“A Green Future: Our 25 Year Plan to Improve the Environment”* [TC/1/15]. In this the Government promised leadership by example on climate change, stating that meeting the goal in the Paris Agreement was *“vital for future environmental security”*:

“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.”

21. On 17 April 2018 the Government publicly committed to reviewing its climate targets in light of the Paris Agreement and in line with the CCC’s recommendation [TC/1/16].
22. On 1 May 2018, the Right Hon Claire Perry MP, in an exchange with Barry Gardiner, the Shadow Secretary of State for International Trade, in the House of Commons, implied that the terms of reference for a request were now defined and that the CCC would be asked to ensure the UK reaches a zero-carbon economy by 2050 [TC/1/17]:

“He will also know that we are the first developed nation to have said that we want to understand how we will get to a zero-carbon economy in 2050, and my request to the committee—[Interruption.] ... We were the first country in the world to ask how we will get to decarbonised economy in 2050, and I hope that we would enjoy cross-party support for something so vital”.

23. It is apparent as of June 2018 the Government recognised that:

- (i) compliance with the Paris Agreement is *“vital for future environmental security”*
- (ii) current global commitments are insufficient
- (iii) and that the UK’s climate targets should be reassessed.

Lord Deben’s letter to the Secretary of State of 14 June 2018

24. On 14 June 2018, Lord Deben, the Chair of the CCC, wrote to the Secretary of State, expressing surprise that the Secretary of State had failed to refer to climate change obligations in his statement to the House of Commons [TC/1/9]:

“Dear Secretary of State,

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 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.”

D. THE DECISION UNDER CHALLENGE

25. On 25 June 2018 the House of Commons debated the proposed Airports National Policy Statement the Secretary of State laid before Parliament on 5 June. On 26 June 2018 the Secretary of State designated it as a national policy statement under the provisions of section 5(1) of the Planning Act 2008 [PB/E].

26. The NPS assumes that the current 2050 Target, which remains tied to the anachronistic 2°C limit, is the sole benchmark for assessing the compatibility of the NPS with the UK’s climate change obligations:

“5.71 The UK’s obligations on greenhouse gas emissions are set under the 2008 Climate Change Act. Under this framework, the UK has a 2050 target to reduce its greenhouse gas emissions by at least 80% on 1990 levels, and has a series of five year carbon budgets on the way to 2050”.

27. Specifically, no reference is made to the following matters:

- (i) that the current 2050 Target remains tied to a 2°C temperature limit rejected by the international community as inadequate and dangerous
- (ii) that the Paris Agreement has replaced that limit with compound limit of ‘well below’ 2°C and aiming for 1.5°C
- (iii) that the Government considers compliance with the Paris Agreement to be *“vital for future environmental security”*
- (iv) that the CCC has advised the Government to reassess its targets in light of the Paris Agreement and the IPCC’s report into the implications of the 1.5°C goal; and
- (v) that the Government has agreed to conduct such a review, which is expected to commence shortly.

28. The proposed expansion of Heathrow is a major national project with long-term implications. What matters in the long-run is how it measures up to the UK’s climate change targets once they have been reviewed in light of the Paris Agreement, and not its relation to an outdated target that the Government itself has committed to reviewing.

E. SUMMARY OF GROUNDS FOR JUDICIAL REVIEW

29. The Claimant has four grounds for seeking judicial review of the Secretary of State’s decision:

- (a) It is *ultra vires*, because the effective exercise of the Secretary of State’s power under section 5 of the 2008 Act depends on his compliance with section 10 of the 2008 Act, and he has not complied with that section;
- (b) It is irrational, because it fails to take into account relevant considerations;
- (c) It violates the HRA 1998, in particular by disproportionately interfering with the right to life, the right to property, the right to a private and family life and the rights of those with certain protected characteristics to be free from discrimination.
- (d) It breaches the public sector equality duty set out in s. 149 of the 2010 Act.

30. Each of those grounds is explained below.

F. GROUND 1: ULTRA VIRES

- 31. Section 10 of the 2008 Act is clear that in exercising his functions under section 5 of the 2008 Act the Secretary of State “*must (in particular) have regard to the desirability of ... mitigating, and adapting to, climate change ...*” (emphasis added).
- 32. The effect of a breach of section 10 is that the purported exercise of the Secretary of State’s is *ultra vires*.
- 33. For the reasons set out above it is clear that the Secretary of State is in breach of section 10 of the Act.

G. GROUND 2: IRRATIONAL POLICY

- 34. It is trite law that a public decision-maker must not act irrationally, including by ensuring that she or he takes into account relevant considerations, and properly informs herself or himself regarding all decisions.
- 35. Matters relevant to the exercise of the Secretary of State’s functions under section 10 of the 2008 Act included the following:
 - (i) The UK Government’s obligations under the Paris Agreement
 - (ii) The UK Government’s commitment to reassessing its climate targets in light of the Paris Agreement

- (iii) The overriding importance attached by the Government to compliance with Paris Agreement
 - (iv) The gravity of the risks of non-compliance
 - (v) The Secretary of State's obligations under the Human Rights Act
 - (vi) The Secretary of State's public sector equality duty under the 2010 Act.
36. There is no evidence that the Secretary of State has taken any of the above matters into account in reaching his decision.

H. GROUND 3: HUMAN RIGHTS

37. The Claimant relies upon the HRA 1998 and the rights under the European Convention on Human Rights (“**ECHR**”) incorporated by that instrument: in particular, Article 2, Article 8 and Article 1 of Protocol 1 (“**A1P1**”). The Claimant relies upon these both individually and read in conjunction with Article 14.
38. The Claimant does not assert that it is a ‘victim’ of human rights breach. Rather the Claimant’s case is that:
- (i) Section 3 of the HRA 1998 requires this Court to interpret the 2008 Act in a manner that is compatible with ECHR rights so far as it is possible to do so; and
 - (ii) The Secretary of State’s obligations under the HRA are an essential part of the legal framework he is bound to apply in exercising his functions under the 2008 Act, specifically in relation to section 10.
39. It is generally accepted that unconstrained climate change will have an unprecedented effect on human life, leading to a significant loss of life, serious impacts on health for those who survive and substantial property damage. It is already having a significant effect on the health of those impacted by the rising temperatures, flooding, droughts and other extreme weather events caused or exacerbated by climate change, and/or in respect of decisions people are making about their futures, including decisions on whether to commit to having children in light of the potential risks of climate change.

ECHR and climate change

40. The link between climate change and human rights has long been recognised. For example, the UN Human Rights Council resolution 10/4 on Human Rights and Climate Change acknowledged that:

“...climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence”.

41. The Resolution further recognised that:

“...while these implications affect individuals and communities around the world, the effects of climate change will be felt most acutely by those segments of the population who are already in vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous or minority status and disability”.

42. The view that climate change is inextricably linked to the protection of human rights was explicitly acknowledged by the Office of the High Commissioner for Human Rights (“**OHCHR**”), which stated as follows in a submission to the 21st Conference of the Parties to the UNFCCC in 2015 (underlining added):

“It is now beyond dispute that climate change caused by human activity has negative impacts on the full enjoyment of human rights. Climate change has profound impacts on a wide variety of human rights, including the rights to life...

The human rights framework also requires that global efforts to mitigate and adapt to climate change should be guided by relevant human rights norms and principles including the rights to participation and information, transparency, accountability, equity, and non- discrimination. Simply put, climate change is a human rights problem and the human rights framework must be part of the solution. ...

In the context of climate change, extreme weather events may be the most visible and most dramatic threat to the enjoyment of the right to life but they are by no means the only one. Climate change kills through drought, increased heat, expanding disease vectors and a myriad of other ways ... In order to uphold the right to life, States must take effective measures to mitigate and adapt to climate change and prevent foreseeable loss of life.” (emphasis added)

43. It is clear that the European Court of Human Rights (“ECtHR”), too, recognises that environmental issues are necessarily bound up with human rights protection. On 27 June 2003, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1614 (2003) on environment and human rights. The relevant part of this recommendation states:

“9. The Assembly recommends that the Governments of member States:

(i) ensure appropriate protection of the life, health, family and private life, physical integrity and private property of persons in accordance with Articles 2, 3 and 8 of the European Convention on Human Rights and by Article 1 of its Additional Protocol, by also taking particular account of the need for environmental protection;

(ii) recognise a human right to a healthy, viable and decent environment which includes the objective obligation for states to protect the environment, in national laws, preferably at constitutional level;

(iii) safeguard the individual procedural rights to access to information, public participation in decision making and access to justice in environmental matters set out in the Aarhus Convention ...”.

44. In *Taşkın v. Turkey*² the Court referred to Recommendation 1614 and stated:

“The Court points out that Article 8 applies to severe environmental pollution which may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health ...

² 2004, Application no. 46117/99 [PB/50-78].

The Court points out that in a case involving State decisions affecting environmental issues there are two aspects to the inquiry which it may carry out. Firstly, the Court may assess the substantive merits of the national authorities' decision to ensure that it is compatible with Article 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual."

45. In 2005, the Council of Europe published a "manual on human rights and the environment" ("**the Manual**"). Part II of the Manual describes the environmental principles that can be derived from the ECtHR's rulings. In particular, the manual states:

"... the Court has emphasised that the effective enjoyment of the rights which are encompassed in the Convention depends notably on a sound, quiet and healthy environment conducive to well-being. The subject matter of the cases examined by the Court shows that a range of environmental factors may have an impact on individual convention rights, such as noise levels from airports, industrial pollution, or town planning.

As environmental concerns have become more important nationally and internationally since 1950, the case-law of the Court has increasingly reflected the idea that human rights law and environmental law are mutually reinforcing. Notably, the Court is not bound by its previous decisions, and in carrying out its task of interpreting the Convention, the Court adopts an evolutive approach. Therefore, the interpretation of the rights and freedoms is not fixed but can take account of the social context and changes in society. As a consequence, even though no explicit right to a clean and quiet environment is included in the Convention or its protocols, the case-law of the Court has shown a growing awareness of a link between the protection of the rights and freedoms of individuals and the environment."³ (emphasis added)

46. More specifically, the responsible authorities may owe positive obligations to take action to combat climate change in order to satisfy the right to life enshrined in Article 2. Article 2 places a positive obligation on the Secretary of State to safeguard

³ Council of Europe, Manual on Human Rights and the Environment, pp. 30-31 [PB/H/3-4].

lives, including where a risk to life is created by environmental matters. Such obligations include a requirement to take active measures, such as establishing an appropriate legislative and administrative framework to address the particular features of a relevant situation and to implement policies within that framework that sufficiently safeguard lives. In this respect, the Manual states:

“Given the fundamental importance of the right to life and the fact that most infringements are irreversible, this positive obligation of protection can apply in situations where life is at risk. In the context of the environment, Article 2 has been applied where certain activities endangering the environment are so dangerous that they also endanger human life.”

47. For Article 2 to be engaged, it is not necessary that loss of life has actually occurred. Thus, the State can be under a positive obligation to safeguard life in the event of a natural disaster.⁴ In 2015, as referenced above, a Dutch Court ruled in *Urgenda* that the Dutch Government must increase the ambition of its emission reduction plans, stating:

*“If, and this is the case here, there is a high risk of dangerous climate change with severe and life-threatening consequences for man and the environment, the State has the obligation to protect its citizens from it by taking appropriate and effective measures. For this approach, it can also rely on the aforementioned jurisprudence of the [European Court of Human Rights].”*⁵

48. Likewise, Article 8 can be engaged (and can impose positive obligations)⁶ where environmental factors *“directly and seriously affect private and family life or the home”*.⁷

49. A1P1 will be engaged if there is an interference with peaceful enjoyment of possessions engendered by environmental factors.⁸

⁴ *Budayeva and Others v. Russia*, Application. nos. 15339, 21166, 20058, 11673 and 15343/02, 22 Mar 2008 [PB/G/151-199].

⁵ *The Urgenda Foundation v Kingdom of the Netherlands*, District Court of the Hague [2015] HAZA c/09/00456689, June 2015 [PB/G/280-334].

⁶ *Moreno Gómez v Spain*, Application no. 4143/02, 16 Nov 2004 [PB/G/34-49].

⁷ As in the case of severe pollution: *Fadeyeva v Russia*, Application no. 55723/00, 9 Jun 2005 [PB/E/79-118].

⁸ *Budayeva*, footnote 9 above.

Relevance of international commitments

50. The ECtHR has held that a State's international environmental law obligations help determine the scope of Convention rights. In *Tatar v. Roumanie*,⁹ the Court held that the Romanian Government should have applied norms of international law, as well as national law, but had failed to do so, and that accordingly there had been a breach of Article 8.
51. Likewise, in *Urgenda*, the Dutch Court had regard to the Netherlands' international obligations, in conjunction with its ECHR obligations, in holding that there had been a breach of the duty to protect citizens from harm.
52. This Court should also consider the international commitments into which the UK has entered, as set out above, in delimiting the scope of the Secretary of State's human rights obligations. Those international obligations are relevant not just to the question of whether the Secretary of State is under a positive obligation to safeguard rights, but also to the question of the discretion that should be accorded to him.¹⁰
53. The Government, by signing and ratifying the Paris Agreement, has specifically undertaken "to promote and consider [its] obligations on human rights" in taking action to address climate change¹¹.
54. As recognised by the Government, the threat posed by climate change is in a category of its own. The worst case scenarios for *this century* (the upper boundary of the IPCC projected range is 7.8°C), imply loss of life on an unimaginable scale and the collapse of the order on which civilisation depends.
55. No equivalent situation has as yet been confronted by the case-law. However the HRA 1998 must be interpreted flexibly. It would be surprising if the HRA 1998 did not impose on the Government an obligation to take reasonable and rational measures to preserve the conditions on which the effective enjoyment of all human rights must depend. If the Convention is to serve its purpose it must adapt, and do so quickly.

⁹ 2009, Application no. 67021/01

¹⁰ See paragraph 228 below.

¹¹ Paris Agreement Preamble [**PB/F/88-89**].

56. In relation to these rights, the Secretary of State should be accorded a narrower margin of discretion than might sometimes be the case when he is reaching a decision of this type. That is so for the following reasons:
- (a) the scientific consensus is overwhelming and the Secretary of State accepts that the consequences of climate change are potentially devastating;
 - (b) his scope of his discretion should be constrained by the UK's international law obligations including those under the Paris Agreement, and general principles of law, such as the precautionary principle;
 - (c) it would be startling if the scope of his discretion extended to assessing his HRA obligations, exclusively with reference to the 2050 Target tied to the 2°C limit, rejected by the international community as inadequate and dangerous, while ignoring the Government's commitment to reviewing the target.

I. GROUND 4: PUBLIC SECTOR EQUALITY DUTY

57. Pursuant to s. 149 of the 2010 Act, when the Secretary of State¹² is exercising his functions in relation to sections 5 and 10 of the 2008 Act, he must have:

“...due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.”

58. In particular, the Secretary of State ought to have had due regard to the fact that the young disproportionately bear the burden of climate change. This is particularly so given that section 10 of the 2008 Act requires the Secretary of State to exercise his functions *“with the objective of contributing to the achievement of sustainable*

¹² Who is a “public authority” for the purposes of s. 149 by virtue of being listed in Schedule 19.

development”, a concept which specifically invokes the concept of intergenerational equity.

59. Climate change is further liable to lead to poor relations between, in particular, the young, who bear the burden of climate change, and older generations, whom the young blame for having caused the problem and failing to tackle it in time.
60. The guiding case of *R (Brown) v Secretary of State for Work and Pensions*¹³ sets out six principles which provide guidance to the Court to when the s. 149 duty has been fulfilled. These are:
 - (a) the authority must be aware of the duty;
 - (b) the duty must be fulfilled before and at the time that the relevant function is exercised;
 - (c) the duty must be exercised “*in substance, with rigour and with an open mind*”;
 - (d) the duty is non-delegable;
 - (e) the duty is a continuing one; and
 - (f) it is good practice for the authority to keep a record of its consideration.
61. Applying these to the present case, there is no evidence that the Secretary of State had due regard to the above factors at all at any stage of his decision.
62. For this reason also, the Secretary of State’s decision is unlawful.

J. REMEDY SOUGHT

63. The Claimants accordingly seek a declaration that the Secretary of State has acted unlawfully in the purported exercise of his functions under section 5 of the 2008 Act.

K. AARHUS CONVENTION

64. This claim falls within the scope of the Aarhus Convention. Accordingly, the costs limits set out in CPR 45.3 apply.

¹³ [2008] EWHC 3158 (Admin) §§ 90-96. Approved *inter alia* in *R (Rajput) v Waltham Forest LBC* [2011] EWCA Civ 1577, § 31.

L. PRE-ACTION CORRESPONDENCE

65. The Claimant served the Defendant with a pre-action protocol letter on 1 August 2018. The Defendant responded on 3 August to say that, in light of the 7 August deadline for filing, he did not propose to serve a substantive reply.

M. CONCLUSION

66. For all of the reasons set out above, the Claimants contend that the Secretary of State's decision is unlawful.
67. The Claimants accordingly seek permission to apply for judicial review and the substantive relief set out above. The criteria for the grant of such permission are clearly met in this case:
- (a) the Claimants have a sufficient interest in the matter to which the claim relates;
 - (b) the application has been brought promptly; and
 - (c) there is an arguable case that the grounds for judicial review exist which merit a full investigation at an oral hearing with the parties and relevant evidence.

Tim Crosland
Director, Plan B
3 August 2018