

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-

(1) HEATHROW AIRPORT LIMITED
(2) ARORA HOLDINGS LIMITED

Interested Parties

AMENDED STATEMENT OF FACTS AND GROUNDS

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A. SUMMARY OF THE CLAIM

Introduction

1. This amended Statement of Facts and Grounds is submitted further to §10(1) of Holgate J’s order of 8 October 2018.
2. Plan B is one of a number of claimants to rely on grounds relating to climate change. In summary Plan B contends that the Secretary of State has:
 - (i) failed to explain how the Airports National Policy Statement (“**the NPS**”) is compatible with the UK’s legislated climate change target for 2050 (“**the 2050 Target**”) and the associated planning assumption for UK aviation (“**the planning assumption**”), which aim at a 2°C limit for global warming now rejected by the Government as inadequate;
 - (ii) failed to give any consideration to whether the NPS is compatible with UK Government policy on climate change, which is to limit warming to the more stringent target of 1.5°C and “well below” 2°C, in accordance with the Paris Agreement on Climate Change (“**the Paris Agreement**”) and which is to review and revise the 2050 Target in that light;
 - (iii) misconstrued the Planning Act 2008 (“**the 2008 Act**”), section 5(8) by failing to interpret the phrase “*Government policy relating to the mitigation of, and adaptation to, climate change*” to include consistency with the Paris

Agreement and the 1.5°C and ‘well below’ 2°C limit, in breach of the Human Rights Act 1998, section 3.

3. Friends of the Earth is the lead claimant on the grounds relating to climate change. Plan B adopts the submissions of Friends of the Earth on (i) and (ii) above and makes supplemental submissions on these points. Plan B is the sole claimant to advance the proposition set out at (iii) above. In order to focus the available time on (i) to (iii) above, Plan B now withdraws its Ground 4, relating to the Equality Act 2010 and the public sector equality duty.
4. Plan B contends that had the Secretary of State exercised his functions under the 2008 Act lawfully, he would have been compelled to reach a different decision. Plan B therefore seeks:
 - (i) A declaration that the Secretary of State has acted unlawfully in his designation of the NPS under section 5(1) of the 2008 Act;
 - (ii) An order quashing that decision; and
 - (iii) Such other relief as the Court considers appropriate.

Summary of the Grounds of Claim

Ground 1 – *Ultra vires*

5. Friends of the Earth (CO/3147/2018) advance two Grounds of Claim, which Plan B supports:
 - (a) “Ground 1: failure to explain how the Airports NPS policy takes account of UK climate change policy”; and
 - (b) “Ground 2: breach of the sustainable development duties”.
6. Taken together these two Grounds are equivalent to Plan B’s Ground 1, which is that the Secretary of State’s designation is *ultra vires*, because he has breached the express terms of the 2008 Act, sections 5(8) and 10. Consequently Plan B adopts Friends of the Earth’s submissions on these Grounds, in so far as they relate to Plan B’s Ground 1, and makes only supplemental submissions.

Ground 2 – Irrational policy

7. Plan B's Ground 2 (*'irrational policy'*) does not depend on the wording of the 2008 Act, sections 5(8) or 10.
8. In summary, the argument on Ground 2 is that irrespective of the interpretation of the Planning Act 2008, sections 5 and 10, the Secretary of State's designation of the NPS is irrational given his failure to take into consideration factors that could not sensibly be ignored. Such factors include:
 - (a) the UK Government's ratification of the seminal Paris Agreement in November 2016, which rejected as inadequate the 2°C temperature limit at which the planning assumption currently aims; and
 - (b) the UK Government's subsequent commitment to reviewing its climate change targets to align them to the more the stringent goal of 1.5°C and 'well below' 2°C, which it considers "*vital for future environmental security*"¹, in light of the IPCC Report.

Ground 3 – Breach of the Human Rights Act 1998, section 3

9. Plan B contends that the Human Right Act, 1998, section 3 requires that the phrase "*Government policy relating to the mitigation of, and adaptation to, climate change*" in section 5(8) of the Planning Act 2008 be interpreted and given effect to as including the Paris Agreement, which the Government has advanced, signed and ratified.
10. Climate change is already causing loss of life in the UK and rendering homes in parts of the country uninsurable due to flood risk. Beyond a 'tipping point' in the climate system, demarcated by the Paris Agreement temperature limit of 1.5°C and 'well below' 2°C, the impacts of climate change pose intolerable risks to large parts of the population. It follows that the UK Government has obligations under ECHR Article 2 (the right to life) and 8 (the right to family life) to take reasonable measures to safeguard against the threat.
11. The Government enjoys a wide discretion or 'margin of appreciation' in relation to the measures taken. However, Strasbourg jurisprudence is clear that the scope of that dis-

¹ See TC/1/6

² Beyond Stern: From the Climate Change Programme Review to the Draft Climate Change Bill, Seventh Report of Session 2006–07

cretion is constrained by international treaty obligations and general principles of law such as the precautionary principle.

12. In breach of the Human Rights Act, section 3 the Secretary of State has interpreted sections 5(8) of the Planning Act in a way that excludes the UK's obligations under the Paris Agreement and has failed to evaluate the NPS against the Paris Agreement temperature limit of 1.5°C and "well below" 2°C.

B. THE CLAIMANT

13. 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 (including the UK Government) 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. FACTUAL BACKGROUND

Nb. At the time of drafting the Agreed Statement of Facts has yet to be finalized, and there remains a dispute between the Claimants and the Defendant on the Annex relating to climate change. To preserve Plan B's position, this section duplicates significant parts of the current version of the Annex to the Agreed Statement.

C.1 The current 2050 Target and the derivative planning assumption for aviation aim to limit warming to 2°C. UK Government policy, however, is to limit warming to the more stringent standard of 1.5°C and "well below" 2°C. The Government is currently reviewing the 2050 Target with a view to aligning it to its policy position.

The Climate Change Act and the 2°C Target

14. In 2008, when the UK's Climate Change Act became law, there was a political consensus that limiting global warming to 2°C would be sufficient to avert disaster. The UK

Government's commitment to this consensus was noted by the House of Commons Environmental Committee in its review of the Climate Change Bill²:

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

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

Climate change is on a different scale from any other political challenge. Its potential effects could be both physically and economically devastating. It is not just the size but the timing of these effects that poses such a challenge ...".

15. Consequently the UK's 2050 Target aimed at limiting warming to 2°C. The rationale for the Target is explained in the letter of Lord Adair Turner (then Chair of the CCC) to Ed Miliband, then Secretary of State for DECC of 7 October 2008³:

"To determine a UK emissions reduction target, we first considered what a global target should be and then the UK's appropriate contribution.

The Committee's judgement, on the basis of the IPCC AR4 report, is that adverse human welfare consequences are likely to increase significantly if global temperature rises more than 2°C relative to pre-industrial temperatures ...".

16. The current position is set out on the CCC's website⁴:

"Through the Climate Change Act, the government has committed to:

- *reduce emissions by at least 80% of 1990 levels by 2050*
- *contribute to global emission reductions, to limit global temperature rise to as little as possible above 2°C" (emphasis added).*

² Beyond Stern: From the Climate Change Programme Review to the Draft Climate Change Bill, Seventh Report of Session 2006-07

³ See **TC/1/9**

⁴ See TC/1/10:<https://www.theccc.org.uk/tackling-climate-change/reducing-carbon-emissions/carbon-budgets-and-targets/>

The genesis of the 1.5 degrees target

17. From 2010, the adequacy of the 2°C was subjected to increasing scientific and political scrutiny.
18. In 2011, Christiana Figueres, Executive Secretary of the UNFCCC, warned⁵:
“Two degrees is not enough – we should be thinking of 1.5°C. If we are not headed for 1.5°C we are in big, big trouble.”
19. In 2012, the UNFCCC Conference of the Parties (COP) commissioned an expert review (“Structured Expert Dialogue”) of the adequacy of the 2°C global temperature limit.
20. In 2013, Lord Stern, whose 2007 Review informed the setting of the 2050 Target, gave a presentation to the World Economic Forum in Davos, in which he said⁶:
*“Looking back, I underestimated the risks. The planet and the atmosphere seem to be absorbing less carbon than we expected, and emissions are rising pretty strongly. Some of the effects are coming through more quickly than we thought ...
This is potentially so dangerous that we have to act strongly. Do we want to play Russian roulette with two bullets or one? These risks for many people are existential.”*
21. Also in 2013, the Environmental Audit Committee stated⁷:
“Compared to 2011, the case for strong action to avoid dangerous climate change has strengthened. The world is currently on track to warm by 4°C.”
22. In May 2015, the Structured Expert Dialogue, commissioned by the UNFCCC COP in 2012, issued its Final Report, which concluded⁸:
“The ‘guardrail’ concept, in which up to 2°C of warming is considered safe is inadequate ... Experts emphasised the high likelihood of meaningful differences between 1.5°C and 2°C of warming regarding the level of risk from ... extreme events or tipping points ...”.
23. In December 2015, the 197 Governments which are parties to the UNFCCC united in rejecting the 2°C limit as dangerous and inadequate, by adopting the Paris Agreement on Climate Change, which reframes the limit as follows:

⁵ UN chief challenges world to agree tougher target for climate change, The Guardian, 1.6.2011

⁶ Nicholas Stern: ‘I got it wrong on climate change – it’s far, far worse’, The Guardian, 26.1.2013

⁷ Fifth Report, Progress on Carbon Budgets

⁸ Report of the Structured Expert Dialogue (2015), page 18

“Holding 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”. (emphasis added)

24. Governments also noted in the Preamble to the Paris Decision the urgent need to raise the ambition of their climate change targets:

'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 holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels ...'

UK Government policy on the Paris Agreement and the 1.5°C and “well below” 2°C goal

25. The UK Government was instrumental in the adoption of the Paris Agreement, and the FCO ran an extended network of climate diplomats to support its successful negotiation.
26. In June 2015, in the build up to COP21, the meeting at which the Paris Agreement was adopted, the UK Government made the following intervention at the UN Security Council Debate on Climate Change⁹:

“As an island state, we too face risks. Risks of losing land to the sea, and more frequent – and more dangerous – flooding. However our first national climate change risk assessment, two years ago, found that it could be the indirect, international impacts of climate change that present the greatest risks. We may see food price spikes, large-scale migration, and even state failure ...

That is why we must approach climate change in the same way we approach any other grave threat to our international security – with urgency, effectiveness and determination.”

27. In September 2015, Mark Carney, Governor of the Bank of England, warned of the threat to prosperity from climate change, describing it as “*the tragedy of the horizon*”¹⁰.

⁹ http://www.spainun.org/wp-content/uploads/2015/07/United-Kingdom_CC_201506.pdf

¹⁰ <https://www.bankofengland.co.uk/speech/2015/breaking-the-tragedy-of-the-horizon-climate-change-and-financial-stability>

28. On 16 September 2016, following the adoption of the Paris Agreement, the CCC met to discuss the implications of the Paris Agreement for the UK's climate change targets, concluding: *"that whilst a new long-term target would be needed to be consistent with Paris, and setting such a target now would provide a useful signal of support, the evidence was not sufficient to specify that target now"*.
29. In a subsequent 60 page report, titled UK climate action following the Paris Agreement¹¹, the CCC stated:

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

The Paris Agreement aims to limit warming to well below 2°C and to pursue efforts to limit it to 1.5°C. This is more ambitious than both the ambition underpinning the UK 2050 target and previous international agreements." (emphasis added).

30. It advised waiting for further evidence, such as the IPCC report into 1.5°C, before making any changes.
31. In October 2017 the Government published its Clean Growth Strategy, emphasising its commitment to the Paris Agreement goals¹²:

"Following the success of the Paris Agreement, where Britain played such an important role in securing the landmark deal, the transition to a global low carbon economy is gathering momentum. We want the UK to capture every economic opportunity it can from this global shift in technologies and services ...

Without significant reductions in emissions, the world is likely to be on course for average temperature rise in excess of 2°C above pre-industrial levels, and possibly as much as 5°C for the highest emissions scenarios, by the end of this century ...

Scientific evidence shows that increasing magnitudes of warming increase the likelihood of severe, pervasive and irreversible impacts on people and ecosystems. These climate change risks increase rapidly above 2°C but some risks are considerable below 2°C. This is why, as

¹¹ <https://www.theccc.org.uk/wp-content/uploads/2016/10/UK-climate-action-following-the-Paris-Agreement-Committee-on-Climate-Change-October-2016.pdf>

¹² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700496/clean-growth-strategy-correction-april-2018.pdf

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 ...”.

32. In December 2017, Plan B commenced legal proceedings against the Secretary of State for BEIS, for failing to review and revise the 2050 Target in line with the Paris Agreement. In its submissions the Government acknowledged that¹³:

“The fact that the 2050 target alone is not sufficient to meet the full ambition of the Paris Agreement (i.e. insofar as it relates to net zero emissions and a limit of 1.5° in global increases of temperature) is uncontroversial” (emphasis added).

33. Contradictorily, in his Summary Grounds of Response to Friends of the Earth, the Secretary of State asserts at §62(2) that:

“It was the CCC's view that the 2050 Target is potentially consistent with the Paris Agreement”.

34. That is not a view that the CCC has itself expressed anywhere in the extensive literature it has published on the issue, a point which the Secretary of State implicitly recognizes with his reference¹⁴. The footnote in support of the assertion (“*See the CCC's response filed in CO/16/2018*”) refers to a legal submission made on behalf of the CCC, and not to any evidence.

35. To the contrary, the CCC’s published position is that the Paris Agreement is likely to require a more stringent 2050 Target. Indeed in pre-action correspondence with Plan B, the CCC wrote as follows [TC/1/11]:

“We recognise that the Paris Agreement describes a higher level of ambition than the one that formed the basis of the UK’s existing legislated emission reduction targets ...

Our advice, however, has been not to set new emissions targets now. The Committee does not believe it had the evidence to set such a target now.”

¹³ BEIS Skeleton Argument, §37

¹⁴ See TC/1 §§27-30

36. Lord Krebs, who was himself a member of the CCC in 2016, has summarized the CCC's position as follows¹⁵:

"In the Paris Agreement, governments pledged not only to hold global warming to "well below 2°C above pre-industrial levels", but also to attempt to "limit the temperature increase to 1.5°C ... recognising that this would significantly reduce the risks and impacts of climate change."

The government's statutory advisor, the Committee on Climate Change (the CCC, on which one of us used to sit), advises that in order to stand an evens chance of meeting the 1.5°C aspiration, global emissions of CO₂ need to fall to net zero by the 2040s. The IPCC is producing a special report this year on the case for limiting warming to 1.5°C and pathways for doing so, and is likely to say the same thing.

One of the principles of the UN climate convention is that prosperous nations lead the way. Britain agreed to this back in 1992 and has reaffirmed it many times since. If the science is clear that the global target should be "net zero by 2050", there is no case for the UK setting a later date – and there is a case for making it earlier." (emphasis added).

37. It is correct that the CCC has also said that the 2050 Target "could be consistent" with a 66% probability of limiting warming to 2°C. But that only emphasizes the inconsistency with the aim to limit warming to "well below" 2°C, let alone 1.5°C. Professor James E. Hansen, one of the world's leading climate scientists, summarized the position as follows¹⁶:

"I understand, as well, that the Committee on Climate Change, the sole Interested Party in your case ... claims that the current U.K. emissions reduction target for the year 2050 "could be consistent with a 66% probability of limiting warming to 2°C." ...

First, to say that a target "could be" consistent with warming of 2°C is really to say nothing at all; it is akin to saying that "it might, or might not be consistent."

Second, the research since 2008 that I have undertaken in conjunction with leading international experts indicates that limiting warming to 2°C will not be adequate, over the long run, to avoid planet-wide disastrous consequences. A target that is "consistent with" a 34 percent chance of exceeding 2°C warming, accordingly, must be deemed beyond the pale."

¹⁵ TC/1/17: *Further, faster, deeper: the UK needs a more ambitious Climate Change Act*, Lord Krebs and Joanna Haigh, *The Conversation*, 29 March 2018, <http://theconversation.com/further-faster-deeper-the-uk-needs-a-more-ambitious-climate-change-act-93218>

¹⁶ see TC/1/12

38. In January 2018 the CCC published a report entitled “*An independent assessment of the UK’s Clean Growth Strategy*”. In the course of this report the CCC invited the Secretary of State to commission a review of the 2050 Target in October 2018, following the publication of the IPCC’s report into global pathways for 1.5°C¹⁷:

“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 and for emissions to reach net-zero at some point in the second half of the century. It is therefore essential that actions are taken now to enable these deeper reductions to be achieved ...

... 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.” (emphasis added)

39. Also in January 2018, the Government published “*A Green Future: Our 25 Year Plan to Improve the Environment*” [TC/1/6]. 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.” (emphasis added).

40. On 17 April 2018, the Government announced at the Commonwealth Heads of Government Meeting that it would review and revise its climate change targets to align

¹⁷ see TC/1/5

them to the Paris Agreement, following publication in October 2018 of the IPCC's report into the implications of crossing the 1.5°C threshold of global warming¹⁸.

41. On 1 May 2018, Claire Perry, on behalf of the Government, informed Parliament that the Government wanted to know how to get to a "zero-carbon economy by 2050", and asked for cross-party support for "*something so vital*."¹⁹
42. On 31 July 2018 the Conservative MP, Simon Clarke, sent the Prime Minister a letter, signed by 142 cross-party MPs and 51 members of the House of Lords, welcoming the announcement²⁰:

"We are writing to you to welcome the announcement that the Government will ask the Committee on Climate Change (CCC) for advice on a net zero emissions target, with the aim of bringing our greenhouse gas emissions reduction target in line with the Paris Agreement.

The Paris Agreement commits parties to "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels". In order to achieve this, we will support you in setting a before-2050 net zero greenhouse gas emissions reduction target, and hope that you will enshrine this in law within the lifetime of this Parliament." (emphasis added).

43. Governments, including the UK Government, commissioned the IPCC's report into the implications of 1.5°C global warming in 2015. Governments reviewed the draft report between 8 January and 25 February 2018. The final report, published on 8 October 2018, concluded that²¹:

- (i) the implications for humanity of exceeding the 1.5°C threshold were extremely severe,
- (ii) at current rates of emissions that threshold was likely to be crossed at some point after 2030, and
- (iii) avoiding such an outcome demanded urgent and radical action to reduce GHG emissions.

¹⁸ See TC/1/7

¹⁹ See TC/1/8: <https://hansard.parliament.uk/commons/2018-05-01/debates/BAD2B942-B27A-428E-87B5-6F50B699DCBE/OffshoreWindSector>

²⁰ <https://www.theclimatecoalition.org/joint-letter>

²¹ <http://www.ipcc.ch/report/sr15/>

44. Jim Skea, a co-chair of the IPCC working group on mitigation, and also a member of the CCC, stated²²:

“We have presented governments with pretty hard choices. We have pointed out the enormous benefits of keeping to 1.5C, and also the unprecedented shift in energy systems and transport that would be needed to achieve that. We show it can be done within laws of physics and chemistry. Then the final tick box is political will. We cannot answer that. Only our audience can – and that is the governments that receive it.”

45. On 15 October 2018, the Energy Minister, Claire Perry, together with Paul Wheelhouse, Energy Minister for the Scottish Government and Lesley Griffiths, Energy Minister for the Welsh Government, formally commissioned advice from the CCC on revised climate change targets in accordance with the Paris Agreement²³:

“Last week the Intergovernmental Panel on Climate Change (IPCC) published their special report on the impacts of global warming of 1.5 degrees above pre-industrial levels. This report deepens the scientific evidence base on the implications of pursuing efforts to limit global warming to 1.5 degrees above pre-industrial levels, as set out in the Paris Agreement ...

... Your advice should also provide options for:

- the range which UK greenhouse gas emissions reductions would need to be within, against 1990 levels, by 2050 as an appropriate contribution to the global goal of limiting global warming to well below 2°C above pre-industrial levels, and*
- the range which UK greenhouse gas emissions reductions would need to be within, against 1990 levels, by 2050 as an appropriate contribution towards global efforts to limit the increase to 1.5°C above pre-industrial levels.*

Please provide your advice by the end of March 2019.”

C.2 The proposed expansion of Heathrow is likely to preclude or be precluded by the more stringent 1.5°C and “well below” 2°C temperature limit

46. For consistency even with the discredited 2°C limit, CO₂ emissions from aviation must not exceed the planning assumption for UK aviation of 37.5 Mt CO₂ by 2050.

²² ‘We have 12 years to limit climate change catastrophe, warns UN’, The Guardian, 8 October 2018

²³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/748489/CCC_commission_for_Paris_Advice_-_Scot__UK.pdf

47. As set out in the witness statement of Tim Johnson (in CO/3147/2018), evidence from the Airports Commission, the Government and the CCC indicates that the NPS proposal threatens the viability even of the *current* planning assumption that aims only at the 2°C limit. Inevitably, consistency with the 1.5°C target implies a substantially more stringent planning assumption.
48. In 2013, for example, before the Government had committed to expanding capacity, it was estimating that emissions from UK aviation would be 47 Mt CO₂ by 2050, substantially exceeding the planning assumption limit²⁴:

"Carbon emissions

16. The constrained passenger forecasts lead to a central prediction of CO₂ emissions from aircraft departing UK airports growing from 33.3 million tonnes of carbon dioxide (MtCO₂) in 2010 to 43.5 MtCO₂ by 2030. The range around this forecast is 39.7 - 48.2 MtCO₂. By 2050, UK aviation CO₂ emissions are forecast to be 47.0 MtCO₂, with a range around the forecast of 34.7 - 52.1MtCO₂." (emphasis added)

49. The Airports Commission estimate for emissions by 2050, assuming implementation of the NPS proposal, is 43.5 Mt CO₂²⁵. The Department of Transport's 2017 estimate of emissions for 2050, assuming implementation of the NPS proposal, ranges from a low of 38.1 Mt CO₂ to a high of 44.1 Mt CO₂²⁶.
50. All these estimates exceed the current planning assumption, even as it remains tied to the dangerous and discredited 2°C limit. Compliance with it already depends on 'theoretical' abatement measures, which in practice are likely to be difficult and expensive to implement (see statement of Tim Johnson, §39 ff). It may be inferred that the NPS is inconsistent with the UK Government's policy commitment to the far more stringent limits implied by the Paris Agreement.
51. 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

²⁴see TC/1/13

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/223839/aviation-forecasts.pdf

²⁵ See TC/1/14

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/437260/carbon-further-assessment.pdf, p.19

²⁶ See TC/1/15

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/674749/uk-aviation-forecasts-2017.pdf, p. 106 ff

obligations in his statement to the House of Commons [TC/1/9] and asserting that UK aviation emissions in excess of the planning assumption “*must not be planned for, since this would place an unreasonably large burden on other sectors.*” (emphasis added)

52. Responding to this letter, on 20 June 2018, the Secretary of State wrote:

“I hope you will understand that I am not always able to include all the detail I would like in an oral statement.” (emphasis added)

53. The more stringent climate change targets that are now required for consistency with the Paris Agreement and the 1.5°C goal imply a more stringent planning assumption.

54. The Secretary of State has failed to provide a proper explanation of how the NPS is compatible with the current 2050 Target and the planning assumption, let alone attempted to explain how it could be aligned to more stringent measures required to implement UK Government policy.

C.3 The implications of exceeding the 1.5°C and “well below” 2°C threshold are exceptionally serious and likely to be irreversible and a precautionary approach is required

55. The IPCC report emphasises the extremely dangerous consequences for humanity of exceeding the 1.5°C threshold, whether assessed in terms of the environment, the economy or international security. The Government itself describes climate change as an ‘existential threat’ [TC/1/16].

56. There is a scientific consensus that beyond a certain limit, feedback effects in the climate system will interact and lead to a ‘tipping point’. Crossing such a threshold may lead to conditions inhospitable to human life. Lord Deben, Chair of the CCC, has described the ‘tipping point’ as follows²⁷:

“This refers to the point at which these changes in the climate system lead to runaway global warming. At this stage, what little influence we had on the climate system will no longer have any effect on the outcome. Runaway global warming could lead to mass extinction.”

57. By way of example, ice reflects heat away from the earth’s surface. As the world warms, sea ice melts, to be replaced with dark water which, instead of reflecting heat away from the earth’s surface, absorbs it, speeding up the process of ice melt, in a vi-

²⁷ September 2007, Blueprint for a Green Economy, Submission to the Shadow Cabinet, Chair, John Gummer, p.375

cious cycle of warming. With rising temperatures, forest fires increase in frequency and severity. Trees, which were absorbing CO₂ from the atmosphere, instead release it, further compounding the warming process.

58. Recent research suggests that²⁸:

“The risk of tipping cascades could be significant at a 2°C rise and could increase sharply beyond that point.”

59. This serves only to highlight the inadequacy of aiming for 2°C warming, as the UK 2050 Target currently does. A precautionary approach is required in the face of such risks.

D. THE DECISION UNDER CHALLENGE

56. On 25 June 2018, the House of Commons debated the proposed NPS, which 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.

57. The NPS assumes that the current 2050 Target, which remains tied to the outdated 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”.

58. Specifically, no reference is made to the facts that:

- (i) the 2050 Target aims at the discredited 2°C temperature limit;
- (ii) the Government has committed to the Paris Agreement limit of 1.5°C and ‘well below’ 2°C; or that

²⁸ Trajectories of the Earth System in the Anthropocene, Steffen, Schellnhuber et al, 8252–8259 | PNAS, August 14, 2018, vol. 115, no. 33

- (iii) the Government has committed to a process of review to align the 2050 Target to the Paris Agreement.

E. APPLICABLE LEGAL PRINCIPLES

The precautionary principle

59. Article 191(2) TFEU provides that:

“Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken”

60. The precautionary principle is a central principle of EU law on protection of the environment and of human health, and as such is material to considering the obligations of the Government in relation to climate change.
61. The precautionary principle applies where a relevant threat of serious or irreversible environmental harm is established, and where there is scientific uncertainty as to the damage.
62. The precautionary principle requires that precedence should be given to the protection of public health, safety and the environment, and to the taking of appropriate measures to prevent specific potential risks to those interests. Application of the principle involves the determination of a level of risk which is acceptable, and actions to reduce the risk to such acceptable level
63. In Plan B’s submission, application of the precautionary principle to the context of climate change, requires that the UK Government should, *at a minimum*, revise its climate change targets to be consistent with a 50% probability of limiting warming to 1.5°C (which equates to an 80% probability of limiting warming to 2°C).

The Paris Agreement

64. The Paris Agreement, Article 2, requires that Parties establish domestic emissions reduction targets that are *consistent* with both:
- (a) Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels; and

(b) Pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels.

65. Further both the Paris Agreement and general principles of international law oblige all Parties to establish targets on the basis of equity and the precautionary principle; and developed country Parties, such as the UK, to provide 'leadership' on implementation.

The duty to prevent harm

66. States have the sovereign right to exploit their own resources. They have a corresponding responsibility to ensure activities within their control do not cause substantial damage to other states or areas beyond the limits of national jurisdiction (such as the high seas or outer space). This is described as the 'principle of prevention' or the 'no-harm rule'. The International Court of Justice has held that²⁹:

"A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."

67. The United Nations Framework Convention on Climate Change ("**the UNFCCC**") directly invokes the principle in its Preamble, removing all doubt regarding its application to climate change:

"Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

68. States, therefore, have an obligation to take all appropriate measures to anticipate, prevent or minimize the causes of climate change, in particular through effective measures to reduce greenhouse gas emissions to a level consistent with the Paris Agreement temperature limit.

²⁹ *Pulp Mills on the River Uruguay* (2010) ICJ, para 101

F. GROUND 1: ULTRA VIRES

69. Section 5 of the Planning Act states:

... (7) *A national policy statement must give reasons for the policy set out in the statement.*

(8) *The reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change.*

70. Section 10 of the 2008 Act states 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).

71. At a minimum these sections required the Secretary of State to address in the NPS:

- (i) the fact that the 2050 Target aims at the discredited 2°C temperature limit;
- (ii) the Government’s commitment to the Paris Agreement limit of 1.5°C and ‘well below’ 2°C;
- (iii) the Government’s commitment to a process of review to align the 2050 Target to the Paris Agreement in light of the IPCC report; and
- (iv) the Government’s policy commitment and legal obligation to provide leadership on the implementation of the Paris Agreement.

72. In failing to address these matters, the Secretary of State breached sections 5 and 10 of the 2008 Act. The effect of these breaches is that the purported exercise of the Secretary of State’s power of designation under the 2008 Act is *ultra vires*. Plan B adopts and supports the submissions of Friends of the Earth on its Grounds 1 & 2, in so far as they raise similar arguments.

F. GROUND 2: IRRATIONAL POLICY

73. Ground 2 (*‘irrational policy’*) does not depend on the wording of the 2008 Act, sections 5(8) or 10. Rather, the argument on Ground 2 is that irrespective of the interpretation of the Planning Act 2008, sections 5 and 10, the Secretary of State’s designation of the NPS is irrational given his failure to take into consideration factors that could not sensibly be ignored in the particular circumstances of this case.

63. The distinction between Plan B's Grounds 1 and 2 reflects the distinction drawn by this Court in *R (DSD & NBV) v The Parole Board of England*³⁰:

"If a consideration falls to be taken into account only in certain circumstances, it cannot logically be one which the statute impliedly identifies account must be taken as a matter of legal obligation. If, on the other hand, a matter is so obviously material to a decision on a particular project, it would be Wednesbury unreasonable for the decision-maker to ignore it."

64. The NPS proposal is for a major investment in national infrastructure that would have impacts for many decades into the future. In the circumstances it was irrational for the Secretary of State to close his mind to the facts that:

- (i) the 2050 Target aims at the discredited 2°C temperature limit;
- (ii) the Government has committed to the Paris Agreement limit of 1.5°C and 'well below' 2°C; and that
- (iii) the Government has committed to a process of review to align the 2050 Target to the Paris Agreement in light of the IPCC report.

G. GROUND 3: BREACH OF THE HUMAN RIGHTS ACT, SECTION 3

65. Plan B contends that the Human Right Act, 1998, section 3 requires that the phrase "*Government policy relating to the mitigation of, and adaptation to, climate change*" in section 5(8) of the Planning Act 2008 to be interpreted and given effect to as including the Paris Agreement, which the Government has advanced, signed and ratified.

66. Climate change is already having substantial adverse impacts in the UK. Research has been conducted into the 2003 heat-wave, associated with the loss of 70,000 lives across Europe, which concluded that the loss of lives in London can be attributed to climate change.³¹ According to the Environment Agency more than a million homes in the UK risk becoming uninsurable due to flood risk.³²

67. These impacts will only get worse as climate change progresses. Beyond a 'tipping point' in the climate system, climate change threatens mass loss of life and destruction

³⁰ [2018] EWHC 694 (Admin), §137

³¹ Mitchell et al. *Attributing human mortality during extreme heat waves to anthropogenic climate change* (July 2016)

³² *Rise in flood risk could make one million homes uninsurable*, The Independent, 09.01.11

of property within the UK. The Government itself refers to climate change as an ‘existential threat’ [TC/1/16].

68. It follows that the UK Government has obligations under ECHR Article 2 (the right to life) and Article 8 (the right to family life) to take reasonable measures to safeguard those within its jurisdiction against the threat. In any event, in ratifying the Paris Agreement the UK Government has explicitly undertaken to “respect, promote and consider” its human rights obligations in relation to its climate change policies³³.
69. Further, as the UK Government recognised in its *Climate Change Risk Assessment 2017*³⁴, climate change disproportionately impacts on vulnerable and protected sections of society, engaging the non-discrimination provision of Article 14:

“The UK Climate Change Risk Assessment 2017 Evidence Report highlights that climate risks will affect people differently, depending on their social, economic and cultural environment. Low-income households are particularly susceptible to climate change impacts, as these impacts disproportionately affect their resources. These groups also have lower capacity and resources to adapt. Evaluation of climate risks and actions must consider these distributional effects.”

70. The government has a wide discretion or ‘margin of appreciation’ in choosing its measures. Strasbourg jurisprudence, however, is clear in this regard³⁵: a State’s discretion is constrained by its relevant Treaty obligations and general principles of law, including the precautionary principle.
71. Referring to the decision of the Dutch District Court in *Urgenda*, to which Plan B referred in its original Statement of Facts and Grounds, the Secretary of State says³⁶:
- “This decision is, of course, not in any way binding on the English Courts, and is in any event understood to be under appeal to the Hague Court of Appeal.”*
72. Plan B does not suggest that a decision of the Dutch Courts is binding on the English Courts. But since the decision applies the same Strasbourg jurisprudence, which the

³³ Paris Agreement, Preamble

³⁴

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/584281/uk-climate-change-risk-assess-2017.pdf

³⁵ See, for example, *Tatar v Romania* (App. No. 67021/01, Judgment of 27 January 2009), §112 (available only in French).

³⁶ Secretary of State, Summary Grounds, §18

Secretary of State is required to take into account, to the same global problem of climate change, which arises in this case, the English Courts may nevertheless find the judgement persuasive and certainly of note.

73. On 9 October 2018, the Dutch Court of Appeal upheld the decision of the Dutch District Court in *Urgenda* that the Dutch State had failed to plan for sufficient CO2 emission reductions to safeguard its citizens from climate change.³⁷ Specifically, the Court of Appeal found that the Dutch State was in breach of Articles 2 and 8 of the ECHR:³⁸

"Articles 2 and 8 ECHR

45. *As is evident from the above, the Court believes that it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life. As has been considered above by the Court, it follows from Articles 2 and 8 ECHR that the State has a duty to protect against this real threat ...*

73. *Based on this, the Court is of the opinion that the State fails to fulfil its duty of care pursuant to Articles 2 and 8 ECHR by not wanting to reduce emissions by at least 25% by end-2020. A reduction of 25% should be considered a minimum, in connection with which recent insights about an even more ambitious reduction in connection with the 1.5° C target have not even been taken into consideration ... The very serious dangers, not contested by the State, associated with a temperature rise of 2° C or 1.5° C – let alone higher – also preclude such a margin of uncertainty ...*

74. *On these grounds, the State's reliance on its wide 'margin of appreciation' also fails". (emphasis added)*

74. In summary, the Government's margin of appreciation in this area is constrained by its relevant Treaty obligations, including the Paris Agreement. It follows that, in order to be compatible with Articles 2 and 8, the phrase "*Government policy relating to the mitigation of, and adaptation to, climate change*" in section 5(8) of the Planning Act 2008 should be interpreted and given effect to as including the Paris Agreement, so that the Secre-

³⁷ The Urgenda Foundation v. Kingdom of the Netherlands, District Court of the Hague [2015] HAZA c/09/00456689, June 2015

³⁸ For an English translation of the judgment see:

<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>

tary of State was bound to take into account the 1.5°C and “well below” 2°C target of the Paris Agreement, which he failed to do.

I. CONCLUSION

75. Plan B can only speculate on whether the Secretary of State, in exercising his functions under the 2008 Act, ignored the Government’s policy position on the Paris Agreement and the 1.5°C and ‘well below’ 2°C limit, because:
- (a) He was unaware of these matters;
 - (b) Considered them irrelevant; or
 - (c) Because he found it convenient to do so, since they are manifestly inconsistent with the proposal he wishes to advance.
76. Regardless of the true explanation, the omissions undermine the legitimacy of the proposal, which would create intolerable risks for current and future generations of UK citizens if allowed to progress.
77. For these reasons his decision should be quashed.

Tim Crosland
Director, Plan B
1 November 2018