IN THE COURT OF APPEAL
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
[2019] EWHC 1070 (ADMIN) (HICKINBOTTOM LJ AND HOLGATE J)

APPEAL NO: C1/2019/1053

BETWEEN

THE QUEEN
on the application of
PLAN B. EARTH

Appellant

- and -

THE SECRETARY OF STATE FOR TRANSPORT

Respondent

- and -

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

Interested Parties

APPELLANT'S REPLY TO RESPONDENT AND INTERESTED PARTIES' SKELETON ARGUMENTS

[References in this skeleton are in the form "[CB/x/y]" and "[SB/x/y]" where "CB" is the Core Bundle, "SB" is the Supplementary Bundle, "x" is the tab number and "y" is the page number"]

A. INTRODUCTION

1. The Secretary of State for Transport's ("**SST**") Skeleton argument fails to confront the essence of the Plan B. Earth's ("**Plan B**") appeal, which is that at the time of

the designation of the ANPS in June 2018 "*Government policy relating to … climate change*", for the purposes of s. 5(8) of the 2008 Act, included both:

a) The minimum target established by CCA s. 1 as it was then, to reduce greenhouse gas emissions by at least 80% by 2050 compared to a 1990 baseline; and

b) A commitment to introduce a new UK target in accordance with the Paris Agreement (a commitment which has now been implemented into law, via a change to CCA s. 1).

2. The SST and the court below proceeded on the false assumption that "*Government policy relating to … climate change*" was confined to a) above and that b) above should be disregarded.

3. Both the SST and the court below appear to recognise and rely upon and the expertise of the Committee on Climate Change ("**the CCC**"), the government's statutory adviser on climate change**.** Yet both ignore the unequivocal advice of the CCC that it was "essential" to consider both of these components of Government policy and to make immediate provision for the more stringent target that was implied. In its response to the Government's Clean Growth Strategy, published in January 2018, the CCC stated:

> "*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….*"[1] (emphasis added).

4. Neither the SST nor the court below, have advanced any explanation for disregarding the CCC's clear position on this issue.

5. On 14 June 2018 the Chair of the CCC Lord Deben, and the Deputy Chair Baroness Brown, wrote a joint a letter to the Secretary of State of the time, the Rt Hon Chris Grayling MP, regarding his approach to the ANPS:

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[1] SB [x/y], CCC report, January 2018 "An independent assessment of the UK's Clean Growth Strategy"

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

6. In responding to the CCC by letter dated 20 June 2018[2], the SST omitted to explain that he considered the Paris Agreement irrelevant and that he preferred the historic and discredited 2˚C global limit as his benchmark. Rather he referred to the CCC's concerns as a "detail". If the SST considered the CCC had it wrong, he ought to have made that clear, openly and transparently.

7. The SST and the court below cannot have it both ways. They cannot rely upon the advice of the CCC to explain the irrelevance of the Paris Agreement, while simultaneously ignoring the CCC's unequivocal position that the Paris Temperature Limit, and the Government's commitment to a Paris compliant target were critical factors to be taken into account in the designation of the ANPS.

8. The SST claims the now amended 2050 Target is of no relevance to these proceedings on the basis that it was not "*available to the SST to consider when deciding whether to designate the ANPS*"[3]. The Respondent is correct that the amended target itself was not available at the time of the designation. But the change to legislation confirms and reflects the Government's pre-existing *policy commitment* to introduce a net zero target, in accordance with the Paris Agreement. And that was available for the SST to consider when deciding whether to designate the ANPS, because it was first made by the Government in March 2016, but the SST considered it to be "irrelevant". Legislation does not appear from nowhere. Logically and constitutionally (in the ordinary course of

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[2] CB [x/y], ACSG §97

[3] CB [x/y], SST Skeleton Argument

events), it represents the Legislature's approval to a change to the Executive's pre-existing policy. The 2008 Act s.5(8) requires for good reason the SST to consider the policy of the Executive (and not simply the will of the Legislature).

9. The remainder of this reply responds to more specific points raised in the SST's and Interested Parties' skeleton arguments.

B. THE POSITION OF THE OTHER PARTIES ON S.5(8) OF THE 2008 ACT

10. At §4 of his skeleton argument, the SST highlights that Friends of the Earth did not support the Appellant's interpretation of the s.5(8) of the 2008 Act. That is perfectly correct and proper. It is notable, however, that like the court below, he neglects to mention that seven other Appellants (the Mayor of London, Greenpeace and the five boroughs) expressly and clearly supported the Plan B's interpretation of s.5(8), describing the Paris Agreement as a "key aspect" of the Government's policy on climate change.[4]

C. THE GOVERNMENT'S COMMITMENT TO A PARIS COMPLIANT TARGET

11. Surprisingly, the SST contends that Plan B did not rely on the Government's commitment to introducing a new target, consistent with the Paris Agreement, in the court below, and therefore that it is not open to the Appellant to criticise the court below for failing to consider that commitment:

> "*Moreover, in so far as Plan B now seeks to criticise the Court for having failed to address the Net Zero Commitment independently of the Paris Temperature Limit and the Paris Agreement within which the latter is contained, it is not open to it to do so … the Net Zero Commitment did not feature in the list of issues … Nor was it any part of Plan B's pleaded case below (or its oral submissions)*"[5].

12. The submission is misconceived. The Government's commitment to introducing a Paris compliant target was not "independent" of its policy commitment to the Paris Agreement. It was the *consequence* of its commitment to the Paris Agreement and evidence that compliance with the Paris Agreement was in fact a

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[4] Boroughs skeleton argument in the court below, §96(1)

[5] Respondent skeleton argument, §49

matter of Government policy for the purposes of s.5(8) of the 2008 Act. In ignoring the Government's commitment to introducing a new Paris compliant target, the court below ignored the most compelling evidence in support of Plan B's position that the Paris Agreement was a key component of Government policy relating to climate change.

13. Contrary to the Respondent's submission, Plan B made numerous references to this commitment in the court below. Its Statement of Facts and Grounds, for example, state:

> "*Specifically, no reference is made to the facts that …*
>
> *(iii) the Government has committed to a process of review to align the 2050 Target to the Paris Agreement.*"[6] (emphasis added)

14. Plan B's oral submissions, which were recorded and are available online, included the following:

> "*MR CROSLAND: … What the committee urged the Secretary of State to do was to consider both, the climate change target under the CCA and the Paris Agreement. It goes back to the position they set out so clearly in 2016, where they say now is not the right time to make the changes, we need the evidence from the IPCC. But, in the meantime, we know that change is coming, we know that government has already committed to a net zero target in light of the Paris Agreement, we know the 2050 target is likely to require amendment, so what we have to do is maintain flexibility to go further because otherwise we end up shutting the stable door after the horse has bolted … That is the position of the climate change committee and that is our position.*
>
> *MR JUSTICE HOLGATE: Yes.*"[7] (emphasis added)

15. Moreover, the SST and the court below rely on the Government's position and the court's judgement in the case of *Plan B v SST, BEIS*[8]. The Government's Summary Grounds in that case state:

> "*The Government is fully committed to enshrining the goal of net zero emissions in domestic law in due course.*"[9]

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[6] CB [x/y], Appellant Amended Grounds, §58

[7] SB [x/y]Transcript, 19 March 2019, page 110

[8] Authorities Bundle [x/y]

16. The judge noted in his judgement:

> *"The Government is committed to set a net zero emission target at the appropriate time."* [10]

17. The court below summarises this judgement while omitting the relevant passage[11].

18. Likewise the SST and the court below rely on the CCC's report of October 2016. The court below quotes from this report at length[12], while omitting the reference to the Government's commitment to introducing a net zero target in accordance with the Paris Agreement, which is highlighted in the opening to the report's Executive Summary:

> *"In line with the Paris Agreement, the Government has indicated it intends at some point to set a UK target for reducing domestic emissions to net zero."*[13]

19. The Government's commitment to introducing a new target, consistent with the Paris Agreement, was prominent before the court below via:

- **a.** The Appellant's pleadings and submissions
- **b.** The CCC's report of October 2016, and
- **c.** The judgement in *Plan B v SST, BEIS*

20. The SST's assertion that the Government's commitment to introducing a new target, in line with the Paris Agreement, was not before the court below is therefore just as surprising as the decision of the court below to ignore the commitment in its otherwise detailed judgment.

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[9] SB [x/y], SST BEIS, Summary Grounds, §29

[10] Plan B v SST, BEIS, Judgment, §49

[11] Court below, judgement, §585

[12] Court below, judgment, §581ff

[13] SB [x/y]

D. THE SST'S FAILURE TO EXPLAIN HIS POSITION

21. The SST likewise claims that Plan B's Ground 4, relating to the SST's failure to explain his position regarding the Paris Agreement to consultees, to the CCC and to the Parliament, was not argued below.

22. It is correct that Ground 4 was not originally part of the Plan B's pleaded case. But that is because it was only as a result of these legal proceedings that the SST's true position was finally revealed, i.e. that:

    a. the SST considered the Paris Agreement and the Government's commitment to introducing a new climate change target in line with Paris Agreement to be "irrelevant" to the interpretation of "*Government policy relating to … climate change*" for the purposes of s.5(8) of the 2008 Act; and that

    b. the SST assessed the ANPS against the historic, discredited 2˚C temperature limit, which had been rejected as inadequate by 195 governments in December 2015, as opposed to the Paris Agreement Temperature limit of "well below" 2˚C and 1.5˚C.

23. It would not have been possible to complain about the SST's misrepresentation when pleadings were filed, because at the time no-one (with the possible exception of the SST) was aware that the position had been misrepresented.

24. Once the issue came to light, however, the SST's *volte face* became a prominent feature of the Plan B's case:

    > "*The fundamental point, my Lords, is that the position that the Secretary of State now advances, that the Paris Agreement is irrelevant, was new to these legal proceedings in January. It was not his original position and it was not his position as set out in the ANPS. That gives him this basic problem that the reasons he gave in the ANPS originally, under section 5(8), that did not state the Paris agreement was irrelevant, but gave every impression that international obligations had been considered, these are not the reasons he now gives to the court. So, they can't both be right.*"[14]

25. In his response to the consultation on the ANPS, for example, the SST asserted:

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[14] Transcript, 19 March 2019, page 113

> "*The Government notes the concerns raised about the impact on the UK's ability to meet its climate change commitments; the Government has a number of international and domestic obligations to limit carbon emissions*."[15]

26. More specifically he implied he had in fact been giving careful consideration to the Paris Temperature Limit (while in fact misstating its terms):

> "*The Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) is the first worldwide scheme to address CO2 emissions in any single sector and will be a first important contribution from this sector to meeting the long-term goal set out in the Paris Climate Agreement to pursue effort to limit the global temperature limit to well below 2 degrees Celsius*."[16] (emphasis added)

27. This passage conveyed to consultees that the SST was working on the assumption that the relevant global temperature limit was the Paris Agreement temperature limit, not the historic and discredited 2˚C limit.

28. Initially in defending Plan B's legal action in the court below, the SST asserted:

> "*the Secretary of State considered the Paris Agreement in producing the ANPS …*"[17]

29. The court below concluded that it was legitimate for the SST to regard the Paris Temperature Limit as irrelevant and the historic, discredited 2˚C limit as the more appropriate benchmark for assessing the ANPS. It did not, however, confront the SST's failure to be open about his position through the consultation process or in correspondence with the CCC. A consultation must meet the basic requirements of fairness *(R (Mosely) v Harringay LBC [2014] UKSC 56; [2014] 1 WLR 3947)*. The SST's omissions and misrepresentations were a fundamental breach of that principle.

E. THE 2˚C TEMPERATURE LIMIT

30. The SST acknowledges that "*the 2 degrees temperature limit was taken into account as a material consideration in the ANPS process*"[18] and contends that this was

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[15] CB [x/y], Government response to the consultation on the ANPS, §8.18, [SB/x/y]

[16] CB [x/y], Government response to the consultation on the ANPS, §8.19, [SB/x/y]

[17] CB [x/y], SST's Amended Detailed Grounds of Defence §24, [CB/x/y]

[18] SST, Skeleton Argument, §56

reasonable since that was global temperature limit in 2008, when the historic CCA target was originally set.

31. By the time of the designation of the ANPS, however, nearly ten years later, the 2˚C limit had been rejected by almost all governments (including the UK) on the basis that it would entail intolerable risks for "*people and ecosystems*". The Government's *Clean Growth Strategy*, published in October 2017, which the Respondent acknowledges to be Government policy relating to climate change clearly set out the rational for the change:

> "*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 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 …"*[19] (emphasis added).

32. The Respondent's attempt to justify reliance upon a global temperature limit as the benchmark for assessing the ANPS, which at the relevant time had been rejected by the Government as presenting intolerable risk, should be rejected as the height of irresponsibility.

33. It is pertinent to the SST's credibility on this issue that he has taken a contrary position either side of his designation of the ANPS. As set out at §26 above, during the consultation process it was the Paris Temperature Limit rather than the 2˚C limit that he referred to. And then in December 2018, some six months after the designation of the ANPS, he published a document, as part of his consultation on a UK Aviation Strategy, "*International aviation and the Paris Agreement temperature goals*"[20], revealing that for the purposes of the Aviation Strategy it was the Paris Temperature Limit rather than the historic 2˚C target he considered to be relevant.

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[19] SB [x/y]

[20] SB [x/y]

34. The SST has offered no credible explanation for adopting a different approach to the global temperature limit in designating the ANPS than that he adopted in other contexts.

F. REVIEW UNDER THE PLANNING ACT s. 6

35. On 1 May 2019, Parliament declared a state of climate and ecological emergency. The Rt Hon Michael Gove MP, at the time Secretary of State for the Environment, said:

> *"We recognise that it is an emergency … The next generation will face the consequence if we don't take action."*[21]

36. On 2 May, the CCC recommended that a net zero target be implemented "as swiftly as possible".

37. Consequently the Plan B wrote to the SST seeking a review of the ANPS under s.6 of the 2008 Act. More than four months later the SST is yet to confirm whether or not he plans to conduct a review (an approach at odds with the declaration of emergency).

38. Nevertheless, the SST contends that the mere fact that "the request is being considered" renders this appeal academic.

39. If the designation of the ANPS was fundamentally flawed, as Plan B contends, that flaw cannot be cured SST's agreement to review the ANPS (let alone his agreement to give *consideration* to a request for a review). The procedural tests and legal frameworks for the two processes are clearly distinct. A review assumes the prior approval by Parliament to a lawfully designated ANPS, whereas a review process is at the discretion of the SST. To assert that a review under s. 6 of the 2008 Act can cure an unlawful designation under s. 5 is to assert that the role of Parliament in the designation process can effectively be bypassed.

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[21] SB [x/y]

G. THE ECONOMIC ARGUMENT

40. The SST asserts that *"Plan B opposes any airport expansion but does not challenge chapter 2 of the ANPS, which sets out the need for expansion and estimates losses of up to £45 billion to the UK economy from not increasing capacity"*.[22]

41. The SST's assertion is incorrect. The SST made the same point in the course of his submissions below, which Plan B addressed as follows:

> *"My Lords, Plan B has no position on aviation other than that it should be consistent with the government's policy on climate change, the lynchpin of which is the Paris Agreement temperature limit.*
>
> *In relation to the claimed economic benefits of the ANPS, the only reason we have not said anything about them is because, in our submission, they have just not been relevant to the particular issues that we raise.*
>
> *But since Mr Maurici raises that point, I ask my Lords to recall the evidence that we referred the court to last Wednesday from some of the countries leading economi[sts], including Lord Stern, formally chief economist to the World Bank, Mark Carney, the governor of the Bank of England, both of whom emphasised the grave risks to the economy if climate change is not c[ontained] to agreed limits.*
>
> *The government makes the same point in its Clean Growth Strategy, and I would turn my Lords' attention to bundle 13/147. It is here in the speaking note. This explains how those economic risks may manifest in reality.*
>
> *It is a report of the Environment Agency's assessment:*
>
> > *"Home owners living near rivers and the coast face losing up to 40 per cent of the value of their homes as flood risk makes them uninsurable. More than a million homes and 300,000 businesses are at risk, including those in parts of London, Southend, Brighton, Reading, Birmingham ..."*
>
> *And the list goes on. My Lords, the collapse of property prices due to uninsurable flood risk on the scale envisaged by the Environment Agency would not be good for the economy.*
>
> *It is clear that such risks and the costs of adapting to climate change generally were simply not considered by the Secretary of State in the course of this assessment, and unless and until the climate change impacts are properly addressed in accordance with the Act, including in relation to adaptation, and until the words of the governor*

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[22] SST Skeleton argument, §14

of the Bank of England regarding "the tragedy of the horizon" are taken into account, the claimed economic benefits, in our submission, must be treated with some caution."[23]

42. As evident from the above, in so far as the claimed economic benefits of the proposal are relevant to the issues raised in this appeal, they are contested by Plan B for the simple reason that, as recognised in the Government's *Clean Growth Strategy*, a failure to comply with the Paris Agreement would be likely to have serious adverse consequences for the economy, which were not considered by the SST.

43. More to the point, the SST does not dispute the intolerable risks for humanity, according to the science, inherent in transgressing the Paris Temperature Limit. Unless he disputes those risks, it is impossible to see how he considers it appropriate to assess the risks of the ANPS against a less stringent benchmark, rejected as inadequate and dangerous.

H. THE FIRST INTERESTED PARTY'S DISCRETIONARY ARGUMENT

44. The First Interested Party now seeks to argue that even "*even if [Plan B's] arguments were to be accepted, it is not properly arguable that having regard to those factors could have made any difference to the outcome*".

45. In Plan B's submission that argument is inconsistent with the conduct of these proceedings in the court below.

46. In January 2019, at the pre-trial review, Plan B and Friends of the Earth both made applications for disclosure of material, relevant to the SST's understanding of the implications of the Paris Agreement for the ANPS. The SST denied that such material was necessary on the basis that he did not intend to pursue any discretionary argument:

    "*But the only issue is: was the Secretary of State, as a matter of law, entitled to consider matters as against "existing legal obligations and policy commitments" on climate change as given effect by the Climate Change Act 2008. If he was then the claim fails. If he was not, and the matter had to be considered as against the Paris*

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[23] SB [x/y]

Agreement, FoE's ground will be made out. It does not need more documents to shed light on the thinking within Government on the Paris Agreement and how this might in the future be reflected in, for example, the revision of the 2050 Target under the Act.[24]"

47. Plan B's and Friends of the Earth's applications for disclosure were rejected on the basis of this concession. The First Interested Party was present throughout the pre-trial hearing and gave no indication of an intention to argue the discretionary point. To stay silent while the court below rejected Plan B's application for disclosure on the basis that the discretionary argument would not be taken, only to raise it now, is a misuse of the processes of the court.

48. In any event, it may be inferred from the SST's own evidence that the ANPS would preclude the adoption of any more stringent carbon reduction measures, let alone the net zero target for 2050, which was already envisaged by the Government at the time of the designation.

49. Caroline Low, on his behalf, says as follows[25]:

> "*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.*"

50. On the Secretary of State's own evidence "best use" of the ANPS proposal, without additional measures, would substantially exceed the planning assumption of 37.5 MtCO2 in 2050 consistent with the historic 80% emissions reduction target. In other words best use of a Heathrow NWR and existing capacity imply emissions in excess of the *minimum* target even prior to the more demanding target now adopted.

51. There was no evidence available to the SST, from which he could reasonably have concluded that the ANPS would be consistent with a net zero target, and all the available evidence gave strong indication to the contrary.

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[24] CB [x/y]

[25] SB [x/y], Low, §505

I. CONCLUSION

52. In finding in favour of the Respondent that the Paris Agreement was an "irrelevant consideration" for the purposes "*Government policy relating to … climate change*" the court below ignored the Government's commitment to introducing a net zero target, in line with Paris Agreement, which was first announced in March 2016 and which has now been implemented into law. While claiming to rely on the advice of the CCC, the court below in fact ignored its advice that it was "essential", in designating the ANPS, to allow for a Paris compliant target.

53. Further the court below ignored the Respondent's active misrepresentation through the consultation process to the effect that he *had* considered the ANPS against the Paris Agreement; and ignored that fact that the position he argued before the court below was fundamentally different from the one he had presented through the consultation process.

54. If the court below had given proper account to these matters, and properly considered the advice of the CCC, it would have been driven to the conclusion that the ANPS was fundamentally flawed and that it should be quashed.

Tim Crosland
Director, Plan B
18 September 2019