

# Briefing

## Heathrow expansion - illegal

*‘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.’ (Court of Appeal judgment, paragraph 277)*

### Introduction

Friends of the Earth have stopped Heathrow Airport expanding to protect our climate. As one of the largest emitters of carbon dioxide in the UK, a new runway at Heathrow would have been extremely dangerous for people and the planet.

This briefing explains the successful outcome of the judicial review appeal, and another appeal on climate grounds by Plan B Earth. In *R (oao Friends of the Earth) v Department for Transport & Others*, Friends of the Earth appealed the High Court’s dismissal of its challenge to the legality of the “Airports National Policy Statement”.

The “Airports National Policy Statement” (ANPS) is the policy framework created under the Planning Act 2008 by the Secretary of State for Transport. It allows expansion at Heathrow airport and guides new airport expansion in the south east of England.

Friends of the Earth argued the Secretary of State’s failure to consider:

- the Paris Agreement on climate change,
- the non-CO<sub>2</sub>warming impacts of aviation, and
- the climate impacts of the operation of the airport long into the future beyond 2050

made the decision/ANPS unlawful on each count, because they each breached section 10 of the Planning Act, and also the SEA Directive (regarding Paris only).

Plan B Earth ran an additional point that the failure to consider the Paris Agreement breached section 5(8) of the Planning Act 2008, because it was already government policy.

The Court of Appeal agreed with both claimants on all arguments advanced, and “... will not permit unlawful action by a public body to stand” (Judgment, para. 284).

### Climate Change and Sustainable Development

In 2008 when the Planning Act was made, Friends of the Earth campaigned for an amendment to section 10 of the draft bill. As a result, section 10 required particular

attention to climate change issues, as part of contributing to sustainable development, when the ANPS was made.

Relying on this provision, Friends of the Earth established at the High Court that the 'Brundtland definition' of 'sustainable development' applied: that we should satisfy our own needs without compromising the ability of future generations to meet theirs. And that this principle requires a balanced approach to considering the environmental, social and economic factors involved. This important reaffirmation of sustainable development was to play a key role on appeal.

### **The Paris Agreement on climate change**

At the Court of Appeal Friends of the Earth then argued the Secretary of State had not contributed to sustainable development in this way as he had intentionally ignored the Paris Agreement, which is of obvious and prime importance to how we manage climate change now and in the future.

The Court of Appeal agreed. It ruled that by ignoring the Paris Agreement the Secretary of State had breached section 10. Not only that, it was so "*obviously material*" to the decision to expand Heathrow that discounting it was irrational (i.e. illogical or absurd).

*'...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.'* (Judgment, paragraph 237)

This conclusion is of wide importance for the climate movement in the UK. It establishes that – in addition to the Planning Act provisions relied on - the Secretary of State had no discretion to ignore Paris even though it had not been incorporated at the time the ANPS was made. This will influence all future national policy statements to be made, or reviewed, under the Planning Act. It also lends support to arguments that the Paris Agreement cannot be ignored in other contexts/decisions where climate change is an important factor. The Court of Appeal's decision was not only based section 10 of the Planning Act: Paris was "obviously material".

### **Strategic Environment Assessment**

A strategic environmental assessment is a key tool in assessing environmental impact and in achieving sustainable development. The purpose in law is to achieve a high level of environmental protection with a view to promoting sustainable development.

An environmental report must be produced by the public authority that contains proscribed information. One requirement is that relevant environmental objectives established at an international level are included and their application explained.

As the Secretary of State for Transport had intentionally excluded consideration of the Paris Agreement altogether, he breached this legal requirement too.

### **Non-CO<sub>2</sub> warming impacts**

Aviation is scientifically recognised as having a non-CO<sub>2</sub> global warming impact of a similar magnitude to that of its carbon emissions. Overall, the combined impact could be up to twice as much as that of carbon emissions alone. The Secretary of State accepted this but decided that due to scientific uncertainty over the precise calculation of the non-CO<sub>2</sub> impact, it would ignore this major environmental impact altogether.

Friends of the Earth argued this was unlawful. Not only did it clearly contradict the section 10 sustainable development duty and the needs of future generations, because they would have to unexpectedly deal with the reality of those damaging impacts later, but it also breached the precautionary principle. The Court of Appeal agreed:

*“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.”* (Judgment, paragraph 258)

The court went on to cite Principle 15 of the UN Rio Declaration (1992), and EU jurisprudence, in demonstrating this important principle for environmental governance. This is an important re-statement and strengthening of the precautionary principle in domestic law at a time when we leave the EU.

### **Climate Change beyond 2050**

The Secretary of State had limited itself on climate issues to the Climate Change Act 2008 and the 2050 climate target in that Act. Of course, climate change will not just stop in 2050, and the economic benefits of Heathrow were assessed up to 2085.

Friends of the Earth argued this was unlawful, as it ignored a significant amount of climate emissions from a high-carbon long-lived development that future generations would need to deal with at some point. It represented an unbalanced approach to the environmental, social and economic factors as part of sustainable development, preferring economic over environmental.

The Court of Appeal ruled that the effects of climate change beyond 2050, and the non-CO<sub>2</sub> impacts (as above) would need to be considered in any redetermination. Applying the same reasoning it has found that these failures breached section 10, and were also irrational.

### **Plan B Earth's claim**

Plan B claimed that Paris was already part of government policy given its ratification, various documentary evidence (such as the ‘Clean Growth Strategy’) and ministerial statements leading up to the decision to expand Heathrow. The Secretary of State said that whilst broad commitments had been made government policy was limited to what was within or flowing from the Climate Change Act 2008.

The Court of Appeal sided with Plan B: *‘it is clear, therefore, that it was the Government’s expressly stated policy that it was committed to adhering to the Paris Agreement...’* (Judgment, paragraph 216).

Whilst the legal effect of this is to an extent limited by the fact of the government’s policy position at any given point in time, this is a very significant finding. It means that the failure to consider Paris as part of current government policy was not only unlawful as it breached section 5(8) of the Planning Act, but also for so long as the policy position remains the same, all future NPSs being newly made will need to take into account Paris too. In the lead up to COP26 it is doubtful that the government will weaken its policy commitment here, but even if it were to do that, Friends of the Earth’s victory on section 10 will maintain the need to consider Paris in any event on both any new NPS being made, and also a review of an old one. Section 10 applies in both instances.

What is more, where other public authorities have similar legal duties to take account of government policy, that must surely also now include Paris given Plan B's ruling.

### **Conclusion**

The Airports National Policy Statement (June 2018) for expansion at Heathrow and increased airport capacity in the south east of England was unlawfully made. This is because the Secretary of State failed to consider the Paris Agreement, non-CO<sub>2</sub> warming impacts of aviation, and the effects of climate change beyond 2050.

In respect of Paris, this breached section 5(8)'s requirement to take account of government policy, and section 10's requirement to contribute to sustainable development with particular regard to the mitigation (etc) of climate change. It also breached the SEA Directive and its implementing Regulations too.

Importantly, and in addition to this, the Court ruled in Friends of the Earth's case that the Paris Agreement is also an "*obviously material*" consideration, and the Secretary of State acted irrationally by ignoring it. This can have wider significance.

The same conclusion was then independently applied to the failure to consider non-CO<sub>2</sub> impacts and climate change impacts beyond 2050. These also breached section 10 and any reconsideration or re-making of the ANPS must address all these issues as "*obviously material*" and important, in their own right.

Friends of the Earth and Plan B's cases represent a massive 'win' in securing 'climate justice' for present and future generations, including:

- strengthening the application of the Paris Agreement domestically;
- strengthening the application of "sustainable development" and the "precautionary principle";
- establishing the need to consider the non-CO<sub>2</sub> impacts of aviation, which will apply in other aviation development proposals, and may even make expansion at Heathrow impossible due to their possible magnitude; and
- Having precedent setting effect for the making (section 5(8) and section 10) or review (section 10) of future national policy statements under the Planning Act 2008.

### **William Rundle, Head of Legal Friends of the Earth**

#### **End Note:**

1. *Friends of the Earth were represented by: David Wolfe QC (Matrix); Peter Lockley (11KBW); Andrew Parkinson (Landmark); and Leigh Day LLP.*
2. *WWF intervened in Friends of the Earth's case on UN Convention on the Rights of the Child. These issues were not decided in the end.*
3. *The other claimants: London Boroughs of Hillingdon, Wandsworth, Richmond, Hammersmith and Fulham; Royal Borough of Windsor and Maidenhead; and Greenpeace Ltd; they were all unsuccessful on appeal.*