M25 junction 10/A3 Wisley interchange TR010030

9.114 Applicant's comments to ExA's fourth written question 4.4.1

Rule 8(1)(b)

Planning Act 2008

Infrastructure Planning (Examination Procedure) Rules 2010

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Infrastructure Planning

Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

M25 junction 10/A3 Wisley interchange

Development Consent Order 202[x]

9.114 Applicant's comments to ExA's fourth written question 4.4.1 (Court of Appeal's judgment)

Rule Number:	Rule 8(1)(b)
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Author:	M25 junction 10/A3 Wisley interchange project team, Highways England and Atkins

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Table of contents

1. Introduction

1.1.1 This document provides the *Court of Appeal's judgment* accompanying Highways England's comment to the ExA's fourth written question 4.4.1.

Neutral Citation Number: [2020] EWCA Civ 214

Case Nos: C1/2019/1053, C1/2019/1056 and C1/2019/1145

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
DIVISIONAL COURT
LORD JUSTICE HICKINBOTTOM AND MR JUSTICE HOLGATE
[2019] EWHC 1070 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 February 2020

Before:

Lord Justice Lindblom
Lord Justice Singh
and
Lord Justice Haddon-Cave

- -

Between:	**C1/2019/1053**
R. (on the application of Plan B Earth)	**Claimant**
- and -	
Secretary of State for Transport	**Defendant**
- and -	
(1) Heathrow Airport Ltd. **(2) Arora Holdings Ltd.**	**Interested Parties**
- and -	
WWF-UK	**Intervener**

- -
- -

Mr Tim Crosland, Director of Plan B Earth for the **Claimant**
Mr James Maurici Q.C., Mr David Blundell, Mr Andrew Byass and Ms Heather Sargent
(instructed by **the Government Legal Department**) for the **Defendant**

Mr Michael Humphries Q.C. and Mr Richard Turney (instructed by **Bryan Cave Leighton Paisner LLP**) for the **First Interested Party**
Mr Charles Banner Q.C. (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Second Interested Party**
Ms Helen Mountfield Q.C. and Mr Raj Desai (instructed by **WWF-UK**) for the **Intervener**

And between: **C1/2019/1056**

R. (on the application of Friends of the Earth Ltd.) **Claimant**

- and -

Secretary of State for Transport **Defendant**

- and -

(1) Heathrow Airport Ltd.
(2) Arora Holdings Ltd. **Interested Parties**

- and -

WWF-UK **Intervener**

- -
- -

Mr David Wolfe Q.C., Mr Peter Lockley and Mr Andrew Parkinson (instructed by **Leigh Day**) for the **Claimant**
Mr James Maurici Q.C., Mr David Blundell, Mr Andrew Byass and Ms Heather Sargent (instructed by **the Government Legal Department**) for the **Defendant**
Mr Michael Humphries Q.C. and Mr Richard Turney (instructed by **Bryan Cave Leighton Paisner LLP**) for the **First Interested Party**
Mr Charles Banner Q.C. (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Second Interested Party**
Ms Helen Mountfield Q.C. and Mr Raj Desai (instructed by **WWF-UK**) for the **Intervener**

And between: **C1/2019/1145**

R. (on the application of
(1) London Borough of Hillingdon Council
(2) London Borough of Wandsworth Council
(3) London Borough of Richmond upon Thames Council
(4) Royal Borough of Windsor and Maidenhead Council
(5) London Borough of Hammersmith and Fulham Council
(6) Greenpeace Ltd.
(7) Mayor of London) **Appellants**

- and -

Secretary of State for Transport **Respondent**

- and -

(1) Heathrow Airport Ltd.
(2) Secretary of State for the Environment, Food and Rural Affairs
(3) Transport for London **Interested Parties**
(4) Arora Holdings Ltd.

- and -

WWF-UK **Intervener**

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Mr Nigel Pleming Q.C., Ms Catherine Dobson and Ms Stephanie David (instructed by **Harrison Grant**) for the **First, Second, Third, Fourth, Fifth and Sixth Appellants**
Mr Ben Jaffey Q.C., Ms Catherine Dobson, Ms Flora Robertson and Ms Stephanie David (instructed by **Transport for London Legal**) for the **Seventh Appellant**
Mr James Maurici Q.C., Mr David Blundell, Mr Andrew Byass and Ms Heather Sargent (instructed by **the Government Legal Department**) for the **Respondent**
Mr Michael Humphries Q.C. and Mr Richard Turney (instructed by **Bryan Cave Leighton Paisner LLP**) for the **First Interested Party**
The Second and Third Interested Parties did not appear and were not represented
Mr Charles Banner Q.C. (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Fourth Interested Party**
Ms Helen Mountfield Q.C. and Mr Raj Desai (instructed by **WWF-UK**) for the **Intervener**

Hearing dates: 17, 18, 22 and 23 October 2019
Further written submissions: 1 and 6 November 2019

- - - - - - - - - - - - - - - - - - - -

Judgment Approved by the court for handing down

Lord Justice Lindblom, Lord Justice Singh and Lord Justice Haddon-Cave:

Introduction

1. This is the judgment of the court.

2. Heathrow is a major international airport – the busiest in Europe, and the busiest in the world with two runways. Each year it handles about 70% of the United Kingdom's scheduled long-haul flights, 80 million passengers, and up to 480,000 air traffic movements. Gatwick is the busiest single runway airport in the world and each year handles about 11% of the United Kingdom's scheduled long-haul traffic. If the United Kingdom is to maintain its status as a leading aviation "hub", it is argued that its aviation capacity must increase. Whether this increase in capacity should be supported in national policy, and in particular whether it should involve the construction of a third runway at Heathrow, has long been a matter of political debate and controversy, intensified by concerns over the environmental cost of achieving it, and more recently by the concerted global effort to combat climate change by reducing carbon emissions. These judicial review proceedings, which have reached us in the form of an appeal from the Divisional Court (Hickinbottom L.J. and Holgate J.) and two applications for permission to appeal, do not draw us into that political debate. They do not face us with the task of deciding whether and how Heathrow should be expanded. That is not the kind of decision that courts can make, and is ultimately a political question for the Government of the day. Rather, we are required to consider whether the Divisional Court was wrong to conclude that the Government's policy in favour of the development of a third runway at Heathrow was produced lawfully. That is the question here. It is an entirely legal question.

3. The policy is contained in the "Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England" ("the ANPS"), designated by the Secretary of State for Transport ("the Secretary of State") under section 5 of the Planning Act 2008 ("the Planning Act") on 26 June 2018.

4. There were originally five claims for judicial review challenging the designation decision. Four of them came before the Divisional Court in March 2019 at a "rolled-up" hearing over seven days – as applications for permission to apply for judicial review, together with the claim itself if permission were granted. The fifth (Claim No. CO/3071/2018), brought by Heathrow Hub Ltd. and Runway Innovations Ltd., which raises issues of a different kind from the other four, is also the subject of an appeal before us. That appeal is dealt with in a separate judgment, also handed down today. One of the other four claims (Claim No. CO/2760/2018), brought by Mr Neil Spurrier, is no longer pursued. The three claims we are dealing with here are these: Claim No. CO/3089/2018 brought by seven claimants, five of them local authorities – the London Borough of Hillingdon Council and the councils of four adjacent London boroughs – Greenpeace Ltd. ("Greenpeace") and the Mayor of London ("the Hillingdon claimants"); Claim No. CO/3147/2018 brought by Friends of the Earth Ltd. ("Friends of the Earth"); and Claim No. CO/3149/2018 brought by Plan B Earth.

5. Under the Greater London Authority Act 1999 ("the GLA Act") the Mayor of London is required to have in place a London Environment Strategy that contains provisions dealing with climate change (sections 361A, 361B and 361D of the GLA Act), air quality (sections 362 to 369) and noise (section 370). He is subject to a specific "duty to address climate change, so far as relating to Greater London" (section 361A(1) and (2)). Greenpeace and

Friends of the Earth are both non-governmental organisations concerned with the protection of the environment. Plan B Earth is a charity promoting efforts to arrest climate change.

6. In each of the three claims in these proceedings, and in the claim brought by Heathrow Hub and Runway Innovations, the defendant or respondent is the Secretary of State. In the Hillingdon claimants' proceedings, Transport for London ("TfL") is an interested party. TfL has responsibility, under section 154 of the GLA Act, for implementing the Mayor of London's strategy for transport in London. In all three claims Heathrow Airport Ltd. ("HAL") and Arora Holdings Ltd. ("Arora") are interested parties. HAL is the airport operator at Heathrow, and is promoting a scheme for the north-west runway. Arora represents a group of companies that own land within the boundary of that development and intend to build and operate a new terminal constructed as part of it.

7. The Divisional Court dismissed all four claims. Its reasons for doing so are lucidly set out in a judgment handed down on 1 May 2019 ([2019] EWHC 1070 (Admin)), which is fairly described as a "tour de force". In Mr Spurrier's claim the court refused permission to apply for judicial review on all grounds. In the Hillingdon claimants' challenge, it granted permission to apply for judicial review on five grounds but dismissed the claim on each of those grounds, and refused permission on the others. In the Friends of the Earth's claim and in Plan B Earth's, it refused permission on all grounds.

8. The Hillingdon claimants, Friends of the Earth and Plan B Earth all appealed. On 22 July 2019 Lindblom L.J. granted permission to appeal in the Hillingdon claimants' case, and in both the Friends of the Earth and Plan B Earth proceedings ordered that the application for permission to appeal and, if permission to apply for judicial review were granted on that application (under CPR r.52.8(5)), the claim itself (under CPR r.52.8(6)) would be heard together with each other and with the Hillingdon claimants' appeal. Lindblom L.J. also made case management directions, which, among other things, required the parties in all three cases to agree the main issues for the court.

9. On 18 September 2019, the court received an application by WWF-UK ("WWF") for permission to intervene by the making of oral or written submissions on the significance of the UN Convention on the Rights of the Child to the Secretary of State's duty in section 10(2) of the Planning Act when exercising its functions with the objective of achieving "sustainable development". That application was opposed by the Secretary of State. On 4 October 2019 Lindblom L.J. granted WWF permission to intervene by written representations only and gave the parties permission to respond in writing, with a deadline later extended – by an order dated 8 October 2019 – to 1 November 2019. By a further order dated 15 October 2019 he gave permission for all other parties to reply to the responses to WWF's submissions by 6 November 2019.

The main issues before us

10. The main issues for us to decide, as agreed by the parties, fall into four groups: first, issues on the operation of EC Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive"); second, issues on the operation of EC Council Directive 2001/42/EC on the assessment of the effect of certain plans and programmes on the environment ("the SEA Directive"); third, issues relating to the United Kingdom's commitments on climate change; and fourth, relief.

11. The issues on the operation of the Habitats Directive are:

    (1) what standard of review the court should apply when considering whether there has been a breach of the requirements of article 6(4) of the Habitats Directive;
    (2) whether the Secretary of State breached the Habitats Directive in deciding that the scheme for a second runway at Gatwick was not an alternative solution to the scheme for the north-west runway at Heathrow on the basis that it would not meet the "hub objective";
    (3) whether the Secretary of State breached the Habitats Directive in deciding to exclude the Gatwick second runway scheme as an alternative solution to the north-west runway scheme at Heathrow because it would potentially harm a Special Area of Conservation ("SAC") in which a priority species was present, and that an opinion of the European Commission might be required;
    (4) whether the Divisional Court erred:
        (i) in distinguishing between the obligation to consider "alternative solutions" in article 6(4) of the Habitats Directive and the obligation to consider "reasonable alternatives" under the SEA Directive; and
        (ii) in determining that the Secretary of State could lawfully rule out the Gatwick second runway scheme as an alternative solution under the Habitats Directive while also treating it as a reasonable alternative for the purposes of the SEA Directive; and
    (5) whether the court should refer the following questions to the Court of Justice of the European Union under article 267 of the Treaty on the Functioning of the European Union ("TFEU"):
        (i) Is the identification of an "alternative solution" under the Habitats Directive to be approached differently from the identification of a "reasonable alternative" under the SEA Directive? And what test should be applied?
        (ii) Is it compatible with EU law for the court to limit its role to considering whether a process of identifying alternative solutions was not irrational?

12. The issues on the operation of the SEA Directive are:

    (1) what approach the court should take when considering whether an environmental report complies with the SEA Directive, and in particular, whether or not it should apply the approach indicated in *R. (on the application of Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin); [2004] Env. L.R. 29;
    (2) whether, in deciding to designate the ANPS, the Secretary of State breached article 5(1) and (2) of, and Annex 1(a) to, the SEA Directive by failing to provide an outline of the relationship between the ANPS and other relevant plans and programmes;
    (3) whether, in deciding to designate the ANPS, the Secretary of State breached article 5(1) and (2) of, and Annex 1(c) to, the SEA Directive by failing to identify the environmental characteristics of areas likely to be significantly affected by the ANPS; and
    (4) whether the Secretary of State breached the SEA Directive by failing to consider the Paris Agreement.

13. The issues relating to the United Kingdom's commitments on climate change, in addition to issue (4) on the operation of the SEA Directive, are:

    (1) whether the designation of the ANPS was unlawful because the Secretary of State, in breach of section 10(3)(a) of the Planning Act, failed to have regard to the desirability of mitigating, and adapting to, climate change in the light of the United Kingdom's commitment to the Paris Agreement, the non-carbon dioxide ("non-CO_2") climate impacts of aviation, the effect of emissions beyond 2050, and to the ability of future generations to meet their needs;
    (2) whether the Divisional Court erred by failing to give reasons for rejecting Friends of the Earth's argument on the non-CO_2 climate impacts of aviation and the effect of emissions beyond 2050, having regard to the ability of future generations to meet their needs;
    (3) whether the Divisional Court erred in treating the then extant 2050 target of a reduction in greenhouse gas emissions of at least 80% (against the 1990 baseline) as precluding any consideration of government policies and commitments, implying a more stringent level of protection;
    (4) whether the Divisional Court erred in holding that neither the "Paris Temperature Limit" nor "the Government's policy commitment to introducing a net zero target" formed any part of relevant government policy within section 5(8) of the Planning Act, and that both were otherwise irrelevant;
    (5) whether the Divisional Court erred in holding that the 2°C temperature limit was a relevant consideration; and
    (6) whether the Divisional Court erred in treating as irrelevant the Secretary of State's "failure to explain to Parliament the basis of his decision".

14. The issue on relief is whether any remedy, and what, should be granted if any of the grounds of claim is made out.

The origins and genesis of the ANPS

15. The Divisional Court set out a full and clear account of the events leading to the formulation and designation of the ANPS (in paragraphs 42 to 85 of its judgment, under the heading "The Factual Background"). We gratefully adopt that account. For the hearing before us, the parties provided an agreed narrative. In setting the scene for what follows, we confine ourselves to the most salient events in that history. We shall describe the relevant circumstances in more depth, and refer to the relevant content of the ANPS, as we deal with the issues we have to consider.

16. On 16 December 2003, the Government published a White Paper, "The Future of Air Transport", which proposed a new runway at Heathrow (Cm. 6046, section 11).

17. On 26 November 2008, both the Climate Change Act 2008 ("the Climate Change Act") and the Planning Act received Royal Assent. The Climate Change Act established the Committee on Climate Change (section 32). It also set a "carbon target" for the United Kingdom to reduce its greenhouse gas emissions by 80% from their level in 1990, by 2050 (section 1). This was consistent with the global temperature limit in place at the time, which was 2°C. However, on 27 June 2019 article 2(2) of the "Climate Change Act 2008 (2050

Target Amendment) Order 2019" (SI 2019/1056) amended the target figure in section 1 of the Climate Change Act from 80% to 100%.

18. On 7 September 2012, the Government established the Airports Commission to "examine the scale and timing of any requirement for additional capacity to maintain the UK's position as Europe's most important aviation hub", and to "identify and evaluate how any need for additional capacity should be met in the short, medium and long term" (paragraph 1.3 of the Airports Commission's Final Report, published in July 2015). The Airports Commission duly considered 58 different proposals for delivering additional airport capacity in the South East of England by 2030 (paragraph 10.4.14 of the Habitats Regulations Assessment for the ANPS). It recognized that increasing airport capacity would have "significant impacts on the environment and local communities" (paragraph 3.49 of the ANPS). Its terms of reference required it to look at the environmental impact of meeting the need for additional capacity, and to provide a final report, recommending credible options by "no later than summer 2015" (paragraph 1.3 Airports Commission's Final Report).

19. In March 2013, the Secretary of State issued an Aviation Policy Framework, setting out the Government's long-term policy for aviation. The Aviation Policy Framework included a climate change strategy for aviation, which concentrated on action at a global level (paragraphs 12 to 20). It emphasized the important role to be played by the Airports Commission (paragraphs 21 to 24). On 17 December 2013, the Airports Commission published an interim report, which assessed the evidence on "the nature, scale and timing of the steps needed to maintain the United Kingdom's status as an international hub for aviation" (paragraph 5). In the context of the United Kingdom's "hub status", it explained that the strength of Heathrow's route network was underpinned by the airport's transfer passengers, a third of its total passenger traffic (paragraph 3.88). Three options were selected for further consideration: first, the Heathrow north-west runway scheme proposed by HAL – a new runway, 3,500 metres in length, constructed to "the north-west of the airport" (paragraph 6.67 of the Airports Commission's Interim Report); second, the Heathrow extended northern runway scheme proposed by Heathrow Hub – extending the existing northern runway to at least 6,000 metres to allow it to operate as two separate runways (ibid.); and third, the Gatwick second runway scheme – a new runway over 3,000 metres in length, south of the existing runway (ibid.).

20. In January 2014, the Airports Commission consulted on a draft Appraisal Framework, entitled "Airports Commission: Appraisal Framework", which included "appraisal modules" on noise, air quality, biodiversity and carbon (Appendix A, sections 5 to 8). It appointed an Expert Advisory Panel "to help [it] to access, interpret and understand evidence relating to [its] work, and to make judgements about its relevance, potential and application" (Annex A to its Final Report). It adopted the Appraisal Framework in April 2014. Between November 2014 and February 2015, it undertook a consultation on the short-listed schemes (paragraph 1.16), whose main purpose was to "test the evidence base, to identify any concerns stakeholders may have as to the accuracy, relevance or breadth of the assessments undertaken, and to seek views on the potential conclusions that might be drawn" (paragraph 4.12). It also held public discussion sessions in the local areas around Heathrow and Gatwick to hear the views and concerns of local people, MPs and councillors, community groups and business organisations (paragraph 4.15).

21. On 1 July 2015, the Airports Commission published its Final Report. It highlighted the consolidation of the airline industry and the rise of alliances within the industry, which had led to the expansion of "hub-and-spoke" networks run by major carriers at the world's largest airports – in which traffic is routed through local airports ("hubs"), with feeder traffic from other airports in the network ("spokes"). It emphasized the strength of competition from European and Middle-Eastern "hubs" (Executive Summary). It acknowledged that there was a need for additional runway capacity in the South East of England by 2030 and that all three short-listed schemes were "credible" (Executive Summary and paragraph 16.62). It concluded that the Heathrow north-west runway scheme was the most appropriate way to meet the need, if combined with measures to address environmental and community impacts, including "[incentivisation] of a major shift in mode share for those working at and arriving at the airport"; a requirement that additional operations at an expanded Heathrow "must be contingent on acceptable performance on air quality"; a ban on all scheduled night flights in the period between 11.30 p.m. and 6 a.m.; and the ruling out of a fourth runway at Heathrow (paragraph 13.3). It also concluded that the Heathrow north-west runway scheme performed "most strongly" in the "Strategic Fit appraisal module" because "[it] would deliver the greatest increase in connectivity, particularly with regard to strategically important long-haul connections, [and] would provide a world-class passenger experience and support growth in airfreight more effectively than expansion at Gatwick" (paragraph 6.91). Conversely, it concluded that the Gatwick second runway scheme was directed more towards "short-haul European travel, with significant changes in industry structure needed to see a substantial increase in long-haul connectivity" (paragraph 6.92). At the same time the Airports Commission published a Business Case and a Sustainability Assessment to provide a foundation for an Appraisal of Sustainability.

22. Between July and December 2015, the Airports Commission's conclusions were subjected to a number of reviews undertaken on behalf of the Secretary of State. One of these was conducted by a Senior Review Panel chaired by Ms Caroline Low, the Aviation Capacity Programme Director at the Department for Transport. In October 2015, on behalf of the Mayor of London, TfL published a response to the Airports Commission's Final Report, entitled "Mayor of London's response to the Airports Commission recommendation for a three-runway Heathrow". In section 7, "Summary", it expressed concerns about noise, NO_2 levels, the increase in freight traffic and the lack of rail infrastructure.

23. In December 2015, the Paris Agreement was concluded as an agreement within the United Nations Framework Convention on Climate Change ("the UNFCCC"), but outside the Kyoto Protocol. It was adopted by consensus following the 21st Conference of the UNFCCC on 12 December 2015, by all 195 participating member states and by the European Union. It brought about a stronger international commitment to mitigating climate change. It enshrines a firm commitment to restricting 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" (article 2(1)(a)), as well as an aspiration 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" (article 4(1)). It requires each state to determine its own contribution to this target (article 4(2) and (3)).

24. On 14 December 2015, in an oral statement to Parliament, the Secretary of State announced that the Government accepted the case for airport expansion; that it agreed with, and would

further consider, the Airports Commission's shortlist of options; and that it would use a national policy statement under the Planning Act to establish the policy framework within which to consider an application for development consent. The Secretary of State also stated that further work had to be done on environmental impacts, particularly those relating to air quality, noise, carbon emissions and local communities (Hansard Columns 1306 and 1307). The decision to make the announcement had been agreed at a Cabinet Economic and Industrial Strategy (Airports) Sub-Committee meeting on 10 December 2015.

25. In March 2016, WSP Parsons Brinkerhoff ("WSP"), the consultants retained by the Secretary of State to advise on the environmental issues involved in the preparation of the ANPS, produced the "Appraisal of Sustainability: Airports NPS Scoping Report", which was to be sent to the consultation bodies – Natural England, Historic England and the Environment Agency – under regulation 12(5) of the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations"). The scoping report was formally issued to the consultation bodies on 9 March 2016. The period of consultation ran to 18 April 2016.

26. In mid-2016, the process of "appropriate assessment" began under regulation 61 of the Conservation of Habitats and Species Regulations 2010 – later replaced by regulation 63 of the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations"). Throughout this process WSP consulted Natural England. The Habitats Regulations Assessment produced for the shortlisted options in June 2018 stated that the Gatwick second runway scheme would result in "fewer types of impact at fewer European sites" than either of the two Heathrow schemes (paragraph 9.2.11). However, changes to air quality caused by nitrogen oxide ("NO_X") could not be discounted at the Mole Gap to Reigate Escarpment SAC, which contained a priority natural habitat type – for a rare species of wild orchid (ibid.).

27. On 13 October 2016, the Committee on Climate Change published "UK climate action following the Paris Agreement", which considered the implications of the Paris Agreement and made recommendations for action by the United Kingdom. The Executive Summary stated (on p.7):

> "Do not set new UK emissions targets now. The UK already has stretching targets to reduce greenhouse gas emissions. Achieving them will be a positive contribution to global climate action. 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. We have concluded it is too early to do so now, but setting such a target should be kept under review. The five-yearly cycle of pledges and reviews created by the Paris Agreement provides regular opportunities to consider increasing UK ambition."

The report said that "[the] UK 2050 target is potentially consistent with a wide range of global temperature outcomes" (p.16).

28. On 25 October 2016, the Secretary of State announced that the Government's preferred option was the north-west runway scheme at Heathrow. This decision had been agreed at

the Cabinet's Economy and Industrial Strategy (Airports) Sub-Committee meeting on that day.

29. On 17 November 2016, the United Kingdom ratified the Paris Agreement.

30. In December 2016, the Hillingdon claimants issued a claim for judicial review of the preference decision made on 25 October 2016. On 30 January 2017, that claim was struck out by Cranston J.. He concluded that the court had no jurisdiction to hear it because, under section 13 of the Planning Act, the matters it raised could only be pursued during the six-week period following the adoption or publication of a national policy statement, and the policy statement under challenge had not yet been adopted or published (*R. (on the application of London Borough of Hillingdon Council) v Secretary of State for Transport* [2017] EWHC 121 (Admin); [2017] 1 W.L.R. 2166, at paragraphs 4 and 5).

31. In February 2017, WSP produced a Scoping Consultation Responses Report, which explained how responses from the consultation bodies had been taken into account in the preparation of the Appraisal of Sustainability. On 2 February 2017, the Department for Transport launched a consultation on the draft ANPS for a period of 16 weeks. Alongside the draft ANPS, the Secretary of State published for consultation several draft documents, including the Appraisal of Sustainability and the Habitats Regulations Assessment. There were more than 72,000 responses to that consultation.

32. On 24 October 2017, the Department for Transport launched a further consultation on updated evidence, including the Government's revised aviation demand forecasts. A revised draft ANPS and a number of other supporting documents were published at the same time, including an updated Appraisal of Sustainability and an updated Habitats Regulations Assessment. There were more than 11,000 responses to that consultation. A joint response was provided by the Hillingdon claimants. The London Borough of Hillingdon Council and the London Borough of Hammersmith and Fulham Council also submitted individual responses. The Mayor of London responded to this consultation in December 2017. The responses raised a number of concerns, including alleged breaches of the SEA Directive and the SEA Regulations.

33. On 23 March 2018, the Transport Committee published the report on its inquiry on the revised draft ANPS, which had been set up in November 2017. The report made 33 recommendations. Subject to those recommendations, it approved the draft ANPS (paragraphs 1 to 25 of the report, entitled "House of Commons Transport Committee Airports National Policy Statement Third Report of Session 2017-2019").

34. In June 2018, the Secretary of State published the final "Appraisal of Sustainability: Airports National Policy Statement". Table 1.1 sets out the information referred to in Schedule 2 to the SEA Regulations. On the "environmental protection objectives, established at international … level", it states:

> "The topics in Appendix A include a review of policy and legislation which has been taken into account by the assessment of the NPS.
>
> The scoping report also undertook a full review of policies, plans and programmes which may affect the Airports NPS (Appendix A of the Scoping Report). Section 4.3 summarises the key sustainability themes and objectives."

Appendix A of the scoping report includes a list of international policy and legislation relevant to airport policy. The Paris Agreement is not in the list.

35. On 5 June 2018, the Department for Transport published the Government's response to the representations made in the course of consultation on the ANPS, entitled "Government response to the consultations on the Airports National Policy Statement: Moving Britain Ahead". This document considered, among other things, noise (section 7) and carbon emissions (section 8). On the same day, following its approval by the Cabinet Sub-Committee, the Secretary of State laid before Parliament the final draft of the proposed ANPS. On 25 June 2018, the House of Commons debated and voted on the proposed ANPS. 415 MPs voted in favour of it, 119 against – a majority of 296. It is not suggested in these proceedings that the fact that there was such approval has any legal significance. The ANPS does not have the status of an Act of Parliament and can, in principle, be the subject of challenge by a claim for judicial review. If the process by which the ANPS was adopted by the Secretary of State was unlawful, the fact that it was approved by the House of Commons could not save it from a successful claim.

36. On 26 June 2018, the Secretary of State designated the ANPS under section 5(1) of the Planning Act. On the same day, the Secretary of State also published "The Airports National Policy Statement: Post Adoption Statement", explaining how environmental considerations and consultation responses had been taken into account; and the "Relationship Framework Document between the Secretary of State for Transport and Heathrow Airport Limited", explaining how the Department for Transport and HAL would work together to achieve additional airport capacity.

The Planning Act

37. National policy statements are the statements of national planning policy for "nationally significant infrastructure projects" in England and Wales under the statutory regime in Parts 2 and 3 of the Planning Act. Section 14(1) defines "nationally significant infrastructure projects" as including projects consisting of "airport-related development" (section 14(1)(i)). The Planning Act specifies the procedural steps that must be undertaken before a national policy statement can be formally "designated" by the Secretary of State, including consultation, Parliamentary scrutiny and consideration of sustainability (section 5(3) and (4)). It also obliges the Secretary of State, when determining an application for development consent, to have regard to any relevant national policy statement (section 104 in Part 6).

38. Section 5 provides:

> "(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.

(4) A statement may be designated as a national policy statement for the purposes of this Act only if the consultation and publicity requirements set out in section 7, and the parliamentary requirements set out in section 9, have been complied with in relation to it and –

(a) the consideration period for the statement has expired without the House of Commons resolving during that period that the statement should not be proceeded with, or

(b) the statement has been approved by resolution of the House of Commons –

(i) after being laid before Parliament under section 9(8), and

(ii) before the end of the consideration period.

…

(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. … ."

An appraisal of sustainability is capable of constituting the environmental report for the purposes of articles 3 and 5 of the SEA Directive. This was so in the case of the ANPS.

39. Section 6, "Review", provides for a national policy statement to be reviewed. Section 6(1) states:

"(1) The Secretary of State must review each national policy statement whenever the Secretary of State thinks it appropriate to do so."

Subsection (2) states that such a review "may relate to all or part of a national policy statement". Section 6(3) provides:

"(3) In deciding when to review a national policy statement the Secretary of State must consider whether –

(a) since the time when the statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,

(b) the change was not anticipated at that time, and

(c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different."

Subsection (4) contains equivalent provisions for a decision to "review part of a national policy statement". Section 6(5) and (7) provides:

(5) After completing a review of all or part of a national policy statement the Secretary of State must do one of the following –

(a) amend the statement;
(b) withdraw the statement's designation as a national policy statement;
(c) leave the statement as it is.

…

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

40. Sections 7 and 8 reflect the consultation requirements of the SEA Directive. They oblige the Secretary of State to "carry out such consultation, and arrange for such publicity, as [he] thinks appropriate in relation to the proposal" (section 7(2)), to "consult such persons, and such descriptions of persons, as may be prescribed" (section 7(4)), and to "have regard to the responses to the consultation and publicity in deciding whether to proceed with the proposal" (section 7(6)). The Secretary of State must consult any local authority in whose area the plan is based and "the Greater London Authority, if any of the locations concerned is in Greater London." (section 8(1) and (2)).

41. Section 9 states:

"(1) This section sets out the parliamentary requirements referred to in sections 5(4) and 6(7).

(2) The Secretary of State must lay the proposal before Parliament.

(3) In this section "the proposal" means –
(a) the statement that the Secretary of State proposes to designate as a national policy statement for the purposes of this Act, or
(b) (as the case may be) the proposed amendment.

… ."

42. Section 10 provides:

"(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;
… ."

43. Section 13(1) provides that the court "may entertain proceedings for questioning a national policy statement or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement only if … (a) the proceedings are brought by a claim for judicial review …".

44. Section 104 states:

"(1) This section applies in relation to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates.

…

(3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.

(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.

(5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.

(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.

… ."

The Habitats Directive

45. Article 2(1) of the Habitats Directive states:

"(1) The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies."

46. Article 6(1) requires Member States to establish necessary conservation measures for an SAC, involving if necessary "appropriate management plans specifically designed for the sites". Article 6(2) compels Member States to take appropriate steps to avoid the deterioration of natural habitats and the habitats of species within the SACs.

47. We are largely concerned with the correct interpretation of the requirements of article 6(3) and (4), which are transposed into domestic law by regulations 63 and 64 of the Habitats Regulations.

48. Article 6(3) states:

> "(3) Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

The effect of article 6(3), therefore, is that a competent national authority – here the Secretary of State – may only designate a national policy statement or grant a development consent order after an appropriate assessment under the Habitats Regulations has been performed and if satisfied, on the basis of that assessment, that the national policy statement or the development consent order would not "adversely affect the integrity" of the site concerned – subject to the derogation provisions in article 6(4).

49. Article 6(4) provides:

> "(4) If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.
>
> … ."

Article 6(4) also provides for the situation where an SAC hosts a "priority natural habitat type" or a "priority species". Priority natural habitat types are "natural habitat types in danger of disappearance" (article 1(d)) and priority species are those which are "endangered" (article 1(g)(i)), "vulnerable" (article 1(g)(ii)), "rare" (article 1(g)(iii)), or "requiring particular attention" (article 1(g)(iv)), for the conservation of which "the Community has particular responsibility" (article 1(g) and (h)). In such cases, article 6(4) states that the only considerations that may be raised are restricted to "those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest".

The SEA Directive and the SEA Regulations

50. The purpose of the SEA Directive is "to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development" (article 1).

51. The provisions of the SEA Directive are founded on the "precautionary principle". Recital 1 states:

> "(1) Article 174 of the Treaty provides that Community policy on the environment is to contribute to, *inter alia*, the preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources and that it is to be based on the precautionary principle … ."

52. Recital 9 states:

> "(9) This Directive is of a procedural nature, and its requirements should either be integrated into existing procedures in Member States or incorporated in specifically established procedures. … ."

53. Recital 14 states:

> "(14) Where an assessment is required by this Directive, an environmental report should be prepared containing relevant information as set out in this Directive, identifying, describing and evaluating the likely significant environmental effects of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme … ."

54. Article 2(b) provides that an "environmental assessment" means the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making, and the provision of information on the decision. Under article 2(c) an "environmental report" should contain the information required in article 5 and Annex I.

55. Article 3 states:

> "1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.
>
> 2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,
>
> (a) which are prepared for … transport … and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC …

…

4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.

… ."

56. Article 4(1) requires that the environmental assessment must be carried out "during the preparation of a plan or programme and before its adoption". In this case, therefore, the environmental assessment had to be carried out before the ANPS was designated.

57. Article 5 provides:

"1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I."

The information required by article 5(1) and Annex 1 is subject to articles 5(2) and (3) which state:

"2. The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

3. Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or though other Community legislation may be used for providing the information referred to in Annex I."

58. So far as is relevant here, Annex I states:

"The information to be provided under Article 5(1), subject to Article 5(2) and (3), is the following:

(a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes;

…

(c) the environmental characteristics of areas likely to be significantly affected;

(d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Directives 79/409/EEC and 92/43/EEC;

(e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;

…

(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information.

… ."

59. Article 6(1) states:

"1. The draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article and the public."

60. The SEA Directive has been transposed into domestic law by the SEA Regulations. It was common ground before this court that, since the Regulations are in similar terms to the Directive, it is appropriate to go straight to the Directive, although it does not strictly speaking have direct effect in domestic law.

61. Regulation 12 of the SEA Regulations states:

"12. – Preparation of environmental report

(1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.

(2) The report shall identify, describe and evaluate the likely significant effects on the environment of –

(a) implementing the plan or programme; and

(b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.

(3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of –

(a) current knowledge and methods of assessment;

(b) the contents and level of detail in the plan or programme;

(c) the stage of the plan or programme in the decision-making process; and

(d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

…

(5) When deciding on the scope and level of detail of the information that must be included in the report, the responsible authority shall consult the consultation bodies.

… ."

The EIA Directive

62. Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment ("the EIA Directive") has been transposed into domestic law by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations"). It applies at the development consent order stage.

The issues on the operation of the Habitats Directive

63. Before the Divisional Court, and before us, the parties were agreed on the consequences of a plan not qualifying as an "alternative solution". As the Divisional Court put it (in paragraph 299):

> "299. During the course of oral submissions, as we understood it, it became common ground that, if and when a plan or scheme does not qualify as an "alternative solution" within the meaning of article 6(4), then it does not need to be considered any further under the Habitats Directive. If it is properly assessed as not qualifying as an "alternative solution" before an HRA has been conducted, it is not necessary for Habitats Directive purposes to consider that plan or scheme in any later HRA or otherwise at all. It was also common ground that articles 6(3) and (4) involve an iterative process, certainly for policy-making as a plan proceeds from an initial draft through consultation to its finally adopted form; and, in that iterative process, something which is considered by the competent authority to be an "alternative solution" at one stage may, in the light of further information and/or assessment, properly cease to be so regarded subsequently."

64. The ANPS acknowledges (in paragraph 1.32) that the development of the north-west runway at Heathrow has the potential to have adverse effects on the integrity of European sites for the purposes of article 6(3) of the Habitats Directive, because "more detailed project design information and detailed proposals for mitigation are not presently available and inherent uncertainties exist at this stage". However, it rejects the Gatwick second runway scheme as an alternative solution under article 6(4), concluding that:

> "1.32. … [No] alternatives [to the preferred scheme] would deliver the objectives of the Airports NPS in relation to increasing airport capacity in the South East and maintaining the UK's hub status. In line with Article 6(4) of the Directive, the Government considers that meeting the overall needs case for increased capacity and maintaining the UK's hub status, as set out in chapter two, amount to imperative reasons of overriding public interest supporting its rationale for the designation of the Airports NPS. … ."

65. There are numerous references in the ANPS to the importance of the objective of "maintaining the UK's hub status". Paragraph 1.3 says that the Airports Commission had been established "to examine the scale and timing of any requirement for additional capacity to maintain the UK's position as Europe's most important aviation hub …". Several passages in chapter 2, which deals with the need for additional airport capacity, emphasize the United Kingdom's role as a "hub". In chapter 3, which explains why the north-west runway at Heathrow was chosen as the preferred scheme, paragraphs 3.18 and 3.19 state:

> "3.18 Heathrow Airport is best placed to address this need by providing the biggest boost to the UK's international connectivity. Heathrow Airport is one of the world's major hub airports, serving around 180 destinations worldwide with at least a weekly service, including a diverse network of onward flights across the UK and Europe. Building on this base, expansion at Heathrow Airport will mean it will continue to attract a growing number of transfer passengers, providing the added demand to make more routes viable. In particular, this is expected to lead to more long haul flights and connections to fast-growing economies, helping to secure the UK's status as a global aviation hub, and enabling it to play a crucial role in the global economy.
>
> 3.19 By contrast, expansion at Gatwick Airport would not enhance, and would consequently threaten, the UK's global aviation hub status. Gatwick Airport would largely remain a point to point airport, attracting very few transfer passengers. Heathrow Airport would continue to be constrained, outcompeted by competitor hubs which lure away transfer passengers, further weakening the range and frequency of viable routes. At the UK level, there would be significantly fewer long haul flights in comparison to the preferred scheme, with long haul destinations served less frequently. Expansion at Heathrow Airport is the better option to ensure the number of services on existing routes increases and allows airlines to offer more frequent new routes to vital emerging markets." (our emphasis).

Habitats Directive issue (1) – the standard of review

66. Having cited relevant authority, including the decisions of the Supreme Court in *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 W.L.R. 1591 and *Kennedy v Information Commissioner* [2014] UKSC 20; [2015] 1 A.C. 455, and observations made by Carnwath L.J., as he then was, in *Office of Fair Trading v IBA Health Ltd.* [2004] EWCA Civ 142; [2004] 4 All E.R. 1103 (at paragraphs 91 and 92) and of Sir Thomas Bingham M.R., as he then was, in *R. v Ministry of Defence, ex p. Smith* [1996] Q.B. 517 (at p.556B), the Divisional Court said that in its view, "as well as the nature of the decision under challenge, the factors upon which the degree of scrutiny of review particularly depends include (i) the nature of any right or interest it seeks to protect, (ii) the process by which the decision under challenge was reached and (iii) the nature of the ground of challenge" (paragraph 151 of the judgment).

67. With those considerations in mind, the Divisional Court acknowledged that the interests the claimants sought to protect were "matters of great public importance", but also that the proponents of airport expansion had pointed to "the contribution made to the national

economy and the creation of employment". It accepted that, "[inevitably], policy-making in this area involves the striking of a balance in which these and a great many other factors are assessed and weighed", and "is carried on at a high, strategic level and involves political judgment as to what is in the overall public interest" (paragraph 152).

68. As the Divisional Court said, "the degree of scrutiny required by any challenge before [it] will be dependent upon … the strand of policy which is under review" (paragraph 166). It saw in the decision of this court in *R. (on the application of Mott) v Environment Agency* [2016] EWCA Civ 564; [2016] 1 W.L.R. 4338 "a helpful reminder of well-established good law: the court should accord an enhanced margin of appreciation to decisions involving or based upon "scientific, technical and predictive assessments" by those with appropriate expertise". It observed that "where a decision is highly dependent upon the assessment of a wide variety of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (ultimately by Parliament), the margin of appreciation will be substantial" (paragraph 179). And it accepted that, by analogy with the first instance decision in *R. (on the application of Prideaux) v Buckinghamshire County Council* [2013] EWHC 1054 (Admin); [2013] Env. L.R. 32, "the Secretary of State was entitled to attach great weight to the reports of [the Airports Commission], particularly [the Airports Commission's] Final Report" (paragraph 180).

69. The Divisional Court concluded that the appropriate standard of review to be applied when considering whether there has been a breach of the requirements of articles 6(3) and (4) of the Habitats Directive is "Wednesbury" irrationality. In coming to this conclusion, it relied on the judgment of Sales L.J., as he then was, in *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174; [2016] Env. L.R. 7 (at paragraphs 78 to 80), and the judgment of Peter Jackson L.J. in *R. (on the application of Mynydd y Gwynt) v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWCA Civ 231; [2018] Env. L.R. 22 (at paragraph 8). It said that "although a strict precautionary approach is required for article 6(3) of the Habitats Directive, the appropriate standard of review is ["Wednesbury" irrationality]: the court should not adopt a more intensive standard or effectively remake the decision itself" (paragraph 350). It saw no "arguable justification for a different standard of review to be adopted" when the court is assessing whether a project or plan meets core policy objectives under article 6(4) as opposed to article 6(3). Indeed, it went on to say that, "if anything, the assessment of whether a policy meets the core objectives of a policy-maker, assigned by Parliament with the task, is … even more essentially a matter for that policy-maker, and not the court which is peculiarly ill-equipped to make such assessments" (paragraph 351).

70. In coming to those conclusions, the Divisional Court distinguished *R. (on the application of Lumsdon) v Legal Services Board* [2015] UKSC 41; [2016] A.C. 697 on its facts. The decision in that case – where the crucial issue was whether a quality assurance scheme for advocates was proportionate as a derogation from the freedom of establishment for providers of services under EU law – was, it said, of "no assistance in determining whether article 6(3) and (4) of the Habitats Directive are to be construed as incorporating a proportionality approach …" (paragraph 347). The relevant provision there – article 9(1)(b) and (c) of Parliament and Council Directive 2006/123/EC – explicitly required the use of a "less restrictive measures" test, which included proportionality (paragraph 345). The Habitats Directive imposes no such test. The passages in the judgment of Lord Reed and Lord Toulson relied on by the Hillingdon claimants (in particular, paragraphs 63 and 67)

related to "national measures" derogating from "fundamental freedoms". In this case there was no such derogation (paragraph 346 of the Divisional Court's judgment).

71. The Divisional Court added, however, that "the nature and standard of review is not determinative in this case" (paragraph 351). This was because, in its view, there was "no legal basis for challenging the Secretary of State's decision to adopt the … "hub objective" and/or his assessment that [the Gatwick second runway scheme] failed to meet it" (paragraph 353). Even if "the proportionality approach" were appropriate here, the Secretary of State "would have a significant margin of appreciation; and the evidence was firmly against [the Gatwick second runway scheme] being able to maintain the UK's hub status function" (paragraph 356).

72. For the Hillingdon claimants, Mr Ben Jaffey Q.C. submitted, as he did before the Divisional Court, that the appropriate standard of review here is proportionality. He argued that the use of the domestic law concept of review on "Wednesbury" principles is inappropriate where fundamental principles of EU law are in play. He invoked article 191(2) of the TFEU, which states:

> "191(2) 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, that environmental damage should as a priority be rectified at source and that the polluter should pay.
>
> … ."

The "precautionary principle", Mr Jaffey submitted, should have been applied by the Secretary of State when preparing and designating the ANPS – because uncertainty remained over the environmental impacts of the Heathrow north-west runway. And the preference accorded to "alternative solutions" by article 6(4) of the Habitats Directive was an example of the requirement to take "preventive action".

73. Mr Jaffey maintained that the application of a standard of review based on proportionality was consistent with the opinion of Advocate General Kokott in Case C-239/04 *Commission v Portugal* [2006] ECR I-10183 (at paragraphs 42 and 43). The identification of alternatives under the Habitats Directive was, he submitted, the same kind of exercise as establishing, in the second stage of a proportionality assessment, whether the means chosen are the least restrictive alternative. Measures that impair fundamental environmental protections granted by EU law are, he argued, comparable in their significance to a serious interference with fundamental rights under EU law. He relied again on the Supreme Court's decision in *Lumsdon*. And he drew our attention to the opinion of Advocate General Kokott in Case C-723/17 *Craeynest v Brussels Hoofdstedelijk Gewest* [2020] Env. L.R. 4, in which she said (in paragraphs 43 and 53):

> "43. … [In] complex scientific or technical assessments and weighing up there is, as a rule, broad discretion which can be reviewed only to some degree. That discretion is nevertheless limited in certain cases and must therefore be reviewed more intensively, in particular where they are particularly serious interferences with fundamental rights.

…

53. … The rules on ambient air quality … put in concrete terms the Union's obligations to provide protection following from the fundamental right to life under art. 2(1) of the Charter and the high level of environmental protection required under art. 3(3) TEU, art. 37 of the Charter and art. 191(2) TFEU. … ."

Mr Jaffey submitted that fundamental rights under article 37 of the Charter were interfered with by the ANPS, and the decision of the Secretary of State must therefore be "reviewed more intensively".

74. Mr James Maurici Q.C. for the Secretary of State and Mr Charles Banner Q.C. for Arora reminded us that the Advocate General's analysis in *Craeynest* was not adopted by the court in its judgment in that case. The court held (in paragraph 54 of the judgment):

"54. … [It] is clear from the Court's case-law that, in the absence of EU rules, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, such as Directive 2008/50. However, the detailed rules provided for must not be less favourable than those governing similar domestic situations (principle of equivalence) and must not make it impossible in practice or excessively difficult to exercise rights conferred by EU law (principle of effectiveness). … ."

Thus the court effectively confirmed that it is for the Member States to determine the applicable standard of review, and that this is so in cases involving complex scientific or technical assessments in Directives concerned with environmental protection. Therefore, submitted Mr Maurici and Mr Banner, it is wrong to suggest that review on the basis of "manifest error" – equivalent in EU law to "Wednesbury" unreasonableness – is inadequate here. The Hillingdon claimants had failed to demonstrate that it would otherwise be "impossible in practice" to exercise rights conferred by EU law.

75. We accept those submissions of Mr Maurici and Mr Banner, for two reasons. First, although the Advocate General in *Craeynest* indicated that in some cases a more intensive standard of review will apply, this was especially – as she put it (in paragraph 43 of her opinion) – "where they are particularly serious interferences with fundamental rights". The Hillingdon claimants have not shown how any fundamental EU rights have been interfered with in this case, let alone seriously interfered with or made "impossible in practice" to exercise. Secondly, as the court said in *Craeynest*, there is a clear strand of EU case law that respects the discretion of Member States to lay down procedural rules for the protection of EU law rights. "Wednesbury" irrationality is the normal standard of review applicable in judicial review proceedings in this jurisdiction where interferences are alleged with rights of various kinds, including rights arising in domestic environmental law. And it seems to us appropriate in principle, and not less favourable, to apply the same standard to rights under EU law. Nor does it render the exercise of EU rights virtually impossible or excessively difficult in practice. In our view, therefore, there is no justification for applying a more intense standard of review than "Wednesbury" to the operation of the provisions of article 6(4) of the Habitats Directive. Neither the court's decision in *Craeynest* nor the Advocate General's opinion supports a different conclusion.

76. Mr Jaffey also submitted that the Divisional Court's reliance on *Smyth* and *Mynydd y Gwynt* was misguided: first, because those cases do not address article 6(4) explicitly, and that provision is different from article 6(3); and secondly, because the concept of an "alternative solution" under article 6(4) is a question of EU law, not domestic law.

77. We cannot accept that argument. In our view, as Mr Maurici submitted, the Divisional Court was right to follow *Smyth* and *Mynydd y Gwynt*, and to conclude there is no good reason to distinguish between the appropriate standard of review for article 6(3) and that for article 6(4). In *Smyth* it was submitted that in scrutinizing the performance by the Secretary of State of his obligations under article 6(3) of the Habitats Directive the national court is required to adopt a more intensive standard of review than "Wednesbury". Sales L.J. said (in paragraph 80 of his judgment):

> "80. I do not accept these submissions. In the similar context of review of screening assessments for the purposes of the Environmental Impact Assessment (EIA) Directive and Regulations, this Court has held that the relevant standard of review is the *Wednesbury* standard … . Although the requirements of Article 6(3) are different from those in the EIA Directive, the multi-factorial and technical nature of the assessment called for is very similar. There is no material difference in the planning context in which both instruments fall to be applied. There is no sound reason to think that there should be any difference as regards the relevant standard of review to be applied by a national court in reviewing the lawfulness of what the relevant competent authority has done in both contexts. … ."

78. A similar conclusion is to be seen in the judgment of Peter Jackson L.J. in *Mynydd y Gwynt*, where he said (at paragraph 8):

> "8. The proper approach to the Habitats Directive has been considered in a number of cases at European and domestic level, which establish the following propositions:
>
> …
>
> (9) The relevant standard of review by the court is the *Wednesbury* rationality standard, and not a more intensive standard of review: *Smyth* at [80]."

79. It seems to us, therefore, that the Hillingdon claimants' criticism of the Divisional Court's reliance on *Smyth* and *Mynydd y Gwynt* is unfounded. If a particular standard of review is appropriate in judging compliance with a provision in EU environmental legislation that involves a decision-maker's assessment, the same standard is likely to be appropriate for the corresponding exercise under another such provision, so long as the requirements of the two provisions are sufficiently alike and the context is not materially different. The assessment called for in article 6(3) and in article 6(4) is similar. There is, as Sales L.J. put it in *Smyth*, "no material difference in the planning context in which both instruments fall to be applied". Neither assessment nor context diverge. We therefore agree with the Divisional Court that the same standard of review should apply to both provisions, and that the appropriate standard is "Wednesbury".

80. Ultimately however, as the Divisional Court also concluded, the question of the appropriate standard of review is, in this case, academic. Even on the approach urged on us by the Hillingdon claimants, applying the test of proportionality, we would agree with the Divisional Court that the Secretary of State was entitled to reach the conclusion he did on

"alternative solutions" under article 6(4). In our view he was not in breach of any provision of the Habitats Directive or the Habitats Regulations in finding the Gatwick second runway scheme failed to meet the "hub objective". If this is right, the standard of review appropriate to article 6(4) does not affect the outcome of these three claims for judicial review.

Habitats Directive issue (2) – the rejection of the Gatwick second runway scheme for its failure to meet the "hub objective"

81. In the draft Habitats Regulations Assessment published for consultation on 2 February 2017, the Heathrow extended northern runway was ruled out as an alternative because it was not shown to have less damaging ecological impacts than the north-west runway (paragraph 9.2.6, under the heading "Habitats Regulations Assessment of Short-List"). The second runway at Gatwick was ruled out because of its impact on air quality at the Mole Gap to Reigate Escarpment SAC (paragraph 9.2.7). The draft Habitats Regulations Assessment concluded (in paragraphs 9.2.8 and 9.2.9):

> "9.2.8 Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised for IROPI are those relating to human health or public safety, to beneficial consequences of primary importance for the environment. Airport capacity expansion is not applicable to those considerations. Accordingly given the potential for adverse effects to priority [habitats] at [the Gatwick second runway scheme] opinion from the European Commission would be necessary with regard to other IROPI; in the absence of such an opinion being obtained it is not possible to conclude that [the Gatwick second runway scheme] is a reasonable alternative. In Case C-258/11 [*Sweetman v An Bord Pleanala* [2014] P.T.S.R. 1092] the European Court said at para. 55 that maintaining protected sites in a favourable status was "particularly important" where there was a priority species/habitat and in Case C-404/09 [*Commission v Spain*] it was said, at para 163, that under the Habitats Directive Member States must take appropriate protective measures to preserve the characteristics of sites which host priority natural habitat types and/or priority [species] and should generally avoid "intervention when there is a risk that the ecological characteristics of those sites will be seriously compromised as a result".
>
> 9.2.9 In conclusion based on the information available at this stage it has not been possible to identify any reasonable alternatives to the preferred scheme."

82. The draft ANPS, published for consultation on the same day, concluded (in paragraph 3.18) that the "expansion at Gatwick Airport would not enhance, and would consequently threaten, the UK's global aviation hub status"; that "Gatwick Airport would largely remain a point to point airport, attracting very few transfer passengers"; and that expansion at Heathrow was "the better option to ensure the number of services on existing routes increases", which would allow "airlines to offer more frequent new routes to vital emerging markets". Paragraph 3.19 of the ANPS itself is in identical terms (see paragraph 65 above).

83. The same conclusion was expressed in the revised draft of the Habitats Regulations Assessment, published for consultation on 24 October 2017, which stated unequivocally (in

paragraph 9.2.7) that the Gatwick scheme could not be regarded as an "alternative solution" under article 6(4) of the Habitats Directive (paragraph 9.2.7).

> "9.2.7 The LGW-2R scheme is not considered to meet the plan objectives of increasing airport capacity in the South East and maintaining the UK's hub status, because expansion at Gatwick Airport would not enhance (and would consequently threaten) the UK's aviation hub status. Gatwick Airport would largely remain a point to point airport, attracting very few transfer passengers. At the UK level, there would be significantly fewer long haul flights in comparison to the preferred scheme, with long haul destinations served less frequently. As such, it cannot be considered as an alternative solution." (our emphasis).

84. Explaining its conclusion that there was no legal basis for challenging the Secretary of State's decision to adopt the "hub objective" or his view that the Gatwick second runway scheme failed to meet that objective, the Divisional Court observed that "at least as far back as September 2012 when [the Airports Commission] was established, increasing airport capacity so as to maintain the UK's position as Europe's most important aviation hub was identified as a core objective". The Airports Commission's Final Report had "confirmed the economic importance of the "hub objective", and the need to increase capacity in order to reverse the decline in the UK's hub status". This had been acknowledged both in the February 2017 draft ANPS and in the final designated version of it. Thus "the inclusion of the 'hub objective' as properly one of the fundamental aims of the ANPS [was] simply not open to challenge" (paragraph 354 of the judgment).

85. The Divisional Court noted that although the Hillingdon claimants contested the conclusion in the ANPS and in the Habitats Regulations Assessment that the expansion of Gatwick by the addition of a second runway would not deliver the "hub objective", there were "no legal challenges to the assessments and conclusions reached in paragraphs 3.18-3.19 … of the ANPS". One of those conclusions was that the Gatwick second runway scheme would not maintain, but would threaten, the United Kingdom's "global aviation hub status", and this was "entirely consistent with [the Airports Commission's] Final Report" (paragraph 355). It continued (in paragraphs 355 to 359):

> "355. … Therefore, on the conclusions reached by the Secretary of State, this is not an issue about the *extent* to which the Gatwick 2R Scheme would meet the "hub objective", which would be a matter of degree or relative attainment of that aim. Rather, the Secretary of State has concluded that the scheme would not meet that policy objective at all. That conclusion is not open to challenge by way of judicial review. The Secretary of State was entitled to decide that a proposal that would threaten the "hub objective" is not an "alternative solution" for the purposes of the Habitats Directive. That conclusion too is not open to legal challenge.
>
> 356. … The selection of the "hub objective" as a consideration of central importance to the ANPS and the Gatwick 2R Scheme as failing to deliver that objective, were both key points for Parliament to consider when the final version of the NPS was laid before it and for the Secretary of State when he designated the NWR Scheme. …

357. Finally, Mr Jaffey contends that the decision to reject the Gatwick 2R Scheme as an "alternative solution" for the purposes of the HRA is inconsistent with its retention as a "reasonable alternative" in the AoS for the purposes of the SEA Directive. We have already dealt with the language of these two regimes and their differing legal purposes (see paragraphs 320-322 above). The Gatwick 2R Scheme was not ruled out as an alternative at the beginning of the SEA process. An opportunity was given for the case for it to be advanced. The "sifts" of alternatives referred to by Mr Jaffey were carried out either by the AC or before the consultation stage under the SEA Directive.

358. Mr Jaffey then relied upon the description of the Gatwick 2R Scheme as an alternative in the final version of the AoS (June 2018) and the Post Adoption Statement (26 June 2018). But these documents are not to be construed as if they were legal instruments. Moreover, they plainly state that they are to be read together with the ANPS, and so the passages relied upon should be read compatibly with the policy statement unless that is made impossible by the language used. That is not the case here. The documents referred to by Mr Jaffey state that, even with a second runway, Gatwick would largely remain a point-to-point airport. In other words, as paragraph 3.10 of the ANPS states, Gatwick would attract "very few transfer passengers". That is an assessment by the Secretary of State that is justified on the evidence. On the basis of that assessment, Gatwick would be the antithesis of a hub.

359. Furthermore, Annex C of the submission by officials to the Secretary of State on 25 September 2017 explained why Gatwick was retained in the consideration of alternatives in the AoS, having regard to the different purposes of the SEA regime, in accordance with the analysis set out above (paragraph 322), and to record and explain how the evidence underpinning the decision to select the NWR had been tested comprehensively. We see no merit in Mr Jaffey's criticisms, which we consider overly forensic."

86. The Hillingdon claimants do not, and in our opinion cannot, challenge the Secretary of State's conclusion that the Gatwick second runway scheme would not fulfil the "hub objective" or his conclusion that such a development "would not enhance (and would consequently threaten) the UK's aviation hub status". The thrust of this part of the claim is different. It goes to the Secretary of State's selection and use of the "hub objective" as a criterion by which to measure potential plans or projects and "alternative solutions" in formulating the ANPS. Mr Jaffey's main submission on this issue is that the "hub argument" was adopted by the Secretary of State at a late stage in the evolution of the ANPS, with the aim – or at least with the effect – of avoiding the need to consider expansion at Gatwick as an alternative and then potentially having to select that option. Mr Jaffey confirmed, however, that he was not alleging bad faith on the part of the Secretary of State. The Divisional Court had countenanced a "deliberately narrow re-definition" of the object of the ANPS.

87. We reject that argument, essentially for the same reasons as did the Divisional Court. First, as the Divisional Court recognized, the "hub objective" was a central aim of the ANPS throughout its process, and indeed was firmly in place before that process began. When the Airports Commission was established in September 2012, its explicit purpose was to "examine the scale and timing of any requirement for additional capacity to maintain the

UK's position as Europe's most important aviation hub" (paragraph 1.3 of the ANPS). The suggestion that the "hub argument" was adopted by the Secretary of State only at a late stage in the process, and with a view to avoiding the need to consider expansion at Gatwick as an alternative, is incorrect as a matter of fact.

88. Secondly, and again as the Divisional Court concluded, the Secretary of State was entitled to decide that a potential scheme threatening the "hub objective" could not properly be an "alternative solution" under the Habitats Directive. It is true that the Airports Commission's Final Report accepted that a second runway at Gatwick was a "credible option" for expansion, stating (in paragraphs 16.62 and 16.63):

> "16.62 Whilst each of the three schemes shortlisted for detailed consideration was considered a credible option for expansion, the Commission has unanimously concluded that the proposal for a new northwest runway at Heathrow Airport … presents the strongest case.
>
> 16.63 … [It] is the most effective means of achieving the goal set out in the Commission's original terms of reference to maintain the UK's position as a global hub for aviation."

However, as the Divisional Court acknowledged, the consistent view of the Secretary of State in the course of the ANPS process, accurately reflected in the Habitats Regulations Assessment, was that the Gatwick second runway scheme was not merely incompatible with the "hub objective" but inimical to it. It could therefore scarcely be considered a realistic "alternative solution" under article 6(4) of the Habitats Directive.

89. The conclusion in paragraph 3.19 of the ANPS, foreshadowed by the conclusion in paragraph 9.2.7 of the Habitats Regulations Assessment, which firmly rejected the Gatwick second runway scheme as an "alternative solution" under the Habitats Directive, is legally unimpeachable. It is not attacked in these proceedings, nor could it be. And it provides a complete answer to much of the Hillingdon claimants' case on the Habitats Directive issues.

90. Mr Jaffey relied on a passage in the judgment of Hickinbottom J., as he then was, in *R. (on the application of Friends of the Earth England, Wales and Northern Ireland Ltd.) v Welsh Ministers* [2015] EWHC 776 (Admin); [2016] Env. L.R. 1 (at paragraph 88 xi)):

> "88 xi) … An assessment as to whether the objectives would be "met" by a particular option is therefore peculiarly evaluative; but an option will meet the objectives if, although it may not be (in the authority's judgment) the option that best meets the objectives overall (i.e. the preferred option), it is an option which is capable of sufficiently meeting the objectives such that that option could viably be adopted and implemented. That, again, is an evaluative judgment by the authority, which will only be challengeable on conventional public law grounds. However, whilst allowing the authority a due margin of discretion, the court will scrutinise the authority's choice of alternatives considered in the SEA process to ensure that it is not seeking to avoid its obligation to evaluate reasonable alternatives by improperly restricting the range options it has identified as such."

Mr Jaffey sought to deploy those observations in support of his submission that the Secretary of State had consistently treated the Gatwick second runway scheme as an option that sufficiently met the Government's objectives to make it a viable "alternative solution" under article 6(4).

91. We do not think that submission is tenable. It seems to be based on a misunderstanding of the relevant conclusions in the Habitats Regulations Assessment and the ANPS. On a true reading, those conclusions were not to the effect that Heathrow, with or without a third runway, would be merely a better "hub" than Gatwick with the addition of a second runway. Rather, as the Divisional Court recognized, the crucial point was that, in the Secretary of State's view, Gatwick was simply not capable of attaining the necessary "hub status" to meet the essential aim of the ANPS even if it was expanded by the development of a second runway.

92. As the Divisional Court said (in paragraph 341):

> "341. … [The] correct approach to "alternative solution" in article 6(4) of the Habitats Directive is tolerably clear. In respect of an NPS, a proposed option is not an "alternative solution" unless it meets the core policy objectives of the statement. In this regard, Mr Jaffey's concern that, at an early stage, objectives may be defined with deliberate narrowness so that potential alternatives are (he said) unreasonably or (we say) unlawfully excluded has some force; but the objectives must be both genuine and critical, i.e. objectives which, if not met, would mean that no policy support would be given to the development. It would be clearly insufficient to exclude an option simply because, in the policy-maker's view, another, preferred option meets the policy objectives to a greater extent and is on balance more attractive. … But the extent to which an option meets policy objectives is different from an option not meeting a core policy objective at all."

93. Here, the "hub objective" was clearly a "genuine and critical" objective of the ANPS, which, "if not met, would mean that no policy support would be given to the development". It was described in the Divisional Court's judgment (at paragraph 46) as "the aim of maintaining the UK's position as Europe's most important aviation hub". It cannot be said that this objective was constructed with "deliberate" and unlawful "narrowness" to exclude other options. Given that a central purpose of the ANPS was to promote the United Kingdom's status as an "aviation hub", we see no room for a submission that the Secretary of State acted unlawfully in rejecting the Gatwick second runway scheme on the evidence that it could not fulfil that objective. On the contrary, as we have said, since there was a clear and unassailable finding that expansion at Gatwick "would not enhance, and would consequently threaten, the UK's global aviation hub status" (paragraph 3.19 of the ANPS), a scheme for the development of a second runway at that airport could not realistically qualify as an "alternative solution" under article 6(4). In fact, it would be no solution at all.

Habitats Directive issue (3) – was the exclusion of the Gatwick second runway scheme as an alternative solution because of its potential harm to an SAC in breach of the Habitats Directive?

94. On 25 September 2017, a document was presented to the Secretary of State by officials in the Airport Capacity Policy Directorate of the Department for Transport, distilling the most significant parts of the draft Habitats Regulations Assessment published in February 2017. The relevant content of that document was summarized by the Divisional Court (in paragraph 308):

> "308. The submission document explained that, because it had not been possible at this policy-making stage to exclude the possibility of adverse effects of the NWR Scheme on European sites, an assessment had been made of potential "alternative solutions". Increased capacity at Gatwick would generate additional traffic which was expected to have adverse effects on two European protected sites, the Ashdown Forest SPA/SAC and the Mole Gap to Reigate Escarpment SAC, by causing increases in NO_X levels. The latter site is important for wild orchids, and therefore treated under the Habitats Directive as a priority habitat requiring enhanced protection. Consequently the Gatwick 2R Scheme "was discounted as an alternative solution"."

95. The revised draft Habitats Regulations Assessment published in October 2017 concluded (in paragraph 9.2.11):

> "9.2.11 … Unlike the other European sites considered for LHR-NWR and LGW-2R, Mole Gap to Reigate Escarpment SAC contains a priority natural habitat type, which is defined as one in danger of disappearance, and for the conservation of which the European Community has particular responsibility (see Article 1(d) of the Habitats Directive)."

The following two paragraphs (paragraphs 9.2.12 and 9.2.13) were in identical terms to paragraphs 9.2.8 and 9.2.9 of the February 2017 draft Habitats Regulations Assessment (see paragraph 81 above). Thus a second runway at Gatwick was considered not to be an "alternative solution" because of the potential adverse effects on priority habitats.

96. In their response to consultation dated 19 December 2017 on the draft Habitats Regulations Assessment and the revised draft Habitats Regulations Assessment, in their role as relevant "nature conservation body", Natural England said (in paragraph 4(e)) that they "broadly [agreed] with the conclusions of the strategic Habitats Regulations Assessment, but would highlight the importance of the work still to be done at the project level HRA, with much of the detail still to be worked out … through detailed design assessment". Commenting on paragraphs 9.2.11 to 9.2.13 of the Habitats Regulations Assessment, they stated (in paragraph 14 of Annex 2):

> "Paragraph 9.2.11, 9.2.12, 9.2.13 [of the Habitats Regulations Assessment]: These sections identify the potential for air quality impacts from road traffic on Mole Gap to Reigate Escarpment SAC, with the presence of a priority natural habitat making an IROPI case challenging. This section concludes 'based on the information available at this stage it has not been possible to identify any alternative solutions to the preferred scheme'.
>
> Whilst we recognise this position for the strategic level assessment, we would advise that if the detailed project level HRA for Heathrow NWR also produces

findings that are negative or uncertain, then a more detailed assessment of alternatives (including Gatwick) is needed. This would need to consider in more detail the ecological impacts of emissions on the Mole Gap to Reigate Escarpment SAC in view [of] its qualifying features and conservation objectives. For example if the priority features of interest do not fall within the distance criteria for air quality impacts (200m for roads), then such an impact may be able to be ruled out, which may affect the view taken on alternative solutions."

97. In December 2017, Gatwick Airport Ltd. submitted to the Secretary of State a report produced by RPS in response to the Habitats Regulations Assessment ("Revised draft Airports National Policy Statement: Mole Gap to Reigate Escarpment SAC Orchid Survey of Unit 23"), which asserted that "potential effects on the Mole Gap Reigate Escarpment SAC could be excluded as not likely to have a significant effect on this site" (paragraph S1). The report went on to say (in paragraphs S2 to S4 and S6):

"S2. Notwithstanding that, the purpose of this current RPS report is to present the results of a survey, undertaken by RPS for Gatwick, of the part of the MGRE SAC closest to the M25 to map the location of orchids and the condition of the grassland in general. The aim of the survey was to provide further clarification to the conclusions of the previous RPS work with respect to the potential for effects on priority habitat.

S3. The survey did not identify any orchids of any species on this small part of the SAC that lies within 200 m of the M25. As expected, orchids are restricted to areas that are not grazed or trampled and to those that can tolerate rougher grassland such as Common Twayblade, Common Spotted-orchid and possibly Bee-orchid. Therefore, based on the survey reported here, this part of the SAC does not currently support the Annex I priority habitat calcareous grassland with 'important orchid sites'.

S4. Further, the grassland in the 200m buffer was found to be depauperate compared to the more species-rich swards on the steep slopes elsewhere in the SAC. Some small areas of more species-rich grassland did occur but these were rabbit grazed and subject to high visitor pressure. Therefore, it is highly unlikely that such grassland would support the rare orchid species characteristic of the priority habitat in its current condition.

…

S6. Based on the survey work carried out by RPS, this report concludes that the grassland within 200 m of the M25 is of a condition unlikely to support SAC quality orchidaceous rich grasslands. There are no plans to change the management of this area in the foreseeable future. Therefore there is no potential for an increase in traffic on the M25, as a result of LGW-2R, to have a significant effect with respect to the Annex 1 priority habitat calcareous grassland with 'important orchid sites'."

98. In the light of Natural England's response to consultation, accepting the possibility that the development of a second runway at Gatwick might have an impact on priority species within an SAC, the Divisional Court was satisfied there was "evidence before the Secretary

of State to support the conclusion that potential significant effects upon the SAC arising from [the Gatwick second runway scheme] could not be ruled out" (paragraph 368). It also concluded that the reference made in the draft Habitats Regulations Assessment published in February 2017 to the need to obtain the opinion of the European Commission on the potential effects on the SAC was not in itself an obstacle to the Gatwick second runway scheme being treated as an "alternative solution". But equally, this "did not detract from the essential judgment that, on the information available at the stage of preparing the ANPS, and applying the precautionary approach, the adverse impacts of [the Gatwick second runway scheme] could not be discounted" (paragraph 369). The Divisional Court's final conclusions on this point were these (in paragraphs 370 and 371 of its judgment):

> "370. … [We] accept that that leads to a further question: why should the Gatwick 2R Scheme have been completely discounted as an alternative solution at the ANPS stage because of this potential impact on an SAC near the M25 when, according to the advice of Natural England, a more detailed study at the project level stage for the NWR might be able to rule that impact out? In our view, before us, that question has not been satisfactorily answered.
>
> 371. However, Ground 8.2 was not put in that way; and, whatever the answer to that question might be, it could not establish a failure to satisfy article 6(4) because, in any event, the Secretary of State acted lawfully in excluding the Gatwick 2R Scheme as an alternative solution on the grounds that it failed to meet the "hub objective"."

99. The Hillingdon claimants say it is common ground that there is a substantial risk of harm to a number of SACs if the development of the Heathrow north-west runway proceeds and a risk of harm to priority species at the Mole Gap to Reigate Escarpment SAC if the Gatwick second runway scheme is built. But in any event, Mr Jaffey submitted, it was unlawful to exclude the Gatwick second runway scheme as an alternative on the basis of potential harm to the SAC, for two reasons: first, because no attempt had been made to evaluate the comparative harm of the two developments; and secondly, because the nature and extent of harm likely to be caused by the Gatwick second runway had not been identified and assessed.

100. Mr Maurici submitted that this was to misunderstand Natural England's advice. The true sense of that advice, he contended, was that Natural England had accepted the Secretary of State's approach, while also, and correctly, pointing out that article 6(4) would apply again at the project stage. In response to the Divisional Court's observation (in paragraph 370) that the question to be answered was why the Gatwick scheme had been discounted at the ANPS stage because of its impact on the SAC when, according to Natural England, a "more detailed assessment" might have ruled the impact out, Mr Maurici submitted that the requirements of article 6(4) are engaged at two distinct stages, each of which involves its own process: first, the plan stage – here the stage at which the ANPS was prepared and designated – and second, the project stage – when an application for a development consent order would be submitted and determined. It was inevitable that less information would be available at the plan stage. In the case of the ANPS, on the information available at the plan stage the Secretary of State, in agreement with Natural England, decided that the harmful effects of a second runway at Gatwick could not be ruled out, and Natural England had advised that more detailed work should be done at the project stage. But the Gatwick second runway scheme was conclusively ruled out as an alternative at that stage because it

did not meet – and indeed was seen to threaten – the United Kingdom's "hub status". It follows, Mr Maurici submitted, that only if the Secretary of State was demonstrably wrong on the "hub objective" issue could the Gatwick second runway scheme be regarded as an alternative to the third runaway at Heathrow, at either stage. The Secretary of State's conclusion on this issue was legally sound.

101. We see force in those submissions. If, as we have held, the Secretary of State was entitled to reject the concept of a second runway at Gatwick as an "alternative solution" to the north-west runway at Heathrow because, in his lawful view, it was contrary to the "hub objective", this was logically an overriding factor. It was conclusive on the question of the Gatwick second runway scheme being an "alternative solution" – regardless of the possibility that a scheme could be devised that would avoid harm to the SAC and the priority species within it. Crucially, it meant that such expansion at Gatwick could never be a solution, alternative or otherwise.

102. Under article 6(4) the Secretary of State has the power, and the duty, to make appropriate judgments about the possible harmful effects of a proposed scheme on a European site, and the "overriding public interest" in fulfilling the objectives of the plan or project in question. Mr Jaffey laid emphasis on the opinion of the Advocate General in *Commission v Portugal*. But, as Mr Maurici pointed out, the facts of that case can be distinguished from this, because the relevant authority there failed to consider any alternative plan at all. In this case the criticism made of the Secretary of State is not that he simply failed to consider the Gatwick second runway scheme as an alternative; it is that he wrongly excluded that scheme after he had considered it. And it also seems to us that the Advocate General's reasoning in *Commission v Portugal* supports Mr Maurici's submission that the Secretary of State acted reasonably and lawfully in carrying out the exercise he did to determine which scheme should be pursued. In paragraph 44 of her opinion the Advocate General said this:

> "44. Among the alternatives short-listed …, the choice does not inevitably have to be determined by which alternative least adversely affects the site concerned. Instead, the choice requires a balance to be struck between the adverse effect on the integrity of the SPA and the relevant reasons of overriding public interest."

103. Mr Jaffey also relied on the opinion of Advocate General Kokott in Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017 as supporting his submission that it may often not be possible to determine the outcome of compliance with the requirements of article 6(4) until final approval comes to be given, and it is essential therefore that potentially harmful impacts must be dealt with as fully as possible at every stage.

104. In principle, that proposition can hardly be doubted. As Advocate General Kokott said (at paragraph 49 of her opinion):

> "49. The United Kingdom Government is admittedly right in raising the objection that an assessment of the implications of the preceding plans cannot take account of all the effects of a measure. Many details are regularly not settled until the time of the final permission. It would also hardly be proper to require a greater level of detail in preceding plans or the abolition of multi-stage planning and approval procedures so that the assessment of implications can be concentrated on one point in the procedure. Rather, adverse effects on areas of conservation must be

> assessed at every relevant stage of the procedure to the extent possible on the basis of the precision of the plan. This assessment is to be updated with increasing specificity in subsequent stages of the procedure."

105. We readily accept that article 6(4) requires an iterative assessment of adverse effects, so far as is practical, at each stage of a procedure comprising more than a single stage. This is not in dispute. If the Gatwick second runway scheme had not fallen decisively outside the range of "alternative solutions" to the expansion of Heathrow by the addition of a third runway because such development was incompatible with – and hostile to – the "hub objective", it might well have been necessary to retain it as an alternative. If, in the course of the process leading to the designation of the ANPS, the Secretary of State had finally excluded the Gatwick second runway scheme as an alternative solely or principally on the ground of possible harm to the SAC, or to the priority species within it, his decision to do so might have been vulnerable to the criticism that it was premature and inappropriate.

106. That, however, is not what the Secretary of State did in this case. As the Divisional Court rightly concluded (in paragraph 371 of its judgment), it was, in the circumstances, reasonable and lawful for the Secretary of State to exclude the Gatwick second runway scheme as an "alternative solution" because in his view the evidence before him clearly indicated that it did not comply with the qualifying conditions for an "alternative solution" under the Habitats Directive. So the requirements of article 6(4) effectively ceased to apply to that scheme. It had been validly excluded as an alternative for the project stage for reasons unrelated to, and unaffected by, any possible conclusions relating to harmful effects, or the absence of them, on the Mole Gap and Reigate Escarpment SAC. It follows that if the Secretary of State was in error in relying on such conclusions as an additional and separate consideration, this ultimately had no effect on his performance of the duties imposed on him by the Habitats Directive and the Habitats Regulations, or on the outcome of the designation process. The decisive reason for the exclusion of the Gatwick second runway scheme as an alternative was its failure to satisfy the central objective of maintaining the United Kingdom's "hub status". This, in our view, is clear.

Habitats Directive issue (4) – did the Divisional Court err in distinguishing as it did between "alternative solutions" under the Habitats Directive and "reasonable alternatives" under the SEA Directive?

107. The scoping report produced by WSP in March 2016, was intended to comply with article 5(1) of the SEA Directive and section 5(3) of the Planning Act. It formed the environmental report for the purposes of the SEA Directive.

108. The consultation on the draft ANPS that began on 2 February 2017 was intended to comply with the relevant obligations under both article 6 of the SEA Directive and article 6(3) of the Habitats Directive.

109. The Divisional Court (in paragraph 322 of its judgment) contrasted the operation of the Habitats Directive with that of the SEA Directive. In particular, it contrasted the obligation to consider "alternative solutions" in article 6(4) of the Habitats Directive with the requirement to consider "reasonable alternatives" under article 5 of the SEA Directive. It emphasized the "substantive" nature of the obligation in article 6(4) of the Habitats Directive, whose operation bears on the outcome of the process, in contradistinction to the

requirement in article 5 of the SEA Directive, which is not "substantive" but "procedural". This essential difference between the provisions for the consideration of alternatives in the two Directives enabled it to conclude (in paragraph 323) that it was lawful for the Secretary of State to rule out the Gatwick second runway scheme as an "alternative solution" under article 6 of the Habitats Directive while also treating it as a "reasonable alternative" under article 5 of the SEA Directive. It said (in paragraph 322):

> "322. Second, and more importantly, it is necessary to have well in mind fundamental differences in the operation of the Habitats Directive and the SEA Directive. Where a proposal (whether to adopt a policy or to grant consent for a project) adversely affects the integrity of a European site, the operation of article 6(3) and (4) of the Habitats Directive (and regulations 63 and 64 of the Habitats Regulations) determines the outcome of the process, according to the results of applying the tests laid down in those provisions. It is therefore rightly said by Mr Jaffey that these provisions are *substantive* in nature, and not merely *procedural*. In our judgment, an option which does not meet a core objective of a policy should not be allowed to affect the application of article 6(4). By contrast, the requirements of the SEA Directive for the content of an environmental report and for the assessment process which follows are entirely procedural in nature. Thus, the requirement to address "reasonable alternatives" in the environmental report (or AoS under section 5(3) of the PA 2008) is intended to facilitate the consultation process under article 6 (and section 7 of the PA 2008). The operator of Gatwick and other parties preferring expansion at that location would be expected to advance representations as to why the hub objective should have less weight than that attributed to it by the Secretary of State or that, contrary to his provisional view, the Gatwick 2R Scheme could satisfy that objective. The outputs from that exercise are simply taken into account in the final decision-making on the adoption of a plan, but the SEA Directive does not mandate that those outputs determine the outcome of that process."

110. The Hillingdon claimants seek to fault those conclusions in two ways. First, they say it was inconsistent and unlawful for the Secretary of State to recognize the Gatwick second runway scheme as a credible alternative throughout the SEA process but not to treat it as an alternative under the Habitats Directive. The result of this, they say, was that, before designating the ANPS, the Secretary of State did not fully and properly consider the comparative effects of the north-west runway at Heathrow against the second runway at Gatwick on European protected sites. Secondly, they contend that the Divisional Court was wrong to hold that the corresponding provisions on alternatives in the SEA Directive and the Habitats Directive can be distinguished on the basis that the provisions of the SEA Directive are "procedural" in nature and those of the Habitats Directive "substantive". Mr Jaffey submitted that this false distinction led the Divisional Court to adopt an incorrect approach to the interpretation of the EU law concept of an "alternative". He argued that the test for ruling out alternatives under the Habitats Directive is no less stringent than under the SEA Directive, because an "alternative solution" is necessarily a broader concept than a "reasonable alternative".

111. We cannot accept these submissions. It is necessary, we think, to keep in mind the underlying purpose of each Directive. The purpose of the SEA Directive is to ensure the consideration of environmental information and to secure public participation in the formulation of plans and programmes (see recitals 1, 4, 5 14, 15, 17 and 18). As a reflection

of this basic purpose, and to give effect to it, all "reasonable alternatives" must be considered in an "environmental report" (article 5), which must be prepared and consulted upon before the adoption of the plan or programme (article 6). This exercise, if it is to be carried out effectively, requires that "reasonable alternatives" be put to the public in consultation. In this case, that requirement made it necessary that consultees, including Gatwick Airport Ltd., were given the opportunity to submit to the Secretary of State their representations in favour of particular alternatives, including the Gatwick second runway scheme, and to explain how such alternatives would meet the essential objectives of government policy, of which the "hub objective" was one.

112. In the Habitats Directive, however, there is no duty on the competent authority to consult before concluding that the requirements of article 6(4) are met. This is apparent in the language of article 6(4), which specifies what must be done "[if], in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out …". It is implicit that the consequent requirements – that "the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected", and that it "shall inform the Commission of the compensatory measures adopted" – are engaged only after a consideration of alternatives has been undertaken.

113. We therefore agree with the Divisional Court's conclusion. Whether or not the difference between the relevant provisions in the SEA Directive and those in the Habitats Directive is accurately described as a distinction between "procedural" and "substantive" is not, in the end, the decisive point. One must look at the substance of the provisions in either Directive, and their effect. The Divisional Court did that. As it recognized, in both substance and effect there is a real difference between the respective provisions.

114. In this case, where – in the Secretary of State's judgment – the suggested alternative proposal would go against the "hub objective" as a "core objective" of the policy, its consideration as an "alternative solution" would not only have been unnecessary under article 6(4) of the Habitats Directive, but also inappropriate. As Mr Maurici and Mr Michael Humphries Q.C. for HAL submitted, when the Secretary of State came to consider the designation of the ANPS, he was not obliged by the Habitats Directive and the Habitats Regulations to consider other schemes already rejected as possible "alternative solutions" because of their failure to meet an essential objective of the policy.

115. The operation of article 3 of the SEA Directive, however, is different. In this case it enabled consultees to argue that the "hub objective" should not be decisive against the suggested alternative, and to have their representations to that effect taken into account under article 6. But it did not bind the Secretary of State to a particular outcome. If the Gatwick second runway scheme had been ruled out as an alternative at the beginning of the SEA process, consultees would have been denied the opportunity of making representations in support of it, and having those representations considered.

116. It follows that we accept the argument presented by Mr Maurici and Mr Humphries on this issue. The Secretary of State's approach to the procedure for considering alternatives under each of the two Directives is not to be criticized. It was not inconsistent, irrational or otherwise unlawful. Since the respective provisions were, in substance and effect, different, a difference in approach was justified. Under the Habitats Directive, if a suggested alternative does not meet a central policy objective of the project or plan in issue, then it is

no true alternative and will properly be excluded. It is not then, and cannot be, an "alternative solution". In short, the Habitats Directive has a determining effect on the inclusion or exclusion of alternatives. By contrast, the identification of "reasonable alternatives" under the SEA Directive is a requirement designed to inform the following consultation process. It was, therefore, permissible, in the preparation of the ANPS, to retain the Gatwick second runway scheme as a "reasonable alternative" in the Appraisal of Sustainability throughout the process. However good a plan or project the alternative in question might be in itself, and even if there may be a strong case on environmental grounds for preferring it to the plan or project actually proposed, the SEA Directive does not dictate that it be adopted and the proposed plan or project rejected.

117. Although the Appraisal of Sustainability included consideration of the Gatwick second runway scheme as an alternative, it also expressly acknowledged (in paragraphs 7.4.52 to 7.4.57) the exclusion of that scheme as an alternative under article 6(4) of the Habitats Directive because it failed to meet the "hub objective":

> "7.4.52 On the basis of information that is available or can be reasonably obtained, and in accordance with the Precautionary Principle, it has not been possible to rule out adverse effects on the integrity of the above Natura 2000 sites, either alone or in combination with other plans and projects, with respect to each site's conservation objectives.
>
> 7.4.53 Where mitigation does not conclude an absence of adverse effects on integrity, both alone and in-combination, further assessment of the Airports NPS would be required under Stages 3 and 4 of the HRA process.
>
> …
>
> 7.4.55 … The assessment of alternative solutions has considered whether there are any feasible ways to deliver the overall objectives of the proposed plan, which will be less damaging to the integrity of the European sites affected. The two other schemes shortlisted by the Airports Commission have been considered against the objectives of the plan in relation to meeting the need to increase airport capacity in the South East and maintaining the UK's hub status. Whilst the Heathrow Extended Northern Runway scheme (LHR-ENR) would meet both of these objectives, the Gatwick Second Runway scheme (LGW-2R) would not. The assessment of the LHR-ENR scheme shows it would be no less damaging to European sites and as such is not an alternative solution.
>
> …
>
> 7.4.57 Notwithstanding the conclusion above, the AA undertaken for the two other shortlisted schemes also led to no suitable alternative solutions to LHR-NWR being identified. Further, the basis on which it could be concluded that the LHR-NWR scheme needed to be carried out for IROPI has been examined and it is considered that the needs case underpinning the Airports NPS sufficiently fulfils those reasons. In any event, the Airports NPS provides that no consent will be granted unless there is full compliance with Article 6(3) or Article 6(4) of the Habitats Directive and that any necessary compensatory measures will be secured in accordance with Regulation 66."

118. Those four paragraphs demonstrate the true nature of the process involved in the provisions of article 6(3) and article 6(4) of the Habitats Directive. A scheme considered by the competent authority to be an "alternative solution" at one stage may, in the light of further information or assessment, cease to be so regarded at a subsequent stage. No conflict with this process arose from the Secretary of State's decision to rule out the Gatwick second runway scheme as an "alternative solution" under article 6 of the Habitats Directive while also continuing to treat it as a "reasonable alternative" under article 5 of the SEA Directive.

119. But even if the Divisional Court's analysis, and ours, were incorrect, we would conclude nevertheless that there was no basis for granting relief on this issue. This is because, in our view, the Secretary of State was clearly entitled to reject the Gatwick second runway scheme as an "alternative solution" under the Habitats Directive for its failure to meet an essential objective of his policy. If, as the Hillingdon claimants assert, "alternative solutions" under article 6 of the Habitats Directive and "reasonable alternatives" under article 5 of the SEA Directive are synonymous, it would follow that the Gatwick second runway scheme should also have been rejected as a "reasonable alternative" under the SEA Directive. The criticism levelled at the Secretary of State for adopting an inconsistent approach would amount only to a complaint that he undertook a broader and more burdensome assessment than the SEA Directive required. The Gatwick second runway scheme would have been included unnecessarily, and unjustifiably, as an alternative in the strategic environmental assessment for the ANPS. So as Mr Maurici and Mr Humphries submitted, under section 31(2A) of the Senior Courts Act 1981 ("the Senior Courts Act") (see paragraphs 269 to 280 below), the court would have been right to withhold a remedy for an error of no real consequence in the ANPS process.

Habitats Directive issue (5) – a reference under article 267 of the TFEU?

120. The Hillingdon claimants request a reference to the Court of Justice of the European Union under Article 267 of the TFEU. They say the relevant EU law is not "acte clair", in two respects. The first question should be whether the test for the identification of "alternative solutions" in the Habitats Directive differs from the test for the identification of "reasonable alternatives" in the SEA Directive, and, if so, how. The second should be whether it is compatible with EU law for the court to limit its role to considering whether the identification of "alternative solutions" under article 6 of the Habitats Directive is "irrational", in the sense of being in defiance of logic or lacking any coherent basis.

121. Mr Jaffey referred to these remarks of Advocate General Kokott in her opinion in *Commission v Portugal* (at paragraph 43):

> "43. The absence of alternatives cannot be ascertained when only a few alternatives have been examined, but only after *all* the alternatives have been ruled out. The requirements applicable to the exclusion of alternatives increase the more suitable those alternatives are for achieving the aims of the project without giving rise – beyond reasonable doubt – to manifest and disproportionate adverse effects."

As Mr Jaffey pointed out, the court in its judgment did not adopt, or even comment upon, what the Advocate General had said about the "absence of alternatives". He submitted that

a reference is therefore necessary if this important issue of EU law is to be definitively decided. At the time of the hearing before us, "exit day" was to be 31 October 2019, but it was subsequently postponed to 31 January 2020. Mr Jaffey provided us with an outline of the likely effect of each of three scenarios for the United Kingdom's departure from the EU on references under article 267. Subsequently, Parliament has enacted the European Union (Withdrawal Agreement) Act 2020, which, among other things, amends the European Union (Withdrawal) Act 2018. There is now to be an "implementation period" after exit day, until 31 December 2020. Given the view to which we have come on the merits of the application for a reference, it is not necessary to discuss those scenarios here.

122. The Secretary of State resists the request for a reference on the grounds that an answer to the questions raised is not necessary to enable the court to give judgment, and that in the circumstances the inevitable delay and uncertainty would be unjustified.

123. The Divisional Court did not consider making a reference. In its view, as we have said, the status and consideration of "alternative solutions" under the Habitats Directive and of "reasonable alternatives" under the SEA Directive does not present any real difficulty. It evidently regarded both concepts as uncomplicated. It described the correct approach to "alternative solutions" under article 6(4) of the Habitats Directive as "tolerably clear" (paragraph 341 of the judgment).

124. We agree. In our view, there is no need for a reference in this case. The meaning of – and distinction between – "alternative solutions" under the Habitats Directive and "reasonable alternatives" under the SEA Directive is not unclear. And, in our opinion, the Advocate General's unsurprising observation in *Commission v Portugal* on the need for "*all* the alternatives" to have been ruled out before "the absence of alternatives" can be ascertained does not cast doubt on what an "alternative" may be in either of these two regimes. This must be established in the conventional way, by reading the legislative language in its own legislative context. Neither the Advocate General's remarks nor the absence of endorsement from the court can be said to create any uncertainty on the issues we have to consider. A reference here would serve no useful purpose.

The issues on the operation of the SEA Directive

125. The grounds of appeal concerning the operation of the SEA Directive relate to the adequacy and quality of the Appraisal of Sustainability against the criteria for an environmental report under the SEA Directive.

SEA Directive issue (1) – the court's approach when considering whether an environmental report complies with the SEA Directive

126. The Divisional Court concluded that the judgment of Sullivan J., as he then was, in *Blewett* demonstrates the correct standard of review for an environmental report prepared under the SEA Directive (paragraph 434 of the Divisional Court's judgment). On the legal adequacy of an environmental statement prepared under the EIA Directive and the EIA Regulations, Sullivan J. said this (at paragraph 41 of his judgment):

> "41. … The Regulations should be interpreted as a whole and in a common-sense way. The requirement that "an EIA application" (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. … In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the "full information" about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting "environmental information" provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations…, but they are likely to be few and far between."

127. Whilst those observations concerned the EIA Regulations, the Divisional Court held that they applied by analogy to the SEA Directive and the SEA Regulations. It said (in paragraph 419 of its judgment):

> "419. … Sullivan J held that the starting point was that it was for the local planning authority to decide whether the information supplied by the applicant was sufficient to meet the definition of an environmental statement in the EIA Regulations, subject to review on normal ["Wednesbury"] principles (see [32]-[33]). Information capable of meeting the requirements in schedule 4 to the EIA Regulations should be provided (see [34]), but a failure to describe a likely significant effect on the environment does not result in the document submitted failing to qualify as an environmental statement or in the local planning authority lacking jurisdiction to determine the planning application. Instead, deficiencies in the environmental information provided may lead to the authority deciding to refuse permission, in the exercise of its judgment (see [40]). Thus, the statement in [41], that the deficiencies must be such that the document could not *reasonably* be described as an environmental statement in accordance with the EIA Regulations, was in line with the judge's earlier observations in [32]-[33]. It simply identified conventional ["Wednesbury"] grounds as the basis upon which the court may intervene."

and (in paragraph 420):

> "420. In [*Shadwell Estates Ltd v Breckland District Council* [2013] EWHC 12 (Admin), at paragraph 73], Beatson J referred to a number of authorities which had taken the same approach in EIA cases to judicial review of the adequacy of environmental statements or the environmental information available: [*R. v Rochdale Metropolitan Borough Council ex p. Milne* [2000] EWHC 650 (Admin); [2001] Env. L.R. 22, at paragraph 106], [*R. (on the application of Bedford and Clare) v Islington London Borough Council* [2002] EWHC 2044 (Admin); [2003] Env. L.R. 22, at paragraphs 199 and 203], and [*Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321; [2012] Env. L.R. 22, at paragraph 39]. In *Bedford and Clare*, Ouseley J held

> that the environmental statement for the development of a new stadium for Arsenal was not legally inadequate because it had failed to assess transportation impacts using the local authority's preferred modal split, the loss of an existing waste handling capacity to make way for the development, noise effects at night and on bank holidays, contaminated land issues, and the effects of dust during construction. He considered that the significance or otherwise of those matters had been a matter for the local authority to determine. The claimant's criticisms did not show that topics such as modal split or noise effects had not been assessed at all. Instead, they related to the level of detail into which the assessment had gone and hence its quality. That was pre-eminently a matter of planning judgment for the decision-maker and not the court."

128. In *Shadwell Estates*, Beatson J., as he then was, said (in paragraph 73 of his judgment):

> "73. As to the role of the Court, review of the adequacy of environmental appraisals, assessments, and impact statements, is on conventional ["Wednesbury"] grounds: see [*ex p. Milne*] [2001] Env. L.R. 22 at [106] *per* Sullivan J (Environmental Assessment); [*Bedford and Clare*] at [199] and [203] *per* Ouseley J (Environmental Statement); *R (Jones) v Mansfield DC* [2003] EWCA Civ. 1408 at [14] – [18] (Environmental Impact Assessment), and [*Bowen-West*], at [39] *per* Laws LJ (Environmental Impact Assessment and Environmental Statement)."

129. Though there are differences between the two legislative regimes, those differences did not, in the Divisional Court's view, justify a divergence in the intensity of review. The similarities were significant. Both Directives require an environmental assessment to be undertaken if significant environmental effects are likely (paragraph 417(i) of the Divisional Court's judgment). Both allow the responsible authority to exercise its judgment in deciding the scope of, and detail to be included in, an environmental statement under the EIA Directive or an environmental report under the SEA Directive (paragraph 417(ii)). And both allow for a defect in an environmental statement or an environmental report to be cured by the subsequent publication of, and consultation upon, supplementary material (paragraph 417(iv)). Claims challenging the adequacy of an environmental report under the SEA Directive have been successful only when it has been shown that the authority responsible for preparing the plan or programme has failed to take into account something that article 5 and Annex I expressly require to be dealt with (paragraph 422).

130. As the Divisional Court saw it, the "*Blewett* approach" does not represent a freestanding principle of law, but is simply a "practical application of conventional ["Wednesbury"] principles of judicial review" (paragraph 432). As the information to be included in an environmental report under article 5(1) and Annex I is a matter of judgment on what "may reasonably be required", that judgment is subject to review on normal public law principles, including "Wednesbury" unreasonableness (paragraph 433). The "*Blewett* approach" exemplified this principle and was applicable here. The Divisional Court concluded (in paragraph 434):

> "434. Where an authority fails to give any consideration at all to a matter which it is explicitly required by the SEA Directive to address, such as whether there are reasonable alternatives to the proposed policy, the court may conclude that there has been non-compliance with the Directive. Otherwise, decisions on the inclusion or non-inclusion in the environmental report of information on a

> particular subject, or the nature or level of detail of that information, or the nature or extent of the analysis carried out, are matters of judgment for the plan-making authority. Where a legal challenge relates to issues of this kind, there is an analogy with judicial review of compliance with a decision-maker's obligation to take reasonable steps to obtain information relevant to his decision, or of his omission to take into account a consideration which is legally relevant but one which he is not required (e.g. by legislation) to take into account ([*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] A.C. 1014, at p.1065B]; [*CREEDNZ Inc. v Governor-General* [1981] N.Z.L.R. 172; [*In re Findlay* [1985] A.C. 318, at p.334]; [*R. (on the application of Hurst) v HM Coroner for Northern District London* [2007] UKHL 13; [2007] A.C. 189, at paragraph 57]). The established principle is that the decision-maker's judgment in such circumstances can only be challenged on the grounds of irrationality (see also [*R, (on the application of Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] Q.B. 37, at paragraph 35]; [*R. (on the application of France) v Royal London Borough of Kensington and Chelsea* [2017] EWCA Civ 429; [2017] 1 W.L.R. 3206, at paragraph 103]; and [*Flintshire County Council v Jeyes* [2018] EWCA Civ 1089; [2018] E.L.R. 416, at paragraph 14]). The "*Blewett* approach" is simply an application of this public law principle."

In the Divisional Court's view, therefore, "… the question whether the decision-maker has acted irrationally, be they a local planning authority or a Minister, demands the intensity of review appropriate for those particular circumstances" (paragraph 435).

131. Arguing this part of the Hillingdon claimants' appeal, Mr Nigel Pleming Q.C. submitted that although under article 5(2) the question of what information is "reasonably … required" involves an evaluative judgment by the decision-maker, it remains a legal requirement that the information is sufficient for the purposes of the SEA Directive. Whether this requirement has been met is a matter for the court. The effect of the Divisional Court's approach, said Mr Pleming, is that if the authority responsible for the preparation of the plan or programme is able to point to some information that can be said to address the requirements of the SEA Directive, the court will not examine the adequacy or quality of that information. Mr Pleming submitted that the appropriate intensity of review for testing compliance with the SEA Directive should match the requirements it contains and the court's obligation to give effect to the "precautionary principle". In short, the Divisional Court should have applied greater scrutiny than it did.

132. In the light of the decision of the Court of Justice of the European Union in Case C-567/10 *Inter-Environnement Bruxelles ASBL v Region de Bruxelles-Capitale* [2012] Env. L.R. 30, Mr Pleming submitted that an environmental report cannot be regarded as compliant with the SEA Directive simply because it refers to the requirements of article 5. In that case the court held (at paragraph 37) that "… given the objective of [the SEA Directive], which consists in providing for a high level of protection of the environment, the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly". Mr Pleming contended for an interpretation that is both broad and purposive. He referred to the basic objective identified in recital 14, and the mandatory requirements of articles 5 and 12. An appropriately purposive construction of article 5, he submitted, would indicate that the court should ask itself whether the environmental report is of sufficient quality to allow for effective

comment by those affected. Any failure to fulfil this essential purpose would amount to non-compliance with the SEA Directive. Pointing to the language of article 12(2), which requires Member States to "ensure that environmental reports are of a sufficient quality to meet the requirements of this Directive", Mr Pleming cited *Save Historic Newmarket Ltd. v Forest Heath District Council* [2011] EWHC 606 (Admin); [2011] J.P.L. 233, where Collins J. (at paragraph 12 of his judgment) said that "[quality] involves ensuring that a report is based on proper information and expertise and covers all the potential effects of the plan or programme in question".

133. As Mr Pleming reminded us, a principle stated by Lord Mance in his judgment in *Pham* (at paragraph 96) is that, "[whether] under EU, Convention or common law, context will determine the appropriate intensity of review". The relevant context here, submitted Mr Pleming, is set by the guiding objectives of the SEA Directive. Those objectives demand a structured review of the environmental report to ensure that compliance is achieved. This, he argued, accords with a modern approach to review commended by the Supreme Court in *Pham*, an approach more exacting than that adopted in *Blewett*. He referred to an observation by Advocate General Kokott in her opinion in *Holohan and others v An Bord Pleanála* Case C-461/17 [2019] Env. L.R. 16 (at paragraph 90): that "[for] the purposes of a judicial challenge … an applicant must show which potential significant effects of the project concerned the developer has not adequately assessed and discussed". He submitted that the Advocate General's deliberate use of the word "adequately" is consistent only with a more demanding approach than review at the standard of "Wednesbury" irrationality.

134. Mr Maurici and Mr Banner disputed the proposition that article 5 and Annex I impose requirements justifying a more intensive review than traditional public law principle dictates. They do not lay down hard-edged legal requirements. They allow the Secretary of State a broad discretion to determine what "may reasonably be required …". Mr Banner emphasized the fact that the SEA Directive does not prescribe a right of appeal against an authority's decision to adopt a plan or programme. Where a challenge is made, he submitted, the use of conventional principles in domestic public law, including "Wednesbury" irrationality, is an orthodox application of the Member State's discretion. He relied on the principle acknowledged by Advocate General Léger in his opinion in Case C-120/97 *Upjohn Ltd. v Licensing Authority Established Under Medicines Act 1968* [1999] 1 W.L.R. 927 (at paragraph 50): "[the] court has always taken the view that when an authority is required, in the exercise of its functions, to undertake complex assessments, a limited judicial review of the action which that authority alone is entitled to perform must be exercised, since otherwise that authority's freedom of action would be definitively paralysed …". Consistently with that principle, as Mr Maurici reminded us, the Court of Appeal accepted in *Ashdown Forest Economic Development LLP v Wealden District Council* [2015] EWCA Civ 681; [2016] Env. L.R. 2 that, as Richards L.J. put it (in paragraph 42 of his judgment), "the identification of reasonable alternatives [under article 5(1) of the SEA Directive] is a matter of evaluative assessment for the local planning authority, subject to review by the court on normal public law principles, including ["Wednesbury"] unreasonableness".

135. In our view, the submissions made by Mr Maurici and Mr Banner on this issue are correct. The question here goes not to the principle of an appropriate role for the court in reviewing compliance with article 5 of the SEA Directive. That principle is, of course, uncontroversial. We are concerned only with the depth and rigour of the court's enquiry. How intense must it be?

136. The answer, we think, must be apt to the provisions themselves. The court's role in ensuring that an authority – here the Secretary of State – has complied with the requirements of article 5 and Annex I when preparing an environmental report, must reflect the breadth of the discretion given to it to decide what information "may reasonably be required" when taking into account the considerations referred to – first, "current knowledge and methods of assessment"; second, "the contents and level of detail in the plan or programme"; third, "its stage in the decision-making process"; and fourth "the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment". These requirements leave the authority with a wide range of autonomous judgment on the adequacy of the information provided. It is not for the court to fix this range of judgment more tightly than is necessary. The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional "Wednesbury" standard of review – as adopted, for example, in *Blewett*. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court.

137. None of the authorities relied on by Mr Pleming casts doubt on the well-established principle in domestic case law that it is not the court's task to adjudicate on the content of an environmental statement under the EIA Directive or an environmental report under the SEA Directive, unless there is some patent defect in the assessment, which has not been put right in the making of the decision (see, for example, *R. (on the application of Squire) v Shropshire Council* [2019] EWCA Civ 888; [2019] Env. L.R. 36, at paragraphs 65 to 69). This principle is not inconsistent with the relevant jurisprudence in the Court of Justice of the European Union. In her opinion in *Craeynest*, the Advocate General said (at paragraph 42) that "EU law does not require the Member States to establish a procedure for judicial review of national decisions applying rules of EU law which involve a more extensive review than that carried out by the Court in similar cases".

138. The Hillingdon claimants also contended that the Divisional Court understated the so-called "*Blewett* standard of review" – and presumably the related case law cited by Beatson J. in *Shadwell Estates*, which the Divisional Court mentioned in its reasoning here. Assuming for the moment that this was the correct standard, Mr Pleming urged us to note Sullivan J.'s reference to the need, under the EIA Directive, for the "resulting "environmental information" [to provide the authority] with as full a picture as possible". He submitted that there is a parallel requirement under the SEA Directive for the "information" included in an environmental report to provide the decision-maker with "as full a picture as possible". Thus the "*Blewett* approach" itself does not merely require the court to consider whether an environmental report is "so deficient that it could not reasonably be described as" being such a document. It requires nothing less than the "full picture" to be provided. And in this case, Mr Pleming submitted, the Secretary of State had failed to ensure that the environmental report for the ANPS measured up to this level of content and assessment.

139. We do not accept that argument. Providing "as full a picture as possible" is not an explicit requirement of article 5 of the SEA Directive. Without distorting the words actually used in that provision, one can sensibly infer from them a requirement to provide as full a picture as "may reasonably be required", subject to the considerations referred to – which include "the extent to which certain matters are more appropriately assessed at different levels in

[the decision-making] process". They do not compel an exhaustive provision of information or an exhaustive assessment. The expression used by Sullivan J. must be read together with what he said in the following sentence – that "[there] will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations … , but they are likely to be few and far between". As he recognized in the same paragraph of his judgment, deficiencies in the environmental statement could, in principle, be overcome in the course of the process, so that, in the end, the "environmental information" in its totality – not merely the environmental statement itself – composed "as full a picture as possible".

140. Our conclusion on this issue is, we think, consistent with the reasoning of Lord Hoffmann in *R. (on the application of Edwards) v Environment Agency* [2008] UKHL 22; [2009] 1 All E.R. 57 (at paragraph 61):

> "61. In *Commission of the European Communities v Federal Republic of Germany* (Case C-431/92) [1995] ECR I-2189 the German authorities gave consent to the construction of a power station without requiring the submission, *eo nomine*, of an environmental statement. (At that time the EIA directive had not yet been transposed into German law). Instead, the authorities required and published the information specified by the *Bundesimmissionsschutzgesetz* (Federal Pollution Protection Law). The Court of Justice found that as this information coincided with that required by the EIA directive and the public had been given the opportunity to make representations about it, the requirements of the directive had been satisfied. The same is in my opinion true of the application in this case. No doubt more information could have been provided, but the observations of Sullivan J in [*Blewett*] at para 41 … show that this does not make the statement inadequate. I should add that this is not a case like *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 in which the alleged environmental statement had to be pieced together from a number of documents emanating from different sources. The application itself, emanating from the applicant as the EIA directive requires, was perfectly adequate."

There is nothing in those observations of Lord Hoffmann to suggest that the "Wednesbury" standard of review is not the appropriate standard. And they seem to us to support Mr Maurici's argument that, although more information could have been provided in the Appraisal of Sustainability for the ANPS, this does not mean it was legally inadequate as an environmental report.

141. We can see no force in the contention that the approach adopted in *Blewett* is, in principle, inapplicable to the SEA Directive. As we understand this argument, it is, essentially, that the procedure provided for in the EIA Directive is materially different from that under the SEA Directive. The former is directed to the assessment of the likely significant effects on the environment of an individual project, within a decision-making process in which the merits of the project, and its credentials as sustainable development, must also be judged against policy. The latter, by contrast, involves assessment of the environmental effects of the policy itself – here the ANPS – and there is no other means of formally testing the sustainability of that policy before it has crystallized.

142. Mr Pleming sought to derive support for this argument in an observation made by Lady Hale in *R. (on the application of HS2 Action Alliance Ltd and others) v Secretary of State*

for Transport [2014] UKSC 3; [2014] 1 W.L.R. 324, the case in which challenges to the HS2 project came before the court. Lady Hale said (in paragraph 133 of her judgment) that the "evaluation of alternatives [under the SEA Directive] is of a different order from that required for projects covered by the EIA Directive". And Lord Carnwath observed (in paragraph 44 of his judgment) that the "difference between the two procedures [EIA and SEA Directive] is significant principally in relation to the treatment of alternatives". Mr Pleming submitted that "a different order" in the treatment of alternatives necessarily implies "a different order" in the assessment itself. Thus, he argued, the "*Blewett* approach" cannot simply be read across from one process to the other.

143. We reject this submission, as did the Divisional Court. In our view, there is no warrant for a more taxing approach to be taken in reviewing compliance with the SEA Directive than that indicated in *Blewett*. Indeed, this would be contrary to the clear indications in the case law that the approach to judging the adequacy of an environmental report under the SEA Directive should be essentially the same. The Divisional Court accepted that. And in our opinion it was clearly right to do so.

144. This view seems consistent with both domestic and European authority. In *Walton v Scottish Ministers* [2012] UKSC 44; [2013] P.T.S.R. 51, Lord Reed (in paragraphs 10 to 30 of his judgment), in the light of European case law including *Terre Wallonne ASBL v Region Wallonne* (Joined Case C-105/9 and C-110/09) [2010] ECR I-5611, recognized that the objectives and the procedures for environmental assessment in the SEA Directive and those in the EIA Directive are intended to complement each other. We have referred already to the observation of Beatson J. in *Shadwell Estates* (at paragraph 73) that "review of the adequacy of environmental appraisals, assessments and impact statements, is on conventional *Wednesbury* grounds". In the same vein, in *Seaport Investments Ltd., Re Application for Judicial Review* [2007] N.I.Q.B. 62; [2008] Env. L.R. 23, Weatherup J., as he then was, said (in paragraph 26 of his judgment) that "[the] responsible authority must be accorded a substantial discretionary area of judgment in relation to compliance with the required information for environmental reports". He added that the court "will not examine the fine detail of the contents but seek to establish whether there has been substantial compliance with the information required". And in *No Adastral New Town Ltd. v Suffolk Coastal District Council* [2015] EWCA Civ 88; [2015] Env. L.R. 28 this court too has, in effect, approved the application of the "*Blewett* approach" in a challenge to the adequacy of an environmental report prepared under regulation 12 of the SEA Regulations. At first instance ([2014] EWHC 223 (Admin); [2015] Env. L.R. 3), Patterson J. had found there were two flaws in the early stages of the process, but concluded that these had later been remedied. In the subsequent appeal Richards L.J. considered the judgment of Singh J., as he then was, in *Cogent Land LLP v Rochford District Council* [2012] EWHC 2542 (Admin); [2013] 1 P. & C.R. 2, where a similar issue arose. Singh J. had applied the approach of Sullivan J. in *Blewett*, and Richards L.J. concluded he was right to do so (see paragraphs 48 to 54 of Richards L.J.'s judgment). This, in our view, is a clear indication that the "*Blewett* approach" can and should be applied in claims alleging breaches of the legislative regime for SEA.

SEA Directive issue (2) – a failure to provide an outline of the relationship between the ANPS and other relevant plans or programmes?

145. The Divisional Court noted that the Secretary of State had "made it plain in the SEA process that [the Appraisal of Sustainability] drew upon and updated the extensive work which had had previously been carried out by, and on behalf of, [the Airports Commission], including numerous reports to [the Airports Commission] and its own final report". None of the claimants had suggested that the Secretary of State was not entitled to take that course, and in the view of the Divisional Court "[he] clearly was" (paragraph 393 of the judgment).

146. In section 2.4, "Cumulative Effects", the scoping report produced in March 2016 confirmed that "[local] land-use plans and policies for proposed development in local authorities relating to options considered", and "[other] major projects" would be considered for their cumulative effects with expansion at Heathrow in the "next stage". However, it provided an "initial indication" of the "policies, plans and programmes" that should "potentially be included in the assessment of cumulative effects of other developments" (paragraph 2.4.2).

147. In section 6.15 of the Appraisal of Sustainability itself, under the heading "Cumulative Effects", paragraphs 6.15.1 and 6.15.2 state:

> "6.15.1 As described in Section 3, cumulative effects arise, for instance, where several developments each have insignificant effects but together have a significant effect, or where several individual effects of the plan (e.g. noise, dust and visual) have a combined effect. In the context of AoS, this is also taken to include PPPs as well as major projects. A review of PPPs and major infrastructure projects was undertaken and potential for cumulative effects identified. This is presented in Table 6.5 below. Potential cumulative effects have been included within the assessments described above and in the topic based assessments in Appendix A.
>
> 6.15.2 It should be noted that at the strategic level, this list is not exhaustive and cumulative effects arising from individual projects and plans should be revisited as part of a project level assessment." (our emphasis).

The potential cumulative effects referred to in Table 6.5, "Potential cumulative effects of schemes for the NPS", include effects arising from development planned by the councils among the Hillingdon claimants. The table lists local development plans, local mineral and waste plans, and the London Plan. It recognizes that local plans will provide for residential and commercial development and infrastructure, and that an increase in airport capacity would have cumulative effects with such development. It identifies the potential effects to be addressed, including the reduction in land available for other forms of development, the loss of "greenfield" land, noise and air quality impacts from aircraft, and the environmental effects of additional housing and commercial development and infrastructure. It recognizes the increasing difficulty of identifying suitable land for development faced by many local authorities, particularly around Heathrow, where the availability of land is "highly constrained".

148. Table 6.5 states, under the heading "Plans: Local Development Plans":

> "The local authorities located in the vicinity of the expansion schemes have various plans for residential, commercial or infrastructure development. Cumulative effects with planned development can be anticipated, particularly where proposed new development is located in close proximity to the expansion schemes and the associated surface access improvements. A detailed

consideration of the potential for cumulative effects arising would need to be undertaken as part of an EIA … ."

149. Bringing its various assessments together, the ANPS states, in paragraph 3.53:

> "3.53. The Appraisal of Sustainability identifies that, in addition to changes due to local noise and air quality impacts, communities may be affected by airport expansion through loss of, and/or additional demand for housing, community facilities or services, including recreational facilities. In addition, there will be effects on parks, open spaces and the historic environment, which will affect the quality of life of local communities which benefit from access to these facilities and features. <u>These effects will be of a higher magnitude for the two Heathrow expansion schemes and a lower magnitude for [the second runway at] Gatwick.</u> Overall, each of the three schemes is expected to have negative impacts on local communities, with more severe impacts expected from the Heathrow schemes. Impacts of all three schemes will not be felt equally across social groups. … ." (our emphasis).

150. The Divisional Court was unpersuaded by the Hillingdon claimants' argument that the Appraisal of Sustainability failed properly to address the relationship of the ANPS with other relevant plans (paragraphs 448 and 449 of the judgment). It accepted that, "although individual effects on local authority areas were not separately identified, the cumulative effects of such matters as additional demand for housing and community facilities, together with impacts on open spaces, were weighed in the balance; and they were assessed as counting more severely against the Heathrow schemes than [the Gatwick second runway scheme]" (paragraph 453). It held that the absence of a reference to "cumulative effects" in paragraph (a) of Annex I to the SEA Directive "does not mean that an environmental report cannot deal with the relationship with a group of other plans in terms of "cumulative effects" rather than as impacts on individual plans" (paragraph 454). It saw no reason to reject the evidence given on behalf of the Secretary of State that "it would not have been appropriate in the SEA to analyse the effects of the draft ANPS on the policies of individual local plans and that even if that approach had been followed, the Appraisal Framework would not have changed (Stevenson 1, paragraphs 3.44-3.53)" (paragraph 455).

151. It went on to say (in paragraphs 457 and 458):

> "457. The court was referred in Ms Stevenson's evidence; and, in a table of key points submitted by Mr Maurici, to a large number of references where matters such as loss of housing, schools and community facilities, along with increased demand for such development and facilities, have been addressed at a strategic level. For example, the AoS states that the NWR Scheme is likely to generate a demand for 300 to 500 additional homes per local authority per year as well as support from additional schools, two additional health centres and two primary care centres per local authority to 2030. The AoS makes the judgment that overall impacts on housing demand will affect local authorities across London and the South East and that the demand will spread and be low in comparison to existing planned housing. Those effects were assessed as being negative in relation to the NWR Scheme (see paragraph 1.12.2 of Appendix A to the AoS).

> 458. So, it is plain that consequences of this kind (and not just impacts) *have* been assessed for the NWR Scheme, albeit on a cumulative basis. Essentially, the Hillingdon Claimant Boroughs' complaint is limited to those consequences not having been assessed individually for each local authority area and the analysis having been carried out only at a "high level". By the end of the argument, it had therefore become clear that this was a challenge solely to qualitative aspects of the assessment."

152. As the wording of paragraph (a) of Annex I makes plain, the information to be provided under the provisions in article 5(1) and (2) is specifically "an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes" (our emphasis). With this mind, the Divisional Court concluded that "[the] relevant plans [had] not been ignored" in this case, and "the relationship with these plans [had] been addressed". The Appraisal of Sustainability had "addressed impacts cumulatively", and likewise "the consequences of those impacts". In discharging the obligation to provide an "outline", the Secretary of State was at liberty to decide how far the analysis should be taken. His decision not to analyse these matters at the level of each local authority was not open to challenge (paragraph 460). And his "series of judgments" did not betray a failure to comply with the requirement to provide an "outline of the relationship with other relevant plans". None of those judgments was irrational "as regards the content and level of detail of the coverage by [the Appraisal of Sustainability]" (paragraph 461). Even on the standard or review contended for by the Hillingdon claimants, the Divisional Court "would have concluded that the "quality" of [the Appraisal of Sustainability] did not fail to comply with [paragraph (a) of Annex I to the SEA Directive]" (paragraph 462).

153. It concluded (in paragraph 463):

> "463. … [As] accepted by the Secretary of State … , the issues raised by the Hillingdon Claimant Boroughs, namely the consequences of the NWR Scheme for the areas of individual local authorities, taking into account environmental and planning constraints and the scope for distributing additional development across a number of areas, will remain to be considered in the EIA accompanying any application for development consent and the examination of that application through the DCO process. It follows that the Mayor and local planning authorities will be able to make representations in that process about harmful impacts of this nature, both for individual areas and cumulatively, and the findings about these matters will be taken into account and weighed in the balance under section 104(7) of [the Planning Act]."

154. Before us, as before the Divisional Court, the Hillingdon claimants' main submission was that the Appraisal of Sustainability did not describe, even in outline, the relationship between the north-west runway scheme at Heathrow and the local plans for administrative areas where the environment would be severely affected by that development, nor the relationship with local strategies for the environment, including the London Environment Strategy, adopted by Greater London Authority in May 2018, which includes the London Zero Carbon Target.

155. Mr Pleming complained that there was no reference in the scoping report to the London Environment Strategy or the London carbon budgets. He did not contest the Divisional

Court's conclusion (in paragraph 459) that "… the London Environment Strategy, [the Ultra-Low Emissions Zone] and [the Air Quality Plan of 2017] … were addressed during the SEA process in a number of places, e.g. in section 8.10 of Appendix A to [the Appraisal of Sustainability] and in the WSP October 2017 [Air Quality] Re-analysis to which [the Appraisal of Sustainability] cross-refers". But he submitted that no consideration was given in the Appraisal of Sustainability to the London carbon budgets. The Secretary of State concedes that. However, Mr Maurici said this was a deliberate decision in the light of expert advice that separate consideration of carbon budgets for London would have made no difference to the relevant assessment. The Secretary of State relied on the expert advice of Ms Ursula Stevenson, an "environmental consultant" and, as she describes her role (in paragraph 1.5 of her first witness statement dated 28 November 2018) WSP's "internal 'Technical Excellence' lead for Environmental Assessment and Management services", that the carbon budgets would not change the outcome of the assessment and therefore need not be included in it.

156. We see nothing unlawful in the Secretary of State taking this course. This was a matter of judgment for him. The judgment itself was not irrational or otherwise unlawful. It was consistent with the advice the Secretary of State received, which Ms Stevenson explains (in paragraphs 3.125 to 3.134 of her first witness statement).

157. It is common ground that development provided for in local plans was taken into account in the Appraisal of Sustainability, but that this was done cumulatively – not individually, plan by plan. The issue therefore, as it was before the Divisional Court, is whether cumulative consideration of local plan policies and allocations was sufficient to satisfy the requirement under paragraph (a) of Annex I to the SEA Directive to provide "an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes". The Hillingdon claimants say the obligation to provide an outline of the "relationship" of the plan or programme "with other relevant plans" can only be satisfied if an outline of its relationship with each relevant plan is provided individually; it is not enough to provide a description of its relationship with all the relevant plans and an assessment of its cumulative effects in combination with them, taken as a whole. For example, the local plan for the London Borough of Hillingdon – "A vision for 2026, Local Plan: Part 1, Strategic Policies" adopted in November 2012 – provides for the development of new housing in the borough in the course of the plan period. But the expansion of Heathrow, if it proceeds, will itself generate pressure for additional housing, not planned in the local plan. The nature of the "relationship" between the local plan and the ANPS, therefore, is that the amount of development in the local area is likely to be more than has been identified and assessed in the SEA process. This should have been done, in accordance with paragraph (a) of Annex I, but it was not.

158. The simple answer to this argument, as Mr Maurici submitted, is that the total amount of development likely to come forward through local plans, including the Hillingdon Local Plan Part 1, together with the expansion of Heathrow by the development of a third runway, was sufficiently embraced in the scoping report and sufficiently assessed in the Appraisal of Sustainability to satisfy the requirements of the SEA Directive and the SEA Regulations. We share the conclusions of the Divisional Court (in paragraphs 457, 458 and 460 of its judgment). It is, we think, unrealistic to suggest that the assessment was invalidated by taking the effects of development in several local plans together, rather than separately. To do this, at least in the circumstances of this case, was not at odds with the requirement in paragraph (a) of Annex I. On a straightforward reading of that provision, the requirement to

provide an "outline" of the "relationship" between the plan or programme under consideration and "other relevant plans and programmes", in the plural, does not preclude such "relevant plans and programmes" being dealt with, as the words suggest, on their aggregate effects.

159. The Hillingdon claimants dispute the contention that it was unnecessary for local plans to be considered individually under paragraph (a) of Annex I because the ANPS addresses airport capacity at the national level. Mr Pleming submitted that the complexity of considering the relationship of the ANPS to each of a number of local plans does not excuse a failure to comply with paragraph (a) of Annex I. The ANPS provides policy support for a specific scheme at a specific location, and the effects of that scheme in combination with individual local plans should therefore have been assessed in the SEA.

160. We do not agree. Like the Divisional Court, we consider the approach taken to assessing cumulative effects in the Appraisal of Sustainability to have been lawful. It does not offend either the letter or the spirit of the relevant provisions of the SEA Directive. Given the national policy context in which the ANPS takes its place, it was in our view appropriate to adopt a broad approach to cumulative effects. That was realistic, and, we think, perfectly lawful. It was not a culpable omission to leave out a consideration of cumulative effects with individual local plans in favour of a more comprehensive assessment, following the expert guidance the Secretary of State received. There was no breach of article 5(2) or paragraph (a) of Annex I.

161. Finally, the Hillingdon claimants take issue with the Divisional Court's conclusion (in paragraph 499 of its judgment) that the interaction of the ANPS with local plans can be adequately addressed in the EIA at the development consent stage. The purpose of the legislative regime for SEA, they say, is to ensure that the strategic implications of development are known and considered at the plan-making stage, so that the Secretary of State, local authorities, those affected by the development, and the wider public are able to understand its effects. The counter argument from the Secretary of State is that the Divisional Court was right to recognize the inevitably more detailed assessment under the regime for EIA at the development consent order stage. As it accepted (in paragraph 463), the Mayor of London and local planning authorities will at that stage be able to make specific representations about the likely effects on the environment, including cumulative impacts, and those effects will have to be considered before a development consent order is granted.

162. Again, we agree with the view of the Divisional Court. The SEA regime and the regime for EIA will operate, at different stages of the process under the Planning Act, to ensure that the cumulative impacts of the development are fully assessed. Both at the policy-making stage in the preparation of the ANPS and in the subsequent process by which an application for a development consent order under section 103 of the Planning Act is considered, the cumulative effects of development at Heathrow and any other development with which it interacts, including development planned in local plans, will be assessed. The outcome of that process is not pre-determined by the strategic-level assessment of cumulative effects in the Appraisal of Sustainability. The strategic-level assessment informs an understanding of the strategic implications of the development envisaged in the ANPS. The degree of refinement required in that assessment, under the SEA Directive, is set by the terms of article 5 and Annex I. Those provisions are not unduly onerous. They do not stipulate a particular approach to cumulative assessment. They leave with the authority responsible for

promulgating the plan or programme a reasonably generous discretion in deciding how it should go about that work. In our view, that discretion was not exceeded by the Secretary of State in the preparation of the Appraisal of Sustainability.

SEA Directive issue (3) – a failure to identify the environmental characteristics of areas likely to be significantly affected by the ANPS?

163. The Appraisal of Sustainability included, in Appendix A-4 Noise, a noise impact assessment for the three shortlisted schemes. Because the patterns of air traffic movement likely to be created by the use of a new runway were at that stage uncertain – as indeed they are now – it was not possible to base the assessment of likely noise impacts on definite flight paths. The authors of the assessment therefore used indicative flight paths. They adopted a 54 dB LA_{eq} 16-hour threshold as the level of noise likely to have a significant effect on people (paragraphs 4.5.6 to 4.5.9 and 4.8.2).

164. In its response to representations made in consultation on the ANPS, published in June 2018, the Government said this on the future design of changes to airspace (in paragraph 6.48):

> "6.48. Airspace design falls outside the scope of the Airports NPS. As stated in the Airports NPS, precise flight path designs can only be defined at a later stage after detailed airspace design work has taken place. Once completed, the airspace proposal will be subject to consultation with local communities and relevant stakeholders in line with the requirements of the airspace change process which is owned by the Civil Aviation Authority (CAA). This is a very thorough and detailed process that covers all aspects of the proposal including safety and environmental impacts."

It was made clear (in paragraph 7.13) that the use of the indicative flight paths for the three schemes was considered to be appropriate for the taking of "strategic" decisions at the ANPS stage:

> "7.13. The AoS noise assessment is based on one set of indicative flightpaths. This is consistent with the approach adopted by the [Airports] Commission to compare the three expansion schemes in its final report. The purpose of this assessment is to draw out key strategic considerations relevant to noise. In light of this, the Government considers that the AoS is satisfactory, given that airspace design is currently highly uncertain, and the AoS follows the same approach as that used by the [Airports] Commission to compare the three expansion schemes in its final report."

The time likely to be required for making changes in airspace design was emphasized (in paragraph 7.15):

> "7.15. Proposals to change the UK's airspace design are governed by the separate [CAA's] airspace change process, which was made more rigorous from 2 January 2018. The design of new flight paths is highly technical and can take several years. It is a requirement of the CAA's airspace change process that there must be adequate consultation. Airspace change sponsors would need to take account

> of the Government's new policy on appraising options for airspace design, such as considering the use of multiple routes. It is therefore through this regulatory process that communities will see and have the opportunity to comment on detailed proposals for new flight paths which may affect them."

Whilst the Government acknowledged that the Gatwick second runway scheme clearly performed better than the Heathrow schemes in the number of people likely to be significantly affected by aviation noise, this had been only one factor in the Secretary of State's decision. When all "benefits and dis-benefits" were considered together, the Secretary of State considered that the north-west runway scheme at Heathrow would deliver the greatest "net benefits" to the United Kingdom (paragraph 7.20).

165. The Government emphasized the "strategic" nature of the noise assessment for the ANPS (in paragraphs 7.54 to 7.56):

> "7.54. The noise analysis that is presented in the AoS represents a strategic assessment of unmitigated noise impacts, based on indicative flightpaths. Its purpose is to draw out key strategic considerations relevant to noise. To this end, relevant noise metrics are presented in the AoS. The high level noise assessment presented in the AoS includes an assessment of unmitigated noise impacts at 54 dB LA_{eq}, 16hr, which is consistent with the findings of the [Survey of Noise Attitudes] report. …
>
> 7.55. The Lowest Observed Adverse Effects Level ("LOAEL")] recommended in the Government's response to the consultation on UK Airspace Policy (51 dB LA_{eq} 16hr) is specifically for comparing different options for airspace design. The AoS Noise Appendix explains why it would not be appropriate at this stage of the process to assess absolute noise levels and associated local population exposure below 54 dB LA_{eq} 16hr. For practical reasons it becomes more difficult to estimate noise exposure accurately, and therefore population numbers affected, below this noise level. This is because it is difficult to measure aircraft noise levels at greater distances from an airport where aircraft noise levels are closer to those of other noise sources. Also, due to variability in aircraft position in the air at these greater distances from the airport, the absolute noise levels have a lower level of certainty.
>
> 7.56. Any airspace change required for the Heathrow Northwest Runway scheme would be subject to the CAA's airspace change process. This would require a comparative assessment of options for airspace design with noise impacts assessed from the LOAELs set out in the new national policy on airspace – 51 dB LA_{eq}, 16hr for day time noise and 45 dB Lnight for night time noise. This would be done using WebTAG, which is the Government's standard appraisal methodology for transport schemes, and would ensure that the total adverse effects of each option on health and quality of life can be assessed."

166. On the use of indicative flight paths, the ANPS says this (in paragraph 5.50):

> "5.50. The Airports Commission's assessment was based on 'indicative' flight path designs, which the Government considers to be a reasonable approach at this

> stage in the process. Precise flight path designs can only be defined at a later stage after detailed airspace design work has taken place. This work will need to consider the various options available to ensure a safe and efficient airspace which also mitigates the level of noise disturbance. Once the design work has been completed, the airspace proposal will be subject to extensive consultation as part of the separate airspace decision making process established by the Civil Aviation Authority."

167. The ANPS indicates (in paragraph 5.52) the likely requirements for the noise impact assessment in the EIA that will have to be undertaken if an application for a development consent order is made. The environmental statement prepared at that stage would include an "assessment of the likely significant effect of predicted changes in the noise environment on any noise sensitive premises (including schools and hospitals) and noise sensitive areas (including National Parks and Areas of Outstanding Natural Beauty)". A number of necessary noise mitigation measures are specified. These include the alternation of runway use to ensure local communities have predictable periods of respite from noise (paragraph 5.61) and a ban on scheduled night flights for six and a half hours between 11 p.m. and 7 a.m. (paragraph 5.62). Describing the approach that will be taken to any decision on an application for development consent, the ANPS says (in paragraph 5.68):

> "5.68. Development consent should not be granted unless the Secretary of State is satisfied that the proposals will meet the following aims for the effective management and control of noise, within the context of Government policy on sustainable development:
>
> - Avoid significant adverse impacts on health and quality of life from noise;
> - Mitigate and minimise adverse impacts on health and quality of life from noise; and
> - Where possible, contribute to improvements to health and quality of life."

168. As the Divisional Court recognized, even using indicative flight paths and the 54 dB LA_{eq} 16-hour noise threshold – the two points on which the Hillingdon claimants say the Secretary of State's approach was legally flawed – the Appraisal of Sustainability had still found that the potential negative effects of each of the two Heathrow schemes on quality of life, health and amenity would be greater than those of the Gatwick second runway scheme. This was, as the Divisional Court put it, "because Gatwick is in a more rural location and fewer people are affected by the impact there" (paragraph 467 of the judgment). It is quite clear, however, that the more harmful noise impacts arising from expansion at Heathrow were considered by the Secretary of State in making the decision to select the north-west runway scheme at Heathrow as the preferred development in the ANPS. Equally clear is that even if different flight paths had been assumed or a different noise threshold selected, the conclusion that the Heathrow schemes would result in worse and more widespread noise effects than a second runway at Gatwick would have been the same. As the Divisional Court said, "[this] self-evident point has clearly been taken into account in the decision to designate the ANPS" (ibid.).

169. The Divisional Court reminded itself, and the parties, of the limits to the court's jurisdiction in a claim for judicial review where criticism is made of the decision-maker's approach on a technical or scientific question. As it rightly said, "although many people may be concerned about the noise effects of airport expansion, it is not the function of this court to become involved in the technical merits of the two criticisms made by [the councils among

the Hillingdon claimants] in their claim", but only to "[decide] whether they can demonstrate that the Secretary of State has made an error of law …" (paragraph 468).

170. In its conclusion on the Secretary of State's use of indicative flight paths, the Divisional Court saw a distinction between an approach based on areas "over which flight paths *may* be located" and one based on areas "within which it is *likely* that landings and take offs causing noise pollution will occur". It concluded that the former does not accord with the requirement in paragraph (c) of Annex I to the SEA Directive to identify areas "likely to be significantly affected". The Hillingdon claimants' argument based on that approach was, in its view, "misconceived" (paragraph 475). It also held that "there can be no legal objection to the use of indicative flight paths as a matter of principle" (paragraph 476).

171. As for the argument that flight paths ought to have been determined on a "worst case" basis to "respect the precautionary principle in the SEA Directive", the Divisional Court observed that even if this were correct "there would still remain the same difficult judgment for experts to make as to how to predict where such flight paths are likely to be located". Then there would be the question of "what factors would produce a "worst case" analysis, without arriving at something which is unrealistic and not therefore a sound basis for decision-making". Though this was, as the Divisional Court said, "[to] some extent … a matter of degree", it necessarily involved "an evaluative judgment using predictive techniques and [was] dependent upon expert technical opinion". Undoubtedly, it engaged the "enhanced margin of appreciation" described in *Mott* (paragraph 477). Having considered the evidence and submissions before it on this issue, the Divisional Court concluded (in paragraph 487):

> "487. Ultimately, it was a matter of judgment for the Secretary of State, assisted by expert advice, to determine what information was reasonably required in relation to flight paths, so as to identify areas likely to be significantly affected. On the material before the court, it is impossible to say that the judgment he reached was irrational or that there has been a failure to comply with the SEA Directive in this respect."

172. The Divisional Court grasped the differences in the expert evidence on the appropriate threshold for the noise assessment. Ms Low and Mr Michael Lotinga, a chartered engineer and acoustician employed by WSP, had explained why, in taking strategic level decisions for the ANPS, it had been judged appropriate to adopt the 54 dB LA_{eq} 16-hour level rather than 51 dB LA_{eq} 16-hour. Mr Colin Stanbury, the Aviation Project Officer for the councils of the London boroughs of Richmond upon Thames and Wandsworth, had explained why he disagreed and believed the lower figure should have been used. But, as with the issue of flight paths, the Divisional Court stood back from adjudicating on technical questions of this kind. It said (in paragraph 490):

> "490. We were invited to review the extensive evidence on this subject filed by both sides. Mr Stanbury says (in Stanbury 1, paragraph 28) that in its Air Navigation Guidance 2017 the Government has set the LOAEL at 51dB $LA_{eq16hour}$ based upon the CAA's publication 1506: Survey of noise attitudes 2014: Aircraft. We note in passing that, in his footnotes 24 and 29, Mr Stanbury explains that, according to this survey, at the 51dB level 7% of the population would be "highly annoyed" compared with 9% at the 54dB level. The source for those results is table 31 of CAA publication 1506. To put that into context, the AoS treats 54dB $LA_{eq16hour}$ as signifying "a level at which

> significant community annoyance starts to occur" (Table 4.2 of Appendix A to the AoS)."

It concluded (in paragraph 491):

> "491. … [*Mott*] again underscores that point. There was nothing that could be described as irrational in the Secretary of State's approach to the selection of noise parameters. This issue did not involve any failure to comply with the SEA Directive."

173. In what was largely a reprise of the argument that did not succeed before the Divisional Court, Mr Pleming's main submission here was that the noise impact assessment carried out in the Appraisal of Sustainability failed adequately to define the extent of the areas likely to be significantly affected by noise, as paragraph (c) of Annex I requires. The Secretary of State went wrong in three ways: first, in deciding to use a single set of indicative flight paths that understated the geographical extent of the areas likely to be subject to overflying; secondly, in adopting the 54 dB LA_{eq} 16-hour threshold for identifying noise whose effect on people would be significant – in spite of the Government's own policy setting the threshold at 51 dB LA_{eq} 16-hour; and thirdly, in deciding to identify the numbers of people and buildings, rather than the areas, likely to be significantly affected.

174. Mr Pleming submitted that if paragraph (c) of Annex 1 is read, as it should be, in the light of the precautionary principle and the aim of the SEA Directive to ensure that communities likely to be affected by a plan or programme are consulted and given an early and effective opportunity to comment, it is necessary to avoid underestimating the area over which flights may occur. Using only one set of indicative flight paths, as the Secretary of State did here, was not enough. It was probable that many people significantly affected by noise would not be under those flight paths. It was true that in the Divisional Court the Hillingdon claimants had not argued for the use of "actual flight paths" in the Appraisal of Sustainability (see paragraph 473 of the judgment). But in the absence of precise flight paths, the Secretary of State ought to have used areas instead, not indicative flight paths. Mr Pleming relied on the approach indicated in Advocate General Kokott's opinion in Case C-290/15 *D'Oultremont and others v Region Wallonne* [2016] 7 WLUK 325 (AGO) (at paragraph 37 to 45).

175. We cannot accept those submissions. In our opinion, there was nothing amiss in the Secretary of State's use of indicative flight paths. It was neither irrational nor in any other way unlawful. As Mr Maurici argued, it was understandable, for at least three reasons. First, when the ANPS was being prepared, the siting, dimensions and design of the new runway were not yet final. Secondly, the assessment of noise impacts in the Appraisal of Sustainability had to be undertaken before the separate statutory process for airspace change was conducted, and its outcome known. And thirdly, the approach adopted by the Secretary of State corresponded to that of the Airports Commission when comparing the three airport expansion schemes in its Final Report in July 2015.

176. Mr Pleming also submitted that the Divisional Court was wrong to think it was purely a matter of judgment for the Secretary of State, aided by expert advice, to decide what information was reasonably required when establishing the areas likely to be significantly affected by noise. The Divisional Court should have looked beyond the mere fact that the

noise assessment was informed by expert technical judgment. This, of itself, was not enough to comply with the requirements of the SEA Directive. To rely here on an "enhanced margin of appreciation", as suggested in *Mott*, was wrong. It was possible for an environmental report to be technically adequate but still not compliant. *Mott* concerned a challenge to the rationality of a decision taken by the Environment Agency to impose an annual "catch limit" on a commercial fisherman's licence to operate a salmon fishery on the strength of technical evidence and judgment. In this case, Mr Pleming submitted, the question is of a different kind, and more basic. It is whether the Secretary of State complied with the mandatory requirement under paragraph (c) of Annex I to the SEA Directive to identify areas likely to be significantly affected by noise caused by aircraft using the north-west runway.

177. We find that argument unconvincing. The Divisional Court was, in our view, right to conclude that the Secretary of State's decision, on expert advice, to use indicative flight paths in the noise assessment lay squarely within his decision-making discretion. This was a classic exercise of planning judgment, on the kind of issue for which the court will allow the decision-maker a substantial "margin of appreciation" – as explained in *Mott*. The Secretary of State exercised his judgment rationally. And there was no default in his meeting the requirement in paragraph (c) of Annex I to identify areas "likely to be significantly affected" or that in article 5(2) to include in an environmental report "the information that may reasonably be required …". Both of those requirements leave the authority responsible for preparing a plan or programme a wide margin of judgment.

178. A similar conclusion applies to Mr Pleming's other submission on this issue, which attacks the Secretary of State's decision to adopt the 54 dB LA_{eq} 16-hour threshold as the LOAEL. Mr Pleming accepted that the SEA Directive and the SEA Regulations do not provide generally for prescriptive limits or thresholds to be used in the assessments performed in an environmental report, nor any specific threshold for noise impact assessment. Yet he submitted that in this case the adoption by the Secretary of State of the 54 dB LA_{eq} 16-hour threshold was unlawful, for two reasons. First, he submitted, it was irrational and contrary to the precautionary principle to adopt a higher threshold than was set in the Government's own policy, namely the 51 dB LA_{eq} 16-hour level in its Air Navigation Guidance 2017. Secondly, the adoption of that threshold had the effect of masking the true potential noise impacts of aircraft using the north-west runway at Heathrow.

179. In responding to those submissions Mr Maurici contended, as he did before the Divisional Court, that they amount to no more than a disagreement with expert opinion – an impermissible basis for impugning a decision-maker's exercise of judgment in a claim for judicial review (see the judgment of Beatson L.J. in *Mott*, at paragraph 70). Mr Maurici pointed to Mr Lotinga's evidence, which explained why the adoption of the 54 dB LA_{eq} 16-hour contour was appropriate. In his first witness statement, dated 28 November 2018, Mr Lotinga concluded (in paragraph 3.3.39):

> "3.3.39. … [In] aviation noise policy terms, a suitable threshold for identifying potentially significant adverse effects of aviation noise is considered to be 54 dB $LA_{eq,16hr}$ … . In the AoS, the assessment approach taken was that any predicted increases in exposure to the noise impact categories of 54 dB $LA_{eq,16hr}$ and above, due to an expansion scheme option, constituted a 'significant negative effect' – this is consistent with current national policy."

As Mr Maurici also told us, the CAA, as regulator, specifically advised against the use of a threshold below 54 dB LA_{eq} 16-hour.

180. The Secretary of State's position here is, it seems to us, correct. The Hillingdon claimants' argument is, in truth, a criticism of the expert evidence upon which the Secretary of State based his decision to select 54 dB LA_{eq} 16-hour as the appropriate threshold. The court's reviewing role does not stretch to determining disputed issues of technical, expert evidence. As the Divisional Court concluded (in paragraph 491 of its judgment), it was inappropriate to expect, in a claim for judicial review, a resolution of contentious matters of expert opinion on the question of whether the threshold ought not to have been set at 54dB, but at 51dB or some other level. This again was, obviously, a matter of judgment for the Secretary of State, having in mind the expert advice he was given. The judgment he reached might have been different. But it is not vulnerable to public law challenge.

181. Mr Pleming submitted that it was not enough for the Secretary of State to identify in the Appraisal of Sustainability only the numbers of people and buildings likely to receive a significant noise impact. This, he submitted, was inconsistent with the requirement under paragraph (c) of Annex I to identify the "areas" likely to be significantly affected. "Areas" would include, for example, schools, open spaces, hospitals and care homes. The impacts on them ought to have been considered in the noise assessment – but were not. Failure to do this went against the purpose of the SEA Directive to ensure that communities likely to be affected by a plan or programme are properly consulted and given an early and effective opportunity to comment. If, as here, only numbers of people and buildings are included in a noise impact assessment, communities are denied that opportunity.

182. This argument, we think, rests on a misunderstanding of paragraph (c) of Annex I. The concept of "areas" in that provision does not, in our view, exclude the approach to noise impact assessment adopted in the Appraisal of Sustainability. It does not preclude an assessment that concentrates on the effects of aviation noise on the population of an area within particular noise contours, demonstrating the number of people and buildings likely to experience noise at given levels. This does not mean that an approach that goes further – for example, by bringing into the assessment the effects on particular land uses within the "areas" affected by noise – would not also comply. But it does mean that the hurdle of demonstrating irrationality or illegality in the noise impact assessment undertaken for the ANPS in the Appraisal of Sustainability is not overcome by the submission that the assessment should have been on a different basis, or enlarged beyond what was actually done.

183. A further point, fairly made by Mr Maurici, is that, at the development consent order stage, there will be a full process of consultation and assessment in the EIA for the third runway project – if and when that project is pursued; and that the airspace change process also lies ahead. In both of those future processes the Hillingdon claimants will be able to make submissions on noise and other environmental impacts, with the advantage, then, of much greater clarity not only on the third runway development itself but also on the flight paths to and from the expanded airport.

The climate change issues

184. The issues concerning the United Kingdom's commitments on climate change can conveniently be simplified, and dealt with, under four principal headings: "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?"; "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 Planning Act"; "SEA Directive issue (4) – whether the Secretary of State breached the SEA Directive by failing to consider the Paris Agreement"; and "Climate change issue (2) – did the Secretary of State err in his consideration of non-CO_2 impacts and the effect of emissions beyond 2050?" (see paragraphs 12 and 13 above).

185. As we have said, the Climate Change Act set a "carbon target" for the United Kingdom to reduce its greenhouse gas emissions by 80% from their level in 1990 by 2050 (section 1). This was consistent with the global temperature limit in place in 2008, which was 2°C (see paragraph 17 above). In contrast, the Paris Agreement enshrines a firm commitment to restricting 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" (article 2(1)(a)) (see paragraph 23 above).

186. It is common ground that the Secretary of State did not take the Paris Agreement into account in the course of making his decision to designate the ANPS.

The judgment of the Divisional Court

187. We begin by outlining the reasoning of the Divisional Court, which considered the topic of climate change in paragraphs 558 to 660 of its judgment.

188. In paragraphs 558 to 592, the Divisional Court set out a helpful summary in chronological form of developments in this area, both at the international level and at the domestic level. It set out the history of international agreements since 1992, culminating in the Paris Agreement in 2015. It also referred to the domestic legislation, in particular the Climate Change Act.

189. In paragraphs 593 to 601, the Divisional Court summarized what was said in the ANPS about the subject of climate change. In particular, it quoted in full paragraphs 3.61 to 3.69 and 5.82 of the ANPS. It is unnecessary to set out paragraphs 3.61 to 3.69 of the ANPS again here. But we should set out paragraph 5.82, which states:

> "5.82 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."

190. In paragraphs 602 to 660, the Divisional Court considered in turn Plan B Earth's grounds of challenge and Friends of the Earth's grounds of challenge in the applications for permission to bring claims for judicial review then before it. The court concluded that none of the arguments were viable and refused permission to bring claims for judicial review. Some – but not all – of the arguments made to the Divisional Court have been resurrected before this court.

191. It is to be noted that Plan B Earth's grounds centred upon the meaning and effect of section 5(8) of the Planning Act, with the support of the Hillingdon claimants, whereas the arguments for Friends of the Earth focused on section 10. Indeed, counsel for Friends of the Earth (Mr David Wolfe Q.C.) expressly distanced himself from the submissions of Plan B Earth based on section 5(8), accepting the relevant policy was no more and no less than that set out in the Climate Change Act (see paragraphs 605 and 636 of the judgment).

192. In paragraphs 606 and 607, the Divisional Court said:

> "606. It is well-established that English law is a dualist legal system under which international law or an international treaty has legal force at the domestic level only after it has been implemented by a national statute (see, e.g., [*J. H. Rayner (Mincing Lane) Ltd. v Department of Trade and Industry* [1990] 2 A.C. 418, at p.500] per Lord Oliver of Aylmerton, and [*R. v Secretary of State for the Home Department, ex p. Brind* 1 A.C. 696, at p.747F-H] per Lord Bridge of Harwich). Therefore, none of them having been incorporated, any obligation imposed on the UK Government by the Paris Agreement has no effect in domestic law.
>
> 607. But, in any event, as we have described, whilst expressing international objectives – notably, 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 – the Paris Agreement imposes no obligation upon any individual state to limit global temperatures or to implement the objective in any particular way. It expresses global objectives, and aspirations in respect of national contributions to meet those objectives; and it obliges each state party to "prepare, communicate and maintain successive nationally determined contributions that it intends to achieve". Parties are required to pursue domestic mitigation measures, with the aim of achieving the objectives; and ensure they meet the requirement for successive nationally determined contributions to be progressive (article 4). But it clearly recognises that the action to be taken in terms of contributions to the global carbon reduction will be nationally determined "in the light of different national circumstances" (article 2(2)); and that, in that determination of national contributions, economic and social (as well as purely environmental) factors and the consideration of how other states are proposing to contribute will or may play a proper part. It is clearly recognised on the face of the Paris Agreement that the assessment of the appropriate contribution will be complex and a matter of high level policy for the national government."

It went on to say (in paragraph 608):

> "608. Parliament has determined the contribution of the UK towards global goals in the CCA 2008. Of course, that is not framed in terms of global temperature reduction – a national contribution could not be so framed – but it was clearly based on a global temperature limit in 2050 of 2°C above pre-industrial levels. No one suggests otherwise. However, the target set in section 1 of the Act – that the net UK carbon account for 2050 is at least 80% lower than the 1990 baseline – was set, by Parliament, having taken into account, not just environmental, but economic, social and other material factors. It is an entrenched policy, in the

> sense that that target cannot be changed other than in accordance with the Act, i.e. only if there have been significant developments in scientific knowledge about climate or in European or international law or policy, and then only after obtaining and taking into account advice from the CCC and being subject to the Parliamentary affirmative resolution procedure."

and in paragraph 610:

> "610. The most recent formally expressed view of the CCC is that the current target in section 1 of the CCA 2008 is potentially compatible with the ambition of the Paris Agreement to limit temperature rise to 1.5ºC and "well below" 2ºC, i.e. that ambition could be attained even if the current target is maintained, and therefore one possible rational response to the Paris Agreement is to retain the current CCA 2008 targets, at least for the time being."

193. In paragraph 612, the court agreed with the submission of Mr Maurici in this regard, supported by Mr Wolfe for Friends of the Earth, "that Government policy in respect of climate change targets was and is essentially that set out in the CCA 2008".

194. In paragraph 615, the Divisional Court said:

> "615. The UK policy in this regard, now and at all relevant times, is and has been based on a national carbon cap. The cap is as set out the CCA 2008. It is based upon the 2ºC temperature limit. For the reasons we have given, that policy is "entrenched" and can only be changed through the statutory process. 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. The same flaw permeated Plan B's Amended Statement of Facts and Grounds and written submissions."

and in paragraphs 618 and 619:

> "618. For those reasons, in his decision to designate the ANPS, the Secretary of State did not err in taking the CCA 2008 targets into account; indeed, he would clearly have erred if he had not taken into account the targets as fixed by Parliament.
>
> 619. Nor, in our view, did he err in failing to take into account the Paris Agreement, or the premise upon which that Agreement was made namely that the temperature rise should be limited to 1.5ºC and "well below" 2ºC. This way of putting the ground substantially overlaps with Ground 12 pursued by Mr Wolfe on behalf of FoE, and we will not repeat our response to that ground here (see, rather, paragraphs 633 and following below). However, briefly, the Secretary of State was not obliged to have foreshadowed a future decision as to the domestic

> implementation of the Paris Agreement by way of a change to the criteria set out in the CCA 2008 which can only be made through the statutory process; and, indeed, he may have been open to challenge if he had proceeded on a basis inconsistent with the current statutory criteria. Nor was he otherwise obliged to have taken into account the Paris Agreement limits or the evolving knowledge and analysis of climate change that resulted in that Agreement."

195. As that passage mentions, the court also addressed, and rejected, a similar argument that was advanced by Friends of the Earth (in paragraphs 633 to 649 of its judgment).

Relevant evidence

196. In her first witness statement (dated 29 November 2018) Ms Low, on behalf of the Secretary of State, said (in paragraph 458):

> "458. In October 2016 the CCC said that the Paris Agreement *"is more ambitious than both the ambition underpinning the UK 2050 target and previous international agreements"*, but that the UK should not set new UK emissions targets now, as it already has stretching targets and achieving them will be a positive contribution to global climate action. Furthermore, the CCC acknowledged in the context of separate legal action brought by Plan B against the Secretary of State for Business, Energy and Industrial Strategy [here there is footnote 111] that it is possible that the existing 2050 target could be consistent with the temperature stabilisation goals set out in the Paris [Agreement]. Subsequently, in establishing its carbon obligations for the purpose of assessing the impact of airport expansion, my team has followed this advice and considered existing domestic obligations as the correct basis for assessing the carbon impact of the project, and that it is not appropriate at this stage for the government to consider any other possible targets that could arise through the Paris Agreement." (our emphasis).

197. The document referred to in footnote 111 was the Committee on Climate Change's response to Plan B Earth's reply to the summary grounds of defence in the proceedings brought by Plan B Earth in 2018 against the Secretary of State for Business, Energy and Industrial Strategy.

198. That document was ordered to be served by Nicola Davies J. on 20 March 2018. It does not take the form of evidence, for example as a witness statement, because it is not signed as to the truth of its contents. Nor is it a formal pleading or skeleton argument because it is not signed by counsel or solicitors either. Nevertheless, it comprises submissions made in the then proceedings for judicial review. Paragraph 11(v) stated:

> "11(v) In considering the implications of the political agreement reached in Paris for the UK's 2050 target, it is necessary to translate the temperature goal in the Agreement to what this could mean for UK emissions. Having considered this in our 2016 Report, we noted that "The UK 2050 target is potentially consistent with a wide range of global temperature outcomes" (page 16). The CCC recommended no change to the existing UK 2050 target (at that time, October 2016), not because a more ambitious target was infeasible, but rather because the

> existing UK target was potentially consistent with more ambitious global temperature goals, including that in the Paris Agreement." (our emphasis).

199. In paragraph 9 it was stated:

> "In any consideration of the need to amend the 2050 target for reducing emissions, there is an explicit role for the CCC. The Climate Change Act (2008) sets out (section 3(1)(a)) that before amending the 2050 target, the SoS must obtain and take into account the advice of the CCC. Following on from the Paris Agreement, reached towards the end of 2015, the CCC decided – and in the absence of a request from the Government – that it should provide advice to the SoS. This advice was provided in October 2016."

and in paragraph 27:

> "The CCC accepts that the Paris Agreement describes a greater level of global ambition, in terms of limiting temperature rise, than the one which formed the basis for setting the UK's existing 2050 target. However, the Committee's advice in its 2016 report was based on an updated assessment, taking account of the latest evidence, including the IPCC Fifth Assessment Report (AR5). That evidence had moved on, reflecting factors including:
>
> a. The latest scientific understanding, including a wider range for climate sensitivity, i.e. the amount of warming that would result from a given amount of greenhouse gas emissions
> b. Slower growth in global emissions since 2008 than had previously – in 2008 – been assumed (partly reflecting the effects of the global financial crisis)
> c. The latest assessments of options for reducing emissions, including greenhouse gas removal technologies.
>
> On this basis, as assessed in 2016, the evidence suggested an at least 80% emissions reduction target for the UK in 2050 could be consistent with achieving a less than 2ºC temperature rise globally." (our emphasis).

In paragraph 32, in its summary, the document said the claimants' argument in that case was based on a misinterpretation of the Paris Agreement and a confusion between the Committee on Climate Change's advice relating to the 2050 target and that relating to the achievements of net zero emissions. The summary continued (at sub-paragraph b):

> "The claim that the CCC's advice in terms of consistency with the Paris Agreement is 'untenable'. It was integral to the CCC's advice that it should be consistent with the Paris Agreement. The long-term temperature goal in the Paris Agreement covers a range of ambition from 'well below 2ºC' to 'efforts towards 1.5ºC'. It does not specify a separate 1.5ºC goal. The CCC's 2016 advice reflected consideration of the range and concluded that the existing 2050 target was consistent with a wide range of global temperature outcomes. There will be opportunities, and further evidence, to look at this again."

200. Mr Tim Crosland, on behalf of Plan B Earth, submitted that this was not evidence, still less was it an up to date statement of the Committee on Climate Change's advice to the Secretary of State in April 2018. Rather it was no more than a cross-reference back to the Committee on Climate Change's report of October 2016. Furthermore, he submitted, it was merely the interpretation of the person, presumed to be counsel, responsible for drafting the legal submissions of that report.

201. Nevertheless, as is apparent from the terms of paragraph 458 in the witness statement of Ms Low, the document was treated by her and her team as "advice" from the Committee on Climate Change. As is also clear from paragraph 458, Ms Low and her team clearly regarded "existing domestic legal obligations" as being "the correct basis for assessing the carbon impact of the project". We do not think, however, that this necessarily followed from what the Committee on Climate Change was saying in its response document.

202. In our view, there are two difficulties with the reliance that Ms Low and her team placed upon the "advice" from the Committee on Climate Change. First, the committee was not necessarily saying that the targets set by the Climate Change Act were consistent with the Paris Agreement. It was saying that they "could" be consistent with it.

203. Secondly, and more fundamentally, even if the legal targets in the Climate Change Act were consistent with the Paris Agreement, it did not follow that, as a matter of law, the Government was somehow precluded from taking into account the Paris Agreement when designating the ANPS. What the Committee on Climate Change was addressing was a different question, namely whether the legal targets for reducing CO_2 emissions set out in the Climate Change Act should be amended. Those targets would naturally apply across the board, in a variety of contexts. The narrower question that is raised in this case is whether the Secretary of State was under a legal obligation to take into account the Paris Agreement – or indeed an obligation not to take it into account at all – in the particular context of the decision to designate the ANPS. That question was not necessarily answered, as a matter of law, by what the legal targets in the Climate Change Act were.

204. Mr Crosland submitted that the Committee on Climate Change report of October 2016 did not in fact say that the 80% target for 2050 was potentially consistent with the Paris Agreement.

205. We have already referred (in paragraph 27 above) to the passage in the Executive Summary of the Committee on Climate Change's report, advising the Government that it should "not set new UK emissions targets now".

206. In section 1 of its report the Committee on Climate Change said:

> "1. UK and international ambition
>
> In December 2015 the UK, under the UN negotiations and alongside over 190 other countries, drafted the Paris Agreement to tackle climate change. It will enter into force by the end of 2016 having been ratified by the US, China, Brazil, the EU and others.
>
> The Agreement describes a higher level of global ambition than the one that formed the basis of the UK's existing emissions reduction targets:

- The UK's current long-term target is a reduction of 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 2ºC above pre-industrial levels.

- The Paris Agreement aims to limit warming to well below 2ºC and to pursue efforts to limit it to 1.5ºC. To achieve this aim, the Agreement additionally sets a target for net zero global emissions in the second half of this century.

Alongside the Agreement nearly all parties have submitted pledges of action to 2030. Current pledges fall short of a path to meet either the stated temperature aim of the Paris Agreement or the implicit aim behind the UK target. However, the Agreement includes a process for taking stock of progress and increasing action around the world:

- Pledges by parties in total imply annual global emissions in 2030 of 56 billion tonnes of carbon dioxide equivalent ($GtCO_2e$) whereas the parties to the Agreement agreed the need to reduce annual emission to 40 $GtCO_2e$ to be on a path to below 2ºC.

- The Agreement creates a 'ratchet' mechanism of pledges and reviews to facilitate parties increasing their ambition towards the temperature target. A UN dialogue to take stock of current pledges will take place in 2018. Starting in 2020 the parties will provide new pledges every five years, with stocktakes of the pledges occurring every five years from 2023.

- Parties are also asked to publish mid-century, long-term low greenhouse gas emission development strategies by 2020.

We welcome the Government's commitment to ratifying the Paris Agreement by the end of the year. The clear intention of the Agreement is that effort should increase over time. <u>While relatively ambitious, the UK's current emissions targets are not aimed at limiting global temperature to as low a level as in the Agreement, nor do they stretch as far into the future.</u>" (our emphasis).

207. On page 9 of the report it was said that to stay close to 1.5ºC, CO_2 emissions would need to reach net zero by the 2040s. Reference was made to Table 1, which was set out on the same page.

208. In section 4 of the report the Committee on Climate Change said:

"4. Implications for UK policy priorities in the nearer term

Current policy in the UK is not enough to deliver the existing carbon budgets that Parliament has set. The Committee's assessment in our 2016 Progress Report was that current policies would at best deliver around half of the emissions reductions required to 2030, with no current policies to address the other half.

This carbon policy gap must be closed to meet the existing carbon budges, and to prepare for the 2050 target and net zero emissions in the longer term.

The existing carbon budgets are designed to prepare for the UK's 2050 target in the lowest cost way as a contribution to a global path aimed at keeping global average temperature to around 2ºC. Global paths to keep close to 1.5ºC, at the upper end of the ambition in the Paris Agreement, imply UK reduction of at least 90% below 1990 levels by 2050 and potentially more ambitious efforts over the timescale of existing carbon budgets.

However, we recommend the Government does not alter the level of existing carbon budgets or the 2050 target now. They are already stretching and relatively ambitious compared to pledges from other countries. Meeting them cost-effectively will require deployment to begin at scale by 2030 for some key measures that enable net zero emissions (e.g. carbon capture and storage, electric vehicles, low-carbon heat). In theory these measures could allow deeper reductions by 2050 (on the order of 90% below 1990 levels) if action were ramped up quickly.

The priority now should be robust near-term action to close the gap to existing targets and open up options to reach net zero emissions:

- The Government should publish a robust plan of measures to meet the legislated UK carbon budgets, and deliver policies in line with the plan.

- If all measures deliver fully and emissions are reduced further, this would help support the aim in the Paris Agreement of pursuing efforts to limit global temperature rise to 1.5ºC.

- The Government should additionally develop strategies for greenhouse gas removal technologies and reducing emissions from the hardest-to-treat sectors (aviation, agriculture and parts of industry).

There will be several opportunities to revisit the UK's targets in future as low-carbon technologies and options for greenhouse gas removals are developed, and as more is learnt about ambition in other countries and potential global paths to well below 2ºC and 1.5ºC:

- 2018: the Intergovernmental Panel on Climate Change (IPCC) will publish a Special Report on 1.5ºC, and there will be an international dialogue to take stock of national actions.

- 2020: the Committee will provide its advice on the UK's sixth carbon budget, including a review of progress to date, and nations will publish mid-century greenhouse gas development plans.

- 2023: the first formal global stocktake of submitted pledges will take place.

> We will advise on whether to set a new long-term target, or to tighten UK carbon budges, as and when these events or any others give rise to significant developments." (our emphasis).

Statements made on behalf of the Government after its ratification of the Paris Agreement

209. In the Government paper, "The Clean Growth Strategy" first published in 2017, the Secretary of State for Energy and Industrial Strategy stated:

> "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 <u>will be at the forefront of policy and economic decisions made by government</u> and businesses in the coming decades." (our emphasis).

210. In the judicial review application (CO/16/2018) brought by Plan B Earth against the Secretary of State for Business, Energy and Industrial Strategy (see paragraphs 197 to 199 above), the Secretary of State served summary grounds of defence dated 29 January 2018. Those summary grounds included quotations from Government Ministers, upon which Mr Crosland now relies.

211. Paragraph 23 stated:

> "23. … [While] 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 2ºC*" above pre-industrial levels, and pursuing efforts to limit them to 1.5ºC. <u>This is not the same as a legal duty or obligation for the Parties, individually or collectively, to achieve this aim.</u> …" (emphasis in original).

212. In paragraph 29 there were quotations set out from two relevant Ministers. First on 14 March 2016, the Rt. Hon. Andrea Leadsom MP, then Minister of State for Energy, said in a debate in the House of Commons during the report stage of the Energy Bill:

> "<u>The Government believe we will need to take the step of enshrining the Paris goal of net zero emissions in UK law</u> – the question is not whether, but how we do it, and there is an important set of questions to be answered before we do. The Committee on Climate Change is looking at the implications of the commitments made in Paris and has said it will report in the autumn. We will want to consider carefully its recommendations … ." (our emphasis).

213. On 24 March 2016, the Rt. Hon. Amber Rudd MP, then Secretary of State for Energy and Climate Change, said, in answer to an oral question on what steps her department was taking to enshrine the commitment to net zero emissions made at the Paris Climate Change Conference:

> "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." (our emphasis).

214. On 14 June 2018, the Chair and Deputy Chair of the Committee on Climate Change (Lord Deben and Baroness Brown of Cambridge) wrote a letter to the Secretary of State for Transport (the Rt. Hon. Chris Grayling MP) 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 2ºC and to pursue efforts to limit it to 1.5ºC.
>
> 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.
>
> …
>
> - Our analysis has illustrated how an 80% economy-wide reduction in emissions could be achieved with aviation emissions at 2005 levels in 2050. Relative to 1990 levels this is a doubling of emissions, and an increase in its share of total emissions from 2% to around 25%. We estimate that this would allow for around 60% growth in aviation demand, dependent on the delivery of technological and operational improvements and some use of sustainable biofuels.
>
> - Aviation emissions at 2005 levels in 2050 means other sectors must reduce emissions by more than 80%, and in many cases will likely need to reach zero.
>
> - Higher levels of aviation emissions in 2050 must not be planned for, since this would place an unreasonably large burden on other sectors.
>
> The Airports Commission also incorporated the CCC's advice on aviation, concluding that 'any change to [the] UK's aviation capacity would have to take place in the context of global climate change, and the UK's policy obligations in that area'.
>
> We look forward to the Department's new Aviation Strategy in 2019, which we expect will set out a plan for keeping UK aviation emissions at or below 2005 levels by 2050. To inform your work we are planning to provide further advice in spring 2019." (our emphasis).

215. On 20 June 2018 the Secretary of State replied:

> "I note your surprise that the UK's commitments to reduce greenhouse gas emissions were not specifically addressed in the oral statement to the House of Commons but I can assure you that the Government remains committed to meeting our climate change target of an at least 80% emissions reduction below 1990 levels by 2050 and remains open and willing to consider all feasible measures to ensure that the aviation sector contributes fairly to UK emissions reduction. I hope you will understand that I am not always able to include all the detail I would like in an oral statement."

216. 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 2ºC and to pursue efforts to limit it to 1.5ºC.

The Secretary of State's stance as pleaded

217. In the amended detailed grounds for contesting the claim dated 29 November 2018 (and amended on 1 February 2019), it was submitted on behalf of the Secretary of State (at paragraph 30) that the Climate Change Act does not include emissions from international aviation. It was said that the Committee on Climate Change had advised that emissions from UK aviation (both domestic and international) should be no more than 2005 levels (37.5 $MtCO_2$) in 2050. This is sometimes referred to as "the Planning Assumption". Plan B Earth had referred to it as "the Aviation Target". It was said that the Government had not yet decided whether to accept that advice. A decision on this was deferred by the Aviation Policy Framework and would be considered as part of the emerging Aviation Strategy to be adopted in 2019. This would re-examine how the aviation sector can best contribute its fair share to emissions reductions at both UK and global level.

218. In paragraph 61 of the amended grounds the Secretary of State submitted:

> "61. There is no credible basis for a suggestion that the obligation in s.10(2) and (3) in some way extends further than s. 5(8) to cover (i.e. in the sense of mandating) "*consideration of how the NPS policies relate to known developing areas of climate change policy*". Rather, <u>those provisions provide a very strong pointer that such matters should not be considered</u>: the clear intention of Parliament being that consideration should be given only to existing domestic legal obligations and policy commitments in relation to the mitigation of, and adaptation to, climate change. At the least, the provisions provide no statutory obligation to consider anything other than existing domestic legal obligations and policy commitments. There is, in sum, no warrant for the suggestion that Parliament was intending to set the Secretary of State the impossible task of assessing and taking into account in an NPS not just existing domestic legal obligations and policy commitments in relation to the mitigation of, and adaptation to, climate change but also any possible and as yet unsettled future policies and commitments." (our emphasis).

He went on in paragraph 62(5) and (6) to submit:

> "5) Unless and until the 2050 Target is amended following the proper processes under the CCA 2008, the correct approach is to consider existing domestic legal

obligations and policy commitments and this is what the ANPS does. The relevant domestic legal and policy commitments being those found principally in or set under the CCA 2008 itself (which included for example the Clean Growth Strategy referred to paragraphs 8.5 and 8.6 of the Consultation Response) and the APF;

6) The Secretary of State and his officials did not ignore the Paris Agreement, or that there would be emerging material within Government evidencing developing thinking on its implications, but it was concluded that such material should not be taken into account, i.e. it was not relevant, since it did not form an appropriate basis upon which to formulate the policies contained in the ANPS. This included for the reasons set out in paragraph 34, above. Those reasons relate to the nature of the obligations set out in the Paris Agreement, its effect in domestic law as an unincorporated, international treaty, and to the fact that as at the date of designation of the ANPS, the CCC's views on the implications of the Paris Agreement had not yet been sought, let alone received. As the Government's statutory advisor on matters relating to climate change, the CCC has a critical advisory role in relation to the setting of relevant policy by the Government." (our emphasis).

and in paragraph 63(9):

"9) Accordingly, the Secretary of State will not pursue any discretion argument that there: (a) was no emerging material within Government evidencing developing thinking on the implications of the Paris Agreement, or (b) that such material would highly likely have made no difference to the decision to designate the ANPS. There is no need for him to do so as the argument that he was obliged to consider such material in the first place is hopeless and should be refused permission."

219. There were similar matters pleaded in the amended detailed grounds for contesting the claim brought by Plan B Earth, in particular at paragraph 10.

220. In early 2019, Holgate J. conducted a pre-trial review ("PTR") in preparation for the substantive hearing due to take place in the Divisional Court in March. After that PTR the judge conveyed the following message (via his clerk) to the parties:

"The judge has read the recent exchange of emails on the Statement of Common Ground and climate change issues. His recollection of what occurred at the PTR is broadly along the lines recounted in the letter from Mr Crosland. The defendant's "concession" (if that be the correct description), or rather helpful narrowing of issues, arose in the context of submissions regarding the applications for disclosure by FoE and Plan B. A principal submission by the Defendant was that once the real issue under the grounds of challenge were correctly defined, then the disclosure sought was unnecessary. Para 29 of his position statement says that the only issue is whether the Defendant was entitled as a matter of law to consider matters as against existing legal obligations and policy commitments as given effect by the Climate Change Act 2008. If he was, then this particular ground fails. If he was not, and the matter had to be considered as against the Paris Agreement, then the ground of challenge would

> be made out. Leading counsel for the Defendant confirmed to the court that that was the issue and that any other references in the Defendant's documents which might be taken to suggest otherwise could be ignored. He also said that if the Defendant lost on this issue (defined in this way) he would not raise any discretion points which would justify further specific disclosure. Instead discretion points would be "generic" in nature. The indication given for the Defendant at the hearing was that in so far as the Paris Agreement differs from the 2008 Act in any relevant, significant way, then the matter was not taken into account."

221. It has been made clear before this court, both in writing and in oral submissions, that the Secretary of State (in contrast to HAL) does not take any point under section 31 of the Senior Courts Act. It follows therefore that the Secretary of State accepts that, if he erred in law in failing to take into account the Paris Agreement before designating the ANPS, it cannot be said that it is highly likely that the outcome would have been substantially the same in any event. If the court does reach that conclusion therefore, the Secretary of State (but not HAL) accepts that there would be no reason to deny the claimants appropriate remedies to give effect to the judgment of the court.

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?

222. As we have said, the grounds advanced on behalf of Plan B Earth by Mr Crosland focused principally on the requirements of section 5(8) of the Planning Act. Mr Crosland submitted in essence that the Government's commitment to the Paris Agreement was part of "Government policy" within the meaning of that provision. Mr Crosland's position was supported by Mr Pleming for the Hillingdon claimants. In our view, that submission is well-founded.

223. It is important to start by emphasizing what section 5(8) does and does not require of the Secretary of State. It does not require him to follow or act in accordance with government policy. In terms what it requires is that the ANPS should explain how the Secretary of State has "taken into account" government policy. It is necessarily implicit in that obligation that the Secretary of State must indeed first have taken that government policy into account. This is an important aspect of the transparency of the Secretary of State's actions and his accountability, both to Parliament and to the wider public.

224. Next it is important to appreciate that the words "Government policy" are words of the ordinary English language. They do not have any specific technical meaning. They should be applied in their ordinary sense to the facts of a given situation. In particular, 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.

225. Thirdly, there is no inconsistency or contradiction between that interpretation and the express language of the Climate Change Act. We note that the target set out in the Act is "at least" 80% by 2050. We consider that the Divisional Court fell into error in those passages of its judgment that we have cited earlier (in particular at paragraph 615), where it

appears to have taken the view that the Secretary of State was somehow being required to take a position inconsistent with what was required by his statutory obligations in the Climate Change Act.

226. Fourthly, 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. As we have said, those words do not require the Secretary of State to act in accordance with any particular policy; but they do require him to take that policy into account and explain how it has been taken into account. None of that was ever done in the present case.

227. It appears that the reason why it was never done is that the Secretary of State received legal advice that not only did he not have to take the Paris Agreement into account but that he was legally obliged not to take it into account at all (see the quotations from the Secretary of State's pleaded case in the Divisional Court, in paragraphs 216 to 220 above, in particular the passages we have emphasized). In our view, that was a clear misdirection of law and there was, therefore, a material misdirection of law at an important stage in the process. That misdirection then fed through the rest of the decision-making process and was fatal to the decision to designate the ANPS itself.

228. In our view, the Government's commitment to the Paris Agreement was clearly part of "Government policy" by the time of the designation of the ANPS. First, this followed from the solemn act of the United Kingdom's ratification of that international agreement in November 2016. Secondly, as we have explained, there were firm statements re-iterating Government policy of adherence to the Paris Agreement by relevant Ministers, for example the Rt. Hon. Andrea Leadsom MP and the Rt. Hon. Amber Rudd MP in March 2016.

229. It is important to stress that this means no more than that the executive must comply with the will of Parliament, as expressed in the terms of section 5(8).

230. Furthermore, it simply requires the executive to take account of its own policy commitments. After all, the acts of negotiating, signing and ratifying an international treaty are all acts which under the British constitution are entrusted to the executive branch of the State – the Crown. This distinction between the functions of the Crown and Parliament is what underlies the dualist character of our legal system (see, for example, the speech of Lord Oliver of Aylmerton in *J. H. Rayner (Mincing Lane) Ltd.*, at p.500) and explains why the ratification of an international treaty cannot, without more, change domestic law; if it could, the Crown would be able to change the law of this country without the consent of Parliament. But requiring the Crown to comply with what has been enacted by Parliament (in this case the obligations in section 5(8) of the Planning Act) is an entirely conventional exercise in public law.

231. We repeat that the duty in section 5(8) does not even require the executive to conform to its own policy commitments, simply to take them into account and explain how it has done so.

232. Finally, as we have already said, the Secretary of State has accepted that, if this court should conclude that he fell into legal error in this respect, there can be no question of refusing remedies under section 31 of the Senior Courts Act.

233. We would add this observation. It was not submitted to us that in designating the ANPS the Secretary of State committed no error of law – or that, if he did, the error itself was immaterial – because the relevant consequences of meeting the targets already in place under the Climate Change Act would have been, or at least might have been, the same as those of implementing the United Kingdom's commitments under the Paris Agreement. Such an argument, had it been put forward, would in our opinion have been mistaken. If the Secretary of State was to comply with his duty under section 5(8) of the Planning Act, the implications of the Paris Agreement for his decision, and whether they were different from the implications of meeting the targets under the Climate Change Act, were matters for him specifically to consider and explicitly address in that very exercise. But he did not do so. It is clear that, in deciding to designate the ANPS, he did not take the Paris Agreement into account at all. On the contrary, as we understand it, he consciously chose – on advice – not to take it into account. And in our view, as we have said, his failure to take it into account was enough to vitiate the designation.

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 Planning Act

234. The grounds advanced on behalf of Friends of the Earth by Mr Wolfe focused in particular on the requirements of section 10 of the Planning Act. Mr Wolfe submitted:

    (1) There was an error of law in the approach taken by the Secretary of State because he never asked himself the question whether he could take into account the Paris Agreement pursuant to his obligations under section 10.

    (2) If he had asked himself that question, and insofar as he did, the only answer that would reasonably have been open to him is that the Paris Agreement was so obviously material to the decision he had to make in deciding whether to designate the ANPS that it was irrational not to take it into account.

235. We accept those submissions in essence.

236. First, it is clear to us from the material that was before the Divisional Court that the Secretary of State was advised that he was not permitted as a matter of law to take into account the Paris Agreement because he should for relevant purposes confine himself to the obligations set out in the Climate Change Act (see paragraphs 218 and 220 above). He therefore did not ever consider whether to take the Paris Agreement into account as a matter of discretion.

237. Secondly, and in any event, if he had appreciated he had any discretion in the matter, we agree that the only reasonable view open to him was that the Paris Agreement was so obviously material that it had to be taken into account. It is well established in public law that there are some considerations that must be taken into account, some considerations that must not be taken into account and a third category, considerations that may be taken into account in the discretion of the decision-maker (see, for example, the opinion of Lord

Brown of Eaton-under-Heywood in *Hurst*, at paragraphs 57 to 59). As Lord Brown observed of that third category (in paragraph 58 of his opinion), there can be some unincorporated international obligations that are "so obviously material" that they must be taken into account. The Paris Agreement fell into this category.

238. Again we would emphasize that it does not follow from this that the Secretary of State was obliged to act in accordance with the Paris Agreement or to reach any particular outcome. The only legal obligation, in our view, was to take the Paris Agreement into account when arriving at his decision.

WWF's submissions

239. We had substantial written submissions placed before us on behalf of the intervener, WWF. This generated a great deal of dispute between the parties. With the permission of the court, the Secretary of State filed a 30-page response some time after the hearing had finished; together with a new witness statement and documents, taking up a lever arch file. There were replies by WWF and Friends of the Earth and an unsolicited response to those replies by the Secretary of State, dated 8 November 2019, for which no permission was granted and to which objection was taken by WWF and Friends of the Earth.

240. What Ms Helen Mountfield Q.C. on behalf of WWF submitted is that the phrase "sustainable development" must now be interpreted in the light of the United Kingdom's obligations in international law generally and, in particular, under the 1989 UN Convention on the Rights of the Child, as interpreted by the committee established under that Convention. The Secretary of State objected to this line of argument, essentially because he submitted that this is, in substance, a new ground of challenge and it is inappropriate for this to be raised on an appeal, let alone by an intervener.

241. In the end we have not found it necessary to resolve these procedural and new substantive issues. This is because the submissions for WWF were made in support of the grounds advanced by Friends of the Earth, which we have in essence accepted for the reasons set out above.

SEA Directive issue (4) – did the Secretary of State breach the SEA Directive by failing to consider the Paris Agreement?

242. On behalf of Friends, of the Earth Mr Wolfe (under what he has called ground C in this appeal) also relied on an alleged breach of the duty to undertake a lawful strategic environmental assessment in accordance with the requirements of the SEA Directive and the SEA Regulations.

243. Mr Wolfe submitted that the reference to the "international" level in Annex I to the SEA Directive must include unincorporated international agreements because otherwise, if an agreement has been incorporated into either EU law or domestic law, there would be no need to refer to the international level at all. Mr Wolfe also emphasized that what has to be taken into account are the "objectives" established at international level. This does not necessarily have to consist of particular, precise legal obligations.

244. We accept those submissions on behalf of Friends of the Earth.

245. Mr Maurici submitted that this provision still leaves a wide margin of discretion to the Secretary of State in deciding what is "relevant" to the plan or programme in question.

246. That is of course right. But no matter how wide the margin of judgment to be afforded to the Secretary of State in this context, in our view the Paris Agreement was obviously relevant to the plan or programme under consideration in this case. This is essentially for the reasons we have already given in considering domestic law (see section 10 of the Planning Act).

247. We have therefore come to the conclusion that in this respect too the designation of the ANPS was vitiated by an error of law.

Climate change issue (2) – did the Secretary of State err in his consideration of non-CO_2 impacts and the effect of emissions beyond 2050?

248. Mr Wolfe submitted that the Divisional Court failed in its duty to set out reasons why it was refusing permission to bring this application for judicial review on two grounds:

(1) the non-CO_2 climate impacts of aviation; and
(2) the effect of emissions beyond 2050.

249. Mr Wolfe contended that these grounds of challenge were clearly raised in the arguments before the Divisional Court by Friends of the Earth. He submitted, first, that the total adverse impact of aviation on the climate is around twice that of its CO_2 emissions if taken alone. These impacts are not accounted for under the Climate Change Act framework, which is only concerned with CO_2 emission targets. Secondly, the Heathrow third runway project was envisaged to last until well into the second half of the present century. Its benefits were assessed in the ANPS up to 2085 but, Mr Wolfe submitted, there was no assessment of the climate change impacts beyond 2050. Furthermore, he argued, aviation is one of the very few sectors for which there are no current or currently envisaged credible alternatives to fossil fuel, it was obviously relevant to consider whether it was sustainable in the long-term to expand aviation activity in the light of the foreseen need to move to net zero emissions during the lifetime of the new runway and the potential need to move to net negative emissions.

250. Mr Wolfe's fundamental complaint on this ground is that none of these arguments was addressed in the judgment of the Divisional Court. This ground of appeal in effect raises a "reasons" point.

251. It is clear from paragraph 659(iv) of the Divisional Court's judgment that it was aware that two of the grounds of challenge brought by Friends of the Earth concerned non-CO_2 emissions and the needs of future generations. However, submitted Mr Wolfe, the reasoning of the court that led to its conclusions in paragraph 659 did not separately deal with those two aspects at all.

252. Earlier in its judgment (in paragraph 638), the court noted that the Secretary of State accepted that, in designating the ANPS, he took into account only the Climate Change Act

carbon emission targets and did not take into account either the Paris Agreement, or otherwise, any post-2050 target or non-CO_2 emissions. Mr Wolfe submitted that the reasoning of the court that then followed dealt exclusively with the Paris Agreement point and not these two other aspects at all.

253. Mr Maurici made two essential responses to those complaints. First, he submitted that it was unnecessary for the Divisional Court to set out every step in its reasoning and that, in substance, its reasoning relating to the Paris Agreement issue also applied to these two matters. Secondly, if he is wrong about that, he invited this court to rely on the additional grounds set out in the Secretary of State's respondent's notice. We will address each of those submissions in turn.

254. In so far as the first submission is sound, which we would not accept, the consequence of this court's conclusions above on the relevance of the Paris Agreement and the defect in the Secretary of State's decision-making process would apply equally to these two further aspects. It is therefore unnecessary for us to dwell at length on what is in essence a "reasons" complaint under Friends of the Earth's ground B. It will suffice that the preparation and designation of the ANPS will be remitted to the Secretary of State for reconsideration in accordance with the law, during which exercise the Secretary of State can take these further matters into account as well.

255. On the Secretary of State's respondent's notice we would make these observations.

256. Mr Maurici submitted that the effect of emissions beyond 2050 was a matter closely bound up with the aspiration in the Paris Agreement to achieve net zero greenhouse gas emissions in the second half of this century. He submitted, by reference to the witness evidence of Ms Low, that it would be sensible to assess the impact of airport expansion against current climate change targets and that, as and when carbon reduction targets are developed for the post-2050 period, all those concerned will have to comply with the obligations which result when, and to the extent that, they apply. This point is closely related to the fundamental submission made by Mr Maurici, that there was no obligation on the Secretary of State to take into account the Paris Agreement at all. For the reasons we have already given, we reject that submission. It follows therefore that these two additional aspects of the case, being closely bound, as Mr Maurici submitted they are, with the Paris Agreement issue, will need to be considered in the exercise that the Secretary of State must perform according to law.

257. That said, we would not be inclined to accept the other submission made by Mr Maurici on the Secretary of State's respondent's notice which relates to non-CO_2 emissions. Mr Maurici submitted that the reason why this was not taken into account in the preparation of the ANPS was that the state of scientific knowledge was too uncertain to be capable of accurate measurement at that stage. He pointed out that the question of non-CO_2 effects was highlighted in the Airport Commission's discussion paper on aviation and climate change (in April 2013) and in its interim report (on 17 December 2013). The Chair of the Airports Commission (Sir Howard Davies) discussed the question directly with the Chair of the Committee on Climate Change (Lord Deben), who advised that the appropriate approach was not to assess or include non-CO_2 effects given the significant scientific uncertainty surrounding their scale. Furthermore, Mr Maurici submitted that, as part of its assessment of the ANPS, the Appraisal of Sustainability considered non-CO_2 emissions but set out that these were not able to be assessed because of levels of scientific uncertainty. It was

acknowledged in the Appraisal of Sustainability (at paragraph 6.11.11) that there are likely to be highly significant climate change impacts associated with non-CO_2 emissions from aviation, which are likely to be of a similar magnitude of the CO_2 emissions themselves, but which cannot be readily quantified due to the level of scientific uncertainty. Furthermore, submitted Mr Maurici, these matters were considered in the Government's response to the consultations on the ANPS (at paragraphs 11.49 to 11.50); and in the Post Adoption Statement (at paragraphs 4.4.49 to 4.4.50).

258. Although those submissions have some force, in the end they do not persuade us. This is because, as Mr Wolfe submitted, the fact that there would be non-CO_2 effects was acknowledged and it was recognized that they would be more than twice the CO_2 effects. In line with the precautionary principle, and as common sense might suggest, scientific uncertainty is not a reason for not taking something into account at all, even if it cannot be precisely quantified at that stage.

259. The core of that principle is reflected in Principle 15 of the Rio Declaration (adopted at the UN Conference on Environment and Development in Rio de Janeiro on 14 June 1992 and endorsed by the UN General Assembly on 22 December 1992), which provides:

> "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

260. The precautionary principle is well-established in the jurisprudence of the Court of Justice of the European Union (see, for example, Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-07405).

261. Since the outcome of our decision is that the preparation and designation of the ANPS was unlawful, and the ANPS will be remitted to the Secretary of State for reconsideration in accordance with the law, this matter will need to be taken into account as part of that exercise.

The test for the grant of permission

262. Mr Maurici submitted that the test for deciding whether to grant permission to apply for judicial review in a case of this kind is not the normal one – namely whether the grounds are arguable – but rather the heightened test set out by the Court of Appeal in *Mass Energy Ltd. v Birmingham City Council* [1994] Env. L.R. 298 (in particular at pp.307 to 308 in the judgment of Glidewell L.J.), where he said:

> "… in my view, the proper approach of this Court, in this particular case, ought to be … that we should grant leave only if we are satisfied that Mass Energy's case is not merely arguable but is strong; that is to say, is likely to succeed."

263. Glidewell L.J. gave three reasons for reaching that conclusion. First, the court had the benefit of detailed argument between the parties of such depth that, if leave were granted, it

was unlikely that the points would be canvassed in much greater depth at substantive hearing. Secondly, there would be a very considerable public disadvantage if there were delay to the project, the subject of that application for judicial review. Thirdly, the court had most, if not all, of the documents that would need to be considered at the substantive hearing.

264. In our judgment, the test in *Mass Energy* is not appropriate in a case of this kind. That is because the practice has grown up, since the decision in *Mass Energy*, in which, in appropriate cases, the Administrative Court can order a "rolled-up" hearing, deferring the question of permission to be decided, with the substantive hearing to follow immediately if permission is granted. A similar practice has been developed in the Court of Appeal, as this case demonstrates. In such "rolled-up" hearings, there will be no further delay, if permission is granted, before a substantive hearing can take place. The considerations that led the Court of Appeal to set the heightened standard for the grant of leave which it did in *Mass Energy* do not therefore apply in this context.

265. For those reasons we reject the submission made by Mr Maurici on the approach we should adopt in dealing with the application for permission to apply for judicial review.

266. In any event, the issue is not in the end dispositive. This is because, even if the heightened test in *Mass Energy* were appropriate, we would conclude that it is met in this case. This is for the reasons we have already given in addressing the substantive grounds of challenge relating to the Paris Agreement, which we have concluded are well-founded.

Relief

267. It has long been established that, in a claim for judicial review, the court has a discretion whether to grant any remedy even if a ground of challenge succeeds on its substance. It was established by Purchas L.J. in *Simplex GE (Holdings) Ltd. v Secretary of State for the Environment* [1988] 3 P.L.R. 25 (at paragraph 42) that it is not necessary for the claimant to show that a public authority would – or even probably would – have come to a different conclusion. What has to be excluded is only the contrary contention, namely that the Minister "necessarily" would still have made the same decision. The *Simplex* test, as it has become known, therefore requires that, before a court may exercise its discretion to refuse relief, it must be satisfied that the outcome would inevitably have been the same even if the public law error identified by the court had not occurred.

268. The *Simplex* test has been modified by the amendments made to section 31 of the Senior Courts Act by section 84 of the Criminal Justice and Courts Act 2015. The new provisions apply to all claims for judicial review filed since 13 April 2015. They do not apply to applications for statutory review.

269. On the question of relief, section 31 of the Senior Courts Act provides:

> "(2A) The High Court –
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirements of subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

270. The meaning of "conduct" for this purpose is defined by a new subsection (8), which provides:

"(8) In this section "the conduct complained of", in relation to an application for judicial review, means the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief."

271. Similar provisions have been introduced into section 31 on the question whether permission to bring a claim for judicial review (still referred to in the statute as "leave") should be granted:

"(3C) When considering whether to grant leave to make an application for judicial review, the High Court –

(a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and

(b) must consider that question if the defendant asks it to do so.

(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.

(3E) The court may disregard the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(3F) If the court grants leave in reliance on subsection (3E), the court must certify that the condition in subsection (3E) is satisfied."

272. The new statutory test modifies the *Simplex* test in three ways. First, the matter is not simply one of discretion, but rather becomes one of duty provided the statutory criteria are satisfied. This is subject to a discretion vested in the court nevertheless to grant a remedy on grounds of "exceptional public interest". Secondly, the outcome does not inevitably have to be the same; it will suffice if it is merely "highly likely". And thirdly, it does not have to be shown that the outcome would have been exactly the same; it will suffice that it

is highly likely that the outcome would not have been "substantially different" for the claimant.

273. It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old *Simplex* test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales L.J., as he then was, in *R. (on the application of Public and Commercial Services Union) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin); [2018] 1 All E.R. 142, at paragraph 89).

274. In this case, as we have said, the Secretary of State does not contend that relief should be refused by this court if otherwise the grounds of challenge relating to the Paris Agreement succeed. In contrast, HAL does make that contention. On its behalf Mr Humphries submitted that it is unnecessary and inappropriate to grant a remedy in these proceedings because policy in the ANPS requires the applicant for development consent to provide evidence of the carbon impact of the project "such that it can be assessed against the Government's carbon obligations" (paragraph 5.76 of the ANPS) and that carbon emissions alone may be a reason to refuse development consent if they would be "so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets, including carbon budgets" (paragraph 5.82). Therefore, submitted Mr Humphries, the substance of the issues raised by the appellants can be considered by the Secretary of State at the stage of an application for development consent. And even that would not be the end of the matter. Even if a decision to grant development consent would be in accordance with the ANPS, the Secretary of State would not be bound to grant consent if to do so would lead to the United Kingdom being in breach of any of its international obligations (see section 104(4) of the Planning Act). This would include compliance with the Paris Agreement. Mr Humphries also pointed out, and emphasized, that the Secretary of State has agreed to consider a request from Plan B Earth to review the ANPS in light of the Committee on Climate Change's advice of 2 May 2019. That request is being considered under section 6(3) and (4) of the Planning Act. Mr Humphries submitted that this development renders Plan B Earth's proceedings academic.

275. We do not accept those submissions on behalf of HAL. In essence, we are of the clear view that it is incumbent on the Government to approach the decision-making process in accordance with the law at each stage, not only in any current review of the ANPS or at a future development consent stage. The stages of the decision-making process are inter-dependent. The formulation of the ANPS sets the fundamental framework within which further decisions will be taken.

276. We are unable to accept the suggestion that the terms of section 31(2A) are satisfied in this case. 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 process.

277. Furthermore, and in any event, this is one of those cases in which it would be right for this court to grant a remedy on grounds of "exceptional public interest". The nature and degree of that public interest hardly needs to be set out here. The legal issues are of the highest importance. The infrastructure project under consideration is one of the largest. Both the development itself and its effects will last well into the second half of this century. The issue of climate change is a matter of profound national and international importance of great concern to the public – and, indeed, to the Government of the United Kingdom and many other national governments, as is demonstrated by their commitment to the Paris Agreement.

278. For those reasons, we have reached the firm conclusion that appropriate relief must be granted here, as normally it will be where unlawfulness in the conduct of the executive is established. In our view, therefore, it would not be appropriate to refrain from granting a suitable remedy at this stage to ensure, at least, that the ANPS does not remain effective in its present unlawful form pending the outcome of its statutory review – under section 6 of the Planning Act – in the light of the Paris Agreement (see paragraph 39 above).

279. We have given the parties the opportunity in the light of our draft judgment to agree the precise terms of the appropriate remedy. In the event, however, the parties have been unable to reach agreement on that matter. We have in mind that the relief we grant must properly reflect our conclusions on all the issues before us, in their entirety, and not merely the conclusions we have reached on the climate change issues. The Secretary of State, in his submissions in the light of the draft judgment, has not resisted the granting of relief, but has not suggested any particular form of remedy. HAL and Arora have contended for a stay of the ANPS and a mandatory order requiring the Secretary of State to undertake a review under section 6 of the Planning Act. Friends of the Earth and Plan B Earth have contended for a declaration and a quashing order. The Hillingdon claimants have also submitted that the ANPS should be quashed.

280. In our view, in light of the submissions made to us, the appropriate form of relief to reflect our conclusions as a whole is a declaration, the effect of which will be to declare the designation decision unlawful and to prevent the ANPS from having any legal effect unless and until the Secretary of State has undertaken a review of it in accordance with the statutory provisions, including the provisions of sections 6, 7 and 9 of the Planning Act. We do not consider that in the particular circumstances of this case, given our conclusions on the issues of the SEA Directive and the Habitats Directive, it is necessary or appropriate to quash the ANPS at this stage. Nor do we accept that it is appropriate to make a mandatory order requiring the Secretary of State to undertake a section 6 review, bearing in mind that the Secretary of State has a discretion under section 6(1) to decide to undertake a review "whenever [he] thinks it appropriate to do so". The declaration we make will ensure that the ANPS has no legal effect unless and until the Secretary of State decides to conduct a review. Any such review would have to be conducted in accordance with the judgment of

this court. We should add finally that the initiation, scope and timescale of any review must and will be a matter for the Secretary of State to decide.

Conclusion

281. At the beginning of this judgment we emphasized the long-established limits of the court's role when exercising its jurisdiction in claims for judicial review (see paragraph 2 above). As an appellate court, we operate within the same limits. We have made it clear that we are not concerned in these proceedings with the political debate and controversy to which the prospect of a third runway being constructed at Heathrow has given rise. That is none of the court's business. We have emphasized that the basic question before us in these claims is an entirely legal question.

282. As we have said, we are required – and only required – to determine whether the Divisional Court was wrong to conclude that the ANPS was produced lawfully. Our task therefore – and our decision – does not touch the substance of the policy embodied in the ANPS. In particular, it does not venture into the merits of expanding Heathrow by adding a third runway, or of any alternative project, or of doing nothing at all to increase the United Kingdom's aviation capacity. Those matters are the Government's responsibility and the Government's alone.

283. To a substantial extent we agree with the analysis and conclusions of the Divisional Court. Like the Divisional Court, we have concluded that the challenges to the ANPS must fail on the issues relating to the operation of the Habitats Directive, and also on all but one of the issues concerning the operation of the SEA Directive. However, for the reasons we have given, we have concluded that in one important respect the ANPS was not produced as the law requires, and indeed as Parliament has expressly provided. The statutory regime for the formulation of government policy in a national policy statement, which Parliament put in place in the Planning Act, was not fully complied with. 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). What this means, in effect, is that the Government when it published the ANPS had not taken into account its own firm policy commitments on climate change under the Paris Agreement.

284. That, in our view, is legally fatal to the ANPS in its present form. As we have explained, the normal result in a successful claim for judicial review must follow, which is that the court will not permit unlawful action by a public body to stand. Appropriate relief must therefore be granted. We have formulated a declaration that is, in our view, appropriate, necessary and proportionate in the light of our conclusions as a whole (see paragraphs 267 to 280 above). A declaration has binding effect.

285. Our decision should be properly understood. We have not decided, and could not decide, that there will be no third runway at Heathrow. We have not found that a national policy statement supporting this project is necessarily incompatible with the United Kingdom's commitment to reducing carbon emissions and mitigating climate change under the Paris Agreement, or with any other policy the Government may adopt or international obligation it may undertake. That is not the outcome here. However, the consequence of our decision is that the Government will now have the opportunity to reconsider the ANPS in accordance with the clear statutory requirements that Parliament has imposed.

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