IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEAL

[2020] EWCA Civ 214

B E T W E E N :

HEATHROW AIRPORT LIMITED

Appellant

-and-

(1) FRIENDS OF THE EARTH LIMITED

(2) PLAN B EARTH

(3) WWF-UK

(4) SECRETARY OF STATE FOR TRANSPORT

(5) ARORA HOLDINGS LIMITED

Respondents

FORM 1 - PERMISSION TO APPEAL
Information about the decision being appealed

References [CA#] are to paragraph numbers in the judgment of the Court of Appeal; and references [DC#] are to paragraph numbers in the judgment of the Divisional Court.

The Appellant has had regard to para 3.1.2 of UKSC Practice Direction 3 and confirms that the "grounds of appeal" within this form comprise less than 10 pages.

A. NARRATIVE OF THE FACTS

1. This challenge relates to a decision by the Secretary of State for Transport to designate the Airports National Policy Statement ('ANPS') on 26 June 2018 under s.5 of the Planning Act 2008 ('PA2008'). The ANPS identifies the need for new 'hub' airport capacity in the South East of England, and identifies a third runway at Heathrow Airport ('the NWR scheme') as the means of meeting that need. The Appellant owns and operates Heathrow Airport, and intends to make an application for development consent under the PA2008 for the construction and operation of the NWR scheme.

2. This application for permission to appeal ('PTA') relates to the 'climate change issues' *[CA183-282]* of the judgment of the Court of Appeal handed down on 27 February 2020 [2020] EWCA Civ 214 in relation to the following claims:
   a. Plan B Earth Limited ('Plan B') C1/2019/1053
   b. Friends of the Earth Limited ('FOE') C1/2019/1056
   c. LB Hillingdon and others C1/2019/1145

   The appeal by LB Hillingdon and others did not relate to the 'climate change issues' and this application does not, therefore, relate to that appeal. On 27 February 2020, the Court of Appeal also handed down judgment in relation to a claim by Heathrow Hub Limited and another [2020] EWCA Civ 213, turning in large part on issues of competition law, in which all grounds were dismissed. That decision is not the subject-matter of this application.

3. The 'climate change issues' were grouped by the Court of Appeal, as follows *[CA184]*;
   a. Climate change issues (3), (4), (5) and (6) – did the Government's commitment to the Paris Agreement constitute government policy on climate change, which the Secretary of State was required to take into account under s.5(8) of the PA2008 ('the s.5(8) ground');
   b. Climate change issue (1) – whether the designation of the ANPS was unlawful because the Secretary of State acted in breach of section 10(3) of the PA2008 ('the s.10(3) ground');
   c. SEA Directive issue (4) – whether the Secretary of State breached the SEA Directive by failing to consider the Paris Agreement ('the SEA ground'); and
   d. Climate change issue (2) – did the Secretary of State err in his consideration of non-CO2 impacts and the effect of emissions beyond 2050 ('the non-CO2 and beyond 2050 ground').

4. The background facts in relation to the climate change grounds are, briefly, as follows:
   a. On 26 November 2008 both the PA2008 and the Climate Change Act 2008 ('CCA2008') received Royal Assent. The PA 2008 set up the new development consent system for nationally significant infrastructure projects, including the setting of policy through National Policy Statements. The CCA2008 set out the mechanism by which the Government would set and achieve climate change objectives in the UK.

b. On 1 July 2015 the Airports Commission ('AC') published its final report, which acknowledged the need for additional runway capacity in the south-east to maintain the UK's 'hub status' and recommended that the additional runway should be the Heathrow north-west runway scheme promoted by Heathrow Airport Limited ('HAL') *[CA21]*.

c. Between July and December 2015 the Secretary of State for Transport ('SST') undertook a review of the AC's Final Report *[CA22]*.

d. In December 2015 the Paris Agreement was concluded as an agreement within the United Nations Framework Convention on climate change. The Paris Agreement included a commitment to restrict the global average temperature to *"well below 2ºC above pre-industrial levels and [to pursue] efforts to limit the temperature increase to 1.5ºC above pre-industrial levels"* (art. 2(1)(a)), as well as an *"aspiration" [CA23]* to achieve net zero greenhouse gas emissions during the second half of the 21st century – a *"balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century"* (art. 4(1)). It requires each state to determine its own contribution to this target (art. 4(2) and (3)) *[CA23]*.

e. On 14 December 2015 the SST announced that the Government accepted the need for expansion and that it would review the AC's shortlisted options and would use a National Policy Statement to establish the policy framework to consider an application for development consent *[CA24]*.

f. From March 2016 the SST engaged consultants to advise on environmental issues involved in the preparation of the ANPS *[CA25/26]*.

g. On 13 October 2016 UK's Committee on climate Change published 'UK climate action following the Paris Agreement' and the Executive Summary's advice to Government was (p.7) that *"Do not set new UK emissions targets now. ...."* The report also said that *"[the] UK 2050 target is potentially consistent with a wide range of global temperature outcomes"* (p.16) *[CA27]*.

h. On 25 October 2016 the SST announced that the Government's 'preferred' option was the NWR scheme at Heathrow *[CA28]*.

i. During 2016-2018 Government Ministers made statements that it was committed to adhering to the Paris Agreement to limit the rise in global temperatures to well below 2ºC and to pursue efforts to limit it to 1.5ºC *[CA208/215]*.

j. On 17 November 2016 the UK ratified the Paris Agreement *[CA29]*.

k. On 2 February 2017 the Department for Transport ('DfT') launched a consultation on the draft ANPS. Alongside the draft ANPS there was published an Appraisal of Sustainability ('AoS') and Habitats Regulations Assessment ('HRA'). On 24 October 2017 the DfT published a revised draft ANPS and an updated AoS and updated HRA *[CA31/32]*.

l. On 25 June 2018 the House of Commons debated and voted to approve the ANPS with a majority of 296. *[CA35]*.

m. On 26 June 2018 the SST designated the ANPS under s.5(1) of the PA2008 and, on the same day, published 'The Airports National Policy Statement: Post Adoption Statement' explaining how environmental considerations and consultation had been taken into account *[CA36]*.

n. The ANPS at para 5.82 stated that *"Any increase in carbon emissions alone is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the project is so significant that it would have a material impact on the ability of government to meet its carbon reduction targets, including carbon budgets."[CA189]*.

5. A Divisional Court (Hickinbottom LJ and Holgate J) heard five claims for judicial review of the decision to designate the ANPS by way of a 'rolled up' hearing over 10 days. By an Order dated 3 May 2019, permission to apply for judicial review on the grounds relating to climate change were refused. The Divisional Court dealt with the climate change issues at [558-660] of its judgment [2019] EWHC 1070 (Admin).

6. The Court of Appeal disagreed on each of the climate change issues and reversed the Divisional Court's judgment. The Court of Appeal found *[CA283]* that *"… The Paris Agreement ought to have been taken into account by the Secretary of State in the preparation of the ANPS, but was not (see paragraphs 222 to 238, and 242 to 261 above)…"*.

B. STATUTORY FRAMEWORK

7. Section 5 of the PA2008 provides that:

"(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.

…

(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) 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. …"

8. Section 10 of the PA2008 provides that:

"(1) This section applies to the Secretary of State's functions under sections 5 and 6.

(2) The Secretary of State must, in exercising those functions, do so 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;

…"

9. Section 1 of the CCA2008 (as originally enacted) provided that:

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

(2) 'The 1990 baseline' means the aggregate amount of—

(a) net UK emissions of carbon dioxide for that year, and

(b) net UK emissions of each of the other targeted greenhouse gases for the year that is the base year for that gas."

10. Section 2 of the CCA2008 provides that the 2050 'target' may be amended "*if it appears to the Secretary of State that there have been significant developments in— (i) scientific knowledge about climate change, or (ii) European or international law or*

policy". The Climate Change Act 2008 (2050 Target Amendment) Order 2019 made on 26 June 2019 amended s.1(1) above to substitute 100% for 80%; this new target is sometimes known as 'net zero'. Carbon 'budgets' must be set by the Secretary of State for successive five year periods beginning with the period 2008-2012, taking into account advice from the UK Committee on Climate Change: see ss.4-10 of the CCA2008.

C. CHRONOLOGY OF PROCEEDINGS

11. The brief chronology of proceedings is as follows:
    a. 1 May 2019 – judgment of Divisional Court
    b. 22 July 2019 – Lindblom LJ grants permission to appeal and grants appeal against refusal of permission to apply for judicial review to the claimants
    c. 18 September 2019 – the Court of Appeal received an application from WWF-UK for permission to intervene
    d. 17 October – 6 November 2019 – hearing of applications / appeals in Court of Appeal
    e. 27 February 2020 – judgment of the Court of Appeal

D. RELEVANT ORDERS MADE IN THE COURTS BELOW

12. Relevant orders are:
    a. 12 September 2018 – Holgate J: order granted adjourning permission applications to a directions hearing on 4 October 2018
    b. 4 October 2018 – Holgate J: order granted adjourning applications for permission to a rolled-up hearing commencing on 11 March
    c. 15 January 2019 – Holgate J: order with directions arising from pre-trial review
    d. 1 May 2019 – Hickinbottom LJ and Holgate J: order of Divisional Court - permission to bring judicial review proceedings in FoE and Plan B claims refused
    e. 22 July 2019 – Lindblom LJ: order granting permission for FoE and Plan B appeals to be heard at an oral hearing
    f. 27 February 2020 – Lindblom, Singh and Haddon-Cave LJJ: Appeals allowed on 'climate change issues' by the Court of Appeal and the following relief was granted:
        i. The Order of Divisional Court was set aside;
        ii. Permission to apply for judicial review was granted;

iii. A declaration was granted that (a) the Secretary of State acted unlawfully in failing to take into account the Paris Agreement on Climate Change when deciding to designate the Airports National Policy Statement in support of the expansion of Heathrow Airport; and (b) the Airports National Policy is of no legal effect unless and until the Secretary of State has undertaken a review of it in accordance with the relevant provisions of the Planning Act 2008;

iv. Permission to appeal was refused.

E. TREATMENT OF ISSUES BY THE COURT OF APPEAL

Ground 1 - the s.5(8) ground

13. This ground was dealt with in the Judgment at *[CA222-233]*. The Court of Appeal found that:

a. Section 5(8) requires the SST to have regard to Government policy, but not to follow or act in accordance with it *[CA223]*.

b. The expression 'Government policy' has a meaning wider than the legal requirements of the Climate Change Act 2008 *[CA224]* and there is no inconsistency between that interpretation and the express language of the Climate Change Act 2008 that set a target of *"at least 80"* by 2050 *[CA225]*.

c. That did not mean that the Paris Agreement was given effect *"through the back door"*, and such a debate did not bear on the meaning of s.5(8). That provision did not require the SST to act in accordance with any particular policy, but to take *"that policy into account and explain how it has been taken into account" [CA226]*.

d. The SST was advised that he was *"legally obliged"* not to take the Paris Agreement into account and that this was *"a material misdirection of law at an important stage in the process"* and was fatal to the decision to designate *[CA227]*.

e. The Government's commitment to the Paris Agreement was clearly part of 'Government policy' at the time of designation *[CA228]*.

f. It is clear that in designating the ANPS the SST did not take Government policy (i.e. the Paris Agreement) into account as required by s.5(8) *[CA233]*.

Ground 2 - the s.10(3) ground

14. This ground was dealt with in the Judgment at *[CA234-238]*. The Court of Appeal found that:

    a. The SST was advised not to take the Paris Agreement into account *[CA236]*.

    b. Even if he had some discretion as to whether to take it into account, it was *"so obviously material"* to the decision that it had to be taken into account *[CA237]*.

    c. This did not mean, however, that the SST was obliged to act in accordance with the Paris Agreement *[CA238]*.

Ground 3 - the SEA ground

15. This ground was dealt with in the Judgment at *[CA242-247]*. The Court of Appeal found that:

    a. The reference to *"international"* in Annex 1 to the SEA Directive includes unincorporated international agreements and that *"objectives"* established at international level also have to be taken into account *[CA243/4]*.

    b. Although there may be a margin of discretion for the SST as to what is relevant, the Paris Agreement was obviously 'relevant' to the plan or programme under consideration *[CA246]*.

Ground 4 - the non-CO2 and beyond 2050 ground

16. This ground was dealt with in the Judgment at *[CA248-261]*. The Court of Appeal found that:

    a. The SST's submissions on post-2050 emissions were closely tied up with his submission that there is no obligation on the SST to take the Paris Agreement into account and has been rejected (as above) *[CA256]*.

    b. The AoS considered non-CO2 emissions but set out that they could not be assessed because of 'scientific uncertainty' *[CA257]*.

    c. In accordance with the 'precautionary principle' scientific uncertainty is not a reason for not taking something into account at all *[CA258]*.

    d. As the ANPS will be *"remitted"* to the SST in accordance with the law, this matter will need to be taken into account *[CA261]*.

F. PROPOSED GROUNDS OF APPEAL

17. The Court of Appeal was wrong in law to find as it did. HAL advances the following grounds of appeal:

Ground 1 – the s.5(8) ground

18. The Paris Agreement (or any Government announcements about it) did not constitute *"Government policy relating to the mitigation of, and adaptation to, climate change"* for the purposes of s 5(8) PA 2008 at the date of designation of ANPS.

Ground 2 – the s.10(3) ground

19. In discharging the duty under s 10(3) PA 2008 *to "have regard to the desirability of... mitigating, and adapting to, climate change"*, the Paris Agreement was not a mandatory material consideration, nor was it a consideration to which a rational Secretary of State was otherwise bound to have regard.

Ground 3 – the SEA ground

20. There Court of Appeal erred in its findings on the SEA ground because:
    a. The Paris Agreement did not contain *"environmental protection objectives"* within the meaning of Annex I to the SEA Directive which were relevant to the decision to designate the ANPS; alternatively
    b. The decision not to include information relating to the Paris Agreement in the Sustainability Appraisal was not *Wednesbury* unreasonable and did not render the Sustainability Appraisal legally defective.

Ground 4 – the 'non-CO2' and 'beyond 2050' ground

21. The Secretary of State's approach to non-CO2 emissions and emissions beyond 2050 was rational and in all other respects lawful.

Ground 5 – relief

22. The Court of Appeal erred in granting the relief it did in circumstances where
    a. the question of compliance with international obligations would be considered at development consent stage by virtue of s 104 PA 2008;
    b. the ANPS was framed in a way which expressly required consideration of the impacts on the relevant climate change obligations as they applied at the date of the consideration of any application for development consent;

c. the Secretary of State was already considering a review of the ANPS in light of the incorporation of the Paris Agreement into domestic law through the amendment to the Climate Change Act 2008; and

d. the decision to designate the ANPS, and the terms of the ANPS, would have been the same even if the Paris Agreement was taken into account in the way the Court of Appeal found it ought to have been and so the Court of Appeal should have declined to grant relief under s.31(2A) of the Senior Courts Act 1981 and / or as a matter of residual discretion.

23. Accordingly, the Court of Appeal's decision was wrong in law.

G. REASONS WHY PERMISSION TO APPEAL SHOULD BE GRANTED

Point of law of public importance

24. The grounds of appeal each raise points of law of general public importance. Most particularly, there is a critically important question as to whether the Secretary of State was required to have regard to, and give reasons in respect of, an unincorporated international treaty, namely the Paris Agreement, in discharging his duties in adopting planning policy under the PA2008. There is also a strong (and indeed compelling) public interest in this matter being considered by the Supreme Court for the following reasons:

a. There is substantial public interest in the expansion of airport capacity in the South East of England. That question, and specifically the question of whether a third runway should be built at Heathrow, is of the highest national importance. It has been the subject of extensive consideration by Parliament, successive governments, and the Courts, as well as general public debate;

b. HAL's own interests also justify the matter being heard by the Supreme Court now. The consequences of the Court's Order for HAL are serious. HAL has made very substantial steps towards seeking development consent for the NWR, including extensive public consultation with further consultation having been planned for this spring. The Court of Appeal's judgment risks material delay to the project, of a magnitude which is likely to be considerably greater than the time it would take for this Court to hear an appeal on an expedited basis. HAL is a regulated entity which has been authorised to, and has, invested many millions

of pounds in assembling expertise and carrying out work to make an application for development consent. The Court of Appeal's Order that the ANPS ceases to have legal effect unless and until a review is completed creates a considerable challenge for HAL;

c. The approach of the Court of Appeal to these issues raises potentially wider issues about the status of unincorporated treaties and Ministerial Statements that may have application beyond the sphere of planning policy – national or otherwise.

Grounds of appeal

Grounds 1 & 2: s 5(8) and s 10(3) PA2008

25. Parliament has chosen to set the UK's approach to climate change through specific mechanisms in the CCA2008, namely (a) setting a 'carbon reduction target' for 2050 and (b) requiring the preparation of 'carbon budgets' to achieve that end.

26. The statutory duties in s 5(8) and s 10(3) require, respectively, the relevant Secretary of State in designating an NPS to give *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; and to have regard to the desirability of mitigating, and adapting to, climate change in the context of a duty to give effect to sustainable development.

27. There is nothing on the face of those provisions which requires the Secretary of State to have regard to an unincorporated international treaty with respect to climate change. The general law in those circumstances is clear from a line of cases in the Supreme Court and House of Lords*: "a domestic decision-maker exercising a general discretion (i) is neither bound to have regard to this country's purely international obligations nor bound to give effect to them, but (ii) may have regard to the United Kingdom's international obligations, if he or she decides this to be appropriate"*: R (Yam) v Central Criminal Court [2016] A.C. 771, per Lord Mance at [35]. See, to similar effect, R v SSHD, ex p. Brind [1991] 1 AC 696, where it was submitted that the unincorporated ECHR was *"a relevant, indeed a vital, factor to which [the Secretary of State was obliged to have proper regard pursuant to the Wednesbury doctrine, with the result that his failure to do so rendered his decision unlawful"*. That submission was rejected by

Lord Ackner at p 761-2 *"The fallacy of this submission is however plain. If the Secretary of State was obliged to have proper regard to the Convention, i.e. to conform with article 10, this inevitably would result in incorporating the Convention into English domestic law by the back door"*.[1]

28. It follows that treating the Paris Agreement (and the Government's stated intention to proceed towards incorporation into domestic law) as *Government policy"* for the purposes of s 5(8), and as a mandatory material consideration in *"having regard to the desirability"* of mitigating and adapting to climate change runs contrary to the common law principles surrounding the dualist system, and to Parliament's intention as expressed in the CCA 2008. The Divisional Court was correct to find Plan B and FOE's arguments in these respects unarguable. The Court of Appeal erred in departing from that view. In particular, at *[CA226]*, the Court of Appeal erred in finding that requiring the Secretary of State to *"take [the Paris Agreement] into account and explain how it has been taken into account"* did not give effect to it by the *"back door"*. It was precisely such a submission – that a decision maker was required to take account of an unincorporated treaty – that was forcefully rejected by the House of Lords in *ex p Brind* and by the Supreme Court in *Hurst*. The Court's reasoning at *[CA230]* (that *"it simply requires the executive to take account of its own policy commitments"* in negotiating, signing and ratifying the Paris Agreement) would have applied equally to the arguments rejected in *ex p Brind* and *Hurst*. The Court of Appeal erred on these fundamental principles.

29. The statutory context here strengthens, rather than weakens, the application of those principles, in particular in two respects:

    a. As to climate change policy, through the CCA2008 Parliament has set the means by which climate change should be addressed. The incorporation of the Paris Agreement was inevitably to come through the mechanisms of the CCA2008 (see in particular s.2). To require the Secretary of State for Transport to act in relation to an unincorporated treaty when the subject matter was governed by an existing statutory target, which was to be revisited in light of Paris, is to cut across

[1] Applied more recently by the Supreme Court in *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189 at [57]-[58].

Parliament's role in giving effect to the treaty. The Divisional Court was correct to find, at *[DC615]*, that UK policy in respect of climate change, based on a national carbon cap, was *"entrenched"* in the CCA2008 and that *"neither Government policy (in whatever form) nor the Paris Agreement can override or undermine the policy as set out in the CCA 2008"*;

b. As to the PA2008, where Parliament intended regard to be had to international obligations, it expressly said so: see s.104. Neither s.5, nor s.10, contain similar duties.

30. For the avoidance of doubt, and as the Divisional Court made clear, the Secretary of State *did* have regard to the desirability of mitigating and adapting to climate change, and addressed that question expressly in his reasons for adopting the ANPS. Indeed, the climate change impacts of the ANPS were central to the Government's consideration of the adoption of the policy. The Divisional Court set out the relevant facts, particularly at [593-601]. Once the Paris Agreement is treated in accordance with proper principles, there can be no possible complaint of a breach of s.5(8) or s.10(3).

31. For all those reasons, there are clear prospects of the Appellant succeeding on these grounds.

Ground 3: SEA

32. At *[CA135-144]*, the Court of Appeal set out the correct approach to challenges based on alleged deficiencies in an SEA, noting *[CA136]* that the requirements of the SEA Directive leave the authority *"with a wide range of autonomous judgment on the adequacy of the information provided"*, justifying the Court adopting a *"conventional 'Wednesbury' standard of review"*. It went on to apply that approach to the challenges by LB Hillingdon & others to alleged deficiencies in the SEA, for instance in relation to alleged failure to have regard to other relevant plans and programmes under Annex I of the SEA Directive *[CA145-160]*. There, the Court of Appeal found that it was a matter of judgment for the Secretary of State as to whether he took into account, for instance, the London Environmental Strategy, or the London Carbon Budgets *[CA155-6]*. That was a conventional, and correct, approach.

33. The Court of Appeal's approach to the Paris Agreement in the context of the SEA Directive was wholly different, despite raising exactly the same question: what

information, in the Secretary of State's judgment, is necessary to be provided under Annex I of the SEA Directive? The Secretary of State was entitled to conclude that information in respect of the Paris Agreement was not required and the Court of Appeal should have found accordingly. Further, given that the Court of Appeal applied 'essentially' the same reasoning as it did under the s.10 issue *[CA246]*, its conclusions on this ground are flawed for the same reasons.

Ground 4

34. It is unclear whether the reasoning at *[CA248-261]* was considered by the Court of Appeal to give a freestanding basis for the relief it granted (see in particular *[CA256]* and *[CA261]*). On one reading, this ground stands or falls with the s.5 and s.10 grounds. However, if the two complaints here *were* found to amount to good reasons for granting relief, then the Court of Appeal erred in so finding. At the outset, it should be recalled that these grounds were reasons challenges *[CA248]*. Conventional principles apply, namely whether reasons are adequate in the statutory context, and whether there is any prejudice arising from any lack of reasons.

35. First, non-CO2 emissions were expressly considered by the Secretary of State: they were not left out of account at all, and reasons were given for the approach taken to them: see *[CA257]*. In particular, reasons were given for *not* further assessing non-CO2 emissions in the AoS, namely that they *"cannot be readily quantified due to the level of scientific uncertainty"*. The Court of Appeal treated this as a failure to take non-CO2 emissions into account, and suggested that the approach was contrary to the precautionary principle *[CA258]*. On the contrary, the reference to non-CO2 emissions meant that they were taken into account. As a matter of judgment, it was concluded that no attempt should be made to quantify them in the AoS, and those reasons were adequate. The precautionary principle can only be engaged in this context through the application of the SEA Directive, to which the same *Wednesbury* principles apply as set out by the Court of Appeal at *[CA135-144]*.

36. Second, the Secretary of State's approach to emissions after 2050 was rational. Having decided to consider the ANPS's effects on climate change by reference to the existing statutory framework in the CCA2008, the question of emissions beyond the 2050 target did not arise. In reality, this argument adds nothing to the grounds based on the Paris Agreement.

Ground 5: relief

37. The Court of Appeal rejected HAL's submissions on relief at *[CA274-280]*. It was wrong to do so. Even if the Secretary of State erred in his approach to the Paris Agreement (and consequential matters), there were four compelling reasons why the Court ought not to have granted relief:

    a. If the grant of development consent would mean that the obligations in the Paris Agreement were not met, that would be a reason to withhold development consent under s.104 PA2008;

    b. More specifically, the ANPS was framed (paras 5.76 and 5.82) in a way which expressly required consideration of the impacts on the relevant climate change obligations as they applied at the date of the consideration of any application for development consent;

    c. The Secretary of State already had before him a request to review (under s.6 PA 2008) the ANPS in light of the incorporation of the Paris Agreement into domestic law through the amendment to the CCA2008. That was being considered, and any decision taken in respect of it would itself be amenable to review (s.13 PA2008). The significance of this point was missed by the Court of Appeal at *[CA275]*. If the outcome of the Secretary of State's consideration was that review was not required, because the amended target in the CCA made no difference to the policy, then that would be a complete answer to the claim in any event;

    d. Even if the Paris Agreement had been taken into account in the way the Court of Appeal found it ought to have been, it could not have made a difference to either the designation decision as a whole, or the terms of the ANPS as adopted.

38. For those reasons, the Court of Appeal ought to have refused relief (under s. 31(2A) Senior Courts Act 1981, or as a matter of discretion) even if it was correct to find that Plan B and FOE's grounds were made out.

Conclusion

39. Permission to appeal should be granted for the reasons given above. A separate application for the expedition of the appeal will be made in writing.

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27 February 2020