IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEAL

[2020] EWCA Civ 214

UKSC 2020/0042 & 0047

B E T W E E N:

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

Appellants

-and-

(1) FRIENDS OF THE EARTH LIMITED
(2) PLAN B. EARTH
(3) SECRETARY OF STATE FOR TRANSPORT

Respondents

PLAN B. EARTH'S OBJECTIONS
TO THE APPELLANTS'
APPLICATIONS FOR PERMISSION TO APPEAL

A. INTRODUCTION

1. The Appellants were Interested Parties in Plan B. Earth's ("Plan B") claim against the Secretary of State for Transport ("SST"), arising out of his purported designation of the Airports National Policy Statement ("ANPS") in support of the expansion of Heathrow Airport. The Court of Appeal upheld Plan B's claim that the designation of the ANPS was unlawful, on the grounds that the SST had failed to take into account the Paris Agreement on Climate Change ("The Paris Agreement"), and refused the Appellants permission to appeal to the Supreme Court. The Appellants now renew their applications for permission to appeal. By contrast, the SST accepts the judgment of the Court of Appeal and does not seek permission to appeal.

2. The Planning Act 2008 ("PA") Section 5(8) imposes on the SST a requirement to explain how a National Policy Statement takes account of "*Government policy relating to … climate change*". Plan B's primary argument was that the SST of the time (the Rt. Hon. Chris Grayling MP), in failing to take into account the Paris Agreement on Climate Change and its objective of limiting global warming to 1.5˚C and "well below" 2˚C, and in taking into account instead the discredited

2˚C global temperature limit[1], which 197 governments, including the UK Government, had rejected in 2015 as inadequate and dangerous, had breached PA Section 5(8).

3. Initially, in defending the claim, the SST asserted that he had *"considered the Paris Agreement in producing the ANPS and explained his position …"*[2]. Following disclosure of his witness statements, however, which revealed that he had used not the Paris Agreement limit as a benchmark, but rather the discredited 2˚C global limit, he acknowledged that he had not taken the Paris Agreement into account after all. He was required by Holgate J to amend his pleadings accordingly and henceforth adopted the position that the Paris Agreement was "not relevant"[3].

4. The Court of Appeal held that the Paris Agreement was indeed part of "*Government policy relating to … climate change*" and that the SST should have taken it into account. The SST now accepts that position and does not seek permission to appeal. On 4 March 2020, the Prime Minister stated in Parliament "*we will ensure that we abide by the judgment and take account of the Paris convention on climate change*"[4].

5. The Interested Parties, who would benefit financially from the expansion of Heathrow Airport, now find themselves in a difficult position. Effectively their contention is that the Government cannot, as a matter of law, have a policy commitment to meeting the objectives of the Paris Agreement, even when it is clear, as a matter of fact, that the Government does have such a commitment.

B. THE GOVERNMENT'S POLICY COMMITMENT TO THE PARIS AGREEMENT

6. The Appellants contend that the Court of Appeal's judgment gives effect to the Paris Agreement through "the back door", raising a legal issue of general public importance. The Court of Appeal properly gave short shrift to this argument:

[1] See SST's Skeleton Argument in the Court of Appeal, §56: "*Nevertheless, the SST does not dispute*
[2] Defendant's DGR, para. 24
[3] Defendant's Amended DGR, para. 24
[4] Hansard, 4 March 2020, Volume 620, https://hansard.parliament.uk/Commons/2020-03-04/debates/034D0B7F-9941-489F-ADDD-69F0E6FC7CA9/Engagements

"*… there is no question of giving effect to the Paris Agreement (an unincorporated international agreement) through "the back door", as Mr Maurici submitted before us. In our view, the debate that took place before the Divisional Court about the possible impact of an international agreement on domestic law that has not been incorporated by legislation enacted by Parliament was a distraction from the true issue. That debate, it seems to us, did not bear on the proper interpretation of a statutory provision deliberately and precisely enacted by Parliament itself, in the words of section 5(8) of the Planning Act*."[5] (our emphasis)

7. As noted by the Court of Appeal, "*the words "Government policy" are words of the ordinary English language. They do not have any specific technical meaning …*"[6].

8. The Court of Appeal did not decide that as a matter of law, the Paris Agreement should be treated as "Government policy" simply because it was an international treaty which the Government had ratified. Rather it concluded as a matter of fact, following detailed evidence and submissions, that Government policy relating to climate change included a commitment to the Paris Agreement and the global temperature limit it establishes. That conclusion followed not only from Government's ratification of the Paris Agreement in November 2016[7]. It followed also from the numerous and unequivocal statements made on behalf of the Government confirming its policy commitment to the Paris Agreement, such as:

    a. The statement of the Rt. Hon. Andrea Leadsom MP, then Minister of State for Energy, on 14 March 2016 that "*The Government believe we will need to take the step of enshrining the Paris goal of net zero emissions in UK law – the question is not whether, but how we do it …*".[8] (our emphasis)
    b. The statement of the Rt. Hon. Amber Rudd MP, then Secretary of State for Energy and Climate Change, on 24 March 2016, that "*As confirmed last Monday during the Report stage of the Energy Bill, the Government will take the step of enshrining into UK law the long-term goal of net zero emissions, which I agreed in Paris last December. The question is not whether we do it but how we do it.*"[9] (our emphasis)

[5] Court of Appeal, judgment, §226
[6] Ibid, §224
[7] Ibid, §228
[8] Ibid, §212
[9] Ibid, §213

c. The Government's statements in its *Clean Growth Strategy*, first published in 2017, such as: "*The UK played a central role in securing the 2015 Paris Agreement in which, for the first time, 195 countries (representing over 90 per cent of global economic activity) agreed stretching national targets to keep the global temperature rise [well] below two degrees. The actions and investments that will be needed to meet the Paris commitments will ensure the shift to clean growth will be at the forefront of policy and economic decisions made by government and businesses in the coming decades.*"[10] (our emphasis)

d. The Government's pleaded position in previous legal proceedings in January 2018 that "…*the Government is fully committed to the objectives in the Paris Agreement, the legal obligation upon the Parties is to prepare, communicate and maintain nationally determined contributions to reduce net emissions, with a view to achieving the purpose of holding global average temperature increases to "well below 2˚C" above pre-industrial levels, and pursuing efforts to limit them to 1.5˚C".*[11] (our emphasis)

e. A letter from the Chair and Deputy Chair of the Committee on Climate Change (Lord Deben and Baroness Brown of Cambridge) on 14 June 2018 to the then Secretary of State for Transport in the following terms: "*The UK has a legally binding commitment to reduce greenhouse gas emissions under the Climate Change Act. The Government has also committed, through the Paris Agreement, to limit the rise in global temperature to well below 2˚C and to pursue efforts to limit it to 1.5˚C. We were surprised that your statement to the House of Commons on the National Policy Statement on 5 June 2018 made no mention of either of these commitments*." (our emphasis)

9. The Court of Appeal was correct to conclude that:

> "*It is clear, therefore, that it was the Government's expressly stated policy that it was committed to adhering to the Paris Agreement to limit the rise in global temperature to well below 2˚C and to pursue efforts to limit it to 1.5˚C.*"[12]

10. Equally it was clear that by the time of the purported designation of the ANPS in June 2018, it was no longer Government policy to aim to limit warming to the discredited global limit of 2˚C.

[10] Ibid, §209
[11] Ibid, §211
[12] Ibid, §216

11. Such factual conclusions, drawn from the voluminous evidence before the Court of Appeal, do not give rise to a legal question appropriate for the Supreme Court.

C. THE DIVISIONAL COURT'S ERROR

12. In June 2018, at the time of the purported designation of the ANPS, the Climate Change Act 2008 ("CCA"), section 1 read as follows:

> *"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."* (our emphasis).

13. The Government had, however, already committed to a review process to introduce a new "net zero" target in accordance with the Paris Agreement and subsequently, on 27 June 2019, the section was amended to read "*at least 100% lower than the 1990 baseline*" (our emphasis).

14. The Divisional Court reached the surprising conclusion that taking the Paris Agreement into account in June 2018 would have been to "undermine" and "override" CCA section 1:

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

15. The Divisional Court's conclusion that CCA section 1 precluded consideration of the Paris Agreement was flawed for two reasons.

16. First, as noted by the Court of Appeal, the term "Government policy" is broader than CCA section 1:

"…we can find no warrant in the legislation for limiting the phrase "Government policy" to mean only the legal requirements of the Climate Change Act. The concept of policy is necessarily broader than legislation."[13]

17. Second, the Divisional Court overlooked the words "*at least*" in CCA section 1, the effect of which is that the provision establishes only a minimum level of ambition, in terms of reducing carbon emissions, but not a maximum. Consequently, CCA s. 1 does not prevent the Government from making a policy commitment to outperform this minimum requirement. As recognized by the Court of Appeal there is therefore "*no inconsistency or contradiction*" in taking into account both the CCA section 1 and the Paris Agreement.[14]

18. There is no prospect of the Supreme Court reviving the flawed reasoning of the Divisional Court.

E. RELIEF

19. The SST stated at a Directions hearing in January 2019 that if he were wrong in holding that the Paris Agreement was "not relevant", he would not pursue a discretionary argument that, had he taken it into account, it would have made no difference to the outcome[15]. It was on that basis that Holgate J rejected Plan B's and Friends of the Earth's applications for disclosure of material in possession of the SST relating to the implications of the Paris Agreement. Neither of the Appellants demurred at the time from the SST's position.

20. Since the ANPS was assessed only for compatibility with the historic CCA section 1 target of 80% emission reductions by 2050 (compared to a 1990 baselines) and the historic, discredited global temperature limit of 2˚C, it is difficult to make sense of the Appellants' submissions that taking into account the more ambitious Paris objective of limiting warming to 1.5˚C and "well below" 2˚C would have made no difference.

21. Even on the basis of the minimum level of ambition of 80% reductions by 2050, which has now been superseded, the Committee on Climate Change had advised

[13] Ibid, §224
[14] Ibid, §225
[15] Ibid, §220

that emissions from UK aviation should be no more than 37.5 MtCO2 by 2050[16] ("the planning assumption" or "aviation target").

22. Yet according to the SST's own evidence, a third runway at Heathrow combined with "best use" of existing capacity would, without compensatory measures, have led to emissions in excess even of that limit:

> *"My team forecast that CO2 emissions with both a Heathrow NWR and best use of existing runway capacity would be 40.8 MtCO2 in 2050."*[17] (our emphasis).

23. It was, in other words, already challenging for the SST to reconcile the ANPS with the relatively low level of carbon emission reductions required by what was the 80% minimum target in the CCA s. 1, never mind the more ambitious reductions implied by the Paris Agreement and the amended CCA s. 1.

24. As noted by the Court of Appeal, the Government's statutory adviser, the Committee on Climate Change, had stated in its Report of October 2016 ("*UK Climate Action Following the Paris Agreement*") that "*to stay close to 1.5˚C, CO2 emissions would need to reach net zero by the 2040s*"[18]. (our emphasis)

25. Further, in line with the Government policy of revising its domestic targets in accordance with the Paris Agreement, CCA section 1 was amended in June 2019 to establish a minimum target of 100% emissions reductions by 2050.

26. On the face of it, the SST's own calculation of the carbon emissions resulting from an expanded Heathrow Airport is at odds with both the Paris Agreement and the amended target in CCA section 1. There is no basis on which the Supreme Court could conclude that taking the Paris Agreement into account would have made no difference to the designation of the ANPS.

27. The Court of Appeal was correct to decide that relief was necessary, stating:

> "*We find it impossible to conclude that it is "highly likely" that the ANPS would not have been "substantially different" if the Secretary of State had gone about his task in accordance with law. In particular, in our view, it was a basic defect in the decision-making process that the Secretary of State expressly decided not to take into account the Paris Agreement at all. That was a fundamentally wrong turn in the whole*

[16] Ibid, §217
[17] First statement of Caroline Low, witness for the SST, §505
[18] Ibid, §207

G. CONCLUSION

28. The decision of the Court of Appeal does not give direct effect to the Paris Agreement. Nor does it require the Government to act on its commitment to the Paris Agreement. It simply requires that the Government, in making planning decisions of long-term, national significance, takes into account its own policy commitment to the Paris Agreement and its objective of limiting global warming to 1.5˚C and "well below" 2˚C. Such an outcome accords with the Government's own stated policy intention, as set out in its *Clean Growth Strategy* (see §8(c) above).

29. The SST is right to accept the decision of the Court of Appeal. The Appellants' isolated applications are misconceived and unarguable.

Tim Crosland
Director, Plan B. Earth
7 March 2020